

TO: The Hong Kong Equal Opportunities Commission (via email)

FROM: The Centre for Comparative and Public Law, Faculty of Law, the University of Hong Kong

DATE: November 2014

RE: Submission for Public Consultation on the Discrimination Law Review

1. The Centre for Comparative and Public Law (CCPL) at the University of Hong Kong welcomes the opportunity to comment on the Equal Opportunities Commission's (EOC) Discrimination Law Review. We broadly support most of the proposals put forward by the EOC in its consultation document including the need for modernisation, harmonisation, and simplification of the existing discrimination law framework. In particular, the law should comply with international human rights standards, promote substantive equality, and provide an effective remedy for all forms of unjustifiable discrimination. This submission includes three documents (attached) each of which addresses certain issues raised by the review: 1) the need for consolidation and harmonization of the current discrimination law framework; 2) the role of the EOC in promoting and maintaining equality in Hong Kong, and 3) the implications of Hong Kong's international legal obligations to ensure the right to equality and non-discrimination in law and practice.

2. Antonio Da Roza, Research Assistant Professor in the Faculty of Law, writes about consolidation and harmonization based on his study of the structure and content of the current anti-discrimination statutes. He also addresses the difficulties associated with the harmonisation of exceptions/exclusions as well as the need to ensure free and fair access to the judicial system when making discrimination claims. **(See pages 3-12)**

3. Farzana Aslam, Principal Lecturer in the Faculty of Law and Associate Director of CCPL, writes about the EOC's current limitations in promoting equality and non-discrimination in Hong Kong, highlighting particular concerns about the conciliation mechanism for resolving discrimination claims. She advocates for a consolidated body that

complies with the Paris Principles^{*} and that effectively protects and promotes human rights and equality in Hong Kong. (See pages 13-24)

4. Kelley Loper, Assistant Professor in the Faculty of Law and Deputy Director of CCPL, explains that Hong Kong's anti-discrimination law, and any future reforms to this body of legislation, must comply with Hong Kong's international human rights obligations. These obligations include positive and negative duties to promote substantive, as well as formal, equality and to address all forms of unjustifiable discrimination. To achieve compliance, the government should: 1) amend the definition of indirect discrimination; 2) strengthen the requirement to provide reasonable accommodation; 3) expand the list of prohibited grounds to include characteristics such as sexual orientation, gender identity, age, religion, and immigrant status; and 4) narrowly tailor or remove broad exceptions that could allow unjustifiable discrimination. (See pages 25-33)

5. These responses to the EOC's public consultation exercise highlight some of the limitations and disappointing omissions of Hong Kong's current body of anti-discrimination legislation. We hope that the review process will help the EOC raise awareness about the urgent need for law reform and advocate for actualization of such reform.

^{*} Principles relating to the status of national institutions (Paris Principles), December 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

Submission for Public Consultation on the Discrimination Law Review
Antonio Da Roza[†]

Introduction

1. The need for the consolidation and harmonisation of Hong Kong’s anti-discrimination legislation, and the enhancement of the enforcement process via court procedure, is discussed at length in the Discrimination Law Review consultation document and requires no further expansion here. This response is based on two studies: the first, a comparative study of the existing Hong Kong legislative provisions by section, as well as a wider comparative study of coverage in other common law jurisdictions; and secondly, a detailed statistical study of all Equal Opportunities judgments published by the Hong Kong Judiciary since 1999, and thus addresses certain issues arising out of Chapters 6 and 7 of the Discrimination Law Review consultation document.

Consolidation and harmonisation

2. The similarities of the structures of the four pieces of anti-discrimination legislation in Hong Kong form the basis for their consolidation into a single Ordinance.

3. Each of the four Ordinances consists of nine parts that parallel one another:

| SDO | DDO | FSDO | RDO |
|--|---|--|--|
| Part 1: Preliminary | Part 1: Preliminary | Part I: Preliminary | Part 1: Interpretation, Application, etc |
| Part 2: Discrimination to which Ordinance applies | Part 2: Discrimination to which Ordinance applies | Part II: Discrimination to which Ordinance applies | Part 2: Discrimination and harassment to which Ordinance applies |
| Part 3: Discrimination and sexual harassment in employment field | Part 3: Discrimination and harassment in employment field | Part III: Discrimination in employment field | Part 3: Discrimination and harassment in employment field |
| Part 4: Discrimination and sexual harassment in other fields | Part 4: Discrimination and harassment in other fields | Part IV: Discrimination in other fields | Part 4: Discrimination and harassment in other fields |
| Part 5: Other unlawful acts | Part 5: Other unlawful acts | Part V: Other unlawful acts | Part 5: Other unlawful acts |
| Part 6: General exceptions from Parts 3 to 5 | Part 6: General exceptions from Parts 3 to 5 | Part VI: General exceptions from Parts III to V | Part 6: Matters not affected by Parts 3, 4 and 5 |
| Part 7: Equal Opportunities Commission | Part 7: Commission | Part VII: Commission | Part 7: Commission |
| Part 8: Enforcement | Part 8: Enforcement | Part VIII: Enforcement | Part 8: Enforcement |
| Part 9: Miscellaneous | Part 9: Miscellaneous | Part IX: Miscellaneous | Part 9: Miscellaneous |

Table 1: parallel parts of the anti-discrimination legislation in Hong Kong

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4. The regulatory approach to anti-discrimination in other common law countries tends to differ from jurisdiction to jurisdiction¹. Australia, for example, currently reflects Hong Kong's piecemeal approach in having separate Acts for age, sex, race and disability discrimination, whereas in New Zealand, provisions against discrimination may largely be found under the Human Rights Act 1993. In the United Kingdom, efforts at consolidation were recently made under the Equality Act 2010.

5. In response to **Consultation Question 1** "Do you think that, in reforming the current discrimination laws, the Government should consolidate all the existing Discrimination Ordinances into a single modernized Discrimination Ordinance?" – the brief response is 'yes'.

6. The benefit of consolidation is the harmonisation of the different counterpart provisions, creating a unified standard at law against discrimination in Hong Kong. A prominent example of such consolidation and harmonisation in Hong Kong was the enactment of the Securities and Futures Ordinance (Cap 571) in 2002, which consolidated 10 different pieces of legislation – one primary purpose of which was to eliminate inconsistencies in the procedural and penalty provisions in relation to the different forms of market misconduct.

7. Similar to the aim of the Discrimination Law Review, the Securities and Futures Ordinance harmonised standards upwards. One example that has been highlighted in the consultation document can be found in ss 21 of the DDO and SDO and s 17 FSDO in respect of the application of anti-discrimination provisions to the Government, for which there is no parallel in the RDO. It also appears that there are no parallel provisions in respect of the harassment of employees (s 22 DDO, s 23 SDO, s 24 RDO) or other harassment (s 23 DDO, s 24 SDO, s 25 RDO) under the FSDO.

8. Whilst the present consultation is not intended to expand the scope of anti-discrimination in Hong Kong, one key to consolidation and harmonisation will be to provide sufficient flexibility not only to accommodate the requirements of parallel provisions aimed

¹ Please refer to 'Comparison of Coverage of Anti-Discrimination Legislation in Common-law Jurisdictions' by Charlotte Chan.

at different types of discrimination, but also anticipate future developments to the legislation. The study of anti-discrimination legislation in other jurisdictions reflects the gaps in protection against age discrimination; political opinion; religious belief; and employment status². Indeed, **Consultation Questions 69** and **70** appear to raise related issues on religion and also de facto relationships, illustrating that it may be necessary to expand the scope of the consultation. Flexibility, however, must not come at the cost of widely or vaguely drafted provisions that would effectively lower, rather than raise, the harmonised standards.

9. Of particular concern in this regard are the exceptions. For example, under ss 12 of the DDO and SDO, and s 11 of the RDO is an exception of genuine occupational qualification which is not found in the FSDO. When consolidating these parallel provisions, it may be foreseen that this exception could also be applied to age discrimination in future, and should be drafted sufficiently widely to anticipate as such, but should not be expanded to family relations discrimination.

10. Thus, the response to **Consultation Question 62** “Do you think that the definition of genuine occupational qualifications (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.”? – the response must be ‘yes’, bearing in mind the caveat set out above.

11. The table below illustrates where parallel provisions in respect of exceptions may or may not be found, raising issues of how to harmonise these exceptions, whether or not certain exceptions should be eliminated entirely, and the risk of harmonisation representing an expansion of the exceptions or a lowering of standards to achieve harmonisation.

² *Ibid.*

| SDO | DDO | FSDO | RDO |
|---|---|---|--|
| s 48 Special measures | s 50 Special measures | s 36 Special measures | s 49 Special measures |
| s 49 Charities | s 51 Charities | s 37 Charities | s 50 Charities |
| s 50 Sport, etc. | -- | -- | -- |
| s 51 Insurance, etc | s 52 Insurance, etc | s 38 Insurance, etc | -- |
| s 52 Communal accommodation | -- | -- | -- |
| s 53 Discriminatory training by certain bodies | s 53 Discriminatory training by certain bodies | s 39 Discriminatory training by certain bodies | s 51 Discriminatory training by certain bodies |
| s 54 Other discriminatory training, etc. | s 54 Other discriminatory training, etc. | -- | s 52 Discriminatory training by employers, organisations of workers or employers or professional or trade organisations, etc |
| s 55 Trade unions, etc; elective bodies | s 55 Elections in respect of trade unions, etc. | -- | -- |
| s 56 Indirect access to benefits, etc | s 56 Indirect access to benefits, etc | s 40 Indirect access to benefits, etc | s 53 Indirect access to benefits, etc |
| s 56A Double benefits for married persons | -- | -- | -- |
| s 56B Reproductive technology | -- | -- | -- |
| s 56C Adoption | -- | -- | -- |
| s 57 Acts done for purposes of protection of women | s 57 Acts done for purposes of protection of persons with disability | -- | -- |
| -- | -- | -- | s 54 Nationality law, etc. not affected |
| -- | -- | -- | s 55 Immigration legislation |
| s 58 Acts done under statutory authority to be exempt from certain provisions of Part 4 | s 58 Acts done under statutory authority to be exempt from certain provisions of Part 4 | s 41 Acts done under statutory authority to be exempt from the provisions of Part III or IV | s 56 Acts done under statutory authority not affected by Parts 3, 4 and 5 |
| s 59 Acts safeguarding security of Hong Kong | -- | -- | -- |
| s 60 Construction of references to vocational training | s 59 Construction of references to vocational training | -- | -- |
| s 61 Application to New Territories land | -- | s 42 Application to New Territories Ordinance | s 57 Application to New Territories land |
| s 62 Further exceptions | s 60 Further exceptions | s 43 Further exceptions | s 58 Other matters not affected |
| -- | s 61 Infectious diseases | -- | -- |

Table 2: parallel exceptions in the anti-discrimination legislation in Hong Kong

12. This table may help to formulate a response to **Consultation Question 61** “Do you think that all the exceptions should be contained in one section (Schedules) of the discrimination laws in order that the law is clearer?”. Whilst it appears possible for the exceptions to be contained in a single Schedule, it also illustrates where there are specialised and specific exceptions for some of the existing anti-discrimination laws.

13. It certainly would appear possible to eliminate the discriminatory training exceptions and instead incorporate them under the definition of special measures, for example, in response to **Consultation Question 63** “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?”, but this raises the question of whether or not that would effectively create a new exception for family status discrimination where there was previously none.

14. It also appears to be possible to safely eliminate the national security exception in relation to sex discrimination per **Consultation Question 68** “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?” given that this exception does not apply to other forms of discrimination.

Proceedings and enforcement

15. The means of enforcement against discrimination are set out in the parallel provisions of Part 8 of all four anti-discrimination Ordinances. Part 8 provides for the restrictions on proceedings for contravention of anti-discrimination law; civil claims to be brought in the same manner as tortious claims; the power of the Equal Opportunities Commission to issue enforcement notices; and, in the case of persistent discrimination, injunctions; the power of the Commission to assist complainants by way of conciliation; and other assistance the Commission may provide; and the time period in which proceedings must be brought. In response to **Consultation Question 45** “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?” – the answer must be a resounding ‘yes’ in order to support the existing powers of enforcement.

16. The current procedure for discrimination complaints is a complainant may lodge a complaint with the Commission, after which the complaint will be investigated and go through a process of conciliation. Where conciliation fails and there is no settlement of the complaint, a complainant may apply to the Commission for legal assistance. Where the application to the Commission for legal assistance fails, or in the alternative, complainants

may bring claims themselves to court by way of private legal representation, or apply to the Legal Aid Department for assistance.

17. It is submitted that this procedure may serve as a hurdle for complainants to access the courts. First, applications for legal assistance may only be made after undergoing the conciliation process, effectively making conciliation mandatory, and placing pressure on complainants to settle, potentially to their detriment. This differs from the approach under the Civil Justice Reform, under Practice Direction 5.2 and in particular, the Timetabling Questionnaire at Appendix A of the Practice Direction, which requires parties confirm they have attempted Alternative Dispute Resolution and filed a Mediation Certificate or Notice. Under the Civil Justice Reform, alternative dispute resolution is not mandatory, but there will be costs implications for parties who fail to comply with the Practice Direction or cooperate³.

18. Secondly, whilst it is open to complainants not to follow the Commission's procedure and bring litigation privately or seek Legal Aid, the high cost of civil litigation in Hong Kong has been a longstanding concern, and access to Legal Aid is subject to a further means test, as well as a merits test separate from that of the Commission. As a result, it appears that a low number of discrimination claims are reaching the courts, and a high proportion of litigants have to represent themselves in court.

19. A study of all civil judgments published by the Hong Kong Judiciary from 2005 – 2013⁴ shows Equal Opportunities Actions have one of the highest proportions of unrepresented litigants (i.e. persons without legal representation):

| Type of case | Proportion of judgments in which unrepresented litigants appear | Total number of judgments published from 2005 - 2013 |
|--|---|--|
| HCB (Bankruptcy) | 50.0% | 268 |
| DCEO (Equal Opportunities) | 41.9% | 31 |
| FCCM, FCCP, FCCD, FCCA (Family Court cases) | 32.0% | 322 |
| DCEC (Employees' Compensation) | 30.1% | 405 |
| HCAP (Probate) | 27.0% | 89 |
| HCAL (Constitutional and Administrative Law Proceedings) | 26.6% | 718 |

Table 3: Civil cases with the highest proportion of unrepresented litigants appearing in judgments, 2005 – 2013

³ Para 47, Practice Direction 5.2.

⁴ Pursuant to Seed Funding Grant #201306159002 "Legally unrepresented persons in the civil courts in Hong Kong", University Research Committee, University of Hong Kong.

20. A further study of all DCEO cases (from 1999 – present) was conducted as part of the research for the purposes of this Review. It is of interest to note that at first instance, the outcomes for unrepresented litigants in DCEO cases are far more unfavourable:

| Claimant representation | Success rate i.e. judgment for claimant | Total number of judgments |
|--|---|---------------------------|
| EOC acted for or instructed layers on behalf of claimant | 78.6% | 14 |
| Privately instructed | 33.3% | 18 |
| Legal Aid | 20.0% | 5 |
| Unrepresented | 10.0% | 10 |
| Not specified in judgment | NA | 1 |

Table 4: Representation and outcomes in DCEO judgments, 1999 – present

21. A great deal of caution must be applied when interpreting the data collected from this study of DCEO judgments. First, it is clear that despite capturing all the judgments published by the Judiciary, the sample size is exceptionally small (48 judgments in total). In view of the size of the sample, it would be difficult to safely speculate about trends observed in the data.

22. The study does not capture data from other types of cases in which anti-discrimination law was cited – for example, in High Court Actions or Miscellaneous Proceedings – in order to ensure a fair comparison of cases exclusively concerned with claims against discrimination.

23. The judgments from which the data was obtained include not only final judgments after trial of claims against discrimination, but also ancillary matters such as interlocutory applications, leave to appeal, discovery, costs etc.

24. Finally, when considering representation, it is important to note that the data is derived from the judgments published rather than claims or ‘cases’. Certain claims or cases may have more than one judgment attributable to them, particularly if ancillary matters were heard before or after the main trial of the claim. Each judgment was taken separately to take into account the fact that there are examples of cases in which legal representation changes⁵.

25. It would be overly simplistic on the basis of this study to say that assistance from the Commission, or legal representation of any sort, significantly enhances the probability of

⁵ E.g. see the multiple judgments in respect of *L v The Equal Opportunities Commission and ors* or *Sit Ka Yin Priscilla v The Equal Opportunities Commission and ors*

success before the courts in Equal Opportunities Actions. There may be a variety of reasons as to why a litigant is unrepresented, including the possibility that they may have sought legal advice previously, did not agree with the advice they were given and opted to pursue their claim in court on their own. Nonetheless, a more detailed approach to these judgments provides potential insight as to how different representation impacts the litigation system in Hong Kong. Data was thus collected in respect of various aspects of the judgments, including the number of days taken for hearings, the number of days needed to deliver judgment, and the length of judgments by word count:

| Claimant representation | Average number of days of hearing | Average time to deliver judgment | Average length of judgment |
|--|--|---|-----------------------------------|
| EOC acted for or instructed layers on behalf of claimant | 3.29 days | 44.71 days | 5,336.79 words |
| Privately instructed | 4.29 days | 51.59 days | 9,896.11 words |
| Legal Aid | 6.20 days | 91.60 days | 10,733.60 words |
| Unrepresented | 3.60 days | 42.00 days | 6,286.00 words |

26. It is of interest that cases in which the Commission is involved not only take fewer days for hearing, but also require less time to deliver judgment and result in shorter judgments. This may be attributable to the investigation process of the Commission, which potentially reduces the amount of discovery required or facts and issues in dispute. Even where a litigant is unrepresented (which potentially reduces the number of legal or factual issues the court must deal with), the impact of such cases in respect of time to hear and length of judgment is greater. By contrast, Legally Aided cases required significantly longer to hear, and delivery of judgment requires more both in time and length.

27. Given that complainants who seek Legal Aid are subject to the means and merit tests under that process, it is argued that the procedure of the Commission in this regard ought also to be reviewed, particularly the requirement of conciliation and the separation between Legal Aid and legal assistance from the Commission. Based on the findings of the study above, it appears that there may be some benefit in terms of efficiency and outcomes that for all complainants, Equal Opportunities Actions be carved out of the jurisdiction of the Department of Legal Aid and centralised with the Commission (with the attendant resources for such cases). This may also help complainants avoid confusion as to whom they should bring their complaints to.

28. It should be noted that the time period in which proceedings must be brought is currently 24 months. This may be contrasted with the provision in s 4 of the Limitation Ordinance (Cap 347) that actions in tort cannot be brought after the expiration of 6 years from the date the cause of action accrued. The time for personal injury cases and fatal accident claims is shorter (3 years), although the court has discretion to override the time limit for personal injury cases where it thinks fit, and for employees' compensation claims, similar to the time limit under anti-discrimination law, is also 2 years. It is suggested that the time limit for bringing anti-discrimination claims should also be reviewed. Although anti-discrimination claims are brought in the same manner as tort claims, the injury done through discriminatory acts, or the recourse complainants may have to the courts may not be immediately apparent. It may be appropriate to reduce the time for bringing claims for discrimination where members of the public are well-versed in their rights, but given the need highlighted by the consultation document for greater education in light of the social and demographic changes in Hong Kong, a longer time limit may assist complainants in bringing their cases to the Commission and the courts.

List of Abbreviations

Hong Kong Legislation

| | |
|------------|---|
| DDO 1995: | Disability Discrimination Ordinance 1995 |
| EO 1997: | Employment Ordinance 1997 |
| FSDO 1997: | Family Status Discrimination Ordinance 1997 |
| RDO 2008: | Race Discrimination Ordinance 2008 |
| SDO 1995: | Sex Discrimination Ordinance 1995 |

Australian Legislation

| | |
|-------------|--|
| ADA 2004: | Age Discrimination Act 2004 |
| AHRCA 1986: | Australian Human Rights Commission Act 1986 (only Commonwealth bodies) |
| DDA 1992: | Disability Discrimination Act 1992 |
| MLCEA 1973: | Maternity Leave (Commonwealth Employees) Act 1973 (only Commonwealth Bodies) |
| PPLA 2010: | Paid Parental Leave Act 2010 |
| RDA 1975: | Race Discrimination Act 1975 |
| SDA 1984: | Sex Discrimination Act 1984 |
| WRA 1996: | Workplace Relations Act 1996 |

New Zealand Legislation

| | |
|-------------|--|
| CUA 2004: | Civil Union Act 2004 |
| EPA 1972: | Equal Pay Act 1972 |
| HRA 1993: | Human Rights Act 1993 |
| MDMAA 2013: | Marriage (Definition of Marriage) Amendment Act 2013 |
| PLEPA 1987: | Parental Leave and Employment Protection Act 1987 |

United Kingdom Legislation

| | |
|-----------------|---|
| CPA 2004: | Civil Partnership Act 2004 |
| DDA 1995: | Disability Discrimination Act 1995 |
| EA 2010: | Equality Act 2010 |
| GRA 2004: | Gender Recognition Act 2004 |
| MSSCA 2013: | Marriage (Same Sex Couples) Act 2013 |
| RRA 1976: | Race Discrimination Act 1976 |
| SDA 1975: | Sex Discrimination Act 1975 |
| SDA 1986: | Sex Discrimination Act 1986 |
| WFA 2006: | Work and Families Act 2006 |
| FTE(PLFT)R2002: | Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 |
| PTW(PLFT)R2000: | Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 |
| MPLAR 2002: | Maternity and Parental Leave (Amendment) Regulations 2002 |

Submission for Public Consultation on the Discrimination Law Review

Farzana Aslam*

Introduction

1. This response explores the EOC's role in promoting equality and non-discrimination in Hong Kong, and concludes that to effectively protect and promote equality and non-discrimination in Hong Kong, a consolidated body in the form of a Human Rights Commission that complies with the Paris Principles should replace the EOC.⁶

The Role of the EOC

2. The EOC's vision "to create a pluralistic and inclusive society free of discrimination where there is no barrier to equal opportunities" is a commendable aspiration, but it is wholly unrealistic given its structural limitations and operating constraints. Put simply, the EOC's current role and mandate does not allow it to perform the functions to which it aspires. The concern levelled at the current role of the EOC is fourfold: first, the EOC has a restricted mandate, only providing protection against discrimination for a limited category of rights holders in respect of a limited scope of acts; secondly, it fails to comply with internationally accepted standards relating to its independence; thirdly, the EOC's focus on conciliation impedes access to justice and the growth and development of discrimination law; and fourthly, the EOC's focus on its role as a mediator has led it to take on a passive role rather than an advocacy role that champions the rights of minorities or victims of discrimination. This has resulted in a conservative approach towards commencing investigations and strategic litigation challenging the interpretation of existing discrimination law, and indeed towards the public consultation process itself. These factors undermine the effectiveness of the EOC with the consequence that there has been slow and minimal progress towards the realisation of equality and non-discrimination in Hong Kong.

(i) Restricted Mandate

3. The EOC's four main functions are investigation and conciliation; research and policy, education and promotion; and litigation, but these are all inherently restricted to matters proscribed within the Ordinances. When describing its own functions and powers, all

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⁶ Principles relating to the status of national institutions (Paris Principles), December 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

are limited by reference to this existing body of legislation, save for its power to conduct research, which invokes a broader aim to extend to “issues relevant to discrimination and equal opportunities”.⁷ The CCPL welcomes the EOC’s expansive approach to research, and its lobbying efforts to expand discrimination legislation to cover sexual orientation and age discrimination, but the EOC’s hands are tied when it comes to investigating, conciliating or litigating discrimination on grounds other than those provided for under the four discrimination Ordinances (“the Ordinances”).⁸ The EOC’s powers to investigate, conciliate, or litigate discriminatory acts are confined to consideration of limited categories of discrimination, affecting only certain acts and only certain parties, with the protected characteristics identified within the Ordinances. Even within the protected characteristics, there remain serious omissions. Some of these have been addressed by the EOC in its consultation document, and this is to be commended, however, a more fundamental problem arises from the limited categories of discrimination afforded protection. The EOC cannot investigate, conciliate or litigate discrimination on grounds not within its jurisdiction, such as age, sexual orientation, or political opinion, despite the fact that discrimination on these grounds is unconstitutional under domestic law.⁹ Hong Kong is also bound by seven of the core international human rights treaties,¹⁰ including the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR), placing it under an obligation to ensure that individuals within its territory enjoy equality before the law and non-discrimination across many spheres in both the public and private sector regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status. The EOC’s public consultation exercise marked an opportunity to modernise and reform existing discrimination laws not just by consolidating and harmonising existing categories of protection into one Discrimination Ordinance but by advocating for a broader range of prohibited grounds to include those

⁷ EOC Corporate Statement taken from its website September 20, 2014.

⁸ Namely, the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), the Family Status Discrimination Ordinance, (Cap. 527) and the Race Discrimination Ordinance (Cap. 602).

⁹ Art. 25 of the Basic Law, and art. 22 of the Hong Kong Bill of Rights Ordinance both confer a right to equality before the law. See: *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKFACR 335

¹⁰ 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).

referred to in the Basic Law and the ICCPR and ICSECR. The Foreword to the Consultation Document acknowledges this opportunity:¹¹

“Compliance with international human rights obligations, and relevant recommendations made by the United Nations Committees relating to equality and non-discrimination, therefore provide a direct justification for the DLR and for the Government to reform the existing discrimination laws.”

This opportunity has been missed. The public consultation exercise has been narrowly framed to consist of a review of all the existing categories of protection. This pragmatic approach, whilst perhaps understandable in the current political climate, lacks the leadership and vision expected of a statutory body designated the role of promoting equality and non-discrimination. This lack of leadership is all the more disappointing in light of the UN Human Rights Committee’s most recent Concluding Observations on the Third Periodic Report of Hong Kong,¹² which invited the Hong Kong Government to “consider introducing comprehensive anti-discrimination laws in accordance with the Covenant [ICCPR]”.

4. CCPL submits that ‘modernisation’ or ‘reform’ of the existing discrimination laws can only be achieved by a comprehensive overhaul of the existing discrimination laws, which would include expansion of the protected categories referred to all of those cited in the Basic Law, the Bill of Rights Ordinance and the ICCPR and ICSECR.

(ii) *Lack of Compliance with the Paris Principles*¹³

5. The EOC, despite its limited mandate, is one of the few institutions in Hong Kong that monitors human rights.¹⁴ The EOC acknowledge, “Many elements of its work require independence and are similar to the function of human rights institutions.”¹⁵ Given the EOC’s role as the statutory body responsible for implementing Hong Kong’s discrimination

¹¹ See also paragraph 1.34 to 1.43 of the Public Consultation Document.

¹² Paragraph 19 of the UN Human Rights Committee Concluding Observations on the Third Periodic Report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013), 29 April 2013, CCPR/C/CHN-HKG/CO/3

¹³ The Paris Principles were developed at a meeting of representatives of national institutions held in Paris in 1991 and subsequently endorsed by the UN Commission on Human Rights (Resolution 1992/54 of 3 March 1992) and the UN General Assembly (Resolution 48/134 of 20 December 1993, annex). The Paris Principles identify six criteria that NHRIs should meet in order to be effective, including: a clearly defined and broad-based mandate based on universal human rights standards; autonomy from Government; independence guaranteed by Legislation or the Constitution; pluralism, including membership that broadly reflects their society; adequate resources; and adequate powers in investigation.

¹⁴ Information taken from the OHCHR website on September 29, 2014, cited as being the position as of January 28, 2014. See: http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

¹⁵ Paragraph 6.74 of the Consultation Document.

legislation, CCPL submits that the EOC ought to comply with internationally accepted principles, namely those set out in the Paris Principles.¹⁶ Whilst the EOC has not been accorded the category “A Status” of a National Human Rights Institution,¹⁷ it is judged by reference to these standards on the international stage. The Paris Principles are divided into four sections addressing the competence and responsibilities of NHRIs, their composition, their operation and their status.¹⁸ The Paris Principles require that a NHRI be vested with competence to protect and promote human rights and be given as broad a mandate as possible. The EOC’s current mandate clearly falls short of this fundamental requirement. That aside, with regard to its composition requirements, the Paris Principles require NHRIs to be sufficiently independent from Government, and that appointments be transparent and reflect pluralist representation of civil society.

6. CCPL welcomes the EOC’s observations and the three consultation questions, which address these composition deficiencies,¹⁹ but submit that they are not far reaching enough to ensure compliance with the Paris Principles. For example, the Paris Principles require that appointment of members should reflect pluralist representation of a broad range of civil society involved in the protection and promotion of human rights to enable effective cooperation to be established with, or through the presence of representatives, of NGOs responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, associations of lawyers, doctors, journalists and eminent scientists; trends in philosophical or religious thought; Universities and qualified experts; Parliament; and Government (the latter only in an advisory capacity).²⁰ The reform being proposed by the EOC, namely to ensure that the “composition of Board members has suitable experience and is representative of the groups in society the EOC works to protect

¹⁶ The Vienna World Conference in 1993 established the Paris Principles as the broadly accepted test of a human rights institution’s legitimacy and credibility.

¹⁷ The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) has 3 categories of UN accreditation for NHRIs, based on compliance with the Paris Principles. “A Status”, indicating compliance with the Paris Principles; “B Status”, indicating partial compliance with the Paris Principles; and “C Status”, indicating non-compliance with the Paris Principles. Of 105 NHRIs across the Globe, 70 are “A Status”, 25 are “B Status” and 10 are “C Status”. Hong Kong’s EOC is one of the 10 NHRIs accorded “C Status”. [Information taken from the OHCHR website on September 29, 2014, cited as being the position as of January 28, 2014. See: http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf]

¹⁸ See: *Texts and Materials on International Human Rights*, 2nd Edition, Rhona K. M. Smith

¹⁹ Consultation Questions 55, 56, and 57.

²⁰ The Paris Principles, Composition and Guarantees of Independence and Pluralism, paragraph 1. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

from discrimination”²¹ falls short of advocating for the broad range of pluralist representation and levels of engagement with civil society required under the Paris Principles. Moreover, the proposed reforms do not adequately address the concerns that commentators have expressed regarding independence and the lack of transparency for appointment of the EOC Chairperson and members (for example, failing to disclose the criteria for appointment), and the lack of financial independence of the EOC.²²

7. CCPL calls for the appointment of the Chairperson and members of the EOC to be a transparent process that involves both the Government and civil society.²³

(iii) *Focus on Conciliation*

8. The EOC has a statutory obligation to attempt to conciliate a complaint before giving assistance to litigate, which leads to the majority of discrimination complaints being brought before the EOC resulting in ‘successful conciliations’ but unreported settlements.²⁴ Although the District Court has primary jurisdiction over claims filed under the Ordinances, enabling a victim of discrimination to proceed directly to litigation, in practice, almost all turn to the EOC. There are practical financial considerations behind this: the high cost of legal representation, the lack of legal clinics, the ban on contingency fees, and the fact that a successful claimant is, as a general rule, unable to recover her legal fees in the District Court under the ordinary principle that ‘costs follow the event’.²⁵ The EOC itself may provide legal assistance, but it does so in only a handful of cases per year.²⁶

9. CCPL has long regarded reliance on conciliation for resolving most disputes as a key failing of Hong Kong’s anti-discrimination law, arguing “the absence of an anti-discrimination tribunal or a low-cost way of bringing complaints before the general courts

²¹ Paragraph 6.83 of the Consultation Document

²² See: *Submission to CEDAW on the Implementation of CEDAW in Hong Kong*, CCPL, Women’s Studies Research Centre of the University of Hong Kong, and Hong Kong Women’s Coalition on Equal Opportunities, February 2014. See also Carole J. Peterson, *The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?* Hong Kong Law Journal, 2004, vol. 33, n.3, p.513-522.

²³ *National Human Rights Institutions: Best Practice*, Commonwealth Secretariat, 2001

²⁴ The EOC’s Annual Report for 2012/2013 states that 929 complaints were handled by the EOC in the year 2012/2013, and boasts a 72% “Successful conciliation rate”.

²⁵ See: *Investigation and Conciliation of Discrimination Complaints in Hong Kong*, Carole J. Peterson, Janice Fong and Gabrielle Rush, CCPL, July 2003, p.3

²⁶ Of the 929 complaints handled by the EOC in the year 2012/2013, the EOC gave legal assistance to 10 cases:
EOC Annual Report 2012/2013
http://www.eoc.org.hk/EOC/Upload/AnnualReport/201213/EOC_AR2012_13.pdf

makes it only half a system”.²⁷ CCPL submits that the current adjudication system for discrimination complaints impedes access to justice. The EOC has acknowledged this problem and made recommendations to the Government to establish an Equal Opportunities Tribunal to handle complaints of discrimination under the Ordinances in 2009.²⁸ This call was repeated in the Chairman’s message in its Annual Report of 2010/2011, which states:

“Looking ahead, we refined and revived our urge to the Government for policy support for the establishment of the Equal Opportunities Tribunal, a recommendation that we first made in 2009. The aim is to provide a user-friendly and more flexible judicial system, in order for discrimination cases to be adjudicated promptly. It will not take away the Commission’s role to conciliate such cases in the first instance, but it will enable more cases to be heard in public and help to set the value framework for equal opportunities more effectively.”

The Government referred to the EOC’s proposal to set up an Equal Opportunities Tribunal in its Third Report under CEDAW, and reports that the EOC “is initiating discussions with the community and stakeholders before further pursuing the proposal with the Government. The Government will continue to liaise with EOC on the proposal and study the recommendations after EOC’s further deliberation with the community”.²⁹ It is thus notable that the EOC makes no reference to the establishment of an Equal Opportunities Tribunal in its Annual Report of 2012/2013, or in its March 2014 submission on the Third Report under CEDAW. Significantly, there is no reference to the establishment of a separate Equal Opportunities Tribunal in the Public Consultation.

10. A further concern related to the EOC’s focus on conciliation as the principal method of dispute resolution is that it stunts the development of equality, anti-discrimination and human rights jurisprudence, and limits the social impact of the law, since conciliated complaints are determined behind closed doors and kept confidential.³⁰ CCPL welcomes the EOC’s September 2013 initiative to publish a Casebook featuring real-life discrimination cases handled by the EOC, including conciliated cases, as a welcome reference tool, but it cannot replace binding precedent as a tool for the development of discrimination law.

²⁷ *Ibid* at page 68

²⁸ See EOC Press Release, April 8, 2009: <http://www.eoc.org.hk/eoc/graphicsfolder/ShowContent.aspx?ItemID=8144>.

²⁹ Third Report of the HKSAR under the United National Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) At page 10, paragraph 2.22

³⁰ See: *Supra* note 18 at page 4

The EOC's role as mediator in the conciliation process ignores the inequality of bargaining power that often exists between a complainant and respondent, particularly in light of the fact that the complainant appears without legal representation. Commentators have been particularly concerned about the domestic context where the impact of traditional gender roles often put women in a vulnerable position.³¹

11. CCPL submits that the establishment of an Equal Opportunities Tribunal would provide a low cost, more effective system for the adjudication of discrimination complaints, ensuring greater access to justice for victims of discrimination. Tribunal decisions would form a body of reported cases offering greater certainty, consistency and fairness for litigants and opportunity for the growth and development of Hong Kong discrimination law.

(iv) *Lack of Advocacy Role*

12. The EOC has been accused of playing a 'passive role' in policy advocacy.³² Evidence in support of this criticism is the fact that the EOC has only conducted three formal investigations since its inception in 1996. Moreover, the EOC has brought only a handful of cases that have made a significant impact upon the development of discrimination law. Cases such as *K, Y and W v Secretary for Justice*³³ and *Equal Opportunities Commission v Director of Education*³⁴ that marked legal victories have also been regarded as politically dangerous.³⁵ Rather the EOC has tended to adopt a conservative interpretation of the existing provisions of the Ordinances, resulting in a noticeable dearth of strategic litigation. For example, it is certainly arguable that the existing Race Discrimination Ordinance applies to discrimination against a person based on being Mainland Chinese. However, the EOC has not sought to challenge the perceived orthodoxy on this point, instead accepting that the Race Discrimination Ordinance does not apply in these circumstances.³⁶

³¹ See: *Submission to CEDAW on the Implementation of CEDAW in Hong Kong*, CCPL, Women's Studies Research Centre of the University of Hong Kong, and Hong Kong Women's Coalition on Equal Opportunities, February 2014

³² *Ibid.*

³³ [2000] 3 HKLRD 777

³⁴ [2001] 3 HKLRD 690

³⁵ See Carole J. Peterson, *The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?* Hong Kong Law Journal, 2004, vol. 33, n.3, p.516

³⁶ International jurisprudence suggests that national origin be construed as widely as possible. See: *BBC v Souster* [2001] IRLR 150; *King-Ansell v Police* [1979] 2 N.Z.L.R. 531.

The Public Consultation Process

13. The limited remit of the EOC's Public Consultation is indicative of its apparent reluctance to be a catalyst for change. For Hong Kong to truly demonstrate a commitment to ending discrimination there must be an expansion of the prohibited grounds of discrimination law in Hong Kong. It is therefore disappointing that the EOC refers to the need for studies into public attitudes before a call for change is made.³⁷ Such studies already exist and demonstrate growing public acceptance towards, for example the rights of lesbian, gay, bisexual, transsexual and intersex people.³⁸ However, more than this, there is disappointment that the EOC, a body mandated to "work towards the elimination of discrimination, harassment and vilification"³⁹ appears to suggest public support is required to advocate for a change in the legal framework to support minority rights.

14. The EOC, as a mandated body, has a responsibility to campaign to stop the perpetuation of attitudes that seek to justify discrimination and prejudice, even if these are majority held views. What is being proposed by the EOC are measures to harmonise and consolidate existing legislation and to modernise Hong Kong discrimination law to bring it in line with its international and domestic human rights obligations,⁴⁰ although it will be argued in a separate CCPL submission paper that it does not go far enough in this regard. Given the limited scope of the proposed reforms it is unclear why it was deemed necessary to enter into a Public Consultation process when the EOC was not required to do so before proposing amendments to the Government.⁴¹

15. Having being embarked upon, the Public Consultation process has been striking in its limited attempt to fully engage the general public in meaningful debate that could have addressed and allayed some of the concerns that have arisen following the publication of the Discrimination Law Review Consultation Document ("DLR Consultation Document"). What the Public Consultation process has managed to achieve is widespread fear in the community

³⁷ Equal Opportunities Commission, *Discrimination Law Review: for public consultation*, July 2014 Introduction, para10

³⁸ K Loper, H Lau, C Lau, 'Research Shows a Majority of People in Hong Kong Support Gay and Lesbian Couples' Rights, Not Necessarily Marriage' Jan 2014

³⁹ Equal Opportunities Commission, *Discrimination Law Review: for public consultation*, July 2014 Introduction, para3

⁴⁰ *Ibid*, paras.1.44-1.54

⁴¹ The EOC's powers to review and make recommendations to the Government are contained in s. 64 of the Sex Discrimination Ordinance, s. 62 of the Disability Discrimination Ordinance, s. 44 of the Family Status Discrimination Ordinance, and s. 59 of the Race Discrimination Ordinance.

about the potential economic and social consequences of the proposed reforms, a need for the EOC to hire extra staff to deal with the unprecedented volume of submissions received, and the likelihood that a report on the submissions collected during the Public Consultation process will not be forthcoming until at least a further year, delaying the timetable for any reform.⁴²

16. Public consultation is a regulatory process designed to increase transparency, and a means by which the public's input on matters affecting them is sought. Yet, of the 77 Consultation Questions, most are closed questions, inviting a simple "yes" or "no" answer to what are important questions relating to human rights, policy and justice, rather than eliciting an opinion that may deliver insight into public concerns or provide a springboard for education or awareness-raising. For example, question Q. 21: "Do you think there is a need for introducing specific equal pay for equal value provisions?" It is unclear as to what comes next for the EOC if it is met with a barrage of simple "no" responses to such questions.

17. It appears that most submissions that have been received by the EOC focus on two issues: whether discrimination based on citizenship, immigration and nationality should be prohibited under the Race Discrimination Ordinance, and whether *de facto* relationships should be protected under the Family Status Discrimination Ordinance.⁴³ Yet only a few paragraphs are devoted to providing information, context and potential social and economic consequences relevant to Hong Kong before questions are posed in relation to each of these issues. It is therefore unsurprising that many of the submissions reveal that the reforms suggested have simply not been understood.⁴⁴ A few days before the end of the extended public consultation period, the EOC Chairman, Dr York Chow Yat-ngok observed: "Even though many submissions show misconceptions among Hongkongers, at least we know what misled them."⁴⁵ This comment reveals both a failure to anticipate what issues were likely to be sensitive and/or contentious (as evidenced by a failure to address potential concerns fully within the body of the DLR Consultation Document) and a lack of understanding about some

⁴² See Jennifer Ngo, "Flood of responses on anti-discrimination law amendments will delay results", South. China Morning Post, October 29, 2014, which reports: "more than 80,000 submissions have been received, with many revealing misconceptions about the planned amendments." See also Jennifer Ngo, "Flood of responses crashes discrimination law website", South. China Morning Post, October 7, 2014

⁴³ *Ibid.*

⁴⁴ *Supra*, note 36.

⁴⁵ See Jennifer Ngo, "Flood of responses on anti-discrimination law amendments will delay results", South. China Morning Post, October 29, 2014

of the fundamental purposes of a public consultation exercise, namely, to inform the public, clarify and evaluate a full range of arguments on issues, and build consensus.

18. The CCPL submits that the EOC public consultation process ought to have been preceded, or at least accompanied by awareness raising, education and advocacy aimed at addressing public fears, concerns or likely misconceptions about proposed reforms. It is unclear how the EOC will be able to succeed in securing even the limited package of reforms that are now being debated in light of its failure to accompany its proposals with a robust advocacy campaign designed to influence and shape public opinion in support of such reforms.

Conclusion

19. There is currently no statutory body mandated to monitor compliance with the broader constitutional and international human rights obligations falling outside of the Ordinances, exposing a serious lacuna in the protection of human rights in Hong Kong. The UN Human Rights Committee has repeated its concern in this regard, most recently in March 2013.⁴⁶

20. CCPL submits that the establishment of a Human Rights Commission with a mandate to cover all international human rights is the best way to address the inherent limitations in the role of the EOC. This is a view long shared by the EOC,⁴⁷ and by the UN Human Rights Committee,⁴⁸ so it is disappointing the opportunity has not been taken to assert this proposal

⁴⁶ “The Committee regrets that there is no independent statutory body to investigate and monitor violations of human rights guaranteed by the Covenant in a comprehensive manner” Paragraph 7 of the UN Human Rights Committee’s Concluding Observations on the Third Periodic Report of Hong Kong, 29 April 2013, CCPR/C/CHN-HKG/CO/3.

⁴⁷ See: (i) paragraph 7 of the EOC’s Submission to the Meeting of the Legislative Council Panel of Home Affairs on 11th June 2014 regarding the Second Report of the Hong Kong Special Administrative Region (HKSAR) of the People’s Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Report of the HKSAR under the Convention on the Rights of the Child (CRC), the second report to be prepared by the HKSAR under the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), and the Implementation of International Human Rights Treaties, June 2004 (ii) paragraph 10 of the EOC’s Submission on the Second Report 2 of the of the HKSAR under the International Covenant on Economic, Social and Cultural Rights, February 2005 (iii) Paragraph 2 of the EOC’s Submission on the Third Report of the HKSAR under the International Covenant on Economic, Social and Cultural Rights, May 2013:

http://www.eoc.org.hk/EOC/Upload/submission/Submission_E_03052013.pdf. (iv) Paragraph 3 of the EOC’s Submission on the Third Report of the HKSAR under the International Covenant on Economic, Social and Cultural Rights, March 2014:

http://www.eoc.org.hk/EOC/Upload/submission/Submission_E_19032014.pdf

⁴⁸ Paragraph 7 of the UN Human Rights Committee’s Concluding Observations on the Third Periodic Report of Hong Kong, 29 April 2013, CCPR/C/CHN-HKG/CO/3 states: “Hong Kong, China, should strengthen the mandate and the independence of the existing bodies, including the Ombudsman and the Equal Opportunities

within the Public Consultation process with more vigour and clarity. Only one Consultation Question (no. 60) is taken up with the subject of whether to establish a Human Rights Committee. Limited guidance is given as to what the EOC's views are in terms of structure and mandate for such an institution. In fact only two sentences of the Consultation Document are devoted to this:

*“One option would be to establish a separate Human Rights Commission with jurisdiction over promoting and protecting the human rights under the Hong Kong 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.”*⁴⁹

It is not clear why the alternative proposed by the EOC is limited to expanding its own role to “monitor and promote compliance with the Bill of Rights Ordinance and international human rights obligations” and does not extend to ‘protecting’ those human rights. The EOC already plays a role in monitoring and promoting the Bill of Rights Ordinance and international human rights,⁵⁰ so it is hard to see how simply formalising this function will significantly further the realisation of human rights in Hong Kong. The UK Equality and Human Rights Commission (EHRC), currently accredited by the ICC as an “A Status” NHRI, merged the responsibilities of three statutory bodies comparable to the EOC, namely, the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. In doing so the EHRC emerged as a statutory body vested not only with the responsibility for the promotion and enforcement of equality and non-discrimination laws, but also with a broader mandate to promote and protect human rights.⁵¹ It is noted that the EOC has posed consultation questions related to its powers to monitor and advise on the Government's

Commission. It is also recommended to revise the multiplicity of the existing bodies whose mandate does not afford effective protection of all Covenant rights. Furthermore, the Committee reiterates its previous recommendations (CCPR/C/HKG/CO/2, para. 8) that Hong Kong, China, consider establishing a human rights institution, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles), with adequate financial and human resources, with a broad mandate covering all international human rights standards accepted by Hong Kong, China, and with competence to consider and act on individual complaints of human rights violations by public authorities and to enforce the Hong Kong Bill of Rights Ordinance.”

⁴⁹ Paragraph 6.96 of the Consultation Document

⁵⁰ Paragraph 6.54 of the Consultation Document.

⁵¹ Equality Act 2006. The legal powers of the ECHR are summarised on its website in the following terms: “The ECHR has fewer powers in relation to human rights as in relation to the anti-discrimination equality enactments. However it can: take judicial review proceedings on the basis of breaches of the Human Rights Act, or in relation to any matter in connection with which the Commission has a function; intervene in human rights proceedings taken by others (including in the European Court of Human Rights); or hold inquiries into any issue of human rights (including human rights issues not in the Human Rights Act – for instance the Convention on the Rights of People with Disabilities).” [as it appeared on October 3, 2010].

compliance with international human rights obligations, but these are restrictively defined as “obligations relating to equality and discrimination”.⁵² Equally, the EOC has also posed consultation questions in relation to its powers to intervene or appear as *amicus curiae* in court proceedings⁵³ and to bring judicial review proceedings,⁵⁴ but again the questions are posed such as to limit these powers to within the EOC’s existing mandate of discrimination under the Ordinances. Moreover, the EOC already performs all of these functions, so the only ‘reform’ it is seeking is to amend existing legislation so as to provide for their express power to do so.

21. CCPL submits that the EOC ought to have used this opportunity to explain to the public with full particularity the potential role and mandate of a Human Rights Commission, and the benefits and importance of establishing such an institution in Hong Kong. An effective Human Rights Commission can take a number of forms in terms of framework, but must at the very least be vested with competence to protect and promote human rights, and be given as broad a mandate as possible, these being core requirements of the Paris Principles. CCPL submits Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles. This is not only likely to be the most progressive route towards the realisation of equality, non-discrimination and human rights in Hong Kong, but would also ensure enhanced access to the Human Rights Council, treaty bodies and other UN human rights bodies. The process of establishing a Human Rights Commission should be consultative, inclusive and transparent, and involve all relevant stakeholders, including members of the Legislative Council, relevant government agencies, human rights NGOs, judges, lawyers, trade unions and professional groups, human rights experts and academics.⁵⁵

⁵² Consultation Question number 51

⁵³ Consultation Question number 52.

⁵⁴ Consultation Question number 53.

⁵⁵ See: *National Human Rights Institutions: Best Practice*, Commonwealth Secretariat, 2001.

Submission to the Equal Opportunities Commission's Discrimination Law Review**Hong Kong's International Human Rights Obligations**

Kelley Loper*

Introduction

1. Comprehensive review and reform of Hong Kong's anti-discrimination legislation are long overdue and we welcome the opportunity to respond to the Equal Opportunities Commission's (EOC's) Discrimination Law Review (DLR) exercise. Given its powers and role as the main body in Hong Kong charged with working toward the elimination of discrimination, the EOC is in an ideal position to advocate for much needed legislative change.

2. A number of commentators have noted the slow pace of law reform in Hong Kong generally, and in the discrimination field in particular.⁵⁶ Hong Kong has failed to amend its anti-discrimination laws to meet international standards or to take comparative best practice into consideration. Hong Kong's current body of legislation, much of it based on obsolete UK legislation from the 1970s, does not reflect contemporary developments in other jurisdictions with similar anti-discrimination laws, and does not meet the demands of a modern, diverse, inclusive society. The UK has since amended its legislation to address a number of limitations that had undermined the law's ability to remedy unjustifiable discrimination.

3. Contemporary anti-discrimination laws in the UK and elsewhere reflect growing recognition that the law must ensure substantive, as well as formal, equality and create enforcement models capable of tackling entrenched, systemic discrimination. Without substantial reform, Hong Kong's anti-discrimination legislation will become largely ineffectual. A society like Hong Kong that values diversity and human rights needs strong anti-discrimination legislation in order to compete with other international cities that also attract talent from around the world. In addition, Hong Kong should take its international

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⁵⁶ See generally Michael Tilbury, Simon N.M. Young, and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (HKU Press, 2014) and chapter 10 in particular: Carole J. Petersen and Kelley Loper, "Equal Opportunities Law Reform in Hong Kong: The Impact of International Norms and Civil Society Advocacy", 173-206.

legal obligations seriously. Compliance with international human rights treaties that apply to Hong Kong requires amendment to and expansion of the anti-discrimination statutes.

Problems with the DLR Methodology

4. Given the urgency and clear need for reform, the methodology of the EOC's review raises several concerns. Although the EOC has highlighted many salient issues in its consultation document, the DLR process may have created extra steps that could further delay government action. Alternatively, the EOC could have leveraged its legal expertise, experience, and knowledge of the nature of discrimination in Hong Kong society and presented its proposals directly to the government along with a sound analysis of comparative and international law. At the same time, the EOC could have used its powers and resources to engage in effective awareness-raising campaigns to explain its proposals to the public and the reasons that strengthening anti-discrimination legislation is in Hong Kong's best interests.

5. At that stage, the government could have launched its own consultation exercise or begun drafting new legislation with further input from the EOC and groups that are particularly affected by discrimination in Hong Kong. While public participation is of course desirable when deliberating on law reform, this goal could have been accomplished through the legislative process including the solicitation of public submissions to a Legislative Council Bill's Committee. In any event, the EOC should proceed with caution when analysing the submissions it has received. In particular, it should note that a public consultation exercise is not an empirically sound, scientific study of public opinion. Even a reliable study of public opinion that gathers majority views on these issues has limited value

when determining how best to legislate to protect minorities from discrimination. The majority may not fully comprehend the various minority interests at stake and those not directly affected may not recognize the existence of some forms of discrimination in society.

Hong Kong's Duties to Ensure Equality and Non-discrimination

6. The remainder of this submission examines the Hong Kong government's duties to ensure equality and non-discrimination under international human rights law. It identifies certain provisions in the current body of anti-discrimination legislation that fail to comply with these obligations and require amendment.

7. Hong Kong is bound by seven of the core international human rights treaties.⁵⁷ All but one⁵⁸ create obligations on the government to guarantee equality and non-discrimination on a range of prohibited grounds. Indeed, several of the UN human rights treaty bodies, which monitor states' implementation of their international human rights duties, have commented on Hong Kong's lack of compliance with these obligations and the resulting need to reform its anti-discrimination legislation. The Hong Kong government should carefully consider the recommendations made by these expert bodies and review the existing anti-discrimination statutes to ensure full conformity with international human rights law.

Broad exceptions and omissions

8. First, the government should propose amendments that would either remove or more narrowly tailor any exceptions that currently permit or perpetuate unjustifiable discrimination. Allowing unjustifiable discrimination by way of explicit exemption or by failing to include prohibitions of certain discriminatory acts within the scope of the law is contrary to international human rights standards.

9. The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and other UN human rights treaty monitoring bodies have explained that international human rights law does not necessarily prohibit *all* distinctions on prohibited grounds. In other words, not all forms of differential treatment amount to unjustifiable discrimination and it may be appropriate to include some specific exceptions within anti-discrimination law. A distinction or exception is justifiable, and therefore not discriminatory, if it pursues a legitimate aim, and the means used to achieve that aim meet the tests of necessity and proportionality. For example, the Committee on Economic, Social and Cultural Rights has clarified that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will

⁵⁷ The International Convention on the Elimination of all forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, and the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or punishment.

⁵⁸ The Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or punishment.

include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.⁵⁹

10. Hong Kong's existing legal framework contains a number of overly broad exceptions and exemptions that are unlikely to comply with these requirements, however. For example, section 8(3) of the Race Discrimination Ordinance (RDO) apparently excludes from challenge any distinctions – either direct or indirect - based on nationality, citizenship, permanent residency status, and other similar criteria. Sometimes citizenship or nationality, however, can be used as a proxy for race or ethnic or national origin and unjustifiable requirements or conditions made on these grounds could amount to indirect racial discrimination under international human rights law. While some direct or indirect differential treatment on the grounds of citizenship or nationality may be justifiable in certain circumstances, other forms of such treatment may not comply with the justification test and may therefore amount to prohibited discrimination.

11. The problem with the exceptions in RDO s. 8(3) is that they are drafted so broadly that they fail to distinguish between justifiable and unjustifiable differential treatment. While the Legislative Council may have intended to exclude only *justifiable* distinctions from the scope of the ordinance, the text of the provision goes too far and could inadvertently preclude claims of unjustifiable, indirect racial discrimination. The exceptions for these categories – even if more narrowly tailored – are in fact unnecessary since the definition of indirect discrimination in the ordinance already includes a justification test (see RDO s 4(2)). This test is sufficient to exclude any requirements or conditions involving citizenship, nationality, immigration status, etc. that may have a disproportionate impact on members of certain racial or national origin groups but nevertheless pursue a reasonable, legitimate aim in accordance

⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment 20, Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, 2 July 2009, para. 13. See also, Human Rights Committee, General Comment 18, 10 November 1989, para. 13: "... not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

with the proportionality principle. In other words, *justifiable* distinctions would be allowed under the RDO even if s 8(3) were entirely removed.

12. Another example of an overly broad exception - by way of omission – is the RDO’s failure to include a provision that applies the ordinance to the government in the performance of its functions or the exercise of its powers. This omission makes it more difficult to challenge some unjustifiable racial discrimination perpetrated by government officials or bodies since in practice, the EOC may not be able to investigate such claims. This broad-based exclusion in the RDO for government functions and powers is inconsistent with the other anti-discrimination statutes (see, e.g., the Sex Discrimination Ordinance, s 21).

13. The government should review all of the exceptions contained in the existing anti-discrimination legislation to ensure conformity with international standards and to determine whether such exceptions might permit unjustifiable discrimination. If they do, they should be either removed or more narrowly tailored.

Definition of indirect discrimination

14. The Committee on Economic Social and Cultural Rights has explained that “[i]ndirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.”⁶⁰ The current definition of indirect discrimination in all four of the Hong Kong statutes, however, uses a particularly narrow formulation (referring to a “requirement or condition” rather than a “policy or practice”). Therefore certain forms of indirect discrimination prohibited by international human rights law may be immune from challenge in the Hong Kong context. The government should amend the definition of indirect discrimination in order to reflect international standards and also take into account more progressive developments in other jurisdictions and comparative best practice. The Hong Kong provisions, for example, are much more narrow than definitions found in comparable legislation in other jurisdictions including the UK Equality Act (2010).

Substantive equality

⁶⁰ CESCR, General Comment 20, para. 10(b).

15. International human rights instruments require that governments ensure substantive as well as formal equality and tackle *de facto* as well as *de jure* discrimination. The 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.⁶¹

To comply, the government must fulfil both negative and positive duties. It must refrain from engaging in acts of formal discrimination but must also actively and positively promote substantive equality in fact. In order to achieve substantive equality, the government needs to continuously monitor the Hong Kong situation and identify, address and prevent any actual or potential direct or indirect discrimination. Introducing a positive duty on the government to monitor and mainstream equality throughout the policy-making process would facilitate compliance with these human rights obligations.

16. In addition, in certain circumstances international human rights law requires that governments take special measures or affirmative action in order to achieve substantive equality. The Committee on Economic, Social and Cultural Rights explains that “[i]n order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.”⁶²

17. Substantive equality also requires that states provide reasonable accommodation to persons with disabilities. In order to comply with the general human rights instruments as

⁶¹ CESCR, General Comment 20, para. 8.

⁶² CESCR, General Comment 20, para. 9.

well as the Convention on the Rights of Persons with Disabilities (CRPD), Hong Kong should amend the Disability Discrimination Ordinance (DDO) to more explicitly mandate reasonable accommodation and to include the denial of reasonable accommodation within the definition of disability discrimination.

18. The definitions of disability and pregnancy discrimination should also be amended in order to eliminate the need to identify either a real or hypothetical comparator. The demand for a comparator in these cases often leads to unnecessarily strained reasoning and unpredictable outcomes. The Committee on Economic, Social and Cultural Rights has commented that in addition to less favourable treatment (which implies a comparison), the meaning of “[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)”.⁶³

Prohibited grounds of discrimination

19. The international human rights instruments articulate duties to ensure equality and non-discrimination on a broad range of prohibited grounds. The list of prohibited grounds in the general human rights treaties is non-exhaustive and should be read expansively to include groups defined in relation to certain characteristics that may not be explicitly mentioned in the treaty itself. For example, the UN human rights treaty bodies now agree that disability, age and sexual orientation are prohibited grounds that fall within the “other status” category in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

20. The Committee on Economic, Social and Cultural Rights has provided helpful guidance on interpreting the explicit and implicit grounds listed in Article 2(2) of the ICESCR (which mirror those found in Articles 2(1) and 26 of the ICCPR). The Committee cautions, however, that the grounds discussed in its General Comment are merely illustrative and do not necessarily set out a comprehensive list. The Hong Kong government should adhere to certain principles when proposing relevant changes to the anti-discrimination ordinances. First, it should introduce amendments to the current legislation to address discrimination on *all* prohibited grounds including, for example, sexual orientation, gender

⁶³ CESCR, General Comment 20, para. 10(a).

identity, age, and religion. The DDO should also retain a broad definition of disability that is consistent with the social or human rights model of disability reflected in the CRPD.

21. Second, anti-discrimination legislation should prohibit multiple or cumulative forms of discrimination (discrimination on more than one ground which is often different in nature from discrimination that occurs on a single ground); and third, the legislation should include discrimination by association and when an individual is perceived to have a certain identifying characteristic.

22. In Hong Kong, discrimination against mainland Chinese immigrants based on their origin, their “new immigrant” status, or perceptions about their socio-economic status (or a combination of factors) is a serious issue that has been well-documented. This problem may be particular to the Hong Kong context in light of the SAR’s unique social, economic, political, and historical relationship with mainland China. Despite these particularities, however, the Hong Kong authorities nevertheless have duties under international human rights law to address *all* forms of unjustifiable discrimination on *all* prohibited grounds including discrimination against mainland Chinese immigrants.

23. The term “race” – which includes national or ethnic origin as defined in the RDO and various international human rights instruments – is a social construct and should be interpreted in its broadest sense and consistently with human rights principles. Therefore, the concept of “race” arguably applies to all new immigrants in Hong Kong even those arriving from other parts of the country. For example, the RDO would most likely protect a new immigrant from India who is denied entry to a restaurant because of her status as a new immigrant. *Not* having such “immigrant status” might amount to a “requirement or condition” that disproportionately impacts people of Indian national origin. Similarly, and by analogy, a new immigrant from the mainland who is denied entry to the same restaurant for the same reason might be able to claim national origin discrimination.

24. For the sake of clarity, however, a more explicit category such as “new immigrant status” should be added to the list of prohibited grounds in the RDO or in separate legislation. Failure to remedy unjustifiable discrimination against mainland Chinese immigrants is inconsistent with Hong Kong’s human rights obligations. In the meantime, the EOC should

interpret the existing categories in the RDO as inclusively as possible when pursuing its mandate.

Conclusions

25. The government should introduce amendments to the current body of anti-discrimination legislation to ensure full compliance with Hong Kong's international human rights obligations. These include duties to prohibit all forms of discrimination on all prohibited grounds and to ensure substantive equality. For the sake of clarity, the existing ordinances – and any future anti-discrimination laws and related provisions – should indicate that they intend to implement Hong Kong's international human rights obligations.