

# 立法會

## *Legislative Council*

LC Paper No. CB(2)1908/14-15(04)

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### **Panel on Constitutional Affairs**

**Updated background brief prepared by the Legislative Council Secretariat  
for the meeting on 20 July 2015**

**Briefing by the Chairperson of the Equal Opportunities Commission  
("EOC") on the work of EOC**

### **Purpose**

This paper gives a brief account of the major issues raised by members when the Panel on Constitutional Affairs ("the Panel") received briefings on the work of EOC by its Chairpersons.

### **Background**

2. Established under the Sex Discrimination Ordinance ("SDO") (Cap. 480) on 20 May 1996, EOC is a statutory body responsible for the implementation of SDO, the Disability Discrimination Ordinance ("DDO") (Cap. 487), the Family Status Discrimination Ordinance (Cap. 527) and the Race Discrimination Ordinance ("RDO") (Cap. 602). EOC comprises the Chairperson and up to 16 members. The authority of appointment of the Chairperson and members rests with the Chief Executive who shall determine the remuneration and the terms and conditions of appointment of the Chairperson. Under section 63 of SDO, the Chairperson shall be appointed on a full-time basis whereas other members of EOC may be appointed on a full-time or part-time basis.

3. The post of the Chairperson of EOC, which has the executive responsibility for the overall operation and management of EOC, is pitched at the rank equivalent to Point 8 on the Directorate Pay Scale of the Civil Service. EOC used to have a post of Chief Executive Officer ("CEO") which was pitched at the rank equivalent to Point 3 of the Directorate Pay Scale, but the CEO post was deleted in July 2000. The responsibility of the CEO post was then shared between the Chairperson and the Director (Planning and Administration) of EOC.

4. In Chapter 3 of Report No. 52 of the Director of Audit tabled at the Legislative Council ("LegCo") on 22 April 2009, Audit has recommended that

the Secretary for Constitutional and Mainland Affairs should expedite action to take forward the proposal of separation of the posts of the Chairperson and CEO of EOC which was recommended both in the report of the Independent Panel of Inquiry on the Incidents Relating to EOC as well as the reports of two internal reviews conducted by EOC. The Administration subsequently decided that the current position in respect of the Chairperson of EOC should be maintained, but the post of CEO at the level of Point 3 of the Directorate Pay Scale should be reinstated to oversee the administrative and operational matters, and to strengthen the governance of EOC.

5. On 5 March 2013, the Government announced the appointment of Dr York CHOW Yat-ngok as the new Chairperson of EOC for a term of three years commencing 1 April 2013. The incumbent Chairperson of EOC informed the Panel in June 2013 that in the next six months, he would consider whether there was a need to conduct open recruitment for the post of CEO in the light of the updated manpower situation of EOC.

### **Relevant issues raised by the Panel**

6. It has been the practice for the Chairperson of EOC to brief the relevant Panel on its work on a regular basis. Mr LAM Woon-kwong, the former Chairperson of EOC who took office on 1 February 2010, briefed the Panel on his vision and the work of EOC at the meeting on 10 February 2010. He also briefed the Panel on the draft revised Code of Practice on Employment under DDO at its meeting on 17 May 2010. The incumbent Chairperson of EOC briefed the Panel on the work of EOC at the meetings on 17 June 2013 and 23 April 2014. He also briefed the Panel on the progress of the Discrimination Law Review ("DLR") on 16 March 2015. The major issues raised by members at these meetings are summarized in the following paragraphs.

#### Provision of legal assistance

7. Members had all along expressed concern that the threshold for EOC to provide legal assistance to a person who wished to institute legal proceedings under anti-discrimination ordinances was higher than that applied in the merits test for granting legal aid. Members noted that EOC did not have an action fund for litigation and was not in a position to grant legal assistance for all meritorious cases. Under the present arrangement, EOC would assist an aggrieved person to seek legal aid from Legal Aid Department when needed. Members expressed concern about the insufficiency of the EOC's funding for providing legal assistance to enable EOC to discharge its duty effectively.

8. The former Chairperson of EOC advised that many of the past cases had been resolved by conciliation before legal proceedings were initiated. Of the cases taken to court, the legal expenses incurred by EOC were affordable and most of the trials had resulted in favour of EOC-assisted parties. For meritorious cases which involved a question of principle, EOC would take them to court as long as there were sufficient evidence and a need to enhance and sustain public awareness. According to EOC, its actual expenditures on legal assistance cases over the past years were \$528,000 in 2008, \$863,000 in 2009 and \$660,000 in 2010.

9. Members may wish to note that the former Subcommittee on Revised CoP on Employment under DDO has requested that a litigation fund similar to that for the Consumer Council should be established for EOC. EOC has also proposed to establish a specialized Equal Opportunities Tribunal to replace the District Court as the adjudicating body for discrimination cases. The Administration, however, has reservations about the proposal. Details of the EOC's proposal and the Administration's response were circulated to the Panel vide LC Papers No. CB(2)214/11-12(01) and (02) respectively on 1 November 2011.

#### Implementation of anti-discrimination laws

10. Some NGOs suggested that the Administration should adopt an equality plan for all policy areas on the ground that the scope of protection afforded by RDO was too narrow. The former Chairperson of EOC said that EOC had been meeting with NGOs to discuss the implementation of RDO and would continue to do so. As an advocate of equal opportunities, EOC would take the initiative to rectify any deficiencies identified. The support of the Government, LegCo and the public would be needed to implement its work.

11. Responding to members' enquiry on measures taken by EOC to help ethnic minorities and tackle discrimination encountered by new arrivals from the Mainland who were not protected by RDO, the former Chairperson of EOC advised that EOC had liaised with the Education Bureau to help ethnic minority students integrate into the mainstream system. In 2014-2015, EOC further planned to set up a Multi-ethnic Taskforce to enhance its work in the areas of education, training, and community outreach and to strengthen liaison with stakeholders concerned including schools. The new Taskforce would monitor the effectiveness of the Government's policy on ethnic minorities, especially in education and employment. EOC also rendered assistance to new arrivals from the Mainland should they be discriminated on the grounds of sex, disability and family status.

12. Some members were concerned whether barrier-free access facilities provided to persons with disabilities ("PWDs") in workplaces were adequate and enquired about the responsibility of employers in the provision of reasonable accommodation to employees who had disabilities. The former Chairperson of EOC explained that under the provision of CoP under DDO, an employer had the responsibility to provide reasonable accommodation to an employee with a disability to fulfil the inherent requirements of a job. The provision of accommodation by an employer was not unlimited and EOC would provide conciliation to the parties concerned when required.

13. In response to members' concern that pregnancy discrimination remained the major area of complaints despite SDO had come into operation for years, the incumbent Chairman of EOC advised that EOC endeavoured to redress grievance through conciliation and would remind employers of their legal protection against pregnancy discrimination and their civil liability in this regard. EOC might also publicize the names of the organizations if necessary to enhance the deterrent effect.

14. At the meeting on 17 June 2013, members asked about the Administration's progress in following up the EOC's proposals to amend the anti-discrimination ordinances. The Administration's letter dated 8 August 2013 providing information on the progress is at **Appendix I**.

#### DLR

15. Some members asked whether EOC would consider consolidating the four discrimination laws into a single ordinance and extending the protection to cover discriminatory acts on new grounds (e.g. age and religion). The incumbent Chairperson of EOC advised that EOC had no predetermined stance as to whether the four anti-discrimination laws should be combined into one single ordinance but saw merits in so doing to rectify inconsistencies. It would be the Government's responsibility to consider extending the scope of legal protection under the existing law to cover discriminatory acts on new grounds. Some members urged EOC to conduct an in-depth study on age discrimination in employment in order to assess the prevalence of the problem. The incumbent Chairman advised that EOC would commission an "Exploratory Study on Age Discrimination in Employment" and submit a report to the Administration upon completion of the study.

16. Hon Gary FAN pointed out that according to the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), racial discrimination referred to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic

origin .....". Hon Gary FAN and Hon Claudia MO queried that it would be fundamentally wrong to propose amending RDO to cover Mainlanders and new arrivals as they did not constitute a racial group in Hong Kong. Some other members, however, supported that DLR should cover the relevant issues as they considered that the discrimination experienced by Mainlanders in Hong Kong was a matter of concern.

17. The then Chief Legal Counsel of EOC advised that discrimination on the basis of nationality and citizenship was covered by ICERD. The race discrimination legislation in Australia also included provisions prohibiting discrimination against new arrivals. EOC considered it appropriate to study whether or not RDO should be amended to cover them.

18. Hon WONG Yuk-man considered that a comprehensive review of the provisions of SDO should be conducted as the ordinance had come into operation for more than a decade. He considered that section 2(5) of SDO should be amended to clearly provide for the applicability of the relevant provisions in SDO to men as well. He also suggested that in the review of SDO, reference might be made to the relevant legislation in Australia where, in addition to the two genders (male and female), a gender "X" was provided representing the transgender and intersex people. He considered that these people should also be protected under SDO.

19. Members may wish to note that EOC has decided to include in DLR to examine whether gender neutral language should be used for certain provisions of SDO<sup>1</sup>, and recommendations would be made upon completion of the review.

20. Hon Cyd HO suggested that new provisions should be added to SDO to prohibit employers/the management concerned from taking punitive actions against their employees who had lodged complaints about sexual harassments in their workplace to EOC even though the complaints were not substantiated. The Administration advised that the suggestion would be considered.

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<sup>1</sup> Members may wish to note that a bills committee was formed in the 2013-2014 session to scrutinize the Sex Discrimination (Amendment) Bill 2014, which sought to expand the scope of protection against sexual harassment to cover customers harassing providers of goods, services, or facilities. In the course of scrutiny of the Bill, some members of the Bills Committee proposed using gender neutral references in the Bill to ensure that persons of different gender identities would also be protected under the Bill. EOC explained that while it was desirable to use gender neutral references in SDO, the use of gender neutral references solely for the proposed new subsection (1A) (which only concerned sexual harassment by customers of service providers) in the Bill would create inconsistency in the drafting approach of the provisions of SDO. EOC advised that DLR would examine whether gender neutral language should be used for certain provisions of SDO and recommendations would be made in due course.

21. Noting that DLR would cover, among others, whether protection under the relevant discrimination laws should be extended to cover "de-facto relationships", Hon CHAN Chi-chuen asked whether the definition of "de-facto relationships" covered "same-sex cohabitation relationship", "same-sex marriage" and "civil union for same-sex partners". The incumbent Chairperson of EOC advised that in the context of family status discrimination and sex discrimination, "de-facto relationships" was meant to include cohabitation relationship between a man and a woman, but not same-sex cohabitation relationship as Hong Kong's existing marriage institution was based on monogamy between one male and one female.

22. Some members suggested that EOC should promote the adoption of a broader and refined definition of disability for the provision of government services, such as the Disability Allowance Scheme, to afford better protection to PWDs. Hon CHAN Yuen-han expressed concern that any changes to the definition might affect the provision of services to some chronically ill patients.

23. The incumbent Chairperson of EOC pointed out that there were discrepancies in the definition of "disability" between DDO and those adopted in overseas jurisdictions, e.g. whether it should be refined to require substantial and/or longer term impairments similar to the relevant legislation in the United Kingdom. Dr Hon Fernando CHEUNG considered that the definition of "disability" for the Disability Allowance was outdated and had excluded people with injuries not falling within the specified types. He requested EOC to propose suitable changes to the definition.

#### Outlawing discrimination on the ground of sexual orientation and gender identity

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24. Some members considered that the Administration had not been proactive in eliminating discrimination on the ground of sexual orientation and gender identity and urged EOC to engage in active discussion with all relevant stakeholders on how the rights of transgender persons could be protected. They also requested EOC to step up efforts in eliminating some people's misunderstanding that enactment of the legislation against discrimination on grounds of sexual orientation and gender identity would lead to reverse discrimination.

25. Dr Hon Priscilla LEUNG considered that granting marriage rights to transgender persons would have far-reaching implications on the marriage systems and views of different stakeholders other than sexual minority groups should be consulted before EOC formed stances on the issue. The incumbent Chairperson of EOC considered that Hong Kong should initiate discussion on

issues like "same-sex marriage" and "civil unions" in the light of recent developments such as the legalization of same-sex marriage in some overseas jurisdictions. To facilitate the Administration's consideration of the way forward, EOC had commissioned a consultant to conduct a feasibility study on legislating against discrimination on the grounds of sexual orientation, gender identity, and intersex status.

#### Integrated Education for students with special education needs ("SEN")

26. Some members sought EOC's view on whether the Administration's limited progress in implementing the Integrated Education policy had been in breach of the relevant international human rights treaties and DDO which protected the right to equal access to education irrespective of disability. They also expressed concern that the Education Bureau had refused to take on board some of the recommendations made by EOC in its report entitled "Study on Equal Learning Opportunities for Students with Disabilities under the Integrated Education System" released in 2012. They enquired whether EOC would resort to legal means to tackle the issues.

27. The incumbent Chairperson of EOC said that although EOC had not examined the Administration's Integrated Education policy for SEN students from a legal perspective, EOC was concerned that there were still more than 6 000 SEN children on the waiting list for subvented pre-school rehabilitation places, and that SEN students might not benefit from the proposed 15-year free education. EOC considered that adequate resources and support measures for SEN students should be provided in early childhood education and primary education to facilitate their integration into the mainstream education system. EOC would take this matter up with the Education Bureau, and would not rule out the possibility of resorting to legal means where necessary.

#### Anti-sexual harassment campaign

28. Some members expressed support for the anti-sexual harassment campaign targeted at the education and business sectors to be launched by EOC. They considered that EOC should draw up guidelines under SDO and DDO on the handling of sexual harassment at school. EOC should also issue guidelines to the medical sector and the disciplinary services on the prevention of sexual harassment at health care institutions and during removal of protestors in clearance operations, etc.

29. The incumbent Chairperson of EOC advised that EOC had launched an anti-sexual harassment campaign in schools in collaboration with the Education Bureau in the second half of 2013. These initiatives included developing a Framework for Sexual Harassment Policies in Schools, organizing seminars and

five large scale forums on the subject. EOC would continue to provide training for secondary schools and tertiary institutions on the prevention of sexual harassment and would conduct surveys to assess the effectiveness of the work in this area. Members urged EOC to expedite the preparation of the Code of Practice on Education to facilitate schools' handling of complaints relating to sexual harassment.

30. On the employment front, EOC had requested employees' associations and trade associations to provide information on whether they had issued any guidelines on handling of sexual harassment in workplace. EOC would also assist the Hospital Authority and health care institutions in preventing sexual harassment and developing related internal guidelines. The incumbent Chairperson of EOC advised that following the passage of the Sex Discrimination (Amendment) Bill 2014, EOC had stepped up publicity and public education targeting employers/managerial staff to promote awareness of their obligation to implement appropriate preventive measures against sexual harassment in the workplace.

### **Recent development**

31. The incumbent Chairperson of EOC will brief the Panel on the work of EOC at the next meeting on 20 July 2015.

### **Relevant papers**

32. A list of relevant papers which are available on the LegCo website is in **Appendix II**.



政制及內地事務局  
政府總部  
香港添馬添美道2號  
政府總部東翼



CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU  
GOVERNMENT SECRETARIAT  
EAST WING  
CENTRAL GOVERNMENT OFFICES  
2 TIM MEI AVENUE, TAMAR  
HONG KONG

OUR REF : CMAB/CR 1/34/92

8 August 2013

The Honourable TAM Yiu-chung, GBS, JP  
Chairman of Panel on Constitutional Affairs  
Legislative Council Complex  
1 Legislative Council Road  
Central

Dear Mr TAM,

**Follow-up on the meeting of the Panel on Constitutional Affairs  
on 17 June 2013**

At the meeting of the Legislative Council (LegCo) Panel on Constitutional Affairs (CA Panel) held on 17 June 2013, Members noted that the Administration has been following up the legislative proposals of the Equal Opportunities Commission (EOC) to amend the anti-discrimination ordinances. This letter provides further information about the progress concerned.

2. By way of background, in 1999 the EOC submitted to the Administration 20 proposals to amend the Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO). These proposals were discussed by the LegCo Panel on Home Affairs (HA Panel) in 2001<sup>1</sup>. At that juncture the Administration considered that eight of the 20 proposals were either infeasible or unnecessary; for the remaining 12, the Administration indicated no in-principle objection, among which three have since been implemented fully<sup>2</sup>.

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<sup>1</sup> Relevant HA Panel papers are Papers No. CB(2)247/00-01(01), CB(2)830/00-01(01) and CB(2)1672/00-01.

<sup>2</sup> These three relate to (a) extending the scope of s.2(5)(b) of the SDO to cover sexual harassment in the field of education; (b) extending the coverage of vicarious liability to acts of sexual harassment under s.76(1) of the SDO; and (c) extending the coverage of vicarious liability to acts of harassment or vilification under s.72(1) of the DDO. These amendments were implemented via Ord. No. 29 of 2008 when the Race Discrimination Ordinance (RDO) was enacted.

3. In 2009, the EOC informed the Administration that it was reviewing the 1999 proposals in the light of latest development and experience. In August 2011, the EOC submitted revised proposals relating to all the four anti-discrimination ordinances<sup>3</sup>, including 10 which were raised in 1999 and one new proposal. That being the case, the Chairperson of the EOC stated at the CA Panel meeting held on 17 June 2013 that the EOC would further review the four anti-discrimination ordinances, with a view to harmonizing the principles and provisions therein. We have sought clarification with the EOC; it stated to us its wish for the Administration to continue to take forward the 11 proposals submitted in 2011, but it would also reconsider the first-batch legislative proposals raised in 1999.

4. In the light of the EOC's latest position, the Administration will focus on the 11 amendments submitted by the EOC in 2011. The current status of these 11 proposals is as follows –

- (a) one has been implemented on 10 May 2013<sup>4</sup>;
- (b) five will be taken forward by the Statute Law (Miscellaneous Provisions) Bill, tentatively scheduled for introduction to the LegCo in the 2013/14 legislative session<sup>5</sup>;
- (c) one will be taken forward by an amendment bill tentatively scheduled for introduction to the LegCo in the 2013/14 legislative session<sup>6</sup>;
- (d) one has been considered by the Department of Justice (DoJ) as unnecessary from the legal point of view<sup>7</sup>; and

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<sup>3</sup> The SDO, DDO, RDO, and the Family Status Discrimination Ordinance (FSDO).

<sup>4</sup> The Legislation Publication (Revision) Order 2013 amended the headings of SDO ss.7 and 8 to more accurately reflect the nature of these two provisions.

<sup>5</sup> The five amendments are technical ones relating to the repeal of certain exceptions under Part 2 of Schedule 5 to the SDO; issuance of enforcement notice under the DDO; protection of EOC staff against liability in implementing the four anti-discrimination ordinances; and refining the Chinese text of the four anti-discrimination ordinances.

<sup>6</sup> This amendment seeks to extend the protection of the SDO to cover sexual harassment by customers against service providers, as discussed at the CA Panel on 17 June 2013, ref: CB(2)1324/12-13(03).

<sup>7</sup> EOC's proposal is to clarify that the District Court is not barred from granting more than one statutory remedy under the four anti-discrimination ordinances. DoJ considers that this is unnecessary as the current provisions do not have the effect of barring the District Court from awarding more than one statutory remedy.

- (e) three proposals need to be further considered because of their complexities and potential far-reaching implications<sup>8</sup>.

5. We will continue to work closely with the EOC in taking forward the legislative proposals above.

Yours sincerely,



(D. C. CHEUNG)  
for Secretary for Constitutional and Mainland Affairs

cc Chairperson, EOC

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<sup>8</sup> The three proposals relate to recovery of costs and expenses by the EOC in civil proceedings; the concept of “direct disability discrimination” under s.6(a) of the DDO; and the availability of damages for indirect discrimination where intent cannot be proved.

## Appendix II

### Relevant documents on briefing by the Chairperson of the Equal Opportunities Commission ("EOC") on the work of EOC

Committee	Date of meeting	Paper
Legislative Council	31.10.2012	<a href="#">Official Record of Proceedings Pages 96 - 100 (Written question raised by Hon WONG Ting-kwong)</a>
	5.12.2012	<a href="#">Official Record of Proceedings Pages 95 - 97 (Written question raised by Hon WONG Yuk-man)</a>
CA Panel	17.6.2013 (Item IV)	<a href="#">Agenda Minutes</a>
	23.4.2014 (Item IV)	<a href="#">Agenda Minutes</a>
	16.3.2015 (Item IV)	<a href="#">Agenda Minutes</a>

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Legislative Council Secretariat  
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