

**Panel on Constitutional Affairs
Meeting on 19 March 2010**

**Outline of the topics in the first report of the Hong Kong
Special Administrative Region under the Convention on
The Rights of Persons with Disabilities**

-- Submission from the Equal Opportunities Commission --

Introduction

1. This paper aims to inform Members of the input of Equal Opportunities Commission (the EOC) to the Government's outline of the initial report of the Hong Kong Special Administrative Region (HKSAR) under the United Nations Convention on the Rights of Persons with Disabilities (the Convention). It also highlights some issues of our concern that warrant the Government's efforts to give effect to its obligations under the Convention.

Background

2. In February 2010, the Labour and Welfare Bureau (LWB) issued for public consultation an outline of the initial report of the Hong Kong Special Administrative Region (HKSAR) under the United Nations Convention on the Rights of Persons with Disabilities (the Convention). The Equal Opportunities Commission (the EOC) has been invited to provide views and comments accordingly.

3. The outline sets out the broad subject headings and individual topics that the Government plans to cover in the report but does not provide substantive information on efforts made by the Government to implement the Convention in Hong Kong. In the absence of such information, the EOC can only provide some highlights of its work, in accordance with the preset outline prepared by the Government, for inclusion in the initial report, a copy of which is appended. It is worth noting that the Disability Discrimination Ordinance (the DDO), a piece of domestic legislation protecting and promoting the rights of persons with disabilities (PWDs), came into effect in 1996 prior to the ratification of the Convention, and the EOC was empowered to administer this piece of legislation. Hence, the EOC's submission to the Government covers the period from 1996 when the DDO came into effect.

Issues of EOC's particular concern

4. Apart from the information submitted to the Government, there are some issues about which the EOC has particular concerns:

Definition of disability

5. Recognising the progression in disability rights, in particular the diversity of PWDs, the DDO adopts a fairly broad definition of disability to encompass most situations where a person should be regarded as having a disability and thus effectively protected by the law. However, different policy and functional bureaux/departments of the Government have different definitions of disability under their respective policy purviews, and that gives rise to gaps when approaching issues and cases involved the EOC's statutory power and duties. For example, excluding certain categories of PWDs from the Disability Allowance Scheme and the Rehabilitation Programme Plan may be well explained by policy justifications but not necessarily conducive to promoting equal opportunities. At times, it invites allegations of discrimination.

6. It is understandable for the policy bureaux and functional departments to define their respective scope of service in order to make the best use of resources to meet specific needs of individual members of the public. It is prevalent and convenient for them to approach the issue of disability from a medical or biological view. However, disability should be seen in the context of interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society. The Government's restrictive approach cannot comprehensively yet specifically address the needs of PWDs. Hence, it is advisable for the Government to consider adopting the new International Classification of Functioning, Disability and Health (ICF) introduced by the World Health Organisation in formulating its policies and providing services for PWDs. ICF is a classification of health and health-related domains, which are classified from body, individual and societal perspectives. It acknowledges that societal and environmental factors should come into play when devising rehabilitation and welfare services for PWDs. In this respect, the Government should re-examine its disability and rehabilitation policies and services to ensure that they are devised and delivered to meet the specific needs of people with particular disabilities and no inter-disability discrimination should occur.

Full accessibility of the voting procedures and facilities

7. Nobody should be deprived of the opportunity to exercise his voting right due to the absence of accessible facilities for election exercises. Section 36 of the DDO states that it is unlawful for the Government to discriminate against a person with a disability in the performance of its functions or the exercise of its power. Since April 2000 prior to the by-election held in September of that year, the EOC has been expressing its concern over the accessibility problems of some polling stations. To our great disappointment, the Registration and Electoral Office (REO) of the Government still could not promise to make the polling stations 100% accessible for the coming by-election to be held in May 2010 despite that 10 years had lapsed. The EOC would like the Government to seriously refer to Article 29 of the Convention that the rights to participation in political and public life of PWDs should be equally safeguarded as those of their non-disabled counterparts.

Access to premises

8. Access to premises is one of the major areas of the EOC's concern. Since the DDO came into effect in 1996 until end of January 2010, the EOC has received 308 complaints in relation to problems of access. More remain unreported to us for action. It is recognised the design and development of the society in the past might not have taken into consideration the needs of PWDs, and hence, restrict their full participation in and enjoyment of public life. Physical access is one of the barriers that hinders PWDs, in particular those with mobility difficulties, from inclusion into the society at large. In this respect, expedient remedial actions should be taken to improve the situation, and at the same time, the concept of universal design should be adopted in new developments. However, in the absence of an overarching policy on building an inclusive society and lack of a high-level coordinating agency to oversee the issue, improvement is far from satisfactory. The EOC recommends the Government to consider making use of the licensing mechanism to ensure that elderly homes, restaurants, hostels, places of public entertainment and alike are fully accessible to PWDs.

9. Members may wish to note that in December 2006, the EOC launched a formal investigation to examine the means of access to or use of premises and facilities owned or managed by the public sector. The investigation aims to identify shortfalls in various aspects of accessibility and recommend improvement measures. Findings of individual inspection were passed to relevant parties for comments and actions. Full

report of the study is expected to be released in mid 2010.

Mental Health Policy

10. Mental health has long been regarded as a medical and welfare issue. Although the Government has taken a step forward to promoting mental health and providing one-stop service to improve case management for mental and psychiatric patients, mental health is still approached as solely a health and welfare matter. In fact, mental health is influenced by a matrix of factors which fall beyond the scope and purview of the medical and health sector. Policies related to employment, education, housing, economics, urban planning and criminal justice should be formulated in a way that promotes mental health. Failing to consider the importance of wider civil, political, economic, social and cultural rights of people with mental illnesses will reduce the effects and outcome of mental health services. The EOC therefore urges the Government to take a wholesome approach to address the issue of mental health. The establishment of a Mental Health Council is worth considering.

Implementation of the Convention

11. Although the Convention only entered into force for the HKSAR on 31 August 2008, we have already had the DDO, which is commensurate with the Convention in aims and objectives that give effect to the promotion and protection of the rights of PWDs, in operation since 1996. Having the privilege of a head start over most of our counterparts in the region of more than a decade, the Government should set good examples in complying with the requirements of the Convention. As the defender of equal opportunities and human rights, the EOC will monitor the Government's measures and suggest improvements to implement the rights under the Convention.

Equal Opportunities Commission

March 2010

***Input from the Equal Opportunities Commission
on Government's Report under the UNCRPD***

Part II Main Report

- (a) *Policies, strategies and legal framework for the implementation of each Convention right, identifying the resources available for that purpose and the most cost-effective ways of using such resources*

Prior to the UNCRPD coming into force, the EOC has been working towards the elimination of discrimination against people with disabilities (PWDs) through its statutory functions and powers. Empowered by the Disability Discrimination Ordinance (DDO) which came into full operation in December 1996 making discrimination, harassment, vilification on the ground of disability unlawful, the EOC has been working towards improving the well being of people with disabilities and enabling their full integration into the society. To this effect, the following approaches are adopted:

Enforcement of DDO through complaint handling

Sections 80 and 81 of the DDO vest the EOC with statutory power to investigate and endeavour to settle by conciliation complaints lodged under the DDO. Through this mechanism, the EOC helps people who feel aggrieved under the DDO to seek redress by way of conciliation or other form of assistance. Since EOC's inception in 1996 to the application of the Convention, the EOC investigated into 3,929 complaints of disability, i.e. an annual average of 327 complaints. Since the application of the Convention, the EOC received 667 complaints, meaning an annual average of about 470 cases. In addition to the complaints lodged, the EOC initiated investigation into potential or suspected incidents of disability discrimination. Since the application of the Convention, the EOC has initiated investigation into 61 such cases.

Disability mainstreaming and combating systemic discrimination

Disability mainstreaming in policy formulation stage is a desirable and proactive approach to eliminate discrimination and enhance integration of PWDs into the society. Through research studies, promotion and public education programmes, the EOC aims to remove stereotypical attitudes and cultivate an inclusive society for all.

However, it is noted that the design and development of the society in the past might not have catered for the special needs of PWDs, and that the existing physical and socio-economic infrastructure might give rise to systemic discrimination and restrict PWD's from full enjoyment of their rights. Section 66 of the DDO gives the EOC statutory power to conduct formal investigation which is an effective means to deal with systemic issues and effect changes at policy level. In December 2006, the EOC commenced a formal investigation into accessibility of certain premises within the housing estates, commercial centres, car parks, buildings and offices built, owned or managed by the public sector: the Housing Authority, Housing Society, the Link Management Ltd. and the HKSAR Government. In addition, the EOC also acts as amicus curie and/or interested party as necessary to help the court to explain some principles and law points that impact on public policies.

Empowerment of PWDs

Empowerment is an effective means to enhance PWD's full integration and equal enjoyment of rights. The EOC has been making effort to advocate for the betterment of PWDs and to provide them opportunities and platforms to express their needs and wishes. This is effected through various channels such as organising seminars and talks on rights and protection for PWDs, disseminating relevant information in accessible formats, providing support to NGOs and rehabilitation groups to undertake programmes to promote equal opportunities. Promoting equality of opportunities between persons with a disability and persons without a disability is enshrined in section 62 of the DDO.

(c) Mechanism to monitor progress towards the full realisation of the Convention rights, including indicators and related benchmarks in relation to each Convention right

EOC has kept statistics on the enquiries and complaints received, and legal assistance granted to cases which could not be settled by conciliation but might help establish legal principles and their individual merits warrant them being taken to court. The EOC also conducts public awareness and a pilot customer feedback survey which, together with the trends and patterns of enquiries and complaints, help EOC to devise and formulate its strategy and programme priority of different work areas.

Starting from EOC's inception in 1996 to 31 January 2010, the EOC received 26,390 enquiries and 4,596 complaints under the DDO. Of the 4,596 complaints,

3,288 were employment-related while 1,308 were related to other fields including provision of goods, services and facilities, education, and government functions. The EOC also takes initiatives to investigate into discriminatory acts which might not have been brought forward by the aggrieved party. During the above-mentioned reporting period, the EOC has investigated into a total of 609 self-initiated cases. The success rate of EOC's conciliation efforts was about 62%.

As for legal assistance, a total of 121 DDO-related cases had been granted assistance out of 302 applications received since 1996. As at the end of February 2010, 4 applications were still under consideration.

Surveys on public perception about equal opportunities and the EOC were undertaken in 1998, 2003 and 2007. A slightly higher proportion of respondents in 2007 (95%) had heard of EOC, as compared with 93% in 2003 and 87% in 1998. Among respondents who had heard of EOC, a much higher proportion of them in 2007 knew about the work of EOC (82%), as compared with the corresponding percentage of 57% in 2003 and 40% in 1998. On the qualitative aspect of customer satisfaction, a pilot study had been conducted in 2009. 55% of parties, who underwent our complaint handling process considered our service satisfactory. Customer satisfactory surveys will be conducted in the future as a service improvement measure. In general, the EOC is able to meet the service time pledges set on complaint handling and enquiry services, which is also one of the indicators to measure effectiveness of our service.

General Provisions

Article 1 to 4

(a) *Definition of disability*

The DDO adopts a much wider and inclusive definition of 'disability' that differs from those under different policy purviews of the Government. According to section 2 of the DDO, "disability, in relation to a person, means a total or partial loss of the person's bodily or mental functions; total or partial loss of a part of the person's body; the presence in the body of organisms causing disease or illness; the presence in the body of organisms capable of causing disease or illness; the malfunction, malformation or disfigurement of a part of the person's body; a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or a disorder, illness or disease that affects a

person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior, and includes a disability that presently exists, previously existed but no longer exists; may exist in the future, or is imputed to a person." The DDO basically encompasses most situations where a person should be regarded as having a disability and thus effectively protected by the law. While EOC adopts the definition of disability under the DDO in exercising its statutory duties, gaps may arise when handling cases and issues involved different policy and functional bureaux/departments which have different meanings and policy purview for persons with disabilities. For example, the Rehabilitation Programme Plan and Disability Allowance Scheme have excluded certain categories of PWDs who are equally protected under the DDO.

(c) *The concept of 'reasonable accommodation' and the requirement of 'disproportionate and undue burden' with examples and illustrations*

Concepts of 'inherent requirement', 'reasonable accommodation' and 'unjustifiable hardship'

In the area of employment under the DDO, disability discrimination is not unlawful where, taking into account that „a person with a disability is unable to perform the ***inherent requirements*** of a job; or a person with a disability (i) requires services or facilities that are not required by a person without a disability in order to carry out the inherent requirements of a job, and (ii) the provision of which would impose ***unjustifiable hardship*** on the employer.'

In identifying the inherent requirements of a job, due regard to the duties and responsibilities is required. There must be a definite relationship between the inherent requirements of the job and the personal disability which makes a person unable to perform the job. If a PWD can perform the inherent requirements of the job with some adjustments, including provision of certain services or facilities, employers should consider making such changes unless this imposes unjustifiable hardship. Making adjustments where required to ensure equal opportunities for a PWD is commonly referred to as '***reasonable accommodation***'. Reasonable accommodation may be made at any stage of employment, according to the needs of the PWD.

Illustration by case law

In *M v Secretary for Justice* (DEOC08/2008, unreported) the District court succinctly summarises the law on the ‚inherent requirements’ defence under section 12(2) of the DDO as follows (upheld by the Court of Appeal in *M v Secretary of Justice* [2009] 2 HKLRD 298):

- (i) Whether a defendant can rely on the s.12(2) defence involves a two-stage inquiry: firstly to identify the inherent requirements of the relevant employment, and secondly to ask whether because of the employee’s disability the employee is unable to carry out those requirements;
- (ii) the ‚inherent requirements’ defence does not impose an obligation on the employer to alter the nature of the particular employment so as to accommodate the disabled employee, and the court must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment;
- (iii) when considering whether the requirements of the job are inherent or not, it is the requirements of that particular employment which must be considered, not the requirements of some different employments modified to meet the needs of a disabled employee. Further, the question must be answered by reference not only to the terms of the employment contract, but also by reference to the function which the employee performs as part of his undertaking;
- (iv) in identifying the ‚inherent requirements’ of a particular employment, one must look at the characteristic or requirement of that employment as opposed to those requirements that are peripheral;
- (v) in identifying the requirement, one practical method is to ask whether the employment would be essentially the same if the requirement were dispensed with;
- (vi) the ability to deal continually with mental and physical stress can be an inherent requirement of a particular employment; and
- (vii) in helping an employee to fulfill the inherent requirements, the employer must provide to the employee ‚services’ or facilities’ that are external to the employment. However, the employer has no duty to ask some other staffs to do the work of the disabled employee.

In the area of education, though there is no court case in relation to the DDO, the concepts and principles of reasonable accommodation and unjustifiable hardship

illustrated above equally apply to educational establishment. That is, educational establishments have the obligation to make reasonable accommodations in order to meet students with special learning needs, unless providing such accommodations would render the establishment unjustifiable hardship. However, the type and extent of accommodation may vary depending on the specific requirements of the students and other relevant circumstances.

- (e) *Disaggregated and comparative statistical data on the effectiveness of specific anti-discrimination measures and the progress achieved towards ensuring equal realisation of each of the Convention rights by PWDs including a gender- and age-based perspective*

Since 1996, the EOC has received 302 applications for legal assistance in relation to DDO, of which 121 cases were granted while 4 were still under consideration. Overall success rate of legal application was about 40%. However, there is no breakdown as to the gender and age of applicants.

Findings of EO Awareness Survey 2007 revealed that certain groups (older and less educated, retirees, or home-makers, with lower household income) considered equal opportunities less important and were less supportive of the EOC's work, as compared with other groups. The Baseline Survey of Students' Attitudes towards PWDs (2000) revealed that students in Primary 4 tended to be more accepting of all disability groups. This suggests that the relationship between age and negative attitudes is not a linear one. As students progressed through the age groups, it was interesting to note that Primary 4 and Form 6, the lowest and highest age cohorts, were more positive than the middle group of students in Form 1 and Form 4.

Specific Rights

Article 5 Equality and non-discrimination

Role of EOC in enforcement of discrimination-related ordinances

The DDO came into full operation in December 1996 making discrimination, harassment, vilification on the ground of disability unlawful. The DDO gives protection in the areas of employment, provision of goods, services and facilities, education, training, management of premises and access. The EOC has a statutory role in investigating into complaints lodged under the DDO and endeavouring to settle them by way of conciliation. When conciliation fails, the aggrieved party

could apply for legal assistance from the EOC to seek redress in the District Court. In considering whether legal assistance is to be given, a number of factors would be taken into account such as whether a question of principle is involved; the relative positions of the parties; the strength of the case; whether the case has important precedent value; whether the case reinforces a policy objective or deficiency that warrants EOC's involvement.

In addition to the statutory power to handle complaints lodged with the EOC, it is also vested with the power to conduct formal investigation under section 66 of the DDO. The EOC commenced a formal investigation into accessibility of certain premises built, owned or managed by the public sector: the Housing Authority, Housing Society, the Link Management Ltd. and the HKSAR Government with a view to identifying the intensity of the access problem in these areas and to recommending improvement measures. The investigation report is expected to be released by mid 2010.

Apart from complaint handling, EOC also has a statutory duty to promote equality of opportunities between PWDs and non PWDs. Promotional activities and public education programmes are launched via various media platforms and partnership with NGOs and rehabilitation groups. Issue of Code of Practice on Employment and Code of Practice on Education under the DDO also helps stakeholders to comply with the statutory requirements under the law and to promote create a disability-friendly working and learning environment for PWDs.

Article 8 Awareness-raising

Public-awareness campaigns directed to general society

In recent decades, an important paradigm shift has taken place in the approach to dealing with disability issues, i.e. from welfare to the right-based approach. The emphasis is on capacity building and empowerment of PWDs to the effect that they can independently participate and integrate into the society at large. Information collated from researches and surveys play an important role to help EOC to formulate its work plans to remove stereotypical attitudes and cultivate positive attitudes towards PWDs so as to enhance the latter's integration. In this connection, the EOC commissioned a second baseline survey study in late 2009 to assess public attitudes towards PWDs in the fields of employment, public access, services and facilities, social interaction, education and training.

In recognition of this new UN Convention, the EOC organised a Seminar entitled „Our Ten Years Under the DDO – Moving Forward, Changing Cultures” on 24 January 2008. The seminar aimed to review the impact of the DDO since its implementation and outline the way forward to help build a level playing field for PWDs. International and local experts were invited to share their experience in the development and practice of disability discrimination legislation, and to exchange views on global trends for promoting the well-being and rights of PWDs. It helped to raise awareness of the general public as well as stakeholders towards the rights and needs of PWDs.

Article 9 Accessibility

Access to premises

Complaints handled and legal assistance granted

Accessible environment is essential for independent living of PWDs and elderly. It is a major area of concern for the EOC. From 1996 to 31 January 2010, 308 complaints concerning accessibility were received, accounting for about 7% of the total complaints received for investigation and conciliation. Over 60% of the complaints were settled by conciliation. Of those failing to endeavour a settlement, 18 applicants had applied for legal assistance of which 13 were granted.

Formal Investigation on accessibility

In December 2006, the EOC, in accordance with section 66 of the DDO, launched a formal investigation to examine the means of access to or use of premises and facilities owned or managed by the public sector: the Housing Authority, Housing Society, the Link Management Ltd. and the HKSAR Government. The investigation aims to identify shortfalls in various aspects of accessibility. Findings of the individual inspection were passed to relevant government departments and policy bureaux for comments and improvement actions. Full report of the study is expected to be released in mid 2010.

Transport-for-All policy

Provision of concessionary public transport fares for PWDs

Affordable and accessible public transport is vital to enable social inclusion of the less privileged groups including PWDs. Throughout the years, the EOC has supported the NGOs in negotiating with the Mass Transit Railway (MTR) Corporation, of which the Government is one of the major shareholders, to provide concessionary fare to PWDs. MTR has eventually responded by agreeing to introduce a „Half Fare Promotion Scheme’ which marked a significant step forward to integrating PWDs into the community and setting an example for other public transport operators to consider offering similar schemes to PWDs. The EOC worked with the Government and made necessary legislative amendments to DDO which took effect on 6 October 2009 to facilitate implementation of the Scheme. It is hoped that other public franchised bus companies would introduce similar scheme to enhance integration of PWDs.

Traveling arrangement for PWDs carrying oxygen cylinder

While noting the inconvenience encountered by PWDs in general when traveling on public transport, the barrier faced by people with particular disabilities rendering them to carry life-supporting oxygen cylinder when traveling is even greater. Arising from a case that came to EOC’s attention in 2009, it reveals that there is ambiguity as to whether the different pieces of legislation, namely the Public Bus Services Regulations (PBSR) (Cap230A) and the Dangerous Goods Ordinance (DGO) (Cap295) could be reconciled to provide exemption for people with particular disabilities who have genuine need to carry certain quantity of oxygen with them when traveling on public transport. According to the PBSR, „no person shall bring onto any bus any substance or article to which the DGO applies’. Regulation 74(1) of the Dangerous Goods (General) Regulations which is made under Section 5 of the DGO states that „section 6 of the Ordinance (DGO) shall not apply to the storage or conveyance of any gas specified in the first column of the table to this regulation in any quantity not exceeding that, if any, specified for such gas in the second column of the table’. Oxygen is one of the gases listed in the first column of the table and „two cylinders’ is the quantity specified for oxygen in the second column of the table.

The Government is currently reviewing the relevant legislation with a view to providing clear guidelines for public transport operators. The EOC is closely

monitoring the situation to ensure that people with disabilities should have equal access to public bus service.

Article 21 Freedom of expression and opinion, and access to information

Accessible means to acquire information is vital to full participation in public life. Making information technology and the Web accessible to PWDs is crucial for them to be able to live independently. In this regard, the EOC had promoted the concept of „IT for All’ starting from 2000 and has been urging Government to adopt a comprehensive approach to mainstream the needs of PWDs in the IT development in Hon g Kong. In 2000, the EOC set up an IT Taskforce to examine IT issues in relation to PWDs and women. We also conducted a survey on accessibility of public sector websites and found that out of 163 public sector homepages, only 20% passed the Bobby test, an on-line accessibility check for Web users. Since then, the EOC engaged stakeholders, including professional bodies of the IT industry, government bureaux and departments, and NGOs to advocate for Web Accessibility for All. Efforts in the past decade in promoting web accessibility are rewarded by having mainstreamed this concept into policy formulation which is reflected in the Government’s Digital 21 Strategy as well as the ICT industry.

Article 24 Education

Education is a crucial factor for the development of our society as well as for individuals. By ensuring equal opportunity in education for all members of our community, we develop our most valuable resource to the full and maintain the competitiveness of our society. As for individuals, it not only enables them to fully develop their capabilities, but also is instrumental to their attaining equal opportunities in other areas, such as in work and in getting services and facilities in the community.

Code of Practice on Education

Equal opportunity in education for PWDs is laid down in the DDO. Since September 1996 when the DDO came into operation, there were many enquiries from the school authorities, teaching professionals, parents and students relating to discrimination in education. Hence, the EOC decided to issue a Code of Practice on Education under the DDO with a view to helping them understand their rights and obligations under the law, and providing practical guidelines on how to comply with the legal requirements. The Code was published in July 2001 and served as a

useful reference by stakeholders.

Complaint handling

According to statistics, a total of 131 complaints related to education had been received under the DDO since 1996. The major areas of complaints included admission, accommodation for students with special learning needs, accommodation in examination and harassment on the ground of disability.

Integrated education

Students with special needs are not confined to special schools. Parents can opt for mainstream schools which practise integrated education and are willing and able to provide accommodation for students with special learning needs. The concept of integrated education was first introduced to Hong Kong in the 70s. Initially, it took the form of special class and special programmes in ordinary schools to cater for students with special educational needs. In 1997, the Integrated Education pilot project with an emphasis on whole-school approach was launched. However, acceptance of the policy or principle is not enough to enable the effective implementation of integrated education. The implementation of integrated education over the past decade has led to the involvement of a wider group of teachers and increased public awareness, bringing about heightened parental expectations and increased pressure on schools and teachers. The EOC commissioned a survey study in late 2009 to assess the implementation of equal learning opportunities for students with special education needs under the integrated education system in Hong Kong. The survey is expected to be completed by 2011.

Acting as interested party in judicial review

In addition to complaint handling, the EOC has participated in an important battle for equal education opportunities to children with intellectual disabilities. In June 2009, the EOC was invited to give views on the school leaving arrangements for students studying in special schools for children with intellectual disability (ID schools), taking into account key changes and developments to date since the discussion on the New Senior Secondary (NSS) Academic Structure in late 2004. Parents and concern groups for ID students are in disagreement with the Education Bureau as to whether the proposed three-year senior secondary education is actually available to ID students on par with non-ID students. In August 2009, the EOC, in the capacity of an interested party, took part in the judicial review (HCAL73/2009)

concerning the disputes about the upper age limit for students with intellectual disabilities in receiving secondary education, i.e. the new leaving arrangement for ID students who reach the age of 19. The Government and the Applicant, an ID student studying in special school, have different views on the relevant facts and legal provisions relating to the upper age limit for ID students to remain at school. It is for the Court to resolve and adjudicate on all these matters. The EOC participated in this judicial review mainly to assist the Court in determining certain facts and legal issues and on the relevant clauses in this Convention and the DDO. Besides looking into the matter regarding the upper age limit for school education, the EOC takes an inclusive approach by bringing to the Court's attention (i) the importance of individual assessments at different developmental stages for children with intellectual disabilities; (ii) experience of other countries; (iii) issues relating to the appropriate accommodation for students with intellectual disabilities upon leaving school; and (iv) the need for the Government to consider the overall benefits for the students when allocating resources. The EOC explained the concept of direct and indirect discrimination to the Court. While there may be difficulties in making direct comparison between students with intellectual disabilities studying in special schools and students studying in mainstream schools, the current arrangement may raise issues of indirect discrimination. Although the Court finally did not find the policy and arrangement discriminatory, the Government has agreed to assess on individual merits of students who are due to leaving schools, and if situation warrants, would extend their stay in ID schools so that they could equally enjoy to the fullest benefit of the NSS programme.

Article 27 Work and Employment

- (a) *Legislative measures taken to ensure protection against discrimination in all stages of employment and in any form of employment and to recognise the right of PWDs to work on a basis of equality with others, in particular the right to equal pay for equal work*

Code of Practice on Employment under the DDO

Equality of opportunities in employment ensures that all suitable people compete equally and effectively on the basis of their abilities, aptitude and knowledge. This is an important element in sustaining the success of a society. Equality of opportunity to employment for people with and without disabilities is protected under the DDO. The law makes it unlawful for an employer to discriminate against or harass PWDs on the ground of their disabilities in the course of

employment. The scope of employment under the DDO is essentially wider than what is generally understood as employment under common law and/or the labour legislation. Basically, it covers employment in full-time, part-time, permanent or temporary. Protection begins from pre-employment stage applicable to job applicants and extends to post employment situations when the person has left the employment.

Noting that employment is one of the essential activities that concerns the majority of population, the EOC issued the Code of Practice on Employment under the DDO in January 1997 in accordance with section 65 of the DDO immediate after the DDO came into full force. The code offered to assist employers and employees in understanding the requirements of the DDO and providing guidelines for legal compliance. It also explained the concept and principle of 'equal pay for work of equal value' (EPEV) and encouraged employers to progressively implement EPEV. Having gone through over a decade, the public gains better and broader knowledge of the DDO, and there have been developments in legal jurisprudence and an increase in the number of complaints lodged with the EOC, it is considered timely to revise the code with more case illustrations and good practice suggestions so that it continues to serve as a useful reference for complying with the legal requirements and cultivating a discrimination free workplace. The draft revised code will be published for public consultation in mid 2010.

Complaints received and legal assistance granted in relation to employment under the DDO

Employment field has been the major source of complaints under the DDO received by the EOC. Starting from December 1996 when the employment-related provisions of the DDO were in force up to 31 January 2010, a total of 3,288 complaints in relation to employment had been lodged with the EOC, amounting to 71% of the total complaints received. Out of the total complaints entering into conciliation, 58% had been successfully reached settlement. During the above-mentioned period, 223 applications for legal assistance had been received, of which 79 cases (35%) had been offered assistance.

Statutory Minimum Wage Bill

The Government is going to introduce a Statutory Minimum Wage Bill for consideration by the Legislative Council. Public consultation on the draft bill is under way. In recognition of the concerns expressed by some rehabilitation

groups and PWDs that the proposed bill may force PWDs whose working abilities are hampered by their disabilities out of the labour market, the Government set up a consultative group in which the EOC and stakeholder groups are represented. The group aims to identify measures to protect PWDs who are less competitive in the open workforce and are likely to be adversely impacted by the proposed bill. It is suggested that special arrangement be made to assess the productivity of individual employee who has a disability in the authentic workplace in order to help to determine whether the individual should be remunerated at no less than the statutory minimum wage rate, and if not, the extent of discount. In order to forestall abuse by employers, the right to invoke such assessment is vested with the employee who claims to have a disability. Though majority of the group members support the proposed arrangement, there is still controversy amongst the disability community as to whether it is the best means to protect PWDs' employment opportunities, and the operation details of such assessment mechanism. The EOC has pointed out that though the Government may invoke the exemption of 'special measure' under the DDO, it has to justify that the implementation of such mechanism is reasonably imposed to address the special needs of PWDs and to enhance their equal employment opportunities. Moreover, due consideration should be given to whether such mechanism could be challenged by the higher instruments such as the Bill of Rights Ordinance and Basic Law.

Article 29 Participation in political and public life

Full accessibility of the voting procedures, facilities and materials

Nobody should be deprived of the chance to exercise his voting right due to the absence of accessible facilities for the election exercise. Section 36 of the DDO states that it is unlawful for the Government to discriminate against a person with a disability in the performance of its functions or the exercise of its power. Prior to the by-election held in September 2000, the EOC had approached the Registration and Electoral Office (REO) of the Government in April expressing our concerns over the accessibility problems of some polling stations that deterred PWDs from participating in the election. Although the REO indicated that an elector with a disability could apply to vote at a special polling station designated for his/her constituency if access to the polling station originally allocated to him/her is not accessible due to his/her disability, the re-designation of polling stations for PWDs with particular needs almost always involved the PWD having to travel to area/district not proximate to their residence. This gave rise to another issue of accessible transport between the polling stations and the residence of the PWD in

question. In response to the urge from the EOC and the rehabilitation groups, the REO then agreed to arrange Rehab Bus service for this purpose when prior requests were made by PWDs. The EOC is of the view that all qualified voters with a disability are entitled to equal access to the polling stations as their non-disabled counterparts, and it is the Government's responsibility to make all polling stations fully accessible. Despite the continued requests from the EOC, it still appears that not all the polling stations are accessible to PWDs, and the Government could not promise to make them 100% accessible for the coming by-election to be held in May 2010. The EOC is actively negotiating with the Government to improve the polling arrangements to ensure that nobody should be deprived of his voting rights due to his disability.

Article 30 participation in cultural life, recreation, leisure and sport

Financial support to athletes with and without disabilities

It came to the EOC's attention that there was a proposed scheme 'Elite Athletes Grants' aimed to provide financial support to elite athletes with and without disabilities. The EOC was invited to provide views as to whether the proposed Scheme would comply with the DDO. The EOC noted that elite athletes with disabilities, unlike their counterparts without disabilities, were not eligible for monthly stipends and that the overall financial support to be provided for elite athletes without disabilities were substantially different from athletes with disabilities. Though, understandably that the eligibility criteria and needs of athletes with and without disabilities were quite different, the EOC advised policy makers to ensure that there should be substantial equality for both athletes with and without disabilities when devising the scheme. Despite arguments that there was material difference in circumstances such as objectives of participation, training needs, intensity and scope of training programmes, availability of other sources of support for athletes with and without disabilities etc. that might render comparison of treatment between athletes with and without disabilities under the Scheme not relevant, the Government, however, subsequently agreed to top-up financial support for elite athletes with disabilities on a case-by-case basis if situation warrants.

Specific situation of boys, girls and women with disabilities

Article 6 Women with disabilities

Women and men are equally protected under the Sex Discrimination Ordinance and DDO. When special needs of women with disabilities arise that warrant special treatment, measures reasonably taken to address those specific needs are not rendered unlawful provided that they can be justified as special measures which are exempted under the Sex Discrimination Ordinance and the DDO respectively. For example, provision of sexual/reproductive health services to women only is not unlawful.

In respect of discrimination encountered by women with disabilities, our statistics do not point to any pattern of significance, i.e. gender distribution of complaints under DDO quite evenly spreads between male and female. Conciliation rate of both genders is also about the same.

Equal Opportunities Commission
March 2010