

立法會
Legislative Council

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LC Paper No. CB(2)1850/08-09
(These minutes have been seen
by the Administration)

Subcommittee on Race Discrimination
(Proceedings by Equal Opportunities Commission) Regulation

Minutes of the second meeting
held on Friday, 15 May 2009, at 10:45 am
in Conference Room B of the Legislative Council Building

- Members present** : Hon Paul TSE Wai-chun (Chairman)
Dr Hon Margaret NG
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Kwok-hung
Hon Starry LEE Wai-king
Hon CHEUNG Kwok-che
Hon IP Kwok-him, GBS, JP
- Members absent** : Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Dr Hon Priscilla LEUNG Mei-fun
Dr Hon Samson TAM Wai-ho, JP
- Public Officers attending** : The Administration
- Mr Raymond TAM Chi-yuen
Under Secretary for Constitutional and Mainland Affairs
- Mr Arthur HO Kin-wah
Deputy Secretary for Constitutional and Mainland Affairs
- Mr Hubert LAW Hin-cheung
Principal Assistant Secretary for Constitutional and Mainland Affairs
- Miss Betty CHEUNG Yuet-wah
Senior Assistant Law Draftsman (Acting)
- Miss Emma WONG
Senior Government Counsel (Acting)

Mr Herman POON Lik-hang
Chief Legal Counsel
Equal Opportunities Commission

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Mrs Eleanor CHOW
Senior Council Secretary (2)4

Action

I. Meeting with the Administration

[LC Paper Nos. CB(2)1142/08-09(01), CB(2)1166/08-09(02), CB(2)1332/08-09(01) - (05), CB(2)1452/08-09(01) and (02), CB(2)1500/08-09(01), CB(2)1610/08-09(01), CB(3)444/08-09 and LS50/08-09]

The Subcommittee deliberated (index of proceedings attached at **Annex**).

2. The Subcommittee noted that the Equal Opportunities Commission (EOC) would issue a public statement explaining that the standard for deciding whether to commence proceedings would be essentially the same across all the existing anti-discrimination ordinances.

3. The Administration was requested to -

(a) confirm, in consultation with the Department of Justice (DoJ) and EOC, whether EOC was adequately empowered under section 79 of the Race Discrimination Ordinance to provide legal assistance to an aggrieved person under the following circumstances -

- i) the aggrieved person had an arguable case that he had suffered racial discrimination, harassment or vilification;
- ii) the aggrieved person had suffered substantive damage psychologically as a result of the unlawful act even though his monetary loss was minimal; and
- iii) the aggrieved person was financially unable to initiate legal proceedings on his own in respect of the case which was of high complexity;

Action

and whether the proposed Regulation as presently worded would affect such assistance to be provided by EOC and narrow the functions and powers of EOC under section 59; and

- (b) explain, in consultation with DoJ, how the proposed Regulation as presently worded could achieve the policy objective of giving more flexibility for EOC to bring proceedings in its own name.

4. Members agreed that the next meeting would be held on 25 May 2009 at 2:30 pm to consider the Administration's response to issues raised by members and to study the detailed provisions of the proposed Regulation.

5. The meeting ended at 12:10 pm.

Council Business Division 2
Legislative Council Secretariat
11 June 2009

**Proceedings of the second meeting of the
Subcommittee on Race Discrimination
(Proceedings by Equal Opportunities Commission) Regulation
on Friday, 15 May 2009, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker(s)	Subject(s)	Action required
000147 - 000229	Chairman	Opening Remarks	
000230 - 000506	Administration	Briefing by the Administration on its response to the written views of deputations/individuals on the proposed Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (the proposed Regulation) made under the Race Discrimination Ordinance (RDO) (LC Paper No. CB(2)1452/08-09 (02))	
000507 - 001258	Dr Margaret NG Administration	<p>Request for the Administration to consider the following written views on the drafting of the proposed Regulation and other corresponding regulations made under respective discrimination ordinances, i.e. the Sex Discrimination Ordinance (SDO), the Family Status Discrimination Ordinance (FSDO) and the Disability Discrimination Ordinance (DDO) -</p> <p>(a) same wording should be used to ensure consistency in drafting;</p> <p>(b) drafting of the provisions concerning circumstances in which the Equal Opportunities Commission (EOC) could bring proceedings as if it were the victim should have the effect of enabling EOC to exercise more flexibility in its decision-making; and</p> <p>(c) provisions which imposed additional procedural requirements for EOC to bring proceedings should be removed from the relevant regulation.</p> <p>Explanation by the Administration on the empowering provisions for EOC to bring proceedings -</p> <p>(a) section 83 of RDO provided that the Secretary for Constitutional and Mainland Affairs could make regulations to empower EOC, in case where a victim of racial discrimination, harassment and vilification could bring proceedings under section 70 of RDO but had not done so, to bring proceedings as if EOC were that person; and</p>	

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		<p>(b) the proposed Regulation provided that EOC could bring proceedings in its own name as if it were the victim where :</p> <p>(i) the case raised a question of principle;</p> <p>(ii) it was in the interests of justice to do so; <u>and</u></p> <p>(iii) it appeared to EOC that the claim was well founded.</p>	
001259 - 001653	Chairman Administration	<p>Views of the Chairman that -</p> <p>(a) the circumstances in which EOC could bring proceedings under the proposed Regulation were essentially the same as those under the other anti-discrimination ordinances, although different wording was used in the Regulation under SDO and the Regulation under DDO respectively; and</p> <p>(b) the proposed Regulation had not imposed additional restrictions on EOC to bring proceedings.</p> <p>Response of the Administration that -</p> <p>(a) the empowering provision in section 83 of RDO provided that EOC could bring proceedings under exceptional circumstances, namely, a victim might bring proceedings under section 70 of the RDO but had not done so, and EOC brought such proceedings in its own name as if it were the alleged victim; and</p> <p>(b) EOC needed good reasons before bringing such proceedings and such considerations were reflected by both expressions of "the Commission has reason to believe that a person has committed an act of discrimination..." (adopted in the Regulation under DDO) and "it appears to the Commission that the claim ... is well founded" (adopted in the respective Regulations under SDO and FSDO on which the proposed Regulation was modelled).</p>	
001654 - 002417	Dr Margaret NG Chairman Administration	<p>Views of Dr Margaret NG that-</p> <p>(a) Hong Kong Human Rights Monitor had questioned whether it was ultra vires to specify those circumstances in which EOC</p>	

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		<p>could bring proceedings under the proposed Regulation, as the scope of which was narrower than those provided for under the principal ordinance;</p> <p>(b) as the threshold of the conjunction "and" used to connect the three criteria for EOC to bring proceedings was higher than the word "or", it was questionable whether the proposed Regulation as presently worded reflected the policy objective of RDO; and</p> <p>(c) as the threshold of "well founded" was higher than "has reasons to believe", she was inclined to support using provisions which would allow EOC more flexibility to bring proceedings</p> <p>Response of the Administration that -</p> <p>(a) the enabling provision for the Regulation was contained in section 83(1)(a) of RDO, under which regulations might be made, where any person could bring proceedings under section 70 of RDO but had not done so, empowering the EOC, in such circumstances as were specified in the regulations, to bring and maintain those proceedings as if the EOC were that person; the proposed Regulation therefore specified the circumstances in which the EOC might bring the proceedings;</p> <p>(b) it would be exceptional for the alleged victim not to bring proceedings and nevertheless it was in the interest of justice for EOC to bring proceedings in its own name as if it were the victim. In order for EOC to bring proceedings in its own name as if it were the victim, the case should be required to satisfy the specific requirement (i.e. the case raised a question of principle) and the general requirement (i.e. it was in the interests of justice to bring proceedings and the claim was well founded) at the same time. Therefore, the conjunction "and" rather than "or" was used;</p> <p>(c) bearing in mind that the victim of racial discrimination chose not to institute proceedings, it would be reasonable to expect EOC to bring proceedings only if the case was "well-founded"; and</p> <p>(d) EOC instituting legal proceedings in its own name as if it were the victim and EOC granting legal assistance for victims to institute legal proceedings related to</p>	

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		<p>different sets of contexts. EOC had greater flexibility for the latter as reflected in the use of the conjunction "or" in section 79(2) of RDO which provided that EOC could grant legal assistance to an application if it thought fit to do so, in particular where -</p> <p>(i) the case raised a question of principle; <u>or</u></p> <p>(ii) it was unreasonable to expect the applicant to deal with the case unaided.</p>	
002418 - 002929	Mr LEUNG Kwok-hung Chairman Administration	<p>Views of Mr LEUNG Kwok-hung that -</p> <p>(a) it was a policy issue as to whether a higher or lower threshold should be set for EOC to bring proceedings in its own name; and</p> <p>(b) he supported a lower threshold to allow more leeway for EOC in decision-making.</p>	
002930 - 003206	Mr IP Kwok-him	<p>Views of Mr IP Kwok-him that -</p> <p>(a) it was reasonable to specify the criteria under the proposed Regulation for EOC to consider in deciding whether to bring proceedings in its own name which would only be instituted under exceptional circumstances; and</p> <p>(b) the three criteria were not new and equivalent provisions could be found in respective regulations made under SDO, FSDO and DDO.</p>	
003207 - 003727	Chairman Administration EOC	<p>Response of EOC to questions raised by the Chairman -</p> <p>(a) EOC had never brought proceedings in its own name as if it were the victim under SDO, FSDO and DDO;</p> <p>(b) the procedural requirements for EOC to bring proceedings should not be too rigid so as to give EOC more flexibility; and</p> <p>(c) EOC wished to have criteria to make reference to in its decision making and the criteria for EOC to bring proceedings under various regulations made under the respective anti-discrimination ordinances should be consistent as far as possible.</p>	

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		<p>Response of the Administration that -</p> <p>(a) in most cases EOC should not encounter problem in identifying a victim of discrimination for it to bring proceedings in its own name as if it were the victim, but problems might arise in exceptional circumstances where a class of victims was involved, e.g. a racial group; and</p> <p>(b) the Administration was inclined to support a drafting approach to achieve the policy objective of giving EOC more flexibility to bring proceedings in its own name.</p>	
003728 - 003750	Mr TAM Yiu-chung	<p>Views of Mr TAM Yiu-chung that -</p> <p>(a) he supported the views of the Chairman and Mr IP Kwok-him; and</p> <p>(b) the criteria for EOC to bring proceedings set out in the proposed Regulation were acceptable.</p>	
003751 - 005737	Dr Margaret NG Chairman Administration EOC	<p>Response of the Administration and EOC to Dr Margaret NG's view that the proposed Regulation might be ultra vires -</p> <p>(a) section 83 of RDO set out the context in which the proposed Regulation was to operate, namely, EOC brought proceedings as if it were the victim when the alleged victim decided not to do so, while section 79(2) of RDO referred to the circumstances under which the aggrieved person brought proceedings with legal assistance provided by EOC;</p> <p>(b) as the two sets of contexts described above under the proposed Regulation and the principal Ordinance respectively were not comparable, different criteria were therefore applied. For the former situation, the three criteria set out in the proposed Regulation were more stringent as EOC had to bring proceedings in its own name when the alleged victim had not done so. For the latter situation, the criteria for granting legal assistance set out in section 79(2) of RDO were less stringent; and</p> <p>(c) the type of legal assistance provided by EOC was set out in section 79(3) of RDO, which included, among others, giving advice, arranging for the giving of advice or assistance by a solicitor or counsel, counsel of EOC appearing before the court</p>	

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		<p>to represent the aggrieved person, EOC instructing a legal representative on behalf of the aggrieved person, etc. The practice of EOC so far was to bear all the litigation costs.</p> <p>Request of Dr Margaret NG that -</p> <p>(a) to provide a written response, in consultation with the Department of Justice (DoJ) and EOC, regarding the provision of legal assistance by EOC under the circumstances described in paragraph 3 of the minutes of meeting; and</p> <p>(b) the Administration should attach importance to the views of EOC that there should be consistency in drafting.</p>	<p>Admin</p>
005738 - 011251	Chairman Dr Margaret NG Administration	<p>Dr Margaret NG's suggestion that -</p> <p>(a) the threshold of "well-founded" adopted in the respective regulations under SDO, FSDO and RDO was higher than "has reasons to believe" adopted in DDO. In order to allow EOC greater flexibility, the Administration should consider adopting the latter version; and</p> <p>(b) on the procedural requirements for instituting proceedings, DDO adopted an elaborated and more rigid approach when compared with the corresponding regulations under SDO, FSDO and RDO. In order to allow EOC greater flexibility, the Administration should consider adopting the latter version.</p> <p>Concern of the Chairman that the suggestion of Dr Margaret NG would mean creating a hybrid version, in addition to the two versions adopted in the existing regulations made under SDO, FSDO and DDO, resulting in confusion.</p> <p>Response of the Administration that -</p> <p>(a) it agreed with the view of the Hong Kong Bar Association that in substance, there was no material difference between the threshold of "it appears to the Commission that the claim ... is well founded" under the proposed Regulation and "the Commission has reason to believe that a person has committed an act of discrimination..." in the corresponding regulation under DDO;</p> <p>(b) it noted the Bar Association's view that the subjective wording of the threshold</p>	

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		<p>provision in the proposed Regulation was liable to give an impression that EOC was allowed more leeway in decision-making than the objectively phrased threshold provision in DDO;</p> <p>(c) the Administration considered the proposed Regulation, as presently worded, had achieved the policy objective of giving EOC more flexibility to bring proceedings in its own name, and did not intend to propose amendment to the proposed Regulation; and</p> <p>(d) it would explain, in consultation with DoJ, how the proposed Regulation as presently worded could achieve the policy objective of giving EOC more flexibility to bring proceedings in its own name.</p>	Admin
011252 - 011839	Mr IP Kwok-him Administration Chairman	Legislative timetable	
011840 - 012229	Chairman Mr IP Kwok-him Clerk Administration	Need to hold a further meeting and date of next meeting	