

**Subcommittee to Study the Transport Needs and Provision of
Concessionary Public Transport Fares for Persons with Disabilities**

Submission by the Equal Opportunities Commission

Purpose

1. The purpose of this Paper is to assist the Subcommittee, when examining the proposal of offering concessionary fares to Persons with Disabilities (“PwDs”), to consider issues relating to the Disability Discrimination Ordinance (“DDO”).

Background

2. The Administration intends to request public transport operators to offer concessionary fares to PwDs. In view of the large number of PwDs, operators do not agree to offer concessionary fares to all PwDs. The Administration therefore considered offering concession only to selected PwDs, but it is concerned that this would amount to unlawful discrimination against PwDs who are not selected.

3. The Equal Opportunities Commission (“EOC”) welcomes the Administration’s effort to help PwDs to overcome difficulties arising from their disabilities. But the Administration should be aware that, under the DDO, PwDs are a diverse group, including persons with many different types of disabilities. Each disability may also have varying degrees of impact on the affected individuals.

4. Despite the differences between PwDs with different types of disabilities, when they have to face a common adversity, in accordance with the principles of equality, they are equally deserving of assistance or protection. The wide definition of PwDs under s.2 of the DDO, which is set out in the Annexure to this Paper, is in itself a recognition of equality within this diverse population. If a differentiation were to be made between PwDs with different types of disabilities, one has to ensure that it is not arbitrary or without proper factual or legal basis. But this does not mean that, in principle, concessionary fares can never be given only to selected groups of PwDs. In fact, it can be done so long as the

selection is consistent with the principles of equality as implemented by the DDO.

5. The following contents are designed to highlight the issues one should bear in mind when drawing up a scheme consistent with the principles of equality.

Identification of the target difficulty and the relevant circumstances

6. The purpose of offering concessionary fares is clearly to help PwDs overcome difficulties arising from disabilities. These difficulties are different in nature. Some of them relate to the accessibility of transport facilities, some relate to low income problems caused by disabilities, while some relate to a somewhat less well-defined concept of social integration.

7. In order to observe the principles of equality, the Administration should first clearly identify what is in fact the target difficulty intended to be addressed. The circumstance(s) relevant to this difficulty is the circumstance(s) relevant to concessionary fares, or in other words, the circumstance(s) which entitle PwDs to enjoy the concession.

8. PwDs with different types of disabilities may nevertheless have to face the same or similar difficulty. It is not appropriate for the Administration to just assume that certain difficulties are only confined to PwDs with certain types of disabilities. For example, if the target difficulty of the scheme were low income caused by disabilities, clearly PwDs facing this difficulty are not confined only to those with certain types of disabilities, say, the mentally handicapped, but may include PwDs with many other types of disabilities, say, chronic illness patients...etc.

9. Depending on what is the target difficulty of the scheme, PwDs with different types of disabilities may all have to face the same or similar difficulty. So long as this is the case, they all have circumstances relevant to concessionary fares and they are all PwDs relevant to the scheme. In accordance with the principles of equality, as implemented by the DDO, the scheme should give them assistance equally.

10. For these principles require that, when relevant circumstances are the same or similar, any distinction between people in terms of their disabilities should be disregarded, and that they should be treated in the same way. For a distinction between PwDs with different types of disabilities to be made legitimately, such as the selection of some disabilities and the exclusion of others, it has to be based on material differences in their circumstances.

11. In the above example, the scheme targets low income level, if it only covers the mentally handicapped with low income, but neglects or deliberately does not help PwDs with other types of disabilities, like chronic illness patients, also having similar level of low income, it would not be consistent with the principles of equality.

12. The Administration therefore has to identify the difficulty the scheme intends to address, or to put it differently, the circumstance(s) relevant to concessionary fares, without regard to types of disabilities. Asking the following questions may help, even though they may be overlapping, and are not definitive nor exhaustive, and may even be just different ways of asking the same question, for the objective in the end is simply to articulate the circumstances relevant to concessionary fares with clarity.

- (a) Why precisely are concessionary fares offered?
- (b) How can concessionary fares help those would be entitled to it?
- (c) What is the problem or difficulty faced by those entitled which is to be addressed by the scheme?

Other issues

13. Another angle in the discussion is the matching of help to the problem. Monetary help may not be relevant to accessibility difficulties, and help in the form of accessibility solution may not be relevant to low income level. For clarity of reasoning, the Administration should clearly

articulate the relevance between concessionary fares and the target difficulty.

14. To further enhance effectiveness and fairness, it would be helpful to have refined matching between help and problem, through a quantification method devised to measure the extent to which individuals are affected by the target difficulty.

15. Lastly, for the sake of completeness, if the Administration is not in fact trying to address any target difficulty arising from disabilities, but is offering concessionary fares to the selected PwDs simply because they are PwDs, then the circumstance relevant to entitlement for concessionary fares is just the fact of being a PwD. In this case, all PwDs, whatever the types of disabilities, will be relevant PwDs and should be given concession.

Investigation to identify relevant PwDs

16. When the target difficulty and the relevant circumstances have been properly identified, the next step is to identify the relevant PwDs, whatever types of disabilities. The point has already been made above that there should not be any assumption that the relevant circumstances are only confined to PwDs with selected types of disabilities. Unless empirical data shows otherwise, relevant circumstances may be found in PwDs with many different types of disabilities. If so, all of them are relevant PwDs.

17. If no empirical investigation is made to identify relevant PwDs, whatever their types of disabilities, and an arbitrary line is drawn to confine entitlement only to PwDs with certain selected types of disabilities, then there is a possibility that there will be relevant PwDs with other types of disabilities who are excluded from the scheme. But the scheme should never have excluded any relevant PwDs, because they are all affected by the same target difficulty, they all have circumstances relevant to entitlement for concessionary fares. There is therefore a possibility that the relevant but excluded PwDs may complain that they have not been treated equally with the selected PwDs.

Exchange between the Administration and EOC

18. In the exchange between the Administration and EOC, proposals have been considered which share the common feature of confining entitlement only to PwDs with selected types of disabilities. But these proposals are all seemingly lacking in:-

- (a) a clear identification of the circumstances relevant to entitlement for concessionary fares, without reference to types of disabilities;
- (b) an identification of relevant PwDs through an appropriate empirical investigation.

19. The Administration initially indicated that its target difficulty was the mobility problem of selected PwDs, especially their need for carer assistance. The selection of these PwDs were done by reference to types of disabilities, respectively the physically handicapped, visually impaired, and the mentally handicapped.

20. Although the point about the need for carer assistance might have been a sufficiently clear statement of the target difficulty, there was still a lack of an appropriate investigation by the Administration to identify all relevant PwDs. In particular, the Administration did not appear to have answered the question raised as to whether there are, apart from those with the selected types of disabilities, other PwDs with other types of disabilities who would also require carer assistance, and whether these other PwDs would be covered by the scheme.

21. For example, it is not clear whether PwDs who suffer from chronic pain, respiratory problems, sensory disabilities, neurological fatigue, intellectual, cognitive or psychiatric or other disabilities would be covered. PwDs with these types of disabilities may also require carer assistance.

22. In the circumstances, EOC has not been able to dismiss the possibility that, if the Administration were to implement these proposals, there may be a complaint by PwDs who are excluded but whose

circumstances should have entitled them to concessionary fares. Their complaint will not be groundless, as they will have been treated less favourably than the selected PwDs, for no other reason than that their disabilities are different. This does not appear to be consistent with the DDO nor good and fair public administration.

Reducing the risks of successful complaints

Proper identification of relevant PwDs

23. As can be seen from the above, one way to resist a complaint is to establish that the relevant PwDs have already been covered by the scheme, and that the reason for excluding the complaining PwDs is because of a difference in their relevant circumstances, such as that they do not need carer assistance, and not because of the type of their disabilities. This hinges on a proper identification of the relevant circumstances and an appropriate empirical investigation to identify relevant PwDs with different types of disabilities. But the Administration does not appear to have attempted such an exercise.

Criteria without reference to types of disabilities

24. Another way to avoid a complaint is to refrain from adopting eligibility criteria which refer to types of disabilities. Instead, criteria should be devised and adopted in a way that focused only on the relevant circumstances, so that all PwDs, whatever types of disabilities, who meet the criteria, will be covered by the scheme.

25. For example, assuming that the target difficulty is accessibility, and that this can be overcome by the PwD being accompanied by a carer, the relevant help may then take the form of encouraging carer assistance. Insofar as concessionary fares may effectively facilitate carer assistance, concessionary fares or even free travel for PwDs carers may be suitably given. The circumstances relevant to entitlement will simply be the need for a carer. Eligibility should be open to all PwDs unrestricted by types of disabilities. An appropriate assessment method should be devised to examine the need for a carer, without reference to types of disabilities.

26. In this example, there is no distinction by reference to types of disabilities between PwDs, as any PwDs in need of a carer, whatever types of disabilities, will be eligible. Those PwDs who are excluded from the scheme will not be excluded by a distinction of their disabilities but on the ground of a material difference in their circumstances as regards the need for a carer.

Concessionary fare for recipients of Disability Allowance

27. Providing fare concession only to PwDs who are recipients of the Disability Allowance (“DA”) had been canvassed. The criteria for receipt of DA are derived from the 1st Schedule of the Employees’ Compensation Ordinance, Cap.282. It appears that those who are eligible are essentially PwDs who suffer from:-

- (a) Loss of 2 limbs
- (b) Loss of both hands or of all fingers and both thumbs
- (c) Loss of both feet
- (d) Total loss of sight
- (e) Total paralysis
- (f) Injuries resulting in being permanently bedridden
- (g) Paraplegia
- (h) Any other injury causing permanent total disablement
- (i) Total loss of hearing, both ears

28. With this proposal, it is still not clear what are the circumstances relevant to entitlement for concessionary fares, without reference to types of disabilities. Consequently, apart from the selected PwDs, it is not clear whether there could be any relevant PwDs with other types of disabilities who should also be covered. EOC is again unable to dismiss the possibility of complaints.

Special measures

29. The DDO provides a defence to an act of discrimination if it were an act reasonably intended to ensure equal opportunities for PwDs or to meet their special needs. This may be called the special measures

defence and it is provided for in s.50 of the DDO, which is set out in the Annexure.

30. It is well established in law that, if reliance is placed on this defence, which is a restriction of the operation of the DDO, a heavy burden has to be discharged. In the words of Hartmann J in the Court of First Instance, who had to deal with a similar special measure defence provision under the Sex Discrimination Ordinance:-

“convincing and weighty” reasons must be given to demonstrate; first, that any restriction is demonstrably necessary; second, that it is rational in the sense that it is not arbitrary, unfair or based on irrational considerations, and third, that it is no more than is necessary to accomplish the legitimate objective, in other words that it is a proportionate response [to a problem]

(see Equal Opportunities Commission v Director of Education [2001] 2 HKLRD 690, 733F)

31. If the Administration (or a transport operator) intends to rely on the special measure defence to resist complaints by relevant but excluded PwDs, it should be prepared to demonstrate that their exclusion is not arbitrary or unfair, but is supported by empirical data.

32. For instance, if there were empirical data showing that the vast majority of the members of the physically handicapped group and the mentally handicapped group are in need of carer assistance, but only a few members of the lung disease group need the same, arguably the former 2 groups have a special need for carer assistance. Consequently, when the few members of the lung disease group assert that they also have the circumstance relevant to concessionary fares, the defence may be applicable to defeat their claim by reason that the scheme is a special measure to meet the special need of the physically handicapped group and the mentally handicapped group, and that the selection of these groups and the exclusion of the lung disease group is supported by empirical data.

33. However, in fact, the Administration does not appear to have

any empirical data to support any appropriate selection and exclusion of PwDs by reference to types of disability.

EOC's complaint handling function

34. In the event that a scheme of concessionary fares is implemented, but there are complaints by excluded PwDs, EOC will be bound to deal with the complaints in accordance with the DDO. Of course, if the Administration (or a transport operator) is able to properly articulate the relevant circumstances, and then to demonstrate that there are material differences in the circumstances between the selected PwDs and the excluded PwDs, the complaints will not be well founded. Similarly, if the Administration can make out the special measure defence by proper reasoning supported by empirical data, complaints may be successfully resisted.

35. However, whether a complaint is well founded or can be successfully resisted will depend on the actual facts of the particular case. EOC cannot at this stage preclude the possibility of complaint, and can only point to issues of concern for the Administration to consider. This does not mean that EOC in principle objects to a concessionary fares scheme. On the contrary, it welcomes any properly formulated scheme, supported by appropriate data, and consistent with the principles of equality.

Equal Opportunities Commission
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Definition of “disability”

Section 2 of the DDO provides that:-

“disability” (殘疾), in relation to a person, means-

- (a) total or partial loss of the person's bodily or mental functions;*
- (b) total or partial loss of a part of the person's body;*
- (c) the presence in the body of organisms causing disease or illness;*
- (d) the presence in the body of organisms capable of causing disease or illness;*
- (e) the malfunction, malformation or disfigurement of a part of the person's body;*
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour,*

and includes a disability that-

- (i) presently exists;*
- (ii) previously existed but no longer exists;*
- (iii) may exist in the future; or*
- (iv) is imputed to a person*

Special measures defence

Section 50 of the DDO provides that:-

Nothing in Part III, IV or V shall render unlawful an act that is reasonably intended to-

- (a) ensure that persons with a disability have equal opportunities with other persons in circumstances in relation to which a provision is made by this Ordinance;*

(b) afford persons with a disability or a particular disability, goods or access to services, facilities or opportunities to meet their special needs in relation to-

(i) employment, education, clubs or sport;

(ii) the provision of premises, goods, services or facilities; or

(iii) their capacity to live independently;

(c) afford persons with a disability or a particular disability, grants, benefits or programmes, whether direct or indirect, to meet their special needs in relation to-

(i) employment, education, clubs or sport;

(ii) the provision of premises, goods, services or facilities; or

(iii) their capacity to live independently.