

**Bills Committee on Discrimination Legislation  
(Miscellaneous Amendments) Bill 2018**

**Submission of the Equal Opportunities Commission**

**20 February 2019**



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

## 1. Introduction

The Equal Opportunities Commission (EOC) is Hong Kong's statutory body whose duties are to promote equal opportunities and eliminate discrimination under the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO) and the Race Discrimination Ordinance (RDO).

The EOC welcomes the introduction of the Discrimination Legislation (Miscellaneous Amendments) Bill into the Legislative Council to implement eight recommendations of priority in the EOC's Report on the Discrimination Law Review (DLR) submitted to the Government in March 2016.<sup>1</sup>

The EOC conducted the DLR as part of its statutory duty to keep under review the anti-discrimination laws and make recommendations it considers appropriate. This was the first comprehensive review of all the four anti-discrimination Ordinances since the EOC commenced operating in 1996. The DLR involved a four month public consultation from July to October 2014, in which the EOC received a very large number of written responses of 125,041 from individuals and organisations representing many different groups and interests. In the DLR report published in March 2016, the EOC made 73 recommendations for reform, of which 27 were higher priority recommendations. The higher priority recommendations raise more serious and urgent concerns, based on what the EOC considers are relevant factors as described in its report.<sup>2</sup>

The draft legislative amendments provide protections from discrimination on grounds of sex, disability, race and family status in a number of important areas where the EOC believes there is a need for reform.

This submission examines two key issues within the Bill where the EOC believes amendments should be made. It also calls on the Government to implement the other recommendations (particularly the other priority ones) as soon as possible. Some examples of recommendations where there have been recent developments are provided as they reinforce the need for reform in those areas.

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<sup>1</sup> EOC Discrimination Law Review, Report March 2016, <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

<sup>2</sup> These factors include: the operational experience of the EOC; evidence of discrimination or other human rights affected; number of people affected or seriousness of discrimination; extent of current protection from discrimination; reform could reduce levels of protection from discrimination; current legislation does not comply with Hong Kong or international human rights obligations; recommendations by international human rights bodies; the anti-discrimination legislation in similar international jurisdictions; proposal would address systemic inequality; degree of support or opposition from organisations or individuals to proposals; reform would make the law clearer; reform would simplify legislation; reform would harmonise protection; reform would improve the effectiveness of the EOC; the Government previously agreed to the proposal; the Government has implemented legislation; an exception may not serve a legitimate aim or be proportionate.

## 2. The definition of breastfeeding

In the meeting of the Bills Committee on 14 January 2019 a number of Legislative Council members raised a concern with the definition of breastfeeding in the Bill which requires the woman to be breastfeeding "her child" in order to be protected from discrimination. A similar concern has been raised by the Legal Service Division of the Legislative Council in a letter to the Constitutional and Mainland Affairs Bureau dated 7 January 2019.<sup>3</sup> In the Appendix to the letter it is stated:

*"2. Please clarify whether section 8A intends to protect breastfeeding women in general or only breastfeeding mothers. If the provision aims at protecting breastfeeding women in general, please explain the reason for imposing the condition of "her child" in section 8A. In this regard, we note that similar provisions in Australia (section 7AA of the Sex Discrimination Act 1984) and UK (section 13(6) of the Equality Act 2010) do not have such condition.*

*3. If the legislative intent is to protect breastfeeding mothers only, please clarify, in relation to the operation of the provision, how a member of the public could tell whether a breastfeeding woman is a mother breastfeeding her child. Please also clarify what is the relevant factors for a child to be considered the woman's child. Would it cause any anomaly (or any human right implication) if two women are expressing breast milk at the same time at the same place but one is protected because she is expressing breast milk for "her child" but the other one is not?"*

Clause 7 of the Bill defines breastfeeding as:

*"Section 8A(2) For the purposes of this section—*

*(a) a woman is breastfeeding if she—*

*(i) is engaged in the act of breastfeeding **her child** or expressing breast milk to **feed her child**; or*

*(ii) is a person who feeds **her child** with her breast milk" (emphasis added)*

The crucial issue raised is who should the protections from breastfeeding discrimination cover? The answers to these questions should respond to the practical realities of who is in need of protection from breastfeeding discrimination.

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<sup>3</sup> Letter of the Legal Service Division, Legislative Council, 7 January 2019, <https://www.legco.gov.hk/yr18-19/english/bc/bc52/papers/bc5220190114cb2-578-3-e.pdf>

## 2.1 In what situations should women be protected from breastfeeding discrimination?

The starting point is that breastfeeding discrimination is a form of sex discrimination against women as it can only be performed by women, similarly to pregnancy and maternity discrimination. In most situations of breastfeeding discrimination it will relate to a situation where a woman has given birth to a child and the woman is the biological mother. However, there are several situations where that is not the case.

Firstly, in some situations a biological mother is unable to breastfeed her child but does not wish or is unable to use milk formula. For example this could arise because of medical emergencies (eg the mother has been injured in an accident and is in a coma), diseases or other health conditions (eg the mother has breast cancer, she is taking medication incompatible with breastfeeding or has chronic low milk supply). A mother may for example not be able to use milk formula if the baby has a medical reaction to it or refuse to drink it. Where a baby becomes an orphan, that could also mean there is no mother to breastfeed the child. In those situations, a wet nurse who is not the mother of the child may be employed or volunteer to feed the baby or donate breast milk to the mother.

The practice of wet nursing was common in the past, but is still used in some situations globally. The United Nations World Health Organisation recognizes this by their recommendations and definition of breastfeeding. Their guidance states:

*“As a global public health recommendation, infants should be exclusively breastfed<sup>1</sup> for the first six months of life to achieve optimal growth, development and health”<sup>4</sup>*

Footnote 1 defines exclusive and predominant breastfeeding as:

*“....no other food or drink, not even water, except breast milk (including milk expressed or from a wet nurse) for 6 months of life, but allows the infant to receive ORS, drops and syrups (vitamins, minerals and medicines).*

*“Predominant breastfeeding” means that the infant’s predominant source of nourishment has been breast milk (including milk expressed or from a wet nurse as the predominant source of nourishment). However, the infant may also have received liquids (water and water-based drinks, fruit juice) ritual fluids and ORS, drops or syrups (vitamins, minerals and medicines).”*

The use of wet nursing or donated milk in milk banks where mothers are unable to produce breast milk, has also been discussed recently in the media in Hong Kong.<sup>5</sup>

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<sup>4</sup> The World Health Organisation’s infant feeding recommendation, [https://www.who.int/nutrition/topics/infantfeeding\\_recommendation/en/](https://www.who.int/nutrition/topics/infantfeeding_recommendation/en/)

<sup>5</sup> “Sharing breast milk: The pros and cons of modern wet nursing”, 13 May 2017, Bauhinia Organisation, <http://www.bauhinia.org/index.php/english/analyses/595;>

The National Childbirth Trust in the UK is one of the leading charities for parents of newborn children. It has produced a statement in support of wet nursing, referring to where it is considered appropriate, as well as the use of milk banks where breast milk can be donated for use by women that cannot breastfeed.<sup>6</sup> Similarly, the Australian Breastfeeding Association guidance also refers to situations where a woman expresses breast milk for a relative or friend, for example where the mother is sick.<sup>7</sup>

A second type of situation may arise where the woman breastfeeding is not the biological mother of the child. This would be where a woman has adopted the child or has had the child by surrogacy. In such situations the mother may medically be capable of breastfeeding their adopted or surrogate baby. The Australian Breastfeeding Association has produced guidance for mothers wishing to breastfeed their child by adoption or surrogacy.<sup>8</sup>

If the definition of breastfeeding was restricted to situations where a woman was breastfeeding “her child” an issue would arise as to whether or not it covers only biological mothers or all mothers, including those who have adopted a child or had a child by surrogacy. The definition could therefore create uncertainty.

The EOC believes that it is important to provide protection from breastfeeding discrimination in all the above situations. Some examples of such situations could include:

An employed wet nurse who breastfeeds or expresses milk for a baby of a mother who for medical reasons is unable to breastfeed, and the baby refuses to drink formula milk. She expresses milk at a restaurant and is told she is not allowed to do so and must leave.

A husband and wife adopt a baby and the mother successfully is able to breastfeed her adopted baby. The mother is told by her employer she is not allowed to take any additional breaks to either breastfeed or express milk for her baby.

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<sup>6</sup> [https://www.nct.org.uk/sites/default/files/Wet-nursing\\_0.pdf](https://www.nct.org.uk/sites/default/files/Wet-nursing_0.pdf)

<sup>7</sup> Relactation and induced lactation, Australian Breastfeeding Association, <https://www.breastfeeding.asn.au/bfinfo/relactation-and-induced-lactation>

<sup>8</sup> Breastfeeding the adopted child, Australian Breastfeeding Association, <https://www.breastfeeding.asn.au/bf-info/adoption>; Relactation and induced lactation, Australian Breastfeeding Association, <https://www.breastfeeding.asn.au/bfinfo/relactation-and-induced-lactation>

## 2.2 The definition of breastfeeding in similar jurisdictions

The definitions of breastfeeding in similar jurisdictions of Australia and the United Kingdom are consistent with the above approach that the protections from breastfeeding discrimination should protect all women who are breastfeeding or expressing milk, and not limit such protections to a woman breastfeeding “her child”.

In Australia the Federal Sex Discrimination Act defines breastfeeding discrimination as:

### **“7AA Discrimination on the ground of breastfeeding**

- (1) *For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman’s breastfeeding if, by reason of:
  - (a) the aggrieved woman’s breastfeeding; or
  - (b) a characteristic that appertains generally to women who are breastfeeding; or
  - (c) a characteristic that is generally imputed to women who are breastfeeding;the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not breastfeeding.*
- (2) *For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman’s breastfeeding if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging women who are breastfeeding.*
- (3) *To avoid doubt, a reference in this Act to **breastfeeding** includes the act of expressing milk.*
- (4) *To avoid doubt, a reference in this Act to **breastfeeding** includes:
  - (a) an act of breastfeeding; and
  - (b) breastfeeding over a period of time.*
- (5) *This section has effect subject to sections 7B and 7D.”<sup>9</sup>*

At State level several States provide express protection from breastfeeding discrimination, but only in Western Australia is it defined:

*“10A. Discrimination on the ground of breast feeding (1) For the purposes of this Act a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of breast feeding if on the ground of —*

- (a) the aggrieved person breast feeding or bottle feeding **an infant** or proposing to do so; or*
- (b) a characteristic that appertains generally to persons who are breast feeding or bottle feeding; or*

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<sup>9</sup> Section 7AA Sex Discrimination Act 1984, <https://www.legislation.gov.au/Details/C2018C00431>

*(c) a characteristic that is generally imputed to persons who are breast feeding or bottle feeding, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person who was not breast feeding or bottle feeding.*<sup>10</sup>

In relation to both definitions there is no requirement that the woman be breastfeeding “her child” in order to be protected from discrimination. The Western Australian legislation specifically only refers to “an infant”.

In the United Kingdom, the Equality Act 2010 defines sex discrimination under section 13(6) to include breastfeeding discrimination:

*“(6)If the protected characteristic is sex—*

*(a)less favourable treatment of a woman includes less favourable treatment of her **because she is breast-feeding;**”*<sup>11</sup>

Again there is no requirement that the woman be breastfeeding her child.

### 2.3 EOC proposal

Taking into account the actual situations in which a woman may be breastfeeding, and the definitions on protections from breastfeeding discrimination in other similar common law jurisdictions, the EOC believes that the words “her child” should be deleted from the definition of breastfeeding in Clause 7. This would ensure that women in all situations where they are breastfeeding are protected from discrimination.

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<sup>10</sup> Section 10A Equal Opportunity Act 1984, [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc\\_41630.pdf/\\$FILE/Equal%20ppportunity%20Act%201984%20-%20%5B07-f0-02%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_41630.pdf/$FILE/Equal%20ppportunity%20Act%201984%20-%20%5B07-f0-02%5D.pdf?OpenElement)

<sup>11</sup> Equality Act 2010, <https://www.legislation.gov.uk/ukpga/2010/15/section/13>

### 3. The exclusion of volunteers or interns from the protection from harassment in common workplaces

Clauses 19 to 23 of the Bill relate to protections from sexual, disability and racial harassment in common workplaces. Whilst the EOC welcomes the amendment as it was recommended by the EOC to close a gap in protection from harassment in employment contexts, there is a major gap in the proposal as volunteers or interns have been excluded from the protections.

In the EOC's Discrimination Law Review submissions to the Government of March 2016, the EOC made specific reference to the need that volunteers or interns be protected from harassment in such circumstances. This is because there are increasing numbers of people volunteering or doing internships in Hong Kong, their situations as volunteers or interns make them more vulnerable to harassment given power dynamics, and as they are usually not in an employment relationship they would normally not currently be protected from such harassment.

In particular we stated:

*"3.167 There are large numbers of people in Hong Kong that have done voluntary work, and those numbers have been increasing. 104 In relation to volunteers or interns, if, as often is the case, there is no employment relationship between the parties, the volunteers therefore would not have protections from harassment. This is despite the fact that they often do work similar to employees during the period they volunteer.*

*3.168 In a number of similar jurisdictions, there is protection from sexual harassment in such circumstances. In the State of Victoria in Australia, the Equal Opportunity Act 2010 has a sexual harassment provision in relation to common workplaces, where persons are not employed by the same employer:*

*'Harassment in common workplaces*

*(1) A person must not sexually harass another person at a place that is a workplace of both of them.*

*(2) For the purposes of this section it is irrelevant—*

*(a) whether each person is an employer, an employee or neither; and*

*(b) if they are employees, whether their employers are the same or different.*

*(3) In this section workplace means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment.'105 (emphasis added)*

*3.169 In New South Wales, in relation to workplaces, there is protection similar to Victoria where the harasser need not be an employee. It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both those persons.106 Workplace participants mean:*

*'(a) an employer or employee,*

*(b) a commission agent or contract worker,*

*(c) a partner in a partnership,*

*(d) a person who is self-employed,*

*(e) a volunteer or unpaid trainee.’<sup>107</sup>*

*3.170 This goes beyond employer and employee relationships, for example by including volunteers.*

*3.171 Overall, taking into account the current gap in protection from harassment for persons in common workplaces, and in some situation such as volunteering the increasing numbers of people affected, the EOC believes that the provisions for sexual, racial and disability harassment should be amended to provide protection from harassment in a common workplace. Further, the EOC believes there should be a clear definition of a common workplace and which persons would be protected from harassment. Reference could be taken for example from the models in Victoria and New South Wales in Australia.*

#### **Recommendation 15**

***It is recommended that the Government amend the provisions for sexual, racial and disability harassment under the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance, to provide protection from harassment to persons in a common workplace such as consignment workers and volunteers.’<sup>12</sup>***

The EOC also refers to the Government’s Paper to the Legislative Council Panel on Constitutional Affairs dated 20 March 2017.<sup>13</sup> The Government indicated which proposals it would be taking forward, and in relation to this proposal stated:

*“(c) to expand the scope of protection from sexual, disability and racial harassment, such as between persons in a common workplace (e.g. consignment workers **and volunteers**) and between tenants/sub-tenants occupying the same premises*

*The recommendations would widen the scope of protection from harassment in the SDO, DDO and RDO, including harassment between persons in a common workplace, between service providers and service users, between tenants/sub-tenants occupying the same premises, and between the management of clubs and members or prospective members.’<sup>14</sup>*

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<sup>12</sup> Discrimination Law Review Submissions, pages 68-70,  
<http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

<sup>13</sup> <https://www.legco.gov.hk/yr16-17/english/panels/ca/papers/ca20170320cb2-981-2-e.pdf>

<sup>14</sup> Ibid, see page 4 of the Paper dated March 2017.

We note that at that time the Government indicated it would include volunteers in the amendments. The EOC has requested the Government to provide explanations as to why it has not included volunteers in the Bill despite its previous commitment to do so, but has not been provided one.

The EOC has also recently dealt with a complaint relating to sexual harassment involving a volunteer, where we were not able to take further action because volunteers are currently not protected. The complaint concerned an allegation of sexual harassment of a woman doing volunteer work at a health care institution in Hong Kong, by another volunteer at the same institution. As there was no employment relationship between the volunteer and the institution, we were not able to proceed with the complaint. This highlights that there is evidence of the need to protect volunteers and interns from harassment, particularly sexual harassment.

Further, there is evidence that there are large and increasing numbers of people volunteering or doing internships without being paid, which means they are likely to not be in an employment relationship and be protected from harassment.<sup>15</sup>

Finally, we note that in other jurisdictions, in addition to New South Wales and Victoria in Australia, there are protections from sexual harassment of volunteers or interns in some States of the United States in California, New York, Oregon and the District of Columbia.<sup>16</sup>

Given all the above factors, the EOC calls on the Government to include in the protections from sexual, racial and disability harassment in common places, volunteers or interns who are not in employment.

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<sup>15</sup> "Hong Kong student internships: invaluable work experience or slave labour?", South China Morning Post,

10 October 2016, <https://www.scmp.com/lifestyle/families/article/2026678/hong-kongs-student-interns->

[invaluable-work-experience-or-slave](#)

<sup>16</sup> "Unpaid interns, volunteers to be protected from sexual harassment, discrimination", the Daily Californian, 11 September 2014, <http://www.dailycal.org/2014/09/11/unpaid-interns-volunteers-protected-sexual-harassment-discrimination/>

#### 4. Implementation of other EOC high priority recommendations for reform

The EOC also urges the Government to implement as soon as possible the other 19 higher priority recommendations from the DLR, as the EOC has previously raised with the Government on many occasions.

The EOC notes that such calls have also been made by other organisations and Legislative Council members. For example, we note that many Legislative Council members raised their concerns that the Government is only taking forward eight of the DLR recommendations at the hearings of the Legislative Council Panel on Constitutional Affairs on 20 March 2017,<sup>17</sup> and the Legislative Council Sub-committee on Rights of Ethnic Minorities on 6 November 2017.<sup>18</sup>

In the hearing of the Sub-Committee on Rights of Ethnic Minorities the following two motions were unanimously passed:

*“Given that the existing Race Discrimination Ordinance (“RDO”) is full of loopholes and fails to provide ethnic minorities with full protection, and that the threshold for substantiating complaints of racial discrimination is extremely high, this Subcommittee requests the Government to amend RDO by providing that apart from the provision of services, it is also unlawful for the Government to discriminate in performing its functions and exercising its powers, such that when the Government performs its functions and exercises its powers, people of different ethnic groups will be protected from racial discrimination.”*

*“In 2013, the Equal Opportunities Commission (“EOC”) conducted a review of the four discrimination ordinances and made 73 recommendations to the Government, including 27 prioritized recommendations. However, the Government only agreed to accord priorities to nine of these recommendations. This Subcommittee considers that the Government should accord priorities to the 27 recommendations made by EOC, including amending the Race Discrimination Ordinance by providing that it is unlawful for the Government to discriminate in performing its functions and exercising its powers.”<sup>19</sup>*

In relation to taking forward the other Higher Priority recommendations, the EOC also calls on the Government to take into account not only the EOC’s previous DLR submissions from March 2016, but also recent relevant developments, recommendations and court decisions relating to particular recommendations. Below several key examples are provided.

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<sup>17</sup> <https://www.legco.gov.hk/yr16-17/english/panels/ca/agenda/ca20170320.htm>

<sup>18</sup> [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs52/minutes/hs5220171106.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs52/minutes/hs5220171106.pdf)

<sup>19</sup> Ibid Appendix 2.

#### **4.1 Providing protection from racial discrimination in relation to the exercise of Government functions and powers**

One of the key EOC recommendations in the DLR relating to the Race Discrimination Ordinance (RDO) relates to amending it to provide protection from racial discrimination in the exercise of government functions and powers.<sup>20</sup> Currently there is an inconsistency with provisions of the Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO) and the Family Status Discrimination Ordinance (FSDO) which do provide protection from discrimination in relation to government functions and powers.

The recent court decision in *Singh v Commissioner for Police* DCEO 9/2011 in May 2016 is also relevant.<sup>21</sup> It held and reaffirmed that where the Government is exercising Government functions (eg the act of arresting a person), there is no protection from racial discrimination under the RDO. Although there is protection from racial discrimination by the Government in exercising government functions under the Bill of Rights, a person would not have the same rights to make a complaint to the EOC, or for the EOC to provide legal assistance on that point, as the EOC does not have jurisdiction over the Bill of Rights. As a result, the decision highlighted that there are practical and important reasons why the RDO should be amended.

It should also be noted that the United Nations Committee on the Elimination of Racial Discrimination made recommendations to the Government to cover government functions under the RDO in September 2018.<sup>22</sup> It states and recommended:

*“7. The Committee again reiterates its concern that the domestic legislation of the State party does not contain a definition of racial discrimination in full conformity with article 1 of the Convention. It also reiterates its concern that the State party has not adopted a comprehensive anti-discrimination law. The Committee is concerned that in Hong Kong, China, law enforcement activity does not necessarily fall within the scope of the prohibition on racial discrimination contained in the Race Discrimination Ordinance.*

*8. The Committee urges the State party, including Hong Kong, China, and Macao, China, to amend its domestic laws to expressly define and criminalize all forms of racial discrimination in full conformity with article 1 of the Convention, and expressly prohibit both direct and indirect racial discrimination in all fields of public life, including law enforcement and other government powers.”*

Given all of the above factors the EOC calls on the Government to implement our DLR recommendation relating to this issue as soon as possible.

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<sup>20</sup> See pages 42-45, <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

<sup>21</sup> 30 May 2016,

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=104250&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=104250&QS=%2B&TP=JU)

<sup>22</sup> Concluding Observations on China, CERD/C/CHN/CO/14-17, 19 September 2018,

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCHN%2fCO%2f14-17&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCHN%2fCO%2f14-17&Lang=en)

## **4.2 A duty to make reasonable accommodation for persons with disabilities**

In relation to persons with disabilities, the most important of the EOC recommendations in the DLR was for the introduction of a duty to make reasonable accommodation in key areas of public life covered by the DDO such as employment, housing, facilities and services, and education.<sup>23</sup>

Such a duty is required by the United Nations Convention on the Rights of Persons with Disabilities, to which the Hong Kong Government has agreed it is subject to and applies to Hong Kong.

Recent developments in Hong Kong have only reinforced the need for such a duty to ensure that persons with disabilities are able to fully participate in society. In relation to accessibility, a report released several months ago by the Audit Commission highlighted the continued inadequacy of barrier-free facilities on Government premises. It criticised the Leisure and Cultural Services Department and the Food and Environmental Hygiene Department for poor maintenance of tactile paths at parks and a lack of Braille signs next to emergency push buttons at public toilets respectively. The Architectural Services Department was also criticised for delaying retrofitting work, with 30 work orders postponed for from 730 to more than 1,095 days.<sup>24</sup>

The need to ensure that reasonable accommodation is provided to persons with disabilities is also only becoming increasingly urgent with a rapidly ageing population. By 2041, almost one in every three Hongkongers will be 65 years old or above, and many of those persons will have various forms of disabilities that all sectors of society (public and private) should address with their policies, practices, facilities and services.

As a result the EOC believes that there is an increasingly urgent need to implement the recommendation to introduce a duty to provide reasonable accommodation for persons with disabilities, to ensure that all sectors proactively address the needs of persons with disabilities and do not discriminate against them.

## **4.3 Discrimination relating to marital status and relationships**

Finally, another higher priority EOC recommendation in the DLR relates to discrimination on grounds of marital status which is provided for under the SDO, as well as being relevant to protection from family status discrimination under the FSDO.<sup>25</sup>

The EOC recommended in relation to marital status discrimination under the SDO:

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<sup>23</sup> See pages 27-32, <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

<sup>24</sup> Disability Should not be a barrier in Hong Kong, unless society makes it one, Alfred Chan, 13 January 2019, <https://www.hongkongfp.com/2019/01/13/disability-not-barrier-hong-kong-unless-society-makes-one/>

<sup>25</sup> See pages 111 to 132, <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

*“...the Government conduct comprehensive research and public consultation on the issues of discrimination and the related issue of possible legal recognition of heterosexual and homosexual cohabitation relationships in Hong Kong, including existing cohabitation relationships and same sex marriages from overseas. The consultation should:*

- Consult on providing protection from discrimination for persons in cohabiting relationships in relation to the marital status protection under the Sex Discrimination Ordinance, including the possible repeal, amendment or addition of specific exceptions;*
- Consider all the other potentially discriminatory legislation and policies as to whether it is appropriate to reform them;*
- Consider the possible different methods of recognising such relationships, including coverage of heterosexual and homosexual relationships.”<sup>26</sup>*

The EOC believes that marital status remains a key area of widespread discrimination in Hong Kong which affects both couples in heterosexual and same sex relationships. This is because in order for a couple to be entitled to many rights or to be subject to obligations, most relevant legislation or policies require the couple to be in marriage, and there is only recognition of heterosexual marriages.

Many other similar common law jurisdictions have evolved to recognise different forms of relationships other than marriage (such as civil partnerships and cohabiting relationships), but ensure that the rights and obligations of those relationships are the same or very similar to marriage. This gives all couples equality in terms of recognition, rights and obligations in their relationships, and prevents discrimination against some couples. It also ensures that Governments and other stakeholders can enforce relevant laws that link to obligations of couples in an equal and fair manner.<sup>27</sup>

There have been a number of recent court cases decided or filed relating to discrimination in relationships. The recent decision by the Court of Final Appeal in *QT v Director of Immigration* [2018] HKCFA 28 in June 2018<sup>28</sup> held that it was unlawful sexual orientation discrimination to not provide a dependent visa for a couple from the United Kingdom who are in civil partnership. In response, in September 2018 the Government changed the immigration policy for dependent visas to cover a person who has entered into a same-sex civil partnership, same-sex civil

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<sup>26</sup> Ibid page 129.

<sup>27</sup> For example in relation to bankruptcy law, a bankrupt in a marriage is required to list out particulars of property, land and buildings that are held in his/her spouse's name as well as his/her relationship with the spouse. This is important to ensure that a bankrupt cannot avoid responsibilities to creditors. A bankrupt in a cohabiting relationship, a civil partnership (heterosexual or same sex) recognised overseas, or a same sex marriage recognised overseas would not be required to disclose such property of their partner: Bankruptcy (Forms) Rules (Cap. 6B, Laws of Hong Kong), Schedule.

<sup>28</sup> Court of Final Appeal, 4 July 2018, [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=116049](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=116049)

union, "same-sex marriage", opposite-sex civil partnership or opposite-sex civil union outside Hong Kong.<sup>29</sup>

There are other cases relating to relationships in the areas of employment benefits and taxation,<sup>30</sup> public housing,<sup>31</sup> non-recognition of civil partnerships in Hong Kong for same sex couples,<sup>32</sup> and non-recognition of same sex marriages in Hong Kong.<sup>33</sup>

The EOC believes that in order to prevent discrimination against couples in relationships other than marriage, it is an appropriate time for the Government to consult on comprehensively amending all laws and policies that discriminate based on marital status, and consider legal recognition of other forms of relationships than marriage in Hong Kong as previously recommended by the EOC.

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<sup>29</sup> 18 September 2018, <https://www.info.gov.hk/gia/general/201809/18/P2018091800579.htm>

<sup>30</sup> *Leung Chun Kwong v Secretary for Civil Service* [2018] 3 HKLRD 84

<sup>31</sup> <https://www.scmp.com/news/hong-kong/law-and-crime/article/2174699/married-gay-man-sues-hong-kong-government-over-rejected>

<sup>32</sup> <https://www.scmp.com/news/hong-kong/community/article/2161287/woman-takes-unprecedented-step-advance-lgbt-cause-hong-kong>

<sup>33</sup> <https://www.scmp.com/news/hong-kong/law-and-crime/article/2180551/two-gay-men-mount-first-legal-challenges-hong-kong-laws>

