

Discrimination Law Review

For Public Consultation

Executive Summary

You are invited
to give your comments in writing to the
Equal Opportunities Commission
by 7 October 2014



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

July 2014

INTRODUCTION

1. This is the Executive Summary of the Equal Opportunities Commission's (EOC) consultation document on the Discrimination Law Review (DLR). The DLR is the EOC's review and public consultation on all four existing discrimination ordinances. This is being conducted by the EOC in order to improve protection from discrimination and promote equality throughout society in Hong Kong.
2. The Executive Summary summarizes the issues examined in the consultation document, and includes as an Appendix a full list of the consultation questions. For further information on the consultation document and the public consultation, please visit our DLR website: <http://www.eoc.org.hk>
3. You are invited to send written submissions to the EOC within three months **by 7 October 2014** to respond to any or all of the consultation questions.
4. The EOC will also be holding a series of public forums (details can be found on the above website). It will also arrange meetings with stakeholders to explain the key issues in the consultation. After the consultation period has closed, the EOC will reflect on the issues and the submissions by stakeholders. The EOC will then draft and send a written submission to the Government as to how we believe the discrimination laws should be reformed and modernized.
5. For any queries relating to the public consultation and DLR generally, please contact the EOC by:
 - Mailing Address: 19/F., Cityplaza Three, 14 Taikoo Wan Road, Taikoo Shing, Hong Kong
 - Tel: (852) 2511 8211
 - Fax: (852) 2511 8142
 - Email: eoc@eoc.org.hk
 - SMS Enquiry Service: 6972566616538 (For people with hearing impairment/speech difficulties)

CHAPTER 1: RATIONALE AND PRINCIPLES OF THE REVIEW

1.01 Chapter 1 is divided into two Parts. Part I sets out the context and rationale for conducting the DLR. Part II sets out the key principles by which the EOC is conducting the review and will make submissions to the Government.

Part I: Rationale for the Review

1.02 There are a number of reasons why the EOC believes that it is an appropriate time to conduct a comprehensive review and make proposals to the Government on reforming the discrimination laws. Our reasons for the DLR are based on: the EOC's statutory duty to review discrimination laws and the experience of previous reviews; ongoing evidence of inequality and discrimination in Hong Kong society; the experience of developing discrimination laws in Hong Kong and international jurisdictions; and furthering compliance with Hong Kong's international and domestic human rights obligations regarding equality and non-discrimination.

Part II: Principles of the Review

1.03 The EOC has developed a set of principles to conduct the review. We believe these should also guide the Government in reforming and modernizing all the discrimination laws.

A. Modernization

1.04 The EOC believes that it is vital for the existing discrimination laws to be modernized. This is appropriate for several reasons. Firstly, operational experience of the EOC demonstrates that there are a number of areas where the current discrimination laws are not sufficient to protect people from discrimination. Secondly, the discrimination laws should evolve to take into account improvements in the discrimination laws in similar international jurisdictions.

B. Simplification and preferable consolidation

1.05 A second principle is that the EOC believes that the current discrimination laws should be greatly simplified, preferably by consolidating all the Discrimination Ordinances into one Discrimination Ordinance. Many provisions are common across the current four Discrimination Ordinances (for example forms of

prohibited conduct, exceptions to the principle of non-discrimination, enforcement of the discrimination laws and the functions and powers of the EOC). This makes the current discrimination laws repetitive, and more difficult for stakeholders to navigate as they need to refer to four separate pieces of legislation.

C. Harmonization

- 1.06 A third principle is that where possible and appropriate, the provisions regarding protection from discrimination should be harmonized upwards to the same levels. This is important as there are currently a number of inconsistencies between the protections of the different groups across the Discrimination Ordinances.

D. Promoting and mainstreaming equality

- 1.07 A final principle is that the review will consider measures for promoting and mainstreaming equality, as well as addressing systemic inequality.
- 1.08 A key problem with the existing discrimination laws is that it is primarily reactive and focused on achieving redress for individuals and their claims of discrimination. However, many of the issues in society relating to equality concern institutional issues and the ways in which public and private bodies are managed. It is for this reason that the “special measures” or positive action provisions of the Discrimination Ordinances are important as they recognize that it may be appropriate to provide disadvantaged groups with particular facilities, services and training to help them achieve substantive equality with other groups.
- 1.09 Several other similar common law jurisdictions have developed proactive duties in their discrimination laws for public and private bodies to consider equality issues in the development and implementation of new policies and practices. In Chapter 5, we consider some of those models which could be adopted in Hong Kong.

CHAPTER 2: GOALS OF THE LEGISLATION AND PROTECTED CHARACTERISTICS

2.01 Chapter 2 examines two issues. Part I examines whether the broad goals of the legislation should be set out at the commencement of the Discrimination Ordinances or a consolidated Discrimination Ordinance. Part II considers the definitions and scope of the existing protected characteristics in the Discrimination Ordinances and how they should be reformed.

Part I: Goals of the legislation

2.02 The EOC believes that it is important to consider including at the commencement of the discrimination legislation a clause which states its purpose. This could assist all the stakeholders who need to understand the legislation, as well as assist courts in interpreting and applying the legislation in particular cases.

Part II: Reforming the definitions and scope of the protected characteristics

2.03 Part II examines whether the current definition and scope of the existing protected characteristics of sex, pregnancy, marital status, disability, family status or race should be reformed in any way.

A. Protected characteristics of sex, pregnancy and marital status

2.04 Currently under the Sex Discrimination Ordinance (SDO) the protected characteristics are sex, pregnancy and marital status. Discrimination is prohibited against these groups across all key sectors such as employment, education, the provision of goods and services, and premises.

(i) Protected characteristics of sex

2.05 The EOC believes that gender neutral language should be used for all the sex discrimination provisions. This would make it easier for people to immediately recognize that protection from sex discrimination applies both to women and men.

(ii) Protected characteristic of pregnancy

2.06 There are two issues examined in the consultation document in relation to the scope of protection from pregnancy discrimination: making it clear that there is protection from discrimination during the maternity period; and introducing protection from discrimination relating to a potential pregnancy.

(iii) Protected characteristic of marital status

2.07 Currently, the SDO provides protection from discrimination and other prohibited conduct on grounds of marital status, which is defined as *“the state or condition of being:*

(a) Single;

(b) Married;

(c) Married but living separately and apart from one’s spouse;

(d) Divorced; or

*(e) Widowed”.*¹

2.08 In relation to the state of being “single”, it is yet to be definitely determined by the courts in Hong Kong as to whether it would include those persons who are not married but are either in heterosexual or homosexual de facto relationships.

2.09 The consultation document examines whether there is a need for express protection from discrimination on the grounds of being in genuine existing or former de facto relationships.

B. Protected characteristic of disability

2.10 A crucial issue in relation to persons with disabilities is the scope of what constitutes a disability in order to be protected from discrimination. Disability is defined broadly to include both physical and mental disabilities, as well as disabilities that presently exist, previously existed, may exist in the future or are imputed to a person.

2.11 The consultation document examines whether or not it would be appropriate to refine the definition in any way, for example to require substantial and/ or longer term impairments similar to the Equality Act 2010 in the United Kingdom.

C. Protected characteristic of family status

2.12 The protected characteristic of family status under the Family Status

¹ Section 2 SDO.

Discrimination Ordinance (FSDO) protects people from discrimination who are responsible for the care of immediate family members.

- 2.13 There are three issues that are examined in relation to the definition and scope of protection regarding family status: the term of “family status” and changing it to “family responsibilities”; extending protection to care arising from de facto relationships and former relationships; and clarifying that protection extends to breastfeeding women.

D. Protected characteristic of race

- 2.14 Currently there are protections for race discrimination in relation to the “race, colour, descent or national or ethnic origin” of a person.

- 2.15 The EOC believes that both nationality and citizenship should be added to the forms of protection from race discrimination. The EOC also believes that consideration could be given to whether it is appropriate to have protection from discrimination relating to Hong Kong residency status or related concepts of immigration status. This relates to differences of treatment based on whether persons are permanent or other types of residents; or their immigration status as being immigrants to Hong Kong. This could include for example discrimination between persons from Hong Kong and mainland China.

CHAPTER 3: FORMS OF PROHIBITED CONDUCT

- 3.01 Chapter 3 examines:
- the forms of discrimination or other conduct that should be prohibited under the discrimination laws in Hong Kong;
 - to which protected characteristics such forms of discrimination or other conduct should apply; and
 - how the forms of discrimination or other prohibited conduct should be defined.
- 3.02 Part I explains the current forms of prohibited conduct and Part II makes proposals to reform the prohibited conduct.

Part I: Current prohibited conduct

- 3.03 Currently under the Discrimination Ordinances there are a number of categories of prohibited conduct which apply to the protected characteristics in varying ways. The core prohibited conduct is:
- Direct and indirect discrimination;²
 - Harassment;³
 - Sexual harassment;⁴
 - Victimization;⁵ and
 - Vilification.⁶

Other existing forms of prohibited conduct are also discussed in the consultation document.

Part II: Proposals to reform prohibited conduct

- 3.04 Part II analyzes the following existing or possible new forms of prohibited conduct: direct and indirect discrimination; pregnancy discrimination; equal pay for equal value provisions; discrimination relating to having an assistance animal; discrimination arising from disability; a duty to make reasonable accommodation

² This applies to all the protected characteristics of race, sex, marital status, pregnancy, disability and family status.

³ This applies to the protected characteristics of race and disability but not sex, pregnancy, marital status or family status.

⁴ This is a particular form of harassment that is of a sexual nature and only applies to the protected characteristic of sex.

⁵ This applies to all the protected characteristics of race, sex, marital status, pregnancy, disability and family status.

⁶ This only applies to the protected characteristics of race and disability.

for persons with disabilities; harassment including sexual harassment; intersectional discrimination; discrimination by association; discrimination by perception; and other unlawful conduct.

A. Direct discrimination

3.05 There are two issues examined in the consultation document relating to the formulation of the direct discrimination provisions: changing the test to less favourable treatment on the grounds of the “protected characteristic” rather than the protected characteristic of “the person”; and making it clear in direct disability discrimination provisions that a comparison can be made between persons with different disabilities.

B. Direct pregnancy discrimination

3.06 Currently, direct and indirect discrimination apply to the protected characteristic of pregnancy in the same way as other protected characteristics. However, one of the key aspects of reforming discrimination laws is that it should be tailored to the needs of the particular characteristic. Two issues are examined in the consultation document in relation to direct pregnancy discrimination: removing the requirement of a comparator; and incorporating into the definition aspects that arise from the pregnancy such as sickness, or when the female staff is dismissed after returning from maternity leave.

C. Indirect discrimination

3.07 Two issues in relation to the test of indirect discrimination are examined in the consultation document: changing the test from a “requirement or condition” to a “provision, requirement or practice”; and making it clearer in the legislation what needs to be established for indirect discrimination to be justified.

D. Equal pay for work of equal value for women and men

3.08 Eliminating discrimination in pay between women and men is particularly important to achieving gender equality and dignity for women. The consultation document discusses whether there is a need for introducing specific equal pay for equal value provisions.

E. Disability discrimination

3.09 The consultation document considers three key areas where the current discrimination laws as they apply to persons with disabilities should be reformed: having an express provision that it is unlawful to discriminate on grounds of having an assistance animal such as a guide dog; introducing a discrete category of discrimination arising from disability; and introducing a duty to make reasonable accommodation for persons with disabilities.

F. Harassment

3.10 There are two main issues examined in the consultation document in relation to harassment:

- The scope of protected characteristics where harassment is prohibited; and
- The definitions of race, disability and sexual harassment.

3.11 In relation to the protected characteristics where harassment is prohibited, there is currently no protection from harassment in relation to the characteristics of sex, pregnancy, marital status, or family status. Since there is evidence of harassment in Hong Kong in relation to each of those characteristics, the EOC believes protection should be introduced in those areas.

3.12 In relation to the definitions of race, disability and sexual harassment, there are two major concerns with the current definitions: they are not consistent and they are not sufficiently clear. The consultation document examines how those definitions could be harmonized and made clearer.

G. Intersectional discrimination

3.13 The concept of intersectional discrimination relates to the fact that persons may be treated less favourably not on the basis of one characteristic, but on the basis of the combination or intersection of several characteristics such as sex and age, sex and race, disability and age. The consultation document examines whether there is the need to introduce intersectional discrimination provisions in relation to direct and indirect discrimination, as well as harassment.

H. Discrimination by association

3.14 Discrimination by association concerns the fact that it is not only people with protected characteristics that can be treated less favourably, but also their partners, friends, carers and other associates of them. Currently there is only such protection in relation to disability, and to a more limited extent race. The EOC

believes that discrimination by association provisions should be introduced in relation to direct and indirect discrimination, and harassment across all the protected characteristics.

I. Discrimination by perception

- 3.15 Discrimination by perception concerns less favourable treatment where a person is perceived, assumed or imputed to have a protected characteristic. For example, a person may be discriminated against because he is perceived to have a disability such as HIV even when he does not. Currently there is only express protection for discrimination by perception under the Disability Discrimination Ordinance (DDO) which includes protection where someone is imputed to have a disability. The EOC believes that discrimination by perception provisions should be introduced in relation to direct and indirect discrimination, and harassment across all the protected characteristics.

J. Other unlawful conduct

- 3.16 There are two areas that the EOC currently believes may need reform: liability of principals and agents; and requesting and requiring information for a discriminatory purpose.
- 3.17 In relation to the liability of principals and agents, the consultation document examines whether there should be a defence for principals where they took reasonably practicable steps to prevent discrimination by an agent. This would be similar to a current defence for employers in relation to the actions by employees.
- 3.18 Currently, there is only a prohibition on requesting or requiring information for a discriminatory purpose in relation to disability. The consultation document examines whether that prohibition should be extended to all the existing protected characteristics.

CHAPTER 4: FIELDS OF PROHIBITED CONDUCT

4.01 Chapter 4 examines the fields or sectors in which conduct is or should be prohibited. The related issue of specific exceptions to the principle of non-discrimination is examined in Chapter 7.

4.02 There are four issues examined in the consultation document:

- the scope of protection from discrimination in relation to public authorities;
- inconsistencies between the Discrimination Ordinances as to which sectors prohibit discrimination;
- RDO limitations regarding medium of instruction in the fields of education and vocational training ; and
- expanding the fields and scope of protection from harassment.

A. Scope of protection in relation to public authorities

4.03 All of the Discrimination Ordinances currently provide that the Ordinances bind the Government. However, it is not clear from the manner in which the current provisions are drafted whether other public authorities that are not part of the Government are within the scope of the Discrimination Ordinances, when exercising their functions. The EOC believes that the Discrimination Ordinances should be amended to expressly apply to all public authorities in the performance of their functions and exercise of their powers.

B. Inconsistencies concerning sectors in which discrimination is prohibited

4.04 There are three areas of inconsistency under the existing Discrimination Ordinances. Firstly, unlike all the other Discrimination Ordinances, under the Race Discrimination Ordinance (RDO) there is no protection from racial discrimination in relation to the exercise of Government functions. Secondly, unlike all the other Discrimination Ordinances, there is no express protection from disability discrimination in relation to election and voting to advisory bodies. Thirdly, in relation to discrimination in sporting activity, there is only an express prohibition under the DDO and not any of the other Discrimination Ordinances. The EOC believes that there should be express protection in all those areas.

C. RDO limitations regarding medium of instruction in the fields of education and vocational training

4.05 Although the RDO does provide protection from racial discrimination in education and vocational training, there are express limitations on the RDO's operation in

those sectors which relate to language and the medium of instruction. The EOC believes these limitations should be repealed.

D. Expanding the fields and scope of protection from harassment

4.06 There are a number of additional forms of harassment examined in the consultation document which the EOC believes should or could be prohibited under the Discrimination Ordinances. These are:

- Employer liability for employees being harassed by a third party;
- Liability on persons in common workplaces;
- Liability for educational establishments where a student harasses another student;
- Liability on service users harassing service providers;⁷
- Liability of service users for harassing other service users;
- Liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services;⁸
- Harassment of tenants and sub-tenants by other tenants or sub-tenants;
- Harassment of members/prospective members by members of club management.

⁷ The Government introduced the Sex Discrimination (Amendment) Bill 2014 on 25 June 2014 to address the issue of sexual harassment in this area.

⁸ Ibid

CHAPTER 5: PROMOTING AND MAINSTREAMING EQUALITY

- 5.01 The preceding Chapters examined reforming the measures to prohibit discrimination against individuals. However, the international models relating to eliminating discrimination and promoting equality are increasingly focusing on not just redress for individual acts of discrimination, but also on developing policies, programs, duties and other measures to promote equality and eliminate systemic discrimination.
- 5.02 Chapter 5 examines two methods of promoting equality and what place they should have in the reformed discrimination laws in Hong Kong. Firstly it considers the place and definition of special measures, which are lawful under all the existing Discrimination Ordinances. Secondly, based on international best practice it considers whether duties should be introduced for public authorities to eliminate discrimination and promote equality of opportunity.

Part I: Special Measures

- 5.03 Special measures (or positive action measures as they are also sometimes described in other international jurisdictions such as the United Kingdom and the European Union) are a crucial way in which public and private organizations can develop and implement measures to promote the substantive equality of disadvantaged groups in society.
- 5.04 Two issues are examined in relation to the special measures: the method in which they are conceptualized and positioned in the discrimination legislation; and their definition.

A. The conceptualization of special measures

- 5.05 The EOC believes that it would be preferable to view special measures not as exceptions to the principle of discrimination and therefore a lawful form of discrimination, but rather as proactive measures to promote substantive equality. As a result, the EOC believes that the special measures provisions should be included in a separate part of the legislation on promoting equality.

B. The definition of special measures

- 5.06 The current definition of special measures does not make it clear what are the intentions of the provisions. There is unnecessary repetition in the scope of what

constitutes special measures, and there is also lack of clarity as to their limits in terms of being lawful. The consultation document examines whether the definition of special measures should be reformed using elements from the models in the United Kingdom and Australia.

Part II: Duties on public authorities to promote and mainstream equality

- 5.07 At international level and in a number of jurisdictions around the world, in order to better promote and mainstream equality, duties are imposed on the State and public authorities to promote equality and eliminate discrimination. For example in the United Kingdom there are proactive and binding duties on the government and public authorities to promote equality (Public Sector Equality Duties).
- 5.08 In Hong Kong, there is currently no specific duty in the Discrimination Ordinances requiring public authorities to eliminate discrimination. The Hong Kong Government has however introduced a number of measures to promote the equality of particular groups in society which focus on ensuring that public authorities review their policies and programs for their impact on those groups.
- 5.09 For example, in 2002 the Women's Commission published a gender mainstreaming checklist to assist Government officials to evaluate the gender impact of new and existing public policies, legislation and programs. In relation to the RDO, in 2010 the Government published guidelines for public authorities on how they should promote racial equality in the formulation, implementation and review of relevant policies and measures.
- 5.10 The EOC believes that the current measures in Hong Kong for promoting equality in public authorities may not be sufficient in eliminating discrimination and promoting equality of opportunity. The consultation document therefore examines whether duty on public authorities to promote equality across all the protected characteristics should be introduced.

CHAPTER 6: ASPECTS OF COURT PROCEEDINGS, POWERS AND CONSTITUTION OF THE EOC

6.01 Chapter 6 examines two areas linked to the enforcement of the Discrimination Ordinances. Part I examines a number of aspects relating to court proceedings including certain roles of the EOC. Part II examines the key powers and constitutional arrangements of the EOC.

Part I: Aspects of court proceedings

6.02 Part I examines four aspects of court proceedings: introducing new provisions on the burden of proof; amending the provisions regarding awarding damages in relation to findings of indirect discrimination; amending provisions to enable the EOC to recover its costs in legally assisted cases; and amending the provisions on proceedings that may only be brought by the EOC.

A. Standard and burden of proof

6.03 Discrimination claims are often difficult to prove, since there are not often acts of overt discrimination that can be directly attributed to protected characteristics. In Hong Kong the approach in courts to burden of proof is that where the claimant adduces evidence from which discrimination can be inferred, the court will then look to the defendant for evidence or explanations to indicate whether or not discrimination in fact occurred.

6.04 In many international jurisdictions, the discrimination laws regarding the burden of proof have evolved in two key ways. Firstly, given the difficulties in proving discrimination cases, the case law developed to provide that once facts have been established from which discrimination can be inferred, it is then for the respondent to prove that there was no discrimination. Secondly, the discrimination legislation sets out the elements of the burden of proof in order that there is clarity and consistency in how the principles are applied in court proceedings.

6.05 The EOC believes that: there should be burden of proof provisions in the Discrimination Ordinances; and that they should expressly provide for a shift in the burden of proof, once a claimant has established facts from which discrimination can be inferred.

B. Damages for indirect discrimination

6.06 Currently, damages for indirect discrimination under the SDO, FSDO and RDO are

restricted to situations where the respondent intended to treat the claimant unfavourably. The same restriction does not apply under the DDO. The EOC does not believe such a restriction is appropriate and that the limitation should be repealed.

C. EOC recovering its costs in legally assisted cases

6.07 The general rule in relation to discrimination claims is that each party will bear their own costs, unless the proceedings were brought maliciously, frivolously or there are some other special circumstances. However, where in the unusual event that a claimant is awarded costs and expenses, the Discrimination Ordinances provide that the EOC can recover its expenses only of providing the applicant legal assistance. It cannot recover the legal costs of providing the legal assistance, such as the time of the EOC solicitors working on a case. The EOC believes that it should be able to recover legal costs in such circumstances.

D. Proceedings that may only be brought by the EOC

6.08 Currently the EOC cannot commence proceedings in its own name in relation to discriminatory practices.⁹ A discriminatory practice is the application of a requirement or condition that results in an act of discrimination which is unlawful. The EOC believes that the same principle should apply as for other similar unlawful conduct (e.g. discriminatory advertisements) such that the EOC should be able to bring proceedings.

Part II: Powers and constitution of the EOC

6.09 Part II examines the existing powers and constitutional arrangements of the EOC; whether there is the need to reform these in any ways; as well as whether there is a need for a human rights commission in Hong Kong.

A. Powers of the EOC

6.10 The EOC has a range of powers which it may use to fulfill its functions. It also performs a number of other roles which are not expressly set out in the Discrimination Ordinances but are exercised in furtherance of the functions. We examine both the express powers and the other roles.

⁹ See for example section 42 SDO. A discriminatory practice is the application of a requirement or condition which results in an act of discrimination which is unlawful.

(i) Codes of practice and other guidance

6.11 Under all the Discrimination Ordinances, the EOC may issue Codes of Practice containing practical guidance on eliminating discrimination and promoting equality of opportunity. The issuing of Codes is a formal process which requires them to be laid before and approved by the Legislative Council (statutory guidance).

6.12 Given the long and formal process for approving Codes of Practice, the EOC has also issued other guidance from time to time. In Hong Kong, there are similar provisions providing powers for statutory bodies such as the Privacy Commissioner to produce both Codes and guidance.¹⁰ The EOC believes that it would be preferable that there is express reference to the power of the EOC to produce non-statutory guidance in the reformed discrimination laws.

(ii) Formal investigations

6.13 The EOC believes that the current system and provisions relating to formal investigations should be reformed in three respects: making it clearer that the EOC can conduct both general and specific investigations; harmonizing the circumstances in which enforcement notices can be issued; and introducing ability for the EOC to enter into binding undertakings with a body being investigated.

(iii) Research and education

6.14 The SDO provides that the EOC may undertake or assist the undertaking by other persons of any research and any educational activities which appear to the EOC necessary or expedient for the performance of its functions.¹¹

6.15 There is no equivalent provision relating to research and education in any of the other Discrimination Ordinances, although in practice the EOC does carry out research and educational work in relation to all of them as part of its incidental powers. The EOC believes for reasons of consistency and clarity, the reformed discrimination laws should expressly provide that the EOC has the power to conduct research and education in relation to all the protected characteristics.

(iv) Other existing powers exercised by the EOC

6.16 The EOC also exercises a number of other powers which are not expressly listed as

¹⁰ See for example the powers of the Office of the Privacy Commissioner for Personal Data: Section 8(5) of the Personal Data (Privacy) Ordinance provides the power of the Privacy Commissioner to produce guidance and section 12 provides the power to produce Codes of Practice.

¹¹ Section 65 SDO.

powers of the EOC but are integral to furthering its functions. The EOC believes the following powers should be set out:

- Monitoring and advising on legislation or international human rights obligations related to equality;
- Intervening in or appearing as amicus curiae in court proceedings; and
- Bringing judicial review proceedings where it believes the Government is in breach of the discrimination laws in exercising its powers.

B. Constitutional matters

6.17 The EOC believes that there are several areas where the constitutional provisions on the way the EOC functions could be improved based on international or Hong Kong practices. These are:

- Being required to produce strategic plans which set out the priority areas of work of the EOC over several years;
- Introducing provisions and procedures to help ensure the independence of the EOC from Government, and relevant experience of the Chair and Board members;
- Providing protection in specified situations from personal liability of EOC members and staff under the DDO and FSDO, as is the case for the SDO and RDO; and
- Introducing a provision to enable the EOC to maintain confidentiality in relation to its complaint handling.

C. Establishment of a Hong Kong Human Rights Commission

6.18 A related issue to possible reforms of the duties and powers of the EOC is whether a Human Rights Commission should be established in Hong Kong. Currently there is no single body in Hong Kong that has responsibility for promoting and monitoring wider human rights. The consultation document examines several options for establishing a human rights commission.

CHAPTER 7: EXCEPTIONS

Part I: Overview

7.01 The EOC has a number of concerns with the existing exceptions in the Discrimination Ordinances:

- **Dispersal:** the exceptions are often located in several different parts of the Ordinances (the main body and the Schedules) which makes them very difficult to navigate;

- **Repetition:** some of the exceptions are unnecessarily repeated (for example the exceptions relating to reproductive technology and adoption in relation to sex are contained in both the main body of the SDO and the Schedules);
- **Inconsistency:** for example, the exception relating to national security applies to the protected characteristic of sex but not to any of the other characteristics;
- **Unjustified:** we believe that a number of exceptions are not justified and should be repealed; and
- **Proportionality:** in some cases we believe that the exceptions require amendment to ensure that they are proportionate.

7.02 In order to make the discrimination legislation easier to navigate, we believe it would be preferable that all the exceptions are set out in one section of the law.

Part II: Concerns with the current exceptions under the Discrimination Ordinances

7.03 Concerns with a number of the exceptions are considered either by their category (e.g. genuine occupational qualifications) where they apply to more than one protected characteristic, or by protected characteristic such as sex or race where they only apply to one protected characteristic. The exceptions for which reform or repeal are considered are:

- Genuine occupational qualifications;
- Discriminatory training;
- Exceptions relating to charities;
- Exceptions relating to New Territories Ordinance and small house policy;
- Exceptions relating to sex;
- Exceptions relating to marital status;
- Exceptions relating to family status;
- Exceptions relating to disability; and
- Exceptions relating to race.

APPENDIX: LIST OF CONSULTATION QUESTIONS

CHAPTER 1: RATIONALE AND PRINCIPLES OF THE REVIEW

(Page No. as per Public Consultation document)

Consultation Question 1	P.26
Do you think that, in reforming the current discrimination laws, the Government should consolidate all the existing Discrimination Ordinances into a single modernized Discrimination Ordinance?	

CHAPTER 2: GOALS OF THE LEGISLATION AND PROTECTED CHARACTERISTICS

Consultation Question 2 P.29
Do you think that a clause at the commencement of the discrimination legislation should be incorporated to set out its purpose or goals?

Consultation Question 3 P.30
Do you think that in relation to the protected characteristic of sex, neutral language of “a person” should be used?

Consultation Question 4 P.32
Do you think there should be express reference to protection from discrimination during maternity leave?

Consultation Question 5 P.32
Do you think there should be protection from discrimination on grounds of potential pregnancy?

Consultation Question 6 P.37
Do you think that the protected characteristic of marital status should be amended to apply to “relationship status” and expressly protect persons in de facto relationships? If so, how should de facto relationships be defined? Should it be defined to include protection for both heterosexual relationships and same-sex relationships? Should this also be extended to protection from discrimination relating to former de facto relationships?

Consultation Question 7 P.40
Do you think that the current definition and scope of what constitutes a disability is appropriate and proportionate? Or should it be amended in any way, for example by qualifying that the physical or mental impairment must be substantial and/ or likely to last a certain period?

Consultation Question 8 P.43
Do you think that the protected characteristic of family status should be redefined as “family responsibilities” in order to clarify that it relates to persons who have responsibility for the care of immediate family members?

Consultation Question 9 P.44
Do you think that the scope of family status discrimination should be expanded to include protection where persons in de facto relationships care for immediate family members? If so, how should de facto relationships be defined? Further, do you think the protection should be extended to situations where a person cares for an immediate family member from a former marriage or de facto relationship?

Consultation Question 10 P.44
Do you think that there should be express reference in the definition of family status to include breastfeeding women?

Consultation Question 11 P.50
In relation to the protected characteristic of race, do you think that any or all of the characteristics of nationality, citizenship, residency or related status should be added as protected characteristics?

Consultation Question 12 P.50
In relation to residency status or related status, if you think there should be protection, how should it be defined?

Consultation Question 13 P.51
Do you think that the exception to race discrimination on the grounds of permanent residency and right of abode in Hong Kong under section 8(3)(b)(i) and (ii) should be repealed?

Consultation Question 14 P.51
Do you think that the exception to race discrimination on the grounds of length of residence in Hong Kong under section 8(3)(c) should be repealed?

Consultation Question 15 P.51
Do you think that the exception to race discrimination on the grounds of nationality, citizenship or resident status of a person in another country under section 8(3)(d) should be repealed?

Consultation Question 16 P.51
Do you think that consideration should be given to an exception to discrimination on grounds of residency status, but only where the relevant requirement is for a legitimate aim and is proportionate?

CHAPTER 3: FORMS OF PROHIBITED CONDUCT

Consultation Question 17 P.57
Do you think that the definition of direct discrimination should be amended to:

- include any less favourable treatment on grounds of a protected characteristic; and
- made clear that for direct disability discrimination a comparison can be made with persons without that particular disability (including persons with a different disability)?

Consultation Question 18 P.59
Do you think that there should be a different test for direct pregnancy discrimination which states:
“on the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant a person treats her unfavourably”?

Consultation Question 19 P.59
How to protect pregnant staff from dismissal after maternity leave on the pretext that the

temporary replacement performed better?

Consultation Question 20 P.62

Do you think that the definition of indirect discrimination should be amended to:

- refer to a “provision, requirement or practice”; and
- set out the meaning of “justifiable” as where a provision, requirement or practice “serves a legitimate objective and bears a rational and proportionate connection to the objective”?

Consultation Question 21 P.66

Do you think that there is a need for introducing specific equal pay for equal value provisions?

Consultation Question 22 P.67

Do you think that discrimination due to being accompanied by assistance animal should be added as a category of disability discrimination?

Consultation Question 23 P.70

Do you think that a new category of discrimination arising from disability should be introduced?

Consultation Question 24 P.73

Do you think that new distinct duty to make reasonable accommodation for persons with disabilities should be introduced in the discrimination legislation and that it should be based on the United Kingdom model?

Consultation Question 25 P.76

Do you think that harassment should be prohibited in relation to the protected characteristics of sex, pregnancy, family status and marital status?

Consultation Question 26 P.78

Do you think that the definition for harassment for all protected characteristics should be “A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”?

Consultation Question 27 P.79

Do you think there should be protection from harassment for all protected characteristics?

Consultation Question 28 P.79

In relation to sexual harassment, do you think that the definition should be the same as

other forms of harassment, other than stating in addition that it is unwanted conduct of a sexual nature?

Consultation Question 29 P.81

Do you think that there should be provisions on intersectional direct and indirect discrimination, as well as harassment? If so, do you think that there should be protection from intersectional discrimination on the basis of two or more protected characteristics?

Consultation Question 30 P.84

Do you think that:

- **there should be protection from direct and indirect discrimination, and harassment by association across all the protected characteristics;**
- **and if so, do you think “association” should be broadly defined to include association by immediate family, other relatives, caring responsibilities, friendships or working relationships?**

Consultation Question 31 P.85

Do you think that there should be express protection from direct and indirect discrimination, and harassment by perception and imputation across all the existing protected characteristics?

Consultation Question 32 P.87

Do you think that there should be a defence for principals to liability from unlawful conduct of agents, where the principal took reasonably practicable steps to prevent the unlawful conduct?

Consultation Question 33 P.88

Do you think that the prohibition on requesting information for a discriminatory purpose relating to disability discrimination should be extended to all existing protected characteristics?

CHAPTER 4: FIELDS OF PROHIBITED CONDUCT

Consultation Question 34 P.91

Do you think that there should be express provisions in the discrimination laws that it applies to all public authorities, and that it is unlawful for them to discriminate in the performance of their functions and exercise of their powers?

Consultation Question 35 P.93

Do you think that there should be protection from racial discrimination in the exercise of the Government’s functions and powers?

Consultation Question 36 P.94

Do you think that for reasons of consistency there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies? If

so, do you think that there should be an exception permitting disability discrimination but only where it is for a legitimate aim and proportionate?

Consultation Question 37 P.96

Do you think that the current express protection from disability discrimination in sporting activity should be extended to all the protected characteristics?

Consultation Question 38 P.98

Do you think that the limitations on the operation of the RDO in the education and vocational training sectors regarding the exception on the medium of instruction should be repealed?

Consultation Question 39 P.108

Do you think that new harassment provisions should be introduced for all the protected characteristics which provide:

- (1) employer liability for harassment of employees by customers, tenants or any other third parties not in an employment relationship where an employer is put on notice of the harassment and fails to take reasonable action;**
- (2) common workplace liability on the person harassing but there is no employer/employee relationship (e.g. volunteers harassed by another volunteer);**
- (3) liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action;**
- (4) liability of service users for harassing the service providers;**
- (5) liability of service users for harassing other service users;**
- (6) liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services;**
- (7) liability of tenants and subtenants for harassing other tenants or subtenants; and**
- (8) liability of the management of clubs for harassing members or prospective members?**

CHAPTER 5: PROMOTING AND MAINSTREAMING EQUALITY

Consultation Question 40 P.115

Do you think that:

- Special measures provisions should be conceptualized and positioned within the discrimination legislation as measures to promote substantive equality rather than exceptions to non-discrimination; and**
- The definition of special measures should be made clearer as suggested in paragraph 5.18 in terms of their purpose, circumstances in which they can be used and when they should end?**

Consultation Question 41 P.122

Do you think that there should be duties on all public authorities to promote equality and eliminate discrimination in all their functions and policies, and across all protected characteristics?

CHAPTER 6: ASPECTS OF COURT PROCEEDINGS, POWERS AND CONSTITUTION OF THE EOC

Consultation Question 42 P.126

Do you think there should be provisions introduced which indicate that once the claimant establishes facts from which discrimination can be inferred, the burden of proof shifts to the respondent to show there was no discrimination?

Consultation Question 43 P.127

Do you think that, consistent with indirect disability discrimination provisions, damages should be able to be awarded for indirect sex, pregnancy, marital status, family status and race discrimination, even where there was no intention to discriminate?

Consultation Question 44 P.129

Do you think that the discrimination laws should be amended to ensure the EOC can recover its legal costs where claimants are awarded costs?

Consultation Question 45 P.130

Do you think that for reasons of consistency with its other powers, the EOC should be able to initiate proceedings in its own name for discriminatory practices?

Consultation Question 46 P.132

Do you think that the discrimination laws should contain an express power that the EOC may produce non-statutory guidance?

Consultation Question 47 P.135

Do you think that the formal investigation provisions should set out more clearly the distinction between general and specific investigations?

Consultation Question 48 P.136

Do you think that for reasons of consistency with the EOC's other powers, the EOC should be able to issue enforcement notices relating to discriminatory practices against persons with disabilities?

Consultation Question 49 P.136

Do you think that in relation to formal investigations provisions, permitting voluntary binding undertakings should be introduced and be enforceable by the EOC?

Consultation Question 50 P.136

Do you think that the discrimination laws should expressly provide that the EOC has powers to conduct research and education in relation to all the protected characteristics?

Consultation Question 51 P.138

Do you think that reformed discrimination laws should expressly provide that the EOC has powers to monitor and advise:

- **The Government on relevant existing and proposed legislation and policy; and**
- **On the Government's compliance with international human rights obligations relating to equality and discrimination?**

- Consultation Question 52 P.139**
Do you think there should be an express power of the EOC to apply to intervene in or appear as amicus curiae in court proceedings relating to any relevant discrimination issue?
- Consultation Question 53 P.140**
Do you think that the EOC’s power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC?
- Consultation Question 54 P.141**
Do you think that the EOC should be required to produce a Strategic Plan in consultation with the public that sets out its strategic priority areas of work over several years?
- Consultation Question 55 P.144**
Do you think that a provision should be included in reformed discrimination laws providing for the maintenance of the independence of the EOC from the Government?
- Consultation Question 56 P.144**
Do you think that in relation to Board members, applications should be openly invited and an independent panel established to interview and make recommendations for appointments?
- Consultation Question 57 P.144**
Do you think that there should be a provision in the legislation requiring Board members to have suitable experience in any relevant area of discrimination or promoting equality?
- Consultation Question 58 P.145**
Do you think that there should be a provision protecting EOC members and staff from personal liability where they act in good faith in relation to the DDO and FSDO, as is the case for the SDO and RDO?
- Consultation Question 59 P.145**
Do you think that there should be express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality?
- Consultation Question 60 P.147**
Do you think that Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles? If so what structure and mandate should the Human Rights Commission have?

CHAPTER 7: EXCEPTIONS

Consultation Question 61 P.149

Do you think that all the exceptions should be contained in one section (Schedules) of the discrimination laws in order that the law is clearer?

Consultation Question 62 P.152

Do you think that the definition of genuine occupational qualifications (GOQs) should be reformed and made consistent across all the protected characteristics by defining them as:

- There is an occupational requirement which relates to a protected characteristic;
- the application of the requirement is a proportionate means of achieving a legitimate aim;
- the applicant or worker does not meet the requirement; or, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

In relation to the protected characteristic of disability, the exception does not apply where a reasonable accommodation can be made to perform the occupational requirement.”?

Consultation Question 63 P.153

Do you think that the discriminatory training exceptions are unnecessary and should be repealed and incorporated within the scope of the definition of special measures?

Consultation Question 64 P.153

Do you think that the charities exceptions should be amended to require a legitimate aim and proportionality in order to be lawful?

Consultation Question 65 P.154

Do you think that the Government should conduct a review of its New Territories small house policy?

Consultation Question 66 P.156

Do you think that the Government should as soon as possible repeal the exceptions in the SDO relating to sex and:

- requirements for height or weight;
- granting pension benefits to surviving spouses and children of deceased public officers?

Consultation Question 67 P.156

Do you think that the exception for numbers of men and women employed in the Correctional Services Department is unnecessary and should be repealed?

Consultation Question 68 P.157

Do you think that the national security exception relating to sex is necessary, and if so do you agree that it should be amended to require proportionality?

Consultation Question 69 P.158
Do you think that the exception permitting sex discrimination in employment and qualification bodies for religious purposes should be extended to permit marital status discrimination?

Consultation Question 70 P.158
Do you think that the exception relating to providing benefits differentially based on marital status should be amended to provide equality between persons who are married and persons in a de facto relationship?

Consultation Question 71 P.160
Do you think that:

- **the Human Reproductive Technology Ordinance should be amended to remove a requirement that a person is married to be provided with IVF treatment; and**
- **the exception in the SDO relating to reproductive technology should then be repealed?**

Consultation Question 72 P.160
Do you think that the exception relating to adoption and marital status is no longer necessary because of amendments to the Adoption Ordinance and should be repealed?

Consultation Question 73 P.161
Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?

Consultation Question 74 P.162
Do you think that the exception relating to family status which permits difference in insurance premiums based on family status should be repealed?

Consultation Question 75 P.163
Do you think that the system under the Minimum Wage Ordinance by which persons with disabilities can assess their productivity has worked effectively? Do you think that the exceptions under Items 1 to 3 of Schedule 5 of the DDO should therefore be retained and/or reformed in any way or repealed?

Consultation Question 76 P.165
Do you think that the exception permitting discrimination in employment conditions for persons from overseas with special skills, knowledge or experience should be repealed?

Consultation Question 77 P.165
Do you think that the exception which permits differences in terms of employment for overseas and local staff for specified posts should be reviewed by the Government?

THE END



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