



6<sup>th</sup> October, 2014

**Response to the Public Consultation on the  
Discrimination Law Review of the Equal Opportunities Commission**

Hong Kong Unison welcomes the initiative of the Equal Opportunities Commission (EOC) to review the Discrimination Ordinances and the public consultations the EOC conducted for the review. As Hong Kong aspires to be a democratic society and is determined to maintain its rule of law, it is fundamental that Hong Kong has legislation that embodies the value of equality for all, including the most vulnerable groups. People of various ethnicities have settled in Hong Kong for more than a century and it is essential that there are just laws that protect people from race discrimination to maintain our status as a world-class international city.

Hong Kong has signed various international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); we therefore have international obligations to eliminate discrimination by means including legislation. The flaws in the Discrimination Ordinances in Hong Kong have repeatedly drawn criticisms from the United Nations, showing the urgency of a comprehensive review.

While we welcome this public consultation exercise as a means to collect different views on the law review, educate and engage the public as part of a democratic process, we strongly urge that the contents of minority rights should not be decided based on consensus or the number of people in support or opposition; otherwise, we can never fully protect minorities from discrimination by the majority.

Hong Kong Unison supports the following proposals of the EOC in particular:

***A. Bringing the Government's exercise of powers and performance of functions expressly within the purview of the Race Discrimination Law (Question 35 in the EOC's consultation document<sup>1</sup>)***

The Government's commitment to racial equality is of the utmost importance, and this must be fully and visibly reflected in the way the government exercises its powers and functions. Currently, the performance of functions and the exercise of powers of the Government are

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<sup>1</sup> Document issued by the EOC for the purpose of public consultation on the Discrimination Law Review.



not within the purview of the Race Discrimination Ordinance (RDO). There is no provision in the RDO which states that it is unlawful for the Government to discriminate against persons on the grounds of race in the performance of its functions or the exercise of its powers; and the RDO is the only Ordinance amongst the four Discrimination Ordinances that has this key flaw. This suggests that the Government does not consider equal rights for ethnic minorities and treats ethnic minorities as second-class residents. The United Nations Human Rights Commission has shown concern over this gap and recommended Hong Kong to rectify the gap in close consultation with the EOC, in order to ensure full compliance with Article 26 of the ICCPR, in its *Concluding Observations* on Hong Kong in 2013. We held a consultation meeting with our service users during this 3-month consultation period and the vast majority of the participants support rectifying this gap. Hong Kong Unison strongly supports the EOC's proposal of expressly bringing the Government's exercise of powers and performance of functions within the purview of the race discrimination law.

Besides the Government, discrimination legislation should be applied to public authorities in relation to the exercise of powers and performance of functions and to other bodies in relation to the performance of public functions.

As recently as August this year, the Government argues that bringing the Government's performance of functions within the purview of race discrimination law would cause uncertain and long-term adverse impacts on the Government's ability to formulate and implement policies and may lead to litigations. Indeed, when the Race Discrimination Bill was debated by the Bills Committee in 2008, the government also argued that this would subjugate policy decisions to the judgment of the courts and detract resources unnecessarily hence affect the effectiveness of government administration. Such are blatant claims that show the Government does not consider itself obliged to abide by legal principles such as non-discrimination when making and implementing policies. It is therefore all the more important for the race discrimination law to apply to the Government's exercise of powers and performance of functions. Moreover, often the individual cannot find a substitute for Government's powers and functions, making it important for the discrimination laws to apply to them.

The Government claims that the sections in the Race Relations Act 1976 of the United Kingdom that expanded the scope of the Act to cover government functions were introduced in 2000 against the background of racial violence and institutional racism there. Those sections in the United Kingdom were introduced after the *Stephen Lawrence Inquiry Report* in 1999 on the handling of the killing of the black youth Stephen Lawrence by the



police. It seems the Government considers that it is only necessary to make itself bound by race discrimination legislation when such tragedies happen.

Furthermore, the Government has submitted to the United Nations that the Basic Law and the Bill of Rights Ordinance prohibit it from engaging in practices that would entail any form of discrimination; so specific race discrimination legislation does not have to apply to government functions. Such an excuse is unacceptable. Moreover, the remedies and time bars of a judicial review and a claim under the RDO are different and victims cannot benefit from the complaint handling process or legal assistance of the EOC if they do not have a claim under the RDO.

***B. Introducing the public sector equality duty (Question 41 in the EOC's consultation document)***

We support the EOC's proposal of introducing duties on public authorities to promote and mainstream equality. This proactive approach will better address discrimination, especially institutional ones, than the current complaint-based approach, as public authorities would be required by domestic legislation to actively promote equality and eliminate discrimination instead of just refraining from discrimination. The United Nations Human Rights Committee has recommended Hong Kong to introduce statutory obligations on public authorities to promote equality and to eradicate discrimination in 2013. The vast majority of our service users who attended our consultation meeting also support introducing this duty.

Although the current *Administrative Guidelines on Promotion of Racial Equality* states that the Government should take steps to promote race equality, the Guidelines are not statutory and enforcement by the Government is weak. Also, the Guidelines do not apply to all Government departments and public bodies. Therefore, it is necessary to introduce these duties in our legislation.

When the Race Discrimination Bill was debated by the Bills Committee in 2008, the government again claimed that introducing such duties will incur a host of administrative and documentation work, involving significant resources and manpower requirements. We stress that these public sector duties will surely enhance the protection of the rights of ethnic minorities, which should not be outweighed by concerns over resources.

To strengthen the advocacy for this public sector equality duty, the EOC should do more research and educate the public about factors or good practices in other countries that are necessary for the effective implementation of this duty.



**C. Including nationality, citizenship, residency and related status as protected characteristics** (Questions 11 to 16 in the EOC's consultation document)

Section 8(1) of the RDO provides that "race" means the race, colour, descent or national or ethnic origin. Section 8(3) expressly provides that nationality, citizenship, residence and related status are not within the protected characteristics of race. Besides race discrimination, ethnic minorities also face discrimination on these grounds. This gap makes them unprotected or it is unclear whether they are protected by the RDO in some situations.

For example, for many years there have been cases of banks taking a much longer time and/or refusing to open bank accounts for people of certain nationalities. This leads to inconvenience on employment, receipt of social benefits such as the CSSA, and financial assistance for students of ethnic minorities, which could affect their right to subsistence. This problem with bank services has not been effectively addressed after the RDO came into operation in 2009.

Other examples relate to employment. Our service users have complained that ethnic minority construction workers who are permanent residents of Hong Kong sometimes receive a lower pay if they do not hold an HKSAR passport. Furthermore, when our ethnic minority service user, who is a permanent resident of Hong Kong but not a Chinese national, sought employment, the employer questioned whether she could legally work in Hong Kong because she did not have "3 stars" on her Hong Kong Identity Card.

In 2009, the United Nations Committee on the Elimination of Racial Discrimination (CERD) has recommended Hong Kong to include in the RDO immigration status and nationality as prohibited characteristics of discrimination. As recently as May 2014, the United Nations Committee on Economic, Social and Cultural Rights has shown concern over this and urged Hong Kong to eliminate the widespread discriminatory practices against immigrants and internal migrants from other parts of China.

The vast majority of our service users who attended our consultation meeting also support including nationality, citizenship, residence and related status as protected characteristics under the law. Therefore, we support the EOC's proposal of repealing the exception to race discrimination on the grounds of nationality, citizenship, and residence and related status under section 8(3). These should also be express provisions that these are protected characteristics under the race discrimination law.



Regarding residence and related status, it is possible to introduce exceptions related to social welfare and government functions such as housing, education and social security, but each exception must be individually justified on grounds of legitimacy, reasonableness and proportionality. Also, the Basic Law provides that permanent residents have the right to vote and to stand for elections, which would not be affected by the Discrimination Ordinances.

The Government has submitted to the United Nations that the current definition of race under the RDO is the same as that in ICERD. However, the United Nations CERD has issued its General Comment 30 on Discrimination against Non-Citizens in 2004, which provides that ICERD should not be interpreted to detract in any ways from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the ICESCR and the ICCPR. Also, it provides that states are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of civil, political, economic, social and cultural rights. Furthermore, the above-mentioned comments in the Concluding Observations of different United Nations treaty bodies also show that discrimination legislation should apply to discrimination on the grounds of nationality, citizenship and residence and related status as protected characteristics to meet international human rights standards.

If nationality, citizenship and residence and related status are included as protected characteristics, even if there remain exceptions relating to immigration and naturalization matters, such exceptions have to be made in line with international standards. The relevant requirement or practice should be for a legitimate aim and proportionate. Paragraph 2 of Article 1 of ICERD provides that any legal provisions concerning nationality, citizenship or naturalization should not discriminate against any particular nationality.

We understand that there is much controversy on including protection from discrimination based on residence status, as it is seen by many as favouring new arrivals and immigrants. The Government has previously admitted that new immigrants face discrimination but tried to side-step the issue by saying that this was “social” and not “racial” discrimination based on the current definition of race under the RDO. This is unfair and should be changed. We stress that everyone, no matter what his or her nationality, citizenship and residence status is, be protected against discrimination. At the same time, the Government should substantially strengthen its public education efforts on this issue.

***D. Removing the Exemption Regarding the Medium of Instruction in Education and Vocational Training (Question 38 in the EOC’s consultation document)***



Sections 20(2) and 26(2) of the RDO provide that schools and vocational training institutions are not required to modify or make arrangements regarding the medium of instruction for persons of any racial groups. We support the proposal of the EOC to remove this blanket exemption. Schools and vocational training institutions should be required to consider ethnic minorities' access to equal education and employment opportunities as one of the factors in deciding on the medium of instruction. There have been cases of members of ethnic minorities being unable to receive vocational training in certain fields because institutions are not required by the RDO to instruct in one of our two official languages that is more accessible to ethnic minorities, which is currently English in most cases. Also, many courses in tertiary institutions where the medium of instruction is supposedly English, in practice, are taught in Cantonese because the instructor and/or the majority of the students prefer Cantonese.

Hong Kong Unison has been advocating for years that ethnic minorities should have equal opportunities as Chinese students to learn both Chinese and English, our official languages, at school in order to have equal further education and employment opportunities. The provision of such equal opportunities should not be compromised by the removal of this blanket exemption about the medium of instruction. Also, the government has not done enough to promote, consult and give practical support or sufficient thought to realistic transitional provisions. Parents and students, including those of ethnic minorities, should be given adequate information from the government about the support system for learning Chinese and English so that they can have an informed choice when they choose schools.

As a matter of practicality, we hope the EOC would address concerns over schools' choice between Chinese and English, Cantonese and Putonghua, and Traditional Chinese and Simplified Chinese as the medium of instruction. Some of our service users have also expressed their concerns over, in the situation where ethnic minorities are outnumbered by Chinese students, whether schools will have to teach in Chinese, even if the schools have originally promised to teach in English.

In addition to supporting the above-mentioned proposals by the EOC on the Discrimination Ordinances, we would like to express our views regarding some other issues about this law review as follows.

1. *Question 1 in the EOC's consultation document:* We support consolidating the four Discrimination Ordinances into one because it will be easier for stakeholders to navigate and allow protected characteristics to be added in future. There should be no reduction in the protection currently provided for by the Ordinances after consolidation.



2. *Question 17 in the EOC's consultation document:* For the definition of direct discrimination, we agree with the EOC that it should be amended to include any less favourable treatment on grounds of a protected characteristic, rather than a protected characteristic *of the person*.

3. *Question 20 in the EOC's consultation document:* Regarding indirect discrimination, the current definition requires the existence of a formal requirement or condition, which is too restrictive. This formulation of indirect discrimination was originally modeled on the law of the United Kingdom, which had been amended to include provisions, criteria and practices, the scope of which is much broader as it covers informal practices. We agree that a corresponding amendment should be made to our discrimination legislation to include provisions, criteria and practices in the formulation for indirect discrimination.

4. *Question 29 in the EOC's consultation document:* We support introducing the provision protecting people from intersectional direct and indirect discrimination, as well as harassment. This is because the way people are treated is shaped by a combination of characteristics. For example, ethnic minority women sometimes receive differential treatment due to both their sex and race. Currently, the RDO expressly provides that racial segregation is a form of direct discrimination but there is no such express provision in the Sex Discrimination Ordinance. Any amendment made to discrimination legislation about intersectional discrimination should be made such that segregation on the grounds of race and sex operating intersectionally is a form of direct discrimination too.

5. *Question 30 in the EOC's consultation document:* The RDO applies to direct discrimination and racial harassment by association, but only with a near relative of a particular race under Sections 5 and 7. An amendment should be made to broadly define "association" to include association by immediate family, other relatives, caring responsibilities, friendships and working relationships.

6. *Question 31 in the EOC's consultation document:* Currently, among the four Discrimination Ordinances, only the Disability Discrimination Ordinance (DDO) expressly applies to discrimination by perception. There should be express protection from discrimination by perception across all existing protected characteristics.

7. *Question 33 in the EOC's consultation document:* Currently, only the DDO prohibits requesting or requiring information for a discriminatory purpose. This prohibition should be extended to all existing protected characteristics.



8. *Question 39 in the EOC's consultation document:* Regarding the various gaps in protection from harassment mentioned from Paragraphs 4.61 to 4.79 of the EOC's consultation document, we agree that new provisions should be introduced for all the protected characteristics which provide (i) 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, (ii) common workplace liability on the person harassing but there is no employer/employee relationship, (iii) liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action, (iv) liability of service users for harassing the service providers, (v) liability of service users for harassing other service users, (vi) liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services, (vii) liability of tenants and subtenants for harassing other tenants or subtenants and (viii) liability of the management of clubs for harassing members or prospective members.

9. *Question 40 in the EOC's consultation document:* Regarding special measures, we support the proposal of the EOC to conceptualize special measures as proactive measures to promote substantive equality rather than exceptions to non-discrimination. It is also important to make the definition of special measures and the test of whether an action counts as a lawful special measure clear in our legislation, as any uncertainty could deter various organizations or persons from taking special measures altogether so as to avoid violating the law. We support introducing the test of proportionality as the United Kingdom model does.

10. *Questions 42 and 43 in the EOC's consultation document:* Regarding aspects of court proceedings, given the difficulty of proving discrimination claims, we support introducing provisions to 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. Also, damages should be able to be awarded for indirect discrimination even where there was no intention to discriminate.

11. *Questions 47 and 49 in the EOC's consultation document:* Currently the Discrimination Ordinances provide that the EOC can conduct both general and specific formal investigations, but this should be made clearer in the law. Also, where formal investigation are conducted and it is identified that a public authority or private body may have committed acts of discrimination, a mechanism should be introduced by which the EOC can



enter into a voluntary agreement with that body to prevent future discrimination. Such binding undertakings should be enforceable by the EOC.

12. *Questions 45, 51-54 and 59 in the EOC's consultation document:* The powers of the EOC to institute judicial review proceedings, to apply to intervene in or appear as amicus curiae in court proceedings and to monitor and advise the government on legislation and international human rights obligations should be clearly and expressly provided for in the laws. The EOC should be able to initiate proceedings in its own name for discriminatory practices, as this will allow the enforcement of the law where there could be no complainant. The EOC should be required by legislation to produce a strategic plan in consultation with the public that sets out its strategic priority areas of work over several years. Also, there should be express provision restricting disclosure of information arising from complaint handling by the EOC in accordance with the principles of confidentiality.

13. *Questions 55 to 57 and 60 in the EOC's consultation document:* We strongly support introducing provisions providing for the maintenance of the independence of the EOC from the Government, including the appointment of its Board members, and requiring Board members of the EOC to have suitable experience in any relevant areas of discrimination or promoting equality. Moreover, a Human Rights Commission with a broad mandate to handle all human rights matters and fully compliant with the Paris Principles should be established. Various treaty bodies of the United Nations have recommended the establishment of such a Human Rights Commission.

14. *Questions 76 and 77 in the EOC's consultation document:* The exception relating to the recruitment of employees from overseas with special skills, knowledge or experience under Section 13 of the RDO should be repealed. If a person is employed because of their skills and experience rather than race, that should not amount to direct discrimination and it could probably be justified and not amount to indirect discrimination. Similarly, regarding the exception relating to having specified public positions on different terms of employment, the EOC only poses the question of whether the Government should review these terms; however, we consider that the EOC should go further and propose to repeal this exception in the legislation.

Besides the substantive issues about the law review raised in the EOC's consultation document, we would also like to comment on the advocacy strategy and the public education work of the EOC as well as the present public consultation exercise.

### **Advocacy strategy of the EOC**



We urge the EOC to devise a clear and effective strategy for advocating these proposed amendments. Also, before this consultation exercise, the EOC has done far from sufficient groundwork for advocating these amendments, such as public education on the content of the law and why the gaps in the ordinances need to be rectified. Although not a small number of our service users have heard about the existence of the RDO, almost none of them knew about the content or the various flaws of the RDO. Many of our service users told us that they find it difficult to give in-depth comments on the law review during this short 3-month consultation period.

After this public consultation period when the EOC advocates the Government to accept the proposed amendments, the EOC should prioritize the issues raised in this consultation exercise for the sake of effective advocacy.

### **Consultation meetings conducted by EOC**

Since the public consultation started in July, there have been discriminatory and confrontational sentiments against certain groups among some members of the public, as shown in online forums and the EOC's public consultation forums. As a right-based NGO, we stress that no groups or individuals should be discriminated against. These discriminatory sentiments expressed during the consultation period show that it is all the more necessary to amend our legislation so that it would adequately protect all vulnerable groups. Also, some of the comments made in consultation forums and online forums are based on misunderstandings of concepts such as discrimination. We urge the EOC to proactively make the mass public understand these concepts, for example through the media and publishing a set of "Frequently Asked Questions". A correct understanding of these concepts among the public is as fundamental to achieving equality as the adequacy of the law under review.

In summary, we have the following questions for the EOC:

1. What strategy does the EOC have for advocating the proposed amendments? How would the EOC prioritize the proposed amendments?
2. Against the discriminatory sentiments shown in the public consultation period, how would the EOC promote the spirit of non-discrimination and the correct understanding of concepts related to discrimination to the public so that advocacy for these amendments and equality at large can continue effectively?