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**Panel on Constitutional Affairs**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 17 June 2013**

**Equal Opportunities Commission's legislative amendment proposal related  
to the scope of protection against sexual harassment under the Sex  
Discrimination Ordinance (Cap. 480)**

**Purpose**

This paper provides background information on the legislative amendment proposal related to the scope of protection against sexual harassment under the Sex Discrimination Ordinance (Cap. 480) ("SDO") put forward by the Equal Opportunities Commission ("EOC"), and gives a brief account of the relevant discussion held by the Panel on Home Affairs ("HA Panel").

**Background**

2. EOC is a statutory body established under SDO in May 1996. EOC is responsible for the implementation of SDO, the Disability Discrimination Ordinance (Cap. 487) ("DDO"), the Family Status Discrimination Ordinance (Cap. 527) and the Race Discrimination Ordinance (Cap. 602). The main functions of EOC include –

- (a) working towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race;
- (b) conducting investigation into complaints lodged under the relevant legislation and encouraging conciliation between the parties in dispute; and
- (c) keeping under review the workings of the relevant legislation and when necessary, to draw up proposals for amendments.

3. The Home Affairs Bureau used to be the housekeeping bureau of EOC until July 2007 when the policy responsibility was transferred to the Constitutional and Mainland Affairs Bureau.

### **EOC's review of SDO and DDO in 1997**

4. At the end of 1997, EOC commenced a review of the provisions of SDO and DDO, which were enacted on 14 July 1995 and 3 August 1995 respectively<sup>1</sup>, based on EOC's operational experience. The review was completed in February 1999. Pursuant to section 64(1)(e) of SDO and section 62(1)(e) of DDO, EOC's proposals for legislative amendment were submitted in the same year to the Chief Executive for consideration.

5. According to EOC, the legislative amendment proposals aimed to simplify and clarify existing provisions of these two Ordinances, and to rectify defects in the two Ordinances in the light of implementation experience.

### Proposals agreed to by the Administration in principle

6. In November 2000, the Administration made a written response [LC Paper No. CB(2)247/00-01(01)] to the legislative amendment proposals made by EOC in 1999 for amending SDO and DDO. In its paper, the Administration stated that while it had no objection in principle to some of the proposals, the details and the impact of the proposals upon implementation needed to be further discussed and assessed in consultation with EOC. At the same time, the Administration stated that it had reservations or different views on the rest of the proposals. Moreover, some of the proposed amendments were considered not necessary. In February 2001, EOC submitted to the HA Panel a paper entitled "EOC's response to Administration's response to EOC's proposals for amendment of SDO and DDO" [LC Paper No. CB(2)830/00-01(01)]. Members may wish to note that the EOC's paper encloses a copy of the EOC's legislative amendment proposals as Annex A, and a summary of the proposals agreed to by the Administration in principle as Annex B. These two annexes are attached at **Appendix I** for Members' easy reference.

### Legislative amendment proposals related to the definition of sexual harassment in SDO

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7. The proposals agreed to in principle by the Administration included,

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<sup>1</sup> The non-employment related provisions of SDO and DDO came into operation on 20 September 1996 whereas the employment related provision came into operation on 20 December 1996.

among others, EOC's proposal to extend the scope of protection against sexual harassment in SDO by implementing the following four proposals in relation to SDO –

- (a) to amend section 2(6) so that section 2(5)(b) on "sexual harassment in hostile environment" also applies to the field of education;
- (b) to amend section 40(1) to protect providers of 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.

For details of the above four proposals, please refer to paragraph 3(a) to (d) of Annex A to EOC's paper at Appendix I.

### **Relevant discussion held by the HA Panel**

8. The HA Panel discussed "EOC's proposals to amend SDO and DDO" at its meeting on 13 February 2001. Some members considered that sexually hostile environment might exist in different institutions such as those in the public sector, and enquired about the scope of protection against sexual harassment in SDO.

9. EOC explained that the definition of sexual harassment in section 2(5) of SDO contained two limbs. The first limb was found in section 2(5)(a) and referred to unwelcome conduct or behavior by one person against another. The second limb was found in section 2(5)(b) which referred to hostile environment harassment. Although the first limb applied to all fields covered by SDO, the second limb applied only to the field of employment. EOC was of the view that section 2(5)(b) should also apply to the field of education since educational establishments were responsible for the psychological well-being of their students and for the prevention of a sexually hostile or intimidating learning environment. Hence, EOC had made the proposal in paragraph 7(a) above.

## **Administration's follow-up on EOC's proposals for amendment of SDO and DDO**

10. In response to a Legislative Council ("LegCo") question raised by Hon Emily LAU on "Amendments to SDO and DDO" at the Council meeting of 21 November 2007, the Secretary for Constitutional and Mainland Affairs ("SCMA") advised that the Administration would expand the scope of protection against sexual harassment in educational establishments by extending the definition of sexual harassment in SDO to cover conduct which renders sexually hostile or intimidating the environment in which a woman works, studies or undergoes training, or carries out related or incidental activities. SCMA advised that the Administration had already incorporated this proposed amendment to SDO in the Race Discrimination Bill, which was under scrutiny by the relevant Bills Committee then, as the Bill also dealt with racial harassment in a similar manner.

11. SCMA further advised that some of the other amendments proposed by EOC might have read-across implications on other anti-discrimination ordinances and others might affect the operation of the Government or other organizations. The Administration would consider the most appropriate way for follow up after the enactment of the Race Discrimination Bill.

12. The Race Discrimination Bill, passed by LegCo on 10 July 2008, amended the provision on unlawful sexual harassment by creating a hostile or intimidating environment in SDO. An extract of the section 2(5) of SDO as amended is at **Appendix II** for Members' reference.

13. At the Council meeting of 9 November 2011, in response to a LegCo question raised by Hon Emily LAU on whether the Administration would introduce a bill as soon as possible to amend the relevant provisions of SDO, SCMA advised that the Administration would consult LegCo and relevant parties at an appropriate time to take forward the legislative work.

### **Recent position**

14. Dr Hon Helena WONG has requested to discuss the Administration's follow-up on EOC's proposal to extend the scope of protection against sexual harassment under SDO. The Administration has also proposed to brief members on the progress in following up EOC's legislative amendment proposal related to the scope of protection against sexual harassment under SDO at the next meeting of the Panel on Constitutional Affairs on 17 June 2013.

## **Relevant questions and papers**

15. Details of relevant questions raised at Council meetings since the First LegCo as well as relevant papers available on the LegCo website (<http://www.legco.gov.hk>) are in **Appendix III**.

Council Business Division 2  
Legislative Council Secretariat  
13 June 2013

**EQUAL OPPORTUNITIES LEGISLATIVE REVIEW  
PROPOSALS FOR AMENDMENT OF THE SDO AND DDO**

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**INTRODUCTION**

The Equal Opportunities Commission (“EOC”) is a statutory body established under the Sex Discrimination Ordinance, Cap. 480 (“SDO”). Under the SDO, it is charged with the duty to work towards the elimination of discrimination on the grounds of sex, pregnancy and marital status, to promote equality of opportunity between men and women generally and to work towards the elimination of sexual harassment. Under the Disability Discrimination Ordinance, Cap. 487 (“DDO”), the EOC is charged with the duty to work towards the elimination of discrimination on the ground of disability, to promote equality of opportunity between persons with and without a disability and to work towards the elimination of disability harassment and vilification.

Pursuant to both the SDO and the DDO, the EOC is also charged with the duty to keep under review the working of each Ordinance and to advise the Government accordingly.

These proposals for amendment of the SDO and the DDO are the culmination of a legislative review undertaken by the EOC following twelve months of operational experience. The recommendations comprise proposals for amendment which would clarify and simplify existing provisions, as well as proposals for amendments aimed at rectifying what have found to be defects in the legislation. Underpinning the review exercise is the recognition by the EOC that the legislation in question has not yet been tested in the courts and that any reformulation of equal opportunities laws would benefit from a timely review at a later stage.

This legislative review has been limited to the SDO and the DDO, which were enacted on 14 July 1995 and 3 August 1995 respectively. The non-employment related provisions of these two Ordinances became operational on 20 September 1996 and the employment related provisions came into operation on 20 December 1996. A third

Ordinance, the Family Status Discrimination Ordinance, Cap. 527 (“FSDO”) was passed on 24 June 1997. It did not come into operation until 21 November 1997. It was not included in this review.

## **1. Extra Territorial Application of Law**

Section 14 of both the SDO and the DDO defines the meaning of “an establishment in Hong Kong”. This term governs the scope of the jurisdiction in the field of employment of both Ordinances, as all employment is to be regarded as being at an establishment in Hong Kong unless the employee does his or her work wholly or mainly outside Hong Kong.

The definition suggests that the legislation protects not only against unlawful acts committed against employees in Hong Kong, but also against unlawful acts committed against employees outside Hong Kong as long as such employees work wholly or mainly in Hong Kong. Such construction of section 14 is in keeping with the position in overseas jurisdictions such as Britain and Australia.

● *The EOC proposes that the Government should amend section 14 of the SDO and section 14 of the DDO to make it clear that these sections have extra-territorial effect and protect against unlawful acts committed outside Hong Kong.*

## **2. Employment Wholly or Mainly Outside Hong Kong**

The EOC is of the view that there should also be legal protection against discrimination of employees who work wholly or mainly outside Hong Kong, where both the employee and the employer have a connection with Hong Kong.

● *The EOC proposes that the Government should extend the definition of “an establishment in Hong Kong” in section 14 of the SDO and section 14 of the DDO to protect Hong Kong residents working wholly or mainly outside Hong Kong for businesses and / or companies registered in Hong Kong.*

### 3. Sexual Harassment

#### (a) Education Field

The definition of sexual harassment in section 2(5) of the SDO contains two limbs: the first limb is found in section 2(5)(a) and refers to unwelcome conduct or behaviour by one person against another and the second limb is found in section 2(5)(b) and refers to hostile environment harassment. Although the first limb of the definition applies to all fields covered by the SDO, pursuant to section 2(6) of the SDO the second limb of sexual harassment applies only to the field of employment.

The EOC believes that section 2(5)(b) of the SDO should also apply to the field of education. Educational establishments are responsible for the psychological well-being of their students and for the prevention of the creation of a sexually hostile or intimidating learning environment in like manner as employers are responsible for the psychological well-being of their employees and the prevention of the creation of a sexually hostile or intimidating work environment.

● ***The EOC proposes that the Government should amend section 2(6) of the SDO so that section 2(5)(b) applies to the field of education.***

#### (b) Provision of Goods, Services and Facilities

Section 40 of the SDO deals with sexual harassment in relation to all fields other than employment and education. Operational experience has shown that there are gaps in the protection afforded by this section in respect of the provision of goods, services and facilities, in respect of clubs, and in respect of some tenancy relationships.

Whilst there is protection for a victim of sexual harassment by a provider of goods, services and facilities, section 40 of the SDO does not provide protection for the victim who may be providing such goods, services and facilities. This leaves persons employed in the service industry, in particular, vulnerable.



● *The EOC proposes that the Government should amend section 40(1) of the SDO to ensure that persons providing goods, services or facilities to another person are not sexually harassed by that other person in the course of offering to provide, or providing, the goods, services or facilities.*

(c) Clubs

The SDO makes it unlawful for members of a committee of management of a club to discriminate against members or prospective members of that club. There is no provision in section 40 of the SDO making sexual harassment in such situation unlawful.

● *The EOC proposes that the Government should amend section 40 of the SDO so that it protects members or prospective members of a club against sexual harassment by members of a committee of management of that club.*

(d) Tenancy

Sections 40(2), 40(3) and 40(4) of the SDO provide some limited protection against sexual harassment in tenancy relationships but there is no provision in section 40 of the SDO which makes unlawful sexual harassment by:

- ✧ a tenant against another tenant or sub-tenant occupying the same premises;
- ✧ a sub-tenant against another sub-tenant occupying the same premises.

The EOC considers that the SDO should provide protection against sexual harassment in such cases.

● *The EOC proposes that the Government should amend section 40 of the SDO so that it protects tenants and sub-tenants from sexual harassment by other tenants and sub-tenants occupying the*

*same premises.*

#### 4. Schedule 5 to the SDO

Exceptions are contrary to the principle of equal opportunities and defeat the spirit of anti-discrimination legislation. To prevent exceptions from undermining the effectiveness of anti-discrimination legislation, exceptions should be kept to a minimum. The EOC takes the view that, where necessary exceptions do exist, they should form part of the substantive provisions of the legislation and should not be contained in a schedule of exceptions.

Schedule 5 to the SDO contains eight items set out in Part 2 which, although discriminatory in nature and effect, are exempted from the operation of the SDO and are deemed not to be unlawful by virtue of section 62 of the SDO.

All eight items arise out of government policies, practices and regulations. Each one affects the rights of individuals in their relationship with the Government; Item 3 also relates to private sector employment. The eight items set out in Part 2 of Schedule 5 to the SDO are as follows:

**Item 1** - this item exempts discrimination between men and women from the operation of Parts III, IV and V of the SDO, where such discrimination arises in the context of men and women holding, or seeking to hold, office in the disciplinary services and relates to -

(i) height, uniform, weight or equipment requirements;

The EOC has found that there is a minimum height and weight requirement for men and women for recruitment to the disciplinary services; the Police Force and Auxiliary Police Force apply different treatment to men and women in respect of equipment carried; and there is a difference in uniforms worn by men and women in some of the services, which

discriminates against women.

- (ii) gender recruitment quotas;

The EOC has found that there is a difference in the total number of men and women recruited to, or seeking to hold office in, the disciplinary services.

- (iii) the reservation of positions within the Police Tactical Unit for men;

The EOC has found that, at the time of the review, there were in fact no offices falling within the Police Tactical Unit that were reserved for men.

and / or

- (iv) difference in training in the use of weapons between men and women.

The EOC has found that there is a difference in training in the use of weapons between men and women in the Police Force and the Auxiliary Police Force, which discriminates against women and men.

The EOC takes the view that there should be no height and weight requirements imposed for either women or men. Rather, the inherent requirements of the job in question should be carefully set out and consistent selection criteria developed to recruit to the disciplinary services persons able to meet these specific requirements. A more wholistic approach to physical fitness should ensure that individuals are assessed according to their capabilities to carry out the duties of the job.

Accordingly, the EOC considers that a satisfactory method of assessment should be devised, with consistent selection criteria applied to both sexes alike, that will not (either directly or indirectly) discriminate against women.

The EOC also believes that equal treatment for women and men must be mainstreamed into every aspect of life and that equality of opportunity should extend to women in the disciplinary services. This cannot be achieved if discriminatory practices are allowed to continue. Not only

are fewer women recruited to such services, fewer women are promoted.

Simply removing the discriminatory elements of the disciplinary services' recruitment policies, training policies and dress codes is not enough to eliminate sex discrimination. Effective monitoring is required of specific recruitment and promotion exercises to detect where the problem - if any - lies. Gender distribution in the disciplinary services should be properly assessed, reasons should be identified and examined, and steps should be taken to rectify the inequality.

The EOC considers that the disciplinary services should be required to monitor gender distribution in recruitment and promotion exercises to ensure that there is no discrimination.

**Item 2** - this item exempts from the operation of Part IV of the SDO any discrimination between men and women arising from the Government's 'small house' policy, pursuant to which benefits relating to land in the New Territories are granted to male indigenous villagers.

This policy was introduced to improve the housing situation which existed in the New Territories more than 20 years ago. It does not reflect the developments and changes in the law regarding women owning properties in the New Territories, nor does it reflect changes in the economic make-up of the indigenous villagers.

The Government has advised that a committee was set up to review the 'small house' policy. The review of the policy was commenced in September 1997 and was expected to have been completed at the end of 1998.

The EOC is of the view that the findings of that committee should be made public and that the Government resolve the discriminatory aspects of the 'small house' policy as soon as possible.

**Item 3** - this item exempts discrimination on the ground of marital status from the operation of Parts III, IV and V of the SDO arising from the provision of benefits or allowances by employers in relation to housing,

education, air-conditioning, passage and baggage.

The EOC has found that this exception was introduced to deal with the payment of double benefits to married persons. The introduction of section 56A to the SDO by the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997 now makes it clear that it is not unlawful to deny double benefits to married persons.

In the circumstances, the EOC considers it unnecessary to retain this exception in Item 3.

**Item 4** - this item exempts discrimination on the ground of marital status arising from the provision of any reproductive technology procedure.

With the introduction of Section 56B to the SDO by the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, this exception has been incorporated into the substantive provisions of the SDO.

In the circumstances, the EOC is of the view that it is unnecessary to retain this exception in Item 4.

**Item 5** - This item exempts from the provisions of Parts III, IV and V of the SDO discrimination on the basis of marital status arising out of the provision of adoption services or facilities relating to adoption. Discrimination on the ground of sex remains unlawful.

The Social Welfare Department has conducted a review of the Adoption Ordinance, which regulates adoption in Hong Kong. The Social Welfare Department has advised that it has recommended amendment of the provisions in the Adoption Ordinance to remove any references to gender and marital status, on the basis that it is the interests of the child that should be of paramount consideration in each case.

In view of this, and in view of the introduction of section 56C to the SDO by the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, which has incorporated the exception in Item 5 into the substantive provisions of the SDO, the EOC is of the view that it is

unnecessary to retain this exception in Item 5.

**Item 6** - This item exempts from the provisions of Part IV and V of the SDO discrimination on the basis of marital status arising from the public housing scheme known as the Home Ownership Scheme or the Private Sector Participation Scheme.

Discrimination on the ground of marital status arises from the fact that, in order to qualify as an applicant under the public housing scheme, an applicant must have a family. Where the familial relationship is that of husband and wife, such relationship is given priority over other familial relationships and other marital statuses.

The EOC believes that detailed consideration should be given to this exception to determine whether it is a necessary one or whether, in fact, there exists an alternative method of assessment of applicants which is not discriminatory and does not offend against the principle of equal opportunities.

**Item 7** - This item exempts from the provisions of Parts III, IV and V of the SDO discrimination on the ground of sex arising from certain legislative provisions involving the granting of pensions to surviving spouses and / or children of deceased public officers, public service officers and individual officers. The legislative provisions contain terms that discriminate between male and female children.

The Civil Service Bureau has advised that this exception was included to ensure that the rights of the children of officers appointed before 5 March 1993 was preserved.

The EOC believes that there should be no preferential treatment given to either male or female children in such circumstances and that consideration should be given to finding a method of phasing out this type of discrimination whilst preserving the rights of the children of those officers appointed prior to 5 March 1993.

**Item 8** - This item exempts from the operation of Parts III, IV and V of the SDO discrimination on the ground of

marital status which arises from a proviso to the regulations governing the circumstances in which gratuities may be granted to dependants of officers who die or receive injuries.

The proviso mentioned results in preferential treatment being given to widows who remain “unmarried and of good character” when compared to widows who remarry.

The EOC is of the view that this type of discrimination is based on outmoded attitudes relating to women, which perpetuates stereotypical images and unfair treatment.

- ***The EOC proposes that the Government should repeal section 62 of the SDO and Schedule 5 to the SDO and amend sections 66 and 90(1) of the SDO to remove any references to Schedule 5.***

## **5. Schedule 5 to the DDO**

Schedule 5 to the DDO is meant to provide, by virtue of section 60 of the DDO, a blanket exemption for discriminatory acts identified in the schedule. Since its inception, however, Schedule 5 to the DDO has remained empty.

In view of the fact that exceptions are contrary to the principle of equal opportunities and should be kept to a minimum, and only when necessary, the EOC considers it unnecessary to retain a schedule of exceptions which is blank.

- ***The EOC proposes that the Government should repeal section 60 of the DDO and Schedule 5 to the DDO and amend sections 63 and 87(2) of the DDO to remove any references to Schedule 5.***

## 6. Eligibility to Vote for and to be Elected or Appointed to Advisory Bodies under the DDO

The SDO provides protection against discrimination on the ground of sex, marital status or pregnancy in -

- ✧ determining the eligibility of a person to stand for election or to be selected;
- ✧ the terms and conditions on which a person is considered eligible to stand for election or to be selected;
- ✧ determining the eligibility of a person to vote in elections of members of a relevant body or the holder of a position, or to take part in the selection of the holder of such position;
- ✧ the terms and conditions upon which a person is considered eligible to vote in elections of members or the holder of a position, or to take part in the selection of the holder of such position; and
- ✧ considering whether a person should be appointed to a position, approved as a member of a body or recognised as holding a position.

Relevant bodies for the purposes of section 35 of the SDO are public bodies, public authorities, statutory advisory bodies and bodies prescribed by the SDO.

There is no equivalent protection under the DDO against discrimination on the ground of disability in this field. Under the existing provisions of the DDO, a person who is discriminated against on the ground of disability in any of the five situations outlined above has no recourse to the DDO. This is contrary to the principle of equal opportunities for all.

● *The EOC proposes that the Government should amend the DDO by introducing specific protection for persons with a disability in the field of eligibility to vote for and to be elected or appointed to advisory bodies.*



## 7. Definition of Direct Disability Discrimination

Section 6(a) of the DDO defines the meaning of direct discrimination under the DDO. Under the existing definition, in order to prove direct discrimination on the ground of disability, a complainant must show that :

- ✧ the treatment is on the ground of disability;
- ✧ the treatment is less favourable; and
- ✧ the comparison of treatment is between the person with the disability and a person without a disability.

If taken literally, the comparison of treatment must be between the person with the disability and a person without any disability. This is because of the use of the indefinite article “a” in the expression “person without a disability” in section 6(a) of the DDO. This could lead to confusion.

The EOC takes the view that it could not have been the intention behind the legislation to compare a person with one type of disability and a person without any disability in order to find discrimination. The definition of ‘disability’ is itself so wide, it would be extremely difficult to find a comparator without any disability at all.

Equivalent legislation in overseas jurisdictions such as Australia makes it clear that the comparison of treatment should be made between the complainant and a comparator without ‘the’ disability of the complainant.

- ***The EOC proposes that the Government should amend the definition of direct discrimination in section 6(a) of the DDO to make it clear that the comparison of treatment is made between the person with a disability and a person without ‘the’ or ‘that’ disability.***

## 8. Disability Discrimination against Associates

Section 6(c) of the DDO makes it unlawful to discriminate against an associate of a person with a disability. The word ‘associate’ is defined in section 2 of the DDO in the following terms :

“ ‘associate’, in relation to a person, includes -

- (a) a spouse of the person;
- (b) another person who is living with the person on a genuine domestic basis;
- (c) a relative of the person;
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person.”

Paragraphs (a), (b), (c) and (e) of the definition of ‘associate’ have been drafted in terms which suggest reciprocal relationships. Because of the way paragraph (d) has been drafted, this reciprocity does not apply to the situation of carers.

This leads to difficulties under section 6(c) of the DDO, which provides that a person discriminates against another person for the purposes of the DDO if there is less favourable treatment on the ground of the disability of an associate of that other person. It is rare that a person with a disability would be discriminated against on the ground of the disability of his or her carer. It is more likely that a carer would be discriminated against on the ground of the disability of the person under his or her care.

The EOC is of the view that the legislation should provide protection in both situations.

- ***The EOC proposes that the Government should 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.***

## 9. **Binding Undertakings**

The EOC's enforcement powers under the SDO and the DDO are essentially restricted to the handling of complaints under its power to investigate and conciliate, the institution of legal proceedings under various heads of power, and the conduct of formal investigations (including the issue of enforcement notices.)

The existing regime does not recognise that the EOC may find it useful to accept an undertaking or agreement from an individual who, or an organisation which, has been identified in some way as possibly committing an unlawful act, without needing to go through a formal process. Such an undertaking or agreement would be entered into on a voluntary basis and would provide an attractive option for the parties involved.

The EOC is of the view that a voluntary undertaking or agreement would be desirable if it were formally recognised by the legislation and could be enforced in on the same manner as enforcement notices.

- ***The EOC proposes that the Government introduce voluntary and binding undertakings, which are legally enforceable, into the SDO and the DDO.***

## 10. **Enforcement Notices for Discriminatory Practices under the DDO**

Under the SDO and the DDO, discriminatory practices may only be dealt with by way of formal investigation.

Pursuant to section 77(1) of the SDO, enforcement notices may be served on persons by the EOC where, in the course of a formal investigation, the EOC becomes satisfied that the person is committing or has committed, among other things, a contravention of section 42 of the SDO. Section

42 of the SDO deals with discriminatory practices.

Section 41 of the DDO deals with discriminatory practices under the DDO, and makes specific reference to proceedings under section 73. Unlike section 77(1) of the SDO, however, section 73(1) of the DDO fails to mention that enforcement notices may be issued for discriminatory practices under the DDO. The EOC is of the view that this was an oversight in the legislation.

● *The EOC proposes that the Government should amend section 73(1) of the DDO to include reference to section 41 of the DDO.*

## **11. Costs and Expenses of Litigation**

The EOC has a discretion under the SDO and the DDO to grant assistance upon application for assistance to institute civil proceedings by persons who have been unable to achieve a settlement of their dispute for whatever reason. The assistance which the EOC may give in each case ranges from the giving of legal advice by its own lawyers to the briefing of private counsel to represent a complainant in the civil proceedings.

Sections 85(4) of the SDO and 81(4) of the DDO deal with the recovery of expenses by the EOC upon completion of any civil proceedings. Both sections provide that any expenses incurred by the EOC in providing assistance relating to civil proceedings constitute a first charge for the benefit of the EOC on any costs or expenses payable to the EOC's client. Whilst it is clear that the EOC may recover its expenses, it is unclear whether the EOC can recover its costs.

Pursuant to section 73B(3) of the District Court Ordinance, parties to proceedings under the SDO or the DDO would ordinarily pay their own costs unless the court found that the proceedings were brought maliciously or frivolously, or there existed special circumstances warranting an award of costs.

In the event that an order for costs were made in favour of the EOC's client, it is not clear whether the EOC could recover the costs for legal work done by its own lawyers. The EOC considers that it is desirable that it be able to recover its costs in the same manner as solicitors' firms and the Legal Aid Department.

- *The EOC proposes that the Government should amend section 85(4) of the DDO and section 81(4) of the DDO to enable the EOC to recover costs as well as expenses.*

## **12. Delegation of Powers under the DDO**

Section 64 of the DDO states that the EOC shall not, under section 69 of the SDO, delegate certain functions and powers. The reference to section 69 of the SDO is incorrect. The correct delegation section under the SDO is section 67.

- *The EOC proposes that the Government should amend section 64 of the DDO to refer to section 67 of the SDO.*

## **13. Protection Against Liability of EOC**

Section 68 of the SDO affords some protection to members of the EOC and its committees, employees of the EOC, and conciliators, from personal liability for acts and / or defaults made in performance or purported performance of any function or exercise of power conferred on the EOC by the SDO, as long as such members, employees or conciliators have acted in good faith.

There is no equivalent provision for acts or defaults made in performance of any function or exercise of power imposed or conferred by the DDO or the FSDO. Although the legislative review is restricted to the SDO and the DDO, the EOC considers it desirable that members, employees and conciliators be protected from liability when exercising their functions and powers under all three pieces of legislation.

- *The EOC proposes that the Government should amend the DDO and the FSDO to include protection for members, employees and conciliators of the EOC equivalent to that found in section 68 of the SDO.*

**14. Jurisdiction of District Court for Vicarious Liability and Aiding under SDO**

Section 76(1) of the SDO sets out the circumstances in which claims may be made the subject of civil proceedings in the District Court. Although reference is made in section 76(1)(b) to claims where persons may be vicariously liable for acts of discrimination, there is no reference in section 76(1) of the SDO to claims where persons may be vicariously liable for acts of sexual harassment.

Clearly claimants are, and should be, able to bring civil proceedings for sexual harassment against respondents who are liable under section 46 or section 47 of the SDO.

For the sake of completeness, and to avoid any confusion, the EOC considers it desirable that this should be spelt out in the legislation.

- *The EOC proposes that the Government should amend section 76(1) of the SDO, by including a new section 76(1)(d) along the following lines:*

*“(d) is by virtue of section 46 or 47 to be treated as having committed such an act of sexual harassment against the claimant.”*

**15. Jurisdiction of District Court for Vicarious Liability and Aiding under DDO**

Section 72(1) of the DDO sets out the circumstances in which claims may be made the subject of civil proceedings in the District Court. Although reference is made in section 72(1)(d) to claims where persons may be vicariously liable for acts of discrimination, there is no reference in section 72(1) of the DDO to claims where persons may be vicariously

liable for acts of harassment or vilification.

Clearly claimants are, and should be, able to bring civil proceedings in respect of harassment and vilification of persons with a disability against respondents who are liable under section 48 or section 49 of the DDO.

For the sake of completeness, and to avoid any confusion, the EOC considers it desirable that this should be spelt out in the legislation.

● *The EOC proposes that the Government should amend section 72(1) of the DDO, by re-numbering the existing paragraphs and introducing two new paragraphs along the following lines:*

- “(a) has committed an act of discrimination against a claimant which is unlawful by virtue of Part III or IV;*
- (b) is by virtue of section 48 or 49 to be treated as having committed such an act of discrimination against the claimant;*
- (c) has committed an act of harassment against the claimant which is unlawful by virtue of Part III or IV;*
- (d) is by virtue of section 48 or 49 to be treated as having committed an act of harassment against the claimant;*
- (e) has committed an act which is unlawful by virtue of section 46; or*
- (f) is by virtue of section 48 or 49 to be treated as having committed an act which is unlawful by virtue of section 46.”*

## **16. Availability of Specified Statutory Remedies**

Section 76(3A) of the SDO and section 72(4) of the DDO are the provisions that deal with the statutory remedies that may be ordered by the District Court in civil proceedings under each Ordinance.

The various remedies that the District Court may order are linked by the disjunctive “or”, suggesting that only one remedy may be ordered at any

time. The EOC takes the view that, since both section 76(3A) of the SDO and section 72(4) of the DDO are without prejudice to the Court's power to make orders which it considers just and appropriate in the circumstances, the Court has power to award more than one of the remedies set out in the legislation at any time.

For the avoidance of doubt or argument to the contrary, the EOC considers it desirable that to have this spelt out more clearly in the legislation.

- *The EOC proposes that the Government should amend section 76(3A) of the SDO and section 72(4) of the DDO to make it clear that the District Court may make any one or more of the orders set out in the list of statutory remedies.*

## **17. Civil Proceedings for Discriminatory Practices**

Both the SDO and the DDO contain provisions relating to discriminatory practices. These are sections 42 and 41 respectively. Contravention of such provisions may be dealt with only by the EOC, and only by way of formal investigation. Complainants cannot lodge complaints for the purpose of investigation and conciliation by the EOC in respect of discriminatory practices, nor may they institute civil proceedings in respect of same. They may only lodge complaints, and may bring civil action, against respondents whose discriminatory practices lead to an individual act of discrimination which is unlawful under the legislation.

In cases where a complainant could bring a civil action, but chooses not to, the EOC may rely on the Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation and the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation to bring proceedings in its own name. Such proceedings would be restricted to the specific act of discrimination alleged by the aggrieved person.

Where the EOC becomes aware of a discriminatory practice, but there is no potential individual claim on which to found a legal action, the EOC is unable to deal with the discriminatory practice other than by way of formal investigation.



The EOC is of the view that it should be able to bring civil proceedings in the District Court for declaratory relief against respondents with discriminatory practices, without the need to base such proceedings on individual claims and without conducting a formal investigation.

- ***The EOC proposes that the Government should amend the SDO and the DDO to enable the EOC to bring civil proceedings against respondents believed to have discriminatory practices.***

#### **18. Headings in the SDO**

The EOC has considered the various headings in the legislation and has found that there are two which are misleading. Although they have no binding effect and may only be referred to for guidance in construction, it is an opportune time to amend them.

Section 7 of the SDO refers to “Discrimination against married, etc. persons in employment field”. This is incorrect, as the section refers to marital status discrimination in all fields.

Section 8 of the SDO refers to “Discrimination against pregnant women in employment field”. This is incorrect. The section refers to pregnancy discrimination in all fields.

- ***The EOC proposes that the Government should amend the headings of sections 7 and 8 of the SDO to more accurately reflect the content of the relevant provisions.***

#### **19. Chinese Text of the SDO**

The EOC is of the view that certain expressions and characters in the Chinese text of the SDO should be amended to provide for clarity and better meaning.

- ***The EOC proposes that the Government should amend the Chinese text of the SDO as follows:-***

- A. *in paragraph (b) under Section 2 defining “會社” (club) by repealing “處所” and substituting “會址”.*
- B. *in paragraph (a) under Section 2 defining “僱用” (employment) by repealing “服務” and substituting “僱傭”.*
- C. *in paragraph (b) under Section 2 defining “僱用” (employment) by adding “由個人” before “親自”.*
- D. *in Section 11(4) by repealing all words after “外” and substituting “就 1997 年 10 月 15 日前與女性的死亡或退休有關的規定,如在該日期及之後繼續適用於該女性, 則第(1)(b)及(2)款不適用於該些規定.”*
- E. *in Section 11(5), by repealing*
- (i) *“就” and substituting “與” wherever it appears;*  
*and*
  - (ii) *“而作的付款” and substituting “有關的規定” wherever it appears.*
- F. *in Section 15(4) by repealing all words after “外” and substituting “就 1997 年 10 月 15 日前與女性的死亡或退休有關的規定,如在該日期及之後繼續適用於該女性, 則第(1)(b)及(d)款不適用於該些規定.”*
- G. *in Section 15(5), by repealing*
- (i) *“就” and substituting “與” wherever it appears;*  
*and*
  - (ii) *“而作的付款” and substituting “有關的規定” wherever it appears.*
- H. *By repealing Section 16(4) and substituting “(4) 就 1997 年 10 月 15 日前與成員死亡或退休有關的規定, 如在該日期及之後繼續適用於該成員, 則在有關範圍內, 本條不適用於該些規定.”*

- I. *in Section 19(4)(a), by repealing “該行” and substituting “該職業介紹所”.*
- J. *in Section 19(4)(b), by repealing “該行” and substituting “該職業介紹所”.*

## 20. Chinese Text of the DDO

The EOC is of the view that certain expressions and characters in the Chinese text of the DDO should be amended to provide for clarity and better meaning.

● *The EOC proposes that the Government should amend the Chinese text of the DDO as follows:-*

- A. *in the preamble, by adding*
  - (i) *“或他的有聯繫人士” after “任何人”;*
  - (ii) *“或他的有聯繫人士” before “的騷擾”;*
    - (iii) *“至包括基於任何人或他的聯繫人士的殘疾而作出的歧視” before “及相關”.*
- B. *in paragraph (e) under Section 2 defining “殘疾” (disability), by adding “外觀” before “毀損”.*
- C. *in paragraph (b) under Section 2 defining “會社” (club), by repealing “該其處所” and substituting “其會址”.*
- D. *in paragraph (b) under Section 2 defining “僱用” (employment), by repealing “進行任何工作或勞動合約” and substituting “執行任何工作或付出勞動力的合約”.*
- E. *in Section 4(a), by repealing “作出的處所提供” and substituting “提供遷就”.*
- F. *in Section 19(5)(a), by repealing “該行” and substituting “該職業介紹所”.*

- G. in Section 19(5)(b), by repealing “該行” and substituting “該職業介紹所”.**
- H. in Section 20(4)(c)(ii) by repealing all “僱主” and substituting “主事人”.**
- I. In Section 12(5)(a) by repealing “已承諾” and substituting “承諾”**
- J. In Section 37(2) by repealing “教職員” and substituting “職員”.**

**SUMMARY OF PROPOSALS AGREED TO IN PRINCIPLE BY  
ADMINISTRATION**

The Administration has agreed in principle to:

1. Extend the scope of protection against sexual harassment in the SDO by implementing the four proposals as recommended at pages 3 and 4 of Annex A-
  - (i) amend section 2(6) of the SDO so that section 2(5)(b) extends “sexually hostile environment” harassment to the field of education;
  - (ii) amend section 40 of the SDO to protect providers of goods, services and facilities against sexual harassment by customers;
  - (iii) amend section 40 of the SDO to protect members / prospective members of a club against sexual harassment by members of a committee of management of that club; and
  - (iv) amend section 40 of the SDO to protect tenants and sub-tenants from sexual harassment by other tenants and sub-tenants.
2. Repeal Item 1 in Schedule 5 of the SDO, as recommended at pages 5 to 7 of Annex A, insofar as Item 1 relates to uniform / equipment requirements and training in the use of weapons in the disciplinary forces; positions reserved for men in the Police Tactical Unit; and gender quotas (except in respect of the Correctional Services Department).
3. Repeal Items 4, 5, 7 and 8 in Schedule 5 of the SDO, as recommended at pages 7 to 10 of Annex A.
4. Introduce voluntary and binding undertakings into the SDO and the DDO, as recommended at page 14 of Annex A.
5. Amend section 85(4) of the SDO and section 81(4) of the DDO to enable EOC to recover legal costs for acting as solicitor / counsel in

## **Annex B**

providing legal assistance, as recommended at pages 15 and 16 of Annex A.

6. Amend section 76(1) of the SDO and section 72(1) of the DDO to make it clear that claims may be made against persons who are vicariously liable for acts of sexual harassment, disability harassment and disability vilification as recommended at pages 17 and 18 of Annex A.
7. Enable the EOC to seek declaratory and injunctive relief in the District Court under the SDO and the DDO in respect of discriminatory acts, policies and practices, as recommended at page 19 of Annex A.
8. Amend the headings of sections 7 and 8 in the SDO to more accurately describe their contents, as recommended at page 20 of Annex A.
9. Amend the expressions and characters in the Chinese text of the SDO, as recommended at pages 20 and 21 of Annex A, to provide for greater clarity.
10. 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 necessary consequential amendments, as recommended at page 13 of Annex A.
11. Amend section 73(1) of the DDO to include reference to section 41 of the DDO, as recommended at pages 14 and 15 of Annex A.
12. Include in the DDO protection for members, employees and conciliators of the EOC equivalent to that found in section 68 of the SDO, as recommended at pages 16 and 17 of Annex A.
13. Amend the expressions and characters in the Chinese text of the DDO, as recommended at pages 20 to 23 of Annex A.

(3) For the purposes of this Ordinance, an enforcement notice or a finding by the District Court becomes final when an appeal against the notice or finding is dismissed, withdrawn or abandoned or when the time for appealing expires without an appeal having been brought; and for this purpose an appeal against an enforcement notice shall be taken to be dismissed if, notwithstanding that a requirement of the notice is quashed on appeal, a direction is given in respect of it under section 78(3).

(4) (*Repealed 29 of 2008 s. 91*)

(5) For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if—

(a) the person—

(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or

(ii) engages in other unwelcome conduct of a sexual nature in relation to her,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or

(b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her. (*Amended 29 of 2008 s. 91*)

(6) (*Repealed 29 of 2008 s. 91*)

(7) In subsection (5)—

“conduct of a sexual nature” (涉及性的行徑) includes making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing.

(8) A provision of Part III or IV framed with reference to sexual harassment of women shall be treated as applying equally to the treatment of men and for that purpose that provision, and subsections (5) and (7), shall have effect with such modifications as are necessary.

(9) Subject to subsection (10), in this Ordinance “existing statutory provision” (現有法例條文) means any provision of—

(a) any Ordinance enacted before this Ordinance was enacted;

(b) any subsidiary legislation made—

(i) under an Ordinance enacted before this Ordinance was enacted; and

(ii) before, on or after this Ordinance was enacted.

(10) Where an Ordinance enacted after this Ordinance was enacted re-enacts (with or without modifications) a provision of an Ordinance enacted before this Ordinance was enacted, then that provision as re-enacted shall be treated for the purposes of subsection (9) as if it continued to be contained in an Ordinance enacted before this Ordinance was enacted.

(3) 就本條例而言，凡執行通知發出或區域法院作出裁定後，有人對該項通知或裁定提出上訴而其上訴遭駁回、撤回或放棄，或並無人提出上訴而上訴期限亦已屆滿，則該項通知或裁定即成為最終的通知或裁定；就此而言，如有人就執行通知提出上訴，即使該通知中的某項要求經上訴後遭推翻，但卻有指示根據第 78(3) 條就該通知發出，則該上訴亦被視作遭駁回。（由 1998 年第 25 號第 2 條修訂）

(4) (*由 2008 年第 29 號第 91 條廢除*)

(5) 就本條例而言，任何人（不論如何描述其身分）——

(a) 如——

(i) 對一名女性提出不受歡迎的性要求，或提出不受歡迎的獲取性方面的好處的要求；或

(ii) 就一名女性作出其他不受歡迎並涉及性的行徑，而在有關情況下，一名合理的人在顧及所有情況後，應會預期該女性會感到受冒犯、侮辱或威嚇；或

(b) 如自行或聯同其他人作出涉及性的行徑，而該行徑造成對該名女性屬有敵意或具威嚇性的環境，（由 2008 年第 29 號第 91 條修訂）

該人即屬對該女性作出性騷擾。

(6) (*由 2008 年第 29 號第 91 條廢除*)

(7) 在第 (5) 款中——

“涉及性的行徑” (conduct of a sexual nature) 包括對一名女性或在其在場時作出涉及性的陳述，不論該陳述是以口頭或書面作出。

(8) 在第 III 或 IV 部中凡有提述性騷擾的條文，須視為同樣地適用於男性所受的待遇；就此而言，該等條文以及第 (5) 及 (7) 款經作出必要的變通後具有效力。

(9) 在符合第 (10) 款的規定下，在本條例中，“現有法例條文” (existing statutory provision) 指以下法例的任何條文——

(a) 在本條例制定之前已制定的任何條例；

(b) 任何——

(i) 根據本條例制定之前已制定的條例訂立；並

(ii) 在本條例制定之前、當日或之後訂立，的附屬法例。

(10) 凡在本條例制定之後制定的條例，將一條在本條例制定之前已制定的條例的條文再制定（不論是否加以修改），則該條經再制定的條文，就第 (9) 款而言須視為猶如繼續載於在本條例制定之前已制定的條例中。

## Appendix III

### Relevant documents on Equal Opportunities Commission's legislative amendment proposal related to the scope of protection against sexual harassment under the Sex Discrimination Ordinance (Cap. 480)

Committee	Date of meeting	Paper
Panel on Home Affairs	13 February 2001 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	28 June 2006	<a href="#">Official Record of Proceedings</a> <a href="#">Page 81 - 83 (Written question raised by Hon Emily LAU)</a>
	21 November 2007	<a href="#">Official Record of Proceedings</a> <a href="#">Page 24 - 31 (Oral question raised by Hon Emily LAU)</a>
	26 May 2010	<a href="#">Official Record of Proceedings</a> <a href="#">Page 85 - 89 (Written question raised by Hon CHEUNG Man-kwong)</a>
	9 November 2011	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 116 - 118 (Written question raised by Hon Emily LAU)</a>
	11 January 2012	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 122 - 127 (Written question raised by Hon Emily LAU)</a>

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