LC Paper No. CB(2)658/07-08(02)

Response to Equal Opportunities Commission's Proposals for Amendment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance

Introduction

The Equal Opportunities Commission (EOC) submitted proposals for amendment of the Sex Discrimination Ordinance (SDO) and Disability Discrimination Ordinance (DDO) in the "Equal Opportunities Legislative Review" (the Report) in 1999.

2. We have carefully examined the proposals. For some of the more complicated ones, additional information and clarifications have been sought from the EOC.

Sex Discrimination Ordinance

3. Regarding the proposals on the SDO, we have **no objection in principle** to the following:

(i) to extend the scope of protection against sexual harassment by implementing four proposals –
   (a) to amend section 2(6) so that section 2(5)(b) (sexual harassment in hostile environment) applies to the field of education;
   (b) to amend section 40(1) to protect persons providing goods, services or facilities against sexual harassment by customers;
   (c) to amend section 40 to protect members/prospective members of a club against sexual harassment by members of club management; and
   (d) to amend section 40 to protect tenants and sub-tenants from sexual harassment by other tenants and sub-tenants;

(ii) to repeal the following items in Schedule 5 which are exempted from the operation of the relevant Parts in the SDO –

(a) uniform/equipment requirements and training in the use of weapons in the disciplined forces, positions reserved for men in the Police Tactical Unit and gender recruitment quotas (except in respect of the Correctional Services Department (CSD); please also see paras. 9(ii) and 11 below);

(b) provision of reproductive technology procedure;

(c) provision of adoption services or facilities of infants;

(d) granting of pension benefits to surviving spouses and children of public officers; and

(e) granting of gratuities to widows of auxiliary police officers;

(iii) to introduce voluntary and binding undertakings into the SDO as an alternative means of settlement for the parties concerned without the need to go through a formal process such as court proceedings;

(iv) to amend section 85(4) to enable the EOC to recover legal costs for acting as solicitor/counsel in providing legal assistance;

(v) to amend section 76(1) to make it clear that claims may be made against persons who are vicariously liable for acts of sexual harassment;

(vi) to enable the EOC to seek declaratory and injunctive relief in the District Court in respect of discriminatory acts, policies and practices (please also see para. 4 below);

(vii) to amend the headings of sections 7 and 8 to more accurately describe their contents as referring to discrimination on the ground of marital status and pregnancy respectively in areas not just limiting to employment; and

(viii) to amend 10 expressions and characters in the Chinese text of the SDO to provide for greater clarity.

4. Further discussion with the EOC will also be required to delineate the criteria of invoking the power sought in para. 3(vi).

5. On the proposal to extend the definition of "an establishment in Hong Kong" in section 14 to protect Hong Kong residents working wholly or mainly outside Hong Kong for business and/or companies registered in Hong Kong, the Labour Advisory Board has been consulted. Board Members have raised some fundamental issues and drawn the EOC's attention to these issues, which relate to many areas including the scope of application, difficulties encountered by employers in forestalling unlawful acts committed by indigenous employees, problem of enforcement, etc. We share Board Members' concern in particular on what defence against vicarious liability is available to employers for acts committed outside Hong Kong which are unlawful in Hong Kong but are prevalent and socially acceptable in the place where they are committed. We need further elaboration from the EOC on the scope and application of the proposed amendment (a list of the issues which require further clarifications is attached at Annex) before we can assess more accurately the implications of the proposal as well as whether and how to take it forward.

6. We consider the following proposals as **not necessary** for the purposes stated in the Report:

(i) to make it clear that section 14 has extra-territorial effect and protects against unlawful acts committed outside Hong Kong; and

(ii) to amend section 76(3A) to make it clear that the District Court may make one or more of the orders set out in the list of statutory remedies.

7. On para. 6(i) above, our legal advice considers that the existing section 14 already has extra-territorial effects on unlawful acts committed outside Hong Kong as long as the concerned employees work wholly or mainly in Hong Kong. As such, we do not consider it necessary to introduce EOC's proposed amendment in this respect. However, we support the view of the Labour Advisory Board that more publicity efforts to inform the public of the extra-territorial effects of section 14 would be useful.

8. Section 76(3A) stipulates the remedies available from the District Court. Our reading of this provision is that it does not prevent the District Court from granting more than one remedy and therefore there is no need to amend it as proposed in para. 6(ii).

9. We have **reservations** about the proposal to repeal the following items in Schedule 5, which are exempted from the operation of the relevant Parts in the SDO:

(i) height or weight requirements in the disciplined services;

(ii) gender recruitment quotas (the reservation is in respect of CSD only);

(iii) small house policy;

(iv) provision of benefits or allowances by employers in relation to housing, education, air-conditioning, passage and baggage; and

(v) Home Ownership Scheme or Private Sector Participation Scheme.

10. The height and weight requirements referred to in para. 9(i) have been set on a job-related basis with professional advice to meet the demands arising from the physically demanding job nature in the disciplined services and are intended to ensure officers can perform the required duties and protect themselves. The disciplined services departments have undertaken to review the requirements to explore the feasibility of a more holistic approach to assessing physical fitness. Fire Services Department (FSD) and the Police have completed their reviews. FSD has decided to introduce functional tests in lieu of height and weight requirements whereas the Police maintain that the requirements should be retained to meet their unique operational needs. The reviews by Immigration Department, Customs and Excise Department and CSD are still in progress. We therefore consider it necessary to retain the exception.

11. Regarding para. 9(ii), the CSD has to maintain the ratio of male to female staff in line with its male and female penal population. While

most of the jobs in the CSD may be covered by the exception under section 12(2)(e) for genuine occupational qualification or the exception under section 38(2)(b) for acts done to comply with an existing statutory provision, i.e. the Prison Rules, CSD staff are subject to posting every three to five years for normal job rotation and career development. As there are posts in the CSD which are outside the correctional institutions and are therefore not covered by section 12(2)(e) or section 38(2)(b), we consider it necessary to retain the exception for the CSD.

12. As a related issue to the proposed repeal of the exception for the disciplined services, the EOC also suggested that the disciplined services should be required to monitor gender distribution in recruitment and promotion exercises so as to rectify any inequality identified. We have to stress that disciplined services departments do not impose any artificial ratio or limit on the number of men and women they recruit or promote. The different numbers of men and women recruited and promoted in the disciplined services reflect the sex profile of applicants and the relative suitability of candidates to take up the jobs. Recruitment and promotion are conducted on the basis of fairness and merit. Any form of monitoring to equalise the gender distribution in the disciplined services is considered inappropriate.

13. We have not yet come to a decision on the proposal to repeal the exception in Schedule 5 for the small house policy (para. 9(iii) refers), which is currently being reviewed. We consider it more appropriate to decide whether the exception can be removed after the completion of the review.

14. On the proposal in para. 9(iv) to remove the exception for benefits and allowances, we believe the exception is necessary. It is not uncommon for employers in the private and public sectors to provide different rates of allowances to persons of different marital status, mostly for extending certain benefits to spouses of their employees. Removal of the exception will have financial implications for employers as the rates of allowances would have to be aligned irrespective of the recipients' marital status.

15. As regards the proposal in para. 9(v) on the Home Ownership Scheme and Private Sector Participation Scheme, we consider it

appropriate to give priority to nuclear families over singleton applicants to address the more pressing needs of nuclear families for improving their living conditions. Retaining the exception for the differential treatment of people with different marital status will facilitate efficient allocation of scarce public housing resources.

Disability Discrimination Ordinance

16. Regarding the proposals on the DDO, we have **no objection in principle** to the following:

(i) to amend the definition of "associate" in section 2 of the DDO to extend it to a person under the care of a person, and make any other consequential amendments which may be necessary;

(ii) to amend section 72(1) to provide for greater clarity;

(iii) to amend section 73(1) to include reference to section 41 of the DDO;

(iv) to amend section 81(4) to enable the EOC to recover legal costs for acting as solicitor/counsel in providing legal assistance;

(v) to include in the DDO protection for members, employees and conciliators of the EOC equivalent to that found in section 68 of the SDO;

(vi) to introduce voluntary and binding undertakings into the DDO as an alternative means of settlement for the parties concerned without the need to go through a formal process such as court proceedings;

(vii) to enable the EOC to seek declaratory and injunctive relief in the District Court in respect of discriminatory acts, policies and practices (please also see para. 17 below); and

(viii) to amend 10 expressions and characters in the Chinese text of the DDO to provide for greater clarity.

17. Further discussion with the EOC will also be required to delineate the criteria of invoking the power sought in para. 16(vii).

18. Our comments on the proposal to extend the definition of "an establishment in Hong Kong" in section 14 to protect Hong Kong residents working wholly or mainly outside Hong Kong for business and/or companies registered in Hong Kong with regard to the Disability Discrimination Ordinance are the same as those on the Sex Discrimination Ordinance set out in para. 5 above.

19. We consider the following proposals **not necessary** for the purposes stated in the Report:

(i) to make it clear that section 14 has extra-territorial effect and protects against unlawful acts committed outside Hong Kong;

(ii) to amend section 64 of the DDO to refer to section 67 of the SDO;

(iii) to amend section 72(4) to make it clear that the District Court may make one or more of the orders set out in the list of statutory remedies; and

(iv) to introduce specific protection for persons with a disability in the field of eligibility to vote for and to be elected or appointed to advisory bodies.

20. On para. 19(i) above, our legal advice considers that the existing section 14 already has extra-territorial effects on unlawful acts committed outside Hong Kong as long as the concerned employees work wholly or mainly in Hong Kong. As such, we do not consider it necessary to introduce EOC's proposed amendment in this respect. However, we support the view of the Labour Advisory Board that more publicity efforts to inform the public of the extra-territorial effects of section 14 would be useful.

21. The proposed amendment in para. 19(ii) above is not necessary as it had already been rectified by the Law Reform (Miscellaneous

Provisions and Minor Amendments) Ordinance 1997.

22. Regarding para. 19(iii) above, our reading of section 72(4) is that it does not prevent the District Court from granting more than one remedy and there is no need to amend it as proposed.

23. We consider it not necessary to introduce a specific protection for people with a disability in the field of eligibility to vote and to be elected or appointed (para. 19(iv) refers). In fact, the right of permanent residents of Hong Kong to vote and to be elected has been stipulated in Article 26 of the Basic Law and Article 21 of the Bill of Rights, which corresponds to Article 25 of the International Covenant on Civil and Political Rights. This political right is, however, given to those with a minimum degree of personal maturity in order to assume responsibility for the state. Thus minors and the mentally incapacitated are accepted as permissible exclusion by the Human Rights Committee. If the EOC's proposal is adopted, we would need to write in an exclusion from unlawful discrimination cases involving persons who are not reasonably capable of exercising his right to vote or of holding the relevant position by reason of his disability. We consider it not necessary to repeat in the DDO a right that has already been safeguarded in the Basic Law and Bill of Rights, nor desirable to introduce a provision that excludes persons not reasonably capable, e.g. the mental incapacitated persons, from enjoying the right.

24. We have **reservations** about the following proposals:

(i) to amend the definition of section 6(a) of the DDO to the effect that the comparison of treatment is made between a person with a disability and a person without "the" or "that" disability; and

(ii) to repeal section 60 and Schedule 5 and amend sections 63 and 87(2) to remove any references to Schedule 5.

25. We have reservations on the proposed amendment in paragraph 24(i) above as it may render unlawful the implementation of some worthwhile affirmative programmes for persons with a particular disability which are not exempted under sections 50 or 51 of the DDO, i.e., programmes which are not funded by charitable organisations nor are

they designed to cater for the "special needs" of persons with a particular disability. One example is the "Self Help Integrated Placement Service" run by the Labour Department to encourage and support the ex-mentally ill job-seekers to search for jobs through their own initiatives. The programme is funded by public revenue. As it is just a pilot project, assistance is only rendered to the ex-mentally ill for the time being. The Labour Department would consider whether the programme can be extended to persons with other types of disability after its effectiveness has been reviewed. If the proposed amendment in paragraph 24(i) is implemented, any worthwhile measures that are designed for a particular disability and funded by public revenue, just like the "Self Help Integrated Placement Service", may be rendered unlawful.

26. Paragraph 24(ii) above suggests repealing Schedule 5 that provides, by virtue of section 60, a blanket exemption for discriminatory acts identified in the schedule. Though the Schedule has remained empty since inception, we consider it necessary to retain the provision allowing for unforeseeable exceptions in the future. This will give us greater flexibility if any genuine needs for exempting a discriminatory act from the application of DDO arise in future.

Home Affairs Bureau
Health and Welfare Bureau
October 2000

Annex

Queries in respect the proposal to extend the definition of "an establishment in Hong Kong" in section 14 to protect Hong Kong residents working wholly or mainly outside Hong Kong

(a) Coverage of the proposed amendment:

(i) How would section 14 of the SDO/DDO be rephrased if the proposed amendment is to be implemented"? What precisely would be the definitions of "Hong Kong *residents'* and "businesses and/or companies *registered* in Hong Kong"? Please also cite for reference relevant provisions from anti-discrimination ordinances in places outside Hong Kong which have extra-territorial effects.

(ii) Please confirm whether or not the following types of employment would still fall outside the scope of the SDO/DDO notwithstanding the implementation of the proposed amendment:

- Hong Kong residents working for companies incorporated outside Hong Kong but registered under Part XI of the Companies Ordinance (Cap 32, Laws of Hong Kong), Hong Kong residents working for a joint venture formed by the Hong Kong registered companies/businesses and companies/businesses registered outside Hong Kong; or companies/businesses registered outside Hong Kong of which the Hong Kong registered companies/businesses are the major shareholders or partners,

- Hong Kong residents recruited by the Hong Kong registered companies/businesses to work in places outside Hong Kong but the employment contracts in question are signed with companies/businesses registered outside Hong Kong,

- Non-Hong Kong residents who are recruited by the Hong Kong registered companies/businesses in Hong Kong to work in places outside Hong Kong

(iii) What kind of discriminatory acts/harassment would be taken as arising out of employment when the employees are working outside Hong Kong? Would the Hong Kong registered companies/businesses be held vicariously liable for discriminatory acts/harassment that occurred during social/semi-official functions or for acts committed by persons other than its own employees against its Hong Kong employees?

(b) What kind of defence against vicarious liability for unlawful acts committed outside Hong Kong would be available to the Hong Kong registered companies/businesses? Could differences in culture and practices be taken as a defence if the discriminatory acts/harassment are committed by indigenous employees in places outside Hong Kong where such acts are prevalent and socially acceptable? Would be available forms of defence be stipulated expressly in the SDO/DDO or the corresponding Codes of Practice?

(c) Where an indigenous employee employed by the Hong Kong registered company/business commits an act outlawed by the SDO/DDO against a Hong Kong employee of the same employer, would the former be *personally liable* for the unlawful acts? What kinds of mechanism should be put in place to ensure that the employee under complaint and concerned witnesses who are non-Hong Kong residents would come to Hong Kong to give evidence for the sake of complaint investigation or legal proceedings?