

Discrimination Law Review

Submissions to the Government



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

March 2016

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FOREWORD

It is a fitting moment for the Equal Opportunities Commission (EOC) to be publishing its submissions to the Government on the Discrimination Law Review. Today it is almost 20 years since the EOC commenced operating, and since the first anti-discrimination legislation came into effect in 1996.

The right to equality is a fundamental human right and the anti-discrimination legislation is a vital means to ensure that everyone in society is protected from discrimination, but also has equal opportunities to participate fully in work, education, and other aspects of public life. The legislation has not only been important to ensure that people can seek justice where they have been discriminated against, but also helped to transform public and organisations' attitudes towards issues of equality for women, persons with disabilities, ethnic minorities, and persons who care for family members.

However, it is also important to periodically reflect on whether the legislation continues to meet the needs of people in Hong Kong, which is why in March 2013 the EOC embarked on its first comprehensive review of all the anti-discrimination legislation.

The operational experience of the EOC and evidence provided by responses to the public consultation, highlight that there are a number of areas which the current legislation cannot address. For example there is no protection from race discrimination where the Government is exercising its functions or powers; from sexual harassment of a volunteer in a workplace if they are not employed, or from disability discrimination in relation to voting or standing for election.

It is also important to highlight that, as all societies, Hong Kong society is constantly evolving which often impacts on issues relating to equality of the particular groups the anti-discrimination legislation seeks to protect. For example there are more women that are breastfeeding their newborn children and therefore are impacted by possible discrimination relating to breastfeeding; there are more persons with visual disabilities that wish to use guide dogs to help them participate in life, and would benefit from express protection from discrimination when using them; and there are many more couples and families living in cohabiting relationships, but they face discrimination in numerous aspects of their lives from employment, immigration to family rights.

The EOC has taken those factors and many others into account in making these submissions to the Government. It has also carefully analysed the very large number of responses the EOC received of over 125,000 from both organisations and individuals. These have provided valuable evidence, legal reasoning and general views on all the issues consulted on, and we thank all those who have taken the time to send responses.

After taking into account all factors, the EOC believes that there are a number of areas where the anti-discrimination legislation should be reformed by amendments to the legislation, and where appropriate further detailed consultation and research. These proposals relate to all the groups protected by the legislation and therefore we believe everyone in Hong Kong would benefit from them: from introducing a duty to make reasonable accommodation for persons with disabilities; providing a right to return to work for women after maternity leave; to introducing protection from discrimination on grounds of nationality, citizenship and residency status.

The EOC looks forward to discussing our proposals with the Government and all stakeholders. Such continuing dialogue is crucial in order that any legislative amendments in the future are not only effective, but also take into account everyone's diverse views. This submission does not mark an end, but rather the start of the next phase in the work to achieve greater equality for all in Hong Kong. We look forward to working with you.

A handwritten signature in black ink, appearing to be 'Y.N. Chow', with a stylized, flowing script.

York Y.N. Chow
EOC Chairperson
March 2016

ACRONYMS AND ABBREVIATIONS

AHRC	Australian Human Rights Commission (Australia)
BORO	Bill of Rights Ordinance (Cap. 383)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRPD	Convention on the Rights of Persons with Disabilities
DDO	Disability Discrimination Ordinance (Cap. 487)
DLR	Discrimination Law Review
EHRC	Equality and Human Rights Commission (Great Britain)
EOC	Equal Opportunities Commission
EU	European Union
FSDO	Family Status Discrimination Ordinance (Cap. 527)
GOQ	Genuine Occupational Qualification
ICAC	Independent Commission Against Corruption (ICAC)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-Governmental organisations
RDO	Race Discrimination Ordinance (Cap. 602)
SDO	Sex Discrimination Ordinance (Cap. 480)
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund

INTRODUCTION

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 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 21st century Hong Kong in which the society and issues of equality are evolving. As a result, in March 2013 the EOC launched the Discrimination Law Review (DLR) 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 public consultation exercise which took place from 8 July 2014 to 31 October 2014. The purpose of the public consultation was to take into account the evidence, experience and reasoning of the public in relation to all the issues raised, as well as to educate the public about the issues.
4. This was the first time the EOC has conducted a comprehensive review of all the existing four anti-discrimination Ordinances, and as a result there were many issues consulted on with 77 questions in the consultation document (the "Consultation Document").
5. The consultation generated an enormous level of interest from a wide range of sectors of society. A very large number of 125,041 written responses from individuals and organisations were received, representing many different groups and interests. Taking into account the fact that some responses were sent on behalf of a group of individuals and/ or organisations there were 238,422 views provided.
6. This document is our submissions to the Government on all the issues raised by the Questions in the Consultation Document, and some other key points raised in the consultation responses. The submissions set out many areas where the current anti-discrimination Ordinances should in our view be modernised to improve the protections from discrimination for everyone in society. As discussed below, we have prioritised some of the issues which we believe raise more serious or urgent attention with legislative reform. For example, the EOC believes there should be better protections for women in relation to areas such as pregnancy and sexual harassment; for

persons with disabilities in areas such as providing a duty to make reasonable accommodation; providing more comprehensive protection from racial and related discrimination for example by including coverage of nationality, citizenship and residency status; and providing protection from discrimination and related rights to couples in cohabiting relationships.

7. These submissions should be read together with the report on responses to the public consultation which are being published at the same time ("Report on Responses"). The Report on Responses describes in a factual manner the responses we received from all stakeholders, both organisations and individuals. This includes both quantitative figures on the responses, as well as qualitative descriptions of some of the main reasons provided for supporting or not supporting proposals.
8. The structure of these submissions is as follows. Chapter 1 provides our analysis of the responses to the public consultation in terms of the major patterns, as well as their relevance and implications for our submissions to the Government. This is linked to but different from the Report on Responses which provides a factual summary of the responses from both organisations and individuals. Chapter 1 also provides an analysis of some other key issues that have been raised in the consultation responses which are not directly related to the Questions in the Consultation Document. For example a number of consultation responses called for new protected characteristics to be added to the anti-discrimination legislation in Hong Kong such as age, sexual orientation, gender identity and religion. This is also relevant to research the EOC has recently conducted on considering introducing anti-discrimination legislation relating to new protected characteristics.
9. Chapter 2 describes the main factors that the EOC has taken into account in determining its position on the issues, whether those factors support or do not support proposed reforms. This is discussed in order that the public can better understand how the EOC has analysed and prioritised the issues for proposed legislative reform.
10. Chapter 3 provides our submissions on what we believe are higher priority issues for the Government to implement reforms, because they raise more urgent and serious concerns, based on the EOC's analysis as described in Chapter 2. The issues relate to a wide variety of aspects of the four anti-discrimination Ordinances including improving protections from discrimination for persons with disabilities, women, racial groups, and people in cohabiting relationships; improving protection from direct and indirect discrimination, and harassment; and developing proactive measures to promote equality and eliminate discrimination.
11. Chapter 3 is divided into two Parts. Part I provides submissions on issues we believe should be implemented with legislative reform or other action as

soon as possible. Part II provides submissions on issues we believe are equally a higher priority, but we believe require more in depth research, consultation, education or other action given the complexity of the issues, impact on other legislation, concerns raised in the consultation responses and divergent views, need for further dialogue, or other factors. On each issue we describe the Question, key points a reader can derive from the issues, relevant factors we have taken into account in determining our position, and the recommendations to the Government.

12. Chapter 4 provides our submissions on all the other Questions we consulted the public on in the Consultation Document. On each issue our position varies depending on the relevant factors we have taken into account as described in Chapter 2. For example, on some issues we believe the Government should implement legislative reform, on some issues we believe there is not sufficient justification for legislative reform at this time, and on other issues we believe it is not necessary to make legislative reforms, since the current legislation provides sufficient protection from discrimination. The format of the Chapter is similar to Chapter 3: on each issue we describe the Question, relevant factors we have taken into account in determining our position, and the recommendations to the Government. We have not included key points given the issues are not higher priorities.
13. Chapter 5 indicates the issues which the Government has recently acted on by making legislative reforms since the start of the public consultation on the DLR. These are therefore issues that no longer require action, and the EOC is not making submissions to the Government on.
14. Following the publication of these submissions and the Report on Responses the EOC will be taking the following steps:
 - Discuss in detail the submissions with the Government, including relevant bureaux and departments, as well as key public authorities as to how the recommendations can be taken forward;
 - Meet and discuss with other key stakeholders the submissions and possible implications for their particular work;
 - Engage with the general public to improve their understanding of the submissions across different forms of media and channels, including our dedicated DLR website, newspapers, radio, internet and other media;
 - Consider what further follow up action may be appropriate such as research or improved guidance on particular issues relating to the current anti-discrimination Ordinances and the proposals.
15. The EOC notes that, in making these recommendations, it is only within the power of the Government to take them forward by making legislative reforms. The EOC hopes that the Government would give serious consideration to the recommendations, which we believe will be

instrumental to building a truly inclusive society in Hong Kong.

16. In the future, the EOC will also continue to monitor the outcomes of the Discrimination Law Review and how we can further improve the anti-discrimination legislation in Hong Kong, such that everyone can be better protected from discrimination and have equal opportunities to participate in society.

CHAPTER 1: ANALYSIS OF RESPONSES TO THE PUBLIC CONSULTATION

- 1.01 The EOC received a very large number of responses to the public consultation of 125,041. As a result, the EOC believes it was important to thoroughly analyse the responses so as to identify trends and explore what conclusions can be drawn, as well as whether and how those conclusions may be relevant to the submissions, their prioritisation, and further work on improving public understanding on the issues. This is related to the Report on Responses to the consultation, which describes in a factual manner the quantitative and qualitative nature of responses. However in this Chapter, the EOC indicates the EOC's broad positions on those responses, and how they relate to the Commission's submissions to the Government.
- 1.02 The Chapter is divided into three Parts. Part I analyses the nature of the responses from organisations and individuals, and how it is relevant to the submissions and Chapter 2, which describes the relevant factors in making submissions. Part II looks at the implications of the responses to the consultation in terms of the need for further education, research and consultation. Part III describes the EOC's response to other key issues raised in the consultation responses which are not directly related to the Questions in the Consultation Document.

Part I: Nature of the responses from organisations and individuals

- 1.03 As the EOC described in the Report on Responses, there was significant diversity of responses both between different types of organisations, and between organisations and individuals. These differences were also reflected in the patterns of their degree of support for proposals.

(i) Differences between organisation and individual responses

(a) Responses from organisations

- 1.04 As indicated in the Report on Responses, the EOC received 288 responses from organisations which consisted of a wide variety of stakeholder groups in Hong Kong. The EOC categorised the types of organisations into 15 groups as follows: non-Governmental organisations (NGOs) working with women; NGOs working with ethnic minorities; NGOs working with persons with disabilities; NGOs working on human rights; other types of NGOs; religious groups; family groups; educational institutions (such as schools);

organisations from the legal profession or legal institutions; corporations; employer groups (such as Chambers of Commerce); employee groups (such as Trade Unions); public bodies; political parties; and residents groups.

- 1.05 It is also important to note that in relation to a number of the organisations, they are themselves representative groups of a large number of individuals or organisations, for example, Trade Unions which represent many employees; Chambers of Commerce which represent many corporations and other businesses; and NGOs that are umbrella groups representing a number of distinct NGOs (e.g. NGOs working to promote equality of persons with different types of disabilities). As a result, although there were 288 responses from organisations, the numbers of organisations and individuals represented in those responses is in fact many thousands.
- 1.06 Overall, the proportion of organisations that were supportive of proposals was significantly higher than for individuals. For 57 of the 77 Questions, a majority percentage of responses from organisations supported the proposals. This can be contrasted with responses from individuals where for 66 of the 77 Questions, a majority percentage opposed the proposals.
- 1.07 Generally, given more of the organisations had direct experience of working on issues relating to discrimination, they often provided more detailed reasoning for their positions including, evidence of discrimination (for example, non-Governmental organisations working with ethnic minorities, women, persons with disabilities); or how the anti-discrimination legislation affects a particular sector (for example, Chambers of Commerce in relation to employment issues, or Banking organisations referring to the possible impact of proposed protections relating to nationality).
- 1.08 In terms of differences of responses between organisations, overall non-Governmental organisations working with women, ethnic minorities, persons with disabilities, or on human rights were generally more supportive of the proposals. In contrast, most of the religious, family and primary and secondary religious educational institutions expressed concerns or disagreement with a majority of the proposals. The religious, family and primary and secondary religious educational institutions also expressed particularly strong concerns on the proposals relating to providing protection from discrimination for persons in cohabiting/ de facto relationships.
- 1.09 Further, generally, employer groups such as Chambers of Commerce were more likely to disagree with many of the proposals, often raising concerns of the possible effect on business, for example in terms of perceived increased expenses associated with the proposals.

(b) Responses from individuals

- 1.10 The EOC received a very large number of responses from individuals, with the number far exceeding those from any previous public consultation the EOC has conducted. In the Commission's previous public consultations, such as in relation to Codes of Practice guidance on the existing anti-discrimination Ordinances, most of the responses were from organisations, with very few from individuals. The large number of individual responses is likely to be attributable to a number of factors including: the high level of media attention generated by the public consultation; increased use of social media by individuals in sharing the consultation and co-ordinating responses by individuals; and a high level of use by individuals of pro forma type responses.
- 1.11 The format of a large proportion of responses from individuals is notable and different from most responses from organisations. Most of the responses from individuals used variations of a pro forma response. In other words, an identical or very similar form of response was used by a large number of individuals to respond to a series of questions.
- 1.12 Many of the responses from individuals to the Questions (and a much higher proportion than responses from organisations) did not provide reasoning or evidence as to why they either disagreed or agreed with proposals. Where this was the case, it has therefore been not possible to analyse those responses (whether from individuals or organisations) to determine whether they raise any pertinent concerns or other relevant information.
- 1.13 Several examples of pro forma responses are contained in **Appendix 3** of the Report on Responses. It is also notable that there were available on the internet a number of "slot machine" types of pro forma responses by which individuals could randomly choose responses to particular questions to be sent as responses.
- 1.14 The EOC is also aware that individuals used social media to disseminate to particular groups or the general public the pro forma responses and encourage people to respond using them. Several examples of the social media pages used to encourage responses are also included in **Appendix 3** of the Report on Responses.
- 1.15 The pro forma responses and the non-pro forma responses from individuals indicate that a very high proportion relate to two primary issues: protection from discrimination on grounds of nationality, citizenship and residency status; and protection from discrimination for persons in cohabiting/ de facto relationships.
- 1.16 In relation to the first issue of protection from discrimination on grounds of nationality, citizenship and residency status, most individual responses were

concerned with the potential expansion in protection from discrimination of mainland Chinese people in the context of residency discrimination. This relates to Questions 11 to 16. A very high proportion of individuals were opposed to the proposals. Some of the main reasons provided for opposing the proposals were: nationality, citizenship and residency status are in their view different from race and should not be protected from discrimination; it would increase tension between people from Hong Kong and mainland China; it would enable people from mainland China to immediately claim the rights and benefits of permanent residents of Hong Kong; and it would make it unlawful to criticise the behaviour of mainland Chinese.

- 1.17 The EOC believes that a number of the above reasons are not consistent with what the legal effect of the anti-discrimination legislation would be, or the intention of the proposals. In relation to the concern that protection from residency discrimination would enable new immigrants from mainland China to immediately claim benefits and rights of Hong Kong permanent residents, this would not be the case. For example, where another statutory provision permits discrimination on grounds of residency, that provision will prevail and the anti-discrimination legislation does not apply.¹ This is discussed further in Chapter 3 in relation to the submissions on Questions 11 to 16.
- 1.18 Further, in relation to the concern that nationality, citizenship and residency status are different to race and therefore should not be protected, international human rights obligations under the United Nations Convention on the Elimination of Racial Discrimination require there to be protection from discrimination on grounds of nationality, citizenship and residency or immigration status. This is because those characteristics are often closely linked to race. Again, this is discussed further in Chapter 3.
- 1.19 It is also relevant to note that many of the pro forma responses on potential protection of mainland Chinese from discrimination also responded to other questions they perceived were linked to mainland Chinese, even if that was not the intended focus of the question. An example of this was Question 35 and the proposal that there be protection from racial discrimination in relation to the exercise of Government functions and powers. Close to two-thirds of responses expressed the view that if the discrimination law applied to all public authorities, it would mean mainland immigrants and persons from Hong Kong would have to be treated equally, that new immigrants from the mainland would have the same civil rights as Hong Kong permanent residents, and would be able to become civil servants. For the reasons expressed above, the EOC believes protection from residency discrimination would not have that effect. Moreover, the intent of the proposal was not about mainland Chinese, but to close a key gap in the protection against racial discrimination for all racial groups.

¹ For example, under article 21 of the Bill of Rights only permanent residents have the right to vote.

- 1.20 Secondly, many individual responses were made on the issue of whether persons in cohabiting/de facto relationships similar to marriage should be protected from discrimination on grounds of marital status or family status. This relates to Questions 6, 9, 70, 71, 72 and 73. Overall, a very high proportion of individuals were opposed to such proposals. Some of the main reasons provided for opposing the proposals were: it would go against family values or religious beliefs to recognise de facto relationships; persons in de facto relationships should not be treated as equivalent to marriages; and it would be difficult to prove who is in a de facto relationship and when the relationship commences or ends.
- 1.21 Again the EOC believes that some of the concerns are not consistent with what the legal effect of the anti-discrimination legislation would be, or the intention of the proposals. For example, in relation to the concern that it would be difficult to prove who is in a de facto relationship, this could be addressed, for example, by having a clear definition in the anti-discrimination legislation of a cohabiting relationship. Further, it could be addressed by possibly having a system of legally registering the relationship in a similar manner to marriages, in order that there is clarity as to who is in a legally recognised cohabiting relationship.

(ii) Implications for the submissions to the Government

- 1.22 The above analysis of response from organisations and individuals has implications for the degree of weight the EOC has placed on responses to the public consultation in determining our position on issues. Firstly, the numbers of organisations or individuals supporting or opposing proposals is one of a number of factors the EOC has taken into account in determining its position on all the issues. As discussed in Chapter 2, there are a large number of other factors that are also relevant. Secondly, the numbers of organisations and individuals supporting or opposing proposals is not necessarily a determinative factor for several reasons described below.

(a) The number of organisations or individuals supporting or opposing proposals is one of many factors

- 1.23 As is discussed in Chapter 2, there are a number of other relevant factors the EOC has taken into account in determining its position on all the proposals, including our EOC operational experience of complaints and research, evidence of discrimination on an issue, whether there is currently a lack of legal protection from discrimination, previous submissions made by the EOC to the Government during previous reviews of the anti-discrimination legislation, and the extent to which the current legislation complies with international human rights obligations.

(b) The number of organisations or individuals supporting or opposing proposals is not determinative

- 1.24 There are several reasons why the EOC believes that caution should be exercised in relying on the numbers of organisations or individuals supporting or opposing proposals.
- 1.25 Firstly, the intention of the public consultation was to obtain evidence and reasoning which would assist the EOC in analysing whether there is justification for making reforms. For example, some organisations working with women stated they are often discriminated against when breastfeeding in public. The intention of the consultation was not to act merely as a survey of the public as to whether they supported or opposed proposals. However, many of the responses, particularly from most individuals, did not provide evidence or reasoning. Where no reasoning was provided by individuals or organisations, it has not been possible to determine whether they raise points that should be taken into account.
- 1.26 Secondly, there was a great difference between responses from organisations and individuals. As discussed above for most of the Questions, a vast majority of individuals opposed the proposals, while a majority of the organisations supported the proposals. A number of those organisations also are representative organisations of other entities (e.g. Chambers of Commerce), or individuals (e.g. Trade Unions). This means that the organisations in some cases represent the views of a large number of people in society. There should, therefore, be caution in attempting to extrapolate conclusions regarding the comparative numbers of organisations and individuals supporting or opposing proposals.
- 1.27 Thirdly, it is important to recognise that the views of the majority should not in any event necessarily be determinative, particularly in relation to issues of protecting the rights of minorities or persons in society with less power and influence. This is of particular relevance in relation to certain ethnic minorities, women and persons with disabilities. A number of non-Governmental organisations representing those groups also made this point in their consultation responses.
- 1.28 This point has also been emphasised by the courts of Hong Kong. For example, Hong Kong's Chief Justice Geoffrey Ma, in relation to the right of gay men to be protected from discriminatory criminal legislation, stated that the role of the courts is to "*protect minorities from the excesses of the majority.*"² Anti-discrimination legislation is often important to protect minorities, even if the majority of people may not agree.

² Leung TC William Roy v. Secretary for Justice [2006] 4 HKLRD 211 (CA), paragraph 53.

- 1.29 Fourthly, as discussed previously, a number of the concerns raised particularly from individuals are not consistent with what the legal effect of the anti-discrimination legislation would be, or the intention of the proposals. Given the possibility that some of the responses might have been based on inaccurate interpretation of the effect of the proposals, the EOC has exercised extra caution in analysing those responses, and to avoid over-relying on them for the purpose of the submissions.

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

- 1.30 There were several other key points raised in the consultation responses concerning the consultation process and the proposals, which the EOC believes are relevant in order to take forward the issues in society.
- 1.31 Firstly, a number of both organisations and individuals raised concerns that the consultation period was not long enough, and that there was insufficient opportunity to discuss the potential implications of proposals with key stakeholders.
- 1.32 The EOC extended the original consultation period of three months by several weeks in order to provide more time for stakeholders to provide their views. In relation to taking the issues forward, the EOC agrees that, in relation to a number of issues, it may be appropriate to have separate and more detailed consultation by the Government before implementing legislative reforms, especially where the issues are complex, touch on legislation across different domains and policy areas, and have instigated wide debate with divergent views. This would provide a means for different groups in society to fully express their views and for more in-depth consideration of the issues. Some examples of this are discussed in Chapter 3: The proposal to develop a duty on public authorities to promote equality and eliminate discrimination; protection from discrimination on grounds of nationality, citizenship and residency status under the RDO; and the protection from discrimination of persons in cohabiting/ de facto relationships in relation to marital status discrimination under the SDO and family status discrimination under the FSDO.
- 1.33 Secondly, some of the concerns raised highlight that there is a need for greater education by the EOC on the current legislation and proposals, given that the concerns may not be consistent with what the legal effect of the current anti-discrimination legislation or proposals would be. The EOC already has a number of mechanisms to promote understanding of the anti-discrimination legislation, for example by preparing guidance and extensive training programmes for different sectors. However, the EOC will consider

what further education would be appropriate in light of the particular issues raised in the consultation responses. In addition, in relation to the EOC's proposals, the Commission will arrange as appropriate meetings with relevant stakeholders in order to further discuss the issues. The EOC believes that it will be important to have an ongoing dialogue with the public concerning the submissions to the Government.

Part III: Additional issues raised in the consultation responses

- 1.34 It is important to note that as discussed in the Report on Responses, a number of the consultation responses from both organisations and individuals raised issues concerning potential reform of the anti-discrimination legislation which are not directly related to the Questions in the Consultation Document. Of greatest significance is that a number of organisations and individuals called for new protected characteristics to be added to the anti-discrimination legislation in Hong Kong. There were a number of additional characteristics which were discussed as being appropriate for protection from discrimination, including age, sexual orientation, gender identity, intersex status, religion or belief, political or other opinion, participation in trade unions, and language.
- 1.35 The responses made reference to the fact that under both international human rights obligations to which the Hong Kong Government is subject to, and the obligations under the Bill of Rights and Basic Law, there is an obligation to protect people from discrimination on additional grounds to those under the existing four anti-discrimination Ordinances.
- 1.36 As stated in the Consultation Document, the focus of the Discrimination Law Review has been on considering reforms to the protections from discrimination under the four anti-discrimination Ordinances. It has not been intended to focus on developing comprehensive anti-discrimination legislation in relation to new protected characteristics. In our view, that should be the subject of separate consultation and detailed consideration,³ because such issues would raise the need for considerable discussion and consultation by the Government, as occurred when the current four anti-discrimination Ordinances were developed.
- 1.37 However, the EOC does believe that it is important for the Commission to consider, within its duties and powers to review the current anti-discrimination legislation, whether the current protected characteristics

³ See paragraphs 10 and 11 Discrimination Law Review Public Consultation Document.
http://www.eocdlr.org.hk/downloads/dlr_fulldoc_en.pdf?f=s&c=white

should be expanded in any ways. For that reason, the EOC has recently conducted two research studies to consider the need for anti-discrimination legislation on the grounds of age,⁴ as well as on the grounds of sexual orientation, gender identity and intersex status.⁵ In relation to the study on age discrimination in employment, the study determined that there was significant discrimination against both older and younger employees in Hong Kong on grounds of their age, and recommended that the Government should start:

“...conducting large scale prevalence survey of age discrimination regularly to collect public views on the issue. The last time that the Government conducted similar survey was more than 10 years ago. Regular surveys allows the Government to monitor closely the prevalence and trend of age discrimination and ensures sufficient public discussion of the related issues, so as to start discussion of legislating against age discrimination as soon as possible.”⁶

- 1.38 In relation to the study on discrimination on grounds of sexual orientation, gender identity and intersex status the study determined that there was widespread discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people and recommended that:

“The Government should consider conducting a public consultation on introducing anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status....(and) that the consultation focus on the scope and possible content of the legislation, rather than whether there should be legislation.”⁷

- 1.39 The EOC will continue to discuss with the Government taking forward the above issues of discrimination and possible legislative reform, in order that there is better protection from discrimination for everyone in Hong Kong.

⁴ “Exploratory Study on Age Discrimination in Employment” Equal Opportunities Commission, 7 January 2016, <http://www.eoc.org.hk/eoc/upload/ResearchReport/2016161633111925251.pdf>

⁵ “Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status”, 26 January 2016, <http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

⁶ “Exploratory Study on Age Discrimination in Employment”, *ibid* page 5.

⁷ “Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status” *Ibid* page 14

CHAPTER 2: RELEVANT FACTORS IN MAKING SUBMISSIONS

- 2.01 There are a number of factors that the EOC has taken into account in assessing the effectiveness of the current anti-discrimination legislation in Hong Kong, determining which issues should be the subject of legislative or related reforms, and which are of a higher priority than others. This Chapter provides an overview of the primary factors the EOC has taken into account, both those factors supporting and those that may not support legislative reform.
- 2.02 Depending on the issue, some factors may be more relevant than others. Generally speaking the more factors in favour of making a proposal, the more likely it is that the EOC believes the issue requires legislative reform. However, the factors are not intended to be an exhaustive list of possible relevant factors or absolute criteria such that certain factors must be met to be appropriate for legislative reform.
- 2.03 For example, Question 35 of the Consultation Document asked whether there should be protection from discrimination under the Race Discrimination Ordinance in relation to the Government exercising its functions and powers.
- 2.04 In our view this issue is, as discussed in Chapter 3, a higher priority for legislative reform based on a number of factors including: it affects a large number of people; it would ensure that there is the same level of protection from racial discrimination in relation to Government functions as there is under the three other anti-discrimination Ordinances; the current legislation does not fully comply with United Nations international human rights obligations regarding racial discrimination and recommendations made by United Nations international human rights bodies; and there has been strong support for the proposed reform from organisations during the passage of the Race Discrimination Bill and in the responses to the public consultation on the DLR.

A. Role and operational experience of the EOC

- 2.05 An overarching relevant consideration in relation to all the issues is the duties on the EOC to ensure that the anti-discrimination legislation is effective; vulnerable groups are not subjected to discrimination; and where there is evidence of a need for reform, recommendations are made to the Government.
- 2.06 Further, the EOC now has 20 years of operational experience which has been taken into account where relevant. This includes experience of

considering complaints of discrimination and where the legislation may not be effective; previous reviews of the anti-discrimination Ordinances; our research and policy work which may provide evidence of issues of discrimination and inequality; and our experience of how our own powers and constitutional arrangements may be improved.

B. Evidence of discrimination or other human rights affected

- 2.07 Another key factor as to whether there is a need to improve protection from discrimination is whether there is any evidence of discrimination (such as direct or indirect discrimination, harassment) in relation to a particular issue. This also links to the factor described below as to the extent of protection from discrimination in relation to the particular issue. Such evidence may either arise from the operational experience of the EOC, or where other organisations or individuals provide evidence of an issue which needs addressing.
- 2.08 For example in relation to Question 10 and issues of breastfeeding discrimination, the EOC receives a number of complaints of discrimination by women breastfeeding in public, and a number of the responses to the consultation from organisations indicated that breastfeeding women experience discrimination in the provision of goods and services, at premises or in employment.
- 2.09 Certain issues may also raise possible breaches of other human rights. For example, in relation to Question 5 and the issue of providing express protection from potential pregnancy discrimination, some of the responses to the consultation from organisations stated that, in relation to foreign domestic workers, some of their employment agencies or employers forced them to take contraceptives to avoid becoming pregnant. Such conduct would not only be clearly discriminatory against those women, but also breach their human rights to health and reproductive rights.⁸

C. Number of people affected or seriousness of discrimination

- 2.10 In general terms, the more likely that an issue affects a large number of people in Hong Kong, the more likely it is an issue that should be addressed with legislative reform. For example in relation to Question 39(2), the fact that there is no protection from sexual harassment of persons volunteering at a workplace affects a large number of people in Hong Kong who do internships or volunteer with organisations to gain work experience.

⁸ See the World Health Organisation, Health and Human Rights, December 2015, <http://www.who.int/mediacentre/factsheets/fs323/en/>

- 2.11 It should also be noted that there may be situations where, although there are not a large number of persons affected, if the discrimination caused is of a serious nature, this may also provide justification for legislative reform.

D. Extent of current protection from discrimination

- 2.12 Another important relevant factor is the degree to which there is currently protection from discrimination on the particular issue. For example, in relation to Question 35, there is currently no protection from racial discrimination in relation to the exercise of Government functions and powers. And in relation to Question 30, there is currently only limited protection from racial discrimination by association as it only covers situations involving near relatives. This is more limited protection than the current discrimination by association protections in relation to disability.

E. Reform could reduce levels of protection from discrimination

- 2.13 An important factor not supporting reform is where the amendment may result in a reduction in the levels of protection from discrimination. This is also one of the factors described in Chapter 1 of the Consultation Document as being one of the important principles that should generally guide the reform of the anti-discrimination legislation.⁹ For example, Question 7 relates to the definition of the disability and whether it should be reformed in any ways. Some stakeholders raised concerns of a possible amendment reducing the levels of protection by narrowing the scope of who is considered to have a disability.

F. Current legislation does not comply with Hong Kong or international human rights obligations

- 2.14 Another relevant factor is the extent to which the current anti-discrimination legislation complies with Hong Kong's human rights obligations under the Bill of Rights, Basic Law, as well as international human rights obligations under the United Nations Conventions including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). All these Conventions apply to Hong Kong.

⁹ See paragraph 1.54 of the EOC Discrimination Law Review Public Consultation Document, July 2014, <http://www.eocdlr.org.hk/en/document-01.html?f=s&c=white>

- 2.15 For example, in relation to Questions 11 to 16 and protection from discrimination on grounds of nationality, citizenship and residency status, the United Nations has stated that the international human rights obligations under CERD to provide protection from racial discrimination should include protections in relation to nationality, citizenship and immigration status.

G. Recommendations by international human rights bodies

- 2.16 A related factor to international human rights obligations, is whether United Nations human rights committees have made recommendations to the Hong Kong Government to reform the anti-discrimination legislation. This is because the United Nations has committees of independent experts that monitor countries' compliance with the UN human rights Conventions, and make recommendations to those countries to reform legislation, policies and practices on the rights contained in the Conventions.
- 2.17 For example, again in relation to Questions 11 to 16 as described above, several of the United Nations Committees have made specific recommendations to the Hong Kong Government to provide protection from discrimination on grounds of nationality, citizenship and immigration/residency status. In particular, recommendations have been made by the Committee on the Elimination of Racial Discrimination, and the Committee on Economic Social and Cultural Rights.

H. The anti-discrimination legislation in similar international jurisdictions

- 2.18 The concepts and content of Hong Kong's anti-discrimination legislation is based on a combination of both the British and Australian anti-discrimination legislation. This is also linked to the fact that Hong Kong retains a distinct common law legal system which is different from mainland China's legal system.
- 2.19 In considering what improvements can be made to anti-discrimination as well as other legislation in Hong Kong, reference is often drawn to developments in similar common law jurisdictions such as the United Kingdom, Australia, New Zealand and Canada. As a result, the developments in those jurisdictions are a relevant factor the EOC has taken into account, where appropriate.

I. Proposal would address systemic inequality

- 2.20 Whether a measure would address systemic inequality in society is also a relevant factor. The current anti-discrimination legislation focuses primarily on addressing individual instances of discrimination. However, some of the proposals focus how systemic inequality can be better addressed, given the evidence that some groups in Hong Kong do face systemic inequalities. An example of this is Question 41 and the proposal of duty on public authorities to promote or mainstream equality.

J. Degree of support or opposition of organisations or individuals to proposals

- 2.21 The degree of support or opposition to proposals by organisations and individuals is a relevant factor. However, as indicated in Chapter 1, this is not necessarily a determining factor for a number of reasons. For example, as indicated in Chapter 1, in relation to the responses from many individuals and some organisations, concerns raised may not be consistent with what would be the legal effect of the anti-discrimination legislation, or the intention of the proposals. For example, there was strong opposition from most individuals regarding Questions 11 to 16, in relation to the protection from discrimination on grounds of residency status and people from mainland China. The EOC notes that many individuals believed that the effect of providing protection from discrimination would be that new immigrants from mainland China would automatically be entitled to the same benefits as permanent residents. This is not the case as for example where other statutory provisions permit discrimination on grounds of residency, that provision would prevail and the anti-discrimination legislation would not apply. This is discussed further in Chapter 3.

K. Reform would make legislation clearer

- 2.22 Improving the clarity of the anti-discrimination legislation is an important factor as it would assist the understanding of the legislation, whether it is by persons who may have been discriminated against, and other stakeholders such as employers who need to apply the legislation in practice. For example, although the courts have interpreted the protections from pregnancy discrimination under the Sex Discrimination Ordinance to cover when a woman is on maternity leave, the SDO makes no express reference to such protection. Question 4 concerns this issue and asked whether the SDO should be amended to make it clear that women are protected from discrimination on grounds of maternity when they are on maternity leave.
- 2.23 On the other hand, there are some issues where, after further considering

the legal effect of the current legislation and the possible amendments, the EOC believes the current legislation provides sufficient clarity. For example, in relation to Question 8 and protection from family status discrimination, the EOC does not believe that it is necessary to change the term “family status” to “family responsibilities” as the current term family status is sufficiently clear in its meaning.

L. Reform would simplify legislation

- 2.24 A relevant factor is also whether the reform would simplify the legislation, which may also be linked in some circumstances to improving the clarity of the legislation. For example, Question 62 concerns the issue of whether the exceptions for Genuine Occupational Qualifications across the Ordinances should be simplified into one definition which could be applied to all anti-discrimination Ordinances.

M. Reform would harmonise protection

- 2.25 A further relevant factor is whether the reform would harmonise the protections from discrimination. This is important as there is currently inconsistency in protections between the four anti-discrimination Ordinances in relation to a number of issues. For example, in relation to Question 43, which concerns claims of indirect discrimination, damages can only be awarded in claims of indirect sex, pregnancy, marital status, family status and race discrimination where there was an intention to discriminate. This is not consistent with provisions relating to indirect disability discrimination where no such intention to discriminate must be established to award damages.

N. Reform would improve effectiveness of the EOC

- 2.26 A number of the issues raised in the consultation relate to the duties and powers of the EOC. This is because the EOC is the statutory body with the responsibility for promoting equality and preventing discrimination under the four anti-discrimination Ordinances. It is therefore also relevant to consider the extent proposals may improve the effectiveness of the EOC. For example, Question 54 concerns whether the EOC should be required to produce a strategic plan which sets out the strategic priorities of the EOC over several years, in order to improve transparency and accountability of the organisation.

O. Government previously agreed to the proposal

- 2.27 In relation to a number of issues, the EOC has previously made submissions to the Government to reform the anti-discrimination Ordinances. On some of those issues, the Government previously agreed to make reforms, but to date has not done so. This is therefore another relevant factor supporting the reform. For example, in relation to Question 45, the Government previously agreed in principle that the EOC should be able to bring proceedings in its own name for discriminatory practices.

P. Government has implemented legislation

- 2.28 Where the Government has already made amendments to the existing anti-discrimination Ordinances, this is a key factor indicating legislative reform may no longer be necessary. For example, in relation to Question 39(4), the Government has already made amendments to the SDO to provide protection from sexual harassment of service providers by service users. There are several areas where such amendments have been made by the Government since the EOC launched the public consultation on the DLR and are all discussed in Chapter 5.

Q. Exception may not serve a legitimate aim or be proportionate

- 2.29 In relation to exceptions under the four anti-discrimination Ordinances, an important relevant factor is the extent to which the exception serves a legitimate aim and is proportionate in the way in which it operates. For example, in relation to Question 65, there is an exception permitting discrimination under the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance in relation to the small house policy by which certain indigenous villagers are entitled to a grant of small houses in the New Territories. It is doubtful whether these exceptions still serve a legitimate aim and are proportionate in their discriminatory effect.

CHAPTER 3: HIGHER PRIORITY ISSUES

- 3.01 This Chapter provides the EOC's position and submissions on what it considers are higher priority issues for the Government to implement legislative reforms or other actions, because they raise more serious and urgent concerns. The EOC has taken into account the relevant factors described in Chapter 2 in determining our positions and the seriousness or urgency of the particular issue of discrimination. The EOC believes that for these issues, the law should serve as one of the main drivers to eliminate discrimination or promote equality.
- 3.02 Chapter 3 is divided into two Parts. It is worth emphasising that the EOC believes that the issues in Part I and Part II are of equal importance and should be promptly tackled by the Government. To facilitate ease of understanding, they have been categorised based on the nature of *how* the Commission feels the issue should be tackled given the potential impact across multiple domains and level of complexity.
- 3.03 Part I focuses on issues that the EOC believes should be implemented with legislative reform or other action as soon as possible. For many of these issues, the EOC believes they are less complex in their legal content or effect than the issues discussed in Part II. The broad issues covered are: equality for persons with disabilities; equality for women; equality for all racial groups; improving protection from direct and indirect discrimination, and harassment; the scope of protection in relation to public authorities; and improving the provisions regarding discrimination claims.
- 3.04 Part II focuses on issues that the EOC believes should be implemented with legislative reform, but require more in-depth public consultation and research first. This is the case, for example, where the issues are more complex, touch on legislation across different domains and policy areas, and have instigated wide debate with divergent views. The issues covered are: a duty to promote and mainstream equality; protection from discrimination on grounds of nationality, citizenship and residency status; and equality for families in terms of cohabiting relationships. For each of these issues, the EOC indicates what it believes the consultation or other action should entail.
- 3.05 On each issue, the submissions set out the Question from the Consultation Document; the key points that a reader can derive from the issues discussed; the evidence and relevant factors the EOC has taken into account in determining its position; and finally the recommendations to the Government.

Part I: Areas to implement as a higher priority

- 3.06 Part I focuses on issues that the EOC believes should be implemented with legislative reform or other actions as soon as possible. The broad issues covered are: equality for persons with disabilities; equality for women; equality for all racial groups; improving protection from direct and indirect discrimination, and harassment; the scope of protection in relation to public authorities; and improving the provisions regarding discrimination claims.

A. Equality for persons with disabilities

- 3.07 The operational experience of the EOC is that there are high numbers of complaints of discrimination by persons with disabilities. Further, our EOC research highlights that persons with disabilities continue to face discrimination, prejudice, as well as barriers to their full participation in all aspects of life such as employment, education, access to services and premises. The situation also highlights that legislative and policy measures are required to better prevent discrimination and advancing equal opportunities for all persons with disabilities in Hong Kong. There are three issues which the EOC believes are higher priorities in relation to improving equality for persons with disabilities: a duty to make reasonable accommodation; express protection from discrimination for persons with disabilities accompanied by an assistance animal; and protection from discrimination for persons with disabilities in voting and standing for election. Each of these is discussed below.

(i) Duty to make reasonable accommodation

Question 24 of the Consultation Document asked:

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

Key Points

- There are a large number of people with disabilities in Hong Kong, and the EOC receives many complaints of disability discrimination relating to failure to provide accommodation to them;
- Currently, there is no express duty to make reasonable accommodation for persons for disabilities under the Disability Discrimination Ordinance, and this is not compliant with international human rights obligations or practice in similar jurisdictions;
- There was strong support by organisations and particularly those working with persons with disabilities for the introduction of a duty.

3.08 There are a large number of people in Hong Kong with disabilities representing approximately 8.1% of the population.¹⁰

3.09 The operational experience of the EOC in recent years is that complaints of disability discrimination represent the highest proportion of complaints under the four anti-discrimination Ordinances. For example, in 2014/15, the EOC handled 716 complaints of discrimination and of those 53% related to claimed disability discrimination.¹¹ Many of the complaints the EOC receives from persons with disabilities relate to issues of accommodation in various fields such as employment; the provision of goods facilities or services; or access to premises.

3.10 The EOC is pleased that the Government has indicated in its 2016 Policy Address that it has increased spending and will provide more targeted services for persons with disabilities to help them participate in society:

“Compared with four years ago, the Government’s recurrent expenditure on support services for persons with disabilities has increased by nearly 50%. In future, continuous and comprehensive support for persons with disabilities will be provided, such as training subsidies and offering on a pilot basis on-site rehabilitation services to pre-school children; extending the duration of post-placement follow-up service, raising the amount of employment and job trial subsidies, and giving employers subsidies to carry out workplace modifications; and supporting persons with disabilities through case managers, and providing home care service for persons with severe disabilities.”¹²

3.11 Providing accommodation to persons with disabilities is a vital means to ensure that they can fully participate in life on equal terms with others and maximise their potential. Participation in employment and education is also important in order that persons with disabilities have an adequate standard of living and that the high numbers of persons with disabilities in poverty can be reduced.¹³ Accommodation is also consistent with the modern and internationally accepted standard of the social model of disabilities, which emphasises that it is the barriers in society that cause disabilities and should

¹⁰ Census statistics released in December 2014 found that there are 578 600 persons with disabilities. “Persons with disabilities and chronic diseases”, December 2014, <http://www.statistics.gov.hk/pub/B11301622014XXXXB0100.pdf>

¹¹ EOC Annual Report 2014/15, pages 64-65, http://www.eoc.org.hk/EOC/Upload/AnnualReport/201415/EOC_AR2014_15.pdf

¹² 2016 Policy Address, paragraph 153, <http://www.policyaddress.gov.hk/2016/eng/pdf/PA2016.pdf>

¹³ A report by the Poverty Commission indicated that persons with disabilities are more vulnerable to poverty, with 45.3% (before policy interventions), and 29.5% (after policy interventions) in poverty, “Hong Kong Poverty Situation Report on Disability 2013”, November 2014, [http://www.povertyrelief.gov.hk/eng/pdf/Hong_Kong_Poverty_Situation_Report_on_Disability_2013\(E\).pdf](http://www.povertyrelief.gov.hk/eng/pdf/Hong_Kong_Poverty_Situation_Report_on_Disability_2013(E).pdf)

be removed where reasonable.¹⁴

- 3.12 Accommodation can include a wide variety of measures such as changing the physical environment (for example in relation to changing access to premises for persons with disabilities in wheelchairs); providing auxiliary aids or services (for example providing documents in Braille for service users with a visual impairment); and reviewing policies or practices that put persons with disabilities at a particular disadvantage (for example allowing an employee to work from home if they are temporarily disabled and have mobility problems).
- 3.13 The current concepts of disability discrimination in the existing Disability Discrimination Ordinance do not incorporate an express requirement to make reasonable accommodation for persons with disabilities. Rather, as discussed in the Consultation Document, accommodation is only considered as one factor in determining whether or not there is a defence to indirect discrimination, and whether or not unjustifiable hardship would be caused to the relevant person (such as an employer) to provide accommodation.¹⁵
- 3.14 The current approach is not fully compliant international human rights obligations, and is different from the approach in the European Union, as well as other similar common law jurisdictions to Hong Kong such as Great Britain in the United Kingdom and Australia.
- 3.15 The United Nations Convention on Rights of Persons with Disabilities (CRPD) came into force on 3 May 2008 and applies to Hong Kong. The CRPD defines discrimination on the basis of disability as including denial of reasonable accommodation.¹⁶

¹⁴ The social model can be contrasted with a medical model of disability which focuses on treatment of the individual's medical condition rather than addressing barriers in society. World Health Organisation, World Report on Disability 2011, Chapter 1, page 4, http://www.who.int/disabilities/world_report/2011/report.pdf

¹⁵ See section 4 of the DDO states:

"For the purposes of this Ordinance, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including-
(a) the reasonableness of any accommodation to be made available to a person with a disability;
(b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
(c) the effect of the disability of a person concerned; and
(d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure)

required to be made by the person claiming unjustifiable hardship."

¹⁶ "'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation": Article 2 CRPD.

3.16 It also states:

“In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”¹⁷

3.17 In relation to the International Covenant on Economic Social and Cultural Rights (ICESCR) which applies to Hong Kong, the Committee on Economic Social and Cultural Rights has recognised that:

“The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as (...) denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.”¹⁸ (emphasis added)

3.18 In the European Union, the anti-discrimination legislation relating to disability discrimination in employment applies to all 28 EU Member States. It specifically requires employers to provide reasonable accommodation for persons with disabilities to have access to, participate in or advance in employment unless such measures would impose a disproportionate burden.¹⁹ The denial of reasonable accommodation is also expressly defined as a form of discrimination.²⁰

3.19 In Great Britain (England, Wales and Scotland), the Equality Act 2010 requires reasonable adjustments to be made in three areas: for physical features, auxiliary aids, and provisions criterion or practices in a broad range of fields (work, services, premises, education and associations).²¹ The

¹⁷ Article 5(3) CRPD.

¹⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2009, Para 28, repeating, in part, Committee on Economic, Social and Cultural Rights, General Comment 5: Persons with disabilities, UN Doc E/1995/22 at 19 (1995), Para 15

¹⁹ Article 5, Framework Directive, 2000/78/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ac10823>

²⁰ Article 2, Framework Directive 2000/78/EC.

²¹ Section 20 of the Equality Act 2010 provides:

“(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with

requirement to make reasonable adjustments is distinct from other provisions on direct and indirect discrimination, and a failure to comply with the duty is a distinct form of discrimination.²²

- 3.20 The experience of Australia is of particular relevance as the existing disability discrimination provisions were largely based on the Australian disability discrimination provisions in the Disability Discrimination Act 1992. However, it is important to note that the Australian provisions on reasonable accommodation have since been amended. In the Australian Disability Discrimination Act 1992, the requirement to make reasonable accommodation is now a distinct part of the elements of direct and indirect disability discrimination.²³ Further, a failure to make reasonable accommodation constitutes discrimination, subject to the defence of unjustifiable hardship.²⁴
- 3.21 In relation to the consultation responses, a significant majority of both organisations and individuals agreed to introducing a requirement to make reasonable accommodation, and most of the organisations working with persons with disabilities fully supported the proposals. In relation to organisations that opposed the proposal, many were employer groups concerned about increases in financial and other burdens. However, the EOC believes that as the duty would only require “reasonable” accommodation, those concerns could be addressed within the legislation and its operation.
- 3.22 Given the evidence of discrimination against persons with disabilities by failure to provide reasonable accommodation; the fact that the absence of a distinct requirement to provide reasonable accommodation is not compliant with international human rights obligations; the example of the modernisation of provisions in other similar jurisdictions; and the strong support for the proposals in the Consultation responses particularly by organisations working with people with disabilities; the EOC believes that the Government should introduce a distinct duty to make reasonable accommodation for persons with disabilities in all fields where the legislation applies.
- 3.23 The EOC also believes that the British model is preferable to follow as it:
- Clearly defines the three forms of reasonable accommodation for persons with disabilities;
 - Makes the requirement to provide reasonable accommodation distinct

persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”

²² Section 21 Equality Act 2010. <http://www.legislation.gov.uk/ukpga/2010/15/contents>

²³ Section 5 and 6 Disability Discrimination Act 1992.

<https://www.comlaw.gov.au/Details/C2015C00252>

²⁴ Section 11 Disability Discrimination Act 1992.

from direct and indirect discrimination.

- 3.24 The requirement would only require “reasonable” accommodation such that changes which would be disproportionate, would not be required. Further, the requirement would only apply where the relevant person (e.g. employer or education provider) knows or ought reasonably to know that a person has a disability and may need reasonable accommodation.
- 3.25 Finally, based on the above, if the requirement to provide reasonable accommodation is introduced, it would be appropriate to repeal all the existing provisions on undue hardship, as reasonable accommodation would take into account undue hardship.

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 undue hardship provisions should be repealed.

(ii) Protection from discrimination for persons accompanied by assistance animals

Question 22 of the Consultation Document asked:

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

Key Points

- There are a large number of persons in Hong Kong with visual impairments, with plans to increase the numbers using guide dogs;
- The EOC has received a number of discrimination complaints from persons who were discriminated against when accompanied by guide dogs in provision of services or access to premises;
- There is currently no express provision that discrimination when accompanied by an assistance animal is a form of disability discrimination.

- 3.26 There are a large number of persons in Hong Kong (174,800 or approximately 2.4% of the population) with visual impairments.²⁵ It is also estimated that approximately 1,700 of those would benefit from guide dogs, but that there are currently only 30 guide dogs in Hong Kong, and there are plans to increase their numbers.²⁶ The EOC also has received a number of

²⁵ Special Topics Report No. 62 “Persons with disabilities and chronic diseases” by HKSAR Census and Statistics Department, December 2014.

<http://www.statistics.gov.hk/pub/B11301622014XXXXB0100.pdf>

²⁶ South China Morning Post, 7 April 2015, <http://www.scmp.com/news/hong-kong/article/1758803/first-hong-kong-born-guide-dogs-set-help-meet-huge-demand-visually>

complaints from persons with visual impairments that they have been discriminated against because of being accompanied by a guide dog and refused services or access to premises. Such instances of discrimination have also been reported in the media, for example in relation to using public transport.²⁷ This has a significant impact on those persons being able to fully participate in society.

- 3.27 Currently, there is no express provision specifying that discrimination against a person who has a guide dog or other animal providing assistance is disability discrimination. Such discrimination would need to be dealt with as an indirect disability discrimination claim. This can be contrasted with Australia where the legislation does provide such express protection in relation to an “assistance animal”.²⁸ The definition is broad enough to include guide dogs for people who have visual impairment, hearing dogs for persons with hearing impairments, other dogs that provide assistance to persons with disabilities, and other types of animals.²⁹ This protection is in the same category of discrimination as disability aids or carers.
- 3.28 In relation to the responses to the consultation, a significant majority of the organisations agreed that there should be express protection from such discrimination, including many of the organisations working with persons with disabilities. Some of the organisations noted that it would also be important to clearly define what is an assistance animal to provide certainty for all stakeholders.
- 3.29 Given the plans to increase use of guide dog assistance animals in Hong Kong by persons with disabilities, the large number of persons with visual impairments and other disabilities who would be potentially affected, and the evidence of discrimination, the EOC believes that express protection from discrimination on grounds of being accompanied by an assistance animal should be added to section 10 of the Disability Discrimination Ordinance. This would incorporate assistance animals in the same category of protection as carers and other assistants who accompany the person with disabilities. The EOC also believes that “assistance animal” should be clearly defined and that reference could be made for example to the definition in the Australian Disability Discrimination Act 1992.

²⁷ Hong Kong Free Press, 1 December 2015, <https://www.hongkongfp.com/2015/12/01/nwfb-driver-refuses-to-let-guide-dog-on-board/>

²⁸ Section 9 of the Disability Discrimination Act 1992 defines an assistance animal or a dog or other animal accredited or trained to assist a person with a disability to alleviate the effects of the disability.

²⁹ For example in *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95 the Federal Magistrates Court found a dog which made its owner, a man with an anxiety disorder, feel more confident in social interactions, to be an assistance dog, and to be a trained animal because its owner had trained it. It was unlawful discrimination to prevent the dog being on public premises.

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 voting in and standing for elections

Question 36 of the Consultation Document asked:

“Do you think that for reasons of consistency there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies? If so, do you think that there should be an exception permitting disability discrimination but only where it is for a legitimate aim and proportionate?”

Key points

- There is currently no protection from disability discrimination in relation to persons voting in or standing for elections under the Disability Discrimination Ordinance, despite there being such equivalent protection in relation to sex, race and family status discrimination;
- 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;
- The United Nations has made specific recommendations to the Hong Kong Government that it should revise its legislation to ensure that it does not unreasonably deny persons with mental disabilities the right to vote.

3.30 Preventing discrimination in relation to voting and standing for public positions is a key aspect of anti-discrimination legislation. Although most persons with disabilities in Hong Kong do have the right to vote and stand for elections, 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 from discrimination.

3.31 The EOC previously made submissions to the Government on this issue calling on amendments to be made to the DDO. In response, the Government indicated it was in their view not necessary to introduce a provision prohibiting discrimination given that there is under the Bill of Rights and Basic Law the right to vote and be elected, and they considered it proportionate to have an exception where persons do not have legal capacity to manage their affairs.

3.32 The Legislative Council Ordinance and the District Councils Ordinance

disqualify from voting all persons who are declared by a court under the Mental Health Ordinance to be incapable by reason of their mental incapacity, of managing and administering their property and affairs.³⁰

3.33 The EOC does not agree with the reasoning of the Government for a number of reasons. Firstly, the fact there is protection of the right to vote under the Bill of Rights does not preclude in our view the need for specific anti-discrimination legislation relating to voting and standing for election just as there is on grounds of sex, race and family status. Secondly, the fact that there is no protection from discrimination under the DDO means that all types of persons with disabilities would be unable to bring a discrimination claim if they were denied the right to vote or stand for election, not just persons declared incapable of managing their affairs. Thirdly, we believe that the current system by which persons incapable of managing their affairs are unable to vote or stand for election should be reviewed.

3.34 The issue of the right to vote of persons with mental disabilities also requires specific consideration. In 2014, the Government estimated that there 147,300 people with mental illnesses or mood disorders in Hong Kong.³¹ The Hong Kong College of Psychiatrists has estimated that 3-4% of the adult working populations suffer from severe mental illnesses.³² However, it is not known how many people have been declared by courts as being incapable of managing their affairs.

3.35 Article 21 of the Hong Kong Bill of Rights provides that every permanent resident shall have the right and opportunity:

“without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions-

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) to have access, on general terms of equality, to public service in Hong Kong.”³³*

³⁰ Section 31(1) of the Legislative Council Ordinance and section 30 of the District Councils Ordinance.

³¹ Persons with disabilities and chronic illnesses, Special Topics report No 62, Census and Statistics Department, December 2014, page ix, <http://www.statistics.gov.hk/pub/B11301622014XXXXB0100.pdf>

³² The Hong Kong College of Psychiatrists, Submission to the Food and Health Bureau on Mental Health Policy in Hong Kong, November 2007.

³³ The distinctions referred to article 1(1) of the Bill of Rights are of “any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/\\$FILE/CAP_383_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/$FILE/CAP_383_e_b5.pdf)

- 3.36 Further, Article 29 of the United Nations Convention on the Rights of Persons with Disabilities requires State Parties:

“To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs...”³⁴

- 3.37 The UN Committee on the Rights of Persons with Disabilities has stated in relation to article 29:

*“Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognise the legal capacity of persons with disabilities in public and political life (art. 29). **This means that a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election...**”³⁵ (emphasis added)*

- 3.38 Recently, the Committee on the Rights of Persons with Disabilities decided a complaint relating to article 29 of the CRPD and the right of six persons with intellectual disabilities to vote in Hungary. The Committee decided that the refusal to allow them to vote when they had been placed under legal guardianship, was unlawful disability discrimination.³⁶ The system in Hungary was analogous to the system in Hong Kong under the Mental Health Ordinance, such that persons could be placed under legal guardianship and denied the right to vote.

- 3.39 Similar findings were also made by the European Union Fundamental Rights Agency³⁷ in relation to a report on the right to vote of persons with mental health problems and persons with intellectual disabilities:

“It would seem restrictions on voting rights should only be allowed in circumstances where no measures could be taken that would accommodate their specific needs in order to allow them to take part in the election.”³⁸

- 3.40 In 2013, the United Nations Human Rights Committee report on the Hong

³⁴ <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

³⁵ Committee on the Rights of Persons with Disabilities, General Comment 1, Equal recognition before the law, 19 May 2014, CRPD/C/GC/1, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

³⁶ CRPD Communication No. 4/2011 Zsolt Bujdosó v Hungary, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13798>

³⁷ The Fundamental Rights Agency is the body that has the role of promoting and protecting human rights in the European Union, <http://fra.europa.eu/en>

³⁸ http://fra.europa.eu/sites/default/files/fra-2010-report-vote-disability_en.pdf

Kong Government's compliance with the International Covenant on Civil and Political Rights (ICCPR) recommended:

*"(The Government) should revise its legislation to ensure that it does not discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable and objective relation to their ability to vote."*³⁹

- 3.41 In relation to the responses to the Consultation, a vast majority of the organisations and individuals agreed that there should be a prohibition on disability discrimination in relation to voting and standing for elections. Of note, a number of the disability and human rights NGOs stated that it would not be appropriate to deny any persons with disabilities the right to vote and stand for election as it would breach their human rights.
- 3.42 The EOC therefore believes that, consistent with the other anti-discrimination Ordinances, as well as human rights obligations under the Bill of Rights, ICCPR and CRPD, as well as recommendations made to the Hong Kong Government, the DDO should be amended to provide an express prohibition on discrimination against persons with disabilities in voting and standing for elections. The EOC also believes that the Government should review the provisions in the Legislative Council Ordinance and the District Councils Ordinance which disqualifying persons who have been declared by courts as incapable of managing their affairs from being registered to vote in Legislative Council and District Council elections. Such review should consider whether the provisions serve a legitimate aim and are proportionate.

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

- 3.43 Women in Hong Kong continue to face discrimination in a number of

³⁹ Paragraph 24, Concluding Observations 107th session Third Periodic Report on Hong Kong China, CCPR/C/CHN-HKG/CO/3

aspects of their lives which have a particular impact on their ability to fully participate in work, and be free from sexual harassment. In relation to employment, women still often face discrimination in having children whether it is during pregnancy, maternity leave or after they return from work. Further, some women are discriminated against in relation to employment and the provision of services in relation to breastfeeding their children. The EOC believes that several legislative reforms should be introduced to better protect women from discrimination and ensure they have equal opportunities in employment. These areas are discussed below.

- 3.44 In relation to sexual harassment, the EOC believes that there are a number of fields where women should be better protected and these are discussed in Section D on reforms of the protections from harassment.

(i) The right of women to return to a position after maternity leave

Question 19 of the Consultation Document asked:

“How to protect pregnant staff from dismissal after maternity leave on the pretext that the temporary replacement performed better?”

Key points

- **There is strong evidence that women continue to face significant discrimination on grounds of pregnancy during pregnancy, maternity leave and after they return to work, for example by being dismissed;**
- **There is currently no protection for women in terms of a right to return to their positions after taking maternity leave, which can be contrasted with similar international jurisdictions.**

- 3.45 Pregnancy discrimination against women remains one of the areas of significant concern in Hong Kong. For example in 2014/15, of the 280 complaints of discrimination investigated under the SDO, 40% (104 complaints) involved pregnancy discrimination. As the Consultation Document indicated, the EOC receives a number of complaints from women in situations where they are dismissed after returning to their work from their maternity leave.

- 3.46 Under the Employment Ordinance, it is unlawful to dismiss a woman who is on statutory maternity leave, subject to exceptions such as misconduct unrelated to being on maternity leave.⁴⁰ However, a woman does not have a statutory right to return to her previous position. In the experience of the EOC, after the women return to work, some employers have argued that the dismissal of the employee was not related to having a child and being on maternity leave, but, for example, that a replacement worker performed better than the employee taking maternity leave.

⁴⁰ Section 15 of the Employment Ordinance.

- 3.47 Given that vulnerability of female employees to being dismissed in such a manner, a number of other jurisdictions with similar legal systems have in place a statutory right to return to their position of employment after maternity leave.
- 3.48 In the United Kingdom, women have a right to return to their former position after taking the ordinary maternity leave period of 26 weeks. If they take the maximum 52 weeks maternity leave, a female employee has the right to return to her old job on her old terms and conditions unless it is “not reasonably practicable”, in which case she must be offered a suitable alternative job on similar terms and conditions.⁴¹ For example, it may not be reasonably practicable to employ the person on the same terms and conditions if that position becomes redundant.
- 3.49 In Australia, the Fair Work Act 2009 guarantees anyone the right to return to work immediately after parental leave. This entitles a parent (mother or father) to return to their pre-parental leave position, or, if that position no longer exists, an available position they are qualified and suited to which is nearest in status and pay to the pre-parental leave position.⁴²
- 3.50 In relation to the responses to the consultation, a number of NGO organisations and individuals expressed a view that women should have the right to return to their previous positions after maternity leave at least for a certain period, subject to exceptions such as a legitimate redundancy of a position.
- 3.51 The EOC believes that in order to better protect women from discrimination related to having been pregnant, on maternity leave, or having to care for their child, women should have a right to return to their previous role, or if that position no longer exists, a suitable alternative position on similar terms and conditions. Such a provision could either be included in the provisions of the Employment Ordinance, or alternatively in the SDO.

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.

⁴¹ Regulation 19, The Maternity and Parental Leave Regulations 1999 (UK).

⁴² Section 84 Fair Work Act 2009 (Australia).

(ii) Express protection from discrimination for breastfeeding women

Question 10 of the Consultation Document asked:

“Do you think that there should be express reference in the definition of family status to include breastfeeding women?”

Key points

- **The EOC receives a number of complaints by breastfeeding women that they have been discriminated against in the provision of services or employment;**
- **The numbers of women breastfeeding in Hong Kong is increasing, so this is an increasingly important issue;**
- **The EOC believes that, in order to improve the clarity of the anti-discrimination legislation, it is important to introduce an express provision that discrimination on grounds of breastfeeding is unlawful.**

3.52 As discussed in the Consultation Document, the EOC receives a number of complaints of discrimination by breastfeeding women. Breastfeeding women in Hong Kong face direct and indirect discrimination in a number of environments. This can take the form of inadequate public facilities for breastfeeding women; women being told that they are not allowed to breastfeed at public venues such as restaurants; and in relation to employment, employers providing inadequate facilities such as a room to express milk or by discriminatory policies such as not allowing breaks to express milk.

3.53 At the same time as their being evidence of discrimination, there is also evidence that the number of women breastfeeding their new born children is increasing, given the benefits that breastfeeding provides children. In 2014, 86.3% of women were breastfeeding their newborns on leaving hospital, a substantial increase from under 20% in 1992.⁴³ However, it was also reported that as at 2012, there is a substantial drop in numbers of women breastfeeding to only 2.3% of women after six months, with a major cause being a lack of support for breastfeeding in public and in workplaces.⁴⁴

3.54 The EOC is pleased that the Government in collaboration with The Hong Kong Committee for UNICEF, launched a campaign in 2015 called "Say Yes to Breastfeeding" to encourage organisations to provide breastfeeding facilities to working mothers who are still nursing.⁴⁵ This is an important step to changing service providers and employers' attitudes to breastfeeding.

3.55 The EOC currently considers such complaints by breastfeeding women as

⁴³ Breastfeeding at an all-time high among Hong Kong's new mums - but lack of support at home and work forces many to stop, South China Morning Post, 30 July 2015, <http://www.scmp.com/news/hong-kong/health-environment/article/1844965/breastfeeding-all-time-high-among-hong-kongs-new>

⁴⁴ Ibid, referring to a Department of Health Survey of babies born in 2012.

⁴⁵ <http://www.sayyestobreastfeeding.hk/en/mom/>

family status discrimination relating to having the care of an immediate family member.⁴⁶

- 3.56 Other jurisdictions make express reference to women being protected from discrimination in relation to breastfeeding. In Australia, there is distinct express protection from direct and indirect discrimination against women who are breastfeeding.⁴⁷ It also makes clear that such discrimination includes the act of expressing milk.⁴⁸ In Great Britain, the Equality Act 2010 does not provide distinct protection for breastfeeding women, but rather states that it is either a form of sex discrimination,⁴⁹ or a form of maternity discrimination.⁵⁰
- 3.57 In relation to the responses to the consultation, many NGOs, particularly those working with women, agreed that there should be express reference to protecting breastfeeding women from discrimination, given the evidence of the difficulties they face in Hong Kong. Several also expressed the view that as only women can breastfeed, it was preferable that provisions be included as sex discrimination, or as a separate category relating to women.
- 3.58 The EOC believes that as there are increasing numbers of women breastfeeding in Hong Kong, it is important for there to be express provisions stating that discrimination on grounds of breastfeeding is unlawful. As the issue only affects women, it may be preferable to have express provisions as a separate category of discrimination, or as a form of sex discrimination under the SDO. Alternatively, express provisions prohibiting discrimination against breastfeeding could be included in the FSDO in the definition of family status. The EOC also believes that it is preferable to include a provision defining breastfeeding to include expressing milk.

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.

⁴⁶ Section 2 Family Status Discrimination Ordinance.

⁴⁷ Section 7AA Sex Discrimination Act 1984.

⁴⁸ Section 7AA(3) Ibid.

⁴⁹ Section 13(6) Equality Act 2010.

⁵⁰ Section 17(4) Equality Act 2010.

C. Equality for all racial groups

3.59 The protections from racial discrimination under the RDO are narrower or have some significant exceptions which weaken the protections from racial and related discrimination. Concerns about a number of these issues were raised by many stakeholders during the passage of the Race Discrimination Bill and remain unaddressed. The EOC believes that legislative reforms should be made in a number of areas including: providing protection from racial discrimination in relation to the exercise of Government functions and powers; better protection from racial discrimination by association; protection from racial discrimination by perception; and repealing the provisions on medium of instruction relating to vocational training and education. Each of these issues is discussed below.

3.60 The EOC also believes that the Government should consider introducing protection from discrimination on grounds of nationality, citizenship and residency status which is discussed in Part 2 on higher priority issues requiring further research, consultation and education.

(i) Protection from racial discrimination in relation to exercise of Government functions and powers

Question 35 of the Consultation Document asked:

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

Key points

- **There is currently no protection from racial discrimination by the Government when they are exercising their functions and powers, and this is not consistent with protections in relation to sex, disability and family status discrimination;**
- **This affects everyone in Hong Kong, as everyone is of a racial group and the RDO is intended to protect everyone from racial discrimination;**
- **The lack of protection is in breach of international human rights obligations and the United Nations has made recommendations to the Government to make an amendment.**

3.61 The RDO currently has a clear gap in protection, which is a fundamental flaw with the current legislation and inconsistent with the three other anti-discrimination Ordinances. Section 3 of the RDO states that it binds the Government, for example in areas of employment, the provision of services and education. However, there is no provision, as in the three other anti-discrimination Ordinances, which states that it is unlawful for the Government to discriminate against persons on grounds of their race in the performance of its functions or the exercise of its powers.

3.62 This means that there is no protection from racial discrimination under the RDO in relation to various Government functions and powers exercised by

Government departments and other public bodies such as the Immigration Department, police and correctional services. This issue affects everyone in Hong Kong as everyone is of a racial group, and the RDO is intended to protect everyone from racial discrimination. For example, there may not be protection from racial discrimination if a police officer arrests and detains a person on grounds of their race, as the act of arresting a person is arguably a police function not a service.

3.63 This is an issue in practice as recently a claim of racial discrimination under the RDO was brought against the Hong Kong Police Force, alleging racial discrimination by police officers in relation to the arrest and detention of an Indian boy. A key issue in the case is to what extent were the police exercising Government functions and therefore potentially not within the coverage of application of the RDO.⁵¹ The EOC was granted leave by the District Court to intervene in the proceedings and provide amicus curiae submissions on this issue. The judgment in the District Court proceedings is yet to be handed down.

3.64 When the Race Discrimination Bill was being discussed by the Legislative Council's Bills Committee, the EOC raised its concerns about this clear gap in protection. A number of the submissions from other organisations at the time also called for the inclusion of Government functions and powers within the RDO.⁵²

3.65 Further, the failure to provide comprehensive protection from racial discrimination under the RDO in relation to Government functions and powers is in breach of the international human rights obligations under the Convention on the Elimination of Racial Discrimination (CERD), and the International Covenant on Civil and Political Rights (ICCPR).

3.66 Under CERD, State Parties must ensure that all acts of racial discrimination by public authorities and public institutions are prohibited:

"States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

*(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;"*⁵³

⁵¹ Singh v Secretary for Justice and Hung Kai Kam DCEO No9 of 2011, District Court.

⁵² See for example Hong Kong's Race Discrimination Bill A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances, Carole Petersen, June 2007.

⁵³ Convention on the Elimination of Racial Discrimination, article 2(1)(a).

- 3.67 In its most recent review of the Government's compliance with the CERD in 2009, the Committee stated:

*"[T]he Hong Kong SAR Race Discrimination Ordinance only covers certain Government activities and exercise of its powers in its scope of application, i.e. employment, education, and the provision of goods and services."*⁵⁴

- 3.68 It also recommended that **"all Government functions and powers be brought within the scope of the Race Discrimination Ordinance."**⁵⁵ (emphasis added)

- 3.69 More recently and in relation to the ICCPR examination in 2013, a similar observation and recommendation was made:

"19. The Committee notes with concern that, unlike the other Discrimination Ordinances, the Race Discrimination Ordinance (RDO) does not specifically apply to the Government in the exercise of its public functions such as the operations of the Hong Kong Police Forces and Correctional Services Department (article 26).

The Committee recommends Hong Kong, China to rectify a key gap in the current Race Discrimination Ordinance, in close consultation with the Equal Opportunities Commission, in order to ensure full compliance with article 26 of the Covenant."⁵⁶ (emphasis added)

- 3.70 In relation to the consultation responses, there was strong support from organisations for the proposed reform from NGOs working with ethnic minorities and women. In relation to individuals, many expressed the view that if the discrimination law applied to all public authorities, it would mean mainland immigrants and persons from Hong Kong would have to be treated equally, that they would have the same civil rights as Hong Kong residents, and would be able to become civil servants.

- 3.71 In reality and as discussed in the Consultation Document, if Government functions are brought within the scope of the RDO and there was protection from discrimination on grounds of residency status including persons from mainland China, it would still be legitimate for the Government to permit only persons who are permanent residents to apply for public housing or apply to be civil servants, if there are legitimate reasons for such policies. The EOC believes that the concerns raised can be addressed by the operation of the legislation, for example because other statutory provisions

⁵⁴ Concluding Observations on China, Committee on the Elimination of Racial Discrimination, 15 September 2009, CERD/C/CHN/CO/10-13, paragraph 28.

⁵⁵ Ibid.

⁵⁶ Concluding Observations on the third periodic report of Hong Kong, China, 29 April 2013, CCPR/C/CHN-HKG/CO/3, paragraph 19.

permitting residency discrimination would continue to apply, or by considering the need for specific exceptions in the anti-discrimination legislation. These issues are discussed further in relation to Question 11 to 16 in Chapter 3 and protection from discrimination on grounds of residency status.

- 3.72 In light of all the above considerations, the EOC therefore believes that an amendment should be made to the RDO, by providing that it is unlawful for the Government to discriminate in performing its functions or exercising its powers.

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) Protection from racial discrimination by association

Question 30 of the Consultation Document asked:

“Do you think that:

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

Key points

- **Currently there is only limited protection from discrimination by association on grounds of race, which is less protection than on the grounds of disability;**
- **There is no protection from racial discrimination by association in relation to for example friends or work colleagues;**
- **The EOC has received some complaints of race discrimination by association in areas not currently protected and it was unable to consider further;**
- **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;**

- 3.73 Discrimination by association concerns the fact that it is not only people with protected characteristics that can be treated less favourably, but also their partners, relatives, friends, carers, work colleagues and others that associate with them. In such situations, it is just as important to ensure that such discrimination is prohibited.

- 3.74 Currently under the anti-discrimination Ordinances, there is only protection from discrimination by association in relation to disability, and race to a limited extent. In relation to disability discrimination this applies to both

direct discrimination and disability harassment.⁵⁷ In relation to race, discrimination by association also applies to direct discrimination and racial harassment, but only by association with a near relative of a particular race.⁵⁸

- 3.75 The race discrimination provisions do not apply to other associates such as friends, carers, or work colleagues. The EOC has received enquiries regarding situations of possible race discrimination by association which the EOC could not consider further. For example an enquiry was made about possible race discrimination by association against a Chinese woman because of her work relating to promoting equality for ethnic minorities.
- 3.76 There is also no protection from discrimination by association in relation to sex, pregnancy, marital or family status.
- 3.77 In Great Britain, the Equality Act 2010 provides protection from association for the characteristics of disability, race, sex, gender reassignment, sexual orientation, age, and religion or belief. There is no protection in relation to pregnancy and maternity given that there is protection from sex discrimination by association. There is also no protection in relation to marriage or civil partnerships. The discrimination by association provisions apply to direct discrimination and harassment.
- 3.78 In Australia, at Federal level there is only protection from discrimination by association in relation to disability discrimination.⁵⁹ However, all State anti-discrimination legislation has protection from discrimination by association in relation to a range of protected characteristics wider than in Hong Kong.⁶⁰

⁵⁷ Section 2(6) and (7) DDO. Associate is defined under section 2(1) of the DDO as including-

“(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”

⁵⁸ Sections 5 and 7 RDO. “Near relative” is defined as the person’s spouse, parent of the person or the spouse, child of the person or the spouse of such a child, a brother or sister of the person or of the spouse or of the spouse of such a brother or sister, a grandparent of the person or spouse, a grandchild of the person or the spouse of such a grandchild: section 2 RDO.

⁵⁹ Disability Discrimination Act 1992.

⁶⁰ There is protection from discrimination by association under the Anti-Discrimination Act 1977 New South Wales, South Australia Equal Opportunity Act 1984 (on grounds of sex, disability, race, age, marital status), Equal Opportunity Act 1984 Western Australia (on grounds of sex, marital status, family status, race, disability age), Anti-Discrimination Act 1998 Tasmania (on grounds including race, age, sexual orientation, gender, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, religious belief or affiliation), Equal Opportunity Act 2010 Victoria (on grounds including age, breastfeeding, gender identity, impairment, marital status, parental status or status as a carer, pregnancy, race, religious belief or activity, sex, and sexual orientation), Anti-Discrimination Act 1991 Queensland (on grounds including sex, relationship status, pregnancy, breastfeeding, age, race, impairment, religious belief or religious activity, gender identity, sexuality, family responsibilities).

This applies to direct discrimination and in some States indirect discrimination. For example in New South Wales, there is protection from direct and indirect discrimination by association in relation to race, sex, marital status, disability and age.

- 3.79 Overall, the EOC believes that as there is some evidence of race discrimination by association in areas not protected, and that there should be harmonisation with protections from disability discrimination, the RDO should be amended to protect discrimination by association to the same degree as disability discrimination. This would include for example protection not just by association with a near relative, but also work colleagues or friends at school. This should apply to both direct discrimination and harassment by association as do the current provisions of the RDO.
- 3.80 In relation to other protected characteristics, the EOC does not currently have sufficient evidence of discrimination by association in relation to sex, pregnancy, marital status or family status to warrant an amendment to the relevant legislation at this time. The EOC will, however, continue to monitor the situation, and if necessary reconsider our position in the future.

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 replace 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

Question 31 of the Consultation Document asked:

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

Key points

- **Currently there is no protection from discrimination by perception or imputation on grounds of race;**
- **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. There is evidence that a number of racial groups in Hong Kong face higher levels of racial discrimination, prejudices and stereotypes, and such protection would help 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.

- 3.81 Discrimination by perception concerns less favourable treatment where a person is perceived, assumed or imputed to have a protected characteristic. For example, a person may be discriminated against because he is perceived to have a disability even when he does not. Currently there is only express protection for discrimination by perception under the DDO which includes protection where someone is imputed to have a disability.⁶¹
- 3.82 In relation to the protected characteristics of sex, pregnancy, marital status and family status, the EOC does not currently have sufficient evidence of discrimination on grounds of perception to warrant such provisions at this time. The EOC will however continue to monitor the situation, and if necessary reconsider our position in the future.
- 3.83 In relation to the protected characteristic of race, the EOC believes that it is appropriate to provide protection from discrimination by perception or imputation in relation to race, as there are a number of situations where persons may be perceived to be of a particular race and treated less favourably. For example, persons perceived to be of Pakistani or Bangladeshi origin (even if they are not), may be more likely to be less favourably treated given that there is evidence that those racial groups face higher levels of racial discrimination, prejudices and stereotypes in Hong Kong.⁶²
- 3.84 The EOC recommended that there should be protection from racial discrimination by association. For reasons of consistency, the EOC believes protection against racial discrimination by perception should also be added, such that the protection is to the same degree as in relation to disability discrimination. This would strengthen existing protection against discrimination on grounds of race.
- 3.85 Other similar jurisdictions do provide protection from discrimination by perception across other protected characteristics. The Equality and Human

⁶¹ Section 2 DDO.

⁶² The Status of Ethnic Minorities in Hong Kong, 1997-2014, Puja Kapi, Centre for Comparative Law, University of Hong Kong, 2015, Chapter 1: Perceptions and self-perceptions, <http://www.law.hku.hk/ccpl/pub/EMreport.html>

Rights Commission Explanatory Notes and the Statutory Codes of Practice on the Equality Act 2010 make it clear that direct discrimination or harassment can include situation of discrimination by perception.⁶³ These cover the protected characteristics of disability, race, sex, gender reassignment, sexual orientation, age, and religion or belief. There is no protection in relation to pregnancy and maternity, marriage or civil partnerships.

- 3.86 In Australia, a number of the States' anti-discrimination legislations expressly prohibit direct and indirect discrimination by perception or imputation.⁶⁴ This covers both situations where persons are perceived to have a protected characteristic and do not (for example someone believes that a person has a particular disability), or where they are presumed or imputed to have a characteristic relating to the protected characteristic (for example the belief that persons with mental disabilities are dangerous to society).

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) Protection from discrimination relating to the medium of instruction in education and vocational training

Question 38 of the Consultation Document asked:

"Do you think that the limitations on the operation of the RDO in the education and vocational training sectors regarding the medium of instruction for different racial groups should be repealed?"

Key points

- **There is a limitation on the operation of the RDO regarding the medium of instruction in vocational training and education;**
- **There is evidence that these provisions are too broad in their effect and may permit, in some circumstances, unjustified indirect race discrimination;**
- **The provisions do not fully comply with the Bill of Rights and international human rights obligations to prohibit discrimination on grounds of language.**

- 3.87 Although the RDO does provide protection from racial discrimination in education and vocational training, there are express limitations on the

⁶³ See for example paragraph 3.21 of the Employment Code of Practice, Equality and Human Rights Commission, http://www.equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf

⁶⁴ See the Anti-Discrimination Act 1977 New South Wales, South Australia Equal Opportunity Act 1984, Equal Opportunity Act 1984 Western Australia, Anti-Discrimination Act 1998 Tasmania, Equal Opportunity Act 2010 Victoria, Anti-Discrimination Act 1991 Queensland.

RDO's operation in those sectors which relates to language and the medium of instruction. Section 26(2) of the RDO states that the prohibition on racial discrimination in education, does not require modifying or making different arrangements regarding the medium of instruction for persons of any racial group. Section 20(2) provides a similar exception in relation to vocational training.

- 3.88 It is important to understand in the context of languages in Hong Kong, both Chinese and English are official languages and enjoy equal status.⁶⁵ This has implications for the exceptions and the extent to which they are necessary. Each of the provisions is examined separately below as they raise some distinct issues.

(a) Vocational training

- 3.89 The EOC has concerns that the effect of this limitation is too broad. In relation to vocational training, the EOC has received a number of complaints of language discrimination relating to vocational training. For example, where training or services are only provided in Chinese, this may constitute indirect race discrimination against non-Chinese ethnic groups such as Caucasians, South Asians and Africans. The Consultation Document provided an example of a complaint received by the EOC on the issue:

Example 33: Exception on medium of instruction under the RDO

The EOC received a complaint from a Nepalese plumber who wished to complete the required training course with a Vocational Training Institution. Without completing the course the plumber would not receive the Hong Kong qualification as a plumber. The Nepalese plumber requested for the training course to be provided in English, but the Institution initially refused. The exception to discrimination in vocational training regarding the medium of training meant that no claim of indirect race discrimination could be brought.

- 3.90 The current limitation in relation to vocational training makes it lawful for an organisation to provide vocational training in a language of their choice, even if it is unreasonable. For example, if an organisation decides to provide vocational training course on project management only in Chinese, despite the fact that 40% of the applicants indicated that they would like to be taught in English, it would not be unlawful. This could adversely affect the racial groups applying for the course that do not speak Cantonese. It could also negatively impact on their ability to improve their skills and qualifications.

⁶⁵ See article 9 of the Bill of Rights and section 5 of the Official Languages Ordinance, [http://www.legislation.gov.hk/blis_pdf.nsf/CurEngOrd/3D26A2C71CB81FE4482575EE002B23B6/\\$FILE/CAP_5_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/CurEngOrd/3D26A2C71CB81FE4482575EE002B23B6/$FILE/CAP_5_e_b5.pdf)

- 3.91 The limitation relating to vocational training may also not be compliant with obligations to prevent discrimination on the grounds of language under the Bill of Rights. The Bill of Rights prohibits discrimination on a number of grounds including language.⁶⁶ The Bill of Rights also implements into Hong Kong legislation the International Covenant on Civil and Political Rights (ICCPR) which contains the same prohibitions on discrimination including on grounds of language. It should also be noted that in similar jurisdictions such as Great Britain and Australia, there are no equivalent limitations or exceptions relating to language and vocational training.
- 3.92 In relation to the consultation responses, of note, one NGO working with ethnic minorities referred to the fact that ethnic minorities are often unable to receive vocational training because they are only offered in Chinese, and not English in which they are often more proficient.
- 3.93 One vocational training organisation was opposed to the repeal of the exception as they cited that there are justifiable situations where certain courses should be taught in Chinese. For example, they cited teaching Chinese culinary art and Chinese medicine pharmaceuticals for trade specific skills as being examples.
- 3.94 The position of the EOC is there are situations where it will be reasonable to only teach a course in one language, but that it is not appropriate to have a blanket limitation regarding medium of instruction. Questions of whether the provision of vocational training in a particular language is indirect racial discrimination should be determined on the facts of the case and whether there was a legitimate aim and it was proportionate to provide the training in only that language. This is the same approach that is currently taken in relation to other fields where there is no limitation relating to medium of instruction, such as in relation to the provision of goods, facilities and services or management of premises. Therefore, the EOC believes that the limitation relating to medium of instruction and vocational training should be repealed.

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.

(b) Education

- 3.95 In relation to the limitation for education under the RDO, the Government explained its reasoning when the Race Discrimination Bill was introduced:

⁶⁶ Article 22 Bill of Rights.

“The requirement for language proficiency in education has been a matter of concern to the ethnic minorities. In this regard, the Government firmly upholds the right of children to education, irrespective of their race or ethnic origin. All children in Hong Kong have the right to nine years of free and universal basic education. However, as stipulated in Clause 26(2) of the Bill, this does not compel the schools to modify its arrangements regarding holidays or medium of instruction in order to cater for students of any racial group.”⁶⁷

- 3.96 The Government specifically referred to the case law of the European Court of Human Rights on the issue:

“In the Belgian Linguistics Case (1968) 1EHRR 252, the applicants, who were French-speaking residents in the Dutch-speaking part of Belgium, wanted their children to be educated in French. The European Court of Human Rights decided that the right to education did not include a right to be taught in the language of choice of the parents, nor a right of access to a particular school of the choice of the parents.”⁶⁸

- 3.97 In other words, although the Government acknowledged that there was a need to improve the assistance for ethnic minorities learning Chinese, they indicated that the right to education does not extend to ethnic minorities having a right to require to be taught in their own ethnic minority language.
- 3.98 In relation to consultation responses, an organisation representing the Heads of Secondary Schools was similarly concerned that if the limitation was repealed, it may be discriminatory not to teach ethnic minorities in their requested ethnic minority language.
- 3.99 The EOC understands the Government’s position that, given Hong Kong has two official languages of Chinese and English, it is reasonable that all students are taught in either Chinese or English. However, the EOC has concerns that the manner in which the limitation regarding education and the medium of instruction is drafted is too broad and not necessary.
- 3.100 Similarly to vocational training, the limitation 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. Further, in similar jurisdictions such as Great Britain and Australia, there are no equivalent limitations or exceptions relating to education and medium of instruction.

⁶⁷ Legislative Council Brief, Race Discrimination Bill, 29 November 2006, page 9, http://www.hab.gov.hk/file_manager/en/documents/policy_responsibilities/the_rights_of_the_individuals/race/LegCoBrief_e.pdf

⁶⁸ Ibid.

- 3.101 In the consultation responses, one organisation referred to an example of discrimination in the medium of instruction where a university course was advertised to be taught in English, but in fact the lecturer sought to teach it in Chinese because they preferred speaking in Chinese. Because of the effect of the current exception, a claim of indirect race discrimination could not be made in such circumstances, even though such treatment is likely to be otherwise considered unjustified and discriminatory.
- 3.102 The major issue in relation to ethnic minorities and education is not that they ask to be taught in their particular ethnic minority language instead of Chinese or English. Rather, the major concern is the level of support for ethnic minority students to learn Chinese as a second language. This has been highlighted by the EOC in its own research.⁶⁹
- 3.103 Recommendations to improve the public education system in Hong Kong for ethnic minorities to learn Chinese as a second language have also been made by international human rights bodies.⁷⁰
- 3.104 In January 2014, the Government announced that it would be strengthening the Chinese learning support for ethnic minority students whose first language is not Chinese and the EOC is monitoring the Government's progress on this.⁷¹
- 3.105 In the view of the EOC the limitation relating to education is too broad. By stating that there is no requirement to "modify or make different arrangements" regarding medium of instruction, that could be interpreted as not requiring any targeted assistance to ethnic minorities to learn Chinese as a second language. It is also not accurate in terms of reflecting the Government's stated intention that the limitation aims only to avoid claims relating to ethnic minorities wishing to be taught in their own ethnic minority language.
- 3.106 Similarly to the limitation regarding medium of instruction and vocational training, the EOC therefore believes the limitation in relation to education and medium of instruction should be repealed. Issues of possible racial discrimination would be considered by applying the normal principles of indirect race discrimination, and whether there was a legitimate aim and it was proportionate to provide the education in that language.

⁶⁹ Education for all, Report of the Working Group for Education of Ethnic Minorities, March 2011, <http://www.eoc.org.hk/eoc/Upload/UserFiles/File/EducationReportE.pdf>

⁷⁰ For example Concluding Observations on Hong Kong, CERD/C/CHN/CO/1—13, 15 September 2009, paragraph 31; Concluding Observations on Hong Kong, E/C.12/CHN/CO/2, 23 May 2014, paragraph 52.

⁷¹ Policy address 2014, paragraphs 74-79, <http://www.policyaddress.gov.hk/2014/eng/index.html>

- 3.107 We do not consider that this would affect the lawfulness of the current education system in which Chinese or English are the languages used. It is likely that teaching in Hong Kong's official languages would be considered to be for a legitimate aim and proportionate.

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

Question 17 of the Consultation Document asked:

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

- *include any less favourable treatment on grounds of a protected characteristic; and*
- *made clear that for direct disability discrimination a comparison can be made either with persons without that particular disability, or without any disability?”*

Key points

- The current definition of direct discrimination is neither sufficiently clear nor consistent with concepts of discrimination by association and perception;
- The current definition of direct disability discrimination may not apply to situations where a person with a disability is less favourably treated than a person with a different disability.

- 3.108 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.

(a) The meaning of discrimination on grounds of a protected characteristic

- 3.109 Firstly, one problem with the current model of direct discrimination is that all the anti-discrimination Ordinances refer to discrimination on grounds of the particular characteristic of *the person*. This means the person discriminated against must possess the protected characteristic. This

contrasts with the formulations in the Great Britain which refers to less favourable treatment on grounds (because) of the characteristic rather than the person.⁷² For example, the current formulation does not cover situations where a person is treated less favourably not because of his or her own race, but nevertheless on racial grounds.

3.110 The Consultation Document referred to a hypothetical example:

Example 11: Discrimination on racial grounds

A Chinese person was employed as the manager of an amusement centre. He was dismissed because of his refusal to carry out a racially discriminatory instruction to exclude young Nepalese people from the amusement centre.

Under the current formulation of direct discrimination, the Chinese person would not be protected from the racial discrimination as they were not less favourably treated because of their race (Chinese). In the United Kingdom a similar situation would be protected: see the *Showboat* case.⁷³

3.111 The current formulation is also not consistent with the concepts of discrimination by association or perception and imputation, in which the person facing discrimination does not have the protected characteristic. As discussed in Questions 30 and 31, such forms of discrimination are already prohibited in relation to disability, and to a lesser extent in relation to association for race.

3.112 The EOC believes that it is important that the direct discrimination provisions be broad in its protection from discrimination, and consistent with other related provisions of discrimination by association and perception or imputation. In the consultation, more than half of the organisations responded in favour of the proposal. The EOC believes that the formulation of direct discrimination for all the protected characteristics should be amended to state that on the grounds of the protected characteristic (e.g. sex, race), a person is treated less favourably, rather than requiring the person to have the protected characteristic.

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 (e.g. sex, race), a person is treated less favourably, rather than requiring the person to have the protected characteristic.

⁷² See section 13(1) of the Equality Act 2010 (UK)

⁷³ *Showboat Entertainment Centre v Owens* - [1984] 1 All ER 836.

(b) Comparator in direct disability discrimination claims

- 3.113 Secondly, in our previous submissions to the Government on the reform of the DDO, the EOC raised a concern with the direct discrimination provisions as they apply to disability.⁷⁴ The EOC is concerned with the language of the provision which requires a comparison to be made between a person with a disability and another person “without a disability”. This may be interpreted as excluding comparison with persons who have another disability, which the EOC believes is not the correct interpretation of the disability discrimination legislation.
- 3.114 The current definition does not clearly say that it is direct disability discrimination where a person with disabilities is less favourably treated than another person with a different disability. The EOC does not believe such an approach would be desirable, as there may be situations where persons with particular types of disabilities are less favourably treated than person with other disabilities in similar circumstances. For example, there is evidence that persons with mental disabilities face even greater prejudice and discrimination than persons with physical disabilities.⁷⁵
- 3.115 The definition under the DDO is different from the approach under the Australian or British disability anti-discrimination legislation. In Australia, the comparison is made with a person without “the disability” which could include a person having a different disability.⁷⁶
- 3.116 In Great Britain, a comparison is made between the treatment of someone on grounds of a protected characteristic and the treatment of “others”.⁷⁷ Further the Equality Act states:
- “In relation to the protected characteristic of disability-*
(a) a reference to a person who has a particular protected characteristic
is a reference to a person who has a particular disability...”⁷⁸
- 3.117 The effect of these provisions is that they can include less favourable treatment between persons with different disabilities.
- 3.118 Previously the British direct disability discrimination provisions referred to less favourable treatment of persons with disabilities compared to persons

⁷⁴ See Item 10 of the Annex to the Submission of the EOC on the reform of the SDO and the DDO 2011, Attachment 1.

⁷⁵ For example the EOC commissioned Survey of Public Attitudes towards persons with a disability, found that only 9% of people would accept persons with mental disabilities as fellow employees and 33% would avoid contact with them, Policy 21 Limited, 2011, page 48, [http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201109/DisabilityReport\(eng\).pdf](http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201109/DisabilityReport(eng).pdf)

⁷⁶ Section 5 Disability Discrimination Act 1992, Commonwealth Australia .

⁷⁷ Section 13(1) Equality Act 2010.

⁷⁸ Section 6(3) Equality Act 2010.

without that “particular disability”.⁷⁹ As an example, this has been interpreted as including where a person with a bipolar disorder is treated less favourably than persons without that disability because of stereotypes about persons with mental disabilities.⁸⁰

- 3.119 As a result, the EOC believes that the direct discrimination provisions in section 6(a) of the DDO should be amended. For example this could state:

*“...on the ground of that other person’s disability he treats him less favourably than he treats or would treat a person **without that particular disability.**”* (emphasis added)

- 3.120 The EOC believes that a corresponding amendment should be made to section 8 of the DDO as it defines the comparison that should be made in claims of disability discrimination under section 6 of the DDO. In the consultation responses, there was 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

Question 20 of the Consultation Document asked:

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

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

Key points

- **The current definition of indirect discrimination is too narrow in several respects and as a result in some situations unjustifiably prevents claims of discrimination being made;**
- **The test of indirect discrimination should more clearly set out the element of justification.**

⁷⁹ Section 3A Disability Discrimination Act 1995, Great Britain.

⁸⁰ Aylott v Stockton on Tees Borough Council [2010] EWCA Civ 910.

- 3.121 Indirect discrimination relates to policies or practices that are neutral in their application but have the effect of disadvantaging a group with a protected characteristic and cannot be demonstrated to be justifiable. The concept of indirect discrimination is particularly important in situations of structural discrimination as opposed to overt direct discrimination.
- 3.122 The same formulation for indirect discrimination exists under all four anti-discrimination Ordinances, which are based on the Great Britain and Australian anti-discrimination legislation. Currently, the key elements of the test for indirect discrimination are:
- A requirement or condition is applied to persons;
 - The proportion of persons with a protected characteristic that cannot meet the requirement or condition is considerably smaller than proportion of people without the protected characteristic;
 - Which is to the detriment of the person with the protected characteristic as they cannot comply with it; and
 - The requirement or condition cannot be shown to be justifiable irrespective of the protected characteristic.
- 3.123 The EOC considers that the definition of indirect discrimination should be improved based on our operational experience of considering complaints, as well as developments in other jurisdictions. There are three issues that the EOC believes need addressing: the scope of the test with respect to a “requirement or condition”; the test of what disadvantage must be established; and making it clearer in the legislation what needs to be established for indirect discrimination to be justified. Of note, there was also considerable support for the proposals from both organisations and individuals in the consultation response.

(a) Requirement or condition

- 3.124 In relation to the element of “a requirement or condition”, the EOC believes that the current provision is too narrow and therefore, in some situations, would prevent claims of indirect discrimination being made.
- 3.125 In Great Britain, courts previously interpreted “requirement or condition” narrowly making it difficult to establish indirect discrimination. Courts interpreted it as requiring the establishment of an “absolute bar” to accessing employment or services.⁸¹
- 3.126 The Consultation Document referred to an example of how the current provisions could prevent claims of indirect discrimination being made.

⁸¹ Perera v Civil Service Commission and Department of Customs and Excise (No 2) [1983] IRLR 166; and Meer v London Borough of Tower Hamlets [1988] IRLR 399.

Example 12: Provisions, criterion or practices

An employer states as part of their criteria for appointment as a legal assistant that candidates which are able to work full time and have no caring responsibilities of children would be given preference.

Under the existing test of indirect discrimination, this would not constitute a requirement or absolute bar to employing persons who could not work full time or have caring responsibilities. As a result it would not be possible to establish indirect discrimination. However, under a broader test the preferential criteria would be capable of being a relevant criterion which could put women at a particular disadvantage as they are more likely to want to work part time and have caring responsibilities for children.

- 3.127 Since then the British legislation was amended and now has a broader definition of a “provision, criterion or practice”. This is also the same definition used in the European Union anti-discrimination Directives and applies across all 28 EU Member States. The terms are construed broadly and include policies, procedures, rules, arrangements, and requirements whether mandatory or discretionary.⁸²
- 3.128 In the current Australian anti-discrimination legislation the test for indirect discrimination is also wider than under the Hong Kong legislation as it stipulates a “condition, requirement or practice” in the case of sex, marital status and pregnancy discrimination;⁸³ or a “term, condition or requirement” in the case of race discrimination.⁸⁴
- 3.129 The EOC believes that the current test of a “requirement or condition” is too restrictive, unreasonably prevents certain types of indirect discrimination claims being brought, and is no longer consistent with similar international jurisdictions tests for indirect discrimination. As a result, it is in our view preferable to use the British terminology of a “provision, criterion or practice”.

(b) Disadvantage or detriment

- 3.130 Secondly, the test of disadvantage or detriment is in our view also too restrictive. For example, the SDO refers to a requirement or condition “which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it”, and that this is to the detriment of women.⁸⁵

⁸² British Airways Plc v Starmar [2005] IRLR 862.

⁸³ See sections 5(2), 6(2), 7(2) of the Sex Discrimination Act 1984.

⁸⁴ Section 9A(1) Race Discrimination Act 1975.

⁸⁵ Section 5(1)(b)(i) Sex Discrimination Ordinance.

- 3.131 Similar international jurisdictions do not require that the proportion who can comply be “considerably smaller”. Rather, they usually require simply that a requirement or condition puts persons with the characteristic at a “disadvantage”.
- 3.132 For example, Great Britain’s Equality Act 2010 refers to “a particular disadvantage”. The Australian Sex Discrimination Act 1984, for example, refers to “the effect of disadvantaging”.⁸⁶
- 3.133 The EOC believes that it should not be necessary to establish statistically a considerably smaller proportion that can comply, as we believe the test of “requirement or condition” should no longer impose a mandatory element. Persons, for example, could be put at a particular disadvantage by a practice or policy which is not mandatory.
- 3.134 The EOC therefore believes that the element of a “proportion of persons with a protected characteristic that cannot meet the requirement or condition is considerably smaller than proportion of people without the protected characteristic” should be repealed.
- 3.135 Further the EOC believes that the element of “which is to the detriment of the person with the protected characteristic as he/she cannot comply with it” should also be amended to state “which is to the detriment of the person”, as compliance with a requirement or condition may not be relevant.

(c) Justification

- 3.136 The last element of the test of indirect discrimination is that a respondent cannot establish the policy is “justifiable”. The EOC believes that this element should be modified to more clearly set out on the face of the legislation what is required.
- 3.137 In Great Britain, the test requires that the respondent cannot show that the condition requirement or practice is a “proportionate means of achieving a legitimate aim”. In other words, the test spells out clearly that there are two elements to establishing that the policy was justified or reasonable: a legitimate aim and that the measures used to achieve that aim were proportionate and necessary.
- 3.138 The Australian model refers to the “reasonableness” of the condition, requirement or practice. The Sex Discrimination Act 1984 provides further explanation of the factors to be taken into account in determining reasonableness:

⁸⁶ Section 5(2) Sex Discrimination Act 1984.

- “(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and*
- (b) the feasibility of overcoming or mitigating the disadvantage; and*
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.”⁸⁷*

3.139 In Hong Kong, the Race Discrimination Ordinance is the only anti-discrimination Ordinance that expressly defines the meaning of “justifiable”. Section 4(2) states that a requirement or condition is justifiable “if it serves a legitimate objective and bears a rational and proportionate connection to the objective”.

3.140 The EOC believes that for reasons of clarity and harmonisation, the indirect discrimination provisions for all the protected characteristics should set out the elements of when indirect discrimination is justified. Our preference would be to adopt the RDO model for all the protected characteristics.

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

Question 39 of the Consultation Document asked:

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

- ***Employer liability for harassment of employees by customers, tenants or any other third parties not in an employment relationship where an employer is put on notice of the harassment and fails to take reasonable action;***
- ***Workplace liability on the person harassing but there is no employer/ employee relationship (e.g. volunteers harassed by another volunteer);***

⁸⁷ For example section 7B Sex Discrimination Act 1984.

- *Liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action;*
- *Liability of service users for harassing the service providers;*
- *Liability of service users for harassing other service users;*
- *Liability for harassment on ships and aircraft in relation to the provision of goods facilities and services;*
- *Liability of tenants and subtenants for harassing other tenants or subtenants;*
- *Liability of the management of clubs for harassing members or prospective members?"*

Key points:

- The EOC receives many complaints of harassment, particularly sexual harassment. The EOC has also conducted a number of studies that indicate that there are high levels of sexual harassment in a range of fields such as employment, education and the provision of services;
- There are a number of situations where the current provisions prohibiting harassment do not provide sufficient protection;
- Employers have an important role in terms of preventing harassment of their employees, and currently there is no provision on the liability of employers for employees being harassed by third parties such as customers;
- There is currently no protection from sexual, racial or disability harassment of persons who do work in a common workplace such as volunteers or persons working on consignment and are not in an employment relationship, but are subjected to harassment by an employee;
- There is currently no protection from racial and disability harassment of service providers by service users, including on Hong Kong registered ships and aircraft;
- There is currently no protection from sexual, racial or disability harassment of tenants or sub-tenants by other tenants or sub-tenants occupying the same premises;
- There is currently no protection from sexual, racial or disability harassment by management of clubs of members or prospective members.

3.141 The operational experience of the EOC is that there are many limitations on the scope of protection from harassment under the anti-discrimination Ordinances. Currently there is protection from sexual, disability and racial harassment in a number of fields but to differing degrees.

3.142 At the same time, the evidence of complaints to the EOC indicates that harassment, and particularly sexual harassment, remains a significant area of concern in Hong Kong. In 2014/15, the EOC investigated 280 cases under the SDO. Of these 259 concerned employment, and of these, 41% (107 cases) involved sexual harassment. Of the 21 non-employment related cases, 71% (15 cases) related to sexual harassment.

3.143 The EOC has also conducted a number of studies relating to sexual harassment in different fields. In relation to employment, a survey of 6,000

workers in the service industries was published by the EOC in 2014. It examined sexual harassment in industries including retail, catering, healthcare and nursing industries. It found that nearly one fifth (19%) had been sexually harassed in the last year.⁸⁸

3.144 In relation to education, in 2013 the EOC published a study into sexual harassment in primary, secondary and tertiary education, which found that more than 50% of the 5,902 students surveyed had experienced various forms of sexual harassment in the preceding year.⁸⁹

3.145 Below each issue from the Consultation Document is examined.

(a) Employer liability for harassment of employees by customers or other third parties where they fail to take reasonable action to prevent harassment

3.146 The EOC firstly believes that an employer should be liable for harassment of an employee by customers, or any other third party not in an employment relationship, where an employer is put on notice of the harassment and fails to take reasonable action to prevent the harassment.

3.147 Currently, employers are liable for the harassment of employees by other employees, whether or not it was done with the employer's knowledge or approval.⁹⁰ An employer will only have a defence if they can demonstrate that they took reasonably practicable steps to prevent the harassment.⁹¹

3.148 The issue of employer liability in relation to third party harassment is particularly relevant to the service industries where as indicated above, there is evidence of significant levels of sexual harassment of employees by customers. The EOC survey of service industries indicated that 28% of sexual harassment was from customers.⁹² In relation to flight attendants, a 2014 EOC survey indicated that this figure was even higher, with 51% stating the sexual harassment they had witnessed or heard about was perpetrated by customers.⁹³

⁸⁸ EOC, Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Workers of Service Industries <http://www.eoc.org.hk/eoc/upload/ResearchReport/201452393149493382.pdf>

⁸⁹ EOC Study on Students' Sexual Attitudes and Views on Sexual Harassment, March 2013, paragraph 5, http://www.eoc.org.hk/EOC/Upload/ResearchReport/SH_eExecutive%20Summary.pdf

⁹⁰ This concept is called vicarious liability of the employer.

⁹¹ See for example section 46(3) of the Sex Discrimination Ordinance.

⁹² EOC, Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Workers of Service Industries, page 7, <http://www.eoc.org.hk/eoc/upload/ResearchReport/201452393149493382.pdf>

⁹³ EOC, Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Flight Attendants, paragraph 9, http://www.eoc.org.hk/EOC/Upload/ResearchReport/SHFlightAttendants_e.pdf

- 3.149 It is also relevant to note that in 2014, the Government accepted the EOC's recommendations by amending the SDO to provide protection from sexual harassment of service providers by service users, given the high levels of such sexual harassment. This is discussed further below. However at that time, no amendment was made on employer liability in such situations.
- 3.150 Employer liability for third party harassment could also help to encourage employers to take steps to develop and implement harassment policies to ensure that any harassment of staff by customers is investigated and, if necessary, acted on. Past studies conducted by the EOC suggest that many employers and businesses still do not have a comprehensive anti-sexual harassment policy statement in place, and that awareness on preventing sexual harassment in the workplace remains low.⁹⁴
- 3.151 The issue of harassment of employees by third parties is also of particular importance in Hong Kong in relation to foreign domestic workers. The SDO currently protects domestic worker employees from sexual harassment by employers and persons residing at the premises.⁹⁵ However, there is no protection from sexual harassment by other third parties such as relatives or friends that visit the premises but do not reside there. In 2014, the EOC conducted a study of sexual harassment of foreign domestic workers in Hong Kong which indicated that, of those who had experienced sexual harassment, 6% was by "visiting friends/relatives of employers", and 12% was by others such as "employer's staff".⁹⁶ As a result, there is currently a gap in protection, and one means of addressing that could be by introducing liability on an employer for third party harassment, if after becoming aware of harassment, the failed to take reasonable steps to prevent it.
- 3.152 In a number of similar international jurisdictions, there is or has been such employer liability. In Great Britain, what is called "third party harassment" provisions were initially introduced in relation to sexual harassment in April 2008 under the Sex Discrimination Act 1975. The Equality Act 2010 extended this to all other protected groups (e.g. race, disability).
- 3.153 The model in the Equality Act 2010 focused on the employment situation and the obligations on employers to protect employees from the actions of customers and other third parties where they have notice of harassment. It provided:

"(2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where—

⁹⁴ EOC, Sexual Harassment – Questionnaire Survey for Business Sector, paragraphs 3 and 12
http://www.eoc.org.hk/EOC/Upload/ResearchReport/SH_BS_eSummary.pdf

⁹⁵ Section 23(12) Sex Discrimination Ordinance.

⁹⁶ "Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Foreign Domestic Workers", Equal Opportunities Commission, 27 November 2014,
<http://www.eoc.org.hk/eoc/upload/ResearchReport/2014112711564340970.pdf>

- (a) *a third party harasses B in the course of B's employment, and*
- (b) *A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.*

(3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.

(4) A third party is a person other than—

- (a) *A, or*
- (b) *an employee of A's.*⁹⁷

3.154 This provision applied both to sexual harassment and other forms of harassment.

3.155 The British third party harassment provisions were repealed with effect from 1 October 2013 under the Enterprise and Regulatory Reform Act 2013.⁹⁸ The repeal was part of the current British Government's policy to reduce perceived regulatory burden on employers. However, it should also be noted that the repeal of this provision was strongly resisted by many stakeholders working on issues relating to discrimination. Of the 80 responses to the consultation, 16 (20%) agreed to the proposal for repeal and 57 (71%) opposed it.⁹⁹

3.156 In Australia, there is protection from sexual harassment both at Federal as well as at State level in varying manners, but those protections do not extend to other forms of harassment (e.g. race or disability).

3.157 In South Australia, there is employer liability for sexual harassment of an employee by a third party who is not a fellow employee:

*"If an employee reports to his or her employer specific circumstances in which the employee was subjected, in the course of his or her employment, to sexual harassment by a person other than a fellow worker, and it is reasonable in all the circumstances to expect that further sexual harassment of the employee by the same person is likely to occur, it is unlawful for the employer to fail to take reasonable steps to prevent the further sexual harassment."*¹⁰⁰

3.158 In New Zealand, it is also relevant to note that an employer can be liable not only for sexual or racial harassment by an employee of another employee,

⁹⁷ Section 40(2) to (4) of the Equality Act 2010.

⁹⁸ Section 65 Enterprise and Regulatory Reform Act 2013.

⁹⁹ Executive Summary, Government Response to the consultation, October 2012.

¹⁰⁰ Section 87(7) Equal Opportunity Act 1984 (SA), introduced in 2009.

but also where they fail to take steps to prevent such harassment by a customer or client. The employer will be liable where the employee makes a complaint to the employer and they fail to take practicable steps to prevent the behaviour.¹⁰¹

- 3.159 The British model focused liability only on an employer whether in the context of clients, customers, common workplaces, the provision of goods or services, and tenancies. This relied on the employer being notified of harassment and the employer failing to take reasonable steps to prevent it. The harassment must have occurred on at least three occasions in order to set a reasonable threshold for employer liability.
- 3.160 The South Australian and New Zealand models have a provision relating to employer liability similar to the former British model, but do not require that harassment must occur on at least three occasions.
- 3.161 Several cases from Great Britain illustrate how these employer liability provisions could operate in practice to protect people from sexual or other harassment. These were Examples 35 and 36 of the Consultation Document.

Example 35: Employer liability for sexual harassment of care worker by client

The claimant who was employed as a care worker in the respondent's care home claimed that she was sexually harassed by a client at the home, and that the respondent took no action either to prevent or to minimise the harassment. The employment tribunal found that the respondent was aware of two incidents of third-party sexual harassment and took the view that the respondent should have taken steps either to prevent or to minimise the harassment. The tribunal held that the employer could have taken a number of reasonable steps to protect the employee from sexual harassment, such as having another member of staff accompany her, consulting the resident's social worker or psychiatrist for advice, altering rotas to minimise contact with the resident or transferring her to another site. The claimant was awarded £7,500 for injury to feelings.¹⁰²

¹⁰¹ See sections 108, 117 and 118 of the Employment Relations Act 2000 New Zealand.

¹⁰² Blake v Pashun Care Homes Ltd [2011] EqLR 1293.

Example 36: Employer liability for racial harassment of social worker by client

The claimant, who was Iranian, was a residential social worker at a home for troubled children. One of the children's behaviour was extremely challenging, and there were a number of incidents when the claimant was on shift including mocking of his accent and saying that he should go back home. As a result, he went on sick leave and issued claims of racial harassment and indirect racial discrimination under the RRA 1976. The Employment Appeal Tribunal (EAT) found that a) the respondent had been on notice of the problems following a report and had not acted to put in effective measures to prevent the behaviour; and b) that the behaviour was harassment for which the respondent was liable given their inaction.¹⁰³

- 3.162 In relation to the consultation responses, a number of women's NGOs supported the proposal as they believed it would provide better protection from sexual harassment of women. In relation to organisations opposing, a number of employer organisations expressed the view that it is difficult to control the actions of customers, and therefore it would be unreasonable to impose liability on employers. In relation to individuals, many also were concerned that it would impose too much liability on employers.
- 3.163 The EOC believes that the concerns of some employer groups and individuals do raise legitimate concerns about the extent of liability, which could be addressed in the legislation.
- 3.164 The EOC believes that there should be employer liability for the harassment of employees by third parties, but only where they have notice of harassment and failed to take reasonable steps to prevent it. This provides a high threshold of two requirements, and the EOC believes this should address the concerns of the employer groups and many individuals. The EOC further believes that, for reasons of consistency, the employer liability should apply to all forms of harassment currently protected, i.e. sexual, racial and disability harassment.

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.**

¹⁰³ Sheffield City Council v Norouzi UKEAT/0497/10/RN

(b) Common workplace liability where there is no employment relationship

3.165 There are a number of situations where there is no employment relationship, but persons may be subjected to harassment and the current provisions do not provide protection. This is of particular concern in relation to sexual harassment, though the same issues arise in relation to racial and disability harassment. For example, this arises in situations of common workplaces such as where a person is working on consignment in a retail shop. It may also arise in relation to volunteers doing work at an organisation, but are not employed by the organisation.

3.166 In the Consultation Document, the EOC referred to an example of a complaint of sexual harassment which the EOC was unable to proceed with given that it involved a consignment situation.

Example 34: Sexual harassment in a common workplace

The EOC received a complaint of sexual harassment by a woman who worked as a promoter of electronic products. She worked on consignment in a large retail shop and alleged sexual harassment by employees of the retail shop. However, as she was an employee of the promoting company and not an employee of the retail shop, we could not take forward her complaint.

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

¹⁰⁴ From the Government's "Youth in Hong Kong: A Statistical Profile 2012": The number of registered young volunteers aged 13-25 in the Volunteer Movement, which was launched by the Social Welfare Department in coordination with a number of non-Governmental organisations/ institutions, increased substantially from 78,277 in 1998 to 429,474 in 2011. According to a survey by the Agency for Volunteer Service in 2009, 68.4% of youth aged 15-24 had participated in voluntary work in the past 12 months prior to the survey. http://e-registration.coy.gov.hk/research/20140422/executive_summary_e.pdf

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

“Harassment in common workplaces

- (1) *A person must not sexually harass another person at a place that is a workplace of both of them.*
- (2) *For the purposes of this section it is irrelevant—*
 - (a) *whether each person is an employer, an employee or neither; and*
 - (b) *if they are employees, whether their employers are the same or different.*
- (3) *In this section **workplace** means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment.”¹⁰⁵ (emphasis added)*

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

- “(a) an employer or employee,*
- (b) a commission agent or contract worker,*
- (c) a partner in a partnership,*
- (d) a person who is self-employed,*
- (e) a volunteer or unpaid trainee.”¹⁰⁷*

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

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

¹⁰⁵ Section 94 Equal Opportunity Act 2010 (VIC).

¹⁰⁶ Section 22B(6) Anti-Discrimination Act 1977 (NSW).

¹⁰⁷ Section 22B(9) Ibid.

Recommendation 15

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

(c) Liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action

3.172 This issue is addressed in Chapter 4, as the EOC does not believe it is a higher priority for reform at this time.

(d) Liability of service users for harassing the service providers

3.173 As was discussed in relation to liability of employers for third party harassment, the Government made amendments to the SDO in 2014 to provide protection from sexual harassment of service providers by service users.¹⁰⁸ The EOC was pleased that the Government took into account the EOC recommendations and studies on the issues that indicate a high level of sexual harassment in service industries, including by customers.¹⁰⁹

3.174 However, there is no equivalent liability for service users for racial harassment or disability harassment of a service provider. The EOC believes that it is important to provide service providers the same protection from racial and disability harassment.

3.175 In relation to racial harassment of service providers, the EOC study of sexual harassment of flight attendants indicated that 12% (53 people) had also experienced racial harassment and 2% (8 people) had experienced disability harassment by colleagues or customers.¹¹⁰

3.176 Overall, given the evidence of racial and disability harassment of service providers by service users and to be consistent with the amendments made to the SDO, the EOC believes that there should be an extension of protection where service providers are subjected to racial or disability harassment by service users.

¹⁰⁸ Sex Discrimination (Amendment) Ordinance, enacted 12 December 2014.

¹⁰⁹ EOC, Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Workers of Service Industries, page 7,

<http://www.eoc.org.hk/eoc/upload/ResearchReport/201452393149493382.pdf>,

EOC, Sexual Harassment and Discrimination in Employment – Questionnaire Survey for Flight Attendants, paragraph 9,

http://www.eoc.org.hk/EOC/Upload/ResearchReport/SHFlightAttendants_e.pdf

¹¹⁰ Ibid, pages 3, 13 and Table 8, Ibid.

Recommendation 16

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

(e) Liability of service users for harassing other service users

3.177 This issue is addressed in Chapter 4, as the EOC does not believe it is a higher priority for reform at this time.

(f) Liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services

3.178 In relation to sexual harassment, this issue was addressed by the Sex Discrimination (Amendment) Ordinance 2014. Section 41 of the Sex Discrimination Ordinance was amended such that there is now liability for sexual harassment of service providers, including where the acts take place outside Hong Kong on board Hong Kong registered aircraft or ships.¹¹¹ This is important given that sexual harassment is prevalent in for example the airline industry.

3.179 Consistent with the amendments made to the SDO regarding protection from sexual harassment of service providers on Hong Kong registered aircraft and ships, as well as recommendations that there be protection from racial and disability harassment of service providers by service users in Recommendation 16, the EOC also believes that there should be protection where such harassment which takes place outside Hong Kong, but on Hong Kong registered aircraft and ships.

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.

¹¹¹ Section 4, Sex Discrimination (Amendment) Ordinance 2014.

(g) Liability of tenants and subtenants for harassing other tenants or subtenants

- 3.180 Currently in relation to premises, there is limited protection from harassment where a landlord harasses a tenant. In relation to sexual, racial and disability harassment, there are provisions to prohibit harassment by a person who has the power to dispose of premises, who manages the premises, or whose license or consent is required for disposal of the premises.¹¹²
- 3.181 However, there is no protection from harassment where a tenant or sub-tenant is harassed by another tenant or sub-tenant occupying the same premises. In 1999, the EOC made submissions to the Government to make amendments to provide for protection in such circumstances in relation to sexual harassment.¹¹³ The Government's response in November 2000 stated that it agreed in principle with the proposal, but no legislative amendment has since been passed.
- 3.182 The EOC also notes that it has on several occasions received complaints of tenants being sexually harassed by other tenants, but the EOC was unable to proceed with the complaint given there is no legislative protection.
- 3.183 Given the evidence of discrimination in this area, and the Government previously agreed in principle with providing protection from sexual harassment between tenants or sub-tenants, the EOC believes that it would be appropriate for those amendments to be made and that for reasons of consistency there is the same protection in relation to racial and disability harassment.

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.

(h) Liability of the management of clubs for harassing members or prospective members

- 3.184 Currently, there is only liability for discrimination in relation to management of clubs discriminating against members or prospective members under the SDO, DDO, RDO and FSDO.¹¹⁴ There is no liability in this field for sexual, disability or racial harassment.

¹¹² See sections 40 SDO, 39 RDO and 39 DDO.

¹¹³ It is to be noted that the 1999 review was only of the SDO and DDO.

¹¹⁴ See sections 37 SDO, 36, DDO, 36 RDO and 27 FSDO.

- 3.185 In previous submissions to the Government in 1999, the EOC recommended that amendments be made to provide such protection from sexual harassment. The Government agreed to that recommendation in principle, but has not made any amendment.
- 3.186 Given that clubs are an important area of life and public interaction between people, and that the Government previously agreed to the proposal in relation to sexual harassment, the EOC believes that it is appropriate for there to be amendments to provide protection from sexual, racial and disability harassment by management of clubs of members or prospective members.

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

Question 34 of the Consultation Document asked:

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

Key points

- 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.

3.187 As the Consultation Document discussed, all of the anti-discrimination Ordinances currently provide that the Ordinances bind the Government.¹¹⁵ All of the Ordinances apart from the RDO also provide that it is unlawful for the Government to discriminate on any of the protected grounds in the performance of its functions or the exercise of its powers.¹¹⁶

3.188 The provisions therefore provide protection from discrimination in relation

¹¹⁵ See section 4 of the SDO; section 5 of the DDO; section 3 of the FSDO and section 3 of the RDO.

¹¹⁶ See section 21 SDO; section 21 DDO; and section 28 FSDO.

to the Government, such as Government departments and other Governmental bodies (e.g. the Education Bureau and the Immigration Department), including actions taken in the performance of the Government's functions and powers (e.g. policing and detention in prisons).

- 3.189 However, it is not clear from the manner in which the current provisions are drafted whether other public authorities that are not part of the Government are within the scope of the anti-discrimination Ordinances in relation to the exercise of their functions and powers. This is particularly relevant in relation to statutory bodies established by the Government, but independent of it. Examples of such bodies include the EOC. All such bodies would be covered by the employment provisions in relation to any employment issues. They would also be covered by the service provisions to the extent that they are providing services to the public.
- 3.190 There may, however, be a gap where the exercise of such public authorities' functions and powers may not be considered a service. The EOC has considered a number of complaints of discrimination against public authorities, so this is in practice an issue where a lack of clarity is causing uncertainty.
- 3.191 In other jurisdictions, it is made clear that public authorities that are not part of the Government but perform public functions and powers, are within the scope of the anti-discrimination legislation.
- 3.192 In Great Britain, the Equality Act 2010 states that the provision of a service includes the provision of a service in the exercise of a public function.¹¹⁷ In Australia, the anti-discrimination Acts provide that acts done by or on behalf of a body or authority established for a public purpose by Federal legislation are within the scope of the anti-discrimination legislation.¹¹⁸
- 3.193 The EOC believes that it is important to amend the anti-discrimination legislation to make it clear that it applies across all protected characteristics not only to the Government and the exercise of its functions and powers, but also all other public authorities. This would also be consistent with the obligations under the Bill of Rights which apply not only to the Government, but also all public authorities and those acting on their behalf.¹¹⁹ The use of term "public authority" would also be consistent with the terminology under the Bill of Rights Ordinance.
- 3.194 In relation to consultation responses, a number of organisations indicated that it would be important to define who is considered a public authority,

¹¹⁷ Section 31(3) Equality Act 2010

¹¹⁸ See for example section 9(7) of the Sex Discrimination Act 1984.

¹¹⁹ Section 7(1), Bill of Rights Ordinance,

[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/\\$FILE/CAP_383_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8/$FILE/CAP_383_e_b5.pdf)

and whether, for example, it would include publicly funded social services organisations.

3.195 However, it should be noted that public authorities are not defined for the purpose of the Bill of Rights. In relation to private organisations which receive public funding, this may be one factor in deciding whether or not the organisation is considered a public authority. In the context of education, English School Foundation schools were held to be public bodies exercising public functions in deciding whether or not to expel a student. Key aspects were that they receive Government funding and the conduct of the schools was subject to statutory regulation including expelling students.¹²⁰ It may therefore be difficult to develop a comprehensive definition of what constitutes a public authority.

3.196 As a result and taking into account all the above factors, the EOC believes that the SDO, DDO, RDO and FSDO should be amended 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.

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

Question 42 of the Consultation Document asked:

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

Key points

- Cases of discrimination are difficult to prove given that there is often not direct evidence of discrimination;
- In relation to proving discrimination, the Hong Kong courts take this into

¹²⁰ *R v English Schools Foundation* [2004] 3 HKC 343.

account such that where the plaintiff provides some evidence of discrimination, the court will look to the defendant for any explanations;

- **International human rights obligations and the approach in similar international jurisdictions provide that in discrimination claims it is appropriate to have a shift in the burden of proof once the plaintiff provides evidence of discrimination.**

3.197 The EOC's duties and powers include investigating complaints of discrimination, seeking to conciliate them, and where appropriate, providing legal assistance in legal proceedings.

3.198 The operational experience of the EOC is that discrimination claims are difficult to prove, whether the claims relate to direct discrimination, indirect discrimination, or harassment. An important issue is whether the anti-discrimination Ordinances should take this into consideration by setting out what must be proved and by whom.

3.199 Like other civil claims, discrimination claims must be proved by the plaintiff on the balance of probabilities. This can be contrasted with criminal claims that must be proved to a higher standard by the prosecution of beyond reasonable doubt.¹²¹

3.200 In relation to direct discrimination claims, there are not often acts of overt discrimination that can be directly attributed to protected characteristics. Further, in relation to indirect discrimination, it will usually be the defendant that has the evidence of what the justifications are for any requirements or conditions it imposes. As a result, the reasons provided by a defendant for any actions will often be crucial in determining whether or not they have acted in a discriminatory manner.

3.201 The Hong Kong approach to the standard and burden of proof has been indicated in a number of decisions. For example, in *Yeung Chung Wai v St Paul's Hospital*, it was stated:

*"I am of the view that the evidential burden does not shift to the defendant employer at any stage. However, the court should approach the question of proof with common sense bearing in mind the standard of proof is on the balance of probabilities and it is sometimes not easy to have direct evidence of discrimination. Once the plaintiff establishes the relevant primary facts on the balance of probabilities, the court in drawing the appropriate inferences will have to consider and weigh the explanation (if any) given by the defendant."*¹²²

¹²¹ The test of balance of probabilities means that it must be proved that it was more likely than not that there was discrimination. In relation to criminal claims, there is a higher standard of proof because a conviction may result in more serious consequences such as deprivation of liberty.

¹²² DCEO 7/2003, paragraph 31.

3.202 In other words, where the plaintiff adduces evidence from which discrimination can be inferred, the court in practice will then look to the defendant for evidence or explanations to indicate whether or not discrimination in fact occurred. The position is not, however, set out in the anti-discrimination legislation.

3.203 A similar approach to considering the explanations of a defendant has been taken in Hong Kong in the context of other civil claims such as negligence. In negligence claims, the plaintiff must also prove there was negligence on the balance of probabilities, but the concept of *res ipsa loquitur* (the thing speaks for itself) means that there is a shift in the burden of proof where the facts point to negligence:

*"The court is able to infer negligence on the defendant's part unless he offers an acceptable explanation consistent with his having taken reasonable care."*¹²³

3.204 International human rights obligations and many similar international jurisdictions consider the issue of burden of proof in anti-discrimination claims and legislation. Further, there has been an evolution regarding more jurisdictions including provisions on burden of proof in their anti-discrimination legislation.

3.205 In relation to the international human rights obligations, the Committee on Economic, Social and Cultural Rights has stated and recommended in relation to discrimination claims before national courts:

*"Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively."*¹²⁴

3.206 Further, the Committee on the Elimination of Racial Discrimination has recommended to all States that are parties to CERD in their General Recommendation on preventing racial discrimination:

*"Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment."*¹²⁵

¹²³ Sanfield Building Contractors Ltd v. Li Kai Cheong, FACV No. 16 of 2002, paragraph 2.

¹²⁴ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 40.

¹²⁵ Committee on the Elimination of Racial Discrimination, *General Recommendation on discrimination against non-citizens*, 2005, paragraph 24,

3.207 In relation to other similar jurisdictions, anti-discrimination legislation regarding the burden of proof has evolved in two key ways. Firstly, the anti-discrimination legislation sets out the elements of the burden of proof in order that there is clarity and consistency in how the principles are applied in court proceedings. Secondly, given the difficulties in proving discrimination cases, the legislation sets out a shift in the burden of proof. In other words, once the claimant establishes facts from which discrimination can be inferred, it is then for the defendant to prove that there was no discrimination.

3.208 In Great Britain, the Equality Act 2010 provides that:

“If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”¹²⁶

3.209 The burden of proof principles are also contained in all the European Union discrimination directives and therefore must be applied in all 28 EU Member States.¹²⁷ The EU legislation also contains a shift in the burden of proof, once the plaintiff establishes facts from which discrimination can be presumed. For example, the Framework Directive provides:

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”¹²⁸

3.210 In Australia, there are also some express provisions in Federal and one State’s anti-discrimination legislation on the burden of proof and where it will shift to the defendant. At Federal level¹²⁹ and at State level¹³⁰, there are provisions on the burden of proof in relation to indirect discrimination claims. For example, section 7B of the Sex Discrimination Act 1984 provides that there is no indirect discrimination if a condition requirement or practice is reasonable, and section 7C places the burden of proving the reasonableness on the defendant.

¹²⁶ Section 136 Equality Act 2010.

¹²⁷ The Race Directive 2000/43/EC, the Framework Directive 2000/78/EC and the Gender Goods and Services Directive 2004/113/EC.

¹²⁸ Article 10(1) Framework Directive 2000/78/EC. The Directive provides protection from discrimination in employment on the grounds of disability, age, sexual orientation and religion

¹²⁹ The Sex Discrimination Act 1984, Section 6(4) of the Disability Discrimination Act 1992, and section 15(2) of the Age Discrimination Act 2004.

¹³⁰ The Anti-Discrimination Act 1991 of Queensland.

3.211 In relation to the Australian Racial Discrimination Act 1975, there is no provision on the burden of proof at all. The United Nations Committee on the Elimination of Racial Discrimination has noted this and made recommendations to the Australia Government on several occasions:

“25. The Committee regrets that no steps have been taken by the State party with regard to the Committee’s previous recommendation that the State party envisage reversing the burden of proof in civil proceedings involving racial discrimination to alleviate the difficulties faced by complainants in establishing the burden of proof (arts. 4 and 5).

The Committee recommends that as part of its harmonisation of federal anti-discrimination laws, the Racial Discrimination Act be amended, as far as civil proceedings are concerned, to require the complainant to prove prima facie discrimination, at which point the burden shifts to the respondent to prove no discrimination existed.”¹³¹ (emphasis added)

3.212 In relation to consultation responses, of the organisations which were supportive, a number of them highlighted the difficulties of proving discrimination claims and, consequently, why it would be appropriate to include a shift in the burden once the plaintiff establishes facts from which discrimination can be inferred. In relation to organisations opposing reform, a number indicated that they believed it would be unfair if there was a change in the current principles of presumption of innocence or “innocent until proven guilty”. In fact, those concepts relate to the higher criminal law standard of proving a claim beyond reasonable doubt, not to civil law standards including claims of discrimination.

3.213 In relation to individuals, most disagreed with the proposals. Some of the reasons expressed for opposing the proposals were:

- How come the respondent bears the burden to show they are innocent while the claimant need not submit evidence. It is wrong to destroy the legal system of Hong Kong for the sake of helping mainlanders;
- It would be unfair to the defendant if the burden of proof shifted to them;
- It would go against Hong Kong established legal system where the plaintiff always has the burden of proof.

3.214 Some of the above reasoning is not consistent with what is being proposed. There is no suggestion that a plaintiff would not need to submit evidence and that the entire burden would be on the defendant to show they are not liable. The proposal also does not relate specifically to mainland Chinese but rather all discrimination claims.

¹³¹ Committee on the Elimination of Racial Discrimination, 27 August 2010, CERD/C/AUS/CO/15-17, paragraph 25.

3.215 Overall and taking into account the difficulty of proving discrimination claims and which parties have relevant evidence; the existing approach by Hong Kong's courts; international human rights obligations; and the practice in similar jurisdictions, the EOC believes that it is appropriate to set out the standard and burden of proof provisions in the anti-discrimination legislation in order that it is clear in all proceedings what is required to be proved by the respective parties. The EOC also believes that the burden of proof provisions should expressly provide for a shift in the burden of proof: that is, once a plaintiff has established facts from which discrimination can be inferred, the defendant must prove that there was in fact no discrimination.

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

Question 43 of the Consultation Document asked:

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

Key points

- There is currently a gap in the provisions regarding awarding damages for indirect discrimination as for discrimination under the SDO, FSDO and RDO you cannot award damages unless it is proved the respondent intended to discriminate against the plaintiff;
- The restriction is not consistent with awarding damages for indirect discrimination under the DDO and is not justified, as intention is not a required element to prove discrimination.

3.216 There are a number of remedies that the District Court can award including: making a declaration that the respondent has engaged in prohibited conduct; ordering the respondent to pay damages for financial loss and/or injury to feelings; ordering the respondent to perform any reasonable acts to redress the loss or damage suffered; and making an order declaring void

in whole or in part any contract made in contravention of the anti-discrimination Ordinances.¹³²

- 3.217 In relation to the damages, the EOC in its previous submissions to the Government in 2011 raised concerns about the indirect discrimination provisions. 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.¹³³
- 3.218 In Great Britain and Australia, similar previous restrictions on damages have been repealed and damages can be awarded irrespective of whether there was an intention to discriminate or not.
- 3.219 The EOC does not believe such a restriction is appropriate for several reasons. Firstly, in proving both direct and indirect discrimination, it is not necessary to prove that discrimination was intended. Intention may be relevant in determining the level of damages, for example awarding higher damages where intention to discriminate is established, but intention should not be a determining factor as to whether or not damages are awarded at all. Secondly, there is inconsistency in remedies under the four anti-discrimination Ordinances which creates unequal protection from discrimination between the protected characteristics.
- 3.220 The EOC therefore reiterates its previous recommendations that the Government to repeal the provisions under the SDO, FSDO and RDO which require proof of intention to discriminate in order to award damages for indirect discrimination claims.

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.

¹³² See for example section 76(3A) of the SDO.

¹³³ Sections 76(5) SDO, 54(6) FSDO, and 70(6) RDO.

PART II: Higher priority issues requiring further research, consultation and education

3.221 The EOC believes that there are also a number of higher priorities which should be the subject of legislative reform, but first require more in depth consultation and research. This is the case, for example, where the issues are more complex, touch on legislation across different domains and policy areas, and have instigated wide debate with divergent views. The issues discussed below are: a duty to promote and mainstream equality; protection from discrimination on grounds of nationality, citizenship and residency status; and equality for families in terms of cohabiting relationships.

A. Duty to promote and mainstream equality

Question 41 of the Consultation Document asked:

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

Key points

- The Government has introduced a number of measures to better promote substantive equality for different groups in Hong Kong, but, in the EOC’s view, they are neither comprehensive nor sufficient, as they only relate to some protected characteristics, some Government bodies and public authorities, and do not have legal effect;
- There is evidence of continuing systemic inequality in Hong Kong for a number of groups, including ethnic minorities, persons with disabilities and women;
- International human rights obligations require jurisdictions to take proactive steps to achieve substantive equality for disadvantaged groups, and some similar jurisdictions have developed specific duties to promote equality and eliminate discrimination in their anti-discrimination legislation.

3.222 A fundamental concern with the current structure of Hong Kong’s anti-discrimination legislation is that its primary focus is on individual redress for claims of discrimination, rather than addressing systemic and institutional discrimination or inequalities in society.¹³⁴ The current obligations are therefore reactive, rather than being proactive in requiring possible discrimination and inequality to be addressed in advance. A proactive approach can identify where policies and practices can be improved, equal opportunities provided, as well as reduce the likelihood of discrimination claims.

¹³⁴ There are some limited examples of provisions which seek to address systemic inequality, such as those permitting special measures: see the discussions in relation to Question 40 in Chapter 4.

- 3.223 At international level and in a number of jurisdictions around the world, there is now increasing recognition that more proactive measures are appropriate to promote equality, as well as address discrimination. For example, some jurisdictions have duties on the Government and public authorities to promote equality and eliminate discrimination.¹³⁵ Below the position in Hong Kong, internationally and in some similar jurisdictions is examined.
- 3.224 In Hong Kong, there is currently no specific duty in the anti-discrimination Ordinances requiring the Government and public authorities to promote equality and eliminate discrimination in all their work. The Hong Kong Government has, however, introduced a number of measures to promote the equality of particular groups in society which focus on ensuring that public authorities review their policies and programs for their impact on those groups.
- 3.225 For example, in relation to gender equality and gender mainstreaming, the Government established the Women's Commission in 2001 to promote gender equality. In 2002, the Women's Commission published a gender mainstreaming checklist to assist Government officers to evaluate the gender impact of new and existing public policies, legislation and programs.¹³⁶ The checklist includes consideration of factors such as whether women's groups have been consulted, assessment of the impact of the policies and programs on women, as well as the monitoring and evaluation of them.
- 3.226 The checklist has been applied by a range of Government department and bureaux, and the Women's Commission published in 2006 a booklet on their experiences of gender mainstreaming.¹³⁷
- 3.227 In the 2015 Policy Address, the Government stated that:
- "...starting from 2015-16 all bureaux and departments should be required to refer to the checklist and apply gender mainstreaming to formulating major Government policies and initiatives."*¹³⁸
- 3.228 Further in the 2016 Policy Address the Government stated that:
- "...the Government will implement a pilot scheme to encourage NGOs in the social welfare sector to refer to the checklist and apply gender mainstreaming when formulating policies and programmes."*¹³⁹

¹³⁵ Making a difference: the promises and perils of positive duties in the equality field, Sandra Fredman, in the Anti-Discrimination Law Review, October 2008.

¹³⁶ Women's Commission, http://www.lwb.gov.hk/Gender_Mainstreaming/eng/gmhke4.html

¹³⁷ http://www.lwb.gov.hk/Gender_Mainstreaming/eng/gmhke1.html

¹³⁸ 2015 Policy address, paragraph 149, <http://www.policyaddress.gov.hk/2015/eng/pdf/PA2015.pdf>

- 3.229 In relation to race equality, during the passage of the Race Discrimination Bill in 2008, there were submissions made to the Government on introducing a race equality duty, including by the EOC.¹⁴⁰ The EOC highlighted the advantages of having a mainstreaming duty or duty to promote race equality, based on the experience mainly of the Great Britain race equality duty at that time.
- 3.230 The Government did not agree to such a duty, but it did, as an alternative, agree to develop Administrative Guidelines on the Promotion of Racial Equality for Government departments and other public authorities. In 2010, the Constitutional and Mainland Affairs Bureau published the Guidelines.¹⁴¹
- 3.231 The guidelines provide guidance for the public authorities on how they should promote racial equality in the formulation, implementation and review of relevant policies and measures. The guidelines are also similar in some respects to the requirements of the former race equality duty in the now repealed Great Britain Race Relations Act 1976.¹⁴²
- 3.232 The Guidelines cover the public services which the Government considers are particularly relevant to meet the special needs of ethnic minorities: medical, education, vocational training, employment and major community services. Notably, however, they do not cover other important public functions and bodies which impact on ethnic minorities including immigration and policing.
- 3.233 The guidelines state that the principles governing the work of public authorities in promoting racial equality are:
- Taking steps to eliminate racial discrimination arising from all relevant policies and measures ; and
 - Providing equal access to ethnic minorities for public services.
- 3.234 The key steps public bodies should take in formulating and reviewing policies and measures are:
- (a) Identify the policies and measures that relate to key public services which are most relevant to the needs of ethnic minorities;

¹³⁹ Policy Address 2016, paragraph 182, <http://www.policyaddress.gov.hk/2016/eng/pdf/PA2016.pdf>

¹⁴⁰ EOC submission to the Bills Committee on the Race Discrimination Bill, 14 May 2008, <http://www.eoc.org.hk/eoc/upload/2009527112829266986.pdf>

¹⁴¹ http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/agpre/adm_guidelines.pdf

¹⁴² This was the first public sector equality duty to be introduced in the United Kingdom in 2001 and has since been replaced by the public sector equality duty under the Equality Act 2010 which covers all the protected characteristics.

- (b) Assess whether and to what extent these policies and measures may affect racial equality or provision of equal access to key public services, and consult relevant stakeholders as appropriate in the process;
 - (c) Consider whether any changes to existing or proposed policies and measures are warranted, and take measures to adopt such changes;
 - (d) Monitor the implementation of the changes; and
 - (e) Review the policies and measures concerned from time to time.
- 3.235 A number of organisations made submissions to the Legislative Council in relation to the draft Guidelines in 2009.¹⁴³ They raised similar concerns including that:
- The guidelines were not mandatory. As a result, they would be unlikely to have a significant impact on the work of public authorities in promoting racial equality;
 - Only a limited number of Government departments and bureaus are covered by the Guidelines. They should apply to all public bodies including the Police, the Correctional Services Department, the Immigration Department, Legal Aid Department, Housing Authority and the Student Financial Assistance Agency.¹⁴⁴
- 3.236 In relation to promoting equality of persons with disabilities and those with family status (family responsibilities), there are no equivalent guidelines or checklists to assist public authorities with promoting equality for these groups in the formulation and review of all relevant policies and programs.
- 3.237 The EOC believes that the current measures in Hong Kong for promoting equality in public authorities are not sufficient in eliminating discrimination and promoting equality of opportunity either within public authorities, or in relation to their services to the public.
- 3.238 There are a number of areas which highlight systemic inequality or lack of equal opportunities. For example, in relation to persons with disabilities, Government statistics indicate that as at 31 March 2012, only 2% of current employees in the Civil Service are disabled.¹⁴⁵ This is despite the fact that the population of persons with disabilities in Hong Kong is approximately 8.1% of the total population.¹⁴⁶

¹⁴³ Society for Community Organisation, <http://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0707cb2-2340-1-e.pdf>, Law Society of Hong Kong http://www.fjt2.net/gate/gb/www.hklawsoc.org.hk/pub_e/news/submissions/20090828a.pdf, Hong Kong Human Rights Monitor and Hong Kong Unison Ltd, http://www.unison.org.hk/DocumentDownload/R01-Position%20papers/2009/HKHM+Unison_submission.pdf

¹⁴⁴ Submission by the Society for Community Organisation, page 1.

¹⁴⁵ Civil Service Bureau, Answer to Legislative Council Question by Emily Lau, 5 June 2013, <http://www.csb.gov.hk/english/info/2513.html>

¹⁴⁶ "Persons with disabilities and chronic diseases", December 2014, <http://www.statistics.gov.hk/pub/B11301622014XXXXB0100.pdf>

- 3.239 In relation to ethnic minorities, the Government's Poverty Commission recently published a report on the poverty levels of ethnic minorities in Hong Kong.¹⁴⁷ It found that for some ethnic minorities, in particular South Asians (Pakistanis, Nepalese and Indians), the poverty rate was disproportionately high, and linked to lower education attainment, less Chinese language proficiency, higher unemployment or lower skilled employment. For example, the report indicates that 51.8% of the poor ethnic minority population are Pakistanis, Nepalese and Indians, with 33.4% being Pakistanis. Further, a very concerning 50.2% of Pakistanis are in poverty or in other words their poverty rate is one in every two persons.¹⁴⁸
- 3.240 The Government indicated in the report that it will continue to introduce "targeted support measures well suited to the needs of EMs through various bureaux and departments."¹⁴⁹ Whilst the EOC supports such measures, the EOC believes that introducing a duty to promote equality would further the Government's aims of improving the opportunities and outcomes for ethnic minorities in key areas such as education and employment.
- 3.241 There are a number of international human rights provisions and concepts relating to promoting substantive equality. In relation to international human rights obligations, States are required not only to address intentional discrimination on an individual level, but also where policies or practices cause substantive inequality. The United Nations Committee on Economic, Social and Cultural Rights explains that:
- "Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds [and that] [e]liminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination."*¹⁵⁰
- 3.242 In the context of gender equality, the concept of gender mainstreaming has been developed by the United Nations, which focuses on the process of States and public authorities systematically evaluating the impact that legislation, policies and programmes will have on gender equality. The United Nations defines gender mainstreaming as:

¹⁴⁷ Hong Kong Poverty Situation Report on Ethnic Minorities 2014, December 2015, http://www.povertyrelief.gov.hk/eng/pdf/2014_EM_Report_Eng.pdf

¹⁴⁸ Ibid Figure 2.6 page 14.

¹⁴⁹ Ibid Executive Summary page xviii

¹⁵⁰ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 8.

“...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”¹⁵¹

3.243 Some jurisdictions include duties to promote equality within their domestic discrimination legislation to promote equality and eliminate discrimination.

3.244 For example, in the United Kingdom, there are proactive duties on the Government and public authorities to promote equality in the jurisdictions of Great Britain and Northern Ireland (“Public Sector Equality Duties” or PSEDs).

3.245 In Great Britain, the Equality Act 2010 requires public authorities in the exercise of its functions to have “due regard” to the need to:

- “(a) Eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act;*
- (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”¹⁵²*

3.246 These duties apply to the public authorities listed in the Act and include Government departments, the National Health Service, Police and local Governments.¹⁵³ The duties also apply to all of the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.¹⁵⁴ Prior to the Equality Act 2010, there were three separate public sector equality duties relating to race, sex and disability.¹⁵⁵

3.247 Listed public authorities are also subject to specific duties which set out in more detail what those public authorities must do to comply with the duty. There are two requirements of the specific duties:

¹⁵¹ United Nations ECOSOC agreed conclusions 1997/2.

¹⁵² Section 149 Equality Act 2010.

¹⁵³ See Schedule 19 Equality Act 2010.

¹⁵⁴ Section 149(7) Equality Act. The Equality Act expanded the scope of the duty to all protected characteristics.

¹⁵⁵ The race equality duty under the Race Relations Act 1976; the gender equality duty under the Sex Discrimination Act 1975 and the disability duty under the Disability Discrimination Act 1995.

- To publish information to show their compliance with the Equality Duty, at least annually; and
- To set and publish equality objectives, at least every four years.¹⁵⁶

3.248 The example from the Consultation Document illustrates what may be required by the duty in practice.

Example 39: Measures to comply with a duty to promote equality

A university in London carries out a staff survey. The results indicate high levels of sexual harassment of staff by colleagues and by students. In order to comply with the equality duty on public authorities to eliminate discrimination, if the university failed to take steps to prevent the sexual harassment it may be liable not only for individual acts of sexual harassment, but also for a breach of the equality duty on public authorities. In those circumstances, appropriate steps to comply with the duty may for example include: revising its policy on preventing and dealing with harassment and its complaint procedures; and training all staff on the new policy and complaint procedures.

3.249 The British Equality and Human Rights Commission has the statutory role to promote understanding and monitor compliance of public authorities with the duty. It publishes guidance (statutory Codes of practice and non-statutory guidance) to help public bodies comply with the duty, including the steps that should be taken and practical examples of how to comply.¹⁵⁷

3.250 Where appropriate, it can review whether public authorities are complying with their duty in relation to specific policies and practices affecting protected groups. If it believes a public authority has failed to comply with the duties, it can issue compliance notices and commence court proceedings for non-compliance.¹⁵⁸

3.251 There have been a number of cases since the equality duties were introduced in Great Britain that have found a breach of the duties. This is usually in situations where there has also been a finding of direct or indirect discrimination by the relevant public authority. The Consultation Document provided an example of a claim where a breach of the equality duty was established.

¹⁵⁶ The Equality Act 2010 (Specific Duties) Regulations 2011

<http://www.legislation.gov.uk/ukxi/2011/2260/made>

¹⁵⁷ <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/>

¹⁵⁸ Section 32 Equality Act 2006.

Example 40: The United Kingdom race equality duty in practice

A school had a uniform policy which permitted pupils to wear only one pair of plain ear studs and a wrist watch. A Sikh pupil wore to school her Kara (a narrow steel bangle with great religious significance for Sikhs). A teacher asked the girl to remove it because it contravened the uniform policy. The girl's requests to be exempted from the policy were refused by the school.

The Court found that the uniform policy indirectly racial discriminated against students of Sikh race and that it was not a proportionate means of achieving a legitimate aim in the circumstances.

In relation to the equality duty, the Court said it had seen no evidence that the teaching staff appreciated their obligations to fulfil the general race equality duty.¹⁵⁹ The school had breached its equality duty by failing to reconsider the uniform policy in the light of the obligations in the general equality duty. The school had also breached the duty by failing to have due regard to its aims in making decisions about the particular girl's wish to wear the Kara once the issue arose.¹⁶⁰

3.252 In relation to the effectiveness of the equality duty, there have been a number of studies conducted in relation to the evaluating the previous race, gender and disability duties which preceded the existing equality duty. One study examined all three previous equality duties and was commissioned by the UK Government in 2009.¹⁶¹

3.253 The study found that:

- *Many organisations (over 80% of respondents) reported that they had seen improvements in the way that their organisations made decisions or allocated resources*
- *97% of the main survey respondents had seen either "significant" or "some improvement" in at least one specific outcome relating to improving equality;*
- *For some, they felt the specific duties had been a catalyst for a positive shift in culture, which brought equalities into the "mainstream";*
- *Most respondents did not feel that the specific duties required them to take disproportionate action – and this applied to each of the duties.*¹⁶²

¹⁵⁹ In this case the Race Equality Duty was set out in s.71 of the Race Relations Act 1976 (as amended) which has been superseded by the general equality duty in s.149 of the Equality Act 2010.

¹⁶⁰ R. (Watkins-Singh) v. Governors of Aberdare Girls' High School [2008] EWHC 1865 (Admin).

¹⁶¹ Equality Duties, Assessing the Cost and Cost effectiveness of the Specific Race, Disability and Gender Equality Duties, June 2009, Government Equalities Office and Schneider-Ross Ltd. http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/PSED/geo_schneider_ross_research_2009.pdf

¹⁶² Ibid pages 2-3.

- 3.254 In Australia, at State level, the Victorian Equality Opportunity Act 2010 includes a positive duty on public authorities and private bodies to take reasonable and proportionate measures to eliminate discrimination, harassment and victimization.¹⁶³ This is a proactive duty similar in some respects to the equality duty in Great Britain.
- 3.255 In determining whether a measure is reasonable and proportionate the following factors must be considered:
- “(a) the size of the person's business or operations;*
 - (b) the nature and circumstances of the person's business or operations;*
 - (c) the person's resources;*
 - (d) the person's business and operational priorities;*
 - (e) the practicability and the cost of the measures.”¹⁶⁴*
- 3.256 Although an individual cannot seek to enforce the duty in legal proceedings, the Victorian Equal Opportunities and Human Rights Commission can use information about compliance with the duty for the purposes of an investigation into a public or private body.
- 3.257 In relation to the consultation responses, a majority of organisations agreed with the proposal with high proportions of organisations representing ethnic minorities and women agreeing. One organisation, AIDS Concern, who works with people with HIV highlighted that although those persons are protected from discrimination under the DDO, there remains significant stigma and misunderstanding, which creates systemic barriers to equality for people with HIV. For example, according to their research, in relation to healthcare, 9.1% of HIV persons were denied healthcare services and 37.1% experienced discrimination in accident and emergency services.¹⁶⁵
- 3.258 It is the position of the EOC that there should be a public sector equality duty, given that the current Government measures to promote equality are in our view not sufficient; there is evidence of systemic inequality across multiple groups, including ethnic minorities; international human rights obligations and developments in similar international jurisdictions. However, given that such a duty would have a wide-ranging impact across multiple domains, the EOC believes that, as a first step, the Government should conduct further research and consultation with the public on

¹⁶³ Section 15, Equal Opportunity Act 2010 (Vic), [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/7CAFB78A7EE91429CA25771200123812/\\$FILE/10-016a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/7CAFB78A7EE91429CA25771200123812/$FILE/10-016a.pdf)

¹⁶⁴ Section 15(6) Equal Opportunity Act 2010 (Vic).

¹⁶⁵ AIDS Concern, Hong Kong HIV Stigma Watch, <https://static1.squarespace.com/static/54e2df1ce4b0406fb3e1b325/t/554700d7e4b07bcfa0915477/1430716631095/Stigma+Watch+Appendix+1+0217+english.pdf>

introducing a duty across all the existing protected characteristics. The EOC believes that this should consider a wide range of factors such as:

- The scope of what the duty would require;
- Which Government bureaux or public authorities it would apply to;
- The possible extent to which it could be legally enforceable and by what method;
- The possible role of the EOC in producing guidance in relation to the duty and monitoring its effectiveness.

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

Questions 11 to 16 of the Consultation Document asked:

“Consultation Question 11

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

Consultation Question 12

In relation to residency status or related status, if you think there should be protection, how should it be defined?

Consultation Question 13

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

Consultation Question 14

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

Consultation Question 15

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

Consultation Question 16

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

Key points

- **There is currently no protection from discrimination under the RDO on grounds of nationality, citizenship or residency status;**
- **There is evidence in Hong Kong that there are a number of situations where different 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 the United Nations has made recommendations to the Government to make amendments;**
- **A number of similar international jurisdictions provide protection from discrimination on grounds including nationality, citizenship and immigrant status;**
- **Any amendments to provide such protections could include appropriate exceptions permitting discrimination where they serve a legitimate aim and are proportionate.**

3.259 Questions 11 to 16 all relate to the issue of possible extensions of protection from discrimination under the RDO to nationality, citizenship or residency status.

3.260 These issues received some of the highest numbers of consultation responses, as well as media attention. We note that there was a particularly high level of focus on the issues relating to protection from discrimination against mainland Chinese people, especially in relation to individual responses.

3.261 Below we consider the discrete issues relating to protection from discrimination on grounds of nationality and citizenship (which are closely related), and of residency because they raise different issues which require separate consideration.

(i) The current position in Hong Kong regarding protection from nationality, citizenship and residency status

3.262 Under the Race Discrimination Ordinance, there is protection from discrimination on grounds of a person's race, colour, descent or national or ethnic origins. There is currently no protection from discrimination based on nationality, citizenship, or Hong Kong residency status, because of the operation of exceptions described below.

3.263 It is firstly important to understand what these terms mean and how they are related. Nationality is the specific legal relationship between a person and a State through birth or naturalisation. Nationality is legally a distinct concept from citizenship. Conceptually, citizenship is focused on the

internal political life of the state, for example whether a person has the right to vote. For example, a person may be a British national, but not be a British citizen having full rights to vote. However, in many countries, nationals are also citizens so there is in practice no major difference.

3.264 National origin is distinct from nationality or citizenship. For example, people of Chinese national origin may be citizens of China but many are citizens of other countries.

3.265 In Hong Kong, there is no Hong Kong nationality or citizenship, since Hong Kong is part of the State of China. However, there is a concept of residency of Hong Kong which may either be permanent residency or non-permanent residency, the criteria for which are set out in Hong Kong's Basic Law.¹⁶⁶ This relates to the situation in Hong Kong by which it maintains a high degree of autonomy according to the principle of "one country two systems" under the Basic Law. For example, a person may become a permanent resident of Hong Kong if they are Chinese citizens or not of Chinese nationality, and have been ordinarily resident in Hong Kong for a continuous period of 7 years.

3.266 There are express exceptions that make clear that nationality, citizenship and residency status are not within the protected characteristic of race. Section 8(3)(b) to (d) states that the following do not constitute acts on the grounds of race:

"(b) that the person—

(i) is or is not a Hong Kong permanent resident;

(ii) has or has not the right of abode or the right to land in Hong Kong;

(iii) is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap 115); or

(iv) has or has not been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap 115);

(c) the length of residence in Hong Kong of the person; or

(d) the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place."

3.267 The RDO also state that nothing in the Ordinance is to be construed as affecting in any way law concerning nationality, citizenship, resident status or naturalisation, or renders unlawful acts done by any person in connection with the operation of such law.¹⁶⁷

3.268 It is important to note that during the consultation on and passage of the Race Discrimination Bill, a number of organisations made submissions that

¹⁶⁶ Article 24 Basic Law.

¹⁶⁷ Section 54 RDO.

there should be protection from discrimination on grounds of nationality, citizenship and residency status, including residency status in the context of discrimination against new immigrants from mainland China.¹⁶⁸

(ii) International human rights obligations

3.269 The Government indicated when it consulted on introducing the Race Discrimination Bill in 2004 that the definition of racial discrimination was based on the definition in the United Nations Convention on the Elimination of Racial Discrimination (CERD).¹⁶⁹ However, the scope of protection from discrimination under international human rights obligations is not limited to race, colour, descent or national or ethnic origins as defined in CERD. On the contrary, international human rights obligations require protection from discrimination on grounds of nationality, citizenship and immigration status. This is because treatment of persons relating to nationality, citizenship, and residency status is often linked to their racial, ethnic or national origins. For example, if a school decided it was not going to allow persons with Pakistani nationality to attend the school, that would disproportionately discriminate against persons of South Asian ethnicity, who would be more likely to have Pakistani nationality.

3.270 In respect of nationality, the UN Human Rights Committee has stated that the prohibition on discrimination in Article 26 of the International Covenant on Civil and Political Rights includes differentiation between nationals and non-nationals.¹⁷⁰ Similarly, the Committee on Economic Social and Cultural Rights has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.¹⁷¹

3.271 The UN Committee on the Elimination of Racial Discrimination (CERD) has stated, in respect to citizenship and immigration status, that:

¹⁶⁸ See for example Hong Kong Bar Association Submission to the Bills Committee 26 March 2007, <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-1461-1-e-scan.pdf> ; Submission by Hong Kong Human Rights Commission, Society for Community Organisation, New Immigrants Mutual Aid Association, Voices of Rights of Asylum Seekers and Refugees, February 2007, <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc520303cb2-1168-1-e.pdf> ; Kelly Loper, Research Assistant Professor, Faculty of Law, University of Hong Kong, February 2008, https://www.law.hku.hk/ccpl/Docs/SubmissiononRDBto72ndCERDfinal_000.pdf.pdf;

¹⁶⁹ Legislating Against Racial Discrimination, A Consultation Paper, September 2004, <http://www.info.gov.hk/archive/consult/2005/lard-e.pdf>

¹⁷⁰ See, for example, *Gueye v France* (Application No. 1961/1983), UN Doc. CCPR/C/35/D/196/1985 (1989); *Adam v Czech Republic* (Application No. 586/1994), UN Doc. CCPR/C/57/D/586/1994 (1996); and *Karakurt v Austria* (Application No. 965/2000), UN Doc. CCPR/C/74/D/965/2000 (2002).

¹⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009, Para 30.

“3. (...) States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law;

4. ***Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.***¹⁷² (emphasis added)

3.272 While Article 1, paragraph 2 of CERD permits distinctions to be made between citizens and non-citizens (e.g. for immigration functions concerning rights of entry), it should be construed consistently with the general prohibition on racial discrimination. In other words, differences in treatment of non-citizens should be for a legitimate aim and proportionate.¹⁷³

3.273 The United Nations has also made specific recommendations to the Hong Kong Government to include protection from discrimination on grounds of nationality, citizenship and immigration or residency status. In 2009 at the last examination of the Peoples’ Republic of China on its compliance with CERD, the Committee on the Elimination of Racial Discrimination made a specific recommendation to the Government for it to include in the RDO “immigration status and nationality” as prohibited characteristics of discrimination.¹⁷⁴

3.274 Further in 2014, the Committee on Economic Social and Cultural Rights made similar recommendations relating to nationality, citizenship and residency status:

“The Committee notes with concern the absence of comprehensive anti-discrimination legislation and regrets that the Race Discrimination Ordinance (RDO) does not include discrimination on the grounds of nationality, citizenship, resident status or the length of residence in Hong Kong, China (art. 2.2).

The Committee recommends that Hong Kong, China take steps to adopt comprehensive anti-discrimination legislation in compliance with article 2, paragraph 2 of the Covenant and taking into account the Committee’s general comment No 20 (2009) on non-discrimination in economic, social and cultural rights. The Committee reiterates its previous recommendation (E/C.12/1/Add.107 para.91) and urges Hong Kong,

¹⁷² Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against non-citizens*, UN Doc. CERD/C/64/Misc.11/rev., 2004, Paras 3-4.

¹⁷³ Ibid paragraphs 1 to 5.

¹⁷⁴ Concluding Observations, Committee on the Elimination of Racial Discrimination, CERD/C/CHN/CO/10-13, 15 September 2009, paragraph 27.

China to eliminate the widespread discriminatory practices against migrants and internal migrants from other parts of China.”¹⁷⁵ (emphasis added)

(iii) The position in other similar jurisdictions

- 3.275 A number of other similar international jurisdictions do provide some express protection from nationality, citizenship or immigration status discrimination.
- 3.276 In Australia, the Racial Discrimination Act 1975 defines race as “race, colour, descent, national or ethnic origin”.¹⁷⁶ However, it also provides that there is protection for anyone that is or has been an immigrant to Australia.¹⁷⁷ Some of the State race anti-discrimination legislation also provides such protections. For example, the Tasmanian anti-discrimination legislation provides protection in relation to nationality and the status of being an immigrant, and in New South Wales and South Australia there is protection in relation to nationality.¹⁷⁸
- 3.277 In Great Britain, the Equality Act 2010 defines race to include colour, ethnic or national origins, as well as nationality and citizenship. There is also an exception to race discrimination relating to nationality, ethnic or national origins where it concerns the exercise of immigration functions pursuant to relevant legislation.¹⁷⁹
- 3.278 Some other common law jurisdictions also provide protection from discrimination in relation to nationality and citizenship. For example, in New Zealand, the Human Rights Act 1993 provides protection from discrimination on grounds of ethnic and national origins which are defined to include nationality or citizenship.¹⁸⁰

(iv) Consultation responses

- 3.279 In relation to the consultation responses, there was a significant difference between the support for the proposals between the organisations and individuals.

¹⁷⁵ United Nations Committee on Economic Social and Cultural Rights, Concluding Observations on the Second Periodic Report of China, 23 May 2014, E/C.12/CHN/CO/2, paragraph 41.

¹⁷⁶ Section 9 Racial Discrimination Act 1975, <http://www.comlaw.gov.au/Details/C2013C00013>

¹⁷⁷ Section 5 Ibid.

¹⁷⁸ Anti-Discrimination Act 1998 (Tas), section 3; Anti-Discrimination Act 1977 (NSW), section 4; Equal Opportunity Act 1984 (South Australia), section 5.

¹⁷⁹ Equality Act 2010, Schedule 3 Paragraph 17.

¹⁸⁰ Section 21 Human Rights Act 1993, <http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

- 3.280 In relation to organisations, there was generally strong support for providing protection from NGOs working in human rights, with ethnic minorities including asylum seekers and refugees, as well as NGOs working with women. A number referred to international human rights obligations which require protection from discrimination on grounds of nationality, citizenship and immigration or residency status.
- 3.281 In relation to organisations opposing the proposals or raising concerns, they fell into two main categories. Firstly, the banking sector raised concerns about the potential impact of making nationality or citizenship discrimination unlawful on their ability to comply with anti-money laundering obligations. Secondly, the tourism and retail sector organisations raised concerns of the effect of making residency status discrimination unlawful on their current practices of providing discounts and other benefits to persons visiting Hong Kong as tourists. These concerns are discussed below in relation to specific concerns on protections from nationality, citizenship and residency status discrimination.
- 3.282 In relation to individuals, there was very high opposition to the proposals, but these were focused mostly on two issues: firstly, the belief that nationality, citizenship and residency are unrelated to race therefore should not be protected; and secondly, issues of protecting mainland Chinese people from discrimination for all the responses to Questions 11 to 16. For example for Question 11, the following main reasons for opposition were provided:
- It would make it unlawful to criticize the behaviour of mainlanders;
 - It would increase tension between people from HK and the Mainland;
 - It would enable mainlanders to claim benefits and rights of HK permanent residents.
 - Nationality, citizenship and residency status are different to race and therefore should not be protected
- 3.283 A large proportion of the responses relate to perceived concerns of providing protection from discrimination of mainland Chinese, for example, that it would make it unlawful to criticise the behaviour of mainlanders, and that if there was protection relating to residency status, mainlanders would be entitled to the same benefits as Hong Kong permanent residents. These concerns are discussed further in relation to residency status below.

(v) Specific issues relating to nationality and citizenship

- 3.284 Currently there is no protection from nationality or citizenship discrimination whether it is direct or indirect discrimination or harassment. Section 8(2) of the RDO specifically states in relation to indirect discrimination that a requirement or condition relating to for example nationality cannot constitute a ground for indirect discrimination. This

means, for example, it would be lawful for an employer to advertise that no persons with Filipino nationality can apply for a job, that a service provider can refuse to serve all people with Pakistani nationality even when it is being used to mask discrimination based on race or ethnicity.

- 3.285 The consultation responses provided evidence of a number of situations in which people in Hong Kong are or may be discriminated against on grounds of nationality or citizenship. For example, several organisations reported discrimination against ethnic minority construction workers who are permanent residents of Hong Kong but are paid lower wages because they are not Chinese citizens. This may be discrimination on grounds of citizenship.
- 3.286 Secondly, some organisations referred to the fact that banks had discriminated against persons of certain nationalities by refusing to open bank accounts or grant credit cards to them, or making the process much more difficult. The EOC has also received 28 complaints on this issue, and referred to such discrimination by banks in its study of racial discrimination experienced by South Asians.¹⁸¹ The issue has also received media attention over a number of years.¹⁸²
- 3.287 In relation to the situation with banks and opening bank accounts, as stated above, a number of banking or related regulatory organisations raised the fact that financial institutions including banks must comply with their Hong Kong and international anti-money laundering and counter terrorist financing obligations.
- 3.288 Financial institutions in Hong Kong are required to comply with the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance¹⁸³ and follow the Hong Kong Monetary Authority guidance which set out customer due diligence and record keeping requirements.¹⁸⁴
- 3.289 In assessing the money laundering and terrorist financing risk of each customer, financial institutions make reference to risk factors including the background of the customer. One risk factor is country or geographical risk, in which nationality, citizenship and residency are taken into account.

¹⁸¹ Study on Racial Encounters and Discrimination experienced by South Asians, http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201203/Race_eFull%20Report.pdf

¹⁸² Hong Kong banks accused of racism after Pakistani man is asked why he wants to open account, 28 November 2014, <http://www.scmp.com/news/hong-kong/article/1650319/hong-kong-banks-accused-ethnic-minority-discrimination>

¹⁸³ See section 7 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance which sets out the provisions relating to producing guidance and its legal effect.

¹⁸⁴ Guideline on Anti-Money Laundering and Counter-Terrorist Financing, March 2015, paragraph 3.5, <http://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/guideline/g33.pdf>

- 3.290 The EOC accepts that financial institutions must comply with the money laundering and counter-terrorist financing legislation and guidance in order to better prevent financial crimes. This means that it may be legitimate to ask questions of potential bank customers about their nationality, citizenship or residency. However, the questions should be conducted in a reasonable and sensitive manner, and where for example a potential customer complies with all the necessary checks, they should be entitled to open bank accounts.
- 3.291 Further, the introduction of protection from discrimination on grounds of nationality, citizenship and residency status would not affect the obligations under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, as under the Race Discrimination Ordinance there is a provision that acts done in order to comply with a requirement of an existing statutory provision, are not unlawful.¹⁸⁵ Alternatively, an express exception could be introduced that conduct done pursuant to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance and its guidance in relation to nationality, citizenship or residency do not constitute unlawful discrimination.
- 3.292 The EOC also believes that it is reasonable to retain an exception to discrimination on grounds of nationality, citizenship and residency where it relates to immigration control, and as exists in a number of jurisdictions.¹⁸⁶ This is because jurisdictions should be able to regulate who can enter and stay in their jurisdiction, including by reference to the nationality, citizenship or residency status of a person.
- 3.293 In light of all the above factors of evidence of discrimination on grounds of nationality or citizenship in Hong Kong, international human rights obligations requiring those grounds to be protected, and recommendations by United Nations to the Government, the EOC believes that there is sufficient justification to introduce protections from discrimination on grounds of nationality and citizenship.
- 3.294 The EOC believes that the Government should first conduct a public consultation to take into account all relevant considerations and views of stakeholders, including how nationality or citizenship is defined, and which exceptions relating to nationality and citizenship may be appropriate to be retained, repealed or introduced.

¹⁸⁵ Section 56 RDO.

¹⁸⁶ Section 8(3)(b)(iii) and (iv) and section 55 RDO.

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.

(vi) Specific issues relating to residency status in Hong Kong including mainland Chinese

- 3.295 As stated above, given the principle of “one country, two systems”, Hong Kong maintains a separate system from mainland China of Hong Kong residency and immigration control, such as being a permanent resident, non-permanent resident, or a tourist visiting Hong Kong.
- 3.296 Section 8(3)(b) specifically excludes from the protection of the RDO whether or not a person is a permanent resident; whether or not they have the right of abode or right to land; and the length of residence of a person in Hong Kong.
- 3.297 This means, for example, if an employer decided it would only employ Hong Kong permanent residents as it believed locals should be given preference, or a mobile service provider decided it would charge more for its contracts where people were residents in Hong Kong less than three years, this would not be unlawful. Such policies would have particularly adverse impacts on all immigrants to Hong Kong, whatever part of the world they have come from.
- 3.298 The EOC does, however, recognise that it is reasonable in some circumstances to differentially treat persons in Hong Kong based on their residency status. Such issues arise in a range of areas such as political rights and determining criteria for eligibility for public services or resources. For example, in relation to voting and standing for elections, only persons who are permanent residents can vote or stand for election. The EOC believes that it is reasonable to restrict political rights to persons who have a sufficient and long term connection with Hong Kong.
- 3.299 In relation to public services, the Government has a legitimate need to balance how it distributes public resources and, where appropriate, give priority to persons who are residents or permanent residents. The EOC believes that it is also reasonable to restrict public resources to persons who have a sufficient connection with Hong Kong.
- 3.300 There have been several decisions by the courts that have examined these issues in the context of claimed discrimination on grounds of residency

under the Bill of Rights, which highlight that the lawfulness of action depends on the particular circumstances of each case, including whether any discriminatory impact was for a legitimate aim and proportionate.

- 3.301 In relation to treatment in public hospitals, in 2011 the Court of Final Appeal made an important decision regarding differences in the costs of treatment between residents and non-residents.¹⁸⁷ The case concerned mainland Chinese women who were not residents of Hong Kong being charged more for obstetric services than Hong Kong resident women. They claimed this was unlawful discrimination on grounds of residency status. The Court decided that the discrimination based on residency was for a legitimate aim and proportionate given limited public resources, the large numbers of mainland Chinese non-residents seeking to use the services, and the need to prioritise Hong Kong residents.
- 3.302 A different approach was taken in the decision of December 2013 by the Court of Final Appeal in *Kong Yunming v The Director of Social Welfare*.¹⁸⁸ The case illustrates an example of differences in treatment of new immigrants from mainland China, which were held not to be for a legitimate aim or proportionate. The Court found that the Government policy requiring all recipients of Comprehensive Social Security Assistance to have been a Hong Kong resident for at least seven years was unconstitutional and in breach of the right to social welfare under article 36 of the Basic Law. The policy had a direct adverse impact on new immigrants from mainland China such as the appellant who was refused social security shortly after her husband died. The Court also decided that a proportionate time limit on receiving social security was the previous limit of living in Hong Kong for one year.
- 3.303 Examined below are specific issues raised in the consultation responses relating to residency and concerns about mainland Chinese; asylum seekers; and the tourism industry.

(a) Protection from discrimination of mainland Chinese

- 3.304 There is substantial evidence that new immigrants from mainland China are discriminated against in various aspects of public life such as employment, the provision of goods and services, and education. For example, the Society for Community Organisation (SoCO) has done several studies analyzing the issues.¹⁸⁹ SoCO is a non-Governmental organisation working on the protection of the human rights of disadvantaged groups in society including the elderly in poverty, people living in caged homes and new immigrants.

¹⁸⁷ *Fok Chun Wa & Anor v Hospital Authority & Anor* FACV No. 10 of 2011,

¹⁸⁸ FACV No 2 of 2013.

¹⁸⁹ Views on the Race Discrimination Bill, Hong Kong Human Rights Commission and others, February 2007, page 3-4.

- 3.305 In a survey conducted of new immigrants from mainland China in 2004, 91% complained that they have experienced discrimination because of their new immigrant identity, behaviour or appearance. Nearly 30% of them were rejected for employment when the employer saw that their identity card did not show permanent residence status or because their dialect was different from that of Hong Kong people. Nearly 40% of them received lower wages than that of local people. Nearly 60% of them received inferior service or treatment than that of local people when the service provider recognised them as a new immigrant, and 60% of them had been racially vilified in public area. It was also found that over 60% of them encountered racial discrimination when they sought help from the Government Department concerned.¹⁹⁰
- 3.306 According to a survey in 2009,¹⁹¹ 81.6% of new immigrant women interviewees complained that their working hours were longer than that of local workers while their wages were lower. Their monthly median wage was HK\$5,000 which is much lower than that of local women (HK\$8,000). 55.1% complained that they were assigned more job tasks, as they are new immigrants. 47.2% complained that it is difficult for them to find a job because of their immigrant status.
- 3.307 Several examples were provided in the study of such discrimination:

“Case One: Discrimination against New immigrant woman - Ms Lee Yuk Heung

‘The cleaning jobs do not require much conversation, but the employers refused my application because I cannot speak accurate Cantonese. They look down on new immigrants from China.’ Lee Yuk Heung is angry.

She was so delighted to leave her homeland, Wubei China and brought with her 5 year-old son to Hong Kong to reunite with her husband in 2003 after 7 years’ separation. However, she was disappointed with Hong Kong people after she experienced discrimination.

She desperately needed a job as her husband, a mini-bus driver, was under-employed. She tried hard but could not find any full-time jobs. Finally, she got a part-time job, but her wage is 30% lower than that of local people. As the family income is low, she needs to skip one meal every day so as to provide enough food for her son.

¹⁹⁰ Hong Kong Human Rights Commission, Society for Community Organisation, New Immigrants’ Mutual Aid Association, Asylum Seekers and Refugees’ Voice, Comments on the Hong Kong report under CERD, July 2009, page 9, <http://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0615cb2-1860-2-e.pdf>

¹⁹¹ Society for Community Organisation, “Study on the New immigrant women’s employment situation 新移民婦女的就業情況調查”, 2009(www.soco.org.hk)

Apart from employment problems, she also found that it is difficult for her to make friends with local people.

'Hong Kong people know from my outlook that I am a new immigrant. They are not willing to approach me and sometimes gossip about new immigrants, saying that new immigrants are a burden to Hong Kong society. I do not dare to talk with them. I don't have any local Hong Kong friends. We are not considered to be Hong Kongers.'

Case Two: Discrimination against New Immigrant mother and son – Ng Yu Chiz and Lau Wai Kam

'My classmates teased me and called me 'Dai Luk Chai' (boy). They are so unfriendly with me as I am from mainland China. I don't have any friends in school.'

Ng Yu Chiz came with his mother to settle in Hong Kong when he was 8 years old in 2003. He expected to make many friendly friends in Hong Kong. But he found that he was labeled as naughty and dirty. Whenever, there is any rubbish thrown out their building, their neighbours think he's the one who has done it. He has become very passive and less confident in communicating with others.

His mother shared same feelings with him as she experienced discrimination in the past few years. She always faces public vilification when she goes to purchase goods. The shop owners or sales always know that she is from mainland China. When she asks the price of the goods, the sales are very impolite and replied her to ask mainland China or buy in mainland China. They do not like to entertain her."

- 3.308 More recently in 2012, a survey conducted by the University of Hong Kong School of Public Health into social harmony, interviewed approximately 1,000 new immigrants from mainland China that had been living in Hong Kong 10 years or less.¹⁹² Approximately 25% of the immigrants reported that they had faced discrimination since their arrival because of their immigration status ranging from situations of being refused services, being treated unfairly, and their family being discriminated against.
- 3.309 In relation to the consultation responses from individuals, there was strong opposition from the majority of respondents. However, the EOC believes that a number of the concerns are not consistent with how the existing anti-discrimination legislation or proposals would operate. Therefore, the EOC believes that the concerns can be adequately addressed within the legislation and its operation. The main issues raised were: the scope of the current protection from racial discrimination of mainland Chinese people;

¹⁹² A social barometer for HK: from family harmony to social cohesion, December 2012, <https://www.med.hku.hk/v1/media/4723.pdf>

the perceived effect of providing protection from residency discrimination; and the impact of protection from discrimination on freedom of expression.

Current scope of protection from discrimination of mainland Chinese

- 3.310 Firstly, there was some confusion as to the current scope of protection of mainland Chinese people under the Race Discrimination Ordinance. This may be related to the previous stated position of the Government during the passage of the Race Discrimination Bill. During that time the Government stated:

*“24. Although new arrivals (and others) from the Mainland do sometimes face discrimination by Hong Kong’s Chinese majority, almost all of them are of the same ethnic stock as local Chinese (i.e., Han Chinese). **The discrimination experienced by new arrivals from the Mainland is not based on race. Rather, it is a form of social discrimination and therefore outside the intended scope of the Bill.***

*25. New arrivals from the Mainland should, of course, enjoy the same protection against racial discrimination as anyone else in Hong Kong. The proposed legislation should protect everyone from racial discrimination. Under the proposed race discrimination bill, a person is a victim of racial discrimination if he is treated less favourably by the discriminator (who may be of the same race as the victim or of a different race) on the ground of his race or ethnicity. **Our view is that new arrivals from the Mainland, per se, do not constitute a racial or ethnic group in Hong Kong. Discrimination against new arrivals from the Mainland by local Chinese is therefore not considered a form of racial discrimination.** We recognise that this position may not be accepted by some groups and would like to have public views on the matter.”¹⁹³ (emphasis added)*

- 3.311 The Government’s position has been that, although mainland Chinese people are protected from racial discrimination under the RDO in some circumstances, it does not cover less favourable treatment by local Chinese people of mainland Chinese, as they are the same race and it is “social” discrimination.
- 3.312 This is an important issue as it affects the application of the RDO to a large number of people. The position of the EOC is that the RDO currently does apply to mainland Chinese people in the same way as it applies to all racial groups. In other words, mainland Chinese people, like anyone else in Hong Kong, are protected from discrimination where they are less favourably treated than another person on grounds of their race, colour, descent, or national or ethnic origin. For example, if a French company in Hong Kong decided not to hire Chinese people as it preferred Caucasians, this would be

¹⁹³ Legislating Against Racial Discrimination, A consultation paper, September 2004, paragraphs 24 and 25, <http://www.info.gov.hk/archive/consult/2005/lard-e.pdf>

racial discrimination against all Chinese people, whether they were, for example, from Hong Kong or mainland China.

3.313 The EOC also believes that 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. In relation to discrimination faced by mainland Chinese, an example scenario could be if a shop in Hong Kong, run by a Hong Kong Chinese person, refused to serve mainland Chinese people who were carrying suitcases, but did serve persons of other races who also carried suitcases. Whether this is racial discrimination will depend on the reason for the treatment. If the reason for not serving the mainland Chinese customer is that the salesperson hates all mainland Chinese, this could be racial discrimination. If the reason for not serving the mainland Chinese customer is that the customer had physically threatened the salesperson, then this is unlikely to be racial discrimination to refuse a service as the reason for the treatment was not race.

3.314 Equally, if a mainland Chinese person in Hong Kong treats a Hong Kong Chinese person less favourably than persons of other races because of being Chinese, that may also constitute unlawful intra-race discrimination.

3.315 It is also important that the extent to which the RDO applies to situation of intra-race discrimination is a matter for the courts to determine, and to date there has not been a definitive determination on the issue.

3.316 However, the position in other jurisdictions is also that there can be intra-race discrimination, or intra-characteristic discrimination. For example, in Great Britain in relation to intra-religious discrimination, the Equality Act 2010 makes clear that intra-race discrimination is unlawful.¹⁹⁴ Further, the Equality and Human Rights Commission guidance on the Equality Act 2010 gives an example:

“A Muslim businessman decides not to recruit a Muslim woman as his personal assistant, even though she is the best qualified candidate. Instead he recruits a woman who has no particular religious or non-religious belief. He believes that this will create a better impression with clients and colleagues, who are mostly Christian or have no particular religious or non-religious belief. This could amount to direct discrimination because of religion or belief, even though the businessman shares the religion of the woman he has rejected.”¹⁹⁵

3.317 The EOC therefore believes that the position of the Government regarding the current scope of the RDO protection and intra-race discrimination

¹⁹⁴ Section 24(1) Equality Act 2010.

¹⁹⁵ Employment Statutory Code of Practice, Equality and Human Rights Commission, Paragraph 3.10, http://www.equalityhumanrights.com/sites/default/files/publication_pdf/employercode.pdf

between Hong Kong Chinese and mainland Chinese may not be the only possible interpretation of the issues.

Effect of protections relating to residency status

- 3.318 In relation to extending protection from discrimination to residency status, the EOC consulted on this issue in the context of mainland Chinese, given that there is substantial evidence (described above) that new immigrants from mainland China who have moved to Hong Kong for work or to reunite with their families face considerable discrimination in many aspects of their lives. Further, as described above, this was an issue of concern raised during the passage of the Race Discrimination Bill by a number of organisations working on issues of equality, and has been raised on a number of occasions by the United Nations in recommendations to the Hong Kong Government on the scope of protection of the RDO.
- 3.319 Many individual responses believed that if there was protection from residency discrimination, mainland Chinese would be automatically entitled to the same public benefits, services and civil rights as Hong Kong permanent residents. For example, they believed that they would be entitled to social housing and the right to vote without having to be permanent residents.
- 3.320 As the EOC highlighted in the Consultation Document, this would not be the case. Exceptions permitting residency discrimination may serve a legitimate aim and be proportionate in a number of scenarios. For example, the EOC believes that it is reasonable, as in many countries, that only persons who are permanent residents of Hong Kong have the right to vote and stand for election. This is similar to citizenship rights in other countries.
- 3.321 Further the EOC also believes that, in some situations, it may be reasonable to restrict public services to persons who are either permanent residents or have been residents for a certain period. For example, in relation to public housing, currently only persons who are permanent residents can apply. This is linked to the fact that there is currently a significant shortage of public housing and the Government prioritises the supply to persons that have closer ties to Hong Kong.¹⁹⁶
- 3.322 Further, if there was protection from discrimination on grounds of residency, these requirements could still apply in two ways. Firstly, under the current RDO, there is already a statutory exception which means that, where there is other legislation that permits discrimination, that conduct will not be

¹⁹⁶ At September 2015 there were approximately 285,000 people who had applied and are waiting for Housing Authority public housing, with an average wait time of 3.6 years, <http://www.housingauthority.gov.hk/en/about-us/publications-and-statistics/prh-applications-average-waiting-time/>

unlawful. The same exception would be applied to any legislation where there are residency requirements for entitlements.¹⁹⁷ Secondly, if there was a provision of indirect residency discrimination, such discrimination would not be unlawful where it has a legitimate aim and is proportionate.¹⁹⁸ In other words, the existing structures of the RDO would take into account situations where it is lawful to discriminate on grounds of residency.

Concerns regarding freedom of expression

- 3.323 Many of the individual consultation responses expressed concerns that the EOC's proposals would inhibit legitimate freedom of expression, for example about bad behaviour by mainland Chinese people in Hong Kong.
- 3.324 In Hong Kong, freedom of expression is protected under the Bill of Rights.¹⁹⁹ However, it is not an unlimited right and can, for example, be restricted to protect the rights of others including from discrimination.²⁰⁰
- 3.325 The RDO also already currently recognises the need to balance the right to freedom of expression and to protection people from racial discrimination by the racial vilification provisions.²⁰¹ These provide that it is unlawful for a person to publicly incite hatred towards, serious contempt for, or severe ridicule of, other persons on the grounds of their race. However, it will not be racial vilification for example to comment on matters of public interest. It is not unlawful to engage in an activity in public "...done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest..."²⁰²
- 3.326 The experience in Hong Kong indicates, as in other jurisdictions, that the threshold for proving vilification is high given the need to balance freedom of expression. In Hong Kong, there have so far been no cases of racial vilification brought, and only three cases of disability vilification.²⁰³
- 3.327 In relation to racial vilification, the same factors would apply to balancing freedom of expression if a matter concerned public comments about mainland Chinese, either under the existing provisions or if residency status was added as a protected characteristic. In other words, whether or not conduct was unlawful would depend on a number of factors, including whether the comments were directed at the race or residency status of the

¹⁹⁷ Section 56 RDO.

¹⁹⁸ Section 4(2) RDO.

¹⁹⁹ Article 16 Bill of Rights.

²⁰⁰ Article 16(3) Bill of Rights.

²⁰¹ Sections 45 and 46 of the RDO.

²⁰² Section 45(3) RDO.

²⁰³ Of the three claims of disability vilification brought, only one has been successful, *Tung Lai Lam v Leung Kin Man*, DCEO 1/2011.

person, and whether or not the comments are reasonably likely to incite hatred.

- 3.328 The EOC believes that the current provisions relating to freedom of expression under the Bill of Rights and the racial vilification provisions under the RDO already strike a reasonable balance, and therefore that the concerns raised can be addressed.

(b) Issues relating to asylum seekers and other protection claimants

- 3.329 A particular issue arises in relation to protection from racial discrimination of asylum seekers, refugees and other protection claimants to non-refoulement²⁰⁴ in Hong Kong.

- 3.330 Refugees are people who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of his nationality, and are unable to, or owing to such fear, are unwilling to avail themselves of the protection of that country.²⁰⁵ An asylum seeker is a person who claims to be a refugee but their claim has yet to be determined.

- 3.331 The EOC's position is that all persons in Hong Kong are generally protected from racial discrimination under the RDO where they are less favourably treated because of their race. For example, it may be unlawful race discrimination for a shop to refuse to serve an asylum seeker in Hong Kong because of their colour. However, the RDO would not affect the lawfulness of action under immigration legislation or its application.²⁰⁶

- 3.332 The Justice Centre, an NGO working with asylum seekers and persons trafficked to Hong Kong, expressed the view that protection from discrimination on grounds of residency status is important to protect asylum seekers. Asylum seekers in Hong Kong seeking protection are issued "recognizance papers"; such papers do not give them any legal immigration status, irrespective of their duration of stay or status of their claim.

- 3.333 The Justice Centre reported that asylum seekers:

"...often receive subpar services at healthcare, education and other services for which they are eligible compared to other local residents or foreign visitors. Often, frontline workers are not familiar with recognizance papers in the first place and have little to no understanding of the changes in the

²⁰⁴ The principle of non-refoulement applies in Hong Kong in relation to the United Nations Convention Against Torture. This requires that no person should be returned to a country where they are at risk of torture, article 3, Convention Against Torture.

²⁰⁵ United Nations Refugee Agency, <http://www.unhcr.org/pages/49c3646c125.html>

²⁰⁶ See section 55 of the RDO.

*system with the introduction of the Unified Screening Mechanism (USM). Protection claimants also report feeling highly embarrassed by having to produce these documents. Many state that they are frequently stopped by the police in the streets and asked for their papers, which raises concern about potential use of racial profiling. Many protection claimants report that tenants in Hong Kong might decline renting accommodation to them upon learning that they are protection claimants.*²⁰⁷

- 3.334 They submitted that, given discrimination faced by asylum seekers, there should be protection from discrimination on grounds of residency or immigration status, but that it should include protection of persons that have no formal legal status in Hong Kong.
- 3.335 The EOC believes that, consistent with the current provisions of the RDO, the protections should cover all persons in Hong Kong, including persons in Hong Kong that are not residents or permanent residents, tourists, and asylum seekers. A provision on residency status discrimination could be defined to cover such categories of persons, while still maintaining the relevant immigration exception.

(c) Tourism and related industries concerns

- 3.336 A number of representative organisations of the tourism and related industries expressed concerns that if there was protection from discrimination on grounds of residency status, it may mean that their practices of providing discounts or other benefits to tourists visiting Hong Kong would become unlawful.
- 3.337 The organisations gave examples of such benefits. The Hong Kong Tourism Board gave some examples of how they promote tourism:
- **Special arrangement in large-scale event:** (1) setting up special channel for tourists, which enables control of people.
 - **Reserve tickets for tourists:** tourists only stay in Hong Kong for a few days. In order to enable tourists to participate in the activities, the Board would work with event organisers and reserve tickets for tourists.
 - **Offer exclusive discount for tourists:** in order to attract tourists, the Board may offer exclusive offers or gifts to tourists, including free drinks, gifts, or dining discounts or shopping discounts.
 - **Lucky draw for tourists:** to encourage shopping or enrich tourists' experience, the Board organised lucky draws and guiding tours.

²⁰⁷ Justice Centre submission to the Discrimination Law Review, October 2014, <http://www.justicecentre.org.hk/framework/uploads/2014/03/EOC-Submission-in-Response-to-the-Public-Consultation-Discussion-Law-Review-Justice-Centre.pdf>

- 3.338 For example in 2014, the Hong Kong Trade Development Council organised a Book Fair charging Hong Kong residents a higher fee than tickets for non-residents (\$25 for residents and \$10 for non-residents), with the aim to encourage tourists to visit Hong Kong. The EOC received complaints that the treatment was discriminatory against Hong Kong residents.
- 3.339 There are several alternatives that could be considered in relation to this issue. Firstly, the issue of whether pricing or benefits for tourists to Hong Kong could be determined on a case-by-case basis, and would be subject to the same tests of direct or indirect discrimination as the existing protections under the RDO. Alternatively, if it was considered appropriate, it may be possible to consider developing a specific exception relating to the tourism industry. However, in our view it would be important for the Government to consult all key stakeholders on this issue given that there are different views on whether discounts and other benefits for tourists should be a lawful exception to residency status discrimination.
- 3.340 Overall, given the current gap in protection from discrimination on grounds of residency status; there being evidence of discrimination on grounds of residency status in a number of fields; international human rights obligations and United Nations recommendations to the Government; and that concerns regarding protection from discrimination on grounds of residency status can be addressed in the legislation, the EOC believes that there should be protection from discrimination on grounds of residency status. This protection would apply to all persons in Hong Kong based on their residency status, not just mainland Chinese.
- 3.341 The EOC believes the Government should firstly conduct a public consultation on all relevant considerations, 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. This would also provide an opportunity for different stakeholders to express their views.
- 3.342 The EOC also believes that, given there is significant confusion on the current and proposed protections from discrimination under the RDO, 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.

Recommendation 25:

It is recommended that the Government conduct a public consultation and 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 Race Discrimination Ordinance and what would be the effect of protections relating to residency status.

C. Equality for families: cohabiting relationships

Questions 6 and 9, 70-73 of the Consultation Document asked:

“Consultation Question 6

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

Consultation Question 9

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

Question 70

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

Consultation Question 71

Do you think that:

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

Consultation Question 72

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

Consultation Question 73

Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?"

Key points

- 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 and the public generally being more accepting of such relationships;
- 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 legally recognising couples in cohabiting relationships in Hong Kong;
- The fact that there is no legal recognition of couples in cohabiting relationships means that they are discriminated against in legislation and policies in many aspects of life including employment benefits, taxation payments, immigration rights, public housing, inheritance and family rights;
- The situation does not comply with international human rights obligations, and possibly Hong Kong 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 international jurisdictions with similar legal systems provide protection from discrimination and legally recognise cohabiting relationships;
- It is important to take into account the concerns of religious groups and institutions regarding recognition of cohabiting relationships and to ensure their right to freedom of religion. The EOC believes that an appropriate balance can be achieved between the rights to equality of persons in cohabiting relationships, and the rights of religious groups for example with justifiable exceptions.

3.343 Questions 6 and 70-73 relate to protection from discrimination on grounds of marital status under the Sex Discrimination Ordinance. This also links to Consultation Question 69 on possible extension of the exception for religious groups to discrimination in employment on grounds of marital status. That issue is discussed in Chapter 4. Question 9 relates to protection from discrimination on grounds of family status discrimination under Family Status Discrimination Ordinance. Both areas relate to the extent to which the anti-discrimination should recognise and provide protection from discrimination for persons who are in family relationships where they are in

cohabiting/ de facto relationships, but are not married. Each of the issues is examined below. To assist in understanding, the term “cohabitation relationships” is used below, as generally such relationships relate to situations where a couple is living together and in a relationship.

(i) Protection from marital status discrimination: cohabitation relationships

3.344 The structures, attitudes and values regarding families in Hong Kong as in other parts of the world are evolving. In relation to family structures, the number of persons who have not been married is on the rise, as is the number of divorces. Over the last two decades from 1991 to 2011, the proportions of never-married population in both genders increased substantially. In 2011, overall 33.5% of males had never been married and 29.2% of females. For example, between 1991 and 2011, in relation to specific age groups of 35-39 year olds, the increase in rates of persons never married increased from 15.1% to 26.4% for men and from 20.7% to 30.2% for women. In relation to divorces, the crude divorce rate was at 3.1 per 1000 population in 2013, nearly three times higher than that in 1991.²⁰⁸ In relation to persons not married, this partly reflects a larger number of persons cohabiting, as well as people getting married at older ages. In relation to divorce rates, this reflects changing attitudes towards divorce being a legitimate solution if a married couple have irreconcilable differences.

3.345 In a study commissioned by the Government in 2008, it was noted that families have become more heterogeneous:

“Structurally, families have become smaller, averaging around 3 persons per household. Socially, with the emergence of different family types such as single-parent family, dual earner family, childless family, single-person family, and step-family, families have become more heterogeneous. This increasing heterogeneity of the family system in Hong Kong resembles the trend observed in other developed societies. It can be attributed to the increasing divorce and remarriage, rise in the age at first marriage, the increasing female participation in labor force, and the decreasing fertility and mortality rates.”²⁰⁹

²⁰⁸ Marriage and Divorce Trends in Hong Kong, 1991 to 2013, January 2015, <http://www.statistics.gov.hk/pub/B71501FA2015XXXXB0100.pdf>

²⁰⁹ Trends in family attitudes and values in Hong Kong, Professor Nelson Chow and Dr Terry Lum, University of Hong Kong, 22 August 2008, paragraph 1 Executive Summary, http://www.cpu.gov.hk/doc/tc/research_reports/20080822%20Trends%20in%20family%20attitudes%20and%20values%20in%20Hong%20Kong.pdf

3.346 In relation to attitudes toward cohabitation relationships where persons do not intend to marry, the study found that 50.7% of people accepted such relationships, and that this figure was higher among younger people.²¹⁰

3.347 The study also recommended that:

“The traditional family values and attitudes should be strengthened while adequate support should be provided for people who do not wish to follow the majority’s attitudes and values. Specifically, our services should be broad enough to assist those who wish to live according to the traditional family attitudes and values as well as those who wish otherwise.”²¹¹

3.348 In relation to attitudes towards same sex cohabitation relationships public attitudes are also evolving. In 2012, a study commissioned by the University of Hong Kong found that 32.7% of people very much support or somewhat support legislation on same sex marriage or registered partnerships, with 39% somewhat or very much opposing.²¹²

3.349 In reviewing the existing anti-discrimination legislation, the EOC has taken into account the changing structures and attitudes towards families and how this relates to protection from discrimination on grounds of marital status and family status.

3.350 Currently, the SDO provides protection from discrimination and other prohibited conduct on grounds of marital status, which is defined as:

“The state or condition of being:

- (a) Single;*
- (b) Married;*
- (c) Married but living separately and apart from one’s spouse;*
- (d) Divorced; or*
- (e) Widowed”²¹³*

3.351 There are also specific exceptions relating to marital status which permit discrimination between people with different marital status to employment benefits,²¹⁴ the right to have IVF reproductive technology treatment,²¹⁵ adoption,²¹⁶ and public housing.²¹⁷

²¹⁰ Ibid pages 19-21.

²¹¹ Ibid paragraph 4 Executive Summary.

²¹² Survey on Hong Kong Public’s Attitudes Towards Rights of People of Different Sexual Orientations, Hong Kong University, 7 November 2012, Table 12 page 8, https://www.hkupop.hku.hk/english/report/LGBT_CydHo/content/resources/report.pdf

²¹³ Section 2 SDO.

²¹⁴ Item 3 Part 2, Schedule 5 SDO permits discrimination against single people in terms of employment benefits.

²¹⁵ Item 4 Part 2, Schedule 5 SDO.

²¹⁶ Item 5 Part 2, Schedule 5 SDO.

²¹⁷ Item 6 Part 2, Schedule 5 SDO.

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

3.353 In the Prudential case (which concerned discrimination on grounds of marital status where a couple was married), the Judge made passing comments about the scope of protection on marital status discrimination. She stated that, in her view, marital status does not include cohabitation relationships as it was not included in the definition:

“...the Hong Kong legislation did not adopt the definition of ‘marital status’ to include the ‘de facto spouse’ of any person in Hong Kong which was provided in Australia and the UK, this clearly meant the Hong Kong legislature did not intend ‘de facto’ spouses to be protected in the same way that ‘married’ spouses are under the legislation. The exclusion is based on local customs and traditional values where a ‘common law wife’ does not receive any protection under the Hong Kong matrimonial legislation.”²¹⁸

3.354 In Hong Kong, there is currently no legal recognition or system for recognising or registering cohabitation relationships, whether they are heterosexual or homosexual relationships. This is the case even where a heterosexual or homosexual couple is in a legally recognised cohabitation relationship in another country, or a homosexual couple is in a legally recognised marriage in another country.

3.355 The effect of non-recognition of cohabitation heterosexual or homosexual relationships in Hong Kong or from overseas, and non-recognition of same sex marriages from overseas, is that it results in discrimination in many aspects of life including employment, taxation, immigration, public housing, inheritance rights and family rights. This is because for many public or private entitlements, there is a condition that they are only provided to persons in heterosexual marriages.

3.356 For example, in relation to employment, the Government civil service only provides employment benefits such as medical benefits to partners of an employee where the couple is in a heterosexual marriage. In relation to tax benefits, similarly there is only an entitlement to a reduction in tax for heterosexual married couples.²¹⁹ In relation to inheritance rights, there is no automatic right of a person to inherit a cohabiting partner’s estate if they

²¹⁸ Ibid, paragraph 64.

²¹⁹ It should be noted that a judicial review claim was launched in December 2015 on these issues under the Bill of Rights, http://www.scmp.com/news/hong-kong/law-crime/article/1895583/gay-hong-kong-civil-servant-legal-challenge-claim-same?utm_source=&utm_medium=&utm_campaign=SCMPSocialNewsfeed

die without a will.²²⁰ In relation to rights regarding your family, where unmarried cohabitants have children, the mother has all the rights and authority regarding the child's custody and upbringing, while the natural father does not have automatic parental rights.²²¹ In addition, there is discrimination as to the orders for maintenance payments that can be made for children where cohabiting couples with children separate, as compared to married couples.²²² In relation to immigration, where a person moves to Hong Kong on a work visa, their partner is only entitled to a dependent visa if they are in a heterosexual marriage.²²³

3.357 There are also specific exceptions in the SDO which permit discrimination on grounds of marital status. These permit discrimination in favour of persons who are married in relation to employment benefits, IVF reproductive technology, adoption and public housing. This discriminates against persons in cohabiting relationships who are not married.

3.358 It is, however, relevant to note that there are limited circumstances where Hong Kong legislation does recognise cohabiting relationships. This applies to issues of domestic violence and emergency medical treatment of partners.

3.359 In relation to domestic violence, in 2009 the Government enacted amendments to the Domestic Violence Ordinance to include protection from domestic violence for persons in cohabiting relationships.²²⁴ The protection from domestic violence in relation to cohabiting relationships is defined to include both heterosexual and same sex relationships.²²⁵ In determining whether a couple is in a cohabiting relationship, a court shall consider all the relevant circumstances, and can include:

- “(a) whether the parties are living together in the same household;*
- (b) whether the parties share the tasks and duties of their daily lives;*
- (c) whether there is stability and permanence in the relationship;*

²²⁰ Section 4, Intestate Estate Ordinance. A person would need to apply for maintenance and prove that they were maintained by the deceased person before their death: section 3(1)(b)(ix) of the Inheritance (Provision for Family and Dependants) Ordinance.

²²¹ To enjoy parental rights, the natural father must make an application for a Court Order under Section 3(1)(c) of the Guardianship of Minors Ordinance

²²² “How Hong Kong’s children of unwed parents miss out in break up”, 1 December 2015, <http://www.scmp.com/lifestyle/families/article/1885178/how-hong-kongs-children-unwed-parents-miss-out-break>

²²³ This issue is also the subject of a judicial review claim under the Bill of Rights, QT v Director of Immigration, HCAL 124/2014.

²²⁴ Domestic and Cohabitation Relationships Violence Ordinance.

²²⁵ A cohabitation relationship:

“(a) means a relationship between 2 persons (whether of the same sex or of the opposite sex) who live

together as a couple in an intimate relationship; and

(b) includes such a relationship that has come to an end”: section 2 Ibid.

- (d) *the arrangement of sharing of expenses or financial support, and the degree of financial dependence or interdependence, between the parties;*
- (e) *whether there is a sexual relationship between the parties;*
- (f) *whether the parties share the care and support of a specified minor;*
- (g) *the parties' reasons for living together, and the degree of mutual commitment to a shared life;*
- (h) *whether the parties conduct themselves towards friends, relatives or other persons as parties to a cohabitation relationship, and whether the parties are so treated by their friends and relatives or other persons.*²²⁶

3.360 This definition is similar to the Australian definition of de facto relationships discussed below. The Domestic and Cohabitation Relationships Violence Ordinance, therefore, provides a clear definition of a cohabitation relationship and the factors that can be taken into account in determining the existence of such a relationship.

3.361 In relation to medical treatment, in July 2015, the Government enacted the Electronic Health Record Sharing System Ordinance. The Ordinance creates a system for electronically recording and sharing health information of persons receiving health care. It includes provisions specifying which persons can make decisions, in relation to medical treatment, on behalf of a patient where they themselves are unable to, for example if they are in a coma, unconscious, or mentally incapable of doing so.

3.362 The Ordinance defines a “substitute decision maker” of a healthcare recipient as “a family member of the healthcare recipient, or a person residing with the healthcare recipient, who accompanies the healthcare recipient at the relevant time”. This now means that cohabiting partners are provided with equal treatment to, for example, spouses in the same situation. This makes practical sense, as the provisions are designed to ensure that where persons require medical treatment, but cannot communicate, they can be appropriately cared for by their children, parents, spouses and partners with whom they are in a family relationship.

3.363 In relation to international human rights obligations, there are requirements to protect people from discrimination on grounds including marital status which extends to persons that are not married but in de facto relationships. For example, in relation to protection from discrimination under the International Covenant on Economic Social and Cultural Rights, the United Nations Committee on Economic Social and Cultural Rights interpreted protection from discrimination as including an individual’s marital *and* family status, noting that:

²²⁶ Section 3B(2) Ibid.

*“Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, **in a de facto relationship or one not recognised by law**, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children.”*²²⁷ (emphasis added)

3.364 In some other jurisdictions, there is express protection from discrimination where persons are in cohabitation relationships. This is also usually linked to the fact that there is legal recognition of such cohabitation relationships with similar entitlements to heterosexual marriages.

3.365 In Australia, cohabiting relationships, whether heterosexual or homosexual, are legally recognised in all key aspects of life and in a similar manner to married couples.²²⁸ In relation to anti-discrimination legislation, the Sex Discrimination Act 1984 provides for protection from discrimination not only for those that are or have been married, but also for those that are in heterosexual or homosexual de facto relationships.²²⁹ Initially only heterosexual de facto relationships were protected, but protection for same sex de facto relationships was added in 2013.

3.366 The protection to persons in homosexual de facto relationships was recently introduced by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013. The protection is now formulated as “marital or relationship status” and is defined as:

- “(a) single;*
- (b) married;*
- (c) married, but living separately and apart from his or her spouse;*
- (d) divorced;*
- (e) the de facto partner of another person;*
- (f) the de facto partner of another person, but living separately and apart from that other*
- (g) person;*
- (h) the former de facto partner of another person;*
- (i) the surviving spouse or de facto partner of a person who has died.”*

3.367 A de facto partner is defined in the Acts Interpretation Act 1901 as relating to a person in a de facto relationship or registered relationship.²³⁰ A de facto relationship is defined as:

²²⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009, Para 31.

²²⁸ Section 4AA Family Law Act 1975.

²²⁹ Section 4, Sex Discrimination Act 1984

²³⁰ Registered relationships concern same sex couples. The registration creates some legally binding rights but is not the same as marriage.

- “(1) For the purposes of paragraph 2D (b), a person is in a **de facto relationship** with another person if the persons:
- (a) are not legally married to each other; and
 - (b) are not related by family (see subsection (6)); and
 - (c) have a relationship as a couple living together on a genuine domestic basis.
- (2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:
- (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) the care and support of children;
 - (h) the reputation and public aspects of the relationship.”²³¹

3.368 In Great Britain, although there is no legal recognition of heterosexual cohabiting relationships, there is recognition of homosexual cohabiting relationships in the form of civil partnerships.²³² Further, since 2014, same sex marriages have been legalised.²³³

3.369 Protection is provided from discrimination on the basis of being either married or in a civil partnership. No protection is provided for those that are single, no longer married or no longer in civil partnerships, as well as those heterosexual or homosexual couples in de facto relationships.²³⁴

3.370 In New Zealand, there is recognition of civil unions between both heterosexual and homosexual couples since 2005.²³⁵ De facto cohabiting relationships are also recognised where heterosexual or homosexual couples have been living together at least three years. The difference between civil unions and de facto relationships is that civil unions involve a formal registration of the relationship. Same sex marriage has been lawful since 2013.²³⁶ This provides very similar rights as marriage.

²³¹ Section 2F(1) and (2) Acts Interpretation Act 1901.

²³² Civil Partnerships Act 2004.

²³³ See the Civil Partnerships Act 2004 and the Marriage (Same Sex Couples) Act 2013.

²³⁴ Section 8 Equality Act 2010.

²³⁵ Civil Union Act 2004.

²³⁶ Marriage (Definition of Marriage) Amendment Act 2013.

3.371 In relation to anti-discrimination legislation there is protection from discrimination in relation to marriages, civil unions and de facto relationships. Marital status is defined as being:

- “(i) single; or*
- (ii) married, in a civil union, or in a de facto relationship; or*
- (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or*
- (iv) separated from a spouse or civil union partner; or*
- (v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended.”²³⁷*

3.372 In relation to the consultation responses to Question 6, a large majority of the organisations disagreed that protection from marital status discrimination should be amended to cover de facto relationships, that it should include both heterosexual and homosexual de facto relationships, and whether protection should be extended to former de facto relationships. Of the organisations that opposed the proposals, religious organisations and religious educational institutions represented the greatest proportions. For example, in relation to the first part of Question 6, 45% of all the responses from organisations were from religious organisations opposing the proposal, and 14% were from religious educational institutions.

3.373 In relation to individual responses, on the first part of Question 6 and whether protection from marital status discrimination should be extended to de facto relationships, a vast majority expressed their disagreement.

3.374 Of these, over half of the respondents gave no reason. The main reasons provided for opposing the proposals where:

- It would be difficult to define or prove who is in a de facto relationship and when they start or end;
- People may attempt to abuse the system by claiming benefits of being in a relationship and single at the same time, or pretending to be in a relationship;
- De facto relationships should not be treated as equivalent to marriages. Persons in de facto relationships should not have the same rights or benefits as married persons;
- It would go against family values to recognise de facto relationships.

3.375 In relation to the second part of Question 6 and whether protection should extend to both heterosexual and same sex relationships, a vast majority of individuals disagreed. Of the respondents who disagreed with this part, over half of the respondents gave no reason. Others gave the following main reasons:

²³⁷ Section 21(1)(b) Human Rights Act 1993, New Zealand.

- This is an attempt or step to legalize same sex marriage which should not be allowed;
 - It goes against family values;
 - It would increase social and/or financial burden.
- 3.376 In relation to the third part of Question 6 and whether protection should be extended to former de facto relationships, the vast majority of individuals disagreed. Of the respondents who disagreed with this part, over two thirds of the respondents gave no reason. Others expressed the following opinions:
- It goes against family values;
 - It would increase social and/or financial burden.
- 3.377 The patterns of both the above individual responses and a number of organisations raised similar concerns. These concerns include those of religious organisations and religious educational institutions on the possible impact on the institution of marriage and family values; the scope of any definition of cohabiting relationships; and the potential financial impact of providing employment benefits for the business sector. The main concerns and the EOC's position on those concerns is explained below.
- 3.378 Many religious organisations, religious educational institutions, and family groups were concerned that if cohabiting or de facto relationships are recognised it would threaten and undermine the institution of marriage. They opposed such recognition whether it is for heterosexual or homosexual relationships, but they raised particular concerns relating to homosexual relations and recognising same sex marriages since they believe it conflicts with their religious beliefs and the right to freedom of religion.
- 3.379 The EOC notes these concerns and recognises that they raise possible issues of conflict with some religious doctrines on marriage generally, and more specifically same sex marriage.
- 3.380 These issues would need to be carefully taken into account in considering possible protections from discrimination and recognition of cohabiting relationships. At the same time, the EOC notes, as described above, there are currently many aspects of life where people who are not in a heterosexual marriage are discriminated against, and that this infringes international human rights obligations, and possibly human rights obligations in Hong Kong.
- 3.381 However, the EOC believes that there are a number of means by which the rights of religious groups and the rights of cohabiting couples could be balanced and concerns addressed in the anti-discrimination legislation, or the systems for recognition of cohabiting relationships.
- 3.382 For example, in the anti-discrimination legislation it would be appropriate to consider whether there should be any exceptions permitting discrimination

on grounds of marital status where they are for a legitimate aim and are proportionate. In relation to employment in religious organisations, Question 69 of the Consultation Document asked whether the current exception relating to sex, should be extended to marital status because for some religious positions marital status may be a criteria for appointment. This is discussed further in Chapter 4.

- 3.383 Further, in relation to same sex relationships and in order to avoid possible conflict with religious doctrines on the institution of marriage, a system of same sex civil unions or de facto relationships could be established which provides similar rights to marriage. Such a system currently exists in Australia, where same sex de facto relationships are recognised but not currently same sex marriages.
- 3.384 A number of other organisations raised concerns about the definition and possible effect of recognising cohabiting/ de facto relationships. They stated that it would be difficult to define cohabiting/ de facto relationships, that it may permit multiple relationships, and that it would create situations where persons in de facto relationships would have the benefits of marriage without any obligations.
- 3.385 The EOC considers that these responses are not consistent with how such anti-Discrimination legislation and legal recognition of cohabiting relationships would operate and do operate in other jurisdictions. It is possible to clearly define cohabiting relationships, as has already been done in Hong Kong in the context of domestic violence legislation. In addition, some jurisdictions such as New Zealand's civil unions have a formal registration system for cohabiting relationships which provides clarity as to who is in such a relationship.
- 3.386 In relation to the issue of multiple relationships, the provisions or system for recognising cohabiting relationships and the protections from discrimination could be constructed in such a way that multiple relationships would not be recognised. For example in New Zealand, it is unlawful to be in more than one civil union, in the same way it is unlawful to be in more than one marriage.²³⁸ Further, the current anti-discrimination legislation states that in relation to married persons, it is not possible for two spouses to claim benefits.²³⁹ A similar provision could be stated in relation to cohabiting relationships.
- 3.387 In relation to the issue of the persons in cohabiting relationships having the benefits of marriage but without the obligations, this does not reflect the actual legal effect of such relationships. In other jurisdictions, the rights and obligations relating to cohabiting relationships are similar to the rights and obligations in a marriage. This would mean cohabiting partners would have

²³⁸ Sections 205-206 Crimes Act 1961.

²³⁹ Section 56A Sex Discrimination Ordinance.

legal obligations to each other in relation to, for example, maintenance of children.

- 3.388 Another concern raised in particular by employers and the business sector is the potential financial impact. They were concerned that if cohabiting couples were protected from discrimination, employers would have to provide them the same employment benefits (such as medical and dental benefits) for their partner as married employees.
- 3.389 There are several responses to this. Firstly, the situation would depend on whether or not an employer already provides employees benefits which include their spouse. If they do not, no issue of discrimination in an equivalent situation of an employee with a cohabiting partner would arise. Secondly, although providing benefits for cohabiting partners may appear to increase costs, the overall outcome may not, given employee satisfaction and productivity may improve. This is because there is evidence that providing all employees with equal employment benefits creates a more inclusive working environment²⁴⁰, which in turn, improves productivity and improves employee retention.²⁴¹ The same principles would also apply to providing benefits for heterosexual cohabiting partners.

Specific issues relating Question 70

Question 70 of the Consultation Document asked:

“Do you think that the exception relating to providing benefits differentially based on marital status should be amended to provide equality between persons are married and persons in a de facto relationship?”

- 3.390 The exception relates to employers providing different rates of allowances or benefits to employees based on their marital status. It permits discrimination on the ground of marital status where a person is single. This usually applies to situations where employers agree to provide benefits relating to housing, medical insurance or other benefits to the spouses of their employees. The exception has a discriminatory effect on those persons in cohabiting relationships but are not married. The EOC previously made submissions to repeal this exception in 1999.

²⁴⁰ Hong Kong LGBT Climate Study 2011-12, Attitudes to an experiences of lesbian, gay, bisexual and transgender employees, Community Business. The study found that 65% of LGBT employees in Hong Kong believed that providing equal employment benefits to LGBT employees would create a more inclusive working environment, Figure 24 and paragraph 16.3, http://www.communitybusiness.org/images/cb/publications/2012/hk_lgbt_climate_study_2011_12_en.pdf

²⁴¹ There are multiple studies that links inclusive working environments and policies with positive effects on business bottom line. See, for example: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf>

- 3.391 In relation to consultation responses, most organisations disagreed with the proposal. Most disagreement was from religious organisations and religious educational institutions, which opposed the proposals on religious grounds, stating the special status of marriages.
- 3.392 In relation to individual responses, a vast majority disagreed. Of the respondents who disagreed, almost four-fifths of the respondents gave no reason. Others provided the following views:
- Persons in de facto relationships are fundamentally different from married couples, it is a personal choice to not get married and persons in de facto relationships are aware of the consequences when they start de facto relationships;
 - It would increase social and/or financial burden.
- 3.393 For the same reasons as described in relation to Question 6, the EOC believes that this issue of employment benefits and the exception should be part of the research and consultation on the scope of protection of the anti-discrimination legislation with respect to cohabiting relationships.

Specific Issues relating to Question 71

Consultation Question 71 asked:

“Do you think that:

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

- 3.394 Section 56B and Item 4 Part 2 of Schedule 5 of the SDO permit discrimination between persons of different marital status in relation to reproductive technology procedures. This is because the Human Reproductive Technology Ordinance (HRTO) states that reproductive technology services are only available to married persons.²⁴²
- 3.395 The EOC does not believe that discrimination in the provision of reproductive technology services on the basis of marital status serves a legitimate aim or is proportionate. In particular, the EOC does not believe that the restriction of IVF treatment only to married couples reflects the evolving nature of Hong Kong society, for example, that many unmarried couples would like to have children, or that single people not in a relationship at the time of seeking IVF may also want children.

²⁴² Section 15(5) Human Reproductive Technology Ordinance.

- 3.396 Concerns with the discriminatory nature of the HRTO have been raised.²⁴³ The discrimination based on marital status may also be in breach of article 22 of the Bill of Rights Ordinance which prohibits discrimination on grounds including “other status” which would include marital status. In Australia for example, there has been a court decision that IVF policies that prevented unmarried cohabiting couples from having such treatment was discrimination on grounds of marital status.²⁴⁴ Further, the Reproductive Technology Ordinance is not consistent with the Adoption Ordinance which no longer requires a person to be married in order to apply for and adopt a child.
- 3.397 In relation to the consultation responses, most organisations disagreed. A large number of religious organisations expressed objections to the proposal on several grounds. They believed that IVF treatment in general failed to respect the sanctity of human life from conception. In their view, as it involves the freezing and destruction of human embryos, it violates human dignity and their churches were against it. A number of religious organisations also stated that IVF treatment breached the obligation under the Convention on the Rights of the Child to act in the best interests of children by placing the rights of the child subordinate to the rights of prospective parents.
- 3.398 In relation to individual responses, most disagreed with the proposal. Of the respondents who disagreed, more than half of the respondents gave no reason. Others provided the following views:
- The exception should not be repealed as it would create legal problems after a break up regarding guardianship and financial responsibilities;
 - It is against children welfare and well-being / against family values to permit IVF to unmarried couples;
 - Only heterosexual married persons should be able to receive IVF treatment.
- 3.399 The EOC believes that it is important to take into account the views of religious groups and individuals in order to protect peoples’ rights to freedom of religion, which is protected under the Bill of Rights. However

²⁴³ See for example “Internal contradiction”, 16 July 2013, <http://www.scmp.com/lifestyle/family-education/article/1283278/internal-contradiction>; and comments by Winnie Chow, a partner at the law firm Hampton, Winter and Glynn, <http://www.hwg-law.com/articles/hong-kong-government-should-review-conservative-and-discriminatory-parent-and-child-ordinan>; “Hong Kong ban on IVF is discriminatory say critics”, 9 January 2015, <http://www.scmp.com/lifestyle/health/article/1677954/hong-kong-ban-ivf-unwed-discriminatory-say-critics>

²⁴⁴ *MW, DD, TA and AB v The Royal Women’s Hospital, Freemasons Hospital and the State of Victoria* (5 March 1997) Victoria Human Rights and Equal Opportunity Commission (Ms Antonia Kohl). No.H96/26, 96/33, 96/48.

there is also a need to balance the rights of religious persons with rights to non-discrimination of persons in cohabiting relationships. Further, the EOC does not believe that the principle under the Convention on the Rights of the Children to always take into account children's best interests, means that IVF cannot be provided to cohabiting relationships, since they can equally bring up children in a loving and supportive environment.

- 3.400 The EOC therefore believes that as part of the research and consultation on recognition of cohabiting relationships and the protection from marital status discrimination under the SDO, the Government should review the requirements under the Reproductive Technology Ordinance requiring marriage for IVF treatment, as well as the IVF exception in the SDO. As part of the review, it would also be important to carefully consider the views of religious groups.

Specific Issues relating to Question 72

Question 72 of the Consultation Document asked:

“Do you think that the exception relating to adoption and marital status is no longer necessary because of amendments to the Adoption Ordinance and should be repealed?”

- 3.401 Item 5 of Part 2 Schedule 5 and section 56C of the SDO provide an exception that it is not unlawful to discriminate between persons of different marital status in relation to adoption under the Adoption Ordinance.
- 3.402 However, the Adoption Ordinance no longer requires an applicant to be married.²⁴⁵ Persons applying to adopt may either be married or sole applicants. A report in 1998 indicated that each year several adoption orders were made in favour of sole applicants.²⁴⁶
- 3.403 In relation to the responses to the consultation, a vast majority of organisations disagreed with the proposal. A number of religious and educational organisations expressed views that only married couples should be able to adopt, and mistakenly believed that was currently the situation under the Adoption Ordinance.
- 3.404 In relation to individuals, a vast majority disagreed with the proposal. Of the respondents who disagreed with this question, close to four-fifths of the respondents did not provide a reason. The rest took the view that only married persons should be able to adopt children, which is for the healthy

²⁴⁵ See section 4 of the Adoption Ordinance which permits applications of adoption either by a “sole applicant” or two applicants who are spouses.

²⁴⁶ For example between April 1997 and March 1998, 9 single applicants and 254 married couples were granted adoption orders: Report on the Review of the Adoption Ordinance, Working Group in the Review of the Adoption Ordinance November 1998.

development of the next generation. Again, this does not reflect the current legal situation as to who can adopt children.

- 3.405 As a result, given the adoption legislation has been amended, the EOC considers that the exception under Item 5 of Part 2 Schedule 5 and section 56C of the SDO are redundant and should be repealed.
- 3.406 The EOC also believes, however, that the Adoption Ordinance should be reviewed given that it refers to adoption by “spouses”, which currently may be interpreted as only permitting married couples applying, and not cohabiting couples.

Specific Issues relating to Question 73

Question 73 of the Consultation Document asked:

“Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?”

- 3.407 Under Item 6 Part 2 of Schedule 5 of the SDO, discrimination between persons of different marital status is lawful. In order to qualify for the public housing Home Ownership or Private Sector Participation schemes, applicants with families rather than single persons are given preferences.²⁴⁷ The EOC previously made submissions to the Government to consider repealing this exception in 1999.
- 3.408 In relation to the consultation responses, a vast majority of organisations disagreed with the proposal. A number of organisations expressed concerns that if cohabiting partners were given equal priority to married couples, there would be a substantial increase in demand for public housing.
- 3.409 In relation to individual responses, a vast majority disagreed with the proposal. Of the respondents who disagreed with this question, most respondents gave no reason. Others generally took the view that:
- People with different marital status have different needs and priorities for public housing;
 - There would be an increase social and/or financial burden.
- 3.410 The EOC believes that the policy of giving preference to public housing for families is a legitimate aim, but that does not mean an exception for marital status is necessary. For example, unmarried cohabiting couples may have families with children, and single parents also have families with children. The EOC therefore believes that it is not appropriate or necessary to take into account the marital status of applicants for public housing. The key

²⁴⁷ See position paper of the government October 2000, <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-658-2-e.pdf>

consideration should be whether or not they have a family. As a result, the EOC believes that the exception should be reviewed and consideration given to repealing it.

- 3.411 Overall, it is clear that structures and attitudes towards different family structures in Hong Kong is evolving to be more heterogeneous and accepting of differences. The Government has also started to recognise the rights of persons in cohabiting relationships in the areas of domestic violence and making medical decisions on behalf of partners. Despite this, persons in cohabiting relationships are still discriminated against in many aspects of their lives because there is no legal recognition of such relationships, which leads to legislation and policies that often only provides rights to married persons. The anti-discrimination also does not expressly provide any protection from discrimination on grounds of being in a cohabiting relationship, and there are express exception permitting discrimination between persons of different marital status.
- 3.412 The EOC therefore believes that, in light of the above, persons in cohabiting relationships should be protected from discrimination on grounds of marital/ relationship status under the SDO. However, this issue is much larger than just the anti-discrimination legislation since there is no legal recognition of cohabiting relationships, and many other pieces of legislation and policies discriminate by only providing entitlements to married couples. 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.
- 3.413 The EOC believes that the Government should first conduct comprehensive research and consultation on the issues of discrimination and the related issue of possible legal recognition of heterosexual and homosexual cohabitation relationships in Hong Kong, including existing cohabitation relationships and same sex marriages from overseas.
- 3.414 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.

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 existing cohabitation relationships and same sex marriages from overseas.

The consultation should:

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

(ii) Protection from family status discrimination: cohabitation relationships

Key points

- 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;
- 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 it is important to protect such persons from discrimination where they care for their current or former family members.

3.415 The issue of recognising cohabiting relationships is also relevant to the protections from discrimination under the Family Status Discrimination Ordinance (FSDO). This concerns protection from discrimination where you care for an immediate family member. Immediate family members are defined as where a person is related by “blood, marriage, adoption or affinity.”²⁴⁸ It also protects persons with a particular family status, compared to how persons with another family status may be treated.²⁴⁹

²⁴⁸ Section 2, Family Status Discrimination Ordinance.

²⁴⁹ See the definitions of direct and indirect discrimination in relation to family status under section 5(a) and (b) of the FSDO.

- 3.416 Affinity is not defined in the FSDO and has not been the subject of interpretation to date in the Hong Kong courts. However, it is often defined as relationships with the blood relatives of a spouse (e.g. in-laws).²⁵⁰
- 3.417 The current definition of family status does not cover care arising from being in a cohabiting relationship. It also does not include care of immediate family members from former relationships (i.e. former spouses or former cohabiting partners).
- 3.418 The EOC believes that the protection should reflect current developments in Hong Kong society where, as described above, there are increasing numbers of persons living in cohabiting relationships as well as divorces. This also means that it is more likely that persons in cohabiting relationships may need to care for, for example, their partner.
- 3.419 In our view, what should be relevant is whether or not someone has the care of an immediate family member and face discrimination, not whether there is a legal relationship of marriage. The current provisions create an illogical situation where, if you are caring for your spouse and are dismissed from employment for that reason, you would be protected from discrimination. However, if in the same circumstances you care for your cohabiting partner, you would not be protected from dismissal and discrimination.
- 3.420 Secondly, in relation to former relationships, as there are higher divorce rates, it is more likely that people are required to care for immediate family from former relationships. In our view, consideration should be given to providing protection in such circumstances whether from former marriages or former de facto relationships. This would also be consistent with current protections in relation to marital status discrimination which include discrimination where you are divorced. The Consultation Document provided an example of what would be the effect of the proposal:

Example 7: Impact of proposed amendment to include former spouse

A woman continues to provide care for her former parent in law after a divorce and is less favourably treated at work because of that care. If the law is amended, she would be protected from family status discrimination.

- 3.421 In other jurisdictions, protection from discrimination in relation to care for family members is broader. For example, the definition of “family responsibilities” under the Australian legislation provides that family responsibilities “means responsibilities of the person to care for or support:

“(a) a dependent child of the person; or

²⁵⁰ See for example, <http://legaldictionary.lawin.org/affinity/>

(b) any other immediate family member who is in need of care and support.”²⁵¹

3.422 Immediate family members are defined as including:

*“(a) a spouse of the person; and
(b) an adult child, parent, grandparent, grandchild or sibling of the person or of a spouse of the person.”²⁵²*

3.423 “Spouse” is also defined to include former spouses and de facto partners or former de facto partners. De facto partners are defined as both heterosexual or homosexual partners.²⁵³ The definition under the Australian legislation is much clearer as to who constitute immediate family members.

3.424 In relation to the consultation responses, a vast majority of organisations disagreed with the proposal to extend protection relating to persons in cohabiting de facto relationships, or to extend protection for care of an immediate family member from a former marriage or cohabiting de facto relationship.

3.425 Similar to responses to Question 6, most organisations opposing the proposals were religious organisations and religious schools. They expressed similar views that only the institution of marriage between a man and woman should be recognised and that only protection from discrimination should be provide to married couple, even in relation to caring for family members.

3.426 In relation to individual responses, a majority disagreed with the proposals. Of the respondents who disagreed with the first part to the Question, over one half of the respondents gave no reason. Others mainly provided the following views:-

- A broader definition would lead to abuse;
- De facto relationships should not be given the same protection as married persons;
- By creating legal obligations to protect de facto relationship would limit the freedom of not marrying;
- It would increase social and / or financial burden;
- The proposal is against family values;
- The proposal is against religious belief.

3.427 The concerns raised are very similar to those raised in relation to Question 6 and the view that only persons in marriages should be protected from discrimination.

²⁵¹ Section 4A Sex Discrimination Act 1984

²⁵² Ibid Section 4A.

²⁵³ Ibid Section 4A and Section 2D Acts Interpretation Act 1901.

- 3.428 For the third part of the question and protection from discrimination in relation to former marriages and former cohabiting relationships, of the individual respondents who disagreed with this part, a significant number gave no reason. Others gave the following reasons for opposing:
- It would increase social and/or financial burden;
 - It was against family values.
- 3.429 As we described above, the focus of this issue is 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.
- 3.430 In light of the fact that the number of persons in cohabiting relationships has increased, and they are equally likely to need to care for their family members, even if the relationship has ended, the EOC believes that there is sufficient justification for there to be protection from family status discrimination.
- 3.431 The EOC therefore believes that it is appropriate that the Government conduct research and consult on the extension of protection under the Family Status Discrimination Ordinance as discussed.

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

- 4.01 This Chapter provides our submissions on all the other Questions we consulted the public on in the Consultation Document. Our position on each issue depends on the relevant factors the EOC has taken into account as described in Chapter 2. For example, on some issues the EOC believes the Government should implement legislative reform but are not as high priorities as those in Chapter 3. On some issues the EOC believes there is insufficient evidence of a need for legislative reform at this time, and on other issues the EOC believes it is not necessary to make legislative reforms, for example, since the current legislation provides sufficient protection from discrimination.
- 4.02 It should also be noted that, in relation to Part 5 of this Chapter and the powers and constitution of the EOC, a number of the proposals relate to implementing or clarifying in the anti-discrimination legislation the powers that the EOC already exercises in practice, rather than proposing completely new powers. On these issues, we therefore believe it is appropriate for the legislation to more clearly reflect what the EOC does in practice.
- 4.03 The EOC has also applied the factors described in Chapter 2 to determine its positions on each of the issues. On the issues where we recommend legislative change, there may be a number of factors as to why we believe that they are not as high priorities as those in Chapter 3, including that the proposal is to make the legislation clearer without involving a substantive change in protections from discrimination; the proposal has a less significant impact in terms of the numbers of people affected or seriousness of the issue; and in relation to the EOC powers, as described above, a number of the proposals are to set out the powers which the EOC already exercises.
- 4.04 For example, in relation to the issue of consolidation of all the anti-discrimination legislation into one Ordinance, although we believe consolidation would be preferable in order to simplify and harmonise the protections from discrimination, such effect could still be achieved by amending all four anti-discrimination Ordinances, and consequently consolidation is not as pressing at this time.
- 4.05 The structure of this Chapter generally follows the order in which the issues and Questions were set out in the Consultation Document for ease of reference: 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.

PART I: Goals of the legislation and protected characteristics

A. Consolidation and Goals of Legislation

(i) Consolidation of legislation

Question 1 of the Consultation Document asked:

“Do you think that, in reforming the current discrimination law, the Government should consolidate all the existing Discrimination Ordinances into a single modernised Discrimination Ordinance?”

- 4.06 In relation to the structure of the anti-discrimination legislation, an issue which was consulted on is whether the four anti-discrimination Ordinances should be consolidated into one anti-discrimination Ordinance. This relates to two of the key principles which the EOC believes are important in modernising the anti-discrimination legislation in Hong Kong as mentioned in the Consultation Document: the legislation should be simplified to make it clearer; and that protections from discrimination should be harmonised where appropriate between different protected characteristics in order that there are the same levels of protection.
- 4.07 Many provisions are common across the current four anti-discrimination Ordinances (for example forms of prohibited conduct, exceptions to the principle of non-discrimination, enforcement of the anti-discrimination legislation and the functions and powers of the EOC). This makes the current anti-discrimination legislation repetitive, and more difficult for stakeholders to navigate as they need to refer to four separate pieces of legislation. For example, the meaning of direct discrimination has a similar construction across all the four existing anti-discrimination Ordinances, and consolidation would simplify the law and avoid unnecessary repetition by having a uniform and single definition of direct discrimination.
- 4.08 In other jurisdictions where there were a number of pieces of anti-discrimination legislation, there has been a trend of consolidation. For example, in Great Britain all the existing anti-discrimination legislation covering distinct protected characteristics were consolidated into the Equality Act 2010.²⁵⁴ In Australia, all the State level anti-discrimination

²⁵⁴ The Equality Act 2010 repealed and consolidated all the existing anti-discrimination legislation including the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995.

legislation consolidates the protections relating to different characteristics into one piece of legislation. The anti-discrimination legislation in New Zealand and Canada is also consolidated.²⁵⁵

- 4.09 Further in relation to Hong Kong legislation, there has also been consolidation of legislation where it is considered appropriate to modernise and make the legislation clearer. For example, the Securities and Futures Ordinance consolidated and modernised legislation relating to financial products, and the securities and futures markets.²⁵⁶
- 4.10 In relation to the consultation responses, some of the main reasons provided by organisations which support the proposal were that they believed it would help to simplify the legislation, and that it would make it easier to add possible new protected characteristics in the future. In relation to organisations that opposed the proposal, several disability-related organisations were concerned that it may affect the distinct approaches to equality relating to persons with disabilities.
- 4.11 In relation to responses from individuals, many of those opposing also expressed the view that the Ordinances should be kept separate as they focus on different types of discrimination, and consolidation would prevent a targeted approach.
- 4.12 The EOC believes that consolidation could be achieved without losing the particularities of each protected characteristic. Where appropriate, differences between different protected characteristics would be maintained, as is the case in the consolidated anti-discrimination legislation in similar international jurisdictions.
- 4.13 A possible alternative to consolidation would be for the Government to make consistent changes to all the common concepts in the existing anti-discrimination Ordinances without consolidation.
- 4.14 Overall, the EOC believes that it would be preferable to consolidate all the anti-discrimination Ordinances to simplify and harmonise the current legislation, as well as to avoid repetition and facilitate any possible additions of protected characteristics in the future. However, the EOC does not believe that this is a higher priority at this time, given that, to create more consistency, corresponding amendments could be made to all four anti-discrimination Ordinances.

²⁵⁵ New Zealand Human Rights Act 1993, and the Canadian Human Rights Act 1985.

²⁵⁶ Securities and Futures Ordinance,
[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/5167961DDC96C3B7482575EF001C7C2D/\\$FILE/CAP_571_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/5167961DDC96C3B7482575EF001C7C2D/$FILE/CAP_571_e_b5.pdf)

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

Question 2 of the Consultation Document asked:

“Do you think that a clause at the commencement of the discrimination legislation should be incorporated to set out its purpose or goals?”

4.15 The EOC consulted on whether the goals of the legislation should be set out at the commencement of the legislation with a purpose clause. Key goals may include eliminating discrimination, promoting equality of opportunity and achieving substantive equality. This could assist all stakeholders that need to understand the legislation, as well as assist courts in interpreting and applying the legislation in particular cases.

4.16 In Australia the current Age Discrimination Act 2004, Disability Discrimination Act 1992 and the Sex Discrimination Act 1984 all contain purpose or objects clauses. For example, section 3 of the Disability Discrimination Act 1992 states:

“The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:*
 - (i) work, accommodation, education, access to premises, clubs and sport; and*
 - (ii) the provision of goods, facilities, services and land; and*
 - (iii) existing laws; and*
 - (iv) the administration of Commonwealth laws and programs; and*
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and*
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.”*

4.17 There was particularly strong support from organisations in the consultation responses, with a number citing that they believed the proposal would facilitate public understanding of the legislation’s purpose.

4.18 Overall, the EOC believes that it would be preferable for consideration to be given to adding a purpose clause to the anti-discrimination Ordinances. However, as the issue does not involve a substantive change in protections 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

Question 3 of the Consultation Document asked:

“Do you think that in relation to the protected characteristic of sex, neutral language of “a person” should be used?”

- 4.19 The EOC consulted on whether gender neutral language should be used for all the sex discrimination provisions. The intention of such an amendment would be to make it easier for people to recognise that protection from sex discrimination applies both to women and men.
- 4.20 Currently under the SDO, the provisions relating to direct and indirect discrimination, as well as sexual harassment refer to discrimination or sexual harassment of women by men.²⁵⁷ The provisions then go on to clarify that references to the treatment of women apply equally to the treatment of men.²⁵⁸
- 4.21 The language used in other similar jurisdictions such as in Great Britain under the Equality Act 2010, and in Australia under the current Sex Discrimination Act 1984 is gender neutral. The sex discrimination provisions refer to “a person” that is discriminated against on the grounds of sex which applies to both women and men.
- 4.22 In relation to the consultation responses, for organisations supporting the proposal, some working on LGBTI²⁵⁹ rights highlighted that in addition to using gender neutral language, consideration should be given to adding new protected characteristics such as gender identity or gender expression to cover people’s gender identity in addition to sex or being male or female. In relation to organisations opposing the proposal, some believed it was important to highlight in the legislation that sex discrimination is more frequent against women, and therefore the current wording should be retained. In addition some religious educational institutions opposed the proposal as they believed if gender neutral language of “a person” was used,

²⁵⁷ Sections 5 and 2(5) SDO.

²⁵⁸ Sections 6 and 2(8) SDO.

²⁵⁹ Lesbian, Gay, Bisexual, Transgender and Intersex people.

it could mean, for example, transgender people would be covered by the legislation.

- 4.23 In relation to individual responses, a number also opposed the proposal as they stated there are only two genders, and it would blur the issues of gender recognition (i.e. they were against protection from discrimination relating to gender identity).
- 4.24 In fact, the intention of the proposed amendment is not to add new protected characteristics such as gender identity, but rather to make it clearer that sex discrimination can apply to both women and men.²⁶⁰
- 4.25 Overall, the EOC believes that it is preferable to amend the SDO provisions by using the neutral term “person” so that it is clearer that sex discrimination can apply equally to discrimination against women or men. However, as this amendment does not involve a substantive change in the protections from discrimination, the EOC does not believe it is a higher priority at this time.

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

- 4.26 The EOC consulted on two issues concerning the scope of protections relating to pregnancy discrimination: providing express protection from discrimination during maternity leave; and providing protection from discrimination relating to potential pregnancy.

(a) Providing express protection from discrimination during maternity leave period

Question 4 of the Consultation Document asked:

“Do you think there should be express reference to protection from discrimination during maternity leave?”

- 4.27 In the operational experience of the EOC as discussed in Chapter 3, pregnancy-related discrimination is a key area where women continue to face considerable discrimination. The EOC consulted on whether it would be preferable to make express reference to a woman being protected from

²⁶⁰ As referred to in Chapter 1, the EOC has done separate research on the possible introduction of anti-discrimination legislation on grounds of sexual orientation, gender identity and intersex status.

discrimination during maternity leave, in order to provide greater clarity and assist the public in understanding the legal obligations.

- 4.28 In Hong Kong the scope of protection from pregnancy discrimination has been interpreted quite broadly. Despite there being no express reference in the SDO as to protection from pregnancy discrimination including the period women are on maternity leave (from when they give birth to when they return to work) or after they have returned to work, the Hong Kong courts have given a liberal interpretation of pregnancy discrimination to include less favourable treatment during these periods. The crucial factor will be whether there is a causal connection between the less favourable treatment and the fact that a woman was pregnant.²⁶¹ 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.²⁶²
- 4.29 The prohibition on sex discrimination against women relating to maternity leave is included in the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW).²⁶³ Further a number of similar international jurisdictions include express prohibitions of discrimination during maternity leave, for example in Great Britain under the Equality Act 2010 in the fields of employment, the provision of goods and services, education and associations.²⁶⁴
- 4.30 In relation to the consultation responses, the vast majority of organisations and individuals supported the proposal, and 36% of the total number of responses from organisations were NGOs working with women that agreed.
- 4.31 Overall, the EOC believes that it would be important to amend the Sex Discrimination Ordinance to make it clear that it provides protection from discrimination for women during maternity leave, and in order to be consistent with the Employment Ordinance. Maternity leave should also be clearly defined in the same way as under the Employment Ordinance.²⁶⁵

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.

²⁶¹ See for example *Lam Wing Lai v YT Cheng (Chingtai) Ltd* DCEO 6/2004

²⁶² Section 15, Employment Ordinance.

²⁶³ Article 11(2) CEDAW.

²⁶⁴ Sections 17 and 18 of the Equality Act 2010,
<http://www.legislation.gov.uk/ukpga/2010/15/contents>

²⁶⁵ Section 12, Employment Ordinance CAP 57,
[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/277C0DAA6FCB2973482575EE00348F4E/\\$FILE/CAP_57_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/277C0DAA6FCB2973482575EE00348F4E/$FILE/CAP_57_e_b5.pdf)

(b) Protection from discrimination relating to potential pregnancy

Question 5 of the Consultation Document asked:

“Do you think there should be protection from discrimination on grounds of potential pregnancy?”

- 4.32 Another issue relating to pregnancy that the EOC consulted the public on is 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 EOC currently would and has considered complaints relating to potential pregnancy discrimination as a form of sex discrimination against women.
- 4.33 For example, a female applicant for a job may be asked at an interview whether she intends to or has a desire to have children in the near future. If she answers that she would like to have children and is then refused the position even though she is the best candidate, this may be discrimination relating to potentially becoming pregnant.
- 4.34 In relation to potential pregnancy, in Australia there is express protection from discrimination in such circumstances. “Potential pregnancy” is defined as:
- The fact that a woman is or may be capable of bearing children;
 - A woman has expressed a desire to become pregnant; or
 - A woman is likely, or perceived to be likely to become pregnant.²⁶⁶
- 4.35 In relation to the consultation responses, the vast majority of organisations agreed with the proposal, of which 35% of the total number of responses were NGOs working with women. In relation to organisation responses, of particular note were the responses by a number of organisations representing foreign domestic workers that stated that a number of workers reported having been forced by employers or employment agencies to take contraceptives or to have pregnancy tests. This is of particular concern as it not only discriminates against them as women, but also violates their human rights regarding sexual autonomy and reproductive rights.²⁶⁷
- 4.36 The Convention on the Elimination of Discrimination Against Women states that women should have equal rights in deciding “freely and responsibly on the number and spacing of their children and to have access to the

²⁶⁶ Section 4B of the Sex Discrimination Act 1984,
http://www.austlii.edu.au/au/legis/cth/consol_act/sda1984209/

²⁶⁷ United Nations Office Human Rights Office of the High Commissioner, Sexual and reproductive health and rights, <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>

information, education and means to enable them to exercise these rights.”²⁶⁸

- 4.37 Further, the UN Beijing Platform for Action on Women’s rights states that “the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”²⁶⁹
- 4.38 Overall, to improve the clarity of the protections, and given the fact that some forms of potential pregnancy discrimination can also involve serious human rights abuses described above, the EOC believes that it is preferable that an express provision prohibiting potential pregnancy discrimination be introduced. In terms of the definition of potential pregnancy discrimination, reference could be drawn for example from the Australian model in the Sex Discrimination Act 1984.

Recommendation 32:

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

C. Protected characteristic of disability

Question 7 of the Consultation Document asked:

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

- 4.39 An important issue regarding protection from discrimination of persons with disabilities is the scope of what constitutes a disability in order to be protected. This also links to the issue of whether a duty to make reasonable accommodation for persons with disabilities should be introduced as discussed in Chapter 3. This is because, whether or not a person is considered to have a disability will determine whether there is a duty to make accommodation for them.
- 4.40 In Hong Kong, the scope of who is protected from disability discrimination is defined in section 2 of the Disability Discrimination Ordinance (DDO). This definition is based on the definition of disability used in the Australian Disability Discrimination Act 1992. Disability is defined broadly to include

²⁶⁸ Article 16(1)(e) CEDAW,

<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12>

²⁶⁹ UN Women Fourth World Conference, 1995, paragraph 96,

<http://www.un.org/womenwatch/daw/beijing/platform/health.htm>

both physical and mental disabilities, as well as disabilities that presently exist, previously existed, may exist in the future or are imputed to a person:

“Disability in relation to a person means-

- (a) total or partial loss of the person's bodily or mental functions;*
- (b) total or partial loss of a part of the person's body;*
- (c) the presence in the body of organisms causing disease or illness;*
- (d) the presence in the body of organisms capable of causing disease or illness;*
- (e) the malfunction, malformation or disfigurement of a part of the person's body;*
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour, and includes a disability that-*
 - (i) presently exists;*
 - (ii) previously existed but no longer exists;*
 - (iii) may exist in the future; or*
 - (iv) is imputed to a person;”²⁷⁰*

4.41 The approach in Great Britain to the definition of disability is somewhat different from the approach in Hong Kong and Australia. Under the Equality Act 2010, a person only has a disability if they have a physical or mental impairment which has a “substantial and long-term adverse effect on the person’s ability to carry out normal day to day activities”.²⁷¹ This reflects the intention of the legislation that it only protects those persons from discrimination where an impairment significantly affects their lives, rather than impairments that have a minor or short-term effect.

4.42 In Great Britain, the impairment must also have a long-term effect which is defined as one which has lasted 12 months, likely to last at least 12 months or is likely to last the rest of the person’s life.²⁷² This can be contrasted with the provisions in Hong Kong and Australia which do not require that the impairment has a long-term effect. So for example, a person suffering from influenza for a period of several weeks who fully recovers would be classified under the DDO as having a disability during that period. Under the British law the person would not be considered to have a disability.

4.43 The current scope of the definition of disability under the DDO should also be considered in light of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which the Hong Kong Government is subject to. It states:

²⁷⁰ Section 2 DDO.

²⁷¹ Section 6 Equality Act 2010.

²⁷² Schedule 1 Part 1 paragraph 2 Equality Act 2010.

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”²⁷³

- 4.44 The CRPD defines persons with disabilities broadly to *“include those who have long-term physical, mental, intellectual or sensory impairments”*. The emphasis is also on the social model of disability which highlights that it is the barriers in society that prevent the person from fully participating in society, rather than the person’s condition.
- 4.45 In the operational experience of the EOC through the years, a number of complaints relating to minor and short-term illnesses and conditions such as influenza or stomach viruses have been received. This raises issues concerning the proportionality of the scope of definition of disability and whether it would be appropriate to refine the definition in any way, for example to require substantial and/ or longer term impairments similar to the British Equality Act 2010. “Long-term” could be defined as lasting or likely to last a particular period.
- 4.46 Nevertheless, there may be concerns with this approach. For example, there are some situations where short-term conditions should be protected from discrimination. If a person suffers from depression for a period of two months because a family member has died but then recovers, it would seem appropriate that they are protected from discrimination during that period. It is arguable that what should be relevant is whether or not someone is treated less favourably because of the condition, rather than the seriousness or length of time the condition exists.
- 4.47 In relation to consultation responses, more than 50% of the organisations disagreed with an amendment to the definition of disability. Of those, a significant number of organisations working with disabilities (17% of the total responses) opposed and were primarily concerned that if the current definition were amended as suggested, it would result in a reduction in the levels of current protection from discrimination. Some also raised a point that the definition of disability under the CRPD is broad and does not require for example that the condition last long-term. The Convention further states that:

“Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities.”²⁷⁴

- 4.48 In other words, the Convention does not affect provisions which are more favourable in terms of realising rights of persons with disabilities. Some

²⁷³ <http://www.un.org/disabilities/convention/conventionfull.shtml>

²⁷⁴ Article 4(4) Convention on the Rights of Persons with Disabilities,
<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

organisations also were concerned that it would be difficult to define concepts such as a disability having a “substantial” effect on the ability of a person to carry out day to day activities. They stated that having a substantial effect could depend not just on physical or mental factors but others such as social factors. An example of this is where there is significant social stigma relating to certain conditions such as infectious diseases.

- 4.49 Some organisations agreed that the definition of disability should be changed, for example in the manner provided in the British Equality Act 2010. One corporation specifically raised a concern that some employees may abuse the system relating to sick leave and that the overly broad definition of disability was relevant to that abuse.
- 4.50 Overall, the EOC currently believes that it would be preferable to retain the current definition of disability in order that there is not a potential reduction in the levels of protection from disability discrimination. Issues of potential abuse of sick leave entitlements should be addressed by employment policies.

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

Question 8 of the Consultation Document asked:

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

- 4.51 The protected characteristic of family status under the Family Status Discrimination Ordinance (FSDO) protects people from discrimination who are responsible for the care of immediate family members. Immediate family members are defined as where a person is related by “blood, marriage, adoption or affinity.”²⁷⁵
- 4.52 In the Consultation Document, the EOC consulted on whether in relation to the protected characteristic of family status the term “family status” should be reworded as “family responsibilities” to make the term clearer.
- 4.53 In relation to international human rights obligations and the approach in other jurisdictions, a variety of terms are used in relation to protection from discrimination where one cares for family members. For example, the UN

²⁷⁵ Section 2, Family Status Discrimination Ordinance.

Committee on Economic, Social and Cultural Rights uses the term “family status” to cover, *inter alia*, persons with responsibilities as carers.²⁷⁶ In Australia, the equivalent protection involving care of immediate family members uses the term “family responsibilities”.²⁷⁷ It is therefore apparent that different terms can be used in relation to protection from discrimination relating to caring for family members.

- 4.54 In relation to consultation responses, a vast majority of organisations believed that the current definition is appropriate, for example because the term “family status” accurately describes the fact that it involves the care of a family member. Some also were concerned that a change to the term family responsibility would incorrectly suggest that it was narrowing the protections to situations of responsibility and not where caring was involved.
- 4.55 Overall, taking into account the views of the public and international approaches, and that this would not involve any substantive change in the protections from discrimination, the EOC believes that it is unnecessary to change the term family status to family responsibilities.

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 II: Forms of prohibited conduct

A. Direct pregnancy discrimination

Question 18 of the Consultation Document asked:

“Do you think that there should be a different test for direct pregnancy discrimination which states:

‘On the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant he treats her unfavourably?’”

- 4.56 Currently, direct and indirect discrimination apply to the protected characteristic of pregnancy in the same way as other protected characteristics. However, one of the key aspects of reforming discrimination law is that it should be tailored to the needs of the particular characteristic. There are two issues that arise in relation to direct pregnancy discrimination:

²⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009, Para 31.

²⁷⁷ See section 4A of the Sex Discrimination Act 1984.

removing the requirement of a comparator; and incorporating into the definition aspects that arise from the pregnancy such as sickness.

- 4.57 The first issue relates to whether a comparator is required in claims of direct pregnancy discrimination. Pregnancy discrimination is a unique form of sex discrimination given that only women can give birth. In relation to international human rights obligations, there is recognition that, in some situations of direct discrimination, there is no comparable situation, such as in relation to pregnancy of women. The UN Committee on Economic Social and Cultural Rights has stated:

*“[d]irect discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).”*²⁷⁸

- 4.58 In the European Union, the case law of the Court of Justice has established that, as only women can become pregnant, it is not appropriate to require a comparator for direct pregnancy discrimination.²⁷⁹

- 4.59 In Great Britain, the Equality Act 2010 reflects this by having a distinct and different definition of direct pregnancy discrimination:

*“A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.”*²⁸⁰

- 4.60 The test does not require comparator, and it refers to being treated “unfavourably” rather than “less favourably,” as the latter relates to notions of a comparison being made.

- 4.61 Secondly, the current definition of direct pregnancy discrimination does not take into consideration aspects that may arise from pregnancy such as sickness, taking extra leave for tests relating to pregnancy, and being replaced by a temporary worker.

- 4.62 For example, many women experience morning sickness or other forms of sickness as a result of being pregnant and may need to take sick leave. In some cases the EOC has dealt with, respondent employers have dismissed such women on grounds of poor performance. They have argued that they did not discriminate against the women on grounds of pregnancy as they would have dismissed any non-pregnant worker that took sick leave in the

²⁷⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009, Para 10.

²⁷⁹ *Webb v EMO Air Cargo (UK) Ltd* [1994] ICR 770.

²⁸⁰ Section 18(2) Equality Act 2010.

same circumstances.

- 4.63 Furthermore, some women in Hong Kong are dismissed after returning from maternity leave on the alleged basis that the temporary replacement worker performed better than the worker taking maternity leave. Employers have argued that the dismissals were on grounds of performance, not pregnancy.
- 4.64 The EOC believes that pregnant women who are treated less favourably as a result of sickness or other characteristic arising from the pregnancy (e.g. taking extra leave), should be protected from discrimination in such circumstances.
- 4.65 In Great Britain, the Equality Act 2010 includes in the definition of direct pregnancy discrimination not only treatment on grounds of pregnancy but also on grounds of *“illness suffered by her as a result of it.”*²⁸¹
- 4.66 In Australia, the definition of direct pregnancy discrimination also includes treatment on grounds of *“a characteristic that appertains generally to women who are pregnant or potentially pregnant.”*²⁸²
- 4.67 In relation to the consultation responses, the vast majority of organisations agreed with the proposals including 33% of the organisations being NGOs working with women who agreed.
- 4.68 Overall, the EOC believes that that there should be a removal of a requirement for a comparator in the definition of direct pregnancy discrimination, and that the definition should include less favourable treatment relating to the pregnancy. The provisions in Australia and Great Britain could be considered in terms of possible wordings, for example the Australian provision states:

“On the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant he treats her unfavourably.”

Recommendation 35:

It is recommended that the Government amend the definition of direct pregnancy discrimination under the Sex Discrimination Ordinance by:

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

²⁸¹ Section 18(2) Equality Act 2010.

²⁸² Section 7(1)(b) Sex Discrimination Act 1984.

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

Question 21 of the Consultation Document asks:

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

- 4.69 Eliminating discrimination in pay between women and men is particularly important to achieving gender equality, dignity for women, and the ability for women to fully participate in work and maximise their potentials.
- 4.70 There are two concepts of equal pay. Firstly, women should be paid the same as men when they are doing equal work (i.e. it is the same or very similar job with similar responsibilities). Secondly, women should be paid the same as men when they are doing different jobs but they are of equal value as the men’s jobs.²⁸³ The Consultation Document provided examples of these concepts:

Example 13: Equal work with similar responsibilities and equal value

A man is employed as a sales assistant for a company selling mobile phones. A female is employed by the same company as a promotion assistant. Although the title of her role is different, her responsibilities are very similar to the responsibilities of the man working as a sales assistant. The two roles would be “like” work and they should be paid the same.

Example 14: Equal work with different responsibilities but equal value

A man and a woman both work in the same café. The man works as a bar attendant and the woman works as a waiter. The roles have quite different responsibilities and some differences in the prerequisites to be employed. However, the employer conducts a job evaluation for all positions in the organisation and determines that the two roles are of equal value. As a result. The man and the woman should be paid the same.

- 4.71 The Consultation Document (pages 63-66) lays out the developments in this area since the 1990s both in Hong Kong and overseas. Many international jurisdictions have developed specific legislation relating to sex discrimination and equal pay: Canada²⁸⁴, the United States²⁸⁵, Great Britain²⁸⁶ and Australia.²⁸⁷

²⁸³ See the EOC Guide to Employers on Equal Pay between men and women:

<http://www.eoc.org.hk/EOC/Upload/UserFiles/File/EPEV/MainGuideWeb-e.pdf>

²⁸⁴ See for example at Federal level section 11 of the Canadian Human Rights Act.

²⁸⁵ At Federal level see the Equal Pay Act 1963.

²⁸⁶ In the United Kingdom there has been discrete equal pay legislation since the Equal Pay Act 1970.

²⁸⁷ Australia’s Federal equal pay legislation is contained in the Workplace Relations Act 1996.

- 4.72 There continues to be evidence in Hong Kong of median pay gaps between women and men across different sectors, age groups, industries and educational attainment. The Government's most recent figures for differences in pay between men and women in 2014 indicate that the median monthly employment earnings of female employed persons was lower than that of their male counterparts: for female employed persons, it was \$11,000 in 2014, while that for males was \$15,000.²⁸⁸
- 4.73 However, there is not as much evidence of whether there are pay gaps in relation to particular roles within sectors, which is a basis of justifying having specific equal pay for work of equal value provisions.
- 4.74 The EOC believes that as it is now a number of years since the issues relating to legislation on EPEV have been considered, it is appropriate to reassess the evidence and whether there is the need for specific provisions. As described above, the Government's statistics indicate that there are differences in the median pay of women and men across most sectors, age groups and educational attainment. Overall, the EOC therefore believes that further research should be conducted by the Government to determine whether there are not only differences in medium pay levels, but also unequal pay for work of equal value. This could for example firstly examine the public and private sectors separately to determine any patterns of inequality.

Recommendation 36:

It is recommended that the Government conduct research as to whether in particular 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

Question 23 of the Consultation Document asked:

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

- 4.75 An issue raised in the Consultation Document is the extent to which the current protections from direct and indirect disability discrimination are sufficient. The EOC referred to the example below as raising a potential gap in protection:

²⁸⁸ Women and Men in Hong Kong – Key Statistics, 2015, paragraph 5.2, <http://www.statistics.gov.hk/pub/B11303032015AN15B0100.pdf>

Example 15: Discrimination arising from a disability

A person with a disability of a brain tumour needs to take four weeks unpaid leave over the period of one year in order to have chemotherapy used to treat the tumour. The employer has a policy that staff who take more than three weeks unpaid leave per year will not have their contract renewed. The employer decides to end the employment of the person stating that although they are sympathetic to the employee's disability, they cannot afford to have employees take four weeks unpaid leave as it adversely affects the productivity of the company.

- 4.76 In the current Disability Discrimination Ordinance, there is some recognition of discrimination that arises from a disability by prohibiting discrimination in relation to a person with disabilities using palliative, therapeutic devices, auxiliary aids or where they are accompanied by an interpreter, reader, assistant or carer.²⁸⁹ However, this protection is limited to those particular areas. It does not provide general protection from any discrimination which may arise from disability.
- 4.77 The Consultation Document (pages 67-69) refers to the situation in Great Britain. The Equality Act 2010 contains a specific category of discrimination arising from disability which is in addition to direct and indirect disability discrimination provisions. This was introduced to address the gap in protection of their direct and indirect disability discrimination provisions.
- 4.78 There was strong support from both organisations and individuals for the proposal. However, the EOC has reconsidered the issues in light of operational experience and the current legislative provisions. In practice, the EOC believes that the above concerns are addressed in the DDO at least to an extent by the operation of section 3 of the DDO. This provides that if an act is done for two or more reasons, and one of the reasons is the disability of a person (whether or not is it the dominant or substantial reason for doing the act), then the act is taken to be done for the reason of disability. There is no equivalent provision in the British Equality Act 2010. This provision is relevant to the example provided, as the reason for not renewing the contract could be argued was partly because of the disability, and partly for taking unpaid sick leave. As a result, the EOC believes that the current disability discrimination provisions could provide sufficient protection.
- 4.79 Overall, the EOC believes that that the current protections from direct and indirect disability discrimination provide sufficient protection and it is unnecessary to introduce a new category of discrimination arising from

²⁸⁹ Sections 9 and 10 of the DDO.

disability at this time. The EOC will however continue to monitor the effectiveness of the direct and indirect disability discrimination provisions.

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

(i) The characteristics where harassment is prohibited

4.80 Questions 25 and 27 of the Consultation Document are related and therefore are considered together below.

Question 25 of the Consultation Document asked:

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

Question 27 of the Consultation Document asked:

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

4.81 There is currently protection from harassment in relation to the protected characteristics of race, disability and sex in the context of sexual harassment only. There is no protection from harassment in relation to the protected characteristics of pregnancy, marital status, or family status. There is also no protection from sex harassment which is not sexual harassment.²⁹⁰

4.82 Although there is some limited evidence of possible harassment in Hong Kong on grounds of family status or marital status, the EOC can consider such situations as possible direct marital status or family status discrimination. Further situations of possible sex or pregnancy harassment could also be dealt with as direct sex or direct pregnancy discrimination.

4.83 Overall, as situations of sex, marital status, pregnancy and family status harassment can generally be dealt with under existing provisions, the EOC

²⁹⁰ In relation to sex harassment, the British Equality Act 2010 provides protection from harassment not only for the characteristics of race and disability but also sex. This is distinct from sexual harassment as it concerns situations where someone is harassed for reasons relating to their sex, but it is not of a sexual nature.

believes that is not a priority at this time to introduce provisions prohibiting sex, pregnancy, marital status or family status harassment.

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.

(ii) The definitions of harassment

4.84 Questions 26 and 28 of the Consultation Document concern the definitions of harassment.

Question 26 of the Consultation Document asked:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.’?”

Question 28 of the Consultation Document asked:

“In relation to sexual harassment, do you think that the definition should be the same as other than forms of harassment other than stating in addition that it is unwanted conduct of a sexual nature?”

4.85 As described previously, there are currently three forms of harassment: race, disability and sexual harassment. There are two major concerns with the current definitions: they are not consistent and they are not sufficiently clear. The EOC believes that the definitions should be harmonised across all the protected characteristics.

(a) Race and disability harassment

4.86 There is currently inconsistency between the definitions of race and disability harassment. In relation to race, protection from harassment under the Race Discrimination Ordinance extends to two situations:

- On the grounds of race a person engages in unwelcome conduct that a reasonable person would think another person would be offended, humiliated or intimidated by: section 7(1); or
- On the grounds of race a person alone or together with other persons engages in conduct that creates a hostile or intimidating environment for a person: section 7(2).²⁹¹

²⁹¹ Section 7 RDO.

4.87 The current definition of harassment under the RDO is repetitive by having similar forms of harassment under section 7(1) and (2), as well as being inconsistent by only requiring an objective test of reasonableness in section 7(1). In contrast, in relation to disability, the DDO only provides protection from harassment in relation to the first category of harassment covered by the RDO. The EOC believes that it is appropriate for the definition of harassment to be harmonised for all forms of harassment, including sexual harassment.

4.88 The EOC considers that the current model for harassment could be simplified in line with developments in Great Britain and Australia which provide clearer models. In Great Britain, harassment is defined as:

“A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) the conduct has the purpose or effect of—*
 - (i) violating B's dignity, or*
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”²⁹²*

4.89 The Equality Act also states that, in determining what effect the conduct had, the following should be taken into account:

- The perception of B;
- The other circumstances of the case; and
- Whether it is reasonable for the conduct to have that effect.²⁹³

4.90 This model avoids the repetitive nature of the test under sections 7(1) and (2) of the RDO and applies an objective requirement of reasonableness to the whole definition of harassment.

(b) Sexual harassment

4.91 Sexual harassment is a particular form of harassment involving engaging in conduct of a sexual nature with another person. This can include a wide range of conduct such as making sexual advances to a person, inappropriately touching a person in a sexual manner, and emailing pornographic pictures to colleagues at work. It applies to anyone that sexually harasses another, irrespective of their sex or sexual orientation. In other words, the provisions can apply to men sexually harassing women, women harassing men or persons sexually harassing someone of the same sex.

²⁹² Section 26(1) Equality Act 2010.

²⁹³ Section 26(4) Equality Act 2010.

4.92 Sexual harassment is defined under section 2(5) of the SDO as:

“...a person (howsoever described) sexually harasses a woman if-

(a) the person-

(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or

(ii) engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or

(b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her.”

4.93 The EOC believes that the test used for sexual harassment should be the same as for other forms of harassment, other than defining sexual harassment as concerning unwanted conduct of a sexual nature. The British model in the Equality Act 2010 takes this approach. It defines sexual harassment as:

“A also harasses B if A engages in unwanted conduct of a sexual nature; and the conduct has the purpose or effect of:

- Violating B’s dignity; or*
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”²⁹⁴*

4.94 Overall, the EOC believes that the definitions of racial, disability and sexual harassment should be amended to be made 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. Reference could be made to other jurisdictions such as Great Britain as to possible models for refining the definitions.

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.**

²⁹⁴ Sections 26(1) and (2) of the Equality Act 2010.

E. Intersectional discrimination

Question 29 of the Consultation Document asked:

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

- 4.95 The reality of peoples’ identities is that they may be defined not just by one characteristic such as their sex, race, age, disabilities and so on, but also by a combination of characteristics. This shapes our personal experiences of the world, including the way in which others treat us.
- 4.96 The concept of intersectional discrimination relates to the fact that persons may be treated less favourably not on the basis of one characteristic, but on the basis of the combination or intersection of several characteristics such as sex and age, sex and race, disability and age. In such situations, the question arises as to whether it would be possible to establish that one protected characteristic is a reason for less favourable treatment.
- 4.97 A number of jurisdictions have introduced provisions that expressly prohibit intersectional discrimination. This is discussed in the Consultation Document (pages 79-81).
- 4.98 Although over half of the responding organisations agreed with the proposal, the EOC has considered the legal issues in further detail and believe that the current provisions in the four anti-discrimination Ordinances are sufficient to apply in possible situations of intersectional discrimination. Under each of the anti-discrimination Ordinances, there is a provision which states that where an act is done for two or more reasons, and one of the reasons is the protected characteristic of the person (e.g. race, disability), then the act will be taken to be done for the reason of the protected characteristic.²⁹⁵ There is no equivalent provision in similar jurisdictions such as Great Britain or Australia. In practical terms, the EOC believes that this provision can be applied to situations of intersectional discrimination, and as a result there is unlikely to be a possible gap in protection for intersectional discrimination. The EOC therefore believes that 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.

²⁹⁵ Section 3 Disability Discrimination Ordinance, section 4 Sex Discrimination Ordinance, section 9 Race Discrimination Ordinance, and section 4 Family Status Discrimination Ordinance.

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

4.99 Question 32 and 33 of the Consultation Document relate to two issues concerning other unlawful conduct: liability of principals and agents; and requesting and requiring information for a discriminatory purpose.

(i) Liability of principals and agents

Question 32 of the Consultation Document asked:

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

4.100 All the anti-discrimination Ordinances provide that anything done by persons as employees shall be treated as being done by them as well as the employers.²⁹⁶ All the Ordinances also provide that anything done by agents of principals (e.g. insurance brokers acting on behalf of insurance companies), shall also be treated as acts done by the principals.²⁹⁷

4.101 Currently under the provisions relating to liability of employers, there is a defence whereby they will not be liable if they prove they took reasonably practicable steps to prevent the employee from doing the unlawful acts.²⁹⁸ There is, however, no such defence in relation to principals’ liability for the actions of agents. This can be contrasted with the position in Great Britain and Australia where there is also a defence for principals in the same manner as for employers.²⁹⁹

4.102 It is also noteworthy that a vast majority of organisations agreed with the proposal, including 14% being corporations that would be affected by the amendment. For example, one representative group of insurers stated that the defence would be particularly important for insurance companies who rely on agents and brokers to distribute their products.

²⁹⁶ See section 46(1) SDO; section 48(1) DDO; section 34(1) FSDO; and section 47(1) RDO.

²⁹⁷ See section 46(2) SDO; section 48(2) DDO; section 34(2) FSDO; and section 47(2) RDO.

²⁹⁸ See for example section 46(3) SDO.

²⁹⁹ See section 109 of the Equality Act 2010 (Great Britain), and for example section 106(2) Sex Discrimination Act 1984 (Australia).

- 4.103 Overall, the EOC believes that for reasons of consistency of protection, the provisions relating to liability of principals under the four anti-discrimination Ordinances should be amended such they have a defence where they took reasonably 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

Question 33 of the Consultation Document asked:

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

- 4.104 Currently, there is only a prohibition on requesting or requiring information for a discriminatory purpose in relation to disability, but not in relation to other protected characteristics.³⁰⁰ The EOC believes that the current prohibition on requesting or requiring information for a discriminatory purpose should be extended to all the existing protected characteristics. This would ensure that there are harmonised and consistent levels of protection.
- 4.105 The example below from the Consultation Document illustrates the benefits of extending the provisions to other protected characteristics other than disability, and indicates why such an amendment would be important:

Example 29: Requesting information for a discriminatory purpose relating to family status

An employer informs a female candidate for a position during an interview that she will need to complete a form as part of the interview process that includes personal information. The form includes questions on whether the woman has children and if so what their ages are. The employer uses the questions to determine whether the woman is likely to have caring responsibilities for children as he does not want to employ such women. An expansion of the provisions relating to requesting information to all protected characteristics would ensure that this would be an unlawful form of family status discrimination.

³⁰⁰ Section 42 DDO. In contrast for example in Australia the current Disability Discrimination Act 1992, Age Discrimination Act 2004 and the Sex Discrimination Act 1984 provide an analogous prohibition in relation to disability, age and sex discrimination where information is requested for a discriminatory purpose.

- 4.106 Overall, the EOC believes there is sufficient justification for there to be amendment to the SDO, RDO and FSDO to provide a prohibition on requesting information for a discriminatory purpose in relation to all the protected 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 III: Fields of prohibited conduct

- 4.107 Several other issues relating to the fields in which discrimination is prohibited were discussed in the Consultation Document. These relate to prohibiting discrimination in sporting activity, and additional issues relating to harassment where the EOC believes there may be insufficient justification for reforms at this time.

A. Prohibition on discrimination in sporting activities

Question 37 of the Consultation Document asked:

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

- 4.108 Sporting activity is an important area of public life where everyone should be able to participate irrespective of their characteristics such as sex, disability, and race. Currently, there is only express protection from discrimination in sporting activity in relation to persons with disabilities, although in some circumstances participation in sporting activity may be covered by the prohibition on discrimination in the provision of goods, services and facilities. For example, if a person was discriminated against by not being allowed to use a sporting facility, that may constitute discrimination in the provision of recreational facilities.
- 4.109 Section 35 of the DDO protects persons with disabilities from discrimination by being excluded from sporting activity, including in administrative or coaching roles. This is subject to certain exceptions, such as where a person with disabilities is not reasonably able to perform the actions required.
- 4.110 The Hong Kong provisions were based on the Australian model whereby only the Disability Discrimination Act 1992 provides an express prohibition

on discrimination in participation in sporting activity. In some other anti-discrimination Acts it can be implied that the goods, services and facilities provisions would cover participation in sport.³⁰¹

- 4.111 The EOC believes that it is preferable to have express protection from discrimination relating to participation in sporting activities for reasons of consistency across the anti-discrimination Ordinances. Further, there may be some situations where the provisions relating to goods and services would not apply, including actions by referees, coaching and the administration of sport. The example below from the Consultation Document indicated a situation where the amendment could provide additional protection from discrimination, as it relates the actions of a referee, not a service:

Example 32: Racial discrimination in sporting activity

A Chinese referee to a football match racially discriminates against an Indian player by repeatedly calling him the derogatory name Ah Cha and penalizing him more than Chinese players. This is likely would be likely to be direct racial discrimination if provisions were introduced to prohibit discrimination in sporting activity across all protected characteristics.

- 4.112 The EOC believes that this protection should also apply to all the protected characteristics, subject to exceptions for particular characteristics as may be required.
- 4.113 Overall, the EOC believes there is sufficient justification for amendment to the Sex Discrimination Ordinance, Race Discrimination Ordinance and Family Status Discrimination Ordinance to provide protection from discrimination in sporting activity, subject to exceptions as may be appropriate.

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

- 4.114 A number of issues relating to protection from harassment were discussed in Chapter 3 as the EOC believes they are higher priorities. There are also

³⁰¹ For example under section 42 of the Sex Discrimination Act 1984 in Australia, there is an exception relating to sex for participation in competitive sport. This indicates that sex discrimination relating to participation in sport is otherwise unlawful.

two issues the EOC consulted on which it believes are not a priority at this time.

(i) Liability of educational establishments for harassment

Question 39(3) of the Consultation Document asked:

“Do you think that 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”

- 4.115 Currently, there is liability when a student of an educational establishment sexually harasses another student.³⁰² Some stakeholders have previously suggested that the educational establishment should be liable for harassment between students where they have notice of harassment between students and fail to take reasonable steps to prevent it.
- 4.116 The EOC has considered the legal issues. In relation to disability, racial and sexual harassment, there may already be liability for educational establishments where they are made aware of possible harassment and fail to take action. The education provisions of the DDO, RDO and SDO provide that it is unlawful for educational establishments to subject a student to “any other detriment”.³⁰³ In our view 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 student harassing. In other words, the current provisions may provide sufficient protection against discrimination in such circumstances.
- 4.117 In relation to the consultation responses, a majority of the organisations opposed the proposal, including 24% opposing who were educational institutions.
- 4.118 Overall, given that there may already be liability of educational establishments in certain circumstances where they fail to take action against harassment of a student by a fellow student, the EOC does not believe it is necessary to make an amendment at this time.

Recommendation 44:

It is recommended that, given the scope of the existing provisions, 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.

³⁰² Section 39(3) SDO.

³⁰³ Sections 24(2)(c) DDO, section 26(1)(c)(ii) RDO and section 25(c)(ii) SDO.

(ii) Liability of service users for harassing other service users

Question 39(5) of the Consultation Document asked:

“Do you think that new harassment provisions should be introduced for all the protected characteristics which provide liability of service users for harassing other service users.”

- 4.119 In relation to the consultation responses, some stakeholders working on issues of sexual harassment have called for there to be liability where a service user harasses another service user. An example of such harassment may be where a person travelling on the MTR is sexually harassed by another person travelling on the MTR.
- 4.120 Similar jurisdictions of Great Britain and Australia do not have any liability in those situations.
- 4.121 There are several reasons why the EOC does not believe that it is appropriate at this time to introduce such provisions. Firstly, the criminal law may apply. In relation to sexual harassment, conduct may amount to sexual assault and a person could lodge a complaint with the Police. Secondly, 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.
- 4.122 Overall, the EOC believes that, given there is some protection if the conduct amounts to criminal activity and taking into account the intended scope of anti-discrimination legislation, introducing provisions prohibiting sexual, racial or disability harassment of service users by other service users is unnecessary at this time.

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 IV: Promoting and mainstreaming equality

- 4.123 Chapter 5 of the Consultation Document considered two possible measures to better promote and mainstream equality in society. The issue of introducing a duty to promote equality was discussed in Chapter 3 as the EOC believes it is a higher priority for the Government to implement. Discussed below are the issues raised on special measures.

Question 40 of the Consultation Document asked:

“Do you think that:

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

4.124 Special measures (or positive action measures as they are also sometimes described in other international jurisdictions such as the United Kingdom and the European Union) are a crucial way in which public and private organisations can develop and implement measures to promote the substantive equality of disadvantaged groups in society. Special measures are recognised internationally in the United Nations Human Rights Conventions as a method of promoting the full enjoyment of human rights of disadvantaged groups.³⁰⁴ Special measures are therefore a vital measure that should be retained in reformed anti-discrimination legislation.

4.125 Two issues were raised in relation to the special measures: the method in which they are conceptualised and positioned in the discrimination legislation; and their definition.

A. The conceptualisation of special measures

4.126 All of the existing anti-discrimination Ordinances contain exceptions to discrimination which permit special measures reasonably intended to:

- ensure that persons with the protected characteristics have equal opportunities with others;
- afford persons with the protected characteristics with goods and services to meet their special needs;
- afford persons with protected characteristics with grants, benefits or programmes to meet their special needs.

4.127 The special measures provisions are contained in the exceptions sections of the Ordinances, together with other exceptions described in Chapter 7 of the Consultation Document. They apply to all the sectors covered by the anti-discrimination Ordinances including employment, education and the provision of goods and services.

4.128 The EOC believes that, as in similar international jurisdictions, it would be preferable to view special measures not as exceptions to the principle of discrimination and therefore a lawful form of discrimination, but rather as

³⁰⁴ See for example the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disabilities (CRPD).

proactive measures to promote substantive equality. As a result the EOC believes that special measures should be included in a separate Part on promoting equality.

B. The definition of special measures

4.129 The current definition of special measures does not make it clear what are the purposes of the provisions. There is unnecessary repetition in the scope of what constitutes special measures, and there is also lack of clarity as to their limits in terms of being lawful.

4.130 The current or previously proposed definitions of special measures in Great Britain and Australia are clearer. For example, the British Equality Act 2010 states that positive action measures may be used where a person reasonably believes that:

- Persons who share a protected characteristic suffer a disadvantage connected to the characteristic (e.g. lack of opportunity for persons with disabilities to enter the workforce may mean that a public authority encourages persons with disabilities to apply for positions in its advertising);
- Persons who share a protected characteristic have needs that are different from others (e.g. ethnic minority staff that have Chinese as a second language may benefit from Chinese language classes);
- Participation in an activity by persons who share a protected characteristic is disproportionately low (e.g. a counselling service for persons suffering stress at work reviews its customers and finds that very few men use the service because of their fears of appearing weak. The counselling service decides to hold seminars for men to explain the benefits of seeking counselling).³⁰⁵

4.131 The positive action measures will be lawful so long as they are a proportionate means of remedying any of the above situations. It is therefore important to review any positive action measures to determine whether the disadvantage has been overcome, in which case the measures should be ended.

4.132 The Australian draft Human Rights and Anti-Discrimination Bill 2012 proposed a new definition for special measures:

- law, policy or program is used in good faith for the sole or dominant purpose to advancing substantive equality for people;
- Those people have a protected characteristic;
- A reasonable person would think that the law, policy or program was necessary to advance substantive equality; and special measures will

³⁰⁵ Section 158 Equality Act 2010.

cease to be lawful if substantive equality is achieved.³⁰⁶

4.133 The EOC believes that the definition of special measures should be reformed to make the provisions clearer and that reference could be drawn from the models in Great Britain and Australia.

4.134 For example a possible model for the special measures provisions could read:

"1. Nothing in this Ordinance will prevent a person taking special measures which are reasonably intended to achieve substantive equality of persons who share a protected characteristic if:

(i) A person reasonably believes:

(a) Persons who share a protected characteristic suffer a disadvantage connected to the characteristic;

(b) Persons who share a protected characteristic have needs that are different from others;

(c) Participation in an activity by persons who share a protected characteristic is disproportionately low;

(ii) A person or body makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected characteristic; and

A reasonable person in the circumstances of the person or body would have considered that making, developing or adopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.

2. A law, policy or program, or conduct, ceases to be a special measure after substantive equality for the people, or class of people, has been achieved."

4.135 This definition would also be broad enough to incorporate training by employers or trade unions involving facilities or other services to encourage persons. As a result the exception relating to training and discussed below in Part VI could be repealed.

4.136 In relation to consultation responses, there was strong support from organisations for the proposals, including from NGOS working with women, ethnic minorities and on human rights.

4.137 Overall, the EOC believes that there is sufficient justification to amend the special measures provisions under the anti-discrimination Ordinances by:

- conceptualising and positioning them within the discrimination legislation as measures to promote substantive equality rather than

³⁰⁶ Clause 21 Draft Human Rights and Anti-Discrimination Bill 2012.

- 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. Reference could for example be drawn from other similar jurisdictions.

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 V: Aspects of court proceedings, powers and constitution of the EOC

4.138 Chapter 6 of the Consultation Document examined issues relating to two issues: court proceedings; and the powers and constitutional arrangements of the EOC.

A. Aspects of court proceedings

4.139 Issues relating to the standard and burden of proof and damages for indirect discrimination were discussed in Chapter 3 as the EOC considers them to be higher priorities for reform. Examined below are two further issues consulted on: the EOC recovering its legal costs in certain cases; and the EOC initiating proceedings in its own name for discriminatory practices. While we believe the proposed amendments are preferable, we do not believe they are as pressing given that the situations described arise infrequently.

(i) EOC recovering its legal costs in certain cases

Question 44 of the Consultation Document asked:

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

4.140 The general rule in relation to discrimination claims is that each party will bear their own costs, unless the proceedings were brought maliciously, frivolously or there are some other special circumstances.³⁰⁷

³⁰⁷ Section 73B(3) District Court Ordinance.

- 4.141 However, where in the unusual event that a claimant is awarded costs and expenses, the anti-discrimination Ordinances provide that the EOC can recover its expenses only of providing the applicant legal assistance.³⁰⁸ It cannot recover the legal costs of providing the legal assistance. Expenses may include aspects such as preparing an expert report, whereas legal costs would be the costs of the representing the claimant such as the time of EOC's solicitors working on a case.
- 4.142 The EOC believes the law should be amended to make it clear that the EOC can recover its legal costs where a claimant is awarded costs in proceedings. The same submission was made by the EOC to the Government in 1999. This would be reasonable as the EOC would be only recovering the amount of the financial assistance it spends to support a claim. The proposal would also be consistent with what solicitors would recover in legal costs in the same circumstances.
- 4.143 The position in Hong Kong is different from other international jurisdictions. For example, under the Great Britain Equality Act 2010, the Equality and Human Rights Commission can recover costs where it provides legal assistance to an individual and the court awards costs in favour of the claimant.³⁰⁹ Similarly, in New Zealand where the Office of Human Rights Proceedings (part of the Human Rights Commission) provides legal assistance to an individual and they are awarded costs in proceedings, the Office can recover its costs.³¹⁰
- 4.144 Overall, the EOC believes as it has previously submitted to the Government should amend the 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.

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.

³⁰⁸ Section 85(4) SDO, section 81(4) DDO, section 79(4) of the RDO and section 63(4) FSDO.

³⁰⁹ Section 29 Equality Act 2006.

³¹⁰ Section 92C(5) Human Rights Act 1993.

(ii) **EOC initiating proceedings in its own name for discriminatory practices**

Question 45 of the Consultation Document asked:

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

- 4.145 Discriminatory practices are defined as the application of a requirement or condition which results in an act of discrimination which is unlawful. For example, an employer may state in its application forms for employment that a person must state whether they have any children. This may lead to discrimination against people based on their family status.
- 4.146 Currently, the EOC cannot commence proceedings in its own name in relation to discriminatory practices.³¹¹ This contrasts with proceedings for the following alleged breaches: requesting someone to provide information; discriminatory advertisements; instructions to discriminate and pressure to discriminate. These provisions are particularly relevant in situations where there may not be a complainant but actions of organisations such as advertising for roles are discriminatory.
- 4.147 The EOC believes that the same principle should apply as for other similar unlawful conduct (e.g. discriminatory advertisements), such that the EOC should be able to bring proceedings. The EOC made submissions to the Government on this issue in 1999, and in 2000 the Government agreed in principle to make an amendment to that effect, but to date has not done so. The EOC therefore reiterates its call for the amendment.
- 4.148 In relation to consultation responses, one organisation representing women stated that it is important that the EOC has such a power, where for example a victim of discrimination is fearful of bringing proceedings, or no one in practice has yet suffered discrimination.
- 4.149 Overall, the EOC believes that there is clear justification for the proposed amendment.

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.

³¹¹ See for example section 42 SDO.

B. Powers and constitutional arrangements of the EOC

4.150 An important aspect of the anti-discrimination legislation is the role of the EOC which is the statutory body with duties and powers to eliminate discrimination and promote equality. The EOC has various powers relating to investigating and conciliating complaints of discrimination; providing legal assistance to individuals in claims of discrimination; educating the public about the effect of the anti-discrimination legislation; conducting research on issues relating to equality; and other related powers. The Consultation Document raised a number of areas where it believes the EOC powers or constitutional arrangements can be improved in order to improve the effectiveness of the EOC in promoting equality for all in Hong Kong. The Consultation Document also considered the related issue of whether a Human Rights Commission should be established in Hong Kong, given that this may link to the duties and powers of the EOC.

(i) Powers of the EOC

(a) Power of the EOC to produce non-statutory guidance

Question 46 of the Consultation Document asked:

“Do you think that the discrimination law should contain an express power that the EOC May produce non-statutory guidance?”

4.151 The EOC has powers to produce guidance to help the public understand how the anti-discrimination legislation applies. Under all the anti-discrimination Ordinances, the EOC may issue Codes of Practice containing practical guidance on eliminating discrimination and promoting equality of opportunity. The issuing of Codes is a formal process which requires them to be laid before and approved by the Legislative Council. As a result, they are sometimes called statutory guidance. They also may be referred to and relied on by the Courts as evidence as to what is required to comply with the anti-discrimination Ordinances. The EOC has issued a number of Codes to date.³¹²

4.152 Given the long and formal process for approving Codes of Practice, the EOC has also issued other guidance from time to time. This may be important for example where the EOC wants to produce user friendly guidance in a brief period, or on a discrete issue under the anti-discrimination Ordinances such as sexual harassment in work.³¹³

4.153 This is similar to the practice of other international statutory bodies, such as the Equality and Human Rights Commission (EHRC) in the Great Britain

³¹² For example the Disability Discrimination Ordinance Code of Practice on Employment, 2011; the Code of Practice on Employment under the Race Discrimination Ordinance, 2009.

³¹³ See for example, Know your rights: sexual harassment,
[http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=know%20your%20rights\(sex\)](http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=know%20your%20rights(sex))

and the Australian Human Rights Commission (AHRC) in Australia. In the Great Britain, the Equality Act 2006 expressly sets out that the EHRC may produce both Codes of Practice and other non-statutory guidance.³¹⁴ In Australia, the AHRC has a general power to issue guidance relating to the prevention of discrimination.³¹⁵

- 4.154 In Hong Kong, there are similar provisions providing powers for Statutory Bodies such as the Privacy Commissioner to produce both Codes and guidance.³¹⁶ The EOC believes that it would be preferable, for reasons of improving the clarity of the EOC powers, that there is express reference to the power of the EOC to produce non-statutory guidance in the reformed anti-discrimination legislation. However, this is not a higher priority, given the EOC already produces such non-statutory guidance in practice.

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.

(b) Setting out more clearly the difference between general and specific formal investigations

Question 47 of the Consultation Document asked:

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

- 4.155 All of the anti-discrimination Ordinances provide that the EOC may conduct formal investigations into any matter which relates to its functions.³¹⁷ These powers are important in order that the EOC can on its own initiative seek to address issues of discrimination or inequality in a particular sector or organisation. The provisions regarding formal investigations indicate that they may either be of a general nature (where a broad issue is being examined such as the accessibility of public places for persons with disabilities), or specific in examining the conduct of named individuals or organisations.³¹⁸ However, the provisions are not very clear in indicating the difference between the two types of investigations.
- 4.156 This can be contrasted with, for example, the provisions in Great Britain under the Equality Act 2006 which sets out the powers of the Equality and

³¹⁴ Section 13 Equality Act 2006.

³¹⁵ Section 11(1)(n) Australian Human Rights Commission Act 1984.

³¹⁶ See for example the powers of the Office of the Privacy Commissioner for Personal Data: Section 8(5) of the Personal Data (Privacy) Ordinance provides the power of the Privacy Commissioner to produce guidance and section 12 provides the power to produce Codes of Practice.

³¹⁷ See for example section 70 SDO.

³¹⁸ See for example section 71(3) and (4) of the SDO.

Human Rights Commission. It separates the two different types of investigations that can be conducted: inquiries which are of a general nature and investigations which consider the conduct of named individuals where it is suspected they have committed an unlawful act (including failure to comply with the equivalent of an enforcement notice or failure to comply with binding undertakings).³¹⁹

- 4.157 As the EOC already has the power to conduct both types of formal investigations, an amendment is not urgently needed. However overall, for reasons of clarity, the EOC believes that the four anti-discrimination Ordinances should be amended to set out more clearly the differences between the two different types of formal investigations (general and specific) that can be conducted. Reference could be drawn for example to the structure used under the Equality Act 2010 in Great Britain.

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.

(c) The EOC issuing voluntary but binding undertakings after formal investigations

Question 49 of the Consultation Document asked:

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

- 4.158 In 1999, the EOC made submissions to the Government that the EOC should be able to enter into voluntary but binding undertakings or contracts, where formal investigations are conducted and it is identified that a public authority or private bodies may have committed acts of discrimination. Such undertakings would be a mechanism for the organisation or individuals to agree actions and help prevent future discrimination. It would also help to avoid the costs and time of litigation. The Government agreed with the EOC’s previous proposals in principle, but has to date not implemented them.
- 4.159 The current powers of the EOC can be contrasted with those of the Competition Commission which can accept “commitments” from organisations to do or refrain from doing acts in a similar manner to the EOC’s proposal.³²⁰ Further, the Competition Commission has the power to enforce commitments in the Competition Tribunal.

³¹⁹ See sections 16 and 20 and Schedule 2 of the Equality Act 2006.

³²⁰ See section 60 Competition Ordinance.

- 4.160 The EOC also believes that such agreements should be able to be enforced by the EOC in court proceedings in a similar way to discriminatory advertisements, instructions and pressure to discriminate.³²¹ This would permit the EOC to apply for an injunction to the District Court where it believes that the undertaking in an agreement is not being complied with, and it is likely that an unlawful act has occurred. Similar provisions regarding enforcement of agreements exist in Great Britain and could be adapted to the needs of Hong Kong.³²²
- 4.161 Overall, the EOC believes there is sufficient justification for the reform, particularly since the Government previously agreed with the proposal in principle. The EOC therefore reiterates its call for the introduction of provisions on voluntary binding undertakings, and believes that the EOC should be able to enforce those undertakings when they are not complied with.

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.

- (d) **Setting out that the EOC has power to conduct research and education on all protected characteristics**

Question 50 of the Consultation Document asked:

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

- 4.162 The Sex Discrimination Ordinance provides that the EOC may undertake or assist the undertaking by other persons of any research and any educational activities which appear to the EOC necessary or expedient for the performance of its functions.³²³ There is no equivalent provision relating to research and education in any of the other anti-discrimination Ordinances, although in practice the EOC does carry out research and educational work in relation to all of them as part of its incidental powers.
- 4.163 The EOC believes for reasons of consistency and clarity, the reformed discrimination law should expressly provide that the EOC has the power to

³²¹ See for example section 82 of the SDO.

³²² See section 24 of the Equality Act 2006.

³²³ Section 65 SDO.

conduct research and education in relation to all the protected characteristics.

- 4.164 The powers of the EOC can be contrasted with the Australian and Great Britain provisions regarding the powers of the Australian Human Rights Commission (AHRC) and the Equality and Human Rights Commission (EHRC) which provide expressly that the power to conduct research and provide education apply to all the protected characteristics.³²⁴
- 4.165 As the EOC does already conduct research and educational activities and the intent of the amendment would be to clarify, not add to the existing powers, the issue is not a higher priority. Nevertheless, overall the EOC believes that there is clear justification for the proposal that the Disability Discrimination Ordinance, Race Discrimination Ordinance and Family Status Discrimination Ordinance be amended to provide that the EOC has express powers to conduct research and education in relation to those Ordinances.

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.

(e) The EOC having express power to monitor and advise the Government

Question 51 of the Consultation Document asked:

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

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

- 4.166 The EOC periodically monitors and provides 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.
- 4.167 For example, in May 2012 the EOC made submissions to a Legislative Council Panel on Welfare Services on Improving Barrier Free Access and Facilities for Persons with Mental Disabilities.³²⁵

³²⁴ Section 11 Australian Human Rights Commission Act 1986 and Section 13 Equality Act 2006 (UK).

³²⁵ <http://www.eoc.org.hk/eoc/upload/2012324161038111119.pdf>

- 4.168 In addition, the EOC regularly provides submissions to the United Nations on the Government's compliance with international human rights obligations under the key human rights conventions.³²⁶
- 4.169 These functions of the EOC are important to assist the Government with independent advice and evidence. The EOC believes that it would provide greater clarity to the EOC's powers if the discrimination law expressly set out the power of the EOC to monitor and provide advice on existing or proposed legislation and policy to the Government, as well as the power to monitor and advise on the Government's compliance with international human rights obligations in relation to equality and discrimination. This would be a matter of setting out in the legislation what the EOC already does regularly in practice.
- 4.170 It is relevant to note that some similar statutory bodies in Hong Kong do expressly set out such powers. For example, the Privacy Commissioner has express function to examine any proposed legislation that may affect the privacy of individuals and report on those issues.³²⁷ Further, the Competition Commission has functions which include advising the Government on competition matters.³²⁸
- 4.171 In other similar jurisdictions such as Great Britain and Australia such powers are also expressly provided for.³²⁹
- 4.172 Overall, in light of the powers of local statutory bodies and similar international Equality Bodies, as well as for reasons of clarity, the EOC believes that there is sufficient justification to make the proposed amendments to set out in the legislation what it already does in practice.

³²⁶ The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

³²⁷ Section 8(1)(d) Personal Data (Privacy) Ordinance.

³²⁸ Section 130(d) of the Competition Ordinance.

³²⁹ In Great Britain, the Equality Act 2006 expressly provides that the Equality and Human Rights Commission (EHRC) has the power to monitor the law and provide advice to the Government on the effect of proposed changes in laws: section 11 Equality Act 2006.

In Australia, the AHRC has express powers to examine proposed and existing legislation to determine whether it complies with discrimination law or international human rights obligations.³²⁹ It also has the power to report to the Government the action that needs to be taken in order to comply with international human rights obligations: sections 11(1)(e) and (k) Australian Human Rights Commission Act 1986.

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.**

- (f) **Express power of EOC to apply to intervene and appear as amicus curiae in court proceedings**

Question 52 of the Consultation Document asked:

“Do you think there should be an express power of the EOC to apply to intervene in or appear as amicus curiae proceedings relating to any relevant discrimination issue?”

- 4.173 The EOC has an important role to provide independent legal advice and evidence on issues relating to discrimination to the courts. The EOC has applied to courts and intervened or appeared as amicus curiae (friend of the court) in a number of proceedings where it was not itself representing any of the parties, but provided independent expert advice to the courts on any issue relating to equality and discrimination.³³⁰ The EOC can apply to intervene or act as an amicus curiae under the rules of the court in the same way that any interested party can apply to join proceedings.³³¹
- 4.174 For example, the EOC has recently applied to the District Court to be joined as amicus curiae which was agreed by the District Court. The case concerns a claim of racial discrimination against the Police and the EOC made independent submissions on the scope of the Race Discrimination Ordinance and provisions prohibiting racial discrimination in the provision of goods and services.³³²
- 4.175 In Hong Kong, the Competition Commission, which has responsibility for promoting and enforcing the competition legislation, has the express power to apply to intervene in proceedings not brought by the Competition Commission but involving an alleged breach of the Competition Ordinance.³³³

³³⁰ An intervener is a person not a party to the action but has some interest which is directly related to the subject matter of the proceedings. The EOC has appeared in cases as an intervener but more commonly as amicus curiae. An amicus curiae has a role to provide a court its expert views and assist it in determining the legal issues.

³³¹ Order 15 Rule 6(2) Rules of the High Court. The discretion of the courts is broad in joining parties to any proceedings.

[http://www.legislation.gov.hk/blis_pdf.nsf/4f0db701c6c25d4a4825755c00352e35/6001DD4CD77C2F14482575EE002ABDB6/\\$FILE/CAP_4A_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/4f0db701c6c25d4a4825755c00352e35/6001DD4CD77C2F14482575EE002ABDB6/$FILE/CAP_4A_e_b5.pdf)

³³² Singh v Secretary for Justice DCEO 9/2011.

³³³ Sections 120 and 121 Competition Ordinance,

http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/F2091B1D7DE087

- 4.176 The practice of statutory Equality and Human Rights Institutions intervening or acting as amicus curiae in proceedings is also common in a number of jurisdictions including the United Kingdom and Australia, where the relevant bodies do expressly have such powers.³³⁴
- 4.177 Overall, the EOC therefore believes that to improve the clarity of the anti-discrimination Ordinances, they should be amended to include express powers of the EOC to apply to intervene or appear as amicus curiae in relevant proceedings. However, as the proposed amendment involves setting out what the EOC can already do and has done in practice, this issue is not a higher priority at this time.

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.

(g) Express power of EOC to institute judicial review proceedings

Question 53 of the Consultation Document asked:

“Do you think that the EOC’s power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC?”

- 4.178 Judicial review is a court procedure by which any person or organisation that believes a Government or public authority has acted unlawfully can challenge that by way of legal proceedings.³³⁵ The right to challenge the decisions of the Government is also protected under the Basic Law.³³⁶
- 4.179 The EOC has used that judicial procedure on one occasion in the case of EOC v Director of Education where it was found that the Government’s policies regarding entry to secondary schools amounted to direct sex discrimination against girls.³³⁷
- 4.180 The judicial review power of the EOC is referred to in the SDO in Part IX Miscellaneous provisions, but only in the context of stating that other

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³³⁴ See section 30 of the Equality Act 2006 and section 11(1)(o) of the Australian Human Rights Commission Act 1986.

³³⁵ See Order 53 Rules of the High Court and Practice Direction SL3.

³³⁶ Article 35 of the Basic Law provides that “Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

³³⁷ [2001] 2 HKLRD 690, CFI.

provisions are without prejudice to the power of the EOC to bring judicial review proceedings.³³⁸

4.181 This can be contrasted with, for example, the position in Great Britain where the Equality Act 2006 expressly provides that the EHRC has the power to institute judicial review proceedings.³³⁹ The EOC believes that it would be preferable that the power of the EOC to institute judicial review proceedings is more clearly set out as a separate power in the part of the legislation dealing with EOC powers rather than miscellaneous provisions.

4.182 Overall, the EOC believes that there is justification for amending the anti-discrimination Ordinances to make it clear that the EOC has the power to bring judicial review proceedings relating to claims of discrimination under the anti-discrimination Ordinances.

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

4.183 Constitutional issues relate to the legal provisions on the way in which the EOC operates. These are important to ensure that the EOC operates effectively, independently of Government, and is accountable to the public. The Sex Discrimination Ordinance sets out provisions on the constitutional aspects of the EOC including the appointment of the Chairperson, members, and staff; the functioning of Committees; the financial aspects of the EOC including accounting; and annual reports.

4.184 The EOC consulted on a number of constitutional matters relating to: producing strategic plans; provisions on the independence of the EOC; provisions relating to the appointment of Board members; and provisions relating to the confidentiality of information arising from conciliation and investigation of complaints.

³³⁸ Section 89(3) SDO.

³³⁹ Section 30 Equality Act 2006.

(a) Requirement on EOC to produce periodic strategic plans

Question 54 of the Consultation Document asked:

“Do you think that the EOC should be required to produce a Strategic Plan in consultation with the public that sets out its strategic priority areas of work over several years?”

- 4.185 Although the EOC is required to produce annual reports on its activities each year, there is no requirement to produce written strategic or corporate plans which set out in detail its planned strategic areas of work over an extended period, as well as how performance in those areas will be measured. In practice it is to be noted that in 2013, for the first time the EOC has produced a three year Work Plan which is similar in some ways to a Strategic Plan.
- 4.186 The EOC believes that the development of a Strategic or Corporate Plan for the EOC would be important to:
- Engage with the public and all key stakeholders in order to and before it decides its priority areas of work;
 - Ensure that the EOC has a clear focus on how it should prioritise and allocate its resources, as well as provide indicators in order to measure performance;
 - Help to produce institutional and systemic changes across society on particular equality issues by focusing on macro areas of concern.
- 4.187 In other similar international jurisdictions with similar organisations such as the EHRC in Great Britain and the AHRC in Australia, the requirements to produce Strategic or Corporate Plans are set out in legislation. For example, the EHRC is required to prepare after consultation with the public a strategic plan for its main areas of work every five years. The Strategic Plan must also be published and sent to the Government who lays it before parliament.³⁴⁰
- 4.188 In Australia, the AHRC is required to prepare a Corporate Plan every three years, which sets out the objectives, strategies and policies to be followed in order to achieve the objectives. The Corporate Plan must also be published by the AHRC.³⁴¹
- 4.189 Overall, the EOC believes that it would be beneficial for the anti-discrimination Ordinances to be amended to provide that the EOC should produce strategic plans. This will help to ensure that the EOC takes a strategic approach to its work and engages key stakeholders in prioritising its work. The strategic plan should set out its strategic priority areas of

³⁴⁰ Sections 4 and 5 of the Equality Act 2006.

³⁴¹ Sections 46AA and 46AB Australian Human Rights Commission Act 1986.

work over several years, and the EOC should consult the public on the draft strategic plans.

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.

(b) Maintaining the independence of the EOC

Question 55 of the Consultation Document asked:

“Do you think that a provision should be included in reformed discrimination law providing for the maintenance of the independence of the EOC from Government?”

4.190 The EOC believes that its independence from Government is important and necessary for a number of practical reasons. The anti-discrimination Ordinances apply to the Government and public authorities in relation to key sectors including employment, the provision of goods and services, education, and Government functions.³⁴² As the EOC has a role in enforcing compliance with the anti-discrimination Ordinances by using its various powers, it is therefore vital that the EOC remains independent of Government in principle and in practice. There are situations where, for example, the EOC conducts a formal investigation into the actions of a Government department, or provides legal assistance to an individual who is claiming that a Government department discriminated against or harassed them.

4.191 The importance of independence from Governments of Equality and/or Human Rights Institutions is emphasized by the United Nations Paris Principles which set out the key elements for their effective functioning.³⁴³ Although the EOC is not a United Nations accredited Human Rights institution, many elements of its work require independence and are similar to the functioning of Human Rights institutions.

4.192 There is to some extent recognition of the independent status of the EOC:

“The Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government”³⁴⁴ (emphasis added)

³⁴² Subject to the RDO not applying to government functions.

³⁴³ <http://www2.ohchr.org/english/law/parisprinciples.htm>

³⁴⁴ Section 63(7) of the SDO.

4.193 The EOC believes that it may be helpful to include further provisions defining the elements of independence.

4.194 Some of the constitutional provisions in similar international jurisdictions contain specific provisions relating to guaranteeing independence. For example in relation to the EHRC, in Great Britain the Equality Act 2006 provides:

“...The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining—

- (a) its activities,*
- (b) its timetables, and*
- (c) its priorities.”³⁴⁵*

4.195 In relation to the consultation responses, approximately three quarters of organisations agreed with this proposal, including NGOs working on human rights and some legal institutions.

4.196 Overall, the EOC believes that it would be useful for the Government to give further consideration as to whether a specific provision defining the elements of independence of the EOC would be appropriate, in light of the nature of the EOC’s work and international practice.

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.

(c) Appointment and experience of Board members

Question 56 and 57 of the Consultation Document related to the appointment process and experience of EOC Board Members. Question 56 asked:

“Do you think that in relation to Board members, the positions should be publicly advertised and an independent panel established to interview and make recommendations for appointments?”

Consultation Question 57 asked:

“Do you think that there should be a provision in the legislation requiring Board members to have suitable experience in any relevant area of discrimination or promoting equality?”

³⁴⁵ Schedule 1 Paragraph 42 of the Equality Act 2006.

Appointment of Board Members

- 4.197 In relation to the first issue of appointments, the Chief Executive appoints the Chairperson and the board members of the EOC.³⁴⁶ This is similar to the legal provisions on the appointment of Chairpersons and board members of other statutory bodies in Hong Kong. In relation to the appointment of the Chairperson, there is a process of advertising the position. An independent panel is appointed by the Government to interview applicants and make a recommendation. In relation to the positions of Board members, there is no process of advertising or an independent panel to interview and appoint them.
- 4.198 Overall, the EOC believes that consideration should be given as to whether the appointment of board members should follow a similar process as the appointment of the Chairperson, in order to encourage a wide variety people to apply for such positions and participate in the work of public authorities. It is also notable that in relation to the consultation responses there was a vast majority support for this proposal by both organisations and individuals.
- 4.199 Given this issue relates not just to the EOC, but the appointment of members to all public authorities, it is an issue which the Government may wish to give broader consideration.

Experience of Board members

- 4.200 The EOC believes that it is appropriate for Board members to have suitable and diverse experience from different sectors related to the role of the EOC in promoting equality for all groups in society. Where necessary it may also be appropriate to appoint persons with specific experience, such as research or Communications experience, where, for example, it is for a person to oversee Committees relating to those functions.
- 4.201 Currently in the anti-discrimination Ordinances, there are no provisions relating to the experience of Board members. This can be contrasted with, for example, the Competition Commission provisions relating to the appointment of their Board members which states:

*"...in considering the appointment of a person as a member of the Commission, the Chief Executive may have regard to that person's expertise or experience in industry, commerce, economics, law, small and medium enterprises or public policy."*³⁴⁷

³⁴⁶ Section 63(3) SDO.

³⁴⁷ Schedule 5, Item 2(1) of the Competition Ordinance.

- 4.202 In other similar international jurisdictions, there are express provisions concerning the experience and representativeness of Board members. For example in Great Britain, the Board members of the Equality and Human Rights Commission are required to have experience in areas of discrimination or other human rights.³⁴⁸ There is also a requirement to have at least one person with disabilities as a Board member.³⁴⁹
- 4.203 Overall, the EOC believes that consideration should be given as to whether provisions should be introduced setting out the experience that may be relevant to the appointment of board members, including on issues relating to equality in diverse sectors. Reference could, for example, be drawn from the provisions in the Competition Ordinance.

Recommendations 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.**

(d) Maintaining confidentiality of information regarding complaints of discrimination

Question 59 of the Consultation Document asked:

“Do you think that there should be express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality?”

- 4.204 The EOC has statutory duties to investigate and where appropriate attempt to conciliate complaints of discrimination.³⁵⁰ In relation to ensuring the integrity and effectiveness of the investigation and conciliation process, 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. This includes confidentiality by all parties involved in the complaint, as well as confidentiality by the EOC in not disclosing information. Where, for example, information is disclosed by a complainant to a third party such as the media, this may go against the principles of confidentiality and fairness of the process.
- 4.205 In relation to the EOC, it has also on a number of occasions been asked by third parties (that are not the parties to the complaint) for information

³⁴⁸ Schedule 1 Paragraph 2, Equality Act 2006.

³⁴⁹ Schedule 1 Paragraph 3(a), Equality Act 2006.

³⁵⁰ See SDO s.84; DDO s.80; FSDO s.62; and RDO s.78.

relating to the complaint. In our view, this would go against the principle of confidentiality and obligations regarding non-release of personal data under the Personal Data (Privacy) Ordinance.

- 4.206 In order to improve the effectiveness of the EOC's investigation and conciliation process, the EOC believes that consideration should be given to introducing a provision in the four anti-discrimination Ordinances, requiring confidentiality to be maintained by all parties involved and the EOC of all information obtained during the process.

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.

(iii) Establishment of a Human Rights Commission

Question 60 of the Consultation Document asked

“Do you think that Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles? If so what structure and mandate should the Human Rights Commission have?”

- 4.207 A related issue to possible reforms of the duties and powers of the EOC, is whether a Human Rights Commission should be established in Hong Kong. This is an issue which concerns not only the possible reform of the anti-discrimination Ordinances, but also possible wider legislative or policy reform and the systems for protecting human rights in Hong Kong.
- 4.208 Human rights are protected in Hong Kong law under the Bill of Rights and the Basic Law. The right to non-discrimination is a human right which is protected under the Bill of Rights, Basic Law, as well as the four anti-discrimination Ordinances. However, currently there is no single body in Hong Kong that has responsibility for promoting and monitoring human rights under the Bill of Rights and Basic Law such as the rights to non-discrimination, liberty, freedom of expression, and freedom of religion. The EOC's mandate is restricted to promoting equality and eliminating discrimination under the four anti-discrimination Ordinances. There are some other bodies that perform specific functions connected to particular human rights. For example, the Office of the Privacy Commissioner for Personal Data has responsibility for dealing with issues relating to the right to privacy of personal data, but its jurisdiction is limited and it does not have a specific human rights mandate.

- 4.209 There has been regular discussion in Hong Kong society on the need for the establishment of a Human Rights Commission.³⁵¹
- 4.210 The United Nations has repeatedly expressed its concern that there is no Human Rights Commission in Hong Kong and recommended that one be established in compliance with the Paris Principles³⁵² for National Human Rights Institutions.³⁵³
- 4.211 The EOC has on several occasions in the past expressed its support for the consultation on and the establishment of a Human Rights Commission.³⁵⁴
- 4.212 As noted in the Consultation Document, internationally there has been a positive trend over the last 20 years with increasing numbers of States establishing NHRIs.³⁵⁵ There are currently 71 “A” status NHRIs, meaning that they are fully compliant with the Paris Principles.³⁵⁶ A number of NHRIs have also developed mandates that include monitoring compliance with both discrimination and human rights law. The Equality and Human Rights Commission in Great Britain and the Australian Human Rights Commission in Australia monitor and enforce both the domestic discrimination legislation and compliance with domestic and international human rights obligations.
- 4.213 In light of international practice, there are several options that could be considered for Hong Kong. One option would be to establish a separate Human Rights Commission with jurisdiction over promoting and protecting the human rights under the Bill of Rights and international human rights obligations. Another option could be that the mandate of the EOC is amended to monitor and promote compliance with the Bill of Rights Ordinance and international human rights obligations. The EOC already fulfils that role to some extent, for example, in reporting to the United Nations on the human rights treaties in so far as they raise issues of equality and discrimination against different groups in society. This may also have the advantage of having one organisation with a mandate to consider all issues relating to human rights, including the interaction between the right to equality and other human rights such as to be free

³⁵¹ See for example Proposal for the Establishment of the Human Rights Commission in Hong Kong, Human Rights Monitor, November 2006.

³⁵² The Paris Principles are the set of minimum requirements regarding mandates and institutional structures of National Human Rights Institutions: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>

³⁵³ Concluding Observations Human Rights Committee, 15 November 1999 CCPR/C/79/Add.117 paragraph 9 and 21 April 2006, CCPR/C/HKG/CO/2, paragraph 8; Concluding Observations of the Committee on Economic Social and Cultural Rights, E/C.12/1/Add107, paragraph 78(b), 13 May 2005; Concluding Observations on China, CRC/C/CHN/CO/3-4, 4 October 2013, paragraph 19.

³⁵⁴ For example, EOC's submission to the Meeting of Legislative Council Panel on Home Affairs held on 21 June 2005, following the Concluding Observations of the ICESCR Committee, 34th session 2005, <http://www.eoc.org.hk/eoc/TextFolder/inforcenter/papers/cedawcontent.aspx?itemid=9796>

³⁵⁵ <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>

³⁵⁶ <http://nhri.ohchr.org/EN/Contact/NHRIs/Pages/Global.aspx>

from inhumane and degrading treatment, the rights to privacy, family life and freedom of religion.

- 4.214 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. A number mentioned that it would also be important that such a Commission be established following the requirements of the Paris Principles described above. Some believed that it would be preferable to establish a separate Human Rights Commission and others believed the mandate of the EOC could be expanded to cover human rights.
- 4.215 Overall, the EOC believes that the Government should give consideration to the establishment of a Human Rights Commission in order to better promote and protect all human rights including the right to non-discrimination. Given the wide scope and complexity of the issues, 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 VI: Exceptions

- 4.216 The EOC examined the existing exceptions in the anti-discrimination Ordinances and has a number of concerns with some of them, including being unclear, repetitive, inconsistent, not having a legitimate aim, or not being proportionate. These issues are elaborated below. In general, the EOC believes that there are a number of exceptions for which the Government should give consideration to amending or repealing. However, the nature and seriousness of the concerns vary given that they raise diverse issues.
- 4.217 As the EOC stated in the Consultation Document, the key elements the EOC believes are required for exceptions to be included in anti-discrimination legislation is that they pursue a legitimate aim and are proportionate in the means by which they achieve that aim. We have applied this principle in reviewing the exceptions.

A. Grouping of exceptions to make the legislation clearer

Consultation Question 61 asked:

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

- 4.218 As the exceptions are located in several different parts of the anti-discrimination Ordinances, in order to make the legislation easier to navigate, the EOC believes it would be better that all the exceptions are set out in the same part of the legislation, preferably in the Schedules. However, as this would not involve a substantive change in the protections from discrimination, the EOC does not believe this is a higher priority compared for example with the issues raised in Chapter 3.
- 4.219 Overall, the EOC believes that it would be preferable to group all the exceptions together in the Schedules to the anti-discrimination Ordinances to make the legislation clearer. This would be particularly relevant if the anti-discrimination Ordinances were being consolidated into one Ordinance.

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

Question 62 of the Consultation Document asked:

“Do you think that the definition of GOQs should be reformed and made consistent across all the protected characteristics by defining them as:

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

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

- 4.220 An exception contained in all the anti-discrimination Ordinances apart from the Family Status Discrimination Ordinance is Genuine Occupational Qualifications (GOQs). This exception is common across a number of other

international jurisdictions such as Great Britain, Australia and the European Union. It concerns employment situations where differences in treatment on grounds of a protected characteristic (e.g. sex, race) are justifiable, because the nature of the role requires that the person has particular attributes. This may involve situations where having the protected characteristic (e.g. being of one sex) is essential, or where not having it (e.g. not having a specific disability) is essential. The Consultation Document provided some examples of such situations:

Example 41: Genuine occupational requirement to be a woman

A counselling service for female victims of domestic violence and rape may decide that in order to cope with the sensitivities of the role of counselling such women, they will only employ female counsellors.

Example 42: Genuine occupational requirement relating to race

In the context of theatrical and film performances, a film production company producing a film concerning the Apartheid era in South Africa may decide that it will only employ black people to perform in certain roles for reasons of authenticity.

Concerns generally with sex, race and disability GOQs

4.221 There is no general definition of GOQs which could be applied to all the protected characteristics. The EOC believes that the GOQ provisions should be simplified and harmonised as has been done for example in Great Britain under the Equality Act 2010.³⁵⁷ The exception should apply to all existing protected characteristics and provide that differences of treatment are not unlawful where:

- 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.³⁵⁸

4.222 The broad exception could mean it is no longer necessary to retain the specific list of situations in which the GOQ applies, although it would also be possible to list some of the situations in which it would apply.

³⁵⁷ Schedule 9, paragraph 1 Equality Act 2010.

³⁵⁸ This formulation is based on the United Kingdom model.

Concerns with the disability GOQ and unjustifiable hardship

- 4.223 In relation to disability, the EOC has a particular concern with the formulation of the exception under section 12 of the DDO. The exception for GOQs is framed as the absence of a disability being a genuine occupation qualification. There are two elements of the exception:
- A person with disabilities would be unable to carry out the inherent requirements of the particular employment; or
 - In order to carry out the requirements of the job, facilities or services would be required which would impose unjustifiable hardship on the employer.
- 4.224 As discussed in Chapter 3, the EOC believes that there should be a duty on employers to make reasonable accommodation. As a result, the EOC believes that the exception as it relates to persons with disabilities should make it clear that it does not apply where reasonable accommodation can be made.
- 4.225 In relation to the consultation responses, some organisations working with musicians provided evidence that some racial groups, such as Filipinos or Chinese, are discriminated against by employers stating conditions of not hiring Filipinos or Chinese. The EOC believes that the proposed reforms may assist in such situations, as the GOQ exception would only apply where it is a proportionate means of achieving a legitimate aim, and arguably race is not relevant to musical performances.
- 4.226 Overall, the EOC believes that there is sufficient justification to amend the GOQ provisions and make them consistent across three anti-discrimination Ordinances in the manner consulted on.

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

Question 63 of the Consultation Document asked:

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

- 4.227 In all the anti-discrimination Ordinances, there are currently exceptions relating to discriminatory training by employers or trade union organisations. The exceptions state that providing training, facilities and other services to encourage persons with a protected characteristic to take up work or positions in trade unions will not be unlawful where there is evidence of under representation of those groups in the positions.³⁵⁹
- 4.228 These provisions are similar to what is permitted by the special measures exceptions in all the anti-discrimination Ordinances and discussed in Part 4 of this Chapter.
- 4.229 The EOC believes it is not necessary to have the specific exceptions relating to discriminatory training. The proposed wording of the amended special measures provisions as discussed in Part 4 of this Chapter would be wide enough to include training, and we believe this would be the preferable approach given it would avoid unnecessary duplication of exceptions.
- 4.230 Overall, the EOC believes that it would be preferable to repeal the discriminatory training exceptions and incorporate it as part of the special measures exceptions in all four anti-discrimination Ordinances.

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

Question 64 of the Consultation Document asked:

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

- 4.231 All the anti-discrimination Ordinances contain exceptions permitting discrimination by charities that provide benefits only to persons with the protected characteristics of sex, family status, disability or race, where the

³⁵⁹ See sections 53 and 54 SDO, section 39 FSDO, sections 53 and 54 DDO and sections 51 and 52 RDO.

relevant provisions are contained in a charitable instrument.³⁶⁰ This applies to the fields of employment, education and the provision of goods, facilities and services. The exception is important given that many charities provide benefits to particular groups, such as women that have been subjected to violence, persons with disabilities, and ethnic minorities.

- 4.232 There is, however, no requirement that the provision of such benefits is for a legitimate aim and proportionate. This can be contrasted with a similar exception under the British Equality Act 2010, which requires the benefits to be “a proportionate means of achieving a legitimate aim or for the purpose of preventing or compensating for disadvantage linked to a protected characteristic”.³⁶¹ This was considered important in order to ensure charities provide benefits without unjustified discrimination.
- 4.233 In relation to the consultation responses, several organisations working as charities or with charities raised concerns about the possible effect of an amendment such as how a charity would be defined, difficulties of what would be considered a proportionate means of achieving a legitimate aim, and how an amendment may affect the work of charities by introducing a new requirement.
- 4.234 The EOC recognises the concerns raised by organisations, and believes it would therefore be important to conduct further consultation with relevant stakeholders on this issue as to whether it would be appropriate to amend the exception or retain its current wording.
- 4.235 Overall, the EOC therefore believes that the Government should consult further with key stakeholders on this issue as to whether an amendment is appropriate or not.

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

Question 65 of the Consultation Document asked:

“Do you think that the Government should conduct a review of its New Territories Small House Policy?”

³⁶⁰ Sections 49 SDO, 37 FSDO, 50 DDO and 50 RDO.

³⁶¹ Section 193 Equality Act 2010.

- 4.236 The SDO³⁶², FSDO³⁶³ and the RDO³⁶⁴ all contain exceptions relating to the New Territories Small House Policy.³⁶⁵ The policy is that an indigenous male villager who is over 18 years and is descended through the male line from a resident in 1898 of a recognised village is entitled to apply for a grant to build a small house. The exceptions are in place because the policy permits discrimination on grounds of sex in favour of men.
- 4.237 The policy also links to the obligation to protect the customs and rights of indigenous villagers of the New Territories, which are protected under the Basic Law.³⁶⁶ Given that the policy does create discrimination against women as well as raise many other issues, the EOC believes that the Government should conduct a comprehensive review of the policy. This would then enable the Government to also review the continuing need for the exceptions in the anti-discrimination Ordinances.
- 4.238 In relation to consultation responses, the vast majority of organisations and individuals supported the review of the policy. A number of organisations stated that the policy should be repealed as it clearly discriminates against women and violates international human rights obligations of women under the Convention on the Elimination of Discrimination Against Women.³⁶⁷
- 4.239 Overall, the EOC believes that there is clear justification for the Government to review the Small House Policy and consider whether the discriminatory aspects of the policy and the exceptions in the anti-discrimination Ordinances should be repealed.

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.

³⁶² Section 61 SDO and Schedule 5 Part 2 Paragraph 2.

³⁶³ Section 42 FSDO.

³⁶⁴ Section 57 RDO.

³⁶⁵ See New Territories Ordinance (Cap 97); and the New Territories Leases (Extension) Ordinance (Cap 150)

³⁶⁶ Article 40 Basic Law.

³⁶⁷ For example the Committee on the Elimination Against Discrimination Against Women, recommended that the Hong Kong government repeal the discriminatory aspects of the small house policy that discriminate against women, Concluding Observations, CEDAW/C/CHN/CO/6, 25 August 2006, paragraphs 37 and 38.

F. Exceptions relating to sex

(i) Exceptions relating to height, weight and surviving spouses

Question 66 of the Consultation Document asked:

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

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

4.240 As described previously, in 1999 the EOC made submissions to the Government on its proposals to reform the Sex Discrimination Ordinance and the Disability Discrimination Ordinance.

4.241 In October 2000, the Government responded to the EOC’s proposals and indicated that it had no objection in principle to implementing some of the proposals, including repealing a number of the exceptions to the principle of non-discrimination between men and women in Schedule 5 of the SDO. The Government indicated that the exceptions had either been incorporated in the main body of the SDO or had become obsolete because of a change in Government policy or repeal of other laws.

4.242 The Government agreed to repeal the exceptions relating to:

- (a) Requirements relating to height, uniform, weight or equipment in relevant positions;³⁶⁸
- (b) discrimination in the reservation of positions for men in the police Tactical Unit;³⁶⁹
- (c) discrimination in weapon training;³⁷⁰
- (d) discrimination between persons of different marital status in the provision of reproductive technology procedure as section 56B of the SDO has incorporated this exception;³⁷¹
- (e) 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;³⁷²
- (f) sex discrimination relating to granting of pension benefits to surviving spouses and children of deceased public officers;³⁷³
- (g) marital status discrimination relating to granting of gratuities to unmarried widows of police officers who die or receive injuries.³⁷⁴

³⁶⁸ Item 1(a) of Part 2 of Schedule 5 SDO.

³⁶⁹ Item 1(c) of Part 2 of Schedule 5 SDO.

³⁷⁰ Item 1(d) of Part 2 of Schedule 5 SDO.

³⁷¹ Item 4 of Part 2 of Schedule 5 SDO.

³⁷² Item 5 of Part 2 of Schedule 5 SDO.

³⁷³ Item 7 of Part 2 of Schedule 5 SDO.

³⁷⁴ Item 8 of Part 2 of Schedule 5 SDO.

- 4.243 In 2011, the EOC reiterated its request that the Government implement its previous commitment to repeal the above provisions. In 2014, the Government passed the Statute Law (Miscellaneous Provisions) Ordinance to make most but not all of the above amendments.
- 4.244 The Government indicated it would not repeal the exceptions relating to sex and:
- requirements for height or weight; and
 - granting pension benefits to surviving spouses and children of deceased public officers.³⁷⁵
- 4.245 Regarding the exception (Item 7 of Part 2 of Schedule 5 SDO) in the granting of pensions to surviving spouses and children of deceased public officers, the Government indicated it was still necessary as there are still children of officers appointed before March 1993 receiving pensions.
- 4.246 The EOC does not believe that there is sufficient justification to retaining the blanket Exception relating to height and weight, as it may unreasonably indirectly discriminate against women or men. Rather than having a blanket exception, the EOC believes that such issues should be determined on a case-by-case basis as to whether or not there is justification for height or weight requirements. In relation to the exception for pensions permitting sex discrimination, the EOC believes that the Government should repeal the exceptions as soon as there are no longer persons receiving pensions pursuant to the discriminatory provisions.
- 4.247 Overall, the EOC believes that there is sufficient justification for the exceptions to be repealed.

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).**

³⁷⁵ The government made an amendment to Item 1(a) of Part 2 of Schedule 5 SDO by removing the references to requirements for uniform or equipment but it is retaining the requirements relating to height and weight.

(ii) Numbers of men and women employed in the Correctional Services Department

Question 67 of the Consultation Document asked:

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

- 4.248 Currently in the SDO, there is an 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.³⁷⁶ In practice, the Government has indicated that the exception is of particular relevance to the Correctional Services Department and their operational needs in relation to treatment of prisoners and issues of safety and privacy.
- 4.249 In relation to the consultation responses, of particular note were the submissions made by the Correctional Services Department and the Correctional Services Officers’ Association. Their responses stated that in their view the exception was appropriate to retain because a provisions in the Prison Rules which require that persons in custody shall only be attended to or searched by an officer of the same sex in order to avoid embarrassment, eliminate the risk of sexual abuse and respect the privacy of the persons. Although it was stated that the exceptions relating to genuine occupation qualifications³⁷⁷ and statutory exception which permit discrimination on grounds of sex may apply in such situations,³⁷⁸ they believed those other exceptions may not apply in all situations and therefore it was still necessary to retain this exception.
- 4.250 In the EOC’s view, where for operational reasons it may be appropriate to maintain a different ratio of staff determined by gender (for the reasons provided), the Correctional Services Department could rely on the existing exception in the SDO of genuine occupational qualifications. Further, the statutory exception would apply as it permits sex discrimination where another statutory provision specifically allows sex discrimination. The EOC therefore does not believe there is sufficient justification to retain the exception.
- 4.251 Overall, the EOC believes there is sufficient justification to repeal the exception.

³⁷⁶ Item 1(b) of Part 2 Schedule 5 SDO.

³⁷⁷ Section 12(2)(e) of the Sex Discrimination Ordinance.

³⁷⁸ Section 38(2)(b) of the Sex Discrimination Ordinance.

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).

(iii) Exception relating to safeguarding security under the SDO

Question 68 of the Consultation Document asked:

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

- 4.252 Under section 59 of the SDO, there is an exception permitting discrimination on grounds of sex for acts done for the purpose of safeguarding the security of Hong Kong. This is the only one of the anti-discrimination Ordinances that contains such an exception and the EOC is not aware of situations where it may be necessary to discriminate between men and women in relation to issues of safeguarding security.
- 4.253 The EOC believes that in order the exception to be retained, the Government should provide evidence as to why it is necessary. In any event, the EOC is concerned that the exception does not require the acts to be proportionate. This can be contrasted, for example, with a similar exception relating to national security under the British Equality Act 2010 requiring proportionality for the exception to be lawful.³⁷⁹
- 4.254 The EOC therefore believes the exception should be reviewed as to whether it is appropriate to retain or be repealed, and if it is retained, whether it should be amended to include a proportionality requirement.

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.

³⁷⁹ Section 192 Equality Act 2010.

(iv) Exception permitting sex discrimination in employment on grounds of religion

Question 69 of the Consultation Document asked:

“Do you think that the exception permitting sex discrimination in employment and qualification bodies for religious purposes should be extended to permit marital status discrimination?”

- 4.255 Currently under section 22 of the SDO, there are exceptions relating to sex discrimination where it relates to either employment or a qualification for an organised religion. The exception 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. An issue that was raised in the Consultation Document is whether or not there is sufficient justification to extent the exception to the protected characteristic of marital status, given that for some employment positions in religious organisations, marital status may be a relevant condition of employment.
- 4.256 Such an approach would be consistent with the scope of a similar exception relating to organised religions in similar international jurisdictions. For example, the Australian Sex Discrimination Act 1984 permits both sex and marital status discrimination in employment *“in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”*.³⁸⁰ Further, under the British Equality Act 2010 there is also a religious exception in employment which permits discrimination on grounds including sex and marital status.³⁸¹
- 4.257 In relation to the consultation responses, a significant majority of organisations agreed with the proposal, and notably of those, 55% were religious organisations. A number of religious organisations and religious educational institutions expressed the view that marital status was a relevant condition for some employment positions relating to religions, and, therefore, it was important that the exception be extended.
- 4.258 On the other hand, several organisations that opposed an extension of the exception stated that all exceptions should be narrowly construed as they permit discrimination, and that they should satisfy a test of a legitimate aim and proportionality. One human rights organisation stated that, in their view, the current exception under section 22 of the SDO is already too broad, as it does not refer to the fact that appointing someone of a particular sex is essential for the post.

³⁸⁰ See section 38 Sex Discrimination Act 1984.

³⁸¹ Schedule 9, Part 1, Item 2 of the Equality Act 2010.

- 4.259 The EOC believes that it is important to respect the right to freedom of religion which is protected under the Bill of Rights.³⁸² An important aspect of that is the right to manifest a religion; however, there is also the need to balance the rights of others, including where other groups are or may be discriminated against.³⁸³
- 4.260 Overall, the EOC believes that the Government should give the issue further consideration by consulting the public on whether there is evidence and justification for an extension of the SDO religious exception in the area of employment to the ground of marital status, and depending on the outcome take appropriate action. As referred to in Chapter 3, the consultation could be conducted as part of the consultation on possible introduction of protections from discrimination on grounds of being in a cohabiting relationship, and whether any exceptions relating to marital status may be appropriate.

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

Question 74 of the Consultation Document asked:

“Do you think that the exception relating to family status which permits difference in insurance premiums based on family status should be repealed?”

- 4.261 Section 38 of the Family Status Discrimination Ordinance provides an exception relating to insurance premiums. This 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. This is similar to equivalent exceptions relating to difference in insurance premiums on grounds of sex or disability.
- 4.262 There may be legitimate reasons for the insurance exception in relation to sex (e.g. if there are differences in insurance premiums for health insurance where there is evidence that men are more likely to suffer from certain diseases) or disability (certain disabilities may mean a person is more at risk of death or sickness; therefore their insurance premiums may be higher than for persons without disabilities).

³⁸² Article 15 Bill of Rights.

³⁸³ Article 15(3) of the Bill of Rights states that *“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”*

- 4.263 However, it is the position of the EOC that in relation to family status there does not appear to be a justification for having a different level of insurance premiums for persons having to care for immediate family. Where the immediate family members are, for example sick, persons with disabilities or elderly that may affect the immediate family members insurance premiums. Nevertheless, the EOC does not think that should affect the insurance premiums for the carer. As a result, the EOC believes that this exception should be repealed.
- 4.264 Overall, the EOC believes there is sufficient justification for the exception to be repealed, since a person having to care for a family member should not affect their insurance premiums.

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

Question 75 of the Consultation Document asked:

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

- 4.265 Items 1 to 3 of Schedule 5 of the Disability Discrimination Ordinance 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 Government explained the reasons for the exception in its report to the United Nations on its compliance with the Convention on the Rights of Persons with Disabilities:

“On the treatment of persons with disabilities under the SMW [Statutory Minimum Wage] regime, LD [Labour Department] has conducted consultation sessions with more than 50 rehabilitation organisations and over 30 employers with ample experience in employing workers with disabilities, and with the participation of EOC. The majority view gauged is that while SMW should be applicable to employees with disabilities like their able-bodied counterparts, a special arrangement should also be put in place for those with impaired productivity so as to minimise any possible adverse impact of SMW on their job opportunities. Under the MWO, employees with disabilities enjoy the same entitlement to SMW as able-bodied workers. The Ordinance also provides a special arrangement

*so that employees with disabilities may choose to have their productivity assessed in the authentic workplace. The assessment serves to determine the extent, if any, that the disabilities affect the degree of productivity of the employees in performing their work so as to determine whether they should be remunerated at no less than the SMW level or at a rate commensurate with their productivity. To forestall abuse, the right to invoke the assessment is vested in the employees with disabilities rather than the employers.*³⁸⁴

- 4.266 The intention of the exception is, therefore, to assist persons with disabilities who do not have full productivity to obtain or retain work. An important safeguard as stated above is that only the person with disabilities can request the assessment, not the employer.
- 4.267 In relation to the consultation responses, 35% of organisations agreed with repealing the exception, 15% disagreed and 50% provided other comments. The high level of other comments is indicative of the fact the Question was not suitable to a “yes/no” answer. In relation to the organisations, there were a number of organisations working with persons with disabilities who provided responses and those views were very diverse in nature. Some of the organisations believed that the system of productivity assessments and the payment of persons with disabilities less than the minimum wage was contrary to the principles of equality, non-discrimination, equal opportunities and therefore should be repealed. Other organisations working with persons with disabilities stated the assessment system was effective in helping them obtain work and should be retained. Several stated that the system as to how productivity is assessed could be improved, as well as providing better guidelines on the system.
- 4.268 Overall, the EOC believes that there are divergent views as to whether the productivity assessment system and exceptions should be repealed or retained. It is therefore considered preferable that the Government continue to monitor the system on a periodic basis and determine what action if any may be appropriate.

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.

³⁸⁴ Report of the HKSAR government on the United Nations Convention on the Rights of Persons with Disabilities,
[http://www.lwb.gov.hk/UNCRPD/Publications/HKSAR's%20UNCRPD%20report_Eng%20\(version%20for%20publication\).pdf](http://www.lwb.gov.hk/UNCRPD/Publications/HKSAR's%20UNCRPD%20report_Eng%20(version%20for%20publication).pdf)

I. Exceptions relating to race

(i) Exception permitting discrimination under RDO (other than race) in relation to employment of persons from overseas with special skills or experience

Question 76 of the Consultation Document asked:

“Do you think that the exception permitting discrimination in employment conditions for persons from overseas with special skills, knowledge or experience should be repealed?”

- 4.269 Section 13 of the RDO is an exception relating to the terms and conditions by which overseas staff are employed at an establishment in Hong Kong. It applies to acts done where a person is employed from overseas and the position requires special skills, knowledge or experience not readily available in Hong Kong. For example, a person recruited from overseas could be employed on better terms and conditions than a person from Hong Kong because those terms and conditions were the same as what they would be offered in a similar position overseas.
- 4.270 The exception is intended to ensure that employers in Hong Kong can secure the services of appropriate staff where the particular skills or experience required of the role mean a person from overseas is more suitable. The exception does not however permit differences in treatment based on the race of the overseas person.³⁸⁵
- 4.271 The EOC believes that this exception is not necessary, given that, although it provides it is lawful to employ persons from outside Hong Kong on different terms and conditions because of their special skills, it is not lawful to choose persons based on their race.
- 4.272 Further, the EOC believes that 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.
- 4.273 In relation to direct racial discrimination, where a person from overseas is chosen by criteria of their skills and experience, that would not constitute racial discrimination. In relation to indirect racial discrimination, employing persons from overseas on better terms and conditions could sometime constitute indirect racial discrimination. The question would then be whether the differences in terms and conditions were a proportionate means of achieving a legitimate aim. The aim of acquiring staff where persons in Hong Kong do not have the skills is likely to be a legitimate aim.

³⁸⁵ Section 13(1)(c)(ii) RDO.

Differences in conditions are also likely to be proportionate if persons in Hong Kong do not have the same type or level of skills.

- 4.274 A hypothetical example where such issues may arise is in relating to teaching languages. For example, a private school in Hong Kong decides to employ a second Spanish teacher. The role requires a native Spanish speaker, and with experience of teaching Spanish for 10 years. The employer decides to employ a teacher from overseas who lives in Barcelona. The appointee asks for the terms and conditions based on what she was paid in Spain, which are more favourable than those of their other Spanish teacher, who is Chinese and has a degree in Spanish language, but is not a native Spanish speaker. The school agrees to pay the appointee based on her requested terms and conditions. It would not constitute direct race discrimination as the appointee was not treated more favourably than the local teacher based on her race, but the level of her language skills. The local teacher may have been subjected to indirect race discrimination. However, it is likely such discrimination was justifiable given the role required a native Spanish speaker, and better terms and conditions may be reasonable.
- 4.275 Other international jurisdictions, such as Great Britain and Australia, do not have such an exception in their discrimination legislation. Instead, such issues would be dealt with on a case-by-case basis under the direct and indirect race discrimination provisions.
- 4.276 Overall, the EOC believes that there is sufficient justification for the exception to be repealed.

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.

(ii) Exception under RDO permitting discrimination in employment terms between locals and persons from overseas

Question 77 of the Consultation Document asked:

“Do you think that the exception which permits differences in terms of employment for overseas and local staff for specified posts should be reviewed by the Government?”

- 4.277 Section 14 and Schedule 2 RDO provide an exception which permits employers for specified public positions to have different terms of employment, whereby some employees are employed on local terms of employment and others are employed on overseas terms of employment. It relates in particular to the employment of judicial officers, Independent

Commission Against Corruption (ICAC) officers, other public officers and specified English teachers.³⁸⁶

- 4.278 The exception is in place as, for the above posts prior to January 1999 (or in the case of judicial officers November 1997), there were differences in terms of employment based on whether a person was from overseas or not. 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.
- 4.279 In relation to the consultation responses, there was strong support from organisations, with some noting that it permits racial discrimination between those from Hong Kong and overseas.
- 4.280 Overall, the EOC believes that the exception clearly permits racial discrimination and, therefore, should be repealed as soon as possible, when the terms of all the relevant employment positions can be made equal.

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.

³⁸⁶ Schedule 2 RDO.

CHAPTER 5: AREAS WHERE REFORMS HAVE BEEN MADE

5.01 As indicated in the Introduction and discussed in Chapter 3 in relation to proposals regarding harassment, there are several issues where the Government has implemented legislative reforms to the four anti-discrimination Ordinances since the public consultation on the Discrimination Law Review. The EOC is pleased that the Government has recognised the need for improvements in the protections from discrimination or operation of the anti-discrimination Ordinances in several areas.

5.02 The specific areas described below have been implemented by the Government and therefore do not require further action.

A. Sexual harassment by customers of service providers

Question 39(4) and (6) asked:

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

- *liability of service users for harassing the service providers;*
- *liability for harassment on ships and aircraft in relation to the provision of goods facilities and services.”*

5.03 Question 39(4) and (6) has been addressed in relation to amendments to provide protection from sexual harassment of service providers by customers, including to ensure that protection applies on board Hong Kong registered ships and aircraft. The amendments were made by the Sex Discrimination (Amendment) Ordinance which was passed on 3 December 2014. It should be noted and, as described in Chapter 3, that the amendment only addresses sexual harassment. In Chapter 3, proposals have been made in relation to racial and disability harassment to be similarly prohibited.

B. EOC issuing enforcement notices for discrimination practices in relation to disability claims

Question 48 of the Consultation Document asked:

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

5.04 This issue was addressed by amendments made pursuant to the Statute Law (Miscellaneous Provisions) Ordinance 2014.

- C. **Protection of EOC members and staff from personal liability where they act in good faith**

Question 58 of the Consultation asked:

“Do you think that there should be a provision protecting EOC members and staff from Personal liability where they act in good faith in relation to the DDO and FSDO, as is the case for the SDO and RDO?”

- 5.05 This issue was addressed by amendments made pursuant to the Statute Law (Miscellaneous Provisions) Ordinance 2014.

- D. **Exceptions relating to sex and marital status discrimination**

Question 66 of the Consultation Document asked:

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

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

- 5.06 The Consultation Document (at paragraph 7.25) referred to the exceptions relating to sex and marital status discrimination under the Sex Discrimination Ordinance (SDO) which the Government agreed to repeal and has since done so:

- 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;³⁸⁷
- 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;³⁸⁸
- 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

- 5.07 The relevant exceptions were repealed by the amendments made pursuant to the Statute Law (Miscellaneous Provisions) Ordinance 2014.

³⁸⁷ It should be noted that in Chapter 3 the EOC has made submissions on the issue of repealing the exception relating to reproductive technology and marital status under 56B of the SDO.

³⁸⁸ It should be noted that in Chapter 3 the EOC has made submissions on the issue of repealing the exception relating to adoption and marital status under section 56C of the SDO.



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