

# Discrimination Law Review

Submissions to the Government  
Executive Summary



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

March 2016

## **THE DISCRIMINATION LAW REVIEW – SUBMISSIONS TO THE GOVERNMENT EXECUTIVE SUMMARY**

1. The Equal Opportunities Commission (EOC) is Hong Kong's independent statutory body with responsibility for promoting equality and eliminating discrimination. One of its key duties is to keep under review the working of the current four anti-discrimination Ordinances: the Sex Discrimination Ordinance (SDO); the Disability Discrimination Ordinance (DDO); the Family Status Discrimination Ordinance (FSDO); and the Race Discrimination Ordinance (RDO). Where the EOC believes it is appropriate, it can make submissions to the Chief Executive of the Hong Kong SAR recommending amendments to the Ordinances in order to better promote equality and eliminate discrimination.
2. The EOC believes that it is essential for Hong Kong's anti-discrimination legislation to meet the needs of the 21st century society in which issues of equality are evolving. As a result, the EOC launched the Discrimination Law Review (DLR) in March 2013 to review all the existing anti-discrimination legislation and make recommendations to the Government to modernise them.
3. As part of the DLR, the EOC conducted a city-wide public consultation exercise which took place from 8 July 2014 to 31 October 2014. The EOC received a very large number of written responses of 125,041 from individuals and organisations representing many different groups and interests. This is the executive summary of the EOC's submissions to the Government on all the issues raised by the Questions in the Consultation Document. The EOC believes there are a number of areas where the four anti-discrimination Ordinances should be modernised to improve protections from discrimination for everyone.
4. For the full submissions as well as the report on responses to the public consultation (which provides more quantitative and qualitative details on the consultation responses), please visit [www.eocdlr.org.hk](http://www.eocdlr.org.hk).

## CHAPTER 1: ANALYSIS OF RESPONSES TO THE PUBLIC CONSULTATION

- 1.1 Given the enormous number of responses and subsequent public attention to the public consultation, the EOC believes it is crucial to thoroughly analyse the responses received, in order to:
- Identify trends and explore what conclusions can be drawn;
  - Investigate whether and how such conclusions may be relevant to the EOC's position and prioritisation of the issues; and
  - Facilitate future work on improving public understanding on these issues.

### *Part I: Nature of the responses from organisations and individuals*

- 1.2 There was significant diversity of responses, both between different types of organisations, as well as between organisations and individuals. The following key patterns and trends were identified.
- The proportion of organisations that were supportive of the proposals was significantly higher than individuals, and they are more likely to provide detailed reasoning of their positions. For 57 of the 77 Questions a majority percentage of responses from organisations supported the proposals. In contrast, for 66 of the 77 Questions, a majority percentage of individuals opposed the proposals.
  - NGOs working with women, ethnic minorities, persons with disabilities, or on human rights were generally more supportive of the proposals. In contrast, religious and family groups, primary and secondary religious educational institutions, and employer groups were generally more likely to disagree with the proposals.
  - Most of the responses from individuals used variations of a pro forma response to respond to a series of questions. A high proportion of individual responses also did not provide any reasoning for their views, which meant the EOC could not analyse whether the responses raise pertinent concerns or other relevant information.
  - A very high proportion of the responses from individuals were primarily concerned with two issues: protection from discrimination on grounds of nationality, citizenship and residency status; and protection from discrimination for persons in cohabiting/de facto relationships.
- 1.3 The above trends have implications for the degree of weight the EOC has placed on responses to the public consultation in determining its stance on issues. The EOC emphasises that the public consultation was intended to obtain evidence, experiences and reasoning which would assist in determining whether there is justification for reform. It was not intended to act as public opinion survey on the proposals. The EOC also recognises that, particularly in relation to the protection of the rights of marginalised minority groups, the views of the majority should not necessarily be determinative. In analysing the responses, the EOC further notes that a number of the concerns raised may have resulted from an inaccurate interpretation of the intention of the EOC's proposals or their potential legal effects. Therefore, the EOC believes that

caution should be exercised in relying on the numbers of organisations or individuals supporting or opposing proposals. Further, in establishing its positions, the EOC also took into account a number of other relevant factors which are set out in Chapter 2.

***Part II: The need for further research, consultation and education***

- 1.4 In relation to a number of issues especially where they are complex, touch on legislation across different domains and policy areas, and have instigated wide debate with divergent views, the EOC believes it may be appropriate to have separate and more detailed consultation by the Government before implementing legislative reforms. This would widen the opportunity for key stakeholders to discuss the potential implications of the reforms, as well as for the EOC to broaden understanding of the public on the issues.

***Part III: Additional issues raised in the consultation process***

- 1.5 In the consultation responses, a number of organisations and individuals called for new protected characteristics to be added to the anti-discrimination legislation in Hong Kong, including age, sexual orientation, gender identity, intersex status, religion or belief, and language. The focus of the Discrimination Law Review has been on reforms to the four anti-discrimination Ordinances and not on developing comprehensive anti-discrimination legislation in relation to new protected characteristics. Nevertheless, the EOC does believe that it is important for the Commission to consider whether the current protected characteristics should be expanded in any ways. For that reason, the EOC has recently conducted two research studies related to discrimination on the grounds of age, as well as on the grounds of sexual orientation, gender identity and intersex status. The EOC will continue to discuss with the Government on taking forward the above issues of discrimination and possible legislative reform, as well as considering the need for legislation in other areas.

## CHAPTER 2: RELEVANT FACTORS IN MAKING SUBMISSIONS

2.1 In the Discrimination Law Review process, the EOC took into account a number of factors in determining which issues should be the subject of legislative or related reforms, and if so which are of a higher priority than others. They include:

- Role and 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

## CHAPTER 3: HIGHER PRIORITY ISSUES

3.1 Chapter 3, divided into two parts, discusses a number of higher priority areas for legislative reforms or other actions, which raise more serious and urgent concerns based on the analysis of key factors by the EOC. For issues discussed in Part I, the EOC views the proposed amendments as generally easier to implement and less complex in application. For issues discussed in Part II, given that the EOC's proposals will likely have impact across multiple domains and policy areas, the EOC recommends that further consultation and research be conducted by the Government before any legislative reforms. The EOC believes that the issues in Part I and Part II are of equal importance and should be promptly tackled by the Government.

### *Part I: Areas to implement as a higher priority*

#### **A. Equality for Persons with Disabilities**

3.2 There is ample evidence that people with disabilities continue to face significant discrimination and barriers to equal opportunities in areas such as employment, provision of services, education, and access to premises, which require legislative or policy reform.

(i) A DUTY TO MAKE REASONABLE ACCOMMODATION

3.3 Under the DDO, there is no express requirement to make reasonable accommodation for persons with disabilities. This is not compliant with international human rights obligations, and inconsistent with the trend of modernisation in other similar jurisdictions. There is strong evidence of discrimination against persons with disabilities, including in complaints to the EOC, and the issue affects the large number of people with disabilities in Hong Kong. There was also strong support for the proposals in the consultation responses, particularly by those working with persons with disabilities, for the introduction of a duty.

**Recommendation 1: It is recommended that the Government amend the Disability Discrimination Ordinance by introducing a distinct duty to make reasonable accommodation for persons with disabilities in all relevant fields including employment; the provision of goods, services and facilities; education; and premises. It is further recommended that the unjustifiable hardship provisions should be repealed.**

(ii) EXPRESS PROTECTION FROM DISCRIMINATION FOR PERSONS WITH DISABILITIES ACCOMPANIED BY AN ASSISTANCE ANIMAL

3.4 Currently, there is no express provision that discrimination against a person when accompanied by an assistance animal is disability discrimination. Based on the EOC's operational experience, there are a large number of persons with visual impairments and other disabilities who would be potentially affected, and there are plans to increase the use of guide dogs and other assistance animals in Hong Kong. The EOC also notes

the evidence of discrimination as seen in the related complaints received, and the significant support for the proposal in the consultation from organisations.

**Recommendation 2: It is recommended that the Government amend section 10 of the Disability Discrimination Ordinance by adding being accompanied by an assistance animal as a category of protection from discrimination, and that assistance animal be clearly defined.**

(iii) PROTECTION FROM DISCRIMINATION FOR PERSONS WITH DISABILITIES IN VOTING AND STANDING FOR ELECTION.

3.5 There is currently no express prohibition on discrimination in relation to persons with disabilities voting in elections or standing for elections to public authorities, statutory advisory bodies or other prescribed bodies. This can be contrasted with the other protected characteristics of sex, race and family status where there is such protection. International human rights obligations require that persons with disabilities have the right to participate in public life by voting and standing for election without discrimination, and United Nations bodies have made specific recommendation to the Hong Kong Government to revise its legislation accordingly. The issue potentially affects a large number of persons with disabilities, including those with mental illness or intellectual disabilities, and there was significant support for the EOC's proposal from both organisations and individuals in the consultation, some of whom noted that denial of the right to vote is a potential breach of human rights.

**Recommendation 3: It is recommended that the Government amend the Disability Discrimination Ordinance to provide a prohibition on discrimination against persons with disabilities in voting and standing for elections. It is further recommended that the Government review the provisions in the Legislative Council Ordinance and the District Councils Ordinance which disqualify persons with disabilities who have been declared incapable of managing their affairs, from being registered to vote in Legislative Council and District Council elections.**

## **B. Equality for women**

3.6 Women in Hong Kong continue to face discrimination in a number of aspects of their lives particularly when having children, which has a major impact on their ability to fully participate in work. They also continue to face high levels of sexual harassment in many fields which is discussed in Section D.

(i) THE RIGHT OF WOMEN TO RETURN TO A WORK POSITION AFTER MATERNITY LEAVE

3.7 There is currently no protection for women in terms of a right to return to their work positions after taking maternity leave, which can be contrasted with protections in similar international jurisdictions. Based on the EOC's operational experience, there is also evidence that women continue to face significant discrimination on ground of pregnancy during pregnancy, maternity leave, and after they return to work, including

by being dismissed. In the consultation exercise, a number of NGO organisations and individuals expressed the view that women should have the right to return to their previous positions after maternity leave at least for a certain period, subject to justifiable exceptions.

**Recommendation 4:** It is recommended that the Government introduce a statutory right of women to return to their previous role after maternity leave, or if that position no longer exists, a suitable alternative position on similar terms and conditions. Such a provision could either be included by an amendment to the Employment Ordinance, or alternatively to the Sex Discrimination Ordinance.

(ii) EXPRESS PROTECTION FROM DISCRIMINATION FOR BREASTFEEDING WOMEN

3.8 There is currently no express provision stating that discrimination on grounds of breastfeeding is unlawful, although the EOC does consider discrimination complaints related to breastfeeding as family status discrimination relating to caring for an immediate family member. The EOC receives a number of complaints of discrimination by breastfeeding women who face both direct and indirect discrimination in a variety of fields. The number of women who are breastfeeding in Hong Kong has also been steadily rising over the years, making this issue increasingly important.

**Recommendation 5:** It is recommended that the Government introduce express provisions prohibiting direct and indirect discrimination on grounds of breastfeeding. These provisions could be included by an amendment to the Sex Discrimination Ordinance as a form of sex discrimination, a separate category of discrimination, or alternatively as an amendment to the Family Status Discrimination Ordinance. The definition of breastfeeding should also include expressing milk.

### C. Equality for all racial groups

3.9 The protections from racial discrimination under the Race Discrimination Ordinance are narrower than the other anti-discrimination Ordinances or have some significant exceptions, which weaken the protections from racial and related discrimination.

(i) PROVIDING PROTECTION FROM RACIAL DISCRIMINATION IN RELATION TO THE EXERCISE OF GOVERNMENT FUNCTIONS AND POWERS

3.10 There is currently no protection from racial discrimination by the Government when they are exercising their functions and powers. This is not consistent with protections under the other anti-discrimination Ordinances; the lack of protection is also in breach of international human rights obligations, and the United Nations has made recommendations to the Government to make an amendment. This is a key issue that affects everyone in Hong Kong irrespective of their particular race, and the EOC notes that a significant proportion of organisations supported this proposal in the public consultation responses.

**Recommendation 6: It is recommended that the Government make an amendment to the Race Discrimination Ordinance by providing that it is unlawful for the Government to discriminate in performing its functions or exercising its powers.**

(ii) BETTER PROTECTION FROM RACIAL DISCRIMINATION BY ASSOCIATION

3.11 Currently, there is only limited protection from racial discrimination by association, which applies only to near relatives, and not to other associates such as friends, carers, and work colleagues. This is less than the corresponding protection in relation to disability. Although the EOC consulted on extending such protection to all protected characteristics, the EOC does not currently have sufficient evidence of discrimination on grounds of association related to sex, pregnancy, marital status and family status to warrant such provisions at this time. As there is limited protection from racial discrimination by association, the EOC believes that it would be a priority to strengthen this protection to the same level as the DDO. The EOC has also received enquiries regarding situations of possible race discrimination by association, which it could not consider further.

**Recommendation 7: It is recommended that the Government amend the Race Discrimination Ordinance provisions prohibiting direct discrimination and harassment by association by repealing the provisions regarding near relatives, and replacing it with a definition of an associate to include:**

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

(iii) PROTECTION FROM RACIAL DISCRIMINATION BY PERCEPTION

3.12 Currently, there is no protection from discrimination by perception or imputation on grounds of race under the RDO. This contrasts with the DDO, where there is express protection for discrimination by perception as related to disability. Although the EOC consulted on extending such protection to all protected characteristics, the EOC does not currently have sufficient evidence of discrimination on grounds of perception related to sex, pregnancy, marital status and family status to warrant such provisions at this time. However, the EOC believes that it is appropriate to provide such protection in relation to race, as there are a number of situations where persons may be more likely to be perceived to be of a particular race and, as a result, treated less favourably. Given the evidence that a number of racial groups in Hong Kong do face higher levels of racial discrimination, prejudices and stereotypes, the EOC feels that such protection would be warranted to help to address this situation and prevent discrimination. Given the EOC's recommendation to add protection from racial discrimination by association, the EOC believes protection against racial discrimination by perception should also be added for

reasons of consistency, and to ensure that the protection level is in line with that related to disability.

**Recommendation 8: It is recommended that the Government amend the Race Discrimination Ordinance to include protection from direct discrimination and harassment by perception or imputation that a person is of a particular racial group.**

(iv) REPEALING THE EXCEPTIONS PERMITTING DISCRIMINATION RELATING TO VOCATIONAL TRAINING AND EDUCATION

3.13 English and Chinese are both official languages of Hong Kong and enjoy equal status. Currently, there is an exception under the RDO permitting discrimination in the medium of instruction in vocational training and education.

3.14 With regard to medium of instruction in vocational training, the EOC has concerns that the effect of this exception is too broad. The EOC has also received a number of complaints of language discrimination relating to vocational training, and some organisations working with ethnic minorities also note the difficulties ethnic minorities often face in vocational training due to the course language. The exception relating to vocational training may also not be compliant with obligations to prevent discrimination on the grounds of language under the Bill of Rights and the International Covenant on Civil and Political Rights (ICCPR). The position of the EOC is that there are situations where it will be reasonable to teach a course in only one language (assuming that there was a legitimate aim and it was proportionate to provide the training in only that language), but that it is not appropriate to have a blanket exception regarding medium of instruction.

**Recommendation 9: It is recommended that the Government repeal the provision regarding vocational training in relation to modifying or making different arrangements for medium of instruction, under section 20(2) of the Race Discrimination Ordinance.**

3.15 With regard to medium of instruction in education, the Government previously indicated that the exception is to prevent schools from being compelled to modify its arrangements regarding holidays or medium of instruction in order to cater to students of any racial group, such as being compelled to teach ethnic minorities in their own language. While the EOC understands the Government's position, it has concerns that the exception is too broad and, consequently, could be interpreted as not requiring any targeted assistance to ethnic minorities to learn Chinese as a second language. There is substantial evidence that ethnic minorities do currently face significant barriers to learn Chinese, which negatively impacts their equal participation in society. The exception relating to education may also not be compliant with Hong Kong and international human rights obligations to prevent discrimination on the grounds of language under the Bill of Rights and ICCPR. The EOC also believes that repealing the exception would not affect the current education system, as teaching in the two official languages would likely be considered to be for a legitimate aim and proportionate, and thus not unlawful.

**Recommendation 10:** It is recommended that the Government repeal the provision regarding education in relation to modifying or making different arrangements for medium of instruction, under section 26(2) of the Race Discrimination Ordinance.

**D. Improving protection from direct and indirect discrimination, and harassment**

(i) IMPROVING THE PROTECTIONS FROM DIRECT DISCRIMINATION

3.16 There are two issues that the EOC believes need addressing in the formulation of direct discrimination: the meaning of discrimination on grounds of a protected characteristic and comparators in direct disability claims.

3.17 The current definition of direct discrimination in all the anti-discrimination Ordinances refers to discrimination on grounds of the particular characteristic *of the person*. This means the person facing discrimination must possess the protected characteristic and potentially excludes situations in which a person is treated less favourably on grounds of a protected characteristic, but does not him/herself have such a characteristic. This is a gap in the protection and differs from comparable protection in other jurisdictions. Additionally, it is also not consistent with other related provisions of discrimination by association and perception or imputation.

**Recommendation 11:** It is recommended that the Government amend the definition of direct discrimination in all four anti-discrimination Ordinances to state that, on the grounds of the protected characteristic, a person is treated less favourably, rather than requiring the person to have the protected characteristic.

3.18 In relation to direct disability claims, the language of the current provision requires a comparison to be made between a person with a disability and another person “without a disability”, which means the protection may not apply to situations where a person with one disability is less favourably treated than a person with a different disability. There is evidence of the need for this to be reformed, given that persons with certain disabilities such as mental disabilities or infectious diseases face even greater stigmatisation and discrimination than other disabilities. There is also strong support for the reform from organisations as it would provide better protection for persons with disabilities.

**Recommendation 12:** It is recommended that the Government amend the direct disability discrimination provisions in sections 6 and 8 of the Disability Discrimination Ordinance to make it clear that it includes protection from discrimination between persons with different disabilities.

(ii) IMPROVING THE PROTECTION FROM INDIRECT DISCRIMINATION

3.19 The current definition of indirect discrimination is too narrow in several respects, including the scope of the “requirement or condition”; the establishment of detriment

or disadvantage; and the definition of what must be set out for indirect discrimination to be justified. As a result, in some situations, claims of discrimination unjustifiably cannot be made. Based on our operation experience of considering complaints, as well as developments in other jurisdictions, the EOC considers that the definition of indirect discrimination should be improved.

**Recommendation 13: It is recommended that the Government amend the definition of indirect discrimination in all four anti-discrimination Ordinances to:**

- **A provision, criterion or practice is applied or would apply equally to persons who do not share the characteristic;**
- **Which is or would be to the detriment of the person with the protected characteristic;**
- **Which cannot be shown to be justifiable by serving a legitimate objective and bearing a rational and proportionate connection to the objective.**

(iii) IMPROVING THE PROTECTIONS FROM HARASSMENT

3.20 Currently, there are a number of situations where the current provisions prohibiting harassment do not provide sufficient protection. These include: no protection from sexual, racial or disability harassment of persons who work in a common workplace (such as volunteers or persons working on consignment) and are not in an employment relationship; no protection from racial and disability harassment of service providers by service users, including on Hong Kong registered ships and aircraft; no protection from sexual, racial or disability harassment of tenants or sub-tenants by other tenants or sub-tenants occupying the same premises; no protection from sexual, racial or disability harassment by management of clubs of members or prospective members. Additionally, the EOC believes that employers have an important role in terms of preventing harassment of their employees, and currently there is no provision on the liability of employers where they fail to take reasonable action to prevent employees being harassed by third parties such as customers.

3.21 The EOC receives many complaints of harassment, particularly sexual harassment. In some cases related to the above, the EOC was unable to proceed with the harassment complaint because there is no legislative protection. On a number of these issues, the EOC has previously made submissions to the Government urging amendments, to which the Government had agreed in principle but not enacted the changes. The EOC has also conducted a number of studies that indicate high levels of sexual harassment in a range of fields such as employment, education and the provision of services. There is also evidence that some vulnerable groups, including foreign domestic workers, may be particularly affected by the gaps in protection, which potentially impacts a large number of people across multiple domains. **The EOC therefore makes the following recommendations to the Government:**

**Recommendation 14: It is recommended that the Government make amendments to the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination**

Ordinance to make an employer liable for the sexual, racial or disability harassment of an employee by a third party such as a customer where the employer has notice of the harassment, and fails to take reasonable steps to prevent the harassment;

**Recommendation 15:** It is recommended that the Government amend the provisions of the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment to persons in a common workplace such as consignment workers and volunteers;

**Recommendation 16:** It is recommended that the Government amend the provisions of Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users;

**Recommendation 17:** It is recommended that the Government amend the provisions of the Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users, where such harassment takes place outside Hong Kong, but on Hong Kong registered aircraft and ships;

**Recommendation 18:** It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection of tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises;

**Recommendation 19:** It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment by management of clubs of members or prospective members.

#### **E. Scope of protection in relation to public authorities**

3.22 There is currently a gap in the protections from discrimination in relation to public authorities, as the four anti-discrimination Ordinances do not provide that it is unlawful for public authorities to discriminate in the performance of their functions and powers. This approach is not consistent with the obligations prohibiting discrimination by public authorities under the Bill of Rights. In relation to the consultation, a number of organisations indicated that it would be important to define who is considered a public authority.

**Recommendation 20:** It is recommended that the Government amend the four anti-discrimination Ordinances to include a provision that they apply to all public authorities, and it shall be unlawful for them to discriminate in the performance of their functions and exercise of their powers. Consideration should also be given as to whether a definition of a public authority is required.

## F. Discrimination claims

### (i) INCLUDING EXPRESS PROVISIONS RELATING TO PROOF OF DISCRIMINATION CLAIMS

3.23 Cases of discrimination are difficult to prove given that there is often no direct evidence of discrimination. Although not expressly set out in the anti-discrimination legislation, the Hong Kong courts do take the approach where, once the plaintiff provides some evidence of discrimination, the court in practice will look to the defendant for evidence or explanations to indicate whether or not discrimination occurred. In similar international jurisdictions, such a shift in the burden of proof is expressly set out in their anti-discrimination legislation. International human rights bodies have also explicitly recommended this approach. In the consultation response, a number of organisations who agreed with the proposal highlighted the difficulties of proving discrimination claims as a reason why it would be appropriate to expressly include in the legislation such provisions.

**Recommendation 21: It is recommended that the Government amend the four anti-discrimination Ordinances to include provisions on the standard and burden of proof:**

- In relation to the standard of proof, these should indicate that the plaintiff must prove that there was discrimination on the balance of probabilities;
- In relation to the burden of proof these should indicate that the plaintiff must establish facts from which discrimination can be inferred, and that once they have done so the burden of proof shifts to the defendant to show there was in fact no discrimination.

### (ii) AWARDING DAMAGES IN INDIRECT DISCRIMINATION CLAIMS

3.24 Currently, damages for indirect discrimination under 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, and causes a gap in the provisions in relation to awarding damages. It is also not justifiable as intention is not a required element to prove discrimination. Several organisations that agreed with the proposal in the consultation also pointed out that intention should not be a pre-condition to awarding damages for indirect discrimination.

**Recommendation 22: It is recommended that the Government repeal the provisions under the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance which require proof of intention to discriminate in order to award damages for indirect discrimination claims.**

## *Part 2: Higher priority issues requiring further research, consultation and education*

### A. Duty to promote and mainstream equality

- 3.25 A fundamental concern with Hong Kong's current anti-discrimination legislation is its primary focus on individual redress for discrimination claims, rather than addressing systemic and institutional discrimination or inequalities, such as through a specific duty requiring the Government and public authorities to promote equality and eliminate discrimination in all their work. Although the Government has put in place a number of measures to better promote substantive equality for different groups, the EOC believes that they are neither comprehensive nor sufficient, as they only relate to some protected characteristics such as sex or race; only apply to some Government bodies and public authorities; and do not have legal effect.
- 3.26 Meanwhile, there is ample evidence of continuing systemic inequality in Hong Kong for multiple groups, including ethnic minorities, persons with disabilities, and women. Further, international human rights obligations require jurisdictions to take proactive steps to achieve substantive equality for disadvantaged groups. In some comparable jurisdictions such as Great Britain, such specific duties to promote equality and eliminate discrimination have been introduced in their anti-discrimination legislation. The EOC also notes that there was substantial support for the proposal from organisations, particularly those representing ethnic minorities and women.
- 3.27 It is the position of the EOC that there should be a public sector equality duty. Given that such a duty would have a wide-ranging impact across multiple domains and pieces of legislation, the EOC believes that further research and public consultation is necessary as a first step to its introduction. This should consider a wide range of factors such as the scope of the duty; which Government bureaux and public authorities would the duty apply to; extent and method of legal enforceability; and the possible role of the EOC to monitor the duty and produce related guidance.

**Recommendation 23: It is recommended that the Government conducts a public consultation and research to introduce a public sector equality duty to promote equality and eliminate discrimination which applies to all the protected characteristics.**

#### **B. Protection from discrimination on grounds of nationality, citizenship and residency status**

- 3.28 There is currently no protection from discrimination under the RDO on grounds of nationality, citizenship, or residency status. Overall, this is a significant gap in protection which affects a large number and diverse groups of people, as there is ample evidence in Hong Kong that there are many situations where different racial groups face discrimination on grounds of nationality, citizenship or residency status. The lack of such protection is not compliant with international human rights obligations, and multiple United Nations bodies have made recommendations to the Government to extend such a protection. A number of similar international jurisdictions do provide similar protections from discrimination.

3.29 The EOC notes that the grounds of nationality and citizenship raise distinct concerns from residency status, and addresses them separately.

(i) NATIONALITY AND CITIZENSHIP

3.30 In relation to the grounds of nationality and citizenship, the EOC believes that there is sufficient justification to introduce protections from discrimination on such grounds, in light of Hong Kong's international human rights obligations; the fact that discrimination on grounds of nationality or citizenship is related to racial discrimination; and the evidence of such discrimination in Hong Kong. It is noteworthy that there was generally strong support from organisations for the EOC's proposals in this area, particularly from NGOs working in human rights, with ethnic minorities including asylum seekers and refugees, as well as NGOs working with women. A number of these responses referred to Hong Kong's international human rights obligations and cited evidence of discrimination. There were also a number of pertinent concerns to the proposals expressed by organisations, including from the banking sector. The EOC believes that such concerns could be adequately addressed in different ways, including through adding appropriate exceptions permitting discrimination where they serve a legitimate aim and are proportionate.

**Recommendation 24: It is recommended that the Government should conduct a public consultation and then introduce protection from discrimination on grounds of nationality and citizenship under the Race Discrimination Ordinance. The consultation should consider relevant issues including how nationality and citizenship is defined, and which exceptions relating to nationality and citizenship may be appropriate to be retained, repealed or introduced.**

(ii) RESIDENCY STATUS INCLUDING MAINLAND CHINESE

3.31 In relation to residency status in Hong Kong, the EOC believes that there should be protection from discrimination on such grounds. This protection would apply to all persons based on their residency status, not just mainland Chinese. The EOC notes there is compelling evidence of discrimination on this ground faced by a variety of groups, including new immigrants as well as asylum seekers and other protection claimants. There were also pertinent concerns to the proposals expressed by organisations in the tourism sector.

3.32 Nevertheless, the EOC also recognises that it is reasonable in some circumstances to differentially treat persons in Hong Kong based on their residency status, such as in granting political rights or determining criteria for eligibility for public services or resources. In such situations, it is important to consider the particular circumstances of each case, including whether any discriminatory impact was for a legitimate aim and proportionate.

3.33 The EOC notes the strong concerns raised during the public consultation in relation to this issue and mainland Chinese, including on freedom of expression, which may be caused by misinterpretation of the scope of the RDO's current protection or the legal effect of the EOC's proposals. For instance, the EOC's position is that some circumstances of intra-race discrimination (where a person treats someone of their own race less favourably than a person of another race) are already prohibited under the RDO, if race was the reason for the treatment. It is important to emphasise that the EOC believes these concerns can be adequately addressed by the legislation. Indeed, the existing structures of the RDO already do, and could in the event of amendment, take into account situations where it would be lawful to discriminate on grounds of residency. Other concerns can also be tackled in different ways, including through justifiable exceptions.

**Recommendation 25:** It is recommended that the Government conduct a public consultation then introduce protection from discrimination on grounds of residency status in Hong Kong under the Race Discrimination Ordinance. The consultation should consider all relevant issues including the possible scope of protections, whether existing exceptions regarding residency status should be repealed or amended, and whether any other specific exceptions may be appropriate. It is further recommended that the Government and the EOC should promote better understanding of the application of the RDO and what would be the effect of protections relating to residency status.

### C. Equality for families in terms of cohabiting relationships

(i) PROTECTION FROM MARITAL STATUS DISCRIMINATION: COHABITATION RELATIONSHIPS

3.34 Currently under the Sex Discrimination Ordinance, there is no express protection from discrimination for persons in a cohabiting relationship but are not married, whether it is heterosexual or homosexual couples. There is also currently no system of legal recognition of couples in cohabiting relationships in Hong Kong.

3.35 The absence of legal recognition of couples in cohabiting relationships, and effect of relevant legislation and policies, means that they face discrimination in many aspects of life, including employment benefits, taxation payments, immigration rights, public housing, inheritance and family rights. Meanwhile, this will likely impact an increasing number of people, given that the structures of families in Hong Kong and the attitudes of the public to different types of families are evolving, with more couples living in cohabiting relationships.

3.36 The situation in Hong Kong does not comply with international and possibly local human rights obligations to protect people from discrimination on the grounds of marital or relationship status, which includes couples that are in relationships but not married. A number of similar international jurisdictions do provide protection from discrimination and legally recognise cohabiting relationships. It is also noteworthy that recent

developments have led to certain circumstances where Hong Kong legislation does recognise cohabiting relationships, such as in protection against domestic violence, and making decisions regarding medical treatment on behalf of partners.

- 3.37 The EOC notes that there were strong concerns expressed on this issue from both organisations, including from religious bodies and employer groups, and individuals during the public consultation. In particular, the EOC fully recognises the importance of taking into account the concerns of religious groups and institutions regarding recognition of cohabiting relationships vis-à-vis their right to freedom of religion. These issues would need to be carefully taken into account in considering possible protections from discrimination and recognition of cohabiting relationships. The EOC believes that an appropriate balance can be achieved in the legislation between the rights of different groups, including through appropriate definitions and justifiable exceptions.
- 3.38 In principle, the EOC believes that persons in cohabiting relationships should be protected from discrimination on grounds of marital status under the SDO. However, this issue is much larger than just the anti-discrimination legislation, given that the absence of relationship recognition has impact across multiple pieces of legislation and policies. For anti-discrimination protection for persons in cohabiting relationships to be comprehensive, consistent and effective, the EOC also believes that there should be legal recognition for cohabitation relationships in Hong Kong.

**Recommendation 26: It is recommended that 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 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.**

(ii) PROTECTION FROM FAMILY STATUS DISCRIMINATION: COHABITATION RELATIONSHIPS

- 3.39 There is currently no protection for persons in cohabiting relationships from discrimination under the Family Status Discrimination Ordinance, where they care for an immediate family member such as their partner. In relation to former relationships, there is also no protection from discrimination where a person cares for an immediate family member from a former marriage or cohabiting relationship.

- 3.40 Given there are increasing numbers of persons in cohabiting relationships, as well as the fact that it is increasingly common for couples to separate by mutual consent (whether in marriages or cohabiting relationships), the EOC believes that there should be protection from family status discrimination for such persons where they care for their current or former family members, including from cohabitation relationships.
- 3.41 The EOC notes the strong concerns articulated on this issue from both organisations, particularly religious bodies and schools, and individuals during the public consultation. They expressed similar views that only the institution of marriage between a man and woman should be recognised, and that protection from discrimination should only be provided to married couples, even in relation to caring for family members. The EOC stresses that the focus of this proposal is not about recognition of same-sex relationships, but about protecting people from discrimination where they care for a family member, irrespective of whether there is a marriage, and whether or not that marriage or cohabitation relationship has ended.

**Recommendation 27: It is recommended that the Government conduct research and consult on the extension of protection under the Family Status Discrimination Ordinance to protection in relation to:**

- **Caring for immediate family members in cohabiting relationships;**
- **Caring for immediate family members of former spouses or former cohabiting partners.**

## CHAPTER 4: PROPOSALS ON OTHER ISSUES IN THE CONSULTATION

- 4.1 This Chapter provides our submissions on all the other Questions in the Consultation Document. Part 1 considers the Questions relating to the goals of the legislation and protected characteristics; Part 2 considers the Questions relating to the forms of prohibited conduct; Part 3 considers the Questions relating to the fields of prohibited conduct; Part 4 considers the Questions relating to promoting and mainstreaming equality; Part 5 considers aspects of court proceedings, as well as the powers and constitution of the EOC; and Part 6 considers the exceptions to unlawful discrimination.
- 4.2 On each issue, the EOC's position varies depending on the analysis of relevant factors as described in Chapter 2. On some issues, the EOC believes the Government should implement legislative reform, but the proposed reforms may not, for a variety of reasons, be considered as pressing as those discussed in Chapter 3. On some issues, the EOC believes it is unnecessary to make legislative reforms at this time, and on other issues the EOC believes it is not necessary to make legislative reforms.

### *Part 1: Goals of the legislation and protected characteristics*

#### **A. Consolidation and goals of the legislation**

(i) CONSOLIDATION OF LEGISLATION

- 4.3 The EOC consulted on whether the four anti-discrimination Ordinances should be consolidated into one anti-discrimination Ordinance, in order to simplify the legislation and, where appropriate, harmonise the protection across different characteristics. The EOC's position is that this would be the preferred approach, given the current lack of consistency between the Ordinances in some areas, that it would facilitate any possible additions of protected characteristics in the future, as well as in light of similar trends in comparable jurisdictions and with other legislation in Hong Kong.

**Recommendation 28: It is recommended that the Government consider consolidating the existing four anti-discrimination Ordinances into one anti-discrimination Ordinance in order to simplify and, where appropriate, harmonise protections from discrimination.**

(ii) GOALS OF THE LEGISLATION

- 4.4 The EOC consulted on whether the goals of the legislation should be set out in a purpose clause, which could assist the understanding, interpretation, and application of the legislation. The EOC believes that it would be preferable for consideration to be given to adding such a purpose clause. However, as the issue does not involve a substantive change in protection from discrimination, the EOC does not believe this is a higher priority at this time.

**Recommendation 29:** It is recommended that the Government consider whether a purpose clause should be added to the four anti-discrimination Ordinances to set out the goals of the legislation relating to eliminating discrimination and promoting substantive equality.

**B. Protected characteristics of sex and pregnancy**

(i) PROTECTED CHARACTERISTIC OF SEX

- 4.5 The EOC consulted on whether all the sex discrimination provisions should be amended to use gender neutral language, in order to make it easier to recognise that protection from sex discrimination applies to both women and men. Overall, the EOC recommends making such amendments to the Sex Discrimination Ordinance (SDO). However, this may not be as pressing as other amendments given that it does not involve substantive change in the protection from discrimination.

**Recommendation 30:** It is recommended that the Government amend the Sex Discrimination Ordinance provisions by using the neutral term “person” so that it is clearer that sex discrimination can apply equally to discrimination against women or men.

(ii) PROTECTED CHARACTERISTIC OF PREGNANCY

- 4.6 The EOC consulted on whether it would be preferable to make express reference under the SDO to a woman being protected from discrimination during maternity leave, in order to provide greater clarity and assist the public in understanding the legal obligations. At present, despite the absence of such express reference, the Hong Kong courts have given a liberal interpretation of pregnancy discrimination to include less favourable treatment during the period women are on maternity leave (from when they give birth to when they return to work), or after they return to work. It is also relevant to note that the Employment Ordinance expressly provides that it is unlawful to terminate a woman from her employment while she is on maternity leave. The EOC notes the strong support for this proposal from both organisations and individuals during the public consultation. However, as the proposal involves setting out in legislation the existing protection and not closing a gap in protection, the EOC believes this may not be as pressing as other proposals.

**Recommendation 31:** It is recommended that the Sex Discrimination Ordinance be amended to provide an express provision that women are protected from discrimination on grounds of maternity while they are on maternity leave.

- 4.7 The EOC also consulted the public on whether there should be express protection from discrimination on grounds of potential pregnancy where a woman is less favourably treated because she may become pregnant in the future. The Commission notes, with particular concern, the responses from a number of organisations representing foreign domestic workers, which report that some workers had been forced by employers or employment agencies to take contraceptives or to have pregnancy tests. In addition to being discriminatory, such acts also breach their human rights regarding sexual

autonomy and reproductive rights. Although the EOC has considered complaints relating to potential pregnancy discrimination as a form of sex discrimination against women, given the fact that some forms of this discrimination can also involve human rights abuses, the EOC believes that an express provision prohibiting potential pregnancy discrimination should be introduced.

**Recommendation 32: It is recommended that the Government introduce an express provision in the Sex Discrimination Ordinance prohibiting potential pregnancy discrimination.**

**C. Protected characteristic of disability**

4.8 The EOC consulted the public on whether the current definition and scope of what constitutes a disability is appropriate, or should be amended. In Hong Kong, similar to the Australian approach, the current scope of who is protected from disability discrimination is defined broadly to include minor and short-term illnesses such as influenza. This contrasts with the British approach which focuses on impairments that significantly affect one's life over the long term, rather than impairments that have a minor or short-term effect.

4.9 The EOC does receive a number of complaints relating to minor and short-term illnesses, and notes that some organisations supported a change in definition, citing for example that the current definition may facilitate abuse of the sick leave system. Nevertheless, it is arguable that what should be relevant is whether the condition is a reason for less favourable treatment, rather than the seriousness or duration of the condition. A significant number of disability-related organisations raised concerns that, should the proposal be enacted, it would reduce the level of current protection from discrimination. The EOC therefore believes that it is preferable to retain the current definition of disability at the moment.

**Recommendation 33: It is recommended that it is preferable at this time to retain the current definition of disability under the Disability Discrimination Ordinance.**

**D. Protected characteristic of family status**

4.10 The EOC consulted on whether the term "family status" should be reworded as "family responsibilities" to enhance clarity. The EOC notes that international human rights legislation and other jurisdictions use a variety of terms in relation to this protection, and that many organisations consider the current definition as appropriate in their consultation responses. This also would not involve any substantive change in the protections from discrimination.

**Recommendation 34: It is recommended that there be no change of the term 'family status' to 'family responsibilities' under the Family Status Discrimination Ordinance.**

## *Part 2: Forms of prohibited conduct*

### **A. Direct pregnancy discrimination**

- 4.11 The EOC consulted on whether, in relation to direct pregnancy discrimination in the SDO, the requirement of a comparator should be removed and aspects that arise from the pregnancy, such as sickness, should be incorporated into the definition. There is recognition internationally that in some situations of direct discrimination, such as in relation to pregnancy given that only women can become pregnant, there is no comparable situation. Other jurisdictions have also removed such comparators and provide discrimination protection for conditions arising from pregnancy. The EOC has dealt with complaints where respondent employers have dismissed women who have taken sick leave due to pregnancy-related sickness on grounds of poor performance. There was also substantial support for the proposal, especially from organisations, some of whom agreed that it was important that the legislation make clear that all less favourable treatment linked to pregnancy should be prohibited.

**Recommendation 35: It is recommended that the definition of direct pregnancy discrimination under the Sex Discrimination Ordinance should be amended by:**

- **Removing the requirement for a comparator; and**
- **Including less favourable treatment relating to the pregnancy, such as sickness.**

### **B. Equal pay for work of equal value for women and men**

- 4.12 The EOC consulted on whether there is a need for introducing specific equal pay for equal value provisions in the SDO. There is evidence indicating overall median pay gaps between women and men across many sectors, age groups and educational attainment. There was also considerable support for the proposal in the public consultation, particularly from organisations working with women, as well as from individuals. However, there is not as much evidence of whether there are pay gaps in relation to particular roles within sectors, which is an important basis of justifying equal pay for work of equal value provisions. It is therefore appropriate to reassess the evidence and whether there is the need for specific provisions.

**Recommendation 36: It is recommended that the Government conduct research as to whether, in particular in public or private sectors, there is evidence of unequal pay for work of equal value between women and men, and if so, what legislative or other measures may be appropriate.**

### **C. Disability discrimination**

- 4.13 The EOC consulted on whether a new category of discrimination arising from disability (such as needing to take significant amounts of unpaid leave for treatment) should be introduced. Through operational experience, the EOC believes that the above concerns

are already addressed in the DDO to some extent by the operation of section 3 of the DDO, which provides that if an act is done for two or more reasons, and one of the reasons is the disability of a person, then the act is taken to be done for the reason of disability. Therefore, the EOC believes that the current protections from direct and indirect disability discrimination provide sufficient protection.

**Recommendation 37: The EOC believes that the current protections from direct and indirect disability discrimination under the Disability Discrimination Ordinance provide sufficient protection, and it is unnecessary to introduce a new category of discrimination arising from disability at this time. The EOC will, however, continue to monitor the effectiveness of the direct and indirect disability discrimination provisions.**

#### **D. Harassment**

- 4.14 The EOC consulted on whether harassment should be prohibited in relation to all the protected characteristics, i.e. including sex, pregnancy, family status and marital status. Currently, there is express protection from harassment in relation only to the protected characteristics of race, disability, and sex in the context of sexual harassment. The EOC has reflected on the current protections and related evidence, and believes that harassment situations on the grounds of sex, pregnancy, family status, and marital status can currently usually be dealt with under the direct discrimination provisions.

**Recommendation 38: The EOC believes that it is not a priority at this time to introduce provisions prohibiting sex, pregnancy, marital status or family status harassment.**

- 4.15 Additionally, the EOC consulted on possible amendments to the current definitions of harassment on grounds of race and disability, and sexual harassment. The EOC is concerned that the definitions are inconsistent across the protected characteristics, and are not sufficiently clear. The EOC believes that it is appropriate for the definition of harassment to be harmonised for all forms of harassment, including sexual harassment. This is the approach taken in comparable jurisdictions, and there was considerable support from organisations on the proposals, particular on the issue of making the test for sexual harassment consistent with the test for racial and disability harassment, other than defining sexual harassment as concerning unwanted conduct of a sexual nature.

**Recommendation 39: It is recommended that the Government should amend in the Race Discrimination Ordinance, Disability Discrimination Ordinance and Sex Discrimination Ordinance:**

- **The definitions of racial, disability and sexual harassment to make them consistent, subject to sexual harassment requiring conduct of a sexual nature; and**
- **It should be made clear that for all the forms of harassment there is both a subjective and objective element to the definition.**

**E. Intersectional discrimination<sup>1</sup>**

- 4.16 The EOC consulted on whether there should be express provisions on intersectional discrimination, including on the basis of two or more protected characteristics. The EOC has considered the legal issues in further detail, and believes that the current provisions of the anti-discrimination Ordinances are sufficient to apply in possible situations of intersectional discrimination and for which there is no equivalent in similar jurisdictions. Such provision states that where an act is done for two or more reasons, and one of the reasons is the protected characteristic of the person, then the act will be taken to be done for the reason of the protected characteristic. Given this, there is less justification for introducing distinct provisions on intersectional discrimination, and that they are not necessary at this time. The EOC will, however, continue to monitor the situation regarding intersectional discrimination and the adequacy of the current provisions.

**Recommendation 40: In relation to intersectional discrimination, the EOC believes that current provisions relating to protection from discrimination where it is done because of more than one protected characteristic provide sufficient protection, and the introduction of provisions on intersectional discrimination is not necessary at this time.**

**F. Other unlawful conduct**

(i) LIABILITY OF PRINCIPALS AND AGENTS

- 4.17 The EOC consulted on whether 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. In Hong Kong, such a defence currently exists only for employers' liability, which contrasts with approaches in similar jurisdictions. The proposal also saw strong support in the consultation response from organisations, several of whom stated that there should also be guidance developed on what would constitute reasonable practicable steps to prevent discrimination.

**Recommendation 41: It is recommended that the Government amend the provisions relating to liability of principals under the four anti-discrimination Ordinances such they have a defence where they took reasonably practicable steps to prevent discrimination.**

(ii) REQUESTING OR REQUIRING INFORMATION FOR A DISCRIMINATORY PURPOSE

- 4.18 The EOC consulted on whether the prohibition on requesting information for a discriminatory purpose relating to disability discrimination should be extended to all existing protected characteristics. The EOC believes this would ensure that there are harmonised and consistent levels of protection. In the consultation, many supporting organisations noted their belief that it would provide consistency in anti-discrimination protection.

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<sup>1</sup> 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 a combination or intersection of several characteristics.

**Recommendation 42: It is recommended that the Government make amendments to the Sex Discrimination Ordinance, Race Discrimination Ordinance and Family Status Discrimination Ordinance to provide a prohibition on requesting information for a discriminatory purpose.**

*Part 3: Fields of Prohibited Conduct*

**A. Prohibition on discrimination in sporting activities**

- 4.19 The EOC consulted on whether the current express protection from disability discrimination in sporting activity should be extended to all the protected characteristics. Currently, there is only relevant express protection in relation to disability discrimination. Although there are some circumstances in which participation in sporting activity may be covered under the provision of goods, services and facilities, there may be others where the related provisions would not apply, including in actions by referees, coaching and the administration of sport. The EOC believes that it is preferable to have express protection from discrimination relating to participation in sporting activities across the anti-discrimination Ordinances for reasons of consistency.

**Recommendation 43: It is recommended that the Government make amendments to the Sex Discrimination Ordinance, Race Discrimination Ordinance and Family Status Discrimination Ordinance to provide protection from discrimination in sporting activity.**

**B. Other issues relating to harassment**

(i) LIABILITY OF EDUCATIONAL ESTABLISHMENTS FOR HARASSMENT

- 4.20 The EOC consulted on whether new harassment provisions should be introduced for all the protected characteristics which provide liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action. Currently, there is only liability on a student of an educational establishment who sexually harasses another student. The EOC has further considered the legal issues, and, in our view, there may already be such liability for educational establishments in relation to racial, disability, or sexual harassment. Under the education provisions of the DDO, RDO and SDO, it is unlawful for educational establishments to subject a student to “any other detriment”; the EOC views that this could include situations where the educational establishment is put on notice of harassment of a student by another student, and then fails to take action to prevent the harassment and discipline the harasser.

**Recommendation 44: Given the scope of the existing provisions, the EOC believes that it is unnecessary at this time to provide liability on educational establishments where they are put on notice of sexual, racial or disability harassment between students and fail to take reasonable action.**

(ii) LIABILITY OF SERVICE USERS FOR HARASSING OTHER SERVICE USERS

- 4.21 The EOC consulted on whether new harassment provisions should be introduced for all the protected characteristics which provide liability of service users for harassing other service users. No such liability exists in similar jurisdictions. Further, in Hong Kong the criminal law may apply in some such situations, for example if sexual harassment conduct amounts to sexual assault. And, generally speaking, the anti-discrimination legislation seeks to provide protection in situations where there are relevant relationships involving care and responsibility, such as employment and education, rather than general activities in public spaces.

**Recommendation 45: It is recommended that it is unnecessary to introduce provisions prohibiting sexual, racial or disability harassment of service users by other service users at this time.**

*Part 4: Promoting and Mainstreaming Equality*

- 4.22 The EOC consulted on issues relating to the conceptualisation and definition of special measures. First, the EOC believes that, as in similar international jurisdictions, it would be preferable to conceptualise special measures as proactive measures to promote substantive equality, rather than exceptions to the principle of discrimination (and therefore a lawful form of discrimination). There was substantial support for this proposal from organisations, a number of whom referred to the fact that international human rights obligations include provisions permitting special measures, and therefore their importance is recognised.
- 4.23 In addition, there is a lack of clarity in the current definition of special measures on their purposes, scope of the provisions, and their limits in terms of being lawful. This can be contrasted to approaches taken in similar jurisdictions, which are clearer in terms of their purpose, circumstances in which they can be used, and when they should end. In the consultation responses, there was also strong support from organisations on this proposal.

**Recommendation 46: It is recommended that the Government amend the special measures provisions under the four anti-discrimination Ordinances by:**

- **Conceptualising and positioning them within the discrimination legislation as measures to promote substantive equality rather than exceptions to non-discrimination; and**
- **Making the definition of special measures clearer in terms of their purpose, circumstances in which they can be used and when they should end.**

*Part 5: Aspects of court proceedings, powers, and constitution of the EOC*

**A. Aspects of court proceedings**

(i) EOC RECOVERING ITS LEGAL COSTS IN CERTAIN CASES

- 4.24 The EOC consulted on whether the discrimination law should be amended to ensure the EOC can recover its legal costs where claimants are awarded costs. Currently, the anti-discrimination Ordinances provide that the EOC can recover its expenses (for example preparing an expert report), but not the legal costs (for example the costs of acting as solicitors on behalf of a claimant). This is different from other international jurisdictions. A number of organisations also expressed their support for the proposal, with one noting that the EOC should not suffer financially when legal assistance is provided in successful claims.

**Recommendation 47: It is recommended that the Government amend the four anti-discrimination Ordinances to provide that the EOC can recover its legal costs where it provides legal assistance to a claimant, the claimant is successful and is awarded costs.**

(ii) EOC INITIATING PROCEEDINGS IN ITS OWN NAME FOR DISCRIMINATORY PRACTICES

- 4.25 The EOC consulted on whether, for reasons of consistency with its other powers, the EOC should be able to initiate proceedings in its own name for discriminatory practices. Currently, the EOC cannot commence proceedings in its own name in relation to discriminatory practices, which contrasts with proceedings for the following alleged breaches: requesting someone to provide information; discriminatory advertisements; instructions to discriminate and pressure to discriminate. The EOC made submissions to the Government on this issue in 1999 and in 2000, to which the Government agreed in principle though to date it has not done so. In the consultation responses, a number of organisations supported the EOC's proposal, with one noting that it is important that the EOC has such a power where, for example, a victim of discrimination is fearful of bringing proceedings.

**Recommendation 48: It is recommended that the Government should make amendments to the four anti-discrimination Ordinances to enable the EOC to initiate proceedings in its own name for discriminatory practices.**

## **B. Powers and constitutional arrangements of the EOC**

(i) POWERS OF THE EOC

- 4.26 The EOC consulted on a number of issues relating primarily to clarifying its powers or setting in legislation what the EOC already does in practice.
- 4.27 The first issue involved whether the discrimination law should contain an express power that the EOC may produce non-statutory guidance. Both in international jurisdictions as well as locally with some other statutory bodies, the power to produce such guidance is expressly provided in legislation. In practice, the EOC already does issue such non-statutory guidance from time to time.

**Recommendation 49: It is recommended that the Government amend the four anti-discrimination Ordinances to provide that the EOC has the power to produce non-statutory guidance on the anti-discrimination Ordinances.**

4.28 The second issue concerned whether formal investigation provisions should set out more clearly the distinction between general and specific investigations. General investigations relate to a particular sector, and specific investigations relate to a specific organisation or individuals. Currently, although all of the anti-discrimination Ordinances provide that the EOC may conduct formal investigations into any matter which relates to its functions, the provisions are not very clear in indicating the difference between the two types of investigations. This contrasts with approaches in comparable jurisdictions. In the public consultation, there was strong support from organisations, with most agreeing it would help to make the legislation clearer.

**Recommendation 50: It is recommended that the Government amend the four anti-discrimination Ordinances to set out more clearly the differences between the two different types of formal investigations (general and specific) that can be conducted.**

4.29 The third issue involved whether, in relation to formal investigations, provisions permitting voluntary binding undertakings<sup>2</sup> should be introduced and be enforceable by the EOC. Currently, there is no such provision, which can be contrasted to the powers of the Competition Commission, as well as in comparable jurisdictions. The Government has previously agreed in principle to this proposal, but has not enacted the amendment. The proposal also saw strong support in the public consultation responses from organisations, of whom one legal group said that the undertakings would be a flexible alternative to litigation where both parties negotiate the terms of the agreement or action plan.

**Recommendation 51: It is recommended that the Government amend the four anti-discrimination Ordinances to provide the EOC with the power to enter into voluntary binding undertakings with organisations following formal investigations. It is further recommended that the EOC should have the power to enforce those undertakings when they are not complied with.**

4.30 The fourth issue looked at whether the EOC's powers to conduct research and education in relation to all the protected characteristics should be expressly set out in the discrimination law. Currently, such powers are only mentioned in the SDO, without equivalent provisions under the other anti-discrimination Ordinances. This can be contrasted to the approaches in other jurisdictions. In practice, the EOC does carry out

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<sup>2</sup> Refers to voluntary but binding undertakings or contracts, where formal investigations are conducted and it is identified that a public authority or private body may have committed acts of discrimination. Such undertakings would be a mechanism for the organisations or individuals to agree actions and help prevent future discrimination. It would also help to avoid the costs and time of litigation.

research and educational work in relation to all of the protected characteristics. There was considerable support on the proposal from organisations in the public consultation.

**Recommendation 52: It is recommended that the Government amend the Disability Discrimination Ordinance, Race Discrimination Ordinance and Family Status Discrimination Ordinance to provide that the EOC has powers to conduct research and education in relation to those Ordinances.**

4.31 The fifth issue concerns the EOC's powers to monitor and advise the Government on issues and policies relating to equality and discrimination. Currently, such powers are not expressly provided in the legislation. Although the EOC already does, in practice, periodically monitor and provide independent advice to Government and the Legislative Council on the effect of proposed legislation or policy issues that will or may have an impact on any issue relating to equality. Further, the EOC does in practice monitor and provide submissions to the United Nations on the Government's compliance with international human rights obligations applying to Hong Kong. In relation to comparable overseas jurisdictions as well as other local statutory bodies, some similar powers are expressly set out in legislation. There was also considerable support for the proposal from organisations, including a group of NGOs and legislative councillors working with persons with disabilities who sent a joint submission highlighting the helpfulness of explicitly setting out the role of the EOC in monitoring compliance with the Convention on the Rights of Persons with Disabilities.

**Recommendation 53: It is recommended that the Government amend the four anti-discrimination Ordinances to 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.**

4.32 The sixth issue examined whether the EOC should have express power to apply to intervene in or appear as amicus curiae (friend of the court) in proceedings relating to any relevant discrimination issue. Such powers are not expressly provided in the anti-discrimination legislation. In practice the EOC has applied to courts and intervened or appeared as amicus curiae in a number of proceedings to provide independent expert advice to the courts on any issue relating to equality and discrimination. Such powers are expressly set out in relation to some other statutory bodies as well as in some international jurisdictions. There was also considerable support from organisations in the consultation responses.

**Recommendation 54: It is recommended that the Government amend the four anti-discrimination Ordinances to include express powers of the EOC to apply to intervene or appear as amicus curiae in relevant proceedings.**

- 4.33 The last issue explored whether the EOC’s power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC. In practice, any person or organisation, including the EOC, that believes a Government or public authority has acted unlawfully can apply to the courts to challenge that by way of judicial review. Currently, the judicial review power of the EOC is referred to indirectly only in the SDO. The EOC believes that such powers should be set out expressly in legislation.

**Recommendation 55: It is recommended that the Government amend the four anti-discrimination Ordinances to provide that the EOC has the power to bring judicial review proceedings relating to claims of discrimination under the anti-discrimination Ordinances.**

(ii) CONSTITUTIONAL MATTERS

- 4.34 The EOC consulted the public on various issues relating to the legal provisions on the way in which the EOC operates.
- 4.35 The first issue looks at whether 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. Although there is no requirement in legislation to produce written strategic or corporate plans, the EOC already does this to a certain extent by producing in 2013 a Three-Year Work Plan. Producing a strategic plan is common in comparable jurisdictions, and important in determining the strategic direction of the Commission’s work and for stakeholder engagement.

**Recommendation 56: It is recommended that the Government amend the four anti-discrimination Ordinances to provide that the EOC should produce strategic plans that set out its strategic priority areas of work over several years, and that the EOC consults the public on the draft strategic plans.**

- 4.36 The second issue is concerned with providing for the maintenance of the EOC’s independence from the Government. As the EOC has a role in enforcing compliance with the anti-discrimination Ordinances, which apply to the Government and public authorities, it is vital that the EOC remains independent of Government in principle and in practice. The importance of independence from Governments of Equality and/or Human Rights Institutions is also emphasised by the United Nations Paris Principles. There is already some recognition of the independent status of the EOC in the SDO, but the further provisions which relate specifically to defining the elements of independence may be helpful. There was also strong support for the proposals from organisations.

**Recommendation 57: It is recommended that the Government give further consideration as to whether a specific provision defining the elements of independence of the EOC would be appropriate, in the four anti-discrimination Ordinances.**

4.37 The third issue concerns the appointment process and experience of EOC Board Members. Currently, there is no process of advertising or an independent panel to interview and appoint EOC Board Members, unlike the process for the EOC Chairperson. There are also no provisions in the anti-discrimination Ordinances relating to the experience of Board members, which is different from the approach in similar jurisdictions, and one statutory body in Hong Kong. There was strong support for the proposals from both organisations and individuals, which the EOC believes are appropriate for reasons of clarity and to improve the EOC's effectiveness.

**Recommendation 58: It is recommended that the Government give consideration to the introduction of provisions in the four anti-discrimination Ordinances on:**

- **The process for the appointment of board members relating to publicly advertising positions or utilising an independent panel;**
- **the experience that may be relevant to the appointment of board members, including on issues relating to equality in diverse sectors.**

4.38 The fourth issue concerns maintaining confidentiality of information regarding complaints of discrimination. In order to ensure the integrity and effectiveness of the investigation and conciliation process, based on operational experience, the EOC believes that it is important that the principles of confidentiality are adhered to, and that information obtained during the process is not disclosed to third parties such as the media. This includes confidentiality by all the parties involved in the complaint, as well as by the EOC in not disclosing information.

**Recommendation 59:**

**It is recommended that the Government consider amending the four anti-discrimination Ordinances to introduce a provision which requires confidentiality to be maintained, by the parties and the EOC, of all information obtained during the investigation and conciliation process, except as may be necessary to disclose to professional advisors, law enforcement agencies or as required by law.**

(iv) ESTABLISHMENT OF A HUMAN RIGHTS COMMISSION

4.39 There has been regular discussion in the Hong Kong society on the need to establish a Human Rights Commission, which has also been recommended by various UN bodies as well as the EOC. In relation to the consultation responses, a majority of organisations agreed with the proposal. There was strong support particularly from NGOs working with women, ethnic minorities and on human rights, as well as from legal organisations. Given the wide scope and complexity of the issues which are much broader than the reform of protections under the four anti-discrimination Ordinances, it would be preferable for the Government to conduct separate detailed research and public consultation on those issues.

**Recommendation 60: It is recommended that the Government should give consideration to the establishment of a Human Rights Commission by conducting separate detailed research and public consultation on those issues.**

*Part 6: Exceptions*

4.40 The EOC examined the existing exceptions in the anti-discrimination Ordinances and believes that there are a number of exceptions which the Government should consider amending or repealing. In reviewing the exceptions in the anti-discrimination legislation, the EOC's key concerns are if the exceptions pursue a legitimate aim and are proportionate in the means by which they achieve that aim.

**A. Grouping of exceptions to make the legislation clearer**

4.41 The EOC consulted on whether the exceptions should be grouped in one place to enhance clarity. Currently, the exceptions are located in several different parts of the anti-discrimination Ordinances, making them difficult to navigate. The EOC believes it would be preferable if all the exceptions are set out in one part of the legislation. However, as this would not involve a substantive change in the protections from discrimination, the EOC does not believe this is a higher priority.

**Recommendation 61: It is recommended that the Government give consideration to grouping all the exceptions together in the Schedules to the four anti-discrimination Ordinances to make the legislation clearer.**

**B. Genuine Occupational Qualifications (GOQs)**

4.42 There is currently no general test of whether an occupational qualification relating to a characteristic is a GOQ. The EOC consulted on reforming the GOQs to have a single and consistent definition across all protected characteristics. Some organisations provided evidence in the consultation response of how the reformed GOQ exception might improve their protection against race discrimination.

4.43 Specifically in relation to disability discrimination, in light of the EOC's view that there should be a duty on employers to make reasonable accommodation for their employees (as discussed in Chapter 3), the EOC believes that the GOQ exception as it relates to persons with disabilities should be accordingly amended such that it does not apply where reasonable accommodation can be made.

**Recommendation 62: It is recommended that the Government amend the definitions of Genuine Occupational Requirements (GOQs) in the Sex Discrimination Ordinance, Disability Discrimination Ordinance and Race Discrimination Ordinance. It is recommended that they are 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 should state that it does not apply where a reasonable accommodation can be made to perform the occupational requirement.

**C. Incorporate discriminatory training exceptions in special measures exceptions**

- 4.44 In all the anti-discrimination Ordinances there are currently exceptions relating to discriminatory training by employers or trade union organisations. The EOC believes it would not be necessary to have these specific exceptions, as the proposed wording of the amended special measure provisions (earlier discussed) would be wide enough to include training.

**Recommendation 63: It is recommended that the Government should repeal the discriminatory training exceptions and incorporate it as part of the special measures exceptions in all four anti-discrimination Ordinances.**

**D. Amending the exception relating to charities**

- 4.45 All the anti-discrimination Ordinances contain exceptions permitting discrimination by charities that provide benefits only to persons with the protected characteristics. There is, however, no requirement that the provision of such benefits is for a legitimate aim and proportionate. In the consultation response, several organisations raised concerns on the possible effect of an amendment, including on defining charities, and the possible implications of requiring a legitimate aim and proportionality. Given this, the EOC believes it would therefore be important to conduct further consultation with relevant stakeholders on this issue.

**Recommendation 64: It is recommended that the Government consult further with key stakeholders on whether or not any amendment to the charities exception in the four anti-discrimination Ordinances is appropriate.**

**E. Review the Small House Policy**

- 4.46 The New Territories Small House Policy discriminates against women, and the SDO, FSDO, and the RDO all contain exceptions making such discrimination lawful. In the consultation response, the vast majority of organisations and individuals supported the review of the policy, with a number of organisations stating that the policy should be repealed as it clearly discriminates against women and violates international human rights obligations on gender equality.

**Recommendation 65:** It is recommended that the Government comprehensively review the Small House Policy and consider whether the discriminatory aspects of the policy and the exceptions in the Sex Discrimination Ordinance, Race Discrimination Ordinance and Family Status Discrimination Ordinance should be repealed.

**F. Exceptions relating to sex**

(i) EXCEPTIONS RELATING TO HEIGHT, WEIGHT AND SURVIVING SPOUSES

4.47 Under the SDO, there remain exceptions relating to sex and requirements for height or weight; and granting pension benefits to surviving spouses and children of deceased public officers. The EOC does not believe that there is sufficient justification to retaining these blanket exceptions. However, in the granting of pensions to surviving spouses and children of deceased public officers, the EOC notes the Government’s reasoning for its necessity (as there are still children of officers appointed before March 1993 receiving pensions), and believes that the Government should repeal the exceptions as soon as there are no longer persons receiving pensions pursuant to the discriminatory provisions.

**Recommendation 66:** It is recommended that the Government repeal the exceptions in the Sex Discrimination Ordinance (SDO) relating to sex and:

- Requirements for height or weight (Item 1(a) of Part 2 of Schedule 5 SDO);
- Granting pension benefits to surviving spouses and children of deceased public officers (Item 7 of Part 2 of Schedule 5 SDO).

(ii) NUMBERS OF MEN AND WOMEN EMPLOYED IN THE CORRECTIONAL SERVICES DEPARTMENT

4.48 Currently in the SDO, there is an exception permitting sex discrimination in relation to the number of persons of each sex recruited to or holding office or class of office, which the Government indicated is particularly relevant to the Correctional Services Department and their operational needs. In the consultation response, some groups noted that the exception was appropriate, pursuant to the Prison Rules which require that persons in custody shall only be attended to or searched by an officer of the same sex. The EOC notes these concerns, but believes that such circumstances can be addressed through the existing GOQ exceptions as well as the effect of the “statutory exception” under the SDO.<sup>3</sup> Therefore, there is no need to retain a blanket exception.

**Recommendation 67:** It is recommended that the Government repeal the exception permitting discrimination on grounds of sex in relation to the numbers of persons of each sex recruited to or holding office or class of office (Item 1(b) of Part 2 Schedule 5 of the Sex Discrimination Ordinance).

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<sup>3</sup> The effect of the statutory exception is that if there is a provision in another piece of legislation which specifically permits sex discrimination, the prohibition on sex discrimination does not apply to that particular issue.

(iii) EXCEPTION RELATING TO SAFEGUARDING SECURITY UNDER THE SDO

4.49 There is an exception in the SDO permitting discrimination on grounds of sex for acts done for the purpose of safeguarding the security of Hong Kong. The EOC believes the Government should provide evidence as to the necessity of this exception. The EOC is concerned that the exception does not require the acts to be proportionate; such views were also reflected by some organisations in their consultation responses.

**Recommendation 68: It is recommended that the Government review the exception under section 59 of the Sex Discrimination Ordinance permitting sex discrimination in relation to safeguarding the security of Hong Kong, as to whether it is appropriate to retain or repealed, and if it is retained whether it should be amended to include a proportionality requirement.**

(iv) EXCEPTION PERMITTING SEX DISCRIMINATION IN EMPLOYMENT ON GROUNDS OF RELIGION

4.50 Currently under the SDO, there are exceptions relating to sex discrimination where it relates to either employment or a qualification for an organised religion, which applies where the discrimination is necessary to comply with the doctrines of the religion, or to avoid offending the religious susceptibilities common to its followers. The EOC consulted on whether such an exception should be extended to cover marital status discrimination as well. In the consultation, a significant majority of organisations, many of whom were religious organisations, agreed with the proposal. Others noted that an extension of the exception stated should be narrowly construed and should satisfy a test of a legitimate aim and proportionality. The EOC believes that it is important to respect the right to freedom of religion, which should be balanced with the right of others not to face discrimination. Overall, the EOC believes that the issue should be the subject of public consultation, in order the all relevant stakeholders and views can be provided. The consultation could be part of the consultation on possible reforms to protection from marital status discrimination under the SDO relating to cohabiting relationships, and whether there is the need for any exceptions, as described in Chapter 3.

**Recommendation 69: It is recommended that the Government consult the public on whether there is evidence and justification for an extension of the religious exception in section 22 of the Sex Discrimination Ordinance in the area of employment, to the ground of marital status.**

## **G. Exceptions relating to family status**

- 4.51 The FSDO provides an exception which permits discrimination in relation to insurance premiums on grounds of a person's family status of having the responsibility to care for an immediate family member. However, the EOC does not believe there is evidence or reasons to justify having a different level of insurance premiums for persons having to care for immediate family.

**Recommendation 70: It is recommended that the Government repeal the exception in relation to insurance in section 38 of the Family Status Discrimination Ordinance.**

## **H. Exceptions relating to disability**

- 4.52 The DDO contains exceptions relating to provisions under the Minimum Wage Ordinance (MWO) which permit persons with disabilities to be paid less than the minimum wage where they have been assessed as having less than full productivity. The intent of the exception, as explained by the Government, is to assist persons with disabilities who do not have full productivity to obtain or retain work. An important safeguard is that only the person with disabilities can request the assessment, not the employer. In the public consultation, there were a number of organisations working with persons with disabilities who provided responses, with very divergent views as to whether the productivity assessment system and exceptions should be repealed or retained.

**Recommendation 71: It is recommended that the Government continue to monitor on a periodic basis the productivity assessment system for persons with disabilities in employment, and determine what action if any may be appropriate including in relation to the exception under Items 1 to 3 of Schedule 5 of the Disability Discrimination Ordinance.**

## **I. Exceptions relating to race**

- 4.53 The RDO contains an exception relating to the terms and conditions by which a person is employed at a Hong Kong establishment from overseas and the position requires special skills, knowledge or experience not readily available in Hong Kong. The EOC does not believe this exception is necessary, and issues relating to differences in the employment terms and conditions of overseas recruits compared to other persons should be dealt with on a case-by-case basis under the existing direct and indirect race discrimination provisions. This is in line with approaches in other comparable jurisdictions.

**Recommendation 72: It is recommended that the Government repeal section 13 of the Race Discrimination Ordinance which permits discrimination in employment conditions for persons from overseas with special skills, knowledge or experience.**

- 4.54 The RDO also provides an exception which permits differences in terms of employment for local or overseas staff for specified public positions. The exception is in place as, in the past, there were permissible differences in employment terms based on whether one was from overseas. In relation to the consultation response, there was strong support from organisations to repeal the provisions, with some noting that it permits racial discrimination between those from Hong Kong and overseas. The EOC believes that the Government should review what steps can be taken to eliminate any differences in such terms of employment in order that the inequality in treatment can be ended and the exception repealed.

**Recommendation 73: It is recommended that the Government repeal as soon as possible the exceptions in section 14 and Schedule 2 of the Race Discrimination Ordinance which permits differences in terms of employment for overseas and local staff.**

## **CHAPTER 5: AREAS WHERE REFORMS HAVE BEEN MADE**

1. The EOC is pleased that there are several issues where the Government has implemented legislative reforms to the four anti-discrimination Ordinances since the public consultation on the DLR. As the specific areas described below have been implemented by the Government, no further action is required.
  - A. Introduction of new provisions to prohibit sexual harassment by customers of service providers, including liability for harassment on Hong Kong-registered ships and aircraft in relation to the provision of goods facilities and services [Sex Discrimination (Amendment) Ordinance 2014]
  - B. Issuance by the EOC of enforcement notices for discrimination practices in relation to disability claims [Statute Law (Miscellaneous Provisions) Ordinance 2014]
  - C. Protection of EOC members and staff from personal liability where they act in good faith [Statute Law (Miscellaneous Provisions) Ordinance 2014]
  - D. Repeal of exceptions related to sex and marital status discrimination under the SDO in relation to:
    - Discrimination in the reservation of positions for men in the Police Tactical Unit: Item 1(c) Part 2 of Schedule 5 SDO;
    - Discrimination in weapon training: Item 1(d) Part 2 of Schedule 5 SDO;
    - Discrimination between persons of different marital status in the provision of reproductive technology procedure as section 56B of the SDO has incorporated this exception: Item 4, Part 2 Schedule 5 SDO;
    - Discrimination between persons of different marital status arising from the provision of any services relating to the adoption of children as section 56C of the SDO has incorporated this exception: Item 5, Part 2 Schedule 5 SDO;
    - Marital status discrimination relating to granting of gratuities to unmarried widows of police officers who die or receive injuries: Item 8, Part 2 Schedule 5 SDO.[Statute Law (Miscellaneous Provisions) Ordinance 2014]