

**HONG KONG EQUAL OPPORTUNITY LAW —  
LEGISLATIVE HISTORY ARCHIVE, 1993–1997**

**Document archive  
Vol. 2**

**Centre for Comparative & Public Law  
Faculty of Law  
University of Hong Kong**

**June 1999**

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## 香港婦女基督徒協會 致平等機會條例草案委員會意見書

香港婦女基督徒協會成立於一九八八年，一向致力促進教會與社會的兩性平等。

本會對胡紅玉議員以私人法案方式向政府提交「平等機會條例草案」，使香港不同階層的市民的人權得到進一步的保障，表示極大的支持。以下本會將就此草案提出我們的意見，供諸位參考：

(一)我們認為胡議員的平等機會條例草案比政府草擬的性別歧視法例更能全面地保障婦女的人權，因為政府所草擬的性別歧視法例並不包括年齡的歧視、因家庭責任或家庭狀況所造成的歧視，而對婚姻狀況及懷孕的歧視亦只限於就業的領域。此外，性別歧視法例會繼續保留新界若干歧視婦女的條文，如祇惠及男性的丁屋政策及剝奪婦女政治權利的選舉制度。

(二)胡議員草案中有關宗教及政治信念的歧視方面，我們感到香港作為一個自由開明的社會，應該容讓每個人有持不同信念的權利而不受社會的歧視，如女性主義、綠色主義等。因此我們希望草案可以包括對此類人士的保障。

(三)我們認為草案對宗教團體任命神職人員、宗教機構在聘請職員等方面將列為一般性例外，不受平等機會法的影響表示反對。因為現時宗教團體內部有些運作是違反了平等的精神，例如教會中男女傳道同工不同酬的制度、堂主任必須男性擔任、教會機構聘請員工時，儘管工作性質與信仰絕無關係，但相同的宗教信仰仍是必要條件及對同性戀者的排斥等。我們認為這種豁免的方式會使教會內一些不平等的問題繼續保留不變，是極不公平的；況且，草案所倡導的公義與平等的價值亦是基督教信仰中重要的部份。

出席代表：胡露茜(聯絡人)  
何麗嫻  
陳裕昌  
李天機

日期：九四年十月廿八日

## Appendix II

## 附錄II

香港婦女勞工協會就平等機會法案及性別歧視草案《意見書》 10.1994

本會的宗旨是以關心婦女勞工問題，爭取婦女勞工權益、團結婦女勞工力量為主。本會所介定的婦女勞工是包括有參與勞動的婦女、全職、兼職受薪及非受薪的家庭主婦。基於本會宗旨，我們是致力於推動兩性平等、社會公義及維護人權的工作。就平等機會法案及性別歧視草案有以下的意見：-

→落實人人共享的平等機會法案-

本會基本上是支持胡紅玉議員動議的平等機會法案，因為其包括的範圍十分全面，可確保在不同情況及背景下的人獲得平等機會的保障。唯一補充的範疇是有關女性生理需要上所受到的歧視問題未被包括在保障範圍內，例如月經假。

至於性別歧視草案中所包括的範圍，本會認為非常狹窄，就是有關性別歧視的範圍上也沒有包括性傾向和家庭責任，如因為是照顧者身份而被剝奪了平等就業、居住等權利。

本會極為不滿有關草案沒有加入年齡歧視的範疇，是漠視了女性現今所面對因年齡歧視而被剝奪了平等就業權利，超過二十多萬年過三十的製造業女工正因為工業北移，而在轉業時受到不合理的年齡歧視問題。此外，有不少婦

女在不足夠資助幼兒服務的情況下被迫放棄工作而留在家中照顧孩子，但當孩子漸長，婦女希望再投入社會工作時卻因年齡限制而被拒絕聘用。

本會亦認為此草案沒有真正誠意落實人人平等的原則，其他方面的歧視如種族、殘疾人士、宗族、政治取向、工會會籍等重要問題亦未被納入法案的保障範圍。

二) 性別歧視草案所提及的範圍也不夠全面，因重點只放在就業上面沒有包括生活上其他環節如居住權利、教育、獲得社會資源、設施、服務的權利。如婦女住屋受婚姻狀況而被拒絕租住房屋，又或因單親家庭背景而遭學校收讀時的歧視。這些環節在草案中並未獲得保障。

三) 本會認為平等機會委員會的功能應加入推銷及提供資源協助一些被歧視者獲得平等的機會，這可以說是「正面」的歧視措施，(positive discrimination) 如提供托兒服務於工作間，社區服務、進修中心等讓婦女獲得選擇機會，和平等條件。

四) 性別歧視草案中的平等機會委員會的角色混淆，一方面足調解，另一方面卻又代表當事人提出訴訟。兩者的處理方法、程序各異，而調解的本質往往需要雙方讓步，這亦會影響委員會立場，加上，如果調解決敗而歸咎當事人，亦可能令當事人失去日後訴訟時的協助。因此，本會認為委員會的角色應着重訴訟的角色，而調解工作則由個案跟進部門處理。如果當事人認為沒需要調解，可直接進行申請訴訟程序。這令委員會之角色更清楚

亦可減省了時間、人力和資源。

總括來說，本會支持平等機會法案，認為此舉能更進一步推動、落實人人平等的原則。而就政府提之草案，應作出修訂，將其範圍擴大至更全面保障平等權利。

荖灣大會堂—轉業廣場收回問卷資料

日期:94年9月2日—10月2日

<表一> 覺得女人三十歲以上搵工困難

	是	冇註明	總數
人數	98	3	101
百分率	97.03	2.97	100

<表二>原因

原因	年齡歧視	輸入外勞	工業外移	非工作需要學歷要求	待遇低	工作條件差
人數	95	77	67	61	49	34
百分率	94.06	76.24	66.34	60.4	48.51	33.66

<表三.一>就業情況

	未找到工作	全職	兼職	總數
人數	76	10	15	101
百分率	75.25	9.9	14.85	100

<表三.二>人數(百分率)

處境	情況	未找到工作
年齡限制		68(89.47%)
要求過高學歷		46(60.53%)
工資太低		46(60.53%)
工時長		44(57.89%)
保障少		28(36.84%)

<表四>已停業

月	人數	百分率
1-3	12	15.79
4-6	16	20.05
6個月以上	38	50
冇註明	10	13.16

<表五.一>希望找到的工作

	全職	兼職	全兼職	冇註明	總數
人數	73	13	7	8	101
百分率	72.28	12.87	3.93	7.92	100

<表五.二>選擇職位(全職)—可選多項

	清潔	傳呼機	信差	辦公室助理	售貨	社會服務	酒店	其他	冇註明
人數	10	14	13	38	14	33	24	5	3
百分率	13.7	19.18	17.81	49.32	19.18	45.21	32.88	6.85	4.11

<表五.三>全職要求薪金

要求薪金	\$4000-5000	\$5000-6000	\$6000以上	冇註明	總數
人數	22	26	9	16	73
百分率	30.14	35.62	12.33	21.92	100

<表六>失業前或現有的收入約佔家庭開支

	1成以下	1-2成	2-3成以上	冇註明	總數
人數	5	15	68	15	101
百分率	4.95	14.85	65.34	14.85	100

<表七>曾否試過搵工時,其他條件適合,而年齡超過指定而遭拒絕

	未試過	試過	冇註明	總數
人數	9	81	11	101
百分率	8.91	80.2	10.89	100

<表八>覺得可以改善婦女就業處境方法

方法	人數	百分率
立法禁止年齡歧視	82	81.19
設立最低工資制	63	62.38
停止輸入外勞	78	77.23
參加再培訓計劃	50	49.5
增加托兒服務	33	32.67
冇註明	2	1.98





新 婦 女 協 進 會  
ASSOCIATION FOR THE ADVANCEMENT OF WOMEN

盧程燕佳女士：

收到電傳有關安排本會在十月三十一日  
上午十一時至十一時三十分會晤平等機會條例草  
案審議委員會一事。本會當日出席的代表為：

張月鳳 CHEUNG YUET FUNG      袁嘉華 YUEN KA WAH  
莫慶軒 MOK HING LUN      洪雪蓮 HUNG SUET LUN

本會擬就下列問題與委員會討論。

1. 本港當前急需立法解決的婦女問題。
2. 平等機會條例草案能否在法例上  
達致男女平等。
3. 在性別問題上，如何制訂政策以解  
決法例上的不足？
4. 平等機會條例草案與性別<sup>歧視</sup>條例草案的  
關係。

新婦女協進會

張月鳳啟

香港九龍彌敦道 444 - 446 號富祥大廈 8 - A

8 - A TSANG CHEUNG HOUSE 444-446 NA HAN ROAD KLN HONG KONG

TEL 751900

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# 推廣人權及平等機會

## 新婦女協進會就立法局議員胡紅玉提交的人權及平等機會委員會條例草案 (1994年3月)及平等機會條例草案(1994年1月21日)的回應

1. 無論在條文意義及精神上，本會均支持上述兩項草案。不過，我們希望草案就平等機會方面，能表達真正平等的態度。

平等主要的目的，是就不同情況作出適當的修正，以對我們作出回應。但我們認為，為提供真正的修正，並不能帶來真正的平等機會。平等機會條例所列目標(c)及(d)兩項，「提高社會對……平等機會……的認同及接受」並不足夠。我們建議就這目標在兩項內增加兩個目標：

- 一 提倡香港社會的男女平等
- 二 提倡香港社會人人平等，不分種族、宗教、或階級、殘疾及年齡。

2. 本會贊同上述條例對社會止暴、人權，及香港政府履行國際公約的承諾的強調。不過，我們關注範圍中的人權及平等機會委員會是否具備足夠權力，就市民提出的投訴作出調查。我們亦關注有關的人權及平等機會委員會及平等機會督導處的其他支援組織。



1. 我們關注平等機會督導處專員具備對投訴、人權問題的意識及專長。上述條例就這方面的要求，在一定程度作出保證。本會樂於支持。
4. 本會認為非政府機構的專職責任，應由政府承擔。我們對人權及平等機會委員會條例第57條感到滿意。
5. 本會亦關注在投訴情況下產生的處理專員的例外情況。我們認為人權及平等機會委員會條例第74條就這情況作出妥善安排。
6. 本會認為法庭訴訟所牽涉的費用，不應對申請人尋求賠償構成阻礙。我們對人權及平等機會委員會條例第64條的條文感到滿意。
7. 我們認為平等機會條例第33條就特別情況的例外情況提供合理及充份的理由。

編按：胡紅玉的兩條條例草案於七月六日在立法局首讀，如欲了解上述兩條條例草案的詳情，請向胡紅玉議員辦事處查詢：5372466。



# WOMEN'S RIGHTS

**WORKING COMMITTEE OF THE EQUAL OPPORTUNITIES BILL FOR  
MIGRANT WORKERS**

**PRELIMINARY COMMENTS ON EQUAL OPPORTUNITIES BILL**

**1. Introduction**

We are a group of organizations who work with, support or represent migrant workers in Hong Kong. Our organizations vary in composition, size, structure, services and aims but we have in common the interests of the migrant worker community in Hong Kong, in particular foreign domestic helpers of whom there are over 130,000.

Our consultation process on the implications of the Equal Opportunities legislation being proposed is not yet complete and at this stage therefore our comments are preliminary. We are however in support of the comprehensive equal opportunities legislation proposed in this Bill and we wish to highlight the need for such legislation with regard to foreign domestic helpers in Hong Kong.

**2. The Bill and Foreign Domestic Helpers**

As fully active participants in Hong Kong society foreign domestic helpers would benefit from the protection offered against all types of discrimination provided for in this legislation and in all activities referred to. We therefore support the inclusion of all types of discrimination proposed in this Bill.

Although foreign domestic helpers would benefit from legislation on all types of discrimination those areas which are particularly relevant for foreign domestic helpers are the sections relating to sexual and racial discrimination and sexual and racial harassment, both of which we consider to be of crucial importance.

**3. The Need for legislation on Sexual and Racial Discrimination**

A great number of foreign domestic helpers in Hong Kong are women and like any woman in Hong Kong they need the protection of anti sexual discrimination legislation particularly in the field of employment, both in terms of recruitment and conditions of work.

Complaints of sexual harassment are all too common. Foreign domestic helpers are particularly vulnerable as they work in the employer's home where the normal safeguards and restraints do not operate to deter a potential perpetrator.

At present a foreign domestic helper has no remedy for sexual

harassment but to leave her job. For a foreign domestic helper this has dire consequences. She will have paid a large sum of money to an agency in her home country to arrange her contract in Hong Kong and normally she will have had to borrow to raise that money. The operation of the two week rule by the Immigration Department means that if she leaves her job she will be forced to return to her home country within two weeks of termination of the contract unless she can persuade the Immigration Department that she was abused. This means extreme financial hardship not only for the domestic helper but also her family. As a result many will endure sexual harassment (and other forms of ill treatment) as they cannot afford the consequences of terminating the contract.

This legislation is important because it recognises sexual harassment as an offence and provides remedies against it. It also serves to promote a culture which says that sexual harassment will not be tolerated in Hong Kong.

In relation to race discrimination foreign domestic helpers face racism in many areas including employment, services, and in the administration of laws and government programmes.

Some examples of this are well known through publication in the media, for example, the notice posted in a residential block of flats to the effect that Filipino's were not permitted to use the main lift. This is blatant racism and at present there is no remedy for such offensive behaviour.

In a more serious case a Filipino woman whose foot was run over by a taxi driver was charged with assault by the Police. This type of behaviour also resulted from a racist attitude and although it was the subject of complaint by the Philippine consulate no more effective remedy is available. Unfortunately many foreign domestic helpers face racist attitudes among the police which is particularly reprehensible when they the Police are often the only source of protection available to foreign domestic helpers in confrontations with employers.

There are many more examples of racism, some more hidden and some more blatant. Many acts of racism go unnoticed often because they are not recognised as racism. Many foreign domestic helpers face racism in their dealings with government departments in particular the Immigration Department. This is not only in relation to policy but the implementation of that policy and individual dealings with officers.

Racial harassment is common, with foreign domestic helpers being subject to racist comments in circumstances where it is impossible for them to object, for example, in the Immigration Department where their objection would almost certainly adversely affect the outcome of their application under determination.

Racist attitudes and practices are also encountered in services and other areas, for example, financial services, in the practices of employment agencies, in the policies of property management agencies.

The importance of this legislation is not only in the provision of remedies for discriminatory behaviour. It is a crucial element in the endeavour to raise awareness of and eliminate discriminatory attitudes. It will serve to drive the message home to Hong Kong society that racial (and other) discrimination will not be tolerated in Hong Kong.

#### **4. Access to Remedies**

No legislation is of any value unless remedies are both available and accessible. For many foreign domestic helpers seeking a remedy against discrimination or harassment in the courts in Hong Kong would be well beyond their financial means. If legal aid were available it would be more feasible but even then the delays in the judicial system are formidable obstacles to a migrant worker whose stay in Hong Kong is limited. It is well known that the Labour Tribunal, intended to provide speedy resolution of claims, is completely bogged down with the sheer volume of cases, with claims currently taking one year or more to be resolved.

An Equal Opportunities Tribunal is essential to provide speedy and effective redress (and penalties) for breaches of equal opportunities legislation. Access to those remedies should be granted irrespective of the aggrieved party's financial standing.

An Equal Opportunities Commission should be established to promote equal opportunities and such a commission should be charged with the role of educating the community on issues of racial and other forms of discrimination.

#### **5. Proposed amendments to the Bill**

The Bill provides for exceptions on selection for employment where the post is the performance of domestic duties in the residence of the employer.

We do not think that this exception is justifiable particularly in relation to race. The home cannot be regarded simply as the employer's home, it is also the domestic helpers work place and discrimination of any kind should not be acceptable in any work place.

The race of a domestic helper is irrelevant to the duties to be performed by a domestic helper. It is understandable why an employer might wish a domestic helper to be culturally compatible for example a muslim family might wish his or her helper to be

muslim as certain aspect of that faith may require certain practices in the home that only a muslim helper would be capable of performing. In that case however the employer should require a muslim, not a Indonesian muslim or an Indian muslim.

It is our experience that when employers are allowed to advertise for certain races or nationalities it is with the intention of providing less favourable working conditions as they are of the opinion that some nationalities will tolerate such conditions more than others. For example some employers will advertise for an Indonesian helper with the intention of paying her less than the minimum wage and that employer will expect that an Indonesian will not complain.

The exception in the Bill not only sends the message that such discrimination is tolerable in Hong Kong but it serves to encourage exploitation of certain groups of foreign domestic helpers. This is not acceptable.

## **6. Conclusion**

As mentioned in the introduction our comments at this stage are preliminary. In principle however we support the aims of this Bill and regard the need for such legislation in Hong Kong as long overdue. Migrant workers in Hong Kong need the protection and remedies offered in the Bill and we consider it essential to take effective measures to eliminate discrimination as soon as possible.

### **List of Organizations**

Asian Domestic Workers Union  
Asian Migrant Centre  
United Filipinos in Hong Kong (UNIFIL)  
Mission for Filipino Migrant Workers  
Caritas  
Helpers for Domestic Helpers  
Asia Alliance of YMCA's  
Friends of Thai in Hong Kong (FOT)  
Asia Monitor Resource Centre  
Movement Against Discrimination  
Oxfam

## 平等機會條例草案外地勞工工作委員會

### 對平等機會條例草案的初步意見

#### 1. 引言

本委員會由多個支持或代表本港的外地勞工，或與外地勞工一起工作的團體組成。雖然彼此在成員、規模、結構、服務及目標方面均有所不同，但我們卻有一共同基礎，就是致力促進本港所有外地勞工的權益，其中人數超過十三萬的外籍家庭傭工，更是我們的關注對象。

由於我們就平等機會條例草案所涉影響而進行的諮詢工作尚未完成，故在現階段只能發表初步意見。對於條例草案建議全面立法，使人人機會平等，我們深表支持，更希望強調，對本港所有海外家庭傭工來說，制訂此項法例實屬必要。

#### 2. 條例草案與海外家庭傭工

此項條例草案涵蓋各種歧視形式及活動，保障範圍廣泛，作為全面積極投入本港社會的一分子，海外家庭傭工定可從中受惠。因此，我們對條例草案建議把一切形式歧視納入保障範圍，表示支持。

雖然海外家庭傭工會因條例草案針對一切形式的歧視而受惠，但草案中有若干範疇與海外家庭傭工特別有關，分別是性別與種族歧視，以及性騷擾與種族騷擾的部分，我們認為兩者都是非常重要的。

#### 3. 立法消除性別與種族歧視的需要

本港大部分海外家庭傭工都是女性，與本港其他婦女一樣，她們很需要當局制訂反性別歧視法例，為其提供保障，特別在就業方面，婦女尤其需要保障，以確保在聘用或工作條件上免受不公平的對待。

在香港性騷擾的投訴屢見不鮮，海外家庭傭工在僱主家中工作，更易受到侵犯，因為一般的防範措施和限制，在這樣的工作環境並不適用，以致侵犯者往往有機可乘。

目前，海外家庭傭工對於性騷擾並無對策，除了辭職不幹外，別無他法。但是，這樣做對海外家庭傭工來說，可謂後果堪虞。她們在原居地為安排來港工作的合約，已向傭工介紹所繳付了一大筆金錢，為了籌措此筆費用，她們很多時被迫舉債。按人民入

境事務處的現行規定，海外家庭傭工在合約終止後兩星期必須回國，除非她可說服人民入境事務處其本人遭受僱主虐待。海外家庭傭工一旦失去工作，不但自己要承受沉重的經濟負擔，其家人亦一樣會陷入經濟困境。基於這緣故，許多海外家庭傭工面對性騷擾（以至各種苛待），都是逆來順受，因為她們根本無法承受終止合約的後果。

在這方面，此項條例草案實屬重要，因為草案不但建議將性騷擾定為罪行，更就此訂立法律補救。同時，該項法例亦有助培養良好風氣，使人人認識性騷擾不容於本港社會。

至於種族歧視方面，海外家庭傭工在很多範疇均飽受歧視，包括就業、服務、以及法律及政府計劃的執行等等。

有些歧視實例經傳媒揭露後，已是眾所周知。例如，在某住宅樓宇內竟張貼一則通告，大意为菲籍傭工不准使用大堂升降機。這分明是種族歧視，但現時尚未有針對此等討厭行為的法律補救措施。

另一宗個案更是嚴重，一名菲籍女子被的士輾過腳部，但事後，卻遭警方控以傷人罪。此種行徑亦是源自種族歧視的心態。雖然菲律賓領事館亦有就此事提出投訴，但除此以外，再無其他有效的補救措施。海外家庭傭工受到警方的種族歧視，情況相當普遍，但不幸的是，警方往往又是她們與僱主發生衝突時，唯一可尋求保障的途徑，因此，警方對海外傭工加以歧視，尤應受到譴責。

其他種族歧視的事例更是不勝枚舉，當中有些較不明顯，有些則昭然可見。種族歧視的行為很多時不為人所察覺，原因是人們根本不將之視作種族歧視。不少海外家庭傭工在辦理一些事項時，受到政府部門的種族歧視，其中尤以人民入境事務處為甚。這並非政府政策所使然，而是關乎各部門施行政策的方式，以及個別人員對待海外傭工的態度。

種族騷擾在本港比比皆是，不少海外家庭傭工要忍受帶有種族歧視的評語，特別是在一些不能提出抗議的情況，更惟有默然強忍。舉例而言，在人民入境事務處，海外傭工對此類評語，便不能反駁半句，因為一旦提出抗議，幾乎可以肯定地說，其在審核中的申請定會受到不利影響。

種族主義態度和行徑在服務提供及其他範疇也十分普遍，例如財務、職業介紹所的做法及物業管理公司的政策等等。



該項法例的重要性不但在於針對歧視行為訂立法律補救，更在於其大大有助促進公眾醒覺歧視態度的存在，進而將之加以消除。條例草案亦可向全港市民發出明確的信息，使人人認識到種族（及其他形式的）歧視是絕不容於香港社會的。

#### 4. 尋求法律補救的途徑

除非法例能夠為公眾提供一些易於尋求的法律補救，否則，怎樣的法例也是了無意義的。對很多海外家庭傭工來說，向本港的法院就歧視或騷擾尋求法律補救，所涉費用遠遠超出其經濟能力。倘若獲得法律援助，向法院尋求法律補救會較為可行；但即使如此，司法制度所出現的種種耽擱，對居港期有限的外地勞工，構成了難以克服的障礙。眾所周知，勞資審裁處的設立，原意是迅速解決勞資雙方的申索個案，但現時該處有待處理的個案積壓如山，申索個案需要一年甚或更長時間方可獲解決。

有鑑於此，成立一個平等機會審裁處實屬必要，這個審裁處不僅是受屈人士一項便捷而有效的申訴途徑，更應有權對觸犯平等機會法例的違法行為判處刑罰。不論其經濟狀況如何，所有受屈人士均應享有尋求此等法律補救的權利。

另外，當局亦應成立一個平等機會委員會，促進人人機會平等，而該委員會須負有教育社會的責任，使市民正確對待種族及各種形式歧視的問題。

#### 5. 對條例草案的建議修訂

條例草案為揀選傭工在僱主家中做家居工作的情況訂立例外條文。

我們認為此項例外條文並不合理，尤其是就種族方面而言。「家」不可僅視作僱主的家，那裡亦是家庭傭工工作的地方，而在工作地方出現的任何形式歧視，均不能接受。

家庭傭工的種族與其所做的家居工作並無關係，惟僱主希望家庭傭工在文化上彼此互相協調，卻是可以理解的。例如，一個回教的家庭會希望其傭工同樣信奉回教，因為該信仰在某些方面或需信徒在家中奉行若干習俗，而只有信奉回教的傭工才能勝任。即使如此，僱主需要的是一名回教徒，而非印尼籍回教徒或印度籍回教徒。

根據我們的經驗，每當僱主獲准在招聘廣告中指定聘請某類種族或國籍的人，他們都有意給予求職者較差的工作待遇，因為在其心目中，某些國籍的人較其他人更易容忍此等條件。例如，部分僱主在廣告中指明招聘印尼籍傭工，因為他們意圖支付低於法定最低工資的薪金，並預期印尼人不會為此作出投訴。

條例草案訂出此項例外條文，不但令人誤以為香港容許這種歧視的存在，更會鼓勵僱主肆意剝削某幾類海外家庭傭工。因此，此項條文是不可接受的。

## 6. 總結

正如引言所說，本委員會在現階段提出的只是初步意見。我們在原則上支持這項條例草案的宗旨，並認為本港一早已有需要訂立此項法例。本港的外地勞工很需要條例草案所建議的各項保障及法律補救，我們認為當局有必要盡早採取有效措施，消除各種形式的歧視。

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### 委員會成員組織名單

Asian Domestic Workers Union

Asian Migrant Centre

United Filipinos in Hong Kong (UNIFIL)

Mission for Filipino Migrant Workers

明愛

家庭傭工協會

Asia Alliance of YMCA's

Friends of Thai in Hong Kong (FOT)

亞洲專訊資料研究中心

反歧視大聯盟

樂施會

香港職工總會監對平等機會草案諮詢委員會提出如下意見：

我們強烈支持將任何因年齡而做出的歧視行為列為非法。現時有很多僱主會在聘請僱員時作出年齡限制，一方面藉此來压低工資及其他工作條件；另一方面，則藉此製造人手不足的假像，用以打大輸入外勞的配額，而外地勞工的輸入，反過來令年紀較大（卅歲或以上）的工人難以入職，造成惡性循環。

（有關的招聘廣告，參看附件）

法例亦應保障參與工會或有關活動的人士。過往，有個案因此而受到僱主減薪減酬，甚至不公平解僱（如九一年梁定邦事件及九三年一黑原工潮），惟往往因法例漏洞而无可奈何。此外，亦有個案顯示，有僱主在招聘員工時，以有否工會背景及經驗作為考慮。故我們極支持立法禁止歧視工會會員及有關活動，特別應有法例確保其自職權，使遭受不公平解僱者能回到原有的工作崗位。

政府應儘快設立一有效運作的婦女委員會，除調解外，亦應扮演仲裁角色，落實婦女的就業權利及保障，包括同工同酬、杜絕性騷擾、全薪分娩津貼、禁絕年齡及性別歧視，及使婦女能就業的完善托兒服務。

由於傷殘人士有缺陷，僱主往往因歧視或設施不足等原因，而不予聘請，使傷殘人士在勞動市場內失去了競爭力，此情況與其他類別的歧視相比，猶其嚴重。故除了在法例上保障傷殘人士享有平等的就業機會外，我們更建議在大中型機構內，設有一定比例的職位與傷殘人士。

我們亦建議成立集體訴訟基金，使一般市民有能力控告其僱主，不會因行政費過高而卻步不前。此外，亦應縮短仲裁時間，而一個專責法庭的設立，是一個必要條件。

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November 7, 1994

Dear Sirs,

Following is a narrative summation of my oral presentation to the Bills Committee last Monday, October 31st. I have included a few points I didn't have time to make earlier.

I didn't at first want to make a presentation to the Bills Committee at all, as I feel that this issue should be taken up by local Chinese. I didn't want to give anyone the opportunity to say that "homosexuality is a western phenomenon." And that discrimination based on sexual orientation is therefore insignificant in Hong Kong.

But when I learned that no gay Chinese men were to publicly present their views, I felt that someone needs to present our case. The non-participation of gay Chinese during these public hearings is proof that discrimination based on sexual orientation is pervasive, and far reaching - not that it is non-existent. The fact that the 10% group requested a private hearing, and Horizons abstained completely from this process is further testimony to this claim. (very few gay people are willing to take the risk of publicly announcing their sexual orientation)

Hong Kong is my home, and I have no intentions to leave either before, or after 1997. The effects of discrimination are felt by every lesbian and gay man in Hong Kong, not just Westerners.

### Background:

I am gay. I am 36 years old. I am a self employed business man. I have had a monogamous relationship with my lover for over ten years. After the decriminalization of homosexuality in Hong Kong, I was part of a group which started Horizons, the gay telephone hotline. Earlier this year I organized a series of fund raising activities for M.A.D., the Movement Against

Discrimination. I devoted considerable time to this effort, and to date we have raised over HK\$46,000. Recently I joined a group whose goal is to hold a Gay Asian Conference in 1995. Hong Kong University has expressed interest in participating in this conference

Because I am self employed, I can make a public statement. Any other lesbian or gay man could easily lose their job.

### Personal Experiences of Discrimination:

Prior to becoming self employed, I worked for a large consumer goods company in Hong Kong. The first few years of my job, staff at my office learned that I was gay. Like the vast majority of gay people, I had no option other than to deny the facts. Nonetheless, I was continuously ridiculed about being a "gei-lo" while staff assumed that I had no idea as to what was being said.

On several occasions, I was asked to my face if I was gay. I had no choice but to deny the truth. At that time, I felt if I was honest, I would have been fired.

I was successful at my job, and was promoted to another office. I decided to take the risk at this new office and stopped denying my sexuality. When the "gossip" quality of my sexuality disappeared, people stopped talking about it. No one cared anymore. I soon found myself working for another gay man. My new boss was very "closeted," and was fearful that I would force him to admit his sexuality too. I would never have done this, but his fear was that if he was forced to admit that he was gay, he would also have to admit to the rest of the organization that he had been fabricating lies about himself for all the years that he had masqueraded as heterosexual. So he let me know in no uncertain terms that I had to resign. My performance was not at all an issue - I was clearly discriminated against by another gay man because of my sexual orientation.

Closeted gay men and lesbians are forced to lie every day. Once a gay person voluntarily "comes out of the closet" or is forced to do so, he or she can never go back in. Hong Kong now offers no protection for these individuals. The lack of antidiscrimination legislation is forcing thousands of gay men and lesbians to lie every day.

Earlier this year my health club membership was terminated. The reason given was an attempt of mine to "flirt" with a heterosexual man. I wouldn't consider this to be discriminatory if heterosexual men were also removed from the gym for flirting with females, but I seriously doubt that any heterosexual gym members have ever been kicked out for flirting with members of the opposite sex! I have never solicited heterosexual men, and frankly was quite offended to learn that someone thought I was "flirting" with him.

The manager of the gym knew that I was gay because I had asked him to participate in a fundraising activity for Horizons. Because I don't try to conceal my "gayness," the manager wanted to get rid of me. The termination of my membership was in effect to send a message that if you act too gay, you won't be tolerated. We are forced to act as if we are heterosexuals.

(Can you imagine what life would be like if every day you had to act as if you were gay? Would you be happy trying to share your life with a member of your own sex?)

### Alternatives without the Equal Opportunity Bill:

Alternatives for gay men are limited. Few professions, if any, readily accept openly gay men in Hong Kong. So we must hide our sexual orientation, and this is not easy.

Consider the case of "John Smith," as reported in the Eastern Express. This man has a wife and children, and is trying to lead his life as a heterosexual. He is trying to suppress his sexuality. Personally, I feel this is very sad for him. The amount of energy he expends trying to convince himself he is not gay must be overwhelming. (I know because I tried to do the same thing until I was 22.) So John Smith is lying to himself, his wife, his children, his friends etc. There are undoubtedly thousands more like him in Hong Kong who feel there is no other alternative. This is a tremendous misallocation of human potential. Needless to say, psychologists will agree, John Smith is fighting a losing battle.

Other than "coming out," (the process of recognizing one's gayness) or trying to live the life of a heterosexual, the only other alternative available in a society allowing discrimination is some "shade of gray" in between these two extremes.

This can range from someone who is "straight" during the day, but goes out with his friends to the gay clubs in the evening, or otherwise leaves a very carefully planned social life so as not to mix the two segments.

At the other side of the continuum is the man who lives with his wife and children, and lies to his family as he secretly goes to the gay saunas, or any of the several public toilets in order to find sexual partners.

### "Conservatism" of Hong Kong People:

I have been told on several occasions that Hong Kong is different from western cities where gays are tolerated. I'm told that Hong Kong is very conservative, and won't accept gay people.

My experience indicates otherwise as in my 7 years of living in the territory, I have never heard of an instance of "gay bashing" in Hong Kong. In the US, gay men and women are regularly robbed, beaten and murdered because of their sexual orientation. Hong Kong is far more tolerant.

When told that "families in western societies are more supportive of gays," I am reminded of my own father's decision to disown me as a consequence of my sexual orientation.

Hong Kong people may openly discuss sexuality less frequently than other societies, but they are not any more conservative in attitudes when it comes to sexuality.

## Policy Affects Attitude, Not Visa Versa:

My lover's place of employment recently implemented a non-discriminatory Human Resources policy. I have switched from being a person without an identity, who no one wanted to socialize with, to Joe's lover who hosts dinner parties for the CEO. I am now covered by the company's health insurance, and receive all the other "perks" a heterosexual spouse would receive.

Clearly the change in organizational policy has affected people's attitudes. If Joe's company had waited until every employee's attitude regarding sexual orientation had changed before the policy was adjusted, I doubt I would ever have witnessed the day.

My experience leads me to believe that people have contempt for homosexuality not because they dislike it, but because they think they are supposed to dislike it. Giving protection to lesbians and gay men will send the message to the community that it's okay to accept homosexuality, no one needs to expend any more energy hating another because of his or her sexuality.

## Rationale for Anna Wu's Equal Opportunity Bill:

So, if anyone asks you why you supported Anna Wu's Equal Opportunity Bill, you can tell them that it was only fair to protect people who have previously been forced to lie about their personal lives. You are giving people the protection to tell the truth and be honest, which is what everyone wants, gay or not.

If this doesn't convince them that you have done the right thing, you can say that lesbians and gay men who are not given protection to lead their personal lives in accordance with their own sexuality, the alternative is to live as heterosexuals. And this means that they must marry members of the opposite sex, conceive children, and lie to their family, friends, and professional colleagues. Surely this cannot be more beneficial to society.

Office of Anna Wu  
Cc: Movement Against Discrimination

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執事先生：

我在一九九四年十月三十一日已向貴審議委員會口述意見，現謹將當日意見加以綜述，並把未及表達的意見，略作補充如下。

我起初根本不想向審議委員會表達意見，因為我認為此事應由本地的華人提出。我不想人們藉此機會說：「同性戀是西方社會的現象」，從而斷言基於性傾向的歧視在香港並不嚴重。

但當我知道沒有男同性戀的華人會公開表達意見，我就覺得總要有人站出來，為同性戀者說些話。同性戀的華人不願出席這些公聽會，正好證明基於性傾向的歧視在本港比比皆是，普遍非常一絕非並不存在。香港拾分壹會選擇以閉門形式進行會議，而同志熱線(Horizons)更完全不參與此輪公聽會，在在均是明証。(事實上，很少同性戀者願意冒險，公開其性傾向。)

香港是我家，在一九九七年前或後，我都無意離開香港。在香港每一位男女同性戀者均感受到歧視的影響，不獨是外籍人士才是如此。



## 背景

我是同性戀者，今年三十一歲，現時自僱從商。我跟愛人保持一夫一妻關係已超過十年。自同性戀行為在本港非刑事化後，我便加入同志熱線(Horizons)。該組織開辦了一條專為同性戀者提供輔導的電話熱線。今年較早時，我曾為反歧視大聯盟籌辦過一連串的籌款活動，我為這工作花了不少的時間，迄今已籌得逾46,000港元的款項。最近，我又加入另一小組，協助籌辦一次在一九九五年舉行的亞洲區同性戀者研討會。香港大學已表示有興趣參與是次研討會。

由於我是自僱人士身分，故膽敢公開表達意見。別的男女同性戀者如是這樣做，便可能工作不保了。

## 受到歧視的個人經歷

在成為自僱人士之前，我任職於本港一家大型消費品公司。在那裡工作的最初數年，同事間說我是同性戀者。跟大多數同性戀者一樣，我在沒有選擇下，惟有矢口否認。但是，我仍然不斷受到嘲弄，給人喚作「基佬」，那些同事還以為我不知道他們在說些甚麼。

我曾數度給人當面詢問是否同性戀者。我別無選擇，只好否認。那時候，我覺得如果坦白承認，自己就會被公司開除。

我的工作幹得不錯，獲得公司晉升，並調任到另一部門。在這個新部門，我決定冒險一試，不再隱瞞自己的性傾向。當我性傾向的「面紗」揭開後，流言蜚語消失了，人們不再以此作話柄，也對這事毫不在意。不久，我發現上司也是同性戀者。這位新上司對這身份「秘而不宣」，故此很害怕我會迫使他承認其性傾向。我絕不會這樣做，但他憂慮如果一旦被迫承認是同性戀者，他將要向全機構的人承認，自己多年來都在編造謊言，假扮成異性戀者。因此，他毫不含糊地表明，我必須辭職。我的工作表現完全不成問題——在這事件中，我顯然由於本身的性傾向，而受到另一名同性戀者的歧視。

把性傾向保密的男女同性戀者每天都要被迫說謊。假如有同性戀者一旦自願又或被迫公開其性傾向，一曝了光，他或她就不可能再退回「保護罩」內。本港並未有為這類人士提供保障。沒有反歧視的法例，數以千計的男女同性戀者，就要被迫每天編織謊言。

今年較早時，我的健身會會籍被會方終止了，原因是我意圖跟一名男異性戀者「調情」。我不會認為此舉是歧視，如果其他男異性戀者亦會因與女性調情而給人解除會籍，不過，我倒懷疑以前是否有過男異性戀者因與女性會員調情而被會方攆走！我從來沒與搭過男異性戀者，坦白說，聽到別人竟以為我想跟他「調情」，我感到很生氣。

健身會的經理知道我是同性戀者，原因是我曾邀請他參與一項為同志熱線(Horizons)而舉辦的籌款活動。我不想隱瞞自己的同性戀者身份，那位經理竟想把我逐出門外。中止我的會籍，不啻是一項明確的信息：你不歛藏同性戀的行為，你就不容於社會。這樣，我們無可奈何，只好假裝是異性戀者。

(如果你每天都要假裝成同性戀者，你可以想像生活是怎樣的一回事嗎？你會樂意嘗試跟一個同性朋友分享生活嗎？)

### 沒有平等機會條例草案，還有何出路？

同性戀男性的出路很有限。本港願意接納男同性戀者的行業，可謂少之又少。故此，我們必須隱瞞性傾向，但這樣做實在不易。

東方快訊曾報導過一宗“John Smith”的個案。這名男性有妻子，也有子女，一直嘗試過異性戀者的生活。他試圖壓抑其性傾向。我本人感到，他的處境很是悲哀。他定必耗用不少精力來試圖說服自己：我不是同性戀者。(我知道自己在22歲以前，也是做著同樣的事。)因此，John Smith對自己說謊，也對妻子、子女、朋友說謊。可以肯定，本港有數以千計與他處境相若的人，感到別無出路。這導致人類潛能用不得其所，簡直是嚴重浪費。不消說，John Smith打的是一場必敗的仗，相信心理學者也會贊同這個說法。

除了「站出來」公開承認自己是同性戀者，或者嘗試過異性戀者生活外，在一個容許歧視行為存在的社會中，同性戀者唯一的出路是在上述兩個極端之間的「灰色地帶」裡過活。

這種生活可以是白天如「常人」一樣，晚上便與朋友到同性戀者酒吧，也可以是很謹慎地安排社交生活，以免混淆兩種不同的身份。

另一個極端是，一個男人和妻兒一起生活，瞞著家人，暗中到同性戀者桑拿浴室或公廁找尋性伴侶。

## 香港人的「保守態度」

我曾數度聽人說，香港與西方一些容忍同性戀者的城市不同。人們告訴我，香港很保守，不會接納同性戀者。

我的體會與上述說法恰好相反。我居港七年，從未聽過這裡有「毆打同性戀者」的事件。在美國，男女同性戀者經常由於其性傾向而遭搶劫、毆打，甚至謀殺。相較之下，香港對同性戀者容忍得多。

每當有人說：「西方社會的家庭對同性戀者給予較大的支持」，我不期然便記起，當年父親因我的性傾向而與我斷絕父子關係。

香港人也許未如其他社會的人一樣經常公開討論性傾向的問題，但是談到對待性傾向的態度，香港人卻一點也不保守。

## 政策影響態度，而非態度影響政策

我愛人的公司最近實施一項不帶任何歧視的人力資源政策，自此以後，我由一個無名無份的人，社交上不受歡迎的人，變成了阿Joe的愛人，並曾數度以主人身份宴請阿Joe公司的行政總裁。現時，我可以享有阿Joe公司的醫療保險，並且獲得其他一切異性配偶應得的附帶福利。

顯而易見，機構政策的轉變影響了人的態度。如果阿Joe的公司等待每個僱員對性傾向的態度都改變了，才調整其政策，我很懷疑自己能否看見這一天的到來。

過往的經歷令我相信，人們對同性戀鄙視，並非因為他們對其憎惡，而是他們認為自己應該對其憎惡。為男女同性戀者提供保障，會給予公眾一項信息，就是接納同性戀是正確的態度，不必因他人的性傾向而敵視別人，枉費精力。

## 支持胡紅玉議員平等機會條例草案的理據

如有人問你為何要支持胡紅玉議員的平等機會條例草案，你大可告訴他，為一些以前被迫隱瞞生活真相的人提供保障，是天公地道的事。得到必需的保障，就可以說真話，不自欺，這是人所共求的事，又豈獨是同性戀者的願望？

如果這番話仍不能令他們信服你所做確當，你可以這樣說，男女同性戀者得不到所需保障，未能隨個人性傾向而生活，只好裝作異性戀者般過活。換言之，必須與異性結婚，生兒育女，整天向家人、朋友和同事說謊，這樣對社會肯定無益。

Robin Adams

一九九四年十一月七日

副本送：胡紅玉議員辦事處  
反歧視大聯盟

530 2018  
788 8960

To: Bills Committee on Equal Opportunities Bill  
attn: Odelia Leung fax: 877-8024  
cc: Anna Wu fax: 530-2018

Appendix VIII

From: William G. Proudfit  
K895620(0)  
3D, Hong Ning House  
17, Po Yan Street  
Sheung Wan  
(h)858-9520 (w)825-1415

**Written Statement after presentation on Oct. 31, 1994**

Following my presentation on Monday I would like to submit the following statement.

Hong Kong currently offers no anti-discrimination protection to individuals discriminated against because of their sexual orientation. At the same time, Hong Kong has one of the lowest unemployment rates in the world. I feel that my personal choices are limited by the lack of anti-discrimination legislation. My present employer has an explicit policy of not discriminating against individuals because they are homosexual. A letter from our CEO was sent to every employee world-wide in 1993 explaining that the Company did not ....'discriminate on the basis of race, religion, color, age, gender, disability, national origin, sexual orientation, marital status, citizenship status or veteran status.' I prefer to not reveal the name of my Company. The policy is far-reaching and comprehensive. The Company is one of the world's largest in its business area.

I have lived in Hong Kong since 1989. I have considered changing jobs on a few occasions. And recently, interviewed with a HK Government authority for a position. I chose to not pursue the position because the HK Government cannot, and will not, offer me any guarantee against dismissal because of my sexual orientation.

I think this type of spin-off effect from the lack of anti-discrimination legislation is common in Hong Kong. Individuals will not change jobs because of the fear of being 'found out' and 'revealed' as practicing homosexuals. In the tight labor market of Hong Kong this is only hurting businesses as they try to fill vacancies with an ever decreasing number of applicants.

Thank you for giving me the opportunity to make my statement.

Wm. G. Proudfit

二三局秘書處譯本，只供參考用

受文者：平等機會條例草案審議委員會  
梁慶儀小姐  
圖文傳真機號碼：877 8024  
副本送：胡紅玉議員  
圖文傳真機號碼：530 2018

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**繼一九九四年十月三十一日  
發表口頭意見後提交的意見書**

本人已於星期一發表口頭意見，現提交意見書如下：

本港目前並沒有為個別因性別傾向而受歧視的人提供反歧視的保障。本港是全世界失業率最低的地方之一，然而，由於缺乏禁止歧視的法例，因此可供本人選擇的職位有限。本人現時的僱主採取明確的政策，確保僱員不會因為身為同性戀者而受到公司歧視。公司的行政總裁在一九九三年致函分布於世界各地的所有僱員，向他們解釋公司並不會「基於種族、宗教、膚色、年齡、性別、身體殘障、血統、性別傾向、婚姻狀況、公民資格或退伍軍人身份而歧視任何僱員」。本人並不打算透露公司的名稱，然而以業務分布範圍而論，這是全球有數的大機構之一。這家公司所採取的政策既全面亦將影響深遠。

本人自一九八九年開始已經在本港居住，曾經多次考慮轉職。最近本人投考一個政府職位，並且應邀參加面試，但最後終於決定放棄該職位，原因是政府不能，而且亦不打算保證本人不會因為性別傾向而遭政府解僱。

本人相信，這種因為缺乏禁止歧視的法例而衍生的影響在本港非常普遍，個別人士恐怕被人「發現」或「揭發」為同性戀者，因而不敢轉職。本港勞工市場求過於供，儘管僱主想填補空缺，但申請人數則越來越少，這種情況只會對工商業造成損害。

感謝閣下接受本人提交的意見書。

Wm. G. Proudfit

Dear Members of the Equal Opportunities Bill Committee,

We are a group of Christian organizations that are concerned with the development of human rights in Hong Kong. We strongly support the Equal Opportunities Bill. We feel that all kinds of prejudice in society often unreasonably deprive many people of opportunities in employment, obtaining service and engagement in commerce and industry. Thus we believe the Hon. Ms. Anna Wu's Equal Opportunities Bill has managed to deal with all kinds of infringements upon human rights and injuries to human dignity at one go. In this sense more complete and throughout than the government's attempt to table separate bills against discrimination. But while supporting this bill, we feel that the bill has some inadequacies in details. We now give our opinions for your reference.

(1) Concerning forbidding using religious and political convictions as reasons for discrimination, we feel that some strong convictions cannot be easily classified as religious or political convictions, e.g. green thinking, feminism. Therefore we fear the bill cannot protect holders of these convictions.

(2) We strongly support the anti-racial discrimination section of the bill. However we think that in Chinese societies "native place" can often be the reason for dissimilar treatment. We believe "cultural background" cannot clearly convey the meaning of "native place" in Chinese. We thereby hope that "native place" can be added to the section concerning "racial discrimination".

(3) The bill's section on criminal records that are overdue cannot take care of those who have committed more serious crimes, but have already decided to reform themselves.

We have already submitted our opinions towards exemptions enjoyed by religious bodies in the bill in May. Right now we still believe for religious organizations' educational and social service institutions to list "believers only" or "preference to believers" in their recruitment advertisements are against principles of fairness and human rights.

Yours faithfully

HK Christian Institute (Lee Tsz-Yeung 3981699)

HK Christian Industrial Committee (Chan Ka-Wai 3665860)

Justice and Peace Commission of the Catholic Diocese of Hong Kong (Tony Fung  
5603865)

Catholic Youth Council (Chan Yue-Cheong 5277240)

26th October, 1994

平等機會條例草案委員會各成員台啓：

我們是一群關心香港人權發展的基督教團體，對此平等機會草案深表支持。我們感到社會上現存之各式偏見常常無理由地剝奪了不少人仕就業、獲得服務、參與工商業活動等機會，因此我們認為胡議員提出的平等機會條例草案一籃子地針對了各樣侵犯人權、損害人性尊嚴的「理由」，實較港府斬件式地提出反歧視法案來得徹底和深入。但在支持此草案的同時，我們感到草案在細節上有些不足，謹在此提出我們的意見，供諸位參考。

(1) 關於禁止以宗教或政治信念作歧視理由，我們感到有些強烈的信念不能容易地歸入宗教或政治信念，如綠色主義、女性主義等；因此我們擔心草案未能保障持這些信念的人仕。

(2) 我們十分贊成草案中反種族歧視的部份，但我們以為在中國人社會中「籍貫」可以是構成差別待遇的常見理由，我們以為「文化背景」一詞不能清晰表達中文「籍貫」的概念，我們希望在「種族歧視」一欄下加進「籍貫」一項。

(3) 草案中對過期刑事紀錄的部份未能照顧曾犯有較嚴重罪行，但已決心改過者。

我們於本年五月時曾就宗教團體在草案中獲得的豁免提出意見，我們目前仍以爲宗教團體開辦的教育和社會福利機構在招聘廣告中列明「只聘請信徒」或「信徒優先」等字眼有違平等及人權的原則。

此致

香港基督徒學會(李子揚 3981699)  
香港基督教工業委員會(陳家偉 3665860)  
天主教正義和平委員會(馮錦霖 5603685)  
天主教青年聯會(陳裕昌 5277240)

一九九四年十月廿六日





基督教香港聯合會  
Christian Council of Hong Kong

## 對《平等機會條例草案》的初步立場

我們是一群關注香港發展的基督徒，對於胡紅玉議員提交給立法局辯論的《平等機會條例草案》（以下簡稱《草案》），我們有以下幾方面的意見。

（一）我們支持胡議員提交的草案內所肯定的平等機會原則，及將這原則應用在包括：性別、婚姻狀況、懷孕、家庭負擔、性傾向、種族、身體殘障、宗教或政治信念、年齡、過時刑事定罪記錄及工會會籍。

同時，我們反對政府以斬件形式處理平等機會問題，因這不能有效改善社會上的歧視現象。

（二）我們認為「平等機會」是一個重要的基本權利，在一般情況下，這權利必須得到尊重。但當這權利與其他基本權利衝突時，我們應參考國際標準及其他國家經驗適當地平衡它們。

### （i）結社自由與平等機會

我們贊成《草案》豁免志願團體在招收成員方面的差別對待（第227條），因這避免侵犯市民的自由結社權，而這對維持一個多元化的社會是非常重要的。

### （ii）宗教自由與平等機會

根據聯合國《消除基于宗教或信仰原因的一切形式的不容忍和歧視宣言》，宗教或信仰自由除包括人人有權信事自己選擇的宗教或信仰外，也還包括「有按照宗教或信仰之要求和標準、培養、委任和選舉適當領導人或指定領導接班人的自由」（第六條七款）。

我們贊成《草案》第228條對宗教團體的一般性豁免，即對有關的宗教領導人的委任、訓練及揀選等……活動豁免，這避免侵犯信徒的宗教自由，對維持一個寬容的社會極重要。



不應立法禁止「宗教學校以宗教信念為聘用條件」

此外，在宣言的第五條第二款中亦指出，「所有兒童均應享有其父母或法定監護人意願接受有關宗教或信仰方面的教育的權利。」

因此，應否立法禁止「宗教學校以宗教信念為聘用條件」不啻及平等機會的權利，我們可參考一些國際的公認標準及某些西方國家的經驗。

根據聯合國《兒童權利公約》（第一條）規定，他國或一國之法律、行政、司法、宗教、排外、歧視、或任何種族、語言、宗教、區別等，不得作為教育、職業、或社會地位、或法律地位、或政治權利、或經濟權利、或社會福利、或教育機會、或任何其他權利之理由。

在公約的附件中，特別指出：「一國所容許的宗教或信仰的表達，不得作為教育、職業、或社會地位、或法律地位、或政治權利、或經濟權利、或社會福利、或教育機會、或任何其他權利之理由。」

這條公約清楚指出，在社會上保持某些宗教學校的存在，應視為對其提供宗教教育的人的歧視。

以上我們論述了宗教學校的存在及提供宗教教育並不構成歧視，但宗教教育是否必須由教徒負責呢？

「更本長其能比決是育書成供不這來。應教是同提校對法定。育教單一地學們立決的而育他育有宗。透自理想，教與能則育府而理長信，才，教政解。成相觸徒件教由理。能們接教條宗宜的。育都我生宗用供適育。方面。學的聘提不教。方長與」為效並教。讀群成命例仰有例宗。何、的生比信能比對解體面的定以不個其了、方人一止亦這據。須習性個「禁，但根。必、靈師括法徒，體。們德括老包立教案開。我在包過需果的定教。時生運透必如」個宗。題學，是校。例一的。問使外更學生比有關。這能面，教學定沒有。答，方授宗給一少由。回」四傳，育「多惠。人以識故教禮應，而。」



加拿大在八二、八四、八六年制訂其《自由和權利憲章》, 其第十五條保障公民的平等權利。八四年指出, 在私人生活中, 教師在學校中, 其私人生活與他無關。AND STUART ET. AL. 決定這差別對待的因素是「職業需要」。OCCUPATIONAL QUALIFICATION) 在私人生活中, 教師在學校中, 其私人生活與他無關。RE CALDWELL ET. AL. 是否歧視, 主要取決於「職業需要」。BONA FIDE 天主教中舉拒絕與天主教徒的學校。天主教中舉拒絕與天主教徒的學校。RE CALDWELL ET. AL. 是否歧視, 主要取決於「職業需要」。BONA FIDE 天主教中舉拒絕與天主教徒的學校。

雖然我們未必贊同加拿大天主教會的做法, 但我們只想指出, 由這個案引伸, 宗教學校在聘用教師時考慮其宗教信念, 是符合「真誠的職業需要」判準。

加拿大的法律學家 DALE GIBSON 在 "THE LAW OF THE CHARTER: EQUALITY RIGHTS" (CARSWELL 1990) 中分析過不同個案, 然後指出宗教學校基於保障其宗教特色的原因, 是可以豁免受有關平等機會的法例約束, 但豁免只限於宗教因素, 如宗教學校以一些與宗教無關的因素 (如種族), 而對不同人不同對待, 則仍應視為歧視行為。

從加拿大的經驗中, 我們清楚看到在平衡平等機會與宗教自由時, 她們會偏重保障宗教自由。

因此, 我們認為基於保障宗教自由的原因, 不應立法禁止「宗教學校以宗教信念為聘用條件」。

現時, 《草案》的第七部份處理「基於宗教或政治信念的歧視」行為, 其 163 條亦對「僱主或委託人為私人教育機構主管當局或……, 而若受僱或工作的職責是有關或以其他方式牽涉或關於僱員參與任何舉行或實踐宗教的活動, 或是為如此參與的目的, 則第 148、149 條或 150 條並不令該歧視違法」, 即在僱用方面對其豁免。

我們的認為, 雖然 163 條有其積極的意義, 但由於何謂「奉行或實踐宗教活動」的解釋不應由政府或法庭決定, 而應由清楚將「宗教團體根據其宗教信念自作為聘用條件」豁免於第七部份之外。



(三) 我們認為《草案》建議以地方法院作為執行機制，是不能有效保障市民的權利的。

我們了解到如果在這《草案》提出一個獨立及擁有仲裁權的平等機會委員會，處理有關平等機會的案件，有其技術上困難。但我們認為，如果沒有一個有效及容易使用的機制提供給市民，則有關的法例必不能真正保障市民的人權。

(四) 對於《草案》內的其它個別問題，如：婚姻狀況及實際配偶的定義，由於我們還在研究中，我們日後會將這問題的意見提交貴委員會參考。

基督徒關懷香港學會 及  
突破青少年發展中心社關組  
一九九四年十月三十一日

聯絡人：基督徒關懷香港學會外務副主席 趙善榮先生  
( 1168929 A/C 71 )

**EQUAL OPPORTUNITIES BILL**

**Submission by the Hong Kong AIDS Foundation  
to the Bills Committee of the Legislative Council**

**GLOBAL AND LOCAL PREVALENCE OF HIV INFECTION**

Since AIDS was first identified in the early eighties 17 million people over the world have been infected with HIV, the AIDS virus, according to the World Health Organization. The WHO has further estimated that the infection figure will be doubled to 30 - 40 million by the end of the century, with Asia as an emerging centre of the epidemic.

2. In Hong Kong, since the first AIDS case was known ten years ago, a cumulative total of 493 persons were reported to have been infected with HIV as at the end of September 1994. The Government estimates that there are currently 4000 - 7000 people with HIV in Hong Kong. Assuming a straight line increase in this number at the rate of 25% per annum, which has been the average rate in the past few years, by the year 2000 Hong Kong will have 15,000 - 27,000 people, or 0.25% - 0.45% of our population, infected with HIV. The majority of this part of our community are, and for many years will remain, asymptomatic and belong to the young and middle aged who are socially and economically active.

**CAUSE OF UNJUSTIFIED DISCRIMINATION AGAINST PEOPLE WITH HIV/AIDS**

3. People with HIV/AIDS have been subjected to serious, unjustified discrimination in Hong Kong as well as abroad. Not only people with AIDS are discriminated against, but HIV positive people who have not yet developed AIDS are often equally unfairly treated. It is perhaps in order here to explain the distinction between HIV infection and AIDS.

4. AIDS, the acronym for Acquired Immune Deficiency Syndrome, is a disease caused by the infection of a virus called Human Immunodeficiency Virus, or HIV in short. When a person is infected with HIV, or becomes HIV positive, he is a carrier of the virus. HIV itself does not cause the infected person to fall ill but by replicating itself while killing the white blood cells it gradually destroys the person's immune system. When the person's immune system is weakened to a certain low level he is prone to a wide variety of opportunistic infections and cancers, which will cause the person to fall ill. Once he has got such secondary infections or cancers he has developed AIDS.

5. During the incubation period of infection, in which a person with HIV bears no symptoms of AIDS, the infected person remains healthy and suffers no physical or mental impairments. The length of the incubation period varies among individuals. Statistics show that about half of the people with HIV have an incubation period of ten years or more.

6. HIV cannot survive outside the human body and can be killed easily by high temperature or household bleach. Inside the human body it concentrates in three types of body fluids, namely, blood, semen and vaginal secretion. Thus, although a person with HIV is capable of transmitting the virus to other persons, this will happen only when there is an exchange of the three types of body fluids mentioned above. In our daily life this means that

the routes of transmission are limited to unprotected sexual contacts, sharing of contaminated syringes in intravenous drug use and perinatal transmission. There is no risk of infection in daily social contacts.

7. Despite the above facts many people thought that HIV is a highly contagious virus that one could easily catch by being close to people with HIV/AIDS, sharing common facilities with them or touching them. These misunderstandings have resulted in serious unjustified discrimination against people with HIV/AIDS in many facets of our daily life. The Hong Kong AIDS Foundation holds the view that, while public education is essential to removing such misunderstandings, before this can be achieved legislative protection should be given as soon as possible to afford people with HIV/AIDS with equal opportunities and eliminate unjustified discrimination against them and further give them the right to contribute back to society.

### FORMS OF DISCRIMINATION

8. This paragraph highlights some of the major areas people with HIV/AIDS (PWHIV/AIDS) in Hong Kong face discrimination and hostile social environments.

- (a) Medical and health care Many private hospitals and medical and dental practitioners have declared or are known to refuse to accept patients who are PWHIV/AIDS. Even in public hospitals there have been incidents that the staff there refused to give injection for AIDS patients. The health authorities have publicly announced that the clinical management of AIDS patients require no major special equipment and that universal blood precautions are adequate for the prevention of HIV transmission in health care settings. There is therefore no solid ground for hospitals or health care workers to reject patients who are PWHIV/AIDS.
- (b) Social services Most home help service agencies refuse to provide their services to PWHIV/AIDS, even when the service required is only meal delivery or escorting the patient to the clinic or hospital. It has also been reported that some drug rehabilitation service agencies would administer HIV antibody tests on potential clients before admission, possibly to screen out those who are HIV positive.
- (c) Education There have been incidents in which HIV positive school children were required or requested by the school authorities to discontinue education in the school. While in the last reported incident the Director of Education announced that schools which reject HIV positive students would face sanctions it is noted with sadness in the findings of a subsequent survey that 37% of the secondary school principles and 41% of the teachers thought that infected children should be kept in special schools. 3% and 6% of the principles and teachers even felt that infected children should not attend any school at all.
- (d) Work A major reason why most PWHIV/AIDS want to keep their HIV status strictly confidential is the fear of lost of opportunity to work. There have been incidents of PWHIV/AIDS being dismissed from employment or requested to leave partnership. A survey conducted in 1992 among a group of executives showed that 21% of the respondents would either resign from the company, if they had a PWHIV/AIDS colleague in their workplace, or ask for a transfer of the positive colleague or themselves.

- (e) Accommodation Loss of living accommodation is another major concern of PWHIV/AIDS if their HIV status becomes known by others. In a case known to the Foundation a landlord suspected his tenant to have AIDS and requested the latter to move out. In another case a relative of a PWHIV/AIDS, in a family dispute, reportedly threatened to report the latter's HIV status to a public housing authority, with the erroneous belief that the authority might terminate the tenancy of the PWHIV/AIDS.
- (f) Funeral service PWHIV/AIDS face discrimination even after death - most major funeral parlours refuse to provide service for people who died of AIDS.
- (g) Immigration Although the Government at present has no policy to refuse entry of PWHIV/AIDS into Hong Kong, which is in line with the recommendations of the World Health Organization, other countries have immigration restrictions against HIV positive persons.

9. The above shows that PWHIV/AIDS in Hong Kong are facing discrimination or threats of discrimination in many major aspects of their daily life. With the number of infected persons steadily increasing positive measures are needed to deal with the injustice.

#### SPECIFIC COMMENTS ON THE BILL

10. Deceased persons Article 6 provides that discrimination of a person on the basis of the disability of his associate or relative is also taken as discrimination on the ground of that person's disability. We wish to seek assurance that this covers the situation where the associate or relative in question is a deceased person, so that refusal to provide funeral services for people who died of AIDS will become unlawful. Besides, many family members of people who died of AIDS dare not disclose the real cause of their relatives' death for fear of harassment by their neighbours, schoolmates or colleagues. The proposed legislation ought to be able to offer protection for them.

11. Immigration Article 9 seems to exclude immigration requirements from the application of the Bill. Having regard to the practice in many countries of restricting entry of PWHIV/AIDS, we suggest that consideration be given to including some legal protection for PWHIV/AIDS as far as entry into Hong Kong is concerned.

12. Suspected disability In one of the examples mentioned in paragraph 8(e) above the discriminatory act was based on suspected disability. Because of the great importance that PWHIV/AIDS attach to confidentiality of their identity they would prefer to suffer discrimination silently rather than disclosing their HIV positive status. Besides, many people who suspect themselves to be HIV positive do not want to verify their suspicion by a blood test, because of lack of courage to face the reality should the outcome be positive or for other good personal reasons. We do not feel that these people should be either left to suffer discrimination or harassment because others suspect or believe they are HIV positive, or forced to take a blood test against their will before they can seek justice. We propose that Articles 113(1), 139 and 141(1) should include a reference to suspected disability.

13. Requirements to identify persons with disability Again for the reason of confidentiality a requirement to take an HIV antibody test as a precondition for any offer

would effectively eliminate almost all HIV positive candidates for the offer or candidates who believe or suspect themselves to be HIV positive. Most PWHIV/AIDS would dread taking an HIV antibody test, unless it is conducted with strict confidentiality and unless the purpose of the test is to help PWHIV/AIDS. An HIV antibody test requirement under any other circumstances is potentially discriminatory. We therefore propose to include as a discriminatory "requirement or condition" under **Article 113(2)** a requirement or condition -

- (a) which aims to identify persons with disability, and
- (b) which is not reasonable having regard to the circumstances of the case.

Besides, **Article 113(3)** should be extended to cover (b) above so that the burden of proof of reasonableness lies with the person who imposes the requirement.

14. **Article 131** should be similarly expanded to make it unlawful for application forms etc to request or require information which unreasonably aims to identify persons with disability. An example of this is the request for information on whether one has taken an HIV antibody test. The fact that one has taken such a test may imply that one has had a suspicion of being infected. As a result many PWHIV/AIDS are reluctant to submit such information.

#### EQUAL OPPORTUNITIES COMMISSION

15. We understand that the Government has pledged to establish an Equal Opportunities Commission to oversee matters relating to sex discrimination and disability discrimination. We urge the early establishment of such commission, which should be charged with the responsibility not only to handle and adjudicate complaints of discrimination but also take positive steps to promote the elimination of discrimination in our community.

16. We request that in any procedures to handle complaints of discrimination the identity of the complainant should be properly protected. This is particularly important if the procedures are meant to offer assistance to PWHIV/AIDS.

#### HIV/AIDS TO BE COVERED BUT NOT SINGLED OUT IN LEGISLATION

17. In this submission we as an AIDS organization naturally emphasise the HIV/AIDS aspects and request HIV/AIDS to be covered in the legislation. However, we advocate equal treatment of PWHIV/AIDS as people with other disabilities and prefer inclusion of HIV infection in the definition of disability, as it is presently treated in the Bill, rather than singling it out in treatment in legislation.

Hong Kong AIDS Foundation  
27 October 1994



(二三司秘書處譯本，只供參考用)

## **平等機會條例草案**

### **香港愛滋病基金會向立法局有關的條例草案 審議委員會提交的意見書**

#### **全球及本港受愛滋病毒感染人數與日俱增**

根據世界衛生組織的資料，自愛滋病於八十年代初首先為人發現後，至今世界各地有1 700萬人受愛滋病毒感染。世界衛生組織更估計，在本世紀末，感染愛滋病毒的人數將會倍增至3 000至4 000萬名，而亞洲更會漸漸成為愛滋病肆虐的地區。

2. 在本港，首宗愛滋病例於十年前發現，而截至一九九四年九月底止，據報已共有493人感染愛滋病毒。政府估計，本港現時有4 000至7 000人帶有愛滋病毒。假設這數字按每年增加25%(過去數年來的平均增長率)持續上升，到了2 000年，香港將會有15 000至27 000人感染愛滋病毒，約佔本港人口的0.25%至0.45%。這些感染人士當中，大多屬於青年或中年，現時並無任何病徵(甚或多年以後亦是如此)，他們與常人一般，活躍於各類社交及經濟活動。

#### **愛滋病毒帶菌者及愛滋病患者受到不合理歧視的成因**

3. 一向以來，愛滋病毒帶菌者及愛滋病患者在本港及外地備受無理的嚴重歧視。不僅愛滋病患者遭受歧視，一些對愛滋病毒呈陽性反應的人，即使並未病發，亦一樣經常受到不公平對待。有鑑於此，解釋感染愛滋病毒及患上愛滋病兩者的分別，實有必要。

4. 愛滋病(即後天免疫力缺乏症，英文簡稱A I D S)由一種破壞人體免疫能力的病毒(即愛滋病毒，英文簡稱H I V)所造成，人體受愛滋病毒感染或對愛滋病毒呈陽性反應，即成為愛滋病毒帶菌者。愛滋病毒本身並不令感染者發病，但病毒不斷自我複製，同時殺死人體的白血球，逐漸破壞人體免疫系統。當人體的免疫系統被削弱至某一程度，各類傳染病及癌病即會乘虛入，使人病倒。一旦染上這些繼發性的傳染病或癌病，即成為愛滋病患者。

5. 在愛滋病潛伏期內，感染愛滋病毒者並無愛滋病的徵狀，身體維持健康，體能或智力未受削弱，愛滋病潛伏期的長短因人而異。統計資料顯示，感染愛滋病毒者當中，約有半數的愛滋病潛伏期為十年或更長時間。

6. 愛滋病毒不能在人體外生存，用高溫或家居用漂白水即可輕易把愛滋病毒殺死。在人體內，愛滋病毒主要存在於三種體液，即血液、精液及陰道分泌。因此，雖然愛滋病毒帶菌者確可以把病毒傳染給別人，但只有在上述三種體液傳入對方體內的情況下，病毒方會傳染。以日常生活而言，病毒的傳染途徑，只限於沒有採取保護措施而作出性接觸、與人共用受污染針筒注射毒品及產期傳染等。日常的社交接觸，並無傳染的危險。

7. 雖然實情如此，但很多人仍然以為愛滋病毒是一種極易傳染的病毒，只要接近愛滋病毒帶菌者或愛滋病患者、與他們共用設施或觸摸他們，就很易受到感染。凡此種種誤解，導致愛滋病毒帶菌者及愛滋病患者在日常生活各方面均備受無理的嚴重歧視。香港愛滋病基金會認為教導公眾以消除這些誤解，實有必要，但在達致這目的之前，當局應盡快制定有關的保障法例，確保愛滋病毒帶菌者或愛滋病患者獲得公平機會，使他們免受無理歧視，從而對社會作出貢獻。

### 歧視的形式

8. 本段會說明本港愛滋病毒帶菌者及愛滋病患者現時在各主要社會範疇所面對的歧視和敵意。

- (a) 醫療及衛生護理 很多私家醫院、醫生及牙醫均已聲明或據知已拒絕診理愛滋病毒帶菌者及愛滋病患者。即使在公立醫院，亦曾發生醫院職員拒絕為愛滋病患者注射藥物的事件。衛生當局曾公開宣布，為愛滋病患者進行臨床護理毋須特殊的設備，醫護程序方面，在處理血液時只須採取一般的預防感染措施，便足以預防感染愛滋病毒。因此，醫院或醫護人員並無有力理由拒絕照顧愛滋病毒帶菌者及愛滋病患者。
- (b) 社會服務 大多數家務助理機構均拒絕為愛滋病毒帶菌者及愛滋病患者提供服務，即使所需服務只限於送遞餐食或護送病人往返診所或醫院亦予絕。據報部分戒毒機構在收容入住者之前，會進行愛滋病毒測試，以便把愛滋病毒帶菌者拒諸門外。

- (c) 教育 感染愛滋病毒的學童遭受校方要求或勒令退學的事件，續有發生，在上一次事件中，儘管教育署署長公布學校如拒絕讓該等學童入學，將會受到制裁，但可悲的是，其後進行的調查結果顯示，37%的中學校長及41%的中學教師認為，感染愛滋病毒的學童應入讀特殊學校。另外，分別有3%及6%的校長及教師更認為該等病童不應入讀任何學校。
- (d) 工作 愛滋病毒帶菌者及愛滋病患者大多數希望將其染上愛滋病的事實保密，主要原因是恐怕工作不保。該兩類人士遭辭退或被要求解除合夥關係的事情，實屢見不鮮。在一九九二年一項以行政人員為對象的調查中，21%受訪者表示如發覺有同事為愛滋病毒帶菌者或愛滋病患者，便會辭職不幹，或要求安排把該名同事或自己調職。
- (e) 住宿地方 愛滋病毒帶菌者及愛滋病患者亦關注到，如自己感染愛滋病毒的事實一旦為人知曉，連住宿地方也恐怕會失去。據基金會所知，有業主因懷疑租客患上愛滋病，即著令其搬遷。在另一個案中，一名愛滋病毒帶菌者／愛滋病患者的親屬在家庭糾紛中，不斷威脅向公共屋邨當局舉報其感染愛滋病毒，原因是他錯誤以為這樣做，會令屋邨當局終止該名人士的租約。
- (f) 殯儀服務 愛滋病毒帶菌者及愛滋病患者即使在死後也受到歧視，大多數的殯儀館都拒絕為愛滋病死者提供服務。
- (g) 入境 港府現時並無政策拒絕愛滋病毒帶菌者及愛滋病患者入境，此舉符合世界衛生組織的建議，不過，在其他一些國家則訂有限制，禁止對愛滋病毒呈陽性反應的人士入境。

9. 以上各點在在顯示本港的愛滋病毒帶菌者及愛滋病患者在生活各個主要方面，均飽受歧視或面對受歧視的威脅。隨著感染人數日漸增加，當局應採取一些積極措施，對付這些不公平的歧視現象。

### 對條例草案的具體意見

10. 死者 草案第6條規定基於身體殘障對某人予以歧視，亦包括基於夥伴或親屬的身體殘障而受歧視在內。我們希望得到保證，條例規定的情況包括所涉夥伴或親屬為死者，務求把拒絕為愛滋病死者提供殯儀服務的行為，定為不合法。此外，愛滋病死者的家庭成員大多不敢透露其親屬死亡的真正原因，以免受到鄰居、同學或同事的刁難。擬議的法例必須為他們提供所需保障。

11. 入境 草案第9條看來立年把入境規定列入草案的適用範圍內。鑑於很多國家現時已禁止愛滋病毒帶菌者及愛滋病患者入境，我們認為可考慮在草案中加入一些條文，為兩類人士在入境方面，提供某些法律保障。

12. 被懷疑身體有殘障 在上文第8(e)段所述的一個例子中，當事人是基於被懷疑身體有殘障而遭受歧視。由於愛滋病毒帶菌者及愛滋病患者極重視身份的保密，他們往往寧願默默忍受歧視，而不願公開自己為愛滋病毒感染者。此外，也有許多人懷疑自己感染愛滋病毒，但又不想驗血以求証，原因不一而足，有些是基於某些個人理由，有些則是缺乏勇氣，深怕証實真的染有病毒，自己會無法面對現實。對於任由這些人因別人懷疑或相信其是愛滋病毒帶菌者而飽受歧視或刁難，又或在違反其意願下被迫接受驗血後，始得到公平對待的情況，我們絕不贊同。我們建議在草案第113(1)、139及141(1)條加入保障規定，以消除基於被懷疑身體有殘障的歧視。

13. 要求確定某人是否身體有殘障 同樣，基於需要保密的緣故，將必須接受愛滋病毒抗體測試，定為聘請的先決條件，實際上幾乎等如把所有的感染愛滋病毒及相信或懷疑自己帶有愛滋病毒的求職人拒諸門外，原因是大部分的愛滋病毒帶菌者及愛滋病患者都很怕接受愛滋病毒抗體的測試，除非這個測試是在絕對保密的情況下進行，又或除非測試目的在於向其提供協助。在任何其他情況下，愛滋病毒抗體測試的要求都帶有潛在的歧視成分。因此，我們建議在草案第113(2)條所述的「要求或條件」下，包括以下兩項：

- (a) 目的在於確定某人是否身體有殘障的要求或條件；及
- (b) 在有關的情況下並不合理的要求或條件。

除此以外，草案第113(3)條的適用範圍亦應擴大至包括上文(b)項，使有意施行此項要求的提出者，須承擔証明該等要求或條件為合理的舉証責任。

14. 同樣，草案第131條有關申請表格等的適用範圍亦應擴大，以便把不合理地要求或規定填寫人須提供某些資料，用以確定其是否身體有殘障，亦定為違法的行為。舉例而言，表格要求填寫人註明曾否接受愛滋病毒抗體的測試，即屬不合理的要求，因為曾經接受此項測試，可暗示到有關人士曾懷疑自己感染了愛滋病毒。由此，許多愛滋病毒帶菌者及愛滋病患者均不願意提供此等資料。

## 平等機會委員會

15. 我們了解政府現已承諾設立一個平等機會委員會，負責監察與性別及身體殘障歧視有關的事宜。我們促請當局盡早成立該委員會，而委員會除負責處理歧視投訴，及作出仲裁外，更應採取積極行動，致力消除各種社會上的歧視行為。

16. 我們要求在處理歧視投訴時，投訴人的身份在任何程序均應適當保密。若進行有關程序的目的在於協助愛滋病毒帶菌者及愛滋病患者，則保密尤為重要。

## 法例應包括而不應特別訂立對愛滋病毒帶菌者及愛滋病患者的保障

17. 在這份意見書中，我們作為一個關注愛滋病的組織，理所當然會強調有關愛滋病毒帶菌者及愛滋病患者的問題。因此，我們要求擬議的法例亦應為該兩類人士提供保障。不過，我們提倡把愛滋病毒帶菌者及愛滋病患者視為身體殘障人士中的一種，予以平等的對待，而不應用特殊方法另加看待。因此，我們認為較佳的做法是把感染愛滋病毒列為身體殘障的一種，草案現時有關身體殘障歧視的規定一樣適用，毋須在法例特別為此類人士另立保障條款。

**香港愛滋病基金會**

一九九四年十月二十七日

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**香港愛滋病基金會**

一九九四年十月二十七日

出席者:

- ①. 余秀珠 Yu Sau Chu.
- ②. 辜垂玲 Ku Sui hing
- ③. 黄秀娟 Wong Sau Kuen.

将会提出以下意见:

- ①. 租屋时常遇到业主或包租不租与单亲, 尤其是离婚者.
- ②. 许多单亲靠综援过活, 因经济状况而处处受歧视.
- ③. 单亲找工作难, 主要因家庭责任全在单亲家长身上, 雇主多不会因为单亲而不给予工作, 而是因单亲家长需承担家庭责任, 便推托可能对工作不能投入而拒绝.
- ④. 年龄 —— 单亲多在30岁以上, 难找工作, 但培训计划又不收30岁以下的学员, 逼使部份30岁以下单亲需依靠综援生活, 但30岁培训后又找不到工作.
- ⑤. 有些大机构有些员工福利未必顾及单亲, 如某公司员工抽年资, 家庭书费等资料可排队申请贷款买楼

→ 续:

通常配偶佔很大的分数,但单亲没有配偶的分数,故孩子的需要得不到照顾。

⑥ 学生车船津贴 —— 表格上规定家庭成员按关系排列计分, 至满五分才可申请, 单亲家庭少了配偶的分数, 但孩子的需要随

⑦ 政府提出的性别歧视法案需多少时间才能真实施运作? 胡红玉议员提出的反歧视法案一旦通过便开始实施, 这可缩短单亲家庭现时正忍受的不公平待遇。



**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Comparison of the Equal Opportunities Bill and the Sex Discrimination Bill

1. Scope of discrimination covered

1.1. The Sex Discrimination Bill [SDB] addresses the same grounds of discrimination as Part II of the Equal Opportunities Bill [EOB]: sex, marital status, and pregnancy. The SDB, however, does not prohibit discrimination on the grounds of marital status and pregnancy outside the area of employment; Part II of the EOB prohibits discrimination on all three grounds both in employment and in all other areas addressed. The SDB does not address the grounds of discrimination covered by Parts III-X of the EOB (family responsibility, sexuality, disability, race, religious or political beliefs, age, spent criminal conviction and union membership).

1.2. Neither bill defines “sex” or “pregnancy”. Both define “marital status” identically, save that the status of being a “de facto spouse” is a marital status under the EOB but not under the SDB.<sup>1</sup>

1.3. Each bill begins by defining direct and indirect discrimination for each of the grounds of discrimination addressed, and then makes such discrimination unlawful in various, specified areas of activity. Both bills define direct and indirect discrimination similarly.<sup>2</sup> Under the EOB, but not under the SDB, discrimination against a person may include discrimination grounded on the status of the person’s relatives or associates rather than the person’s own status.<sup>3</sup> While the EOB treats claims of direct and indirect discrimination the same for enforcement purposes, the SDB provides that claims of indirect discrimination cannot be brought by individuals, but only by the SDB’s proposed Equal Opportunities Commission in connection with its formal investigations.<sup>4</sup> Damages are not available for indirect discrimination under the SDB if the respondent proves a lack of intention to discriminate.<sup>5</sup>

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<sup>1</sup> EOB 3(1), SDB 2(1)

<sup>2</sup> EOB 10, 11, 12; SDB 4, 5, 6, 7, 9

<sup>3</sup> EOB 6

<sup>4</sup> SDB 35

<sup>5</sup> SDB 68(5)

## 2. Unlawful discrimination in work

2.1 Both bills make discrimination on the grounds of sex, marital status and pregnancy unlawful in employment and related areas.<sup>6</sup> Both afford similar protection to employees and applicants and to contract workers,<sup>7</sup> and both address discrimination in partnerships, trade or professional organisations, qualifying bodies and employment agencies.<sup>8</sup> The EOB specifically extends protection to commission agents, while the SDB adds a specific provision relating to vocational training.<sup>9</sup>

2.2. Both bills make exceptions for employment positions for which sex is a genuine occupational qualification,<sup>10</sup> and for employment in connection with religion.<sup>11</sup> The EOB additionally excepts the hiring of domestic helpers to work in the home, and of persons to care for a child in the child's home.<sup>12</sup> The SDB additionally excepts marital status discrimination relating to certain benefits under contracts of service or apprenticeship or contracts to personally execute work.<sup>13</sup>

2.3. The SDB grants a temporary, five year exemption to employers with five or fewer employees.<sup>14</sup> Home Affairs Branch has also indicated that the Secretary of Home Affairs will not bring the employment provisions of the SDB into force until after the SDB's proposed Equal Opportunities Commission has promulgated relevant Codes of Practice.<sup>15</sup>

## 3. Unlawful discrimination in other areas

3.1. Part IV of the SDB and clauses 20-8 of the EOB address areas of activity other than work. Both bills prohibit discrimination on the ground of sex in these areas; the EOB, but not the SDB, also prohibits discrimination on the grounds of marital status and pregnancy.

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<sup>6</sup> EOB 13-19, SDB Part III

<sup>7</sup> EOB 13, 15, SDB 10(1), (2)

<sup>8</sup> EOB 16-9, SDB 14-6, 18

<sup>9</sup> EOB 14, SDB 17

<sup>10</sup> EOB 33, SDB 11

<sup>11</sup> EOB 228, 229(1), (2), SDB 19

<sup>12</sup> EOB 13(3), 15(2), 39

<sup>13</sup> SDB 54, Schedule 4

<sup>14</sup> SDB 10(3) (5)-(7)

<sup>15</sup> The power to bring different provisions of the bills into force on different dates is given by the SDB to the Secretary for Home Affairs and by the EOB to the Governor (EOB 1(2), SDB 1(2))

3.2. Both bills prohibit discrimination in education,<sup>16</sup> and both provide an exception for single-sex schools.<sup>17</sup> The SDB also provides a three-year exception for single-sex schools turning co-educational.

3.3. Both bills prohibit discrimination in the provision of goods, services and facilities.<sup>18</sup> The EOB makes an exception for services which can only be provided to one sex; the SDB provides additional exceptions for single-sex facilities and services in hospitals, in connection with religion, or for reasons of decency or physical contact.<sup>20</sup>

3.4. The EOB prohibits discrimination in relation to accommodation and to land, while the SDB prohibits discrimination in relation to the disposal or management of premises and to consent for assignment or sub-letting.<sup>21</sup> Each bill in different terms makes an exception for small, owner-occupied premises.<sup>22</sup>

3.5. The EOB, but not the SDB, includes provisions addressing discrimination in relation to certain clubs<sup>23</sup>; demands for information made in areas of activity otherwise addressed by the Bill; the administration of laws and government programmes; and elections or appointments to public authorities and advisory bodies.<sup>24</sup>

3.6. The SDB, but not the EOB, includes a provision addressing discrimination in relation to barristers' pupillages and tenancies and instructions to barristers.<sup>25</sup>

#### 4. Sexual harassment

4.1. Both bills include provisions that prohibit sexual harassment in the areas of activity otherwise addressed.

4.2. Each prohibits sexual harassment of employees, applicants or contract

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<sup>16</sup> EOB 20, SDB 22

<sup>17</sup> EOB 2-(3), SDB 23

<sup>18</sup> SDB 24

<sup>19</sup> EOB 22, SDB 25

<sup>20</sup> EOB 36, SDB 30

<sup>21</sup> EOB 23-4, SDB 26-7

<sup>22</sup> EOB 23(3)(a), SDB 28

<sup>23</sup> Clubs that have 30 or more members and supply liquor for consumption on their own premises. EOB 3(1)

<sup>24</sup> EOB 25-8

<sup>25</sup> SDB 31

workers; of students by staff of an educational institution; and in relation to the areas of accommodation and provision of goods, facilities and services.<sup>26</sup>

4.3. The EOB also specifically prohibits harassment of commission agents, or of a domestic helper by any person residing in the home in which the helper is employed.<sup>27</sup> The SDB specifically prohibits harassment by partners, trade or professional organisations, qualifying bodies, employment agencies, or members of the responsible body for an educational institution, as well as harassment in relation to vocational training, barristers' pupillages and tenancies and instructions to barristers.<sup>28</sup>

4.4. Both bills define sexual harassment in terms of unwelcome sexual advances, requests for sexual favours, or sexual conduct (including statements in the victim's presence). The EOB makes such harassment unlawful if the victim suffers or reasonably fears suffering any disadvantage for objecting to the harassment; the SDB makes harassment unlawful if a reasonable person would anticipate that the harassment would offend, humiliate or intimidate the victim.<sup>29</sup> The EOB additionally makes harassment unlawful in employment if it creates a sexually hostile or intimidating work environment for the victim; and unlawful in the other areas if it substantially interferes with a victim's access to, use or enjoyment of relevant facilities.<sup>30</sup>

4.5. The EOB, but not the SDB, also prohibits harassment on the grounds of sexuality, race and disability.<sup>31</sup>

## 5. Other unlawful acts

5.1. Both bills prohibit victimisation of a person for acts done or contemplated in connection with the assertion of rights under the bill.<sup>32</sup>

5.2. Under the EOB, a person who causes, instructs, induces, aids or permits

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<sup>26</sup> EOB 29-32, SDB 20, 32-3

<sup>27</sup> EOB 29(1)(d), (2)

<sup>28</sup> SDB 20(6)-(8), 21, 32(1), 32(6)-(8)

<sup>29</sup> EOB 29-32, SDB 2(5)-(7)

<sup>30</sup> EOB 29(3)(b), 30(2)(c), 31(2)(c), 32(2)(c)

<sup>31</sup> EOB 78-82, 103-7, 135-9

<sup>32</sup> EOB 224, SDB 8

another to do an unlawful act is himself liable for the act.<sup>33</sup> The EOB also prohibits publication of advertisements indicating an intention to unlawfully discriminate; such publication is an offence and may be enforced by private prosecution.<sup>34</sup>

5.3. The SDB similarly prohibits instructions to discriminate; pressure to discriminate; and publication of an advertisement indicating an intention to unlawfully discriminate.<sup>35</sup> Under the SDB, these are unlawful acts with respect to which only the proposed Equal Opportunities Commission, not individuals, may bring proceedings.<sup>36</sup>

5.4. Both bills provide for vicarious liability in certain circumstances.<sup>37</sup>

## 6. Exceptions relating to law and policy

6.1. In addition to exceptions in general terms that may apply to government programmes and activities, certain exceptions apply specifically to law and policy.

6.2. The EOB exempts legislation, policies or acts that fall within the exceptions and savings provided by Bill of Rights Ordinance (Cap. 383).<sup>38</sup>

6.3. The SDB exempts acts done to safeguard the security of Hong Kong.<sup>39</sup>

6.4. Both bills provide exceptions relating to land in the New Territories, under the EOB in relation to applicable Chinese customary law and under the SDB in relation to specified Ordinances.<sup>40</sup> The SDB further exempts any sex discrimination in connection with the Small House Policy in the New Territories.<sup>41</sup>

6.5. The SDB exempts certain acts done for the protection of women in compliance with existing Ordinances or with any subsidiary legislation made under them, including in particular the protective regulations specified in Schedule 2.<sup>42</sup>

6.6. The SDB also exempts certain discrimination in connection with any office

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<sup>33</sup> EOB 238

<sup>34</sup> EOB 225

<sup>35</sup> SDB 36-8

<sup>36</sup> SDB 74

<sup>37</sup> EOB 238-40, SDB 39-40

<sup>38</sup> EOB 9

<sup>39</sup> SDB 51

<sup>40</sup> EOB 42, SDB 53

<sup>41</sup> SDB 54, Schedule 4

<sup>42</sup> SDB 49-50, 52

in the police force, immigration service, and certain other disciplined services, as well as marital status discrimination in connection with certain benefits under the Civil Service Regulations.<sup>43</sup>

## 7. Other exceptions and exemptions

7.1. The EOB provides an exception relating to superannuation or provident funds or schemes, while the SDB excepts provision in relation to death or retirement made by employers, partnerships, or trade or professional organisations.<sup>44</sup> Both provide in similar terms for exceptions relating to insurance.<sup>45</sup>

7.2. Both bills provide exceptions relating to competitive sports<sup>46</sup> and to charitable benefits.<sup>47</sup> Both bills also provide an exception relating to non-profit, voluntary bodies; the EOB, but not the SDB, defines “voluntary body” to exclude certain clubs, statutory bodies, and bodies providing credit or finance to members.<sup>48</sup>

7.3. Both bills make exception for special treatment of women in connection with pregnancy or childbirth.<sup>49</sup> The EOB also provides an exception for measures intended to ensure equal opportunities to, or meet the special needs of, persons of a particular sex or marital status or who are pregnant.<sup>50</sup> The SDB provides an exception for efforts by elected professional or trade organisations to ensure that a minimum number of persons of one sex are members.<sup>51</sup>

7.4. The EOB provides additional exceptions relating to employment of a married couple; accommodation provided for employees or for students; religious bodies; educational bodies with religious purposes; and housing and ancillary services for the aged.<sup>52</sup>

7.5. The SDB provides additional exceptions for communal accommodation,

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<sup>43</sup> SDB 54, Schedule 4

<sup>44</sup> EOB 40(1)-(3), SDB 10(4), 14(4), 15(4)

<sup>45</sup> EOB 40(4), SDB 43

<sup>46</sup> EOB 41, SDB 42

<sup>47</sup> EOB 226, SDB 41

<sup>48</sup> EOB 3(1), 227, SDB 29

<sup>49</sup> EOB 34, SDB 5(2)

<sup>50</sup> EOB 37

<sup>51</sup> SDB 47

<sup>52</sup> EOB 35, 38, 228-30

and for certain discriminatory training

## 8 Enforcement

8.1. Both bills provide for civil proceedings in the District Court; the EOB treats unlawful acts as civil wrongs, while the SDB treats claims in like manner as torts.<sup>54</sup> The EOB provides for the court to make interim orders, and to make any remedial order it considers just and appropriate in the circumstances, including an order to reinstate a dismissed employee.<sup>55</sup> The SDB authorises the court to provide any remedy obtainable in the High Court.<sup>56</sup>

8.2. Under the EOB, the court may vary from the ordinary rules of evidence in order to inform itself on any matter as it sees fit; each party to litigation will ordinarily bear that party's own costs, except when the court finds exceptional circumstances justifying otherwise.<sup>57</sup> The SDB amends the District Court Ordinance (Cap. 336) to empower the District Court Rules Committee to make rules for proceedings under the Bill at variance with the ordinary rules of court.<sup>58</sup> The SDB also amends the Official Languages Ordinance (Cap. 5) to permit the use of Chinese in proceedings under the bill.

8.3. The SDB also establishes an Equal Opportunities Commission which has the exclusive power to bring certain claims and may also conciliate complaints made to it, conduct formal investigations and issue (non-binding) enforcement notices, promulgate codes of practice, and carry out various other functions with respect to the bill.<sup>59</sup>

Office of Anna Wu  
3 November 1994

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<sup>54</sup> SDB 44-6

<sup>55</sup> EOB 231-2, SDB 67-8

<sup>56</sup> EOB 233-4

<sup>57</sup> SDB 68

<sup>58</sup> EOB 235, 237

<sup>59</sup> SDB 14 of Schedule 7

<sup>60</sup> SDB 55-66, 69-77, Schedule 5

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Meaning of Clause 4: “Act done for 2 or more reasons”

1.1. Clause 4 of the Equal Opportunities Bill provides that, where a person does an act on one or more grounds — only one of which is a prohibited status under the Bill — that will amount to discrimination on the ground of that status. The prohibited ground does not have to be the dominant, or even a substantial reason for the act about which the complaint is made.

**EXAMPLE:** A branch office of a large company which employs 20 men and 20 women as clerks receives orders from head office to trim the workforce by 3 people. Five of the men and five of the women are incompetent workers. The manager of the branch office reviews the personnel files of the 5 women who are not competent and sacks the 3 least competent of these. The manager does not examine the files of any men or carry out a comparison between the least competent women and the least competent men.

The employer might argue that the manager sacked the 3 women on the ground of incompetence. However, it is clear that the women were disadvantaged in the process of selecting the workers to be made redundant, yet their sex was a necessary but not sufficient basis for the decision (not all women, or all incompetent women, were sacked).

Under clause 4, the act of dismissal would be considered to have been carried out on the ground of the sacked workers' sex (as well as on the ground of their competence), and the act would be unlawful.<sup>1</sup>

2. Policy objectives

2.1. A central policy goal of the Equal Opportunities Bill is to ensure that irrelevant factors are not taken into account in decision-making in the areas covered by the Bill.

2.2. By adopting the approach of clause 4 rather than requiring the plaintiff to show what the motivations of the defendant were, the policy objectives of the legislation will be better served. This approach provides an incentive for defendants to

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<sup>1</sup> It might also be argued that there is direct discrimination on the ground of sex under s 13(2) in that the employer, by considering only women for redundancy, is subjecting them to a detriment (the possibility or actuality of sacking) on the basis of sex.



ensure that irrelevant discriminatory factors are eliminated completely from their decision-making processes.

### 3. Procedural balance

3.1. The provision also seeks to achieve procedural fairness as between a plaintiff and a defendant.

3.2. The normal rules of evidence would require the plaintiff to prove that the defendant had discriminated against the defendant on the ground of a prohibited status. The motivation of an alleged discriminator is something which is often peculiarly within that person's knowledge. While one can reasonably require a plaintiff to prove that a prohibited ground played some role in the decision of the alleged discriminator, it imposes an unfairly heavy burden on a plaintiff to prove to the court which of the various motivations was the dominant or substantial one. As one judge has commented in a case involving a number of motives: "There will be a composite of reasons in practically every management, or for that matter, any individual decision."<sup>2</sup>

3.3. Under clause 4 once the plaintiff proves that a prohibited ground has played a role in the unfavourable treatment to which (s)he has been subject, this will be sufficient to make out a case of unlawful discrimination and, if the defendant adduces no evidence, the plaintiff will prevail. However, it would be open to the defendant to produce evidence showing that the discriminatory factor played no role in the decision; if that evidence is accepted, then the plaintiff would have failed to establish unlawful discrimination.

3.4. If the defendant produces evidence showing that the prohibited ground played only a minor role or was not the determinative factor, then this can be reflected in any remedy awarded.

### 4. Experience elsewhere

4.1 In some jurisdictions the relevant legislation does not provide any guidance to the courts on the standard to be applied in "mixed motive" discrimination cases, and the courts have had to develop their own tests. These have varied, with some courts requiring the defendant to show "but for" causation (i.e. that the ground was decisive for the decision, which would not have occurred without it), or that it was significant

<sup>2</sup> *Petroleum Refineries (Australia) v Marett* (1987) EOC 592-237 at p 77 215 (Vic Sup Ct)

reason for the less favourable treatment<sup>3</sup>

4.2 No specific provision of this sort is made in the Sex Discrimination Act 1975 (UK) (or in the administration's Sex Discrimination Bill), and the courts have reached different views, with some tribunals requiring that the prohibited ground be the main operating cause,<sup>4</sup> while others have taken the view that it should be a "significant" or "substantial" factor.<sup>5</sup> It may be noted that in the area of unjust dismissal legislation, a much more onerous burden is placed on an employer to show the reason for the dismissal. Section 57(1) of the Employment Protection (Consolidation Act) 1978 provides

"In determining for the purposes of this Part whether the dismissal of an employee was fair or unfair, it shall be for the employer to show —

- (a) what was the reason (or, if there was more than one, the principal reason for the dismissal) . . .".

4.3. Leaving the matter to the courts seems to be an unsatisfactory way to proceed. In a number of jurisdictions, the legislation itself provides that discrimination will be shown if reliance on a prohibited ground is a "substantial" basis for the decision.<sup>6</sup> In other jurisdictions, the same approach is followed as in clause 4 of the Equal Opportunities Bill.<sup>7</sup>

Office of Anna Wu  
3 November 1994

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<sup>3</sup> See the position in New South Wales *Reddrop v Boehringer Ingelheim* (1984) EOC 592-031

<sup>4</sup> *Seide v Gillette Industries* [1980] IRLR 427 (EAT)

<sup>5</sup> *Owen and Briggs v James* [1981] ICR 377 (EAT), approved [1982] ICR 612 (CA)

<sup>6</sup> See, e.g., *Equal Opportunity Act 1984* (Vic) s 4(7), *Sex Discrimination Act 1984* (SA), s 6(2)

This is the approach adopted under inter alia the Australian federal legislation on discrimination: the Sex Discrimination Act 1984 (Cth) s 8, the Disability Discrimination Act 1992 (Cth) s 10, and the Racial Discrimination Act 1975 (Cth) s 18 (following amendments in 1990 to remove the requirement that race be shown to be the dominant reason for the act complained of), as well as the Equal Opportunity Act 1984 (WA) s 5 and the Discrimination Act 1991 (ACT) s 4(3). The Anti-Discrimination Act 1992 (NT) provides that the prohibited ground does not have to be 'the sole or dominant ground' for the less favourable treatment (s 20(3)(a)).

To: The Equal Opportunitites  
Bill Team  
From: Andrew Byrnes  
Date: 4 November 1994

## EQUAL OPPORTUNITIES BILL

### INDIRECT DISCRIMINATION : A NEED TO EXPAND THE DEFINITION?

1. This note raises the issue of whether we should consider expanding the definition of *indirect* discrimination, as presently defined in various sections of the Equal Opportunities Bill, along the lines recommended by the UK EOC in the context of the UK Sex Discrimination Act. The advantage of doing so would be to avoid technical and formalistic interpretations of similar definitions that have occasionally appeared in case law in England and Australia, as well as to make the test of justification more demanding for a person who asserts that an indirectly discriminatory practice is justifiable..

#### **THE PRESENT POSITION UNDER THE EQUAL OPPORTUNITIES BILL**

2. The Equal Opportunities Bill currently defines indirect discrimination on the basis of sex in the following terms (indirect discrimination on other grounds is similarly defined):

“10.(2) For the purposes of this Ordinance, a person (“the discriminator”) discriminates against another person (“the aggrieved person”) on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition--

- (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply,
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

(3) For the purposes of subsection (2)(b), a person who asserts that a condition or requirement is reasonable having regard to the circumstances of the case bears the burden of proving that the condition or requirement concerned is reasonable ”

## THE UK SEX DISCRIMINATION ACT

3. The UK Sex Discrimination Act defines indirect discrimination in similar, though not identical terms. Section 1 of that Act provides:

“1.(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if--

(2) he applies to her a requirement or condition which he applies or would apply equally to a man but--

- (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment because she cannot comply with it.”

## THE UK EOC'S RECOMMENDATIONS

### “Requirement or condition”

4. In its proposals to strengthen the SDA,<sup>1</sup> the EOC noted a number of difficulties that had arisen in the interpretation and application of this provision. It identified in particular two problems relating to the need to show that “a requirement or condition” is being applied:<sup>2</sup>

- a complainant may have difficulty in identifying the requirement where it is “composite” (eg, race+age+sex)
- an employer may express “a preference” (which the English Court of Appeal has held, in *Perera v Civil Service Commission* [1983] ICR 428, does not constitute a “requirement or condition”)

5. The EOC consequently recommended that “the wording of the Act be expanded to make it clear that any practice or policy having an adverse

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<sup>1</sup> Equal Opportunities Commission, *Equal Treatment for Men and Women. Strengthening the Acts – Formal Proposals* (March 1988)

<sup>2</sup> *Strengthening the Act*, para 33

impact upon one sex as opposed to the other or upon married persons as opposed to single could be challenged.”<sup>3</sup>

### *The Australian case law*

6. The position in Australia (which has essentially the same definition as the Equal Opportunities Bill) has been that the courts on the whole have taken a fairly liberal approach. For example, in the recent decision of the High Court of Australia in *Waters v Public Transport Commission* (1992) EOC 93-290 took the view that the removal of conductors from Melbourne trams and their substitution by a form of ticket -- the effect of which was to prevent blind people from using the trams -- involved the imposition of a requirement or condition in the provision of goods or services. One may not be able to rely on such a broad approach being taken by the Hong Kong courts.

### **Justification**

7. The EOC also recommended that the test of justifiability of an indirectly discriminatory requirement or condition should be made more stringent. There were two reasons for this. The first was that the Court of Appeal in *Ojutiku v Manpower Services Commission* [1982] ICR 661 has adopted a fairly lax test, ruling that the test was not that of necessity but of “reasons . . . which would be acceptable to right thinking people as sound and tolerable reasons for [applying the requirement or condition] . . .”.

8. The second factor was the influence of European law (which in this respect forms part of the law of the UK). The European Court of Justice has considered a number of indirect sex discrimination cases brought under article 119 of the Treaty of Rome (equal pay) or the Equal Treatment Directive. One of the leading cases is *Bilka Kaufhaus v Weber von Hartz* [1987] ICR 110, dealing with the exclusion of part-time workers from a pension scheme (this had a disproportionate impact on women). The ECJ adopted the following standard of justifiability:

“[a measure would be justified if] the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.”

9. The EOC recommended that this test of justifiability be substituted for the existing one. The UK Government recently rejected this proposal on the ground that such an amendment was unnecessary in view of the fact that the British courts had, following European law, started to interpret the

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<sup>3</sup> *Strengthening the Act*, para 33

justifiability provision according to the European case law. (In this regard there would not appear to be any corresponding obligation on the Hong Kong courts to follow this lead, as European law does not form part of the law of Hong Kong, nor are the provision of the EC/EU treaties applicable to Hong Kong as a matter of international law. If one is to adopt the English definition, as the Government's Bill proposes, then we should consider amending it as the EOC proposed.)

Andrew Byrnes

7 November 1994

[INDDIR.DOC]

# The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong.  
Tel: (852) 537-2467 Fax: (852) 530-2018

## FACSIMILE MESSAGE

TO Andrew Byrnes NO. OF PAGES (INCLUDING THIS ONE): 2  
cc. Carole Petersen

FROM: Adam Mayes DATE: 29/11/94

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

### MESSAGE:

For your information, these are the questions/hypotheticals raised by Bills Committee members last Friday. Number 7 was asked by Fung Chi-wood (DP), 8 by Heui Yin-fat, 9 by Miriam Lau (LP); all the rest by Peggy Lam.

1. What is the definition of religion? Does it include cults, non-traditional religions?
2. Re. s. 148(3) [religious observances at work exc.]: What if an waiter in a restaurant has to drop everything he's doing once an hour and bow to the West three times for religious reasons? This disconcerts the customers; does the employer have to put up with it?
3. What if an employer requires workers to wear a cap, and one employee refuses on religious grounds? — if the reason for the cap is hygiene; — or if the reason for the cap is just to maintain a uniform appearance?
4. Can an employer insist that a worker work on the worker's Sabbath?
5. What about a shop that's open seven days a week. The employees who work on Sundays get extra pay for doing so. For some employees, their Sabbath is Saturday, but they get no extra pay for working on Saturday. Discrimination?
6. If the answer is always "it depends on what is reasonable under the circumstances", does this mean employers will have to go to court every time?
7. Can religious bodies with schools hire only teachers of the same religion? If a religious schools sponsors prayers or services, can teachers be pressured — even threatened with dismissal — to take part?
8. If a religious school has two equally qualified candidates for a teaching position, one but not the other of the same religious affiliation as the institution, can it prefer the co-religionist?
9. What about the effect on landlords? What if a prospective tenant is going to be burning incense all the time — or what if his religion forbids electricity, so he lights his

flat with candles. This is a fire hazard — would it be discrimination to refuse to rent to someone of this religion?

10. What if a company founder prefers to employ co-religionists because he feels they share the same thinking, can understand each other better, get along better — can't he run his company the way he wants? ("Can't he live his dream?" was the plaintive translation . . .)
11. Re. cl. 228 [religious bodies, etc. exception]: What is the definition of religious bodies? Would it cover companies or shops selling religious items?
12. Re. cl. 163 [emp. exc's to rel/pol disc]: Why are the exceptions for religion and for political beliefs different in scope? Why are political beliefs less protected than religious ones? (Suggested answer for LP members: "because people change their political beliefs more frequently.")



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**URGENT**

FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen  
NO. OF PAGES (INCLUDING THIS ONE) : 1

FROM : Adam Mayes  
DATE : 30/11/94

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

Re. Fri. 2 Dec. Bills Committee meeting

1. I talked to Susie Ho (Prin. Ass't Sec'y (3) in HA Branch), who will (I gather) be presenting for the Government this Friday. She will give an introduction to the SDB with particular reference to employment.
2. She will not dwell on giving an overview of the SDB (though she will make some reference to the definitions of direct and indirect discrimination). As agreed at the previous meeting between AW, Michael Suen & CH Leong, Government will be given an opportunity later to draw the bill together.
3. Instead she will concentrate on employment in order to bring discussion of the SDB into parallel with the EOB. (This is also more or less as agreed; we omitted the sex-related clauses the week before last to allow Gov't to come in — they're just a week later than expected.)
4. She assumes that she will begin with a presentation, followed by questions from members. She is unfamiliar with current practice in Bills Committees (having last attended one two years ago), and will therefore leave it largely to the Chairman to direct the course of the meeting.
5. Her team consists of representatives of HA Branch, the Law Draftsman's office, and one officer from the Ed. & Manpower Branch (Raymond Fan, who deals with employment issues). Her legal advisor is unavailable this week (working with the Boundaries and Elections Committee) but will be in attendance next week.
6. Since her team has just been assembled (and her legal advisor will be absent), she hopes that members will not bombard her with detailed questions, and expects she will have to give later written answers to detailed questions.

To : Patrick Mok  
From : Adam Mayes  
Date : 1/12/94

Major SDB issues (for 2 Dec Bills Committee meeting)

**General**

- 1 SDB omits all grounds other than sex, marital status, privacy
  - In public hearings and submissions, women's groups asked loudly and clearly for laws against age discrimination, and against family responsibility discrimination — why ignored?
  - Why are the treaty obligations covering other grounds (treated in force longer than CEDAW) not implemented now? When will they be?
2. SDB permits marital status & pregnancy discrimination outside employment area [Clauses 6, 7.]
  - Why? Why should landlords, for example, be able legally to discriminate against single parents (one issue raised in submissions)?

**Employment**

1. **Delay while codes of practice are promulgated**
  - 1.1. **Home Affairs intends to postpone commencement of employment provisions until after EOC promulgates codes of practices.** [see cl. 1(2) and HA briefing paper.]
  - 1.2. **The codes will not be legally binding (they only provide guidance on how to comply with the law).** [cl. 61(14)]
  - 1.3. **Delay will be lengthy and indefinite: (1) the EOC will be established, (2) EOC must then draft the codes, (3) EOC must formally consult with employer and worker organisations, (4) draft code must be approved by Legco resolution.** [cl. 61]
  - 1.4. **Possible questions:**
    - On what basis was this decision to delay made? Who was consulted? Is there any public record of that consultation?
    - How long will this take? Can HA honestly say they know how long it will take? Is it possible the delay could carry through the 1997 transition?
    - Why wait through a whole new consultation process? Isn't this just an opportunity for further strategic delay by those opposed to the legislation itself?
    - What makes these codes so valuable, considering that (1) they are not binding on the courts (only the law itself is) and (2) the EOC will in any case be available to provide guidance and conciliate complaints?

- 2 **Five-year exemption for small business**
  - 2.1 The SDB's employment provisions (except with respect to harassment) will not apply for five years to businesses with five or fewer employees [cl 10(3)] (This is an additional five year delay after the codes are promulgated)
  - 2.2 Possible questions
    - How many employers fit this description? How many employees does this proposal leave unprotected for five years?
    - On what basis was this decision made? Who was consulted? Any public record of this?
    - How (if at all) were the expected costs of compliance to small business measured? Why are these putative costs deemed to outweigh the equality rights of the affected employees?
    - Why is this extra delay needed — on top of the indefinite delay while codes are promulgated? — even though the EOC will be on hand to provide guidance and to conciliate complaints?
    - Is there any evidence (from UK or elsewhere) that employers actually use such temporary exemptions to voluntarily bring their practices into compliance?
3. **Exemptions for specific government employment practices**
  - 3.1. **Schedule 4 of the SDB exempts:**
    - ◊ certain discriminatory practices in the Police, Customs, Fire Services and other disciplined services, (for example, height and weight requirements and the exclusion of women from weapons training) [cl. 54 & Schedule 4, Part 2, sec 1.]
    - ◊ marital status discrimination in various benefits under the Civil Service Regulations [cl 54 & Schedule 4, Part 2, sec 3(a)(1)]
  - 3.2 Possible questions
    - These exemptions are clearly drafted with specific practices and policies in mind. Exactly what is meant to be covered?
    - Why can't these practices be re-formulated in a non-discriminatory manner instead of exempted? (The Police, for example, are already re-thinking their uniforms and weapons-training policies)
    - Why should the Administration be allowed to write special loopholes for itself when acting as an employer?
    - Isn't exemption contrary to the spirit of the Bill and to the Administration's support of the principle of non-discrimination?
    - Is it compatible with relevant treaty obligations to exempt entire areas of discrimination? Doesn't this represent a clear failure to meet, for example, the government's obligations under CEDAW?

- 4 Exemption for marital status discrimination in employment benefits
  - 4.1 Schedule 4 also exempts marital status discrimination in various benefits under *any contract of employment* [cl 54 & Schedule 4, Part 2, sec 3(a)(ii) and (iii) ]
  - 4.2 Possible questions
    - Why such a broad exemption? On what basis was this decided?
    - Again, why can't employers (with EOC assistance) re-formulate their policies in a non-discriminatory manner?
    - Isn't such a blanket exemption again contrary to the underlying principles of the Bill?
- 5 ~~Positive discrimination~~ made unlawful?
  - 5.1 The SDB appears to authorise (without requiring) positive discrimination by employers *only in the form of vocational training* [cl 46]
  - 5.2 This means that the SDB *prohibits* employers from voluntarily implementing any other form of positive discrimination.
    - 
    -

### **Other than employment**

1. **The Small House Policy is exempt — why? Doesn't this contravene CEDAW?** [Clause 54; Schedule 4, Part 2, sec. 2.]
2. **Nothing in the SDB expressly forbids discrimination in rural Village Representative elections — is it covered?**
3. **The SDB exempts all “protective legislation ” This specifically includes the industrial regulations that have been attacked by Women's Groups [Clauses 11(2)(g), 49, Schedule 2 ] Why?**
4. **Nothing in the SDB expressly forbids discrimination in clubs — are clubs covered? Which clubs are and which aren't, and which aspects of their operations?**
5. **Nothing in the SDB expressly forbids discrimination in the administration of laws and government policies — are all government activities covered?**
6. **The SDB provides an exemption for “acts safeguarding the security of Hong Kong ” [cl 51] What does this mean, and how is it relevant to an equal opportunity law?**

# DOCUMENT 86

Summary of Areas of Discrimination raised by deputations meeting with the Bills Committee on 27, 28 and 31 October 1994

Name of organization/individual	Area of discrimination	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Alliance for the Promotion of Rights for Grass-roots Women (爭取基層婦女權益聯盟)		✓						✓			- Labour importation scheme being the main cause for discrimination  - Ineffectiveness of re-training scheme
Movement Against Discrimination (反歧視大聯盟)		✓	✓	✓	✓	✓	✓	✓	✓	✓	Support quota system in work for the disabled
Task Group on Anti-Discrimination Legislation for Disabled Persons (立法消解歧視殘疾人士工作小組)						✓					Support quota system in work for the disabled
Hong Kong Ten Percent Club (香港十分一會)				✓							Public education on liberty to choose sexual orientation important

Name of organization/ Individual	Area of discrimination	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Hong Kong Monitor (香港監察)		✓	✓	✓		✓		✓			<ul style="list-style-type: none"> <li>- Public discussion on controversial areas necessary</li> <li>- Freezing period be provided on controversial issues</li> </ul>
Hong Kong Association of Business and Professional Women (香港商業與專業婦女協會)		✓	✓					✓			Support setup of Women Commission
Hong Kong Women Christian Council (香港婦女基督徒協會)							✓				Have reservation on proposed exceptions relating to religious bodies
Hong Kong Women Workers Association (香港婦女勞工協會)		✓						✓			Equal Opportunities Commission's role in providing assistance in respect of proceedings should be emphasized

Name of organization/individual	Area of discrimination	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Association for the Advancement of Feminism (新婦女協進會)		v						v			- Disagree to proposed exceptions relating to NT land - Existing policy should be reviewed to assess its impacts on discrimination
Helpers for Domestic Helpers (家庭傭工協會)					v						Immigration legislation and policy should be covered by the EOB
Hong Kong Confederation of Trade Unions (香港職工會聯盟)						v		v		v	- Labour importation scheme being the cause for discrimination - Support quota system for the disabled in work
Mr Robin Adams and Mr Bill Proudfit				v							Public education on acceptance of persons irrespective of sexual orientation important

Name of organization/individual	Area of discrimination	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Coalition of Religious Bodies (基督教團體關注平等機會法 委員會)							✓				<ul style="list-style-type: none"> <li>- Have reservation on proposed exceptions relating to religious bodies</li> <li>- Some job applicants' personal particulars need not be provided to employers</li> </ul>
Christians for Hong Kong Society (基督徒關懷香港學會)							✓				<ul style="list-style-type: none"> <li>- Support exceptions relating to religious bodies</li> <li>- Public discussion on controversial issues necessary</li> </ul>
Hong Kong AIDS Foundation (香港愛滋病基金會)						✓					<ul style="list-style-type: none"> <li>- Advocate equal treatment of PWHIV/AIDS as people with other disabilities</li> <li>- Request HIV/AIDS be covered by the EOB</li> </ul>



Name of organization/ individual	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union member- ship	Remarks
Concern Group on Single Parents (關注單親人士協會)	v	v					v			The need of single parent families should be considered in devising policy and legislation

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Appendix II  
附錄II  
GOVERNMENT SECRETARIAT  
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圖文傳真 FAXLINE 834 6176

9 December 1994

DOCUMENT 87

Ms. Anna Lo,  
Clerk to the Bills Committee to Study the  
Equal Opportunities Bill and the  
Sex Discrimination Bill,  
Ground Floor,  
Legislative Council,  
8 Jackson Road,  
Hong Kong

Dear Anna,

Sex Discrimination Bill

At the last meeting of the Bills Committee held on 2.12.94. Members expressed concern over Clauses 10(3) and (6) of the Bill which provide for a five year transitional period for small business establishments. I undertook to provide Members with the views expressed by employer organisations in response to the Green Paper on Equal Opportunities for Women and Men. A set of the submissions by relevant employer organisations is enclosed.

I should be grateful if you would pass them to Members of the Bills Committee for information.

Yours sincerely,

(Miss Susie Ho)  
for Secretary for Home Affairs

Encl.



Ref. : A/IC HKWCC

Date : 1993-12-06

The City and New Territories Administration  
31st Floor, Southern Centre  
130 Hennessy Road  
Wanchai  
HONG KONG.

Dear Sir/madam,

Reference is made to the green paper on equal opportunities for women and men on which members of the Council have the following comments to make.

Council members subscribe to the principle of equality between the two sexes. However, members have reservation about the need to enshrine this principle in the form of legislation which can end up doing both sexes a disservice by creating unwarranted tensions between men and women which our community has never experienced before. Being a trade body representing employers, the Council therefore examines the issue with specific focus on the aspect of employment.

### Equal opportunity to join the workforce

Structural changes in our economy has seen the relocation of our industry to China in the last decade. The burgeoning service sector which normally offers better pay and working conditions has out-competed the industrial sector for our much sought-after workforce. Consequently, for those which stay behind, circumstances have made it extremely difficult if not impossible to have sex preference when it comes to filling vacancies, unless the nature of job dictates such preference. Generally speaking, sex discrimination virtually does not exist in the watch and clock industry which involves relatively simple and less physically demanding manufacturing processes. In fact many jobs in our industry are interchangeable between the two sexes when the workers have been given appropriate training. This flexibility further reduces the chances of sex discrimination when recruitment of new workers becomes necessary.

香港鐘錶業工業總會  
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電話：[redacted] 傳真：[redacted]  
電話：[redacted] 傳真：[redacted]

Distribution of employees in selected occupations by sex

The findings of the green paper show that among six selected occupations, namely, managers & administrators, professionals, associate professionals, clerks, craft & related workers and plant & machine operators, jobs which demand higher qualifications or physical capabilities see lesser involvement of the female sex. On the contrary, jobs which are less demanding in these two aspects see a much higher rate of female participation. This phenomenon speaks for itself, that is, traditional norms and values have prevented the female sex from getting higher education and have therefore limited females from the echelon of senior positions. Although old norms and values are rapidly giving way to social and economic changes, equality per se will take sometime to achieve. On the other hand, physical limitation, which distinguishes man and woman, will be here to stay. If laws are enacted to give special treatment or preference to a particular sex, the spirit of equality has already been betrayed.

Equal pay legislation

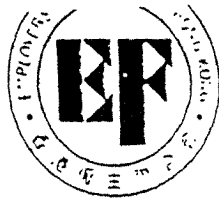
Having made our position clear, we are of the view that any equal pay legislation will still fail to achieve true equality. While no objective yardstick is available to measure performance except in the case of piecework, difference of opinion will create tensions in the workplace and the existence of any such legislation will pave way for labour disputes which are relatively uncommon in the history of our economic development as compared to western countries. If legislation will offer an avenue for redress, it will also solicit complaints from both sexes. We are therefore more inclined to supporting a 'soft' approach whereby employers will only be required to make efforts to realize the principle of equality without being subject to penalty in the event of non-compliance.

Conclusion

When findings show that the labour force participation rate of Hong Kong women is comparable to that of Japan and other developing Asian economies, when figures show that the labour force participation rate of women worldwide is normally lower than that of men and when no evidence is available to indicate that sex discrimination does exist, any legislation to justify a cause without giving due consideration to the merits of its existence is redundant and can be sometimes counter-productive. The Council therefore supports legislations which are educational rather than punitive in as far as equality goes.

Yours truly,

Warren Kwok  
Secretary General



# EMPLOYERS' FEDERATION OF HONG KONG

## 香港僱主聯合會

20th December, 1993

The City & New Territories Administration  
31st Floor, Southorn Centre  
130 Hennessy Road  
Wanchai  
Hong Kong

Attn: Secretary, Home Affairs Branch

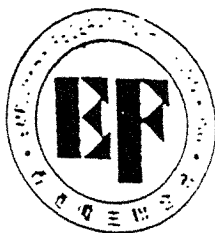
Dear Sir/Madam

### Green Paper on Equal Opportunities for Women and Men

Thank you for inviting comments from the Employers' Federation of Hong Kong. To give you a representative response, we have conducted a questionnaire survey among our members. The comments below are based on the responses from 50 companies employing a total of about 96,000 employees. The voluntary respondents panel is statistically non-sex biased, 60% male and 40% female.

The following are the Federation's points of view on the subject "Equal Opportunities for Women and Men" in the context of employment issues.

1. We support the concept of "equal opportunities for women and men" in political, social and economic aspects including employment.
2. Most of our members believe there is very little discrimination against women in the current employment practices in Hong Kong. Even if there are unequal practices, they tend to lie with fringe areas such as medical and child education benefits. From the employment perspective, Hong Kong does not have serious sex discrimination problems, either in absolute terms or by comparison with other countries which have introduced stringent legislation to control discrimination. There is no evidence that the situation in those countries in North America and Europe is much better than in Hong Kong.
3. Given the tight labour market in Hong Kong, most of our members believe the whole issue is best left to market forces, which is in line with the proven successful free market economic policy in Hong Kong. However, we fully support continuous education and promotion of "equal opportunities for women and men" in all aspects. Most of our members are also prepared in principle to subscribe to a code of practice in this area adopted by the Federation of other employers' organisations.
4. Most of the respondents object to introducing "hard" legislation, including "redress through courts" and "punitive" approaches, to mandate employment equalities between women and men. While a majority of them do not have strong objection to "soft/mediation oriented" legislation, the Federation has strong reservations on supporting any form of legislation in this area. We recommend a code of practice be developed and implemented, before any form of legislation is considered.



## EMPLOYERS' FEDERATION OF HONG KONG

### 香港僱主聯合會

The reasons for not supporting legislation approach on this issue are.

- i) It violates the non-Government intervention principle on individual business management and the overall voluntary conciliation approach on trade disputes, both of which have been playing key roles in contributing to the success of Hong Kong economy. Even in the recent "Review of Labour Relations System", the Government is proposing to maintain the spirit of restraining from further legislation and retaining voluntary arrangements.
  - ii) The extra resources required in the Government and business establishments will further aggravate the labour shortage problem in Hong Kong. It may also adversely affect Hong Kong's competitiveness in international markets, as more legislation may lead to shifting front line staff to perform staff functions.
  - iii) The direct and indirect costs incurred will heavily outweigh any possible incremental benefits brought by the new legislation, which non-legislative approaches may also be able to deliver.
  - iv) Small employers, more than 80% of Hong Kong business establishments, will have practical difficulties in complying with the required employment procedures in connection with the legislation. Very few of them have or can be expected to have a full-time personnel department well equipped to conduct objective job or performance appraisal. This will inevitably leave sex-discrimination attitude or behaviour to subjective judgement, leading to legal confrontation between employers and employees which may not be constructive to the Hong Kong economy.
5. Based on points 2 to 4 stated above, and in the context of employment issues, we do not support the extension of CEDAW to Hong Kong, nor the establishment of a Women's Commission with interventionist or judicial powers in labour matters.

We hope the Government will favourably consider the above points of view.

Yours faithfully

Mark Leese  
Chairman

cc Ms Katherine Fok/Commissioner for Labour  
Ms Joan M Lewis/Human Resources Committee, HKGCC  
Legco Members

Women's



# EMPLOYERS' FEDERATION OF HONG KONG

香港僱主聯合會

3 June 1994

Mr Michael Suen JP  
Secretary for Home Affairs  
31/F Southorn Centre  
130 Hennessy Road  
Wanchai  
Hong Kong

Dear Mr Suen

## Equal Opportunities

As you will be aware we wrote to your Department on 20th December 1993 expressing our views on the Green Paper on Equal Opportunities for Women and Men

The proposal, now being promoted by Legislative Councillor Ms Anna Wu, for Equal Opportunities Legislation and a Human Right Commission for Hong Kong further widens the debate on equal opportunity and non discrimination in our society

The Employers' Federation was pleased to have been given the opportunity to express its views on this proposal, which we have now done

Since both the proposal and our response are related to your enquiries into equal opportunity we send you herewith a copy of our response

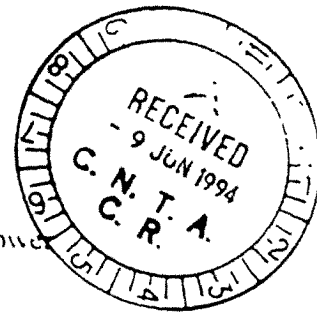
We are also copying this letter and our response to the Secretary for Education and Manpower and the Commissioner for Labour

Yours sincerely

May Chow  
Executive Director

Encl

cc Mr Michael Leung CBL JP, Secretary for Education & Manpower  
Mrs Katherine Fok JP, Commissioner for Labour



ms: n



## EMPLOYERS' FEDERATION OF HONG KONG

## 香港僱主聯合會

13 May 1994

Ms Anna Wu, Legislative Councillor  
Rm 415 Central Government Offices  
West Wing, 11 Ice House St  
Hong Kong

Dear Ms Wu

### **Response to the Proposal to Promote Human Rights and Equal Opportunities**

The Employers' Federation firmly supports equal opportunity and non-discrimination in political, social and economic matters and specifically in employment.

Its formal attitude in this is widely supported by its membership whose views have been canvassed in a membership poll, conducted to guide the Federation in formulating on their behalf a response to the Government's recent Green Paper on Equal Opportunities for Women and Men.

We do not however support a legislative approach and, together with the large majority of our members, are strongly opposed to interventionist legislation which seeks to override the normal employment relationship and to impose subjective value judgement on what does or does not constitute unacceptable discrimination. The attempt in the paper to make a distinction between what is 'reasonable' discrimination (or selection) and what is 'adverse' discrimination highlights just how subjective and controversial the proposed transfer of final judgement becomes.

The proposal, in paragraph 48, states that the proposed legislation would not prevent an employer from employing the person who is most qualified for the job. It also proposes empowering a court to order the employment or reemployment of a successful complainant. In the final analysis the judgement of qualification for a job is thus removed from the employer and replaced by a fertile environment for dispute on even the most flimsy or trivial grounds.

Our perspective is naturally for the most part concerned with the employment situation in Hong Kong. That discrimination still exists in some measure, we do not deny. It exists in all societies, even those which have introduced the most stringent legislation to combat it.

However the progress of Hong Kong in eliminating traditional areas of discrimination in the field of employment compares very favourably with other developed international societies. Equal opportunity has flourished in an environment of a free market place, voluntarism in labour relations and non-intervention.





# EMPLOYERS' FEDERATION OF HONG KONG

## 香港僱主聯合會

The reasons for not supporting legislation are as follows:

- (i) It violates the non-Government intervention principle on industrial relations, less than the overall voluntary conciliation approach to trade disputes. It is not one of the key roles that contributing to the success of Hong Kong economy. It is the "Free and Fair Labour Relations System" the Government is proposing to maintain, separate from future legislation and retaining voluntary arrangements.
  - (ii) The extra resources required in the Government and business establishments, aggravate the labour shortage problem in Hong Kong. It may also adversely affect Hong Kong's competitiveness in international markets. More legislation will lead to on-line staff to perform staff functions.
  - (iii) The direct and indirect costs incurred will hardly outweigh any possible increment brought by the new legislation, which non-legislative approaches may also be able to do.
  - (iv) Small employers, more than 80% of Hong Kong business establishments, will find difficulties in complying with the required employment procedures in connection legislation. Very few of them have or can be expected to have a full-time personnel well equipped to conduct objective job or performance appraisal. This will inevitably discriminate attitude or behaviour to subjective judgement, leading to legal con between employers and employees which may not be constructive to the Hong Kong.
5. Based on points 2 to 4 stated above, and in the context of employment issues, we don't support the extension of CEDAW to Hong Kong, nor the establishment of a Women's Commission, nor the interventionist or judicial powers in labour matters.

We hope the Government will favourably consider the above points of view.

Yours faithfully,

Mak Fesse  
Chairman

cc: Ms Katherine Lok, Commissioner for Labour  
Ms Joan M Lewis, Human Resources Committee, HKGC  
Legco's Member

w:mms



# EMPLOYERS' FEDERATION OF HONG KONG

香港僱主聯合會

Home Affairs Administration  
Labour Relations Centre  
150 Herby Road  
Windsor  
Hong Kong

Attn: Secretary Home Affairs Branch

Dear Sir/Madam,

## Green Paper on Equal Opportunities for Women and Men

Thank you for inviting comments from the Employers' Federation of Hong Kong. To give you a representative response, we have conducted a questionnaire survey among our members. The comments below are based on the responses from 50 companies employing a total of about 60,000 employees. The voluntary respondent panel is statistically non-sex biased, 60% male and 40% female.

The following are the Federation's points of view on the subject of Equal Opportunities for Women and Men in the context of employment issues:

We support the concept of "equal opportunities for women and men" in relation to social and economic aspects including employment.

Most of our members believe there is very little discrimination against women in the current employment practices in Hong Kong. Even if there are unequal practices, they tend to be in fringe areas such as medical and child education benefits. From the employment perspective, Hong Kong does not have serious sex discrimination problems, either in absolute terms or by comparison with other countries which have introduced stringent legislation to control discrimination. There is no evidence that the situation in those countries (e.g. the United Kingdom or Europe) is much better than in Hong Kong.

Given the tight labour market in Hong Kong, most of our members believe the wage issue is best left to market forces, which is in line with the proven successful free market economic policy in Hong Kong. However, we fully support continuous education and promotion of "equal opportunities for women and men" in all aspects. Most of our members are also prepared in principle to subscribe to a code of practise in this area adopted by the Federation or other employers' organisations.

Most of the respondents object to introducing "hard" legislation, including "redress through courts" and "punitive" approaches, to mandate employment equalities between women and men. While a minority of them do not have strong objection to "soft/mediation oriented" legislation, the Federation has strong reservations on supporting any form of legislation in this area. We recommend a code of practise be developed and implemented, before any form of legislation is considered.

We firmly believe that the best approach for resolving discrimination, as it continues exist in Hong Kong, whether on grounds of sex or, for example, disability, and to change community attitudes, is through education and promotion. These should be supplemented in the case of employment by appropriate codes of practice developed by the leading employer groups in co-ordination with Government. Work on such codes about to commence.

The suggestion that equal opportunities legislation might be limited in its application to larger companies is a strange one in that it would involve a degree of selection - or discrimination - in direct conflict with the intent of the legislation. If anything the large employers are already better equipped to apply more objective standards and have a better track record in matters of equal opportunities. It would be ironic therefore for them to be faced selectively with an added burden of intervention and dispute over the judgements. On the other hand the suggestion does reflect the real difficulties that the proposal would pose for small employers.

We totally reject the claim that there is no evidence that productivity and economic growth may be unaffected - even enhanced, by what is proposed. The societies which have taken this route all must carry the government, judicial, and individual company infrastructure to implement such legislation. These are non productive costs, which are clearly reflected in higher levels of taxation, legal costs, and support staff levels, in comparable enterprises in such societies.

If what is proposed, were the best solution for removing serious discrimination and for improved social justice in Hong Kong, then the economic cost it imposes may be justified, as the proposal argues is the case in the context of unlawful employment of young children and safety at work, for example.

We cannot support such a conclusion however. There is a great deal more that Hong Kong can do to eliminate discrimination, without resorting to the draconian measures that are proposed and without further aggravation of Hong Kong's already grave labour shortage through the introduction of a whole new tier of personnel concerned in judgement, argument and debate over the community's performance in the area of discrimination.

In the wider context of this paper on human rights and equal opportunities, we therefore stand by the comments contained in our submission to the City and New Territories Administration in response to the Green Paper on Equal Opportunity for Women & Men. A copy of that submission is attached.

Yours sincerely

Mark Leese  
Chairman

Encl

# 香港中華總商會

THE CHINESE GENERAL CHAMBER OF COMMERCE

24-25 CONNAUGHT ROAD, C. 7/F, HONG KONG

香港干諾道中 24-25 號八樓

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TELEX 89854 CGCC HX  
CABLE CHICHACOM  
FAX 845 2610

編號：(E)-EQU-1993-12-7

## 香港中華總商會對「男女平等機會綠皮書」之意見

敬啟者：

政府於今年八月底發表之「男女平等機會綠皮書」，本會經研究後，現提出下列幾點意見：

- (一) 本會認為男女因生理構造的分別而在社會上不同範疇扮演著不同的角色，傳統上，女性受到男尊女卑思想上的約束，並承擔了家務的責任，未能全力發揮她們的才能，若剔除上述因素，香港男性與女性的地位可說是接近平等；然而，有鑑於上述思想等羈絆，需要政府從基制上消除障礙，且英國及中國皆為「消除對婦女一切形式歧視公約」的締約國，本會亦原則上支持香港引入該公約。本會認為香港政府在決定是否引入公約時，亦須考慮香港主權將於97年回歸中國，現階段是否引入公約最適當的時機。
- (二) 倘若香港引入「消除對婦女一切形式歧視公約」，本會對引入公約而須制定男女同酬法例一點，有所保留，主要原因如下：
  1. 制訂該項法例會令原屬高度競爭、自行調節的香港勞工市場，在運作方面缺乏彈性。有別於一些實施男女同酬法例的國家，本港一向就業率高，勞工市場長期處於緊張狀態，本會認為由市場自行調節而達致男女同工同酬的原則，效果應較立法更為理想。
  2. 制訂男女同酬法例，雖可表示社會人士對男女平等原則的認同和支持；然而，法例一旦實際執行，可能出現相反效果——某些僱主為了避免招致不符合男女同酬法例規定的指控，可能會乾脆不聘請女性。這樣，女性的就業機會反而被大大削減。

# 香港中華總商會

THE CHINESE GENERAL CHAMBER OF COMMERCE

24-25 CONNAUGHT ROAD, C. 7/F, HONG KONG

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FAX 845 2610

3. 現時香港的社會福利服務，並未提供足夠的支援，以實施男女同酬法例——香港婦女要爭取與男性「同酬」的條件，是必須做到能與男性「同工」。可是，目前香港的幼兒照顧設施嚴重不足，根本未能減輕婦女的傳統職責，讓她們安心全情投入工作。
4. 由於香港的企業以中、小型居多，且經營模式多元化，故預料在男女同酬法例的執行上，肯定存在相當大的困難。

(三) 本會認為與其在現階段立法，政府可考慮透過以下的途徑，進一步改善現時香港的男女平等狀況：

1. 本會認為制訂法例並非改善男女平等情況的最理想方法；最有效的方法，是透過公眾教育，特別是學校教育與傳媒，傳遞男女平等的信息，消除傳統上男女角色的定型。
2. 本會建議政府可考慮制訂一套機構招聘員工守則，訂明給予男女應徵者平等的機會，在政府內推行，並鼓勵本港大型、甚至中、小型機構等遵從。
3. 本會建議政府改進及加設幼兒服務和設施，讓婦女的傳統職責可以減輕，使她們可以安心全面投入工作。

如果教育推廣手法未見奏效，才考慮按社會需要及資源，採用逐步立法方式。

(四) 倘香港引入「消除對婦女一切形式歧視公約」，本會贊成設立婦女事務委員會，藉以監察公約的執行：

1. 本會認為婦女事務委員會可作為監察機構，以確保社會各方面遵守及執行公約。
2. 另外，該委員會亦可擔當諮詢的角色，其運作可參考消費者委員會，主要以教育手法推動及喚起社會人士關注婦女的角色。該委員會不應作為行政機構，及不應獲賦予起訴權。

# 香港中華總商會

THE CHINESE GENERAL CHAMBER OF COMMERCE

24-25 CONNAUGHT ROAD, C. 7/F. HONG KONG

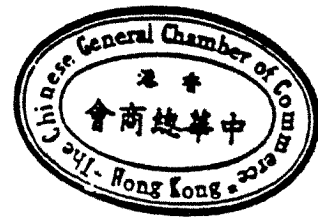
香港干諾道中24-25號八樓

TEL 525 6385 (6 LINES)  
TELEX 89854 CGCC HX  
CABLE CHICHACOM  
FAX 845 2610

(五) 本會支持新界婦女享有繼承權：

由於社會架構的變遷，本會認為新界只傳男丁的習俗已缺乏支持的根據；因此，本會支持新界婦女在無遺囑情況下，與男丁有同等繼承權。

此致  
政務司孫明揚先生



香港中華總商會謹啓

一九九三年十二月三十一日

# 九龍華商會

THE CHINESE CHAMBER OF COMMERCE, KOWLOON.

100 Ten Long Road, 2nd Fl. Kowloon  
Hong Kong  
TELEPHONE 3-822309

九龍新街八至十三號三樓  
電話 二八二〇三九

敬啟者：本會曾于八月二十二日致函 貴總署，諒必收到。現本會  
 再補充如下：本會會員多屬小商戶（人數不超過十人）。如早政府  
 制訂男女同酬法例後，因缺乏可能聘請訂立一套正式的公開招聘  
 及晉升制度，這些都是需要人手管理。在公開招聘上及廣告上又不能自  
 造所需要的人。而本會商戶有些行業做打石的（造石碑），有些是  
 造金掛牌的。這些行業都是需要男工的體能才能辦到的。而女性是不  
 適合。

如果政府真的推行男女同酬法例的話，給我們的小商戶帶來許多  
 不便。在公開招聘上缺乏靈活性，嚴重的損害商戶的經營成本，影響  
 利潤。所以本會要求政府要推行男女同酬法例之前，是否考慮  
 我們的小商戶。

此致

九龍華商會 楊佐輝 啟

九龍華商會理事長楊佐輝啟

1994. 1. 5.



# The Hong Kong General Chamber of Commerce

14 January 1994  
Our Ref: YSC:15

Mr Michael Suen, JP  
Secretary for Home Affairs  
The City and New Territories Administration  
31/F Southorn Centre  
130 Hennessy Road  
Wanchai, Hong Kong

Dear Mr Suen

## Re: Green Paper on Equal Opportunities for Women and Men

The General Chamber welcomes the opportunity to comment on the captioned Green Paper. Equal opportunity is an important issue and cuts across the many aspects of all our social lives.

The Chamber, being a business association, would like to focus its comments on the human resources aspects, in particular private sector employment matters, where we think we could make some contribution towards the debate. Hence, all the following comments should be seen in that context.

### 1. The Current Situation in Hong Kong

Notwithstanding the lack of equal opportunity legislation in Hong Kong, the territory is being seen, or perceived, as one of the best places for working women as far as equal opportunity is concerned. This remarkable achievement is perhaps due more to the market force in the work place and equal education opportunity at schools rather than a concerted social consciousness.

However, gender discrimination is still being practised to a certain extent in Hong Kong. This is most evidenced in the area of benefits entitlements which are well documented within organisations. Particular instances would be in health and housing benefits where female staff are sometimes disadvantaged compared with male contemporaries. Recruitment practices, especially overt discrimination in advertisements, are also an area of concern.

As Hong Kong is becoming a more mature economy and an increasingly affluent society, these practices should no longer be tolerated. On balance, Hong Kong is quite but not perfectly equal in opportunities for women and men in the private sector on employment issues.



## 2. The Way to Move Forward

We strongly recommend that the initial strategy against discrimination should be to determine and promote education to bring about changes in attitudes. Legislation should be used as a tool to assist and support attitudinal change.

Legislation, whether equal pay or anti-discrimination, must have adequate "teeth" to make it effective in its objectives while maintaining sufficient latitude for business to employ the right people for the right job.

We are in support of the legislative approach on the one hand to ensure and encourage the trend towards non-discrimination. We urge, on the other hand, that legislation should be carefully worded to avert the extremes and unnecessary time-wasting and costly litigation experienced in some Western countries. Legislation should focus on practical, objectively measurable and meaningful issues, such as provision of equal medical benefits, and not on issues requiring value judgements, such as interview results or gender specific attributes in job requirements.

There should be channels for grievances established within a legislative framework such as the Equal Opportunities Commission in UK.

We feel strongly that the need to educate employers and employees on the affects of legislation is extremely important. The Chamber is willing, in conjunction with Government and other business associations, to promote the awareness of equal opportunities in the work place.

## 3. CEDAW

CEDAW is understood to be a thorough and systematic evaluative method or process to eliminate discrimination and to overcome the problems of passive legislation. As both UK and PRC are signatories there should be no impediment to Hong Kong joining. We recommend that Hong Kong should become a signatory of CEDAW.

CEDAW recommends the establishment of a Women's Commission, which we support in principle. However, we recommend the name of "Commission Against Gender Discrimination" should be used. This Commission should be given the powers necessary to hear and decide on cases of discrimination rather than resort to the Courts in the first instance.

## 4. Other Issues

### A. Protective Legislation

The existing Protective Legislation for Women Employed in Industrial Undertakings should be amended to protect only "pregnant" women and young persons. Women generally should be allowed to work the same hours as men.

## B. Child Care Services

Government, and not private sector companies, must be the responsible body for the provision of child care services and should be encouraged to do more to meet the needs of society as it is today, particularly in light of increasing nuclear as opposed to extended family situations. Companies should not be expected to provide child care facilities for employees.

In order to promote the Chamber's belief that the real resolution of discrimination in the work place lies in the promotion and education of changes in attitudes, the Chamber proposes, in conjunction with Government and other business associations, to establish Guidelines for Fair Practices in the Work Place to assist employers and employees to understand the nature and elimination of gender discrimination in Hong Kong.

We trust that our comments and suggestions are constructive and practicable, and will attract your serious consideration. Thank you.

Yours sincerely

Y S Cheung  
Assistant Director  
Industrial and Corporate Affairs

cc: The Hon Jimmy McGregor }  
The Hon Peggy Lam } (for information)  
The Hon Christine Loh } }

YSC:lw

To : Patrick Mok  
From : Adam Mayes  
Date : 15/12/94

Some suggested points to raise in 16 Dec. EOB/SDB Bills Committee

As we discussed, *Security Branch* will send a delegation to the EOB/SDB bills committee tomorrow, to defend the disciplined services exemptions in SDB Sched. 4 [Pt. 2, s.1]. There are several issues that the Democrats may wish to raise.

1. Although the exemption is broadly drafted, it appears to be intended to exempt specific existing policies that Sec. Br. feels might be challenged under the SDB. *What, specifically, are these policies?*
  2. Is Security branch seeking to exempt these policies because *the policies would otherwise amount to unlawful discrimination* under the bill?
    - 2.1. It is highly unlikely Sec. Br. will admit the policies would otherwise be unlawful, because two legal conclusions must follow:
      - the policies are *already unlawful* because they contravene the Bill of Rights Art. 22 (and have been unlawful since June 1991); and
      - passage into law of an exemption for these policies would *contravene the Letters Patent* (because of its entrenchment of the ICCPR/BOR).]
    - 2.2. Sec. Br. will likely say that (a) the policies are lawful under the SDB, but they wish to avoid misguided litigation, and/or (b) the policies are being changed but a transition period is necessary. Several issues arise.
  3. Why should the Administration, when acting as an employer, be *permitted to write itself exemptions for convenience* when private employers cannot?
    - 3.1. Shouldn't the Administration set its standards *higher than the private sector, not lower?*
    - 3.2. Especially since the Administration *has for three years already been bound* by the BOR not to discriminate.
  4. If a transitional exemption is genuinely necessary, why should it written directly into the Ordinance itself? An alternative suggestion: amend the SDB so that the Equal Opportunities Commission can grant *temporary exemptions*.
    - 4.1. This is the prevailing practice among Australian anti-discrimination commissions.
    - 4.2. This *eliminates the double standard* — the EOC would receive applications for temporary exemptions *from the private as well as the public sectors*.
    - 4.3. EOC oversight also ensures that the *Administration is not left to police itself* — objective EOC oversight helps ensure that temporary exemptions are both *genuinely necessary* and *genuinely temporary*.\*
- \* [Note that SDB cl. 58 already gives the EOC power to review Sched. 4, *but it can only make recommendations to the Governor* that the Sched. should be changed.]

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## M E M O R A N D U M

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DATE: January 7, 1995

TO: Anna Wu, Carole Petersen,  
Adam/Eric/Celie/David

FROM: Andrew Byrnes

RE: Harassment provisions

1. We need to think about what we are going to do in relation to the sexual harassment provisions of the Equal Opportunities Bill and what amendments need to be made. There appear to be two major issues:

- whether the definition of sexual harassment **should be amended** to incorporate (or substitute) the newer, broader Australian federal definition of harassment\* in the EOB's definitions of sexual harassment;
- whether the coverage in relation to sexual harassment **should be extended** beyond the 4 areas we have presently covered (employment, education, accommodation and goods, services and facilities), so as to cover all the areas covered in the Sex Discrimination Bill, as well as including student to student harassment in educational institutions.

2. Adam has canvassed most of the relevant issues in his note for the Bills Committee session on 16 December 1994. A decision to amend along either of these lines would mean that we would have to look again at the organization of our harassment provisions. We would also need to consider whether similar amendments are appropriate for the other forms of harassment.

### AMENDMENT OF THE DEFINITION OF SEXUAL HARASSMENT

3. The new Australian definition of sexual harassment, which has been taken up in s 2(5) of the Sex Discrimination Bill, provides a general definition of sexual harassment and does not specify quid pro quo and hostile environment harassment (and may not cover hostile environment unequivocally). If we are to incorporate this definition, we could either add it to the existing ones or simply use this one but making sure that it applies to

office under the Crown, and to amend the government laws and programmes provisions to include the exercise of a prerogative power.

Andrew Byrnes

both quid pro quo and hostile environment discrimination. The advantage of the former (**the first option**) is that we keep the benefit of existing case law; the drawback is that it is lengthier. I attach a possible redraft along these lines (Annex A).

4. The **second option**, particularly if we consider that the areas covered should be broader, would be to refashion the provisions in a more concise way, ie with a general definition followed by brief prohibitions in the various areas – something similar to the approach in the Sex Discrimination Bill. I attach a draft for discussion as Annex B. The Australian federal model may also be better (Annex D).

5. A **third option**, if we are to extend the protection against sexual harassment to all areas where protection against discrimination is provided, would be to define discrimination as including “sexual harassment” and then define sexual harassment. That would have the advantage of being the most concise! A first attempt is at Annex C. (Query whether we would then have to provide explicitly for same sex harassment which some view as not constituting discrimination on the basis of sex). However, that approach seems to make our provisions look like the SDB’s drafting and organizational style!

#### **STUDENT-STUDENT HARASSMENT**

6. This is covered by the new Australian federal legislation, but not by the Equal Opportunities Bill or Sex Discrimination Bill. I am inclined to think that we should include it. It is s 28F(2) of the Sex Discrimination Act 1984 (attached).

#### **EMPLOYEES OF PERSONS OTHER THAN THE HARASSER**

7. We have in s 29(1)(a) provided that a person may not harass an employee of that person “or any other person”. This would cover harassment of anyone who was “employed” by anyone (presumably in the work context). If that is so, perhaps we did not need s 29(1)(d) – which may in fact be narrower! At the moment, we do not have a similar extended protection for the other forms of harassment.

#### **“EMPLOYMENT”**

8. “Employment” may, technically, not cover the position of some Crown servants who may “hold an office under the Crown” rather than being employees of the Crown. As a result, they may not be covered by the employment provisions. They may, however fall within the administration of government laws and programmes, though those provisions do not clearly cover the exercise of *prerogative* powers (which may be applicable for some employments). I would suggest that we think about amending both the definition of “employment” to include Crown servants or persons holding any

## ANNEX A (THE FIRST OPTION)

### 29. SEXUAL HARASSMENT IN EMPLOYMENT

- (1) It is unlawful for a person ("the harasser") to harass sexually--
- (a) an employee of that or any other person;
  - (b) an employee of a person by whom the harasser is employed;
  - (c) a person who is seeking employment by that or any other person; or
  - (d) a person employed to perform domestic duties in the premises in which the harasser resides, whether or not the harasser is the employer of that person.
- (2) It is unlawful for a person to harass sexually--
- (a) a commission agent or contract worker of that person;
  - (b) a commission agent or contract worker of a person of whom the first-mentioned person is an employee, a commission agent or a contract worker; or
  - (c) a person who is seeking to become a commission agent or contract worker of the first-mentioned person or of a person of whom the first-mentioned person is an employee, a commission agent or a contract worker.

(3) A person shall, for the purposes of this section, be taken to harass sexually another person if--

(a)(i) the harasser makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or

(ii) the harasser engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances would have anticipated that the other person would be offended humiliated or intimidated;~~and humiliated or intimidated;~~

(ab) the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and--

(i) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the

conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible employment or work; or

(ii) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or work; or

(c) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for the other person.

(4) A reference in subsection (3) to conduct of a sexual nature in relation to a person includes a reference to the making, to or in the presence of, a person, of a statement of a sexual nature ~~concerning that person~~, whether the statement is made orally or in writing.

- [Similar insertions for other sexual harassment provisions re accommodation, education, etc]



## ANNEX B (THE SECOND OPTION)

### *Definition of sexual harassment*

1.(1) For the purposes of this Ordinance a person ("the harasser") sexually harasses another person if—

- (a) the harasser makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- (b) the harasser engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

**either**

(2) Without limiting the generality of subsection (1), a reference to sexual harassment shall include a reference to quid pro quo harassment and hostile environment harassment.

**or**

(2) Without limiting the generality of subsection (1), a person shall, for the purposes of this section, be taken to harass sexually another person if—

- (a) the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and—
  - (i) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way *[in relation to the matters covered by this Ordinance]*; or
  - (ii) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way *[in relation to the matters covered by this Ordinance]*; or
- (b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating environment for the other person *[in relation to the matters covered by this Ordinance]*.

(3) A reference in this section to conduct of a sexual nature in relation to a person includes a reference to the making, to or in the presence of, a person, of a statement of a sexual nature ~~concerning that person~~, whether the statement is made orally or in writing.

*Sexual harassment unlawful*

2.(1) It is unlawful for a person to harass sexually--

- (a) an employee of that or any other person;
- (b) an employee of a person by whom the harasser is employed;
- (c) a person who is seeking employment by that or any other person; or
- (d) a person employed to perform domestic duties in the premises in which the harasser resides, whether or not the harasser is the employer of that person.

(2) It is unlawful for a person to harass sexually--

- (a) a commission agent or contract worker of that person;
- (b) a commission agent or contract worker of a person of whom the first-mentioned person is an employee, a commission agent or a contract worker; or
- (c) a person who is seeking to become a commission agent or contract worker of the first-mentioned person or of a person of whom the first-mentioned person is an employee, a commission agent or a contract worker.

(3) It is unlawful for a person who is a member of the staff of an educational institution to harass sexually a person who is a student at that educational institution or is seeking admission to that educational institution as a student.

(4) It is unlawful for a person who as principal or agent exercises control or purports to exercise control over accommodation or the letting or other allocation of accommodation to harass sexually--

- (a) a person who occupies accommodation over which that person exercises or purports to exercise control; or
- (b) a person who is an applicant for accommodation.

*[These are identical to ss 29(1), 30(1), 31(1) and 32(1) of the Equal Opportunities Bill]*

(5) It is unlawful for a person to sexually harass a woman in the course of offering to provide, or in providing, goods, facilities or services to her.

(6) Where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises in Hong Kong comprised in a tenancy, it is unlawful for the landlord or other person to sexually harass a woman seeking the licence or consent for disposal of the premises to her.

(7) It is unlawful for a barrister or barrister's clerk, in relation to any chambers, to sexually harass a woman -

(a) in the course of offering to provide to her pupillage or tenancy in the chambers; or

(b) who is a pupil or tenant in the chambers.

(8) It is unlawful for any person, in the course of the giving, withholding or acceptance of instructions to a barrister, to sexually harass a woman who is a barrister.

[These are the Sex Discrimination Bill ones, with a couple of omissions. But see Annex D]

## ANNEX C (THE THIRD OPTION)

### TO BE INSERTED IN S 3

3.(4) For the purposes of this Ordinance a reference to a person discriminating against another person includes sexual harassment by the first person of that other person.

(5) For the purposes of this Ordinance sexual harassment of a person by a person of the same sex shall be deemed to be discrimination on the basis of sex.

(6)(a) For the purposes of this Ordinance a person ("the harasser") sexually harasses another person if—

(i) the harasser makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or

(ii) the harasser engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

**either**

(b) Without limiting the generality of paragraph (a), a reference to sexual harassment shall include a reference to quid pro quo harassment and hostile environment harassment.

**or**

(b) Without limiting the generality of paragraph (a), a person shall, for the purposes of this section, be taken to harass sexually another person if—

(i) the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and—

(A) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way [*in relation to the matters covered by this Ordinance*]; or

- (B) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way *[in relation to the matters covered by this Ordinance]*; or
- (ii) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating environment for the other person *[in relation to the matters covered by this Ordinance]*.

(c) A reference in this section to conduct of a sexual nature in relation to a person includes a reference to the making, to or in the presence of, a person, of a statement of a sexual nature ~~concerning that person~~, whether the statement is made orally or in writing.

**SECTION 28H PROVISION OF ACCOMMODATION**

**28H(1) [Harassment by accommodation provider]** It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, (whether as principal or agent) accommodation to that other person.

**28H(2) [Near relative]** This section does not apply to anything done by a person in the course of providing, or offering to provide, accommodation to a near relative.

History

28H inserted by No 179 of 1992, s 3 and Sch

**SECTION 28J LAND**

**28J** It is unlawful for a person to sexually harass another person in the course of dealing (whether as principal or agent) with that other person in connection with:

- (a) disposing of, or offering to dispose of, an estate or interest in land to the other person; or
- (b) acquiring, or offering to acquire, an estate or interest in land from the other person.

History

28J inserted by No 179 of 1992, s 3 and Sch

**SECTION 28K CLUBS**

**28K** It is unlawful for a member of the committee of management of a club to sexually harass a member of the club or a person seeking to become a member of the club.

History

28K inserted by No 179 of 1992, s 3 and Sch.

**SECTION 28L COMMONWEALTH LAWS AND PROGRAMS**

**28L** It is unlawful for a person:

- (a) in the course of performing any function, or exercising any power, under a Commonwealth law or for the purposes of a Commonwealth program; or
  - (b) in the course of carrying out any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program;
- sexually harass another person.

History

28L inserted by No 179 of 1992, s 3 and Sch

**SECTION 29** (Repealed by No 179 of 1992, s 3 and Sch.)

**Division 4 — Exemptions****SECTION 30. CERTAIN DISCRIMINATION ON GROUND OF SEX NOT UNLAWFUL**

**30(1) [Exemption where genuine occupational qualification]** Nothing in paragraph 4(1)(a) or (b), 15(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with a position as an employee, commission agent or contract worker, being a position in

[Next page is 81,251]

- (a) practising a profession; or
- (b) carrying on a trade; or
- (c) engaging in an occupation.

**History**  
S 28C inserted by No 179 of 1992, s 3 and Sch.

## **SECTION 28D REGISTERED ORGANISATIONS**

**28D** It is unlawful for:

- (a) a member of a registered organisation; or
- (b) a member of the staff of a registered organisation;

to sexually harass a member of the organisation, or a person who is seeking to become a member of the organisation.

**History**  
S 28D inserted by No 179 of 1992, s 3 and Sch.

## **SECTION 28E EMPLOYMENT AGENCIES**

**28E** It is unlawful for:

- (a) a person who operates an employment agency; or
- (b) a member of the staff of an employment agency;

to sexually harass another person in the course of providing, or offering to provide, any of the agency's services to that other person.

**History**  
S 28E inserted by No 179 of 1992, s 3 and Sch.

## **SECTION 28F EDUCATIONAL INSTITUTIONS**

**28F(1) [Harassment by staff member]** It is unlawful for a member of the staff of an educational institution to sexually harass:

- (a) a person who is a student at the institution; or
- (b) a person who is seeking to become a student at the institution.

**28F(2) [Harassment by adult student]** It is unlawful for a person who is an adult student at an educational institution to sexually harass:

- (a) a person who is an adult student at the institution; or
- (b) a member of the staff of the institution.

**28F(3) ["adult student"]** In this section:

"adult student" means a student who has attained the age of 16 years.

**History**  
S 28F inserted by No 179 of 1992, s 3 and Sch.

## **SECTION 28G PROVISION OF GOODS, SERVICES AND FACILITIES**

**28G** It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person.

**History**  
S 28G inserted by No 179 of 1992, s 3 and Sch.

**SECTION 28B EMPLOYMENT, PARTNERSHIPS ETC.**

**28B(1) [Employees]** It is unlawful for a person to sexually harass:

- (a) an employee of the person; or
- (b) a person who is seeking to become an employee of the person.

**28B(2) [Harassment by employees]** It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.

**28B(3) [Commission agents, contract workers]** It is unlawful for a person to sexually harass:

- (a) a commission agent or contract worker of the person; or
- (b) a person who is seeking to become a commission agent or contract worker of the person.

**28B(4) [Harassment by commission agents, contract workers]** It is unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.

**28B(5) [Harassment by partner]** It is unlawful for a partner in a partnership to sexually harass another partner, or a person who is seeking to become a partner, in the same partnership.

**28B(6) [Harassment by workplace participants]** It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both of those persons.

**28B(7) [Interpretation]** In this section:

“place” includes a ship, aircraft or vehicle;

“workplace” means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant;

“workplace participant” means any of the following:

- (a) an employer or employee;
- (b) a commission agent or contract worker;
- (c) a partner in a partnership.

**History**

S 28B inserted by No 179 of 1992, s 3 and Sch

**SECTION 28C MEMBERS OF BODIES WITH POWER TO GRANT ETC. OCCUPATIONAL QUALIFICATIONS ETC.**

**28C(1) [Harassment in connection with occupational qualification]** It is unlawful for a member of an authority or body that has power to take action in connection with an occupational qualification to sexually harass a person seeking action in connection with an occupational qualification.

**28C(2) [Interpretation]** In this section:

“action in connection with an occupational qualification” means conferring, renewing, extending, revoking or withdrawing an authorisation or qualification that is needed for, or facilitates:

Australian & New Zealand Equal Opportunity Law & Practice **Sec 28C(2) — ¶97-150**



**SECTION 27 APPLICATION FORMS, &c.**

**27(1) [Provision of information]** Where, by virtue of a provision of Division 1 or this Division, it would be unlawful, in particular circumstances, for a person to discriminate against another person, on the ground of the other person's sex, marital status or pregnancy, in doing a particular act, it is unlawful for the first-mentioned person to request or require the other person to provide, in connection with or for the purposes of the doing of the act, information (whether by way of completing a form or otherwise) that persons of the opposite sex or of a different marital status, or persons who are not pregnant, as the case requires, would not, in circumstances that are the same or not materially different, be requested or required to provide.

**27(2) [Exceptions]** Nothing in sub-section (1) renders it unlawful for a person to request or require—

- (a) a person of a particular sex to provide information concerning such part of the last-mentioned person's medical history as relates to medical conditions that affect persons of that sex only; or
- (b) a person who is pregnant to provide medical information concerning the pregnancy.

**27(3) [Section binds Crown]** This section binds the Crown in right of a State.

**Division 3 — Sexual Harassment****History**

Div 3 substituted by No 179 of 1992, s 3 and Sch

**SECTION 28** (Repealed by No 179 of 1992, s 3 and Sch.)

**SECTION 28A MEANING OF "SEXUAL HARASSMENT"**

**28A(1) [Sexual harassment defined]** For the purposes of this Division, a person sexually harasses another person (the "person harassed") if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

**28A(2) [Interpretation]** In this section:

"conduct of a sexual nature" includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

**History**

S 28A inserted by No 179 of 1992, s 3 and Sch

¶97-150 — Sec. 27(1)

CCH Australia Limited

The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong.

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FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen  
NO. OF PAGES (INCLUDING THIS ONE) : 16

FROM : Adam Mayes  
DATE : 9/1/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

Re. age discrimination issues

1. Attached are some pages from the Employment Ordinance, concerning severance & long-service payments (Part VA & VB respectively). The relevant sections are:

31B — right to severance pmt

31G — amount of sev'ce pmt

31I & 31IA — sev'ce pmt set-off against other retirement schemes

31R — right to LS pmt (+ Sched. 5)

31RA — LS pmt on death of employee (+ Sched. 5)

31V — amount of LS pmt

31Y & 31YAA — LS pmt set-off against other retirement schemes (same as 31I-IA)

2. Also attached is a summary of Aus. State law concerning age discrimination in conjunction with (1) compulsory retirement; (2) superannuation; & (3) statutory compliance. Included are copies of some statutory sections I thought were interesting. I am writing to various Commissions for more details.

the employer with work of the kind he is employed to do, he shall for the purposes of section 31B(1) be taken to be laid off where the total number of days on each of which such work is not provided for him by the employer exceeds—

- (a) half of the total number of normal working days in any period of 4 consecutive weeks; or
- (b) one-third of the total number of normal working days in any period of 26 consecutive weeks,

and he is not paid a sum equivalent to the wages which he would have earned if work had been provided on the days on which no work was provided.

(Amended 41 of 1990 s. 8)

(1A) Notwithstanding subsection (1), any period during which an employee is not provided with work because of a lock-out by his employer, or as a result of a rest day, a statutory holiday or a day of annual leave, shall not be taken into account as normal working days in determining whether an employee has been laid off. (Added 41 of 1990 s. 8; 61 of 1993 s. 4)

(2) The continuity of a contract of employment of an employee shall not be treated as broken by any lay-off as a result of which no severance payment has been made.

(3) For the purposes of this Part the "relevant date" in respect of the right of an employee to a severance payment arising by reason of lay-off means any day on which the period of 4 consecutive weeks or 26 consecutive weeks, as the case may be, referred to in subsection (1) has expired. (Amended 41 of 1990 s. 8)

[cf. 1965 c. 62 s. 5 (1) U.K.]

### 31F. Excluded classes of employees

Section 31B shall not apply—

- (a) where the employer is the husband or wife of the employee;
- (b) to any outworker;
- (c) (Repealed 76 of 1985 s. 6)
- (d) to any person, employed by a government other than the Hong Kong Government, who is a subject or citizen of the state under whose government he is employed; or
- (e) without prejudice to paragraph (a), to any person in respect of employment as a domestic servant in, or in connection with, a private household, where the employer is the father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother or half-sister of the employee.

[cf. 1965 c. 62 s. 16 U.K.]

### 31G. Amount of severance payment

(1) Subject to this Part, the amount of a severance payment to which an employee is entitled in any case shall be calculated by allowing—

- (a) in the case of a monthly rated employee, two-thirds of his last full month's wages, or two-thirds of \$15,000, whichever is less; and
- (b) in any other case, 18 days' wages based on any 18 days chosen by the employee and occurring during his last 30 normal working days, or two-thirds of \$15,000, whichever is less,

for every year (and pro rata as respects an incomplete year) of employment under a continuous contract by his employer subject in all cases to a maximum payment not exceeding the total amount of wages earned during the period of 12 months immediately preceding the relevant date, or the amount of 12 times \$15,000, whichever is less.

(2) Notwithstanding subsection (1), the employee may elect to have his wages averaged over the period of 12 months immediately preceding the relevant date, but where he so elects, then—

- (a) in the case of a monthly rated employee, the monthly average shall not exceed \$15,000; and
- (b) in any other case, the total wages for the period of 12 months shall, for the purpose of calculating the daily average, not exceed 12 times \$15,000.

(3) For the purposes of this section, in the case of an employee who was employed under a continuous contract otherwise than by way of manual labour and whose average monthly wages during the period of 12 months immediately preceding the date of commencement of the Employment (Amendment) Ordinance 1990 (41 of 1990) exceed \$15,000, a reference to the period of employment under a continuous contract shall not include a reference to any such employment occurring more than—

- (a) 3 years prior to 1 January 1990, where the relevant date occurs in 1990;
- (b) 4 years prior to 1 January 1990, where the relevant date occurs in 1991;
- (c) 5 years prior to 1 January 1990, where the relevant date occurs in 1992;
- (d) 6 years prior to 1 January 1990, where the relevant date occurs in 1993;
- (e) 7 years prior to 1 January 1990, where the relevant date occurs in 1994;
- (f) 8 years prior to 1 January 1990, where the relevant date occurs in 1995;
- (g) 9 years prior to 1 January 1990, where the relevant date occurs in 1996;

16 CAP. 57 Employment

- (b) into an account in his name with any bank licensed under the Banking Ordinance (Cap. 155); or
- (c) to his duly appointed agent.

27. Payment not to be made in certain places

Wages, or any sum due to an employee in respect of his contract of employment on the completion or termination thereof, shall not be paid—

- (a) in any place of amusement;
- (b) in any place where totalizer or pari mutuel betting is conducted or where cash-sweeps are organized as authorized under the Betting Duty Ordinance (Cap. 108);
- (c) in any place where intoxicating liquor or any dangerous drug is sold, or
- (d) in any shop or store for the retail sale of merchandise, except where the employee is employed in such place, shop or store.

28. Remuneration other than wages

(1) A contract of employment may provide for giving to an employee food, accommodation or other allowances or privileges in addition to wages as remuneration for his services.

(2) No employer shall give to an employee any intoxicating liquor, dangerous drug, or any ticket or other substitute for ticket for any cash-sweep, totalizer or pari mutuel authorized under the Betting Duty Ordinance (Cap. 108) as remuneration for his services.

29. Prohibition of agreements as to manner of spending

No employer shall in any contract of employment or agreement in consideration of a contract of employment make any provision as to the place at which, the manner in which, or the person with whom, wages paid to an employee are to be expended.

30. Provision of shops, etc. by employers for sale of commodities to employees

An employer may establish shops, stores or places for the sale of commodities to his employees, but no employer shall bind any employee by contract, agreement or other obligation, written or oral, express or implied, to make use of any such shop, store or place for the purchase of commodities.

CAP. 57 Employment

31. Employer not to enter into contract of employment without reasonable belief that he can pay wages

(1) No person shall enter into, renew or continue a contract of employment as an employer unless he believes upon reasonable grounds that he will be able to pay all wages due under the contract of employment as they become due.

(2) An employer shall, if he ceases to believe upon reasonable grounds that he will be able to pay all the wages due by him under a contract of employment as they become due, forthwith take all necessary steps to terminate the contract in accordance with its terms.

(Added 71 of 1970 s. 3)

PART VA

SEVERANCE PAYMENTS

31A. (Repealed 76 of 1985 s. 4)

31B. General provisions as to right to severance payment

(1) Where an employee who has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date— (Amended 76 of 1985 s. 5)

(a) is dismissed by his employer by reason of redundancy, or

(b) is laid off within the meaning of section 31E,

the employer shall, subject to this Part and Part VC, be liable to pay to the employee a severance payment calculated in accordance with section 31G. (Amended 52 of 1988 s. 5)

(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that—

(a) his employer has ceased, or intends to cease, to carry on the business—

(i) for the purposes of which the employee was employed by him; or

(ii) in the place where the employee was so employed; or  
(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish. (Replaced 62 of 1992 s. 4)

~~(b) be domestic servants~~

(h) 10 years prior to 1 January 1990, where the relevant date occurs in 1997 or any year thereafter.

(Replaced 41 of 1990 s. 9)

### 31H. Special provision as to termination of contract in case of strike

Where an employee, who has been given notice by his employer to terminate his contract of employment, takes part in a strike before the expiry of that notice in such circumstances that the employer is entitled by reason of his taking part in the strike to treat the contract as terminable without notice, and the employer for that reason terminates the contract as mentioned in section 31C(1), that subsection shall not apply to that termination of the contract.  
*[cf. 1965 c. 62 s. 10 U.K.]*

### 31I. Set-off of gratuity or retirement scheme payment against severance payment

(1) Subject to subsection (2), where an employee is entitled—  
(a) by virtue of this Part, to a severance payment; and  
(b) by virtue of—

(i) the terms of his contract of employment, to a gratuity based upon length of service; or  
(ii) a retirement scheme, to a payment thereunder,  
the severance payment shall be reduced by the amount of the gratuity or retirement scheme payment (as the case may be) paid to that employee in respect of any or all of the years of service in respect of which that severance payment is payable.

(2) For the purposes of subsection (1), a retirement scheme payment shall not include that part (if any) of the payment which represents an employee's own contributions, including any sum payable in respect of interest thereon.  
*(Amended 41 of 1990 s. 10; 62 of 1992 s. 6)*

### 31IA. Set-off of severance payment against gratuity or retirement scheme payment

(1) The gratuity or retirement scheme payment to which an employee is entitled as referred to in section 31I(1)(b) in respect of all the years of service in respect of which a severance payment is payable under this Part shall be reduced by the severance payment paid to the employee under this Part.

(2) Any retirement scheme payment which would have to be paid under a retirement scheme to an employee but for the reduction under subsection (1) shall be paid by the trustees of the retirement scheme to the employer.

(3) For the purpose of subsections (1) and (2), a retirement scheme payment shall not include that part (if any) of the payment which represents employee's own contributions, including any sum payable in respect of interest thereon.

*(Added 62 of 1992)*

### 31J. Change of ownership of business

(1) This section shall have effect where—

(a) a change occurs (whether by virtue of a sale or other disposal or by operation of law) in the ownership of a business for purposes of which a person is employed, or of a part of a business; and

(b) in connection with that change the person by whom the employee is employed immediately before the change occurs (in this section referred to as "the previous owner") terminates the employment contract in accordance with section 6 or 7

(2) If, by agreement with the employee, the person who immediately changes ownership is the owner of the business or of the part of the business which the employee's contract of employment is referred to as "the new owner", the new owner renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract had been a renewal or re-engagement by the previous owner (without substitution of the new owner for the previous owner).

(3) If the new owner offers to renew the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, but the employee refuses the offer, section 31C(2) or (3) (as the case may be) shall have effect, subject to subsection (4), in relation to that offer and refusal as it would have had effect by the employee.

(4) For the purposes of the operation, in accordance with subsection (1) of section 31C(2) or (3) in relation to an offer made by the new owner—

(a) the offer shall not be treated as one whereby the provisions of the contract as renewed, or of the new contract, as the case may be, would differ from the corresponding provisions of the contract in force immediately before the dismissal by reason only that the new owner would be substituted for the previous owner as employer; and

(b) no account shall be taken of that substitution in determining whether the refusal of the offer was unreasonable

in accordance with Part IV of the Minor Employment Claims Adjudication Board Ordinance (61 of 1994); or (ii) the Registrar of the Labour Tribunal in accordance with Part IV of the Labour Tribunal Ordinance (Cap. 25)."

31N. Claims for severance payments

Notwithstanding anything in this Part, an employee shall not be entitled to a severance payment unless, before the end of the period of 3 months beginning with the relevant date, or within such extended period as the Commissioner may agree— (Amended 19 of 1984 s. 3)

- (a) the payment has been agreed and paid;
(b) the employee has made a claim for payment by notice in writing given to the employer; or
(c) a question as to the right of the employee to the payment, or as to the amount of the payment, has been made the subject of a claim filed with the Registrar of the Labour Tribunal in accordance with Part IV of the Labour Tribunal Ordinance (Cap. 25). [cf. 1965 c. 62 s. 21 U.K.]

31O. Making of severance payment

(1) Where an employee is entitled to a severance payment under this Part, his employer shall make the severance payment to him not later than 2 months from the receipt of a notice in accordance with paragraph (b) of section 31N unless either the employer or the employee has, before the expiration of that period, made the severance payment the subject of a claim filed with the Registrar of the Labour Tribunal in accordance with paragraph (c) of section 31N. [cf. 1965 c. 62 s. 22 U.K.]

(2) A severance payment shall be made in legal tender except that, where the employee so consents, payment may be made— (a) by cheque, money order or postal order; (b) into an account in his name with any bank licensed under the Banking Ordinance (Cap. 155); or (c) to his duly appointed agent.

(3) Any employer who without reasonable excuse fails to comply with subsection (1), (1A) or (2) shall be guilty of an offence and shall be liable on conviction to a fine of \$10,000. (Amended 24 of 1988 s. 2; 62 of 1992 s. 8)

31P. Written particulars of severance payment

(1) On making any severance payment, otherwise than in pursuance of a decision of the Labour Tribunal which specifies the amount of the payment to be made, the employer shall give to the employee a written statement indicating how the amount of the payment has been calculated.

be made, the employer shall give to the employee a written statement indicating how the amount of the payment has been calculated.

(2) Any employer who— (a) without reasonable excuse fails to comply with subsection (1); or (b) in a statement under that subsection includes anything which to his knowledge is false in a material particular, or reckless includes anything which is false in a material particular, or includes anything which is false in a material particular, shall be guilty of an offence and shall be liable on conviction to a fine of \$5,000 (Amended 24 of 1988 s. 2)

(3) Without prejudice to any proceedings for an offence under subsection (2)(a), if an employer fails to comply with the requirements of subsection (1) the employee may by notice in writing to the employer require the employer to give to the employee a written statement complying with those requirements within such period (not being less than 1 week beginning with the day on which the notice was given) as may be specified in the notice.

(4) If, without reasonable excuse, an employer fails to comply with a notice under subsection (3) he shall be guilty of an offence and shall be liable— (a) in the case of a first conviction to a fine of \$5,000; or (b) in the case of a second or subsequent conviction, to a fine of \$10,000. (Amended 24 of 1988 s. 2)

[cf. 1965 c. 62 s. 18 U.K.]

31Q. Presumption

For the purposes of this Part an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy

[cf. 1965 c. 62 s. 9(2) U.K.] (Part VA added 67 of 1974 s. 5)

PART VB

LONG SERVICE PAYMENTS

31R. General provisions as to employee's right to long service payment

(1) Where an employee who has been employed under a continuous contract— (a) for not less than the number of years of service at the relevant date, specified in column 2 of the table in the Fifth Schedule opposite his age at that date specified in column 1 of that table—

(a) for not less than the number of years of service at the relevant date, specified in column 2 of the table in the Fifth Schedule opposite his age at that date specified in column 1 of that table—

- (i) is dismissed and his employer is not liable to pay him a severance payment by reason thereof; or
- (ii) subject to subsections (3) to (5), terminates his contract in the circumstances specified in section 10(aa); or (Amended 61 of 1993 s. 5)

(b) terminates his contract and, at the relevant date, he is not less than 65 years of age and has been employed under that contract for not less than 10 years;

the employer shall, subject to this Part and Part VC, pay to the employee a long service payment calculated in accordance with section 31V(1). (Amended 105 of 1991 s. 2)

(2) Notwithstanding subsection (1), where an employee who has been employed under a continuous contract for not less than 5 years of service at the relevant date but who does not fall within the Fifth Schedule—

- (a) is dismissed and his employer is not liable to pay him a severance payment by reason thereof; or
- (b) subject to subsections (3) to (5), terminates his contract in the circumstances specified in section 10(aa). (Amended 61 of 1993 s. 5)

the employer shall, subject to this Part and Part VC, pay to the employee a long service payment calculated in accordance with section 31V(2). (Added 105 of 1991 s. 2)

(3) Where an employee has terminated his contract in the circumstances specified in section 10(aa), the employer may, at his own expense, require the employee to undergo a medical examination by a registered medical practitioner nominated by the employer to obtain a second opinion as to whether or not the employee is permanently unfit for a particular type of work as specified in the certificate obtained by the employee. (Added 61 of 1993 s. 5)

(4) An employer shall forfeit his right to exercise the option under subsection (3) unless—

- (a) he makes arrangements for a medical examination to take place not more than 14 days after the employer receives a copy of a certificate issued under section 10(aa); and
- (b) he notifies the employee in writing, not less than 48 hours before the examination is to take place, giving him details of the appointment. (Added 61 of 1993 s. 5)

(5) An employee referred to in subsection (3) who, without reasonable excuse, refuses to undergo a medical examination forfeits his right to a long service payment under this Part. (Added 61 of 1993 s. 5)

(6) Where the second opinion obtained by an employer under subsection (3) comes to the opposite conclusion from the certificate issued under section 10(aa), the employer shall submit the certificate and the second opinion to the

Commissioner and the Commissioner shall, after such consultation with such medical experts as he considers necessary, rule whether or not the employee is entitled to a long service payment under this Part. (Added 61 of 1993 s. 5)  
(Replaced 52 of 1988 s. 6. Amended 41 of 1990 s. 11)

### 31RA. Death of employee

(1) Where an employee dies and he had been, at the time of his death employed under a continuous contract, for not less than the number of years of service on the date of his death, specified in column 2 of the table in the Fifth Schedule, opposite his age at that date specified in column 1 of that table, the employer shall, subject to this Part and Part VC, pay a long service payment calculated in accordance with section 31V(1) to— (Amended 105 of 1991 s. 3)

- (a) the spouse of the employee, if the employee leaves a spouse; or
- (b) the issue of the employee, if the employee leaves any issue but no spouse; or
- (c) a parent of the employee, if the employee leaves neither a spouse nor issue; or
- (d) the personal representative of the employee, if the employee does not leave any spouse, issue or parent.

(1A) Notwithstanding subsection (1), where an employee dies and had been at the time of his death employed under a continuous contract for not less than 5 years of service but does not fall within the Fifth Schedule, the employer shall, subject to this Part and Part VC, pay a long service payment calculated in accordance with section 31V(2) to the person specified in subsection (1). (Added 105 of 1991 s. 3)

(2) A person referred to in paragraph (a), (b), (c) or (d) of subsection (1) shall not be entitled to such payment unless—

- (a) that person, or a person, in the form specified by the Commissioner under section 49 on the relevant employee, within the period of 30 days beginning on the day next following the date of death of the employee or within such extended period as the Commissioner may allow; and

(b) the applicant's relationship (being a relationship mentioned in paragraph (a), (b), (c) or (d) of subsection (1)) to the deceased employee is supported by documentary evidence.

(3) The Commissioner may extend the time for serving an application under subsection (2) although the application for extension is not made until after the expiration of the period of 30 days after the date of death of an employee.

(4) Where a person referred to in paragraph (a) or (b) of subsection (1) is a minor, the application under subsection (2) shall be made by the guardian of that person.

household were a business and the maintenance of the household were the carrying on of that business by the employer.

(Added 52 of 1988 s. 6)

### 31S. General exclusions from right to long service payment by reason of dismissal

- (1) Except as provided by section 31X, an employee shall not be entitled to a long service payment by reason of dismissal where his employer, being so entitled by reason of the employee's conduct, terminates his contract of employment without notice or payment in lieu in accordance with section 9.
- (2) An employee shall not be entitled to a long service payment by reason of dismissal where he leaves the service of his employer—
  - (a) before the expiration of notice given to him by the employer in accordance with section 6 without the prior consent of the employer, or
  - (b) without having made a payment in lieu to the employer in accordance with section 7

### 31T. Dismissal by employer

- (1) For the purposes of and subject to this Part, an employee shall be taken to be dismissed by his employer if, but only if—
  - (a) the contract under which he is employed is terminated by the employer with or without notice or payment in lieu thereof other than in accordance with section 9;
  - (b) where under that contract he is employed for a fixed term; that term expires without being renewed under the same contract; or
  - (c) the employee terminates that contract with or without notice or payment in lieu, in circumstances such that he is entitled to terminate it without notice or payment in lieu in accordance with section 10 by reason of the employer's conduct. (Replaced 62 of 1992 s. 9)
- (2) An employee shall not be taken for the purposes of this Part to be dismissed by his employer if—
  - (a) his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment; and
  - (b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract.
- (3) For the purposes of the application of subsection (2) to a contract under which the employment ends on a rest day or holiday, the renewal or re-engagement shall be treated as taking effect immediately on the ending of the employment under the previous contract if it takes effect on or before the next day after that rest day or holiday.

### 31U. Excluded classes of employees

Sections 31R and 31RA shall not apply— (Amended 52 of 1988 s. 7)

- (a) where the employer is the husband or wife of the employee;
- (b) to any outworker;
- (c) to any person, employed by a government other than the Hong Kong Government, who is a subject or citizen of the state under whose government he is employed; or
- (d) without prejudice to paragraph (a), to any person in respect of employment as a domestic servant in, or in connection with, a private household, where the employer is the father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother or half-sister of the employee.

### 31V. Amount of long service payment

- (1) Subject to this Part, the amount of a long service payment payable under section 31R(1) or 31RA(1) shall be calculated by allowing— (Amended 105 of 1991 s. 4)
  - (a) in the case of monthly rated employee, two-thirds of his last full month's wages, or two-thirds of \$15,000, whichever is less; and
  - (b) in any other case, 18 days' wages based on any 18 days chosen by the employee and occurring during his last 30 normal working days, or two-thirds of \$15,000, whichever is less,
 for every year (and pro rata as respects an incomplete year) of employment under a continuous contract by his employer subject in all cases to a maximum payment not exceeding the total amount of wages earned during the period of 12 months immediately preceding the relevant date, or the amount of 12 times \$15,000, whichever is less (Replaced 41 of 1990 s. 12)
  - (1A) Notwithstanding subsection (1), the employee may elect to have his wages averaged over the period of 12 months immediately preceding the relevant date, but where he so elects, then—
    - (a) in the case of a monthly rated employee, the monthly average shall not exceed \$15,000; and
    - (b) in any other case, the total wages for the 12 months shall, for the purpose of calculating the daily average, not exceed 12 times \$15,000. (Added 41 of 1990 s. 12)
- (2) Subject to this Part, the amount of a long service payment payable under section 31R(2) or 31RA(1A) shall be—
  - (a) in the case of an employee aged at the relevant date less than 41 years who at that date has 9 years of service with his employer, 90% of the long service payment to which he would have been entitled if subsection (1) applied;



- (b) in the case of an employee aged at the relevant date less than 42 years who at that date has 8 years of service with his employer, 80% of the long service payment to which he would have been entitled if subsection (1) applied;
- (c) in the case of an employee aged at the relevant date less than 43 years who at that date has 7 years of service with his employer, 70% of the long service payment to which he would have been entitled if subsection (1) applied;
- (d) in the case of an employee aged at the relevant date less than 44 years who at that date has 6 years of service with his employer, 60% of the long service payment to which he would have been entitled if subsection (1) applied; and
- (e) in the case of an employee aged at the relevant date less than 45 years who at that date has 5 years of service with his employer, 50% of the long service payment to which he would have been entitled if subsection (1) applied. (*Repealed 105 of 1991 s. 4*)

(3) (*Repealed 41 of 1990 s. 12*)

### 31W. Calculation of period of employment

- (1) For the purposes of this Part, a reference to the period of employment under a continuous contract shall not include a reference to any such employment occurring more than— (*Amended 41 of 1990 s. 13*)
- (a) 6 years prior to 1 January 1986, where the relevant date occurs in 1986;
- (b) 7 years prior to 1 January 1986, where the relevant date occurs in 1987;
- (c) 8 years prior to 1 January 1986, where the relevant date occurs in 1988; and
- (d) 9 years prior to 1 January 1986, where the relevant date occurs in 1989 or any year thereafter.
- (2) Notwithstanding subsection (1), for the purposes of this Part, in the case of an employee who was employed under a continuous contract otherwise than by way of manual labour and whose average monthly wages during the period of 12 months immediately preceding the date of commencement of the Employment (Amendment) Ordinance 1990 (41 of 1990) exceed \$15,000, a reference to the period of employment under a continuous contract shall not include a reference to any such employment occurring more than—
- (a) 3 years prior to 1 January 1990, where the relevant date occurs in 1990;
- (b) 4 years prior to 1 January 1990, where the relevant date occurs in 1991;
- (c) 5 years prior to 1 January 1990, where the relevant date occurs in 1992;

- (d) 6 years prior to 1 January 1990, where the relevant date occurs in 1993;
- (e) 7 years prior to 1 January 1990, where the relevant date occurs in 1994;
- (f) 8 years prior to 1 January 1990, where the relevant date occurs in 1995;
- (g) 9 years prior to 1 January 1990, where the relevant date occurs in 1996;
- (h) 10 years prior to 1 January 1990, where the relevant date occurs in 1997 or any year thereafter. (*Added 41 of 1990 s. 13*)

### 31X. Special provision as to termination of contract in case of strike

Where an employee, who has been given notice by his employer to terminate his contract of employment, takes part in a strike before the expiry of that notice in such circumstances that the employer is entitled by reason of his taking part in the strike to treat the contract as terminable without notice, and the employer for that reason terminates the contract without notice or payment in lieu in accordance with section 9, section 31S shall not apply to that termination of the contract.

### 31Y. Set-off of gratuity or retirement scheme payment against long service payment

- (1) Subject to subsection (2), where an employee is entitled—
- (a) by virtue of this Part, to a long service payment; and
- (b) by virtue of—
- (i) the terms of his contract of employment, to any gratuity based upon length of service; or
- (ii) a retirement scheme, to any payment thereunder,
- the long service payment shall be reduced by the total sum of the amounts of all the gratuities or retirement scheme payments, as the case may be, paid to that employee in respect of any or all of the years of service in respect of which that long service payment is payable.
- (2) For the purposes of subsection (1), any reference therein to a retirement scheme payment shall not include that part, if any, of the payment which represents an employee's own contributions, including any sum payable in respect of interest thereon. (*Amended 52 of 1988 s. 9; 62 of 1992 s. 10*)
- (*Amended 41 of 1990 s. 14*)

### 31YAA. Set-off of long service payment against gratuity or retirement scheme payment

- (1) The gratuity or retirement scheme payment to which an employee is entitled as referred to in section 31Y(1)(b) in respect of all the years of service

## FIFTH SCHEDULE

[s. 31R]

TABLE

Column 1	Column 2
Age in years of employee as at relevant date	Number of years of services of employee as at relevant date
Less than 41	10
41	9
42	8
43	7
44	6
Not less than 45	5

(Fifth Schedule added 76 of 1985 s. 10)

## SIXTH SCHEDULE

[s. 31ZC]

## DEATH OF EMPLOYER—LONG SERVICE PAYMENTS

- 1 This Schedule shall have effect in relation to an employee where his employer (in this Schedule referred to as "the deceased employer") dies
- 2 Section 31Z shall not apply to any change whereby the ownership of the business, for the purposes of which the employee was employed by the deceased employer, passes to a personal representative of the deceased employer
- 3 Where, by virtue of section 31ZB, the death of the deceased employer is to be treated for the purposes of Part VB of this Ordinance as a termination by him of the contract of employment, the employee shall nevertheless not be treated for these purposes as having been dismissed by the deceased employer if—
  - (a) his contract of employment is renewed by a personal representative of the deceased employer, or he is re-engaged under a new contract of employment by such a personal representative; and
  - (b) the renewal or re-engagement takes effect not later than 4 weeks after the death of the deceased employer.
- 4 Where by virtue of paragraph 3 the employee is treated as not having been dismissed by reason of a renewal or re-engagement taking effect after the death of the deceased employer, then—
  - (a) in determining, for the purposes of section 31R or 31RA, whether he has been employed under a continuous contract for the requisite number of years of service, the interval between the death and the date on which the renewal or re-engagement takes effect shall count as a period of employment with the personal representative of the deceased employer, if apart from this paragraph it would not count for that purpose as such a period of employment; and
  - (b) in computing the number of years of service specified in section 31R or 31RA, the continuity of the employee's period of employment shall be treated as not being broken by any week which falls within that interval.
- 5 For the purposes of the application, in accordance with section 31RB, of Part VB of this Ordinance in relation to an employee who was employed as a domestic servant in, or in connection with, a private household, any reference to a personal representative in this Schedule shall be construed as including a reference to any person to whom, otherwise than in pursuance of a sale or other disposition for valuable consideration, the management of the household has passed in consequence of the death of the deceased employer.

6. Subject to this Schedule, in relation to an employer who has died—
  - (a) any reference in Part VB of this Ordinance to the doing of anything by, or in relation to, an employer shall be construed as including a reference to the doing of that thing by, or in relation to, any personal representative of the deceased employer; and
  - (b) any reference in Part VB of this Ordinance to a thing required or authorized to be done by, or in relation to, an employer shall be construed as including a reference to anything which, in accordance with any provision of Part VB of this Ordinance as modified by this Schedule (including sub-paragraph (a)), is required or authorized to be done by, or in relation to, any personal representative of his.

7. Where by virtue of Part VB of this Ordinance, as modified by this Schedule, a personal representative of the deceased employer is liable to pay a long service payment, or part of a long service payment, and that liability had not accrued before the death of the deceased employer, it shall be treated for all purposes as if it were a liability of the deceased employer which had accrued immediately before his death.

(Sixth Schedule added 76 of 1985 s. 10. Amended 52 of 1988 s. 17; 41 of 1990 s. 24)

## 1 NSW ADA 1977

### 1.1 Compulsory ret't

- covered by 1990 am't [Part 4E]
- made unlawful [s. 49ZV], w/ phase-in [s. 49ZU(1)] as follows:
  - pub sector ee's (except firefighters & coalminers) 1/1/1991;
  - local gov't ee's 1/1/1992;
  - pvt sector ee's, & remaining pub sector ee's 1/1/1993
- Overrides contrary statutes [s. 49ZW], notwithstanding general exc. for stat'ry compl'ce [s. 54]
- Exc. for judicial officers, police officers & certain other public office-holders [s. 49ZX]

### 1.2 Superann'n

- general coverage of age discrim. added by 1994 am't [Part 4G], comm'd 1/7/94
- superann'n covered in general by emp. & svcs. prov'ns
- Exc's [s. 49ZYS(1)(a)-(f)] for:
  - Occupational Superann'n Stdds Act 1987 (Cth)
  - Cth stat'ry compl'ce
  - reasonable actuarial/stat'l data; or if none, then other data; or if none, then other factors
  - discrim. w/in 1 yr of comm't under existing cond. of scheme re. person who joined scheme w/in 1 year of comm't.

### 1.3 Stat'ry compl'ce

- Exc. re. age for laws re legal capacity or legal entitlements, obligations or disqualifications of persons under 18 [s. 49ZYQ(a)]
- Exc. re. age for prot'v legisl'n re. persons under 18 (incl. crim. law) [s. 49ZYQ(b)] (there is also a 2-year exc. re. emp. of persons under 21 [s. 49ZYT], added 1994)
- General exc. [s. 54] for compl'ce w/:
  - any Act before or after ADA, & any subsidiary leg., & Trib'l & Ct. orders [~(2)]
  - but ADA overrides specified list of 6 previous Acts (relating to cooperative societies, credit unions, friendly societies, building societies, registered clubs & gaming & betting) [~(3)]

2 Old ADA 1991 (Act comm'd 30/6/92)

2.1 Compulsory ret't

- Exc. for compulsory ret't [s. 32(1)] lapses after 2 years [s. 32(2)], on 30/6/94
- Prior to lapse of exc., add'l am'ts made to clarify situation ex 1/7/ 94 (I only have the CCH summary, not the text of these):
  - Compulsory ret't spec'ly made unlawful
  - exc. for pre-existing ret't provisions
  - exc. for compulsory ret't in partnership arrangements
  - exc. for ret't of certain public office-holders, e.g. judges, magistrates, ind'l comrs

2.2 Superann'n

- Spec. prohib'n of discrim. in superann'n [ss. 52-7]  
(superann'n & ins'ce provisions comm't delayed to 9/12/92)
- Exc's [ss. 58-65] for:
  - existing superann'n fund cond. re. persons who joined before comm't of superann'n provisions [s. 60]
  - reason'l actuarial/stat'l data; or if none, other data; or if none, other rel't factors [ss 61-3]
  - Occupational Superann'n Stdds Act 1987 (Cth) [s. 64]
  - compl'ce w/ other Cth Acts [s. 65]

2.3 Stat'ry compl'ce

- general exc. for compl'ce w/ any Act (& w/ ind'l trib'l, AD Trib'l & Ct. orders) [s. 106]
- general exc. for legal incapacity [s. 112]

3 SA EOA 1984

3.1 Compulsory ret't

- age discrim. added to Act by am't in 1990, comm'd 1/6/91
- compulsory ret't made unlawful by implic. of discrim. in emp. provisions
- specific 2-year exc. for standard ret't ages [s. 85f(5)-(6)], extended further 6 mo's (to 31/12/93) by am't 1 mo before expiry

3.2 Superann'n

- Unlawful by implic. of discrim. in emp. provisions
- Exc for age disc. in terms on which person joins & in manner of admin. of schemes [85r(1)(b)]

3.3 Stat'ry compl'ce

- No effect on juristic capacity of children [s. 85m]
- exc. for ind'l awards or agreements and approved youth wages [s. 85f(4)]
- Within 2 years of comm't, Minister must prepare report on State laws involving age discrim., on whether Acts should be amended, incl. recommendations from Min., rel't gov't dep'ts & others, & must table in Leg'r. [s. 85s]  
[Note: Logically there should be a sec. exempting stat'ry compl'ce in the interim, but I can't find it.]

4 WA EOA 1984

4.1 Compulsory ret't

- age discrim. added to Act by am't in 1992, comm'd 8/1/93
- compulsory ret't made unlawful by implic. of discrim. in emp. provisions
- 2-year delay in applic. to compulsory ret't [s. 66ZN(1)(b)]
- exc. for stat'ry ret't of judges & magistrates [~(2)]

4.2 Superann'n

- Age discrim. in superann'n spec'ly prohib'd [s. 66ZL(1)(a)-(b)]
- Exc's [~(c)-(f)] for:
  - Occupational Superann'n Stdds Act 1987 or any other Cth Act
  - actuarial/stat'l data or if none, other data or if none, other factors
  - discrim. w/in 1 yr. of comm't under pre-existing cond. of scheme re. person who joined scheme w/in 1 yr of comm't

4.3 Stat'ry compl'ce

- General exc. [s. 66ZS(1)] for age discrim. in:
  - compl'ce w/ any Act except those specified (relating to cooperative & provident societies, credit unions, friendly societies and building societies)
  - awards or ind'l agreements re. youth wages & emp.
- exc. for stat'ry ret't of judges & magistrates [s. 66ZN(2)]
- Within 2 years of comm't, Commissioner must prepare report on laws involving age discrim. and furnish report to Minister [s. 66ZS(3)]. Every body administering statute or capable of enacting subsidiary leg. must w/in 18 mo's send Comr a report on whether statute or sub. leg. contains age discrim. & whether the discrim. should continue [~(4)].

5 NT ADA

5.1 Compulsory ret't

- Exemption re. age applies to standard ret't ages (& standard ages for comm't of work) [s. 36]

5.2 Superann'n

- Discrim. (on any ground) spec'ly prohib'd in superann'n [s. 48]
- Exc's [s. 49] for:
  - Occupational Superann'n Stdds Act 1987 (Cth)
  - discrim. permitted by Sex Discrim. Act 1984 (Cth)
  - compl'ce w/ any other Cth Act
  - actuarial/stat'l data or if none, other data or if none, other factors
  - discrim. under pre-comm't cond. of scheme re. person who joined scheme w/in 1 yr of comm't

5.3 Stat'ry compl'ce

- General exc. for discrim. grounded on rel't legal incapacity [s. 50]
- General exc. for compl'ce [s. 53] w/:
  - Terr'l or Cth Act or reg
  - Ct & Trib'l orders
  - awards & pre-existing ind'l agreements
  - orders or advice of Comr, & guidelines or codes of practice issued by Comr

6 Vic EOA 1984

- Vic EOA does not cover age discrimination
- (Note that there is a general exc. for discrim. in pensions & superann'n [s. 36], and for stat'ry compl'ce [s. 39(e)])

7 ACT DA 1991

- ACT DA does not cover age discrimination
- (Note that there is a general exc. for discrim. in pensions & superann'n [s. 29], and for stat'ry compl'ce [s. 30])

**8**



**SECTION 66ZS ACTS DONE UNDER STATUTORY AUTHORITY, ETC.**

**66ZS(1) [Compliance with any other written law]** Nothing in this Part renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of—

- (a) any other written law which is in force when this Part comes into operation, not being—

\* \* \*

**66ZS(3) [Review of laws]** The Commissioner shall within the period of 2 years beginning on the commencement of section 19 of the *Equal Opportunity Amendment Act 1992* or such longer period as may be prescribed—

- (a) undertake a review of written laws referred to in subsection (1) with a view to identifying circumstances where discrimination on the ground of age occurs, in substance or effect, against any person or class of persons; and

- (b) furnish a report of the findings of the review undertaken under this subsection to the Minister.

**66ZS(4) [Report by law administrator]** Every body that has the administration of any written law, or has the capacity to enact any subsidiary legislation under any law, shall within 18 months of the coming into operation of section 19 of the *Equal Opportunity Amendment Act 1992*, prepare and submit to the Commissioner a statement—

- (a) whether any written law which it administers or subsidiary legislation that it enacts contains any provision which discriminates on the ground of age; and
- (b) if there is such a law, the nature of the discrimination, whether the body considers that the discrimination should be continued and the reasons why it so considers.

**66ZS(5) [Details of statements]** The Commissioner shall include details of statements received by the Commissioner pursuant to subsection (4) in the report furnished pursuant to subsection (3).

**66ZS(6) [Statement of compliance]** Any body that pursuant to this section is required to prepare a statement shall include in any report that it is obliged to make under the *Financial Administration and Audit Act 1985* a statement as to whether it has complied with this section and shall continue to include a statement until such time as it has complied.

History  
S 66ZS inserted by No 74 of 1992, s 19.

**Division 4—Exceptions to Part 4G [age]**

**Legal capacity and welfare of children**

**49ZYQ.** Nothing in this Part:

- (a) affects the operation of a law that relates to the legal capacity or the legal entitlements, obligations or disqualifications of persons who are under 18 years of age; or
- (b) affects the operation of a law the object of which is to protect the welfare of those persons, including provisions of the criminal law that are designed to protect them.

# The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong.  
Tel: (852) 537-2467 Fax: (852) 530-2018

## FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen  
NO. OF PAGES (INCLUDING THIS ONE) : 2

FROM : Adam Mayes  
DATE : 10/1/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

### Re. Emp. Ord. age discrimination

In case you haven't had a chance to peruse the Employment Ordinance, the system for severance payments [Svrce Pmts] and long-service payments [LS Pmts] works as follows (as far as I can tell):

1. The amount of LS Pmts & Svrce Pmts are calculated the same way, basically by multiplying a fraction of monthly pay by years of service (with various limits and options).
2. Age is relevant in determining eligibility for LS Pmts, but not for Svrce Pmts.
3. A Svrce Pmt is generally due when an employee is laid-off or dismissed as redundant (i.e. dismissed for reasons of employer's business convenience rather than employee [mis]conduct).
4. LS Pmts are due:
  - 4.1. as death benefits, to a deceased employee's relatives;
  - 4.2. as retirement benefits, when an employee aged 65+ terminates after 10+ years of service;
    - [Note the statutory set-off of both Svrce & LS Pmts against other retirement benefits or contractual long-service gratuities.]
  - 4.3. in lieu of Svrce Pmt when the employee terminates for medical reasons; or
  - 4.4. in lieu of Svrce Pmt if employee is dismissed, but employer is nonetheless not liable to make Svrce Pmt. [scope of this category is unclear without further exploration of the Ordinance]
5. LS Pmt eligibility is as follows:

- 5.1. Regardless of age —
- no one with under 5 years of service is eligible at all;
  - anyone with 10+ years of service is eligible for full pmt; and
  - anyone with 5+ years of service is eligible for something . . . (at least a fractional pmt).
- 5.2. From 5-9 years of service, age cut-offs determine eligibility for full pmt —
- A person aged 40 or less only qualifies for full pmt once the full 10 years of service is reached.
  - Conversely, a person aged 45+ qualifies for full pmt as soon as 5 years of service is reached.
  - Persons aged 41-44 need between 6-9 years of service to qualify for full pmt; the older the employee, the shorter the required length of service.
- 5.3. Persons barred from full pmt by the age cut-offs get a fractional pmt (a percentage = years of service X 10).

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Tel: (852) 537-2467 Fax: (852) 530-2018

FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen  
NO. OF PAGES (INCLUDING THIS ONE) : 1

FROM : Adam Mayes  
DATE : 12/1/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

Re. Susie Ho's plans for tomorrow

1. She expects that the chairman will want her to begin with the BOR issues. She will then proceed through the goods, facilities & services clause; access to places & transport (as covered by the facilities & services clause); accommodation clauses; and education clauses. She doesn't plan any proactive presentation concerning the SDB's coverage of clubs or gov't admin., since it is not explicitly directed at either.
2. A memo outlining the gov't position on SDB exemptions & the BOR will be faxed to bills comm. members this afternoon (I'll forward it as soon as I get it).
3. She will also attempt to answer questions re. small house policy, but says if Members want a great deal of detail she will have to arrange a future session for the Planning, Env't & Lands Branch to attend.
4. Her legal advisor, Elizabeth Wu, will be present; Ian Deane will not attend, but could attend in the future if Members want further information. She will also have someone along for Education and Manpower for the education questions.
5. Also, Eric has arranged for the Women's Coalition submission to be tabled in tomorrow's meeting.

The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong

Tel: (852) 537-2467 Fax: (852) 530-2018

FACSIMILE MESSAGE

TO

NO. OF PAGES (INCLUDING THIS ONE) : 3

FROM

DATE :

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

C. Principal Subjects of Concern

22. The Committee regrets that the provisions of the International Covenant on Economic, Social and Cultural Rights are not incorporated into Hong Kong domestic law unlike the International Covenant on Civil and Political Rights. The Committee finds unacceptable the view expressed by the Government that the rights enshrined in the International Covenant on Economic, Social and Cultural Rights are "different in nature" from civil and political rights and therefore not capable of being the subject of an enforcement procedure under domestic law.

23. The Committee is concerned that the relatively low level of awareness of and interest in international human rights law on the part of the judiciary results in the inadequate consideration of the provisions of the Covenant in judicial decision-making to the extent that is permitted by the common law system.

24. The Committee expresses its concern that in spite of recent Government initiatives to introduce legislation concerning non-discrimination in relation to sex and disability, there is an absence of comprehensive legislation providing protection against discrimination on the grounds referred to in article 2 of the Covenant. The Committee notes with concern that the Government's proposed legislation on sex discrimination includes a number of exclusions and exemptions--in particular the so-called small-house policy--which discriminate against women.

25. The Committee is concerned at the Government's clear objection to the establishment of a human rights commission.

26. The Committee is particularly disturbed at the problem of split families in Hong Kong, especially where it concerns spouses who are forced to live apart from each other and children who are separated from parents and siblings. The Committee is of the view that this situation is the result of Hong Kong's present immigration law, and considers that the separation of families is inconsistent with the obligations under article 10 of the Covenant.

27. The Committee is also concerned that in the case of Hai Ho-Tak, it has received conflicting explanations as to the reasons for the separation of the child from his parents and as to which authorities are in a position to resolve the problem. The Committee finds these reasons unconvincing and maintains its concern that unduly broad bureaucratic reasons have been used as a justification for a measure which is not compatible with the rights

## Education Acts

- 3.22 In its responses to the Department of Education and Science consultative documents which preceded the Education Reform Bill the Commission suggested detailed amendments to ss.22 and 23 of the Sex Discrimination Act in the light of the proposals. Only one, an amendment to bring grant maintained schools within the scope of s.22, is included in the Bill as introduced.

The need for detailed scrutiny and constant minor amendment is unsatisfactory and

The Commission proposes that sections 22 to 25 be redrafted in general terms to avoid the need for further amendment as education law changes.

## State Activities

- 3.23 In *Regina v Entry Clearance Officer Ex parte Amin* (1983) 2 All ER 864 (HL) (E), the House of Lords by a bare majority held that the expression "provision of goods, facilities and services" in s.29 of the Sex Discrimination Act applies only to "market-place activities" and that in its application to the Crown the Act was limited to the sort of act which could be done by a private person. This had the effect in that case of taking outside the ambit of the Act the discriminatory treatment of a woman by an Entry Clearance Officer in applying immigration rules. The effect of the judgement is that a whole range of activities of the State are outside the ambit of the legislation and

The Commission proposes an amendment to remove the restrictive interpretation imposed by the Amin decision.

## Private Clubs

- 3.24 Since 1976, the Commission has received some 2,000 complaints about the unequal status and treatment of women members of private members' clubs. Most complainants are the women concerned; some have been male sympathisers, including on occasion club officials who would like the support of the Act in seeking to bring about changes in favour of equality of treatment.

Traditionally, problems arise in these clubs from the existence of two categories of membership: one for men ("full" membership), at a higher subscription rate, bringing eligibility for election to all club-wide committees and full voting rights, as well as certain other privileges; the other ("associate" membership), for women, at a lower subscription rate, bringing eligibility for election to a women's committee only, no club-wide voting rights and restricted privileges. It is no cause for concern to the Commission that more than one category of club membership should exist; concern arises only from the absence for both sexes of choice as to the desired category of membership. This absence of choice is particularly disadvantageous to women because of the restricted privileges attached to associate membership, which may lead, for example, to prohibitions on the use of sporting facilities at weekends and on weekday evenings.

- 3.25 Although the Commission has encouraged complainants to seek change within the clubs by constitutional means, it is aware of no significant progress towards equality of status for men and women members of mixed private clubs resulting from such attempts; on the contrary, there is evidence of repeated failure.

A time-clause is included in the Commission's current proposal because, on occasion, women who ask for full membership and privileges may be threatened with expulsion from the club or, indeed, with the general exclusion of women from membership.

- 3.26 The Commission was encouraged by the volume and strength of the support for its proposal in response to the Consultative Document.

The Commission therefore proposes that the Sex Discrimination Act should be amended to bring into the scope of s.29 all private members' clubs which, on or after 1st January 1988, have had people of both sexes in membership.

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本署編號 OUR REF : HAB/CR/1/2/21

12 January 1995

來函編號 YOUR REF.:

電話 TEL NO 835 1373

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DOCUMENT

Mrs. Anna Lo,  
Clerk to the Bills Committee to Study  
the Equal Opportunities Bill and the  
Sex Discrimination Bill,  
Legislative Council,  
1/F., Legislative Council Building,  
8 Jackson Road,  
Hong Kong  
(Faxline : 877 8024)

Dear Anna,

### Sex Discrimination Bill

At the Bills Committee Meeting held on 2 December 1994, Members raised a number of questions on the Sex Discrimination Bill and I undertook to seek legal advice before reverting to the Committee. The reply to the questions raised are set out below.

#### Sexual Harassment

Members questioned whether clause 2(5) of the Bill, as presently drafted, will render it unlawful for a man to sexually harass another man.

Briefly, Clause 2(5) of the Bill provides that for the purposes of the Ordinance, a person (however described), sexually harasses a woman if he engages in certain unwelcome conduct of a sexual nature regarding her. Clause 2(6) defines what is conduct of a sexual nature. Clause 2(7) further provides that any provision of Part III or IV of the Ordinance with reference to sexual harassment of women shall be treated as applying equally to the treatment of men.



Clauses 2(5) and (6) of the Bill define what is sexual harassment. The provisions which provide that sexual harassment is unlawful are found in Parts III and IV of the Ordinance (relating to employment, education, provision of services etc.). Take, for example, Clause 20(1) under which it is unlawful for a person to sexually harass a woman who is seeking to be employed by the person. Reading Clauses 20(1) and 2(7) together, it can be said that it is unlawful for a person (of whatever sex) to sexually harass another person (female or male) who is seeking to be employed by the first mentioned person.

#### The Bill of Rights Ordinance and the Letters Patent

The Hon. Anna Wu questioned whether the exception for the Small House Policy provided in the Sex Discrimination Bill will bar a person from challenging the Policy under the Bill of Rights Ordinance.

An exception provided for the Small House Policy in the Sex Discrimination Bill only operates in respect of proceedings brought pursuant to the Sex Discrimination Ordinance (when enacted). The exception will not bar a person from challenging the Small House Policy under the Bill of Rights Ordinance.

The Hon. Anna Wu also asked whether deferring the commencement of the operation of part of the Sex Discrimination Bill will release Government from complying with the Bill of Rights Ordinance. Government is bound by the Bill of Rights Ordinance. Government, as an employer, has to observe the guarantee against discrimination given under the Bill of Rights Ordinance. The fact that the provisions of the Sex Discrimination Ordinance relating to employment will not come into operation until the relevant code of practice is made by the Equal Opportunities Commission does not preclude a person from bringing an action under the Bill of Rights Ordinance against Government.

The Hon. Anna Wu asked whether the definition of sex discrimination in the Sex Discrimination Bill is consistent with the meaning of discrimination in the Bill of Rights Ordinance.

Although no definition of discrimination is provided in the Bill of Rights Ordinance, based on international jurisprudence, discrimination involves treating differently those whose situations are otherwise analogous, in the absence of an objective and reasonable justification. The Sex Discrimination Bill provides a definition of sex discrimination. Putting it simply, a person discriminates against a woman if, on the ground of her sex, he treats her less favourably than he treats or would treat a man; or if he applies to her a requirement or condition which he applies to a man but which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, which is not justifiable and which is to her detriment that she cannot comply with

it. The Administration believes that this definition in the Sex Discrimination Bill is consistent with the meaning of discrimination under the Bill of Rights Ordinance.

The Hon. Anna Wu asked whether the provisions of the Bill, in particular the exceptions, are consistent with the Letters Patent.

Under Article VII(5) of the Letters Patent, no law of Hong Kong shall be made after 8 June 1991 that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. The guarantee of equality and non-discrimination are provided in articles 2 and 26 of the ICCPR (these 2 articles are adopted, with suitable modifications, as articles 1 and 22 of the Hong Kong Bill of Rights Ordinance). The ICCPR, like the Bill of Rights Ordinance, does not define the term 'discrimination'. However the same principles of what constitutes discrimination should apply in respect of both the Bill of Rights Ordinance and the ICCPR.

As pointed out above, the Sex Discrimination Bill defines, for the purposes of the Bill, what constitutes sex discrimination. Under that definition, a person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats a man. Exceptions are provided in the Bill. All these exceptions are formulated having regard to the principle that differential treatment of women and men would not be discriminatory if there is an objective and reasonable justification for the differential treatment. The Sex Discrimination Bill is therefore not against Article VII(5) of the Letters Patent.

Yours sincerely,

*Susie Ho*

(Miss Susie Ho)  
for Secretary for Home Affairs

To Patrick Mok  
From Adam Mayes  
Date 12/1/95

Some suggested points to raise in 13 Jan EOB/SDB Bills Committee

As you know, Home Affairs' Susie Ho plans to discuss (with the assistance of her legal advisers) —

- the Bill of Rights/ICCPR issues relating to the SDB's broad exemptions, including
- the exemption for the Small House Policy

She will then bring the SDB presentation up to date with the EOB by discussing the SDB clauses relating to —

- goods, services and facilities (SDB cl 25),
- accomodation (cl 26-7),
- exceptions related to the above topics (cl 28-30), and possibly
- education (cl. 22).

I believe DP Members are already thoroughly briefed on the BOR, ~~Small House and rural election issues~~. I would like to suggest some additional points that arise from UK court precedents that limit the scope of "goods, facilities or services" in the SDB.

1. SDB does not cover discrim. in clubs

- 1.1. **The SDB, unlike the EOB, does not specifically cover discrimination by clubs against members or potential members. Only the SDB's "goods, facilities or services" clause (cl. 25) restricts such discrim. by clubs.**
- 1.2. **This clause only covers goods, services or facilities that are provided "to the public or a section of the public." According to UK court decisions, this means the clause does not apply to private clubs.**
- 1.3. **The UK courts' definition of a "private club" is as follows — if membership is available to anyone on objective criteria, the club is public, if membership involves selection on personal grounds, the club is private**  
*Size of membership is irrelevant: in one case, the court held that a union-related association was "private" (and therefore not covered) despite its having over 1 million members.*
- 1.4. **In reaction to these court decisions, Parliament amended the UK law concerning race discrim. by adding a new section that explicitly covers clubs (s 25 of the UK Race Relations Act)**  
Parliament did not so amend the UK sex discrim law, presumably because it does not take sex discrim equally seriously *Neither did the Administration include any such clause in the SDB.*

2. SDB coverage of discrim. in the admin. of laws & programmes is severely limited

- 2.1. **Again in contrast to the EOB, the SDB does not specifically cover discrimination in the administration of gov't laws & programmes — only the SDB's "goods, facilities or services" clause (cl 25) restricts such discrim. UK court decisions have severely**

*limited the application of this clause to gov't*

~~First, the UK courts have stated clearly that decisions by Immigration about whether or not to admit a person are not covered~~

2 3 More generally, acts of gov't are only covered if they "are at least similar to acts that could be done by a private person" *This seems to exempt discrim. in a variety of areas that are uniquely governmental, such as immigration, taxation and customs.*

2 4 Also, a "mere grant of permission to use facilities" is not covered

3	Exc skills exercised differently for men and women	25(3)
4	Exc single-sex facilities in hospitals, etc	30(1)(a)
5	Exc single-sex facilities to avoid embarrassment	30(1)(c)
6	Exc : single-sex facilities where physical contact likely	30(2)
7	Exc.: employment and education exceptions applied to services	30(3) & Sched 3
8	Exc : extent (territorial limitations)	34(1)-(3)
9	Exc : services related to communal accommodation	44[(5)]
10	Exc.. disposal of owner-occupied premises by owner directly	26(3)
11	Exc.: communal accommodation	44

To : Anna Wu, Andrew Byrnes, Carole Petersen, AM, DV and CN

From : Eric Chow

Date : 18.1.95

Subject: *Educational institutions: preference based on religious conviction or family status*

### Statistics

- There is no doubt, as revealed in statistical terms, that schools (including primary and secondary) run by religious orders, in particular Catholic and Protestant schools, form the main trunk of the school system in HK.
- In 1993, out of a total 480 secondary schools (w/ total enrolment amounts to 455,935), 235 are either Catholic or Protestant schools (w/ total enrolment amounts to 235,214) whereas schools with no religion only accounts for 209.
- For primary school, 261 (41%) out of a total 635 are either Catholic or Protestant schools, however, the student enrolment in these schools accounts for 54.1% (or 262,575) of total enrolment which equals 485,061, whereas only 197,246 (40.7%) students are enrolled in primary schools with no religion.

### Secondary School Admission

- Majority of secondary school places are allocated through a centrally administered scheme - Secondary School Places Allocation System (SSPA System). The system covers places in government schools, aided schools (including grant, subsidized schools, but excluding those of the English Schools Foundation), some private schools (including caput and bought place schools, but excluding direct subsidy schools) and prevocational schools.
- Generally, allocation is based on merits (internal assessment of primary schools and the Academic Aptitude Test, which then divide students into five equal bands, i.e. Band 1 to Band 5), parents' choice of schools within a School Net, Computer-Generated Random Number. Religious conviction or family status (such as being children or siblings of benefactors or former students) are not factors under this method.
- Under the SSPA System, government, aided and caput schools are allowed to retain up to 10% of places as discretionary places to admit students based on whatever criteria set by individual schools. The criteria may vary greatly from one school to another. Schools may fill these discretionary places based on students' merits (by way of internal examination), connection to the school (e.g. parents are staff, benefactors, former students of the school), or religious conviction, etc. (For many aided schools with longer history, this arrangement is basically a deal between the schools and the government so that they can still maintain control over accepting a certain amount of students in exchange for giving up majority of places for central allocation and receiving more government subsidy.)
- In addition, after the deduction of discretionary places, a parent secondary school may reserve up to 85% of the remaining places for its feeder primary school (or 25% for its nominated primary schools). Generally speaking, a number of popular secondary schools have their own feeder primary schools (a few of these primary schools are private, like Diocesan Girls' Junior School, St. Paul's Convent School), which means that only a small percentage of places are allocated centrally

## Primary School Admission

- Most of primary school places in government and aided schools (i.e. excluding private ones and those of the English Schools Foundation) are allocated through a centralized system. Accordingly, “the system is designed to elummate the pressure imposed on young children by the intense competition to enter popular primary schools and the adverse effect this has on education at the kindergarten level.”
- Under this system, 65% of the places in Primary 1 in each school are discretionary places to be filled by the school based on a Points System (30% of the places are restricted to children living in the same district of the school while 35% are not) The rest of the places (35%) are centrally allocated by the Education Department based on parental choice, which is restricted to schools in their district of residence)
- Because of the Points System, the filling of “discretionary places” in primary school admission leaves little discretion on the school compared to that in secondary school admission. Details of the Points System:
  - [1] parent(s) teaching or working full time in the primary school (or in the kindergarten or secondary section if it is in the same compound as the primary school) [20 points]
  - [2] sibling(s) studying in the primary school (or in the secondary section if it is in the same compound as the primary school) [20 points]
  - [3] parent(s) being a registered school manager of the primary school [20 points]
  - [4] parent(s) or sibling(s) being a graduate of the primary school [10 points]
  - [5] firstborn child [5 points]

N.B. applicants can only claim one of the above plus either [6] or [7]

  - [6] same religious affiliation as the sponsoring body that operates the school [5 points]
  - [7] parent(s) being a member of the same organization which sponsors the operation of the primary school [5 points]
  - 10 points will be given to children of the right age (5 years 8 months to 7 years old);
  - if a school is oversubscribed, the head of the school may award up to 10 points to those children on the shortlist (there is little, if any, restriction guiding how this 10 points is to be awarded).
- Much of the Points System (especially those underlined) has relevance to differential treatment on the basis of family status, religious conviction or race. [7] may include being members of certain ethnic groups that sponsor the operation of the school, such as Tung Koon District Society Fong Shiu Chuen School, Shanghai Alumni Primary School (of which Peggy Lam is the Supervisor). The rationale for [1], [2] is for the sake of convenient pick-up by parents

## Private Schools

- Out of a total 448 secondary schools registered with the Education Department, 39 are government schools, 323 are aided and 86 are classified private. Among the 86 private schools, there are several categories, namely, Caput Schools (10), Direct Subsidy Schools (11), Private Independent Schools with Bought Places (20) and without (46, 14 of which are international). In fact, all except the last category (46 Private Independent Schools without Bought Places, the standard of many of these, esp. for Form 1-3, is well below average) are

receiving government funding one way or the other. Therefore, strictly speaking, parents and students have limited choices in the private sector that offer quality education.

- The financing of primary schools is far more clear-cut compared to secondary schools. Among 633 registered primary schools, 47 are government schools, 511 are aided and 75 are private (private primary schools indeed receive no government funding). Also contrast to the private secondary schools, a number of these private ones offer quality education.
- Given the relatively insignificant role of private schools (in particular, those not receiving government funding at all) and the large number of religious schools in HK education system compared to the US or Australia, it seems that there is little sense in copying from the Australian legislation the phrase "private educational institutions" in s.163.

**In reviewing whether certain existing practices that are apparently discriminatory should be exempted, several social factors and justification should be considered:**

- rationale for giving preference to children of former students, benefactors, etc. - one reason is to encourage patronage from former students (or from private sector in general) in terms of providing better facilities and scholarship/awards in order to supplement limited government funding.
- parents' choice: given the lack of a good and affordable religious schools in the private sector, it sounds fair that the admission system should to a certain extent respect the wish of parents regarding what kind of education (including the religious background) their children should receive. If schools are not allowed to give preference in admitting students based on religious conviction, it's possible that the computer may by random send a child of Muslim parents to a Protestant school! Additionally, it is generally agreed that a lot of parents (even if they have no religion themselves) in HK favour sending their children to Catholic or Protestant schools.
- historical role of religious orders running schools before government commitment to provide free education for all.
- social mobility: given the fact that majority of secondary and primary schools (including almost all top and popular schools) are in the public sector and thus are accessible for those of lower socio-economic status through computer allocation system, social mobility is generally not considered a problem in HK.
- public support vis-à-vis resistance towards changes: it is unlikely that there should be any major public support for removing the power of schools to allocate small number of places based on criteria like religious conviction or connection to the schools, whereas we may well anticipate school administration and staff would resist removing such power.
- 1997: a fear of increasing government (include legislative) control over autonomy of religious schools (say, in employment of staff or admission of students) that may at the end threaten the existence of religious schools in future. The fear towards EOB as part of the control may not be logical or rational; but it's there!

## Educational institutions: preference based on religious conviction or family status

### Secondary School Admission

- Majority of secondary school places are allocated through a centrally administered scheme - *Secondary School Places Allocation System (SSPA System)* *The system covers places in government schools, aided schools (including grant, subsidized schools, but excluding those of the English Schools Foundation), some private schools (including caput and bought place schools, but excluding direct subsidy schools) and prevocational schools.*
- Generally, *allocation is based on merits* (internal assessment of primary schools and the Academic Aptitude Test, which then divide students into five equal bands, i.e. Band 1 to Band 5), *parents' choice of schools within a School Net, Computer-Generated Random Number* *Religious conviction or family status (such as being children or siblings of benefactors or former students) are not factors under this method*
- Under the SSPA System, government, aided and caput schools *are allowed to retain up to 10% of places as discretionary places to admit students based on whatever criteria set by individual schools* *The criteria may vary greatly from one school to another* *Schools may fill these discretionary places based on students' merits (by way of internal examination), connection to the school (e.g. parents are staff, benefactors, former students of the school), or religious conviction, etc.* (For many aided schools with longer history, this arrangement is basically a deal between the schools and the government when the government started subsidising most schools heavily, so that they can still maintain control over accepting a small percentage of students in exchange for giving up majority of places for central allocation )
- In addition, after the deduction of discretionary places, a parent secondary school may reserve up to 85% of the remaining places for its feeder primary school (or 25% for its nominated primary schools). Generally speaking, a number of popular secondary schools have their own feeder primary schools, which means that only a small percentage of places are allocated centrally *But only a handful of these primary schools are private, like Diocesan Girls' Junior School, St Paul's Convent School, whereas the majority are receiving government funding and so the admission scheme described below applies*

### Primary School Admission

- Most of primary school places in government and aided schools (private ones and those of the English Schools Foundation not included) are allocated through a centralized system Accordingly, "the system is designed to eliminate the pressure imposed on young children by the intense competition to enter popular primary schools and the adverse effect this has on education at the kindergarten level "
- Under this system, *65% of the places in Primary 1 in each school are discretionary places to be filled by the school based on a Points System* (30% of the places are restricted to children living in the same district of the school while 35% are not) *The rest of the places (35%) are centrally computer-allocated by the Education Department based on parental choice, which is restricted to schools in their district of residence*



- Because of the Points System, the filling of “discretionary places” in primary school admission leaves little discretion on the school compared to those in secondary school admission.

Details of the *Points System*

[1] *parent(s) teaching or working full time in the primary school (or in the kindergarten or secondary section if it is in the same compound as the primary school)* [20 points]

[2] *sibling(s) studying in the primary school (or in the secondary section if it is in the same compound as the primary school)* [20 points]

[3] *parent(s) being a registered school manager of the primary school* [20 points]

[4] *parent(s) or sibling(s) being a graduate of the primary school* [10 points]

[5] *firstborn child* [5 points]

*N.B. applicants can only claim one of the above plus either [6] or [7]*

[6] *same religious affiliation as the sponsoring body that operates the school* [5 points]

[7] *parent(s) being a member of the same organization which sponsors the operation of the primary school* [5 points]

- *10 points will be given to children of the right age (5 years 8 months to 7 years old);*
- *if a school is oversubscribed, the head of the school may award up to 10 points to those children on the shortlist (there is little, if any, restriction guiding how this 10 points is to be awarded).*

- Much of the Points System (especially those underlined) has relevance to differential treatment on the basis of family status, religious conviction or race. [7] may include being members of certain ethnic groups that sponsor the operation of the school, such as Tung Koon District Society Fong Shiu Chuen School, Shanghai Alumni Primary School (of which Peggy Lam is the Supervisor). The rationale for [1], [2] is for the sake of convenient pick-up by parents.

#### Arguments for preserving status quo:

- rationale for giving preference to children of former students, benefactors, etc. - one reason is to encourage patronage from former students (or from private sector in general) in terms of providing better facilities and scholarship/awards in order to supplement limited government funding.
- *parents' choice*: given the lack of a good and affordable religious schools in the private sector, it sounds fair that the admission system should to a certain extent respect the wish of parents regarding what kind of education (including the religious background) their children should receive. If schools are not allowed to give preference in admitting students based on religious conviction, it's possible that the computer may by random send a child of Muslim parents to a Protestant school, causing a lot of family disputes! Moreover, it is generally agreed that a lot of parents (even if they have no religion themselves) in HK favour sending their children to Catholic or Protestant schools
- religious atmosphere it's reasonable to expect that *religious schools need a certain percentage of students having the same religion in order to maintain an atmosphere favourable to the promotion of its religion*

- social mobility: given the fact that majority of secondary and primary schools (including almost all top and popular schools) are in the public sector and thus the places are accessible for those of lower socio-economic status through computer allocation system, *social mobility is generally not considered a problem in HK*, meaning that retaining discretionary places does not pose serious threat to social equality
- *1997 factor: a fear of increasing government (incl. legislative) control over autonomy of religious schools* (say, in employment of staff or admission of students) that may at the end threaten the existence of religious schools in future. Some suggest that *there is a risk of driving some well-established schools into the private sector* in order to maintain autonomy, therefore becoming schools only for the rich.
- contribution of religious schools to HK education system. given the *historical role of religious orders running schools* before government commitment to provide free education for all, one need to recognize the previous deals struck between them and the government in terms of say discretionary places.

## Statistics

### Religious Schools

- Schools (including primary and secondary) run by religious orders, in particular Catholic and Protestant schools, form the main trunk of the school system in HK.
- In 1993, out of a total 480 secondary schools (w/ total enrolment amounts to 455,935), 235 are either Catholic or Protestant schools (w/ total enrolment amounts to 235,214) whereas schools with no religion only accounts for 209. 49.9%
- For primary school, 261 (41%) out of a total 635 are either Catholic or Protestant schools, however, the student enrolment in these schools accounts for 54.1% (or 262,575) of total enrolment which equals 485,061, whereas only 197,246 (40.7%) students are enrolled in primary schools with no religion. 41.6%

### Private Schools

- Out of a total 448 secondary schools registered with the Education Department, 39 are government schools, 323 are aided and 86 are classified private. Among the 86 private schools, there are several categories, namely, Caput Schools (10), Direct Subsidy Schools (11), Private Independent Schools with Bought Places (20) and without (46, 14 of which are international). In fact, all except the last category (46 Private Independent Schools without Bought Places, the standard of many of these, esp. for Form 1-3, is well below average) are receiving government funding one way or the other. Therefore, strictly speaking, parents and students have limited choices in the private sector that offer quality education.
- The financing of primary schools is far less complicated compared to secondary schools. Among 633 registered primary schools, 47 are government schools, 511 are aided and 75 are private (private primary schools indeed receive no government funding). Also contrast to the private secondary schools, a few of these private ones offer quality education.
- Given the relatively insignificant role of private schools (in particular, those not receiving government funding at all) and the large number of religious schools in HK education system compared to the US or Australia, it seems that there is little sense in copying from the Australian legislation the phrase "private educational institutions" in s.163

To: Anna and Team

From: Carole Petersen

Date: January 19, 1995 (3 pages total)

Here are some suggested follow - up questions for Government on the Small House Policy, rural elections, and the protective legislation. See you all tomorrow morning.

### 1. Small House Policy

Note the Government's "justification" for the SHP (at par. 21 of the Government's Views on the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights). Ask Government if this is the totality of its justification for the SHP or if there is anything else it wants to add. (We asked Susie this last week and she said she could not answer, so we should ask the representatives this week while they are there.)

Follow-up: The Government's own paper concedes (at par. 20) that there must be "proportionality" between the aim sought and the means employed. Ask the Government to explain why it is necessary to exclude women in order to meet its objectives?

**If Government maintains that women generally move away from the villages, counter with the suggestion that one of the reasons that they must move away is that they are cheated out of participating in the SHP in their own village. If a woman could benefit from the SHP, her husband might well move to her village to live with her there. Although the Government's response to the UN claims that the policy preserves villagers' links with their villages, the truth is that it only encourages men to preserve those links. In contrast, women who grow up in these villages (and may wish to stay in them) are compelled by the Government's discriminatory policy to go elsewhere and either obtain housing on their own or be dependent upon a husband with better access to housing.**

If Government is really concerned about "promoting the cohesiveness" of the villages and "preserving the links" that villagers have with their villages, why does Government permit male grantees to sell the houses/land that they have obtained through the SHP?

Why doesn't the Government simply change the policy to require (1) that an applicant (whether male or female) make a commitment to live in the house that is built on the land grant; and (2) that if the applicant fails to occupy the house for a certain period of time, then the Government has the right to buy back the property and allocate it to other applicants. (The "buy-back" price could be designed to compensate the grantee for any money invested but not to give him or her any windfall).

This would better meet the Government's stated objectives, without discriminating against women.

## 2. Rural Elections

In the last meeting Susie Ho stated that the Government's Bill definitely would not apply to rural elections and that Government would wait to see if there was a "demand" from the public for legislation prohibiting discrimination in such elections. However, it is clear from the submissions on the Green Paper that the public is appalled by this discrimination and has already demanded reform. Many of the submissions specifically criticize the discrimination in rural elections. Moreover, as the Government has admitted, the vast majority of the submissions called for the ratification of CEDAW, which expressly requires (at Article 7) that discrimination in elections be eliminated. Under these circumstances, what is the Government's justification for refusing to address such an important area of discrimination in the Sex Discrimination Bill?

## 3. Employment: Exemptions for "Protective Legislation"

Clause 49(1) of the SDB appears to exempt acts necessary to comply with legislation concerning the protection of women and acts done to comply with legislation on Schedule 2 which are for the protection of women:

However, subclause (2) of Clause 49 defines acts for the protection of women as including only acts for the purpose of protecting women as regards: (i) pregnancy or maternity; and (ii) other circumstances giving rise to risks specifically affecting women. (Emphasis added by me.)

Question: How does government interpret (ii)? Is it aware of how it has been interpreted in the UK and does it expect that it will be interpreted here in the same way?

Background: In the UK Act, the purpose of this language (which was added in 1989 as an amendment to Section 51) is to ensure that women are only excluded from those forms of employment which could harm them as regards pregnancy, maternity, and in their general reproductive capacities (such as jobs ionizing radiation).

It is for this reason that, in 1989, the UK repealed the restrictions on the employment of women: underground; in the cleaning of machinery; on heavy work; and in the supervision of wind apparatus. These restrictions had to be repealed because these areas of work do not include risks which specifically affect women as opposed to men.

But the Hong Kong Government has placed Regulations on Schedule 2 which restrict women's employment in many areas which do not present risks that specifically affect women. These regulations have been placed on Schedule 2 although they would appear not to meet the test of Clause 49(2) of the SDB

Question: Is the Government intending to exempt all of the regulations on Section 2, or does it recognize that many may not pass muster under Clause 49(2) (and presumably could therefore be invalidated by a Court)?

If the Government believes that all of the Regulations on Schedule 2 satisfy the test set forth in Clause 49(2), we might want to return to the initial question. how does Government interpret 49(2) and why has it reached a different interpretation of 49(2) than the UK?

Follow-up Question. Given that women's organizations have called for their repeal, why has the Government placed all of these restrictive regulations on Schedule 2?

See, for example, the Submission of the Coalition of Women's Organizations on the Green Paper and it's recent Submission on the Government's SDB. These submissions (signed by a large number of women's organizations, including the Women's Workers Association) called for the repeal of discriminatory "protective" legislation on the ground that it really only restricts women workers' ability to compete with men on equal terms.

If Susie Ho tries to claim that they have received submissions supporting the continuation of the protective legislation, ask to see them. (I cannot find any in the published submissions on the Green Paper. I also had extensive correspondence with Susie on this and she never could come up with anything. For example, in the Green Paper the Government claimed (at par 143) that it had complaints from women workers about the lack of enforcement of the protective legislation, which Government claimed was evidence of women's support for it. But when I wrote to Susie Ho to ascertain the exact nature of the complaints, all she could tell me was that they had received a total of 81 complaints in 1992 concerning breaches of the protective legislation for women and young persons (combined) and she admitted that there were no records on how many of these complaints were actually from women.)

To : Members of the Subcommittee on Women's Affairs  
From : Anna Wu  
Date : ??/1/94

BOR issues relating to Village Representative elections and Rural Committees.

1. There are approximately 900 VRs, elected from some 500 rural villages. VRs are grouped geographically into 27 Rural Committees.
2. **Neither the constitution of the Rural Committees nor the elections for VRs are regulated by law. Practices vary from area to area.**
  - 2.1 For example, in the six villages that held VR elections held between September 1992 and March 1993, the eligibility criteria for electors included:
    - heads of household (criteria in two villages);
    - heads of household over 18;
    - heads of household over 21;
    - male villagers over 18; and
    - villagers registered with the village office with at least 5 years' residence. (Legco Paper No. 2334/92-93, Annex A)
  3. **While there is variation in the precise practices followed, in general the conduct of VR elections discriminates against women.**
    - 3.1 The election practices of some villages are directly discriminatory, e.g. in those villages where eligibility to vote is explicitly restricted to males.
    - 3.2 There is anecdotal evidence of discriminatory intent in the conduct of village elections. DETAILS testimony of NT women in WA Subcomm???
    - 3.3 The conduct of VR elections is discriminatory in effect.
      - 3.3.1 For example, in the six elections held between September 1992 and March 1993, the proportion of the electorate composed of women was 0/121; 1/59; 46/108; 6/320; 42/337; 0/76. (Legco Paper No. 2334/92-93, Annex A)
      - 3.3.2 There is currently only one woman VR. SOURCE Carol Jones?
4. **The legal status of elected VRs, and of Rural Committees, derives solely from discretionary recognition by the Secretary of Home Affairs.**
  - 4.1 The Heung Yee Kuk Ordinance (Cap. 1097), s. 3(3)(a): defines "Village Representative" as "a person elected or otherwise chosen to represent a village who is approved by the Secretary for Home Affairs."
  - 4.2 The same section of the Ordinance defines "Rural Committee" as "a society registered or exempted from registration under the Societies Ordinance (Cap. 151) and approved by the Secretary of Home Affairs . . . ."
  - 4.3 The Societies Ordinance, s. 6(1), similarly provides that "[t]he Secretary for Home Affairs may, in his absolute discretion, issue to any society a certificate in such form as he thinks fit showing that he acknowledges such society as a rural committee . . . and may cancel, amend or withdraw any such certificate . . . ."
  - 4.4 The discretion conferred on the Secretary for Home Affairs by the provisions cited is limited only by appeal to the Governor in Council (Heung Yee Kuk Ordinance, s. 3(d); Societies Ordinance, s. 6(2)).

5. **As a matter of practice, the CNTA routinely approves the VRs elected.**
- 5.1 Since 1967, administrative approval of a VR has been withdrawn only once, in the case of a Rural Committee Chairman convicted of bribery. (N. Miners, Government and Politics of Hong Kong, 5th Ed., 1991, p. 177)
6. **Once granted legal status by administrative recognition, VRs and Rural Committees constitute the first tier for indirect elections to major representative institutions.**
- 6.1 Heung Yee Kuk: The Chairmen and Vice-chairmen of Rural Committees are ex officio councillors of the Heung Yee Kuk (Heung Yee Kuk Ordinance, s. 3(2)(a)(i)). As ex officio councillors, they serve as electors for 21 additional "special councillors" (s. 3(2)(b)) who are nominated from among Village Representatives ("or such other persons as may be approved by the Secretary for Home Affairs"). All councillors are electors for the Chairman and the two Vice-Chairmen of the Heung Yee Kuk (s. 2(2)(a)).
- 6.2 District Boards: Rural Committee Chairmen are ex officio members of the District Boards for their respective districts (District Boards Ordinance (Cap. 366), s. 6(1)(b)).
- 6.3 Regional Council: The Chairman and Vice-Chairmen of the Heung Yee Kuk are ex officio members of the Regional Council (Regional Council Ordinance (Cap. 385), s. 6(d)). As District Board members, Rural Committee Chairmen serve as electors for "representative members" of the Regional Council (s. 6(b) and s. 8(1)).
- 6.4 Legislative Council: The Chairman, Vice-Chairmen, and the councillors of the Heung Yee Kuk constitute the electoral college for the Rural Functional Constituency seat in Legco (Legislative Council (Electoral Provisions) Ordinance (Cap. 381), Schedule 1, s. 15). As members of the Regional Council, the Chairman and Vice-chairmen of the Heung Yee Kuk are also electors for the Regional Council Functional Constituency seat in Legco (id., s. 14).
7. **Administrative conferral of legal status on VRs and Rural Committees elected or constituted in a sexually discriminatory manner contravenes BOR Articles 1 (entitlement to rights without distinction), 21 (right to participate in public life), and 22 (equality before and equal protection of law).**
- 7.1 Article 22 states generally that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex . . . ."
- 7.2 Article 21 provides that "[e]very permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions --
- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . . ;
- (c) to have access, on general terms of equality, to public service in Hong Kong."
- 7.3 Article 1(1) provides that "[t]he rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as . . . sex . . . ." Article 1(2) provides specifically that "[m]en and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights."

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Meaning of Clause 117 “Unjustifiable Hardship”

1.1 Clause 117 of the Equal Opportunities Bill defines unjustifiable hardship as

“(1) For the purpose of this Part, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including- -

- (a) the nature of the benefit likely to be enjoyed or detriment likely to be suffered, by any person concerned;
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

(2) For the purposes of this Part, where a person maintains that treating a person with a disability without discrimination would involve unjustifiable hardship for the first mentioned person, the first mentioned person bears the burden of proving that so doing would involve unjustifiable hardship.”

1 2 The following explanation illustrates how the above definition can be put into practice.

(a) Nature of the benefit or detriment to all persons concerned.

In some cases, adjustments to accommodate the needs of a person with a disability may involve no real cost or inconvenience to anyone else. In other cases, there may be some detriment to employers or other parties- for example, the cost of modifying the entrance to business premises by fitting ramps instead of stairs

The cost or detriment should not be considered in isolation. Benefits of the accommodation should also be considered. This includes the benefit to the person who is seeking the adjustment as well as the potential benefits to other employees (or potential employees). Customers or clients with similar needs may also benefit, either



because of disability or for other reasons. More direct benefits to the employers also need to be considered.

EXAMPLE: Ramps to accommodate Paula, an employee who uses a wheelchair, will have some cost. But they may also: help other employees moving goods around the business premises; reduce accidents on stairs; and allow the business to better serve customers who use wheelchairs, prams and shopping trolleys.

Any detriment to third parties, such as other employees, will also be relevant in determining whether adjustments impose unjustifiable hardship. But this applies only when there is a real likelihood, or unacceptable risk, of this detriment occurring

(b) The effect of the disability of the person concerned

When considering unjustifiable hardship the decision maker need only take into consideration the relevant and specific adjustments which will enable the particular employee with a disability to effectively carry out the job. Decision makers should not overestimate the level of adjustment required, on the basis of general assumptions about people with disabilities or about the type of disability a person has. This is shown by the following :

EXAMPLE: An "Artflo" company manager was a respondent in a case involving the sacking of his receptionist on the grounds of her hearing disability.

The manager, was given ample information about the amplification aid for the telephone which would have assisted his receptionist to successfully carry out her duties. The manager however claimed unjustifiable hardship saying that it was not reasonable for him to change the entire telephone system for one employee.

All that was necessary, however, was the procurement of a simple device for only one phone. The claim of unjustifiable hardship was therefore unsuccessful.

(1 Vanderhorn vs VYMP International Pty Ltd as Artflo Design (1992) EOC 92-402)

(c) Financial circumstances and cost and estimated amount of expenditure

Some adjustments or accommodation may require little or no additional expenditure. Others may involve more substantial costs which need to be weighed against the benefits.

It may be difficult for enterprises with limited resources to make some types of adjustments or accommodation.

**EXAMPLE 1** A shop with an annual turnover of \$500,000 HK or no net profit to the owner/operators, is asked to install a lift and make other modifications costing \$250,000. This is likely to be seen as unjustifiable hardship.

**EXAMPLE 2** A government department with an annual budget of \$50 million is asked to make modifications costing \$50,000 to improve access to bathrooms and other workplace facilities. This is unlikely to be seen as unjustifiable hardship.

Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill

Meaning of 'religious conviction'

1. Traditional common law approach

1.1. The Equal Opportunities Bill [EOB] does not define religion. Similarly, there is no statutory definition of religion in Australian, Canadian, United Kingdom or United States law. References to religion are meant to be interpreted in light of the common law.

1.2. The definition of religion at common law developed principally in connection with the law of charitable trusts and rate and tax exemption. In this legal context, the definition of religion functioned to control financial exemptions and benefits meant to be granted to recognised religious establishments. The approach therefore tends to be restrictive: it is based on core concepts of Christianity, and is generally narrowly tailored to well-known and widely accepted religious beliefs.

1.3. **Theism, belief in a god or gods, is under this approach taken as a central indicator of religiosity.** Exceptions have developed, without any particular coherence, to recognise other major religions such as Taoism or Buddhism despite the absence of this factor. For example, in a United Kingdom case concerning the meaning of the statutory phrase, "place of meeting for religious worship," Lord Denning interpreted the phrase as referring to

1.3.1. "... a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship. But, apart from exceptional cases of that kind, it seems to me the governing idea behind the words 'place of meeting for religious worship' is that it should be a place for the worship of God."<sup>1</sup>

1.4. Alongside theism, other factors often held to be important in rate, tax and charity cases are unity of doctrine and having a large number of adherents

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<sup>1</sup> Lord Denning MR, *R v Registrar General ex parte Segerdal and anor* [1970] 3 All ER 886 at 889-90 CA

## 2. Common law approach in individual rights jurisprudence

2.1. The traditional common law approach tends to exclude unfamiliar, unconventional and minority religious beliefs. More open-ended definitions of religion have, however, developed in connection with growing legal concern with the individual person's religious freedom.

2.2. In Australia, the High Court has recognised as relevant such factors as a belief in the supernatural, though not necessarily in a deity; beliefs relating to the nature and place of humanity in the universe; beliefs accepted as requiring or encouraging particular standards or codes of conduct; beliefs which offer a way to find meaning and purpose in life; and even mere claims to be religious.<sup>2</sup> As High Court Justice Murphy observed, "the categories of religion are not closed."<sup>3</sup>

2.3. In the United States, Supreme Court decisions in connection with constitutionally-regulated, church-state relations provide that a group with some organisational structure and some belief system that seriously affects believers' lives may be regarded as a religion. In a case concerning conscientious objection on religious grounds to military service, for example, the Court held that the test "... is whether a sincere and meaningful belief occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."<sup>4</sup>

2.4. Following the lead of this constitutional jurisprudence, United States federal civil rights law takes an equally liberal approach. The influential Guidelines published by the Equal Employment Opportunity Commission focus on the subjective strength of an individual's belief:

2.4.1. "The Guidelines do not confine the definition of religious practices to theistic concepts or to traditional religious beliefs. The definition also includes moral and ethical beliefs. Under the Guidelines, a belief is religious not because a religious group professes that belief, but because the individual sincerely holds that belief with the strength of traditional religious views."<sup>5</sup>

2.5. Because it focuses less on doctrinal characteristics of religion (inevitably from a Christian, or at least mainstream, perspective) than on its meaning to the

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<sup>2</sup> Church of the New Faith v Commissioner for Payroll Tax, High Court of Australia, Order, 27 October 1983, unreported judgment.

<sup>3</sup> *Id.* at p. 28.

<sup>4</sup> United States v Seeger, 380 U.S. 163 (1965) at 165-6.

<sup>5</sup> Guidelines on Discrimination because of Religion - Part XII Equal Employment Opportunity Commission Federal Register 31 October 1980 pp 72610-16.

individual, this approach tends to be more inclusive of unfamiliar and unconventional beliefs. Under this approach, sham religions are nonetheless easy to spot, because the court may look to objective evidence to see whether the purported religion has in the past genuinely and significantly influenced the lifestyle and behaviour of the believer.

### 3 Appropriate approach in connection with the EOB

3.1. The liberal approach to defining religion is generally more appropriate in the legal context of equal opportunity law because of its inclusiveness. International norms against religious discrimination developed in reaction to persecution of minority religious groups, groups that hold precisely the sort of unfamiliar religious beliefs a restrictive definition may overlook.

3.2. The traditional, more restrictive approach may still exert some influence, however, in connection with exemptions that grant privileges to a religious organisation, such as the limited privilege to discriminate under clause 228 or 229 of the EOB.

Office of Anna Wu  
27 January 1995

# PRESS STATEMENT

## Legislative Councillor Anna Wu

To: News Editors  
20 January 1995

Anna Wu: 843-7353  
Eric Chow: 537-2466 or 1128635 x8939  
Adam Mayes: 537-2467 or 1128028 x1325

### Mr. Suen's offer of consultation on age and family responsibility

Michael Suen has approached me privately several times with this and similar offers, if I would drop the Equal Opportunities Bill. I would not do so because there was no substance to his offers.

Now he is offering to make a deal with other legislators instead. Although this offer of consultation is also really no more than a delaying tactic, it is an interesting indication of how worried the Administration is that Legco may prefer the Equal Opportunities Bill to the Administration's Sex Discrimination Bill.

Essentially, he is offering consultation on age and family responsibility discrimination as a political bargaining chip to buy legislator's support for the Administration's Sex Discrimination Bill.

Mr. Suen is not offering any commitment to legislate at the end of the consultation. He is asking the victims of discrimination to wait an indefinite time for an uncertain result.

In exchange for this, he wants legislators to abandon the only concrete and comprehensive proposal before them, the Equal Opportunities Bill. He asks a great deal in exchange for nothing — it is not really a deal, it is an invitation to surrender.

Mr. Suen's offer also entirely ignores important areas like race discrimination and sexuality discrimination.

Mr. Suen appears to have forgotten that the Administration has a legal obligation under both treaties and the Bill of Rights to legislate against discrimination, and that it gave an undertaking to do so at the time the Bill of Rights was passed.

Hong Kong does not need more consultation to evaluate the public's sentiments. The problem is that the Administration is not listening to what the public is already saying.

The Administration would be well-advised to spend its precious resources on constructive action rather than evasion — on meeting its obligations to fight discrimination instead of consulting about whether or not to do anything at all.

— end —

23rd January, 1995

DOCUMENT 101

Governor Christopher Patten  
Government House  
Upper Albert Road  
Hong Kong

Dear Governor Patten,

As you know, the Legislative Council's agenda for this session includes the examination of several bills concerning equal opportunity. These include the comprehensive Equal Opportunities Bill that I have put forward, as well as two government bills of more limited scope — the Sex Discrimination Bill and the forthcoming disability discrimination bill.

It seems almost certain that one or more of these bills will become law, as both your Administration and most legislators agree that the time has come to establish a statutory scheme to combat discrimination in Hong Kong.

There is also a high degree of consensus that some form of Equal Opportunities Commission is an indispensable feature of any such statutory scheme. Without doubt, such a Commission would greatly benefit everyone who is concerned with obeying the law, as well as anyone seeking redress for its infringement. Because of the revenue implications of a Commission, however, the legislative provisions to establish it will remain firmly under the control of your Administration.

I am writing to seek your assurances that the Administration will not use this control to restrict the Council's ability to reach an independent decision about the optimal scope of equal opportunity law.

There are growing fears that the Administration may not permit Legco fully to consider arguments in favour of a more comprehensive law than the Administration's proposals. The Administration's sudden withdrawal of the Employment (Amendment) Bill during its passage through Legco last month has instigated worry among legislators, activists and the public that the Administration may not tolerate serious divergence from its own legislative proposals. Should the Administration choose to take this attitude in the equal opportunity area, it is clear that the Equal Opportunities Commission would make a convenient political hostage for this purpose.

Given the strong sentiment in the Council favouring a Commission, along with the fact that the Administration itself has already proposed such a Commission, its establishment should no longer be an issue. Legislators should



be able to take for granted the Commission's ultimate establishment as well as the making of appropriate amendments to extend the Commission's jurisdiction over all grounds of discrimination that the Council believes need to be addressed. A full and fair discussion of equal opportunity legislation should now be able to focus on limiting or expanding the law's scope

Unfortunately, there has been some speculation that the Administration may use the threat of withdrawal of the legislation establishing a Commission as a means to prevent the Council from straying beyond the limited legislative scope favoured by the Administration.

It would indeed be disappointing to see the Administration's proposal to establish an Equal Opportunities Commission, the substantive merits of which are widely applauded, used for this political purpose. Whether or not your Administration would in fact consider such a stratagem, however, the mere existence of fears that it might already affect the legislative process. Legislators have already been working for several months to examine, compare and evaluate the proposals before them. Many in the Council and the community are now gravely concerned that this process may prove meaningless — as it will should the Administration ultimately choose to use its control over the establishment of the Commission to block any expansion of its existing proposals.

I hope, therefore, that you will be prepared without delay to reassure legislators and the public clearly on the following points:

— First and most importantly, that the Administration will not withdraw the legislation establishing the Equal Opportunities Commission if the legislature chooses to press beyond the confines of the Administration's legislative proposals.

— Secondly, if the legislature favours a comprehensive approach, that you will consent to an expansion of the Equal Opportunities Commission's proposed jurisdiction to encompass as appropriate those grounds of discrimination now under discussion, but omitted from the Administration's legislative proposals.

Your assurances on these points will ensure that the Legislative Council is indeed able, in the equal opportunity area, to fulfil the constitutional function entrusted to it: to fully and freely consider the legislative options before it in order to craft the best legislative scheme that it can for Hong Kong.

Yours sincerely,

Anna Wu



**PRESS STATEMENT**  
**Legislative Councillor Anna Wu**

To: News Editors  
 23 January 1995

Anna Wu. 843-7353  
 Eric Chow 537-2466 or 1128635 x8939  
 Adam Mayes: 537-2467 or 1128028 x1325

Letter to the Governor re. the Equal Opportunities Commission

*This morning Ms. Wu sent the attached letter to the Governor, asking for his assurances (1) that the government will not withdraw the Equal Opportunities Commission and (2) that the government will not prevent legislators from amending the Commission to cover grounds of discrimination other than sex. Ms. Wu will also be introducing a motion debate on the government's withdrawal of the Employment (Amendment) Bill in Wednesday's Legco sitting.*

*Ms. Wu has the following comments about her reasons for sending the letter:*

"I'm asking the Governor for assurances about the Equal Opportunities Commission because there is every reason to expect the government to play political games with the Commission.

Nearly everyone involved is agreed on the merits of an Equal Opportunities Commission, but I'm very worried that it will become the Administration's next bargaining chip. The government is clearly worried that Legco may favour the Equal Opportunities Bill and they're reacting defensively.

First they tried to scuttle it with this hastily-drawn and ill-conceived Sex Discrimination Bill, the holes in which are becoming very obvious. The Administration doesn't even understand its own bill. It's evident that they've made little effort to understand discrimination or to think through how either bill would fight discrimination. They simply copied an outdated version of the UK law, and the only creative thinking they've done was directed to exempting anything that might cause the Administration difficulties, like the Small House Policy. Whenever legislators suggest these exemptions should be removed, the government hints threateningly that this might delay passage of the legislation — the exemptions are the whole point, from the government perspective, and they will defend them.

Now they're playing for time with an offer to consult, not legislate, if Legco will drop the Equal Opportunities Bill. Their thinking on this issue is tactical and evasive, not constructive.

The government doesn't know about the impact of the Equal Opportunities Bill because it doesn't want to know, it just wants to scuttle it. Mr. Suen has never attended any of our bills committee meetings. He promised months ago to send a team of officials to comment on the bill, but there's been no sign of them.

The government has had the draft of my bill since last March — nine months later, Security Branch is still telling Legco that they can't comment on the bill because they haven't read it! This is the arrogance of the government and it's very telling of their attitude, not only towards my bill, but towards the constitutional process in the Legislative Council "

— copy of letter (2 pages) follows —

香港總督府



GOVERNMENT HOUSE  
HONG KONG

30 January 1995

A handwritten signature in cursive script, appearing to read 'C. Patten'.

Thank you for your letter of 23 January 1995.

Let me repeat that there is no question of the Government not supporting the principle of equal opportunities for all. Indeed we share the objective of your Equal Opportunities Bill. However it is important to note that anti-discrimination legislation is a relatively new area of law, with which Hong Kong has little experience. It will affect practically every individual in almost all areas of activity. The social, economic and legal implications of such legislation are real and significant and should not be overlooked in deciding whether and how such legislation should be introduced. We believe therefore that the best course would be to start first with a more practicable approach so as to enable us to test out the effect of such legislation in a focussed manner, to allow time for the community to adjust and adapt to the new norm set by the legislation, and to deal with any problems that may arise as a result of the legislation. In short we hold that a step by step approach is more appropriate in our circumstances. For this reason, we are proposing to concentrate first on legislating against discrimination on the grounds of sex and disability. These are areas upon which we have had the opportunity to consult the public and to fully assess the social, economic and legal implications of taking the legislative route.

The Bills Committee of the Legislative Council is now scrutinising the Sex Discrimination Bill and I am pleased to see the lively discussions given by both the Bills Committee and among members of the public on how to improve the provisions in the Bill. I am sure all Legislative Council Members will give very careful and serious attention to the diversity of opinions expressed in processing the Bill. The Government looks forward to its early enactment.

/...

You may also wish to know that as a further step the Secretary for Home Affairs is considering the need to consult the public on the measures to tackle discrimination on the grounds of age and family status. Your views on these issues will certainly be most welcome.

Governor

The Honourable Anna Wu  
Legislative Council  
8 Jackson Road  
Central  
Hong Kong

來函編號 Your Ref:

本函編號 Our Ref: LC 12/61

電話 Tel: 2869 9463

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立法局秘書處

Legislative Council Secretariat

3 February 1995

Hon Ms Anna WU Hung-yuk  
Room 415  
Central Government Offices (West Wing)  
11 Ice House Street  
HONG KONG

### **Private Member's Bills**

May I refer to your letter of 9 May 1994 seeking clarification on procedural matters relating to private Members bill.

We have consulted the President of the Legislative Council who has ruled that SO 39(2) is clear in its terms and requires the notice of a private Member's bill to be accompanied by the CS's certificate, where the bill has a charging effect. Before that is done, the bill is not ready for gazetting or presentation to the Council under SO 40. As a matter of routine, at an early stage, a view should be formed as to whether a bill for presentation by a non-ex-officio Member is likely to have a charging effect and the opinion of the President sought.

On the basis of the President's ruling, we have drawn up a set of procedures for presenting and processing private Member's bills. The procedures were endorsed by the House Committee at its meeting on 2 December 1994 and have been brought into effect since that date. A copy of the procedures is enclosed for your easy reference.

725

香港中區及臣道八號立法局大樓

Legislative Council Building, 8 Jackson Road, Central, Hong Kong.

The President has also ruled that there is no question of superfluity of SO 42(1), as that is directed to ensuring that the signification of the Governor's recommendation is formally given and recorded in the minutes of proceedings.

As regards your query as to whether a Bill may be presented to the Legislative Council in one of the two official languages, the answer is yes, subject to the overriding provision of Section 4(1) of Cap 5 that (other than the exceptional case under subsection (3)) all Ordinances shall be enacted and published in both official languages. The second part of the procedures enclosed sets out the steps that need to be taken to ensure that a bill presented in one language is finally enacted in both languages.

(LAW Kam-sang)  
for Secretary General

Meeting of the House Committee  
2 December 1994

Report of the Subcommittee on Procedural Matters  
Procedures on Private Member's Bills

Purpose

This report seeks Members' endorsement of the recommendation of the Subcommittee on Procedural Matters concerning procedures for processing private Member's bills.

Background

2. There have been enquiries as to when a Member intending to introduce a private Member's bill should consult the President as to whether the bill, in the President's opinion, has any charging effect such as is described in S.O. 23, and how a private Member's bill introduced into the Legislative Council in only one of the two official languages should be processed. In order to enable Members intending to present private Member's bills to work out suitable time frames for the presentation of private Member's bills and to facilitate the processing of private Member's bills, a set of procedures has been drawn up, details of which are at Appendix I.

3. The procedures consist of three parts and cover the procedural steps to be followed in respect of:

- (a) a private Member's bill which is a public bill related to matters of public policy;
- (b) a private Member's bill which is a private bill providing primarily for the particular interest or benefit of an individual, association or body corporate rather than the interest or benefit of the public; and
- (c) a private Member's bill which is presented in one official language.

4. Specifically, the procedures aim to -

- (a) ensure that a Member seeks at an early stage and before actually presenting a private Member's bill, the President's opinion as to whether the bill has any charging effect such as is described in S.O. 23; and
- (b) enable a private Member's bill presented in one official language to be finally enacted in both official languages

5. It has also been proposed that the existing S.O. 38(3A) and S.O. 39(2A), which are reproduced at Appendix II, should be amended in the longer term so as to provide that -

- (a) new bills and bills amending principal Ordinances which are in both official languages are required to be presented in both languages; and
- (b) the Council may, by resolution, waive the requirement in (a) above.

6. It will be necessary to amend section 4(3) of the Official Languages Ordinance if the changes proposed in para. 5(a) and (b) above are adopted.

#### Recommendation

7. The Subcommittee on Procedural Matters at its meeting held on 15 November 1994 endorsed both the procedures proposed for processing private Member's bills at Appendix I and the proposal that in the longer term private Member's bills should be presented in both official languages outlined in para. 5(a) and (b) above. The Subcommittee further agreed that a recommendation be made to the House Committee for these proposals to be accepted.

#### Advice Sought

8. Members' advice is sought as to whether the recommendation of the Subcommittee on Procedural Matters in para. 7 above should be accepted.

Procedures on Private Member's Bills

A private Member's bill is a bill introduced by a Member other than an ex-officio Member of the Council. It may be a public bill which is related to matters of public policy, or it may be a private bill which is not a Government measure and which provides primarily for the particular interest or benefit of an individual, association or body corporate rather than the interest or benefit of the public.

2. Clause XXIV of the Royal Instructions and Standing Order 23 stipulate that a non-official Member cannot propose a bill the object or effect of which may be to dispose of or charge any part of the revenue or other public moneys of Hong Kong unless he is expressly authorised or permitted by the Governor to make such a proposal.

3. The procedures on presenting and processing a private Member's bill are set out below.

Public Bill

4. Before giving notice of his intention to present a public bill under Standing Order 39(1), the Member proposing the bill should:

- (a) obtain a certificate from the Law Draftsman stating that the bill conforms to the requirements of Standing Order 38 and the general form of Hong Kong legislation; and
- (b) in the case of a bill having any effect such as is described in Standing Order 23 (paragraph 2 above), obtain a certificate as required under Standing Order 39(2) from the Chief Secretary stating that the Governor's recommendation will be signified to the bill on second reading. The Member should seek the President's opinion in writing as to whether the bill has any effect such as is described in Standing Order 23 at an early stage.

5. Having been satisfied that the requirements stipulated in para 4 above have been met, the Member gives formal notice to the Clerk of his intention to present the bill to the Council not less than twelve clear days before such sitting as may be specified by the Member for first reading of the bill, in order to allow sufficient time for the Clerk to arrange gazettal.

6. After receipt of the bill for presentation to the Council, the Clerk will:

- (a) in accordance with Standing Order 40(1), cause the text of the bill and its explanatory memorandum to be published in the Gazette;



- (b) in accordance with Standing Order 40(2), cause a copy of the bill and its explanatory memorandum to be sent to every Member present within Hong Kong, whereupon the bill shall be deemed to have been presented to the Council; and
- (c) in accordance with Standing Order 41(1), arrange for the short title of the bill to be placed on the Order Paper for first reading at the sitting specified by the Member.

7. The bill then proceeds through the various stages in Council in the usual manner.

#### Private Bill

8. Before giving notice of his intention to present a private bill under Standing Order 39(1), the Member proposing the bill should:

- (a) obtain a certificate from the Law Draftsman stating that the bill conforms to the requirements of Standing Order 38 and the general form of Hong Kong Legislation;
- (b) in the case of a bill having a "charging effect" on the revenue or other public moneys of Hong Kong, follow the procedures as described in para 4(b) above;
- (c) having obtained the Law Draftsman's certificate and if required, the Chief Secretary's certificate, arrange for the bill to be published in two successive publications of the Gazette and for notice of the bill to be given by two advertisements in each of two daily newspapers (one of which must be a Chinese language newspaper) in accordance with Standing Order 39(3);

9. Having been satisfied that the requirements stipulated in para 8 above have been met, the Member gives formal notice of his intention to present the bill to the Clerk not less than twelve clear days before such sitting as may be specified by the Member for first reading of the bill.

10. After receipt of the bill for presentation to the Council, the Clerk will:

- (a) in accordance with Standing Order 40(2), cause a copy of the bill and its explanatory memorandum to be sent to every Member present within Hong Kong, whereupon the bill shall be deemed to have been presented to the Council; and
- (b) in accordance with Standing Order 41(1), arrange for the short title of the bill to be placed in the Order Paper for first reading at the sitting specified by the Member.

11. The Member pays to the Director of Accounting Services the prescribed fee under the Private Bills Ordinance (Cap. 69) within 21 days after the receipt by the Clerk of the notice of intention to present the bill given by the Member. In the case of a bill which is for a charitable purpose within the meaning of section 2 of the Registered Trustees Incorporation Ordinance (Cap. 306), an application may be made to the Chief Secretary by the Member for the waiver of the fee in whole or part in accordance with section 3(2) of the Private Bills Ordinance.

12. The bill proceeds through the various stages in Council in the usual manner.

#### Private Member's Bills Presented in one Official Language

13. Standing Order 38(3A) provides that "Bills may be presented in English or Chinese". However, the over-riding provision is section 4(1) of the Official Languages Ordinance (Cap. 5), which stipulates that all Ordinances shall be enacted and published in both official languages unless the Ordinance is an "amending Ordinance" and the principal Ordinance to be amended was enacted in the English language only and no authentic text of it in the Chinese language has been published. Hence, in principle, all bills introduced into LegCo should be presented in both official languages unless the principal Ordinance which they seek to amend was enacted in the English language only, and no authentic text of it in the Chinese language has been published. The procedures on processing a private Member's bill presented in only one official language are set out in the paragraphs below.

14. After receipt of a private Member's bill which is required to be enacted in both official languages but which is presented in only one official language, the Clerk will advise the Member proposing the bill of the provisions of section 4(1) of the Official Languages Ordinance. The Clerk will also enquire from the Member why the bill is presented in only one official language and when the text of the bill in the other official language is likely to be available.

15. The Clerk will then :

(a) arrange for the text of the bill and its explanatory memorandum to be published in the Gazette if the bill is a public bill. In the case of a private bill, the Member should ensure that the requirements stipulated in Standing Order 39(3) have been met before giving notice of his intention to present the bill under Standing Order 39(1);

(b) arrange for a copy of the bill and its explanatory memorandum to be sent to every Member present within Hong Kong. In the covering note circulating the bill to Members, Members' attention will be drawn to the fact that the bill is being presented in only one language, and the reasons for doing so will also be given; and

(c) in accordance with Standing Order 41(1), arrange for the short title of the bill to be placed on the Order Paper for first reading at the sitting specified by the Member.

16. After the Member has moved the second reading, the bill is referred to the House Committee unless the Council orders otherwise.

17. The House Committee considers the allocation of the bill to a Bills Committee, to enable the Member in charge to proceed with para 18 below.

18. During the deliberations of the Bills Committee, the Member should make available to the Bills Committee the text of the bill in the other official language for scrutiny. The text of the bill in the other official language agreed in the Bills Committee will be added to the bill by moving amendments at Committee Stage, and if agreed, will enable the bill to be passed in both official languages.

19. After the Bills Committee has reported back to the House Committee, the Member gives notice for the resumption of the second reading debate after consultation with the Chairman of the House Committee in accordance with Standing Order 42(3B).

20. The bill proceeds through the remaining stages of the bill in the usual manner.

21. If, after the moving of the second reading of the bill, the House Committee resolves not to allocate the bill to a Bills Committee for consideration, the resumption of the second reading debate cannot take place until after the Member informs the Clerk that the text of the bill in the other official language is available. The bill, in both official languages at this stage, together with the Legal Adviser's further report, will be resubmitted to the House Committee for consideration as to whether a Bills Committee should be formed to scrutinize the bill. If a Bills Committee is then formed, the procedures as detailed in paras (18) to (19) above will apply.

S.O. 38. Form of Bills

(3A) Bills may be presented in English or Chinese

S.O. 39. Notice of Presentation of Bills

(2A) In the case of a bill presented in one official language in pursuance of a direction under section 4(3) of the Official Languages Ordinance (Cap. 5), the notice shall be accompanied by a certificate signed by the Chief Secretary stating that the Governor in Council has directed that the bill should be presented in the English language or, as the case may be, the Chinese language.

To : Anna Wu  
From : Eric Chow  
Date : 3.2.94

## **Highlights of government programs/policies and administration of law that would be affected by the Equal Opportunities Bill**

### Administration of law

1. Various current legislation that has age restriction needs to undergo review to justify the cause, for instance, voting age, drinking age, driving age, age of consent to heterosexual intercourse (16 for girls), age of consent to homosexual intercourse (21 for men), etc. The fact that age of consent to homosexual intercourse is substantially higher than to heterosexual intercourse should be challengeable under BORO and this Bill.
2. Common law presumptions:
  - sexual incapacity of man (includes boy) under 14 which means he cannot be convicted as a principal of an offence involving sexual intercourse;
  - person under 7 is incapable of committing any crime with intention and cannot be convicted of any crimes.
3. **New Territories Ordinance and election of village representatives.**
4. **Women and Young Persons (Industry) Regulations**

### Government recruitment policy

1. **Discrimination on the ground of age in many government temporary positions.**
2. **Discrimination on the ground of race in some senior posts within the Civil Servants and in some quasi-government bodies, which is intended to follow the localization policy and the requirement prescribed by the Basic Law (principal government posts to be filled by "local Chinese"). In many occasions, the determining factor is not definition of "local" or "permanent residents" or language capacity, but instead, race!**  
Examples:
  - job ad of Hong Kong Council on Smoking and Health (COSH) looking for Executive Director, top in the list of qualifications is "Local Chinese."
  - current debate over whether Chief Executive Officer of Airport Corporation must be filled by "local Chinese."

### Government programs/ policies

1. The formulation of various social policies has been based on the general assumption of household, particularly a four-member household headed by father and mother, as

units of society, therefore somewhat jeopardizing the opportunities of singles.

Examples:

- housing policy: public rental housing is extremely inadequate to cater for the needs of singles, they have a much longer waiting time than families of larger size; worse, singles are virtually ineligible for ANY home purchase schemes heavily subsidized by the government, including, Home Purchase Loan Scheme, Home Ownership Scheme, Sandwich Class Housing Purchase Loan Scheme. For single parent families, though they are eligible for these housing schemes, they are either accorded lower priority (as in the case of Sandwich Class housing scheme), or their particular need is overlooked during the policy formulation process (for example, in setting income limit for public housing application, no consideration has been given to the additional needs of single parent families).
  - Comprehensive Social Security Scheme: as above, the additional needs of single parent families has been overlooked in determining the rates of assistance. They should have been treated more favorably than "normal" families in absolute amount of assistance if they are to be given equal opportunities.
  - Many social policies, for instance taxation, adoption, housing policy, etc. may be required to cater for households formed by *de facto spouses*, which could well include gay/ lesbian couples.
2. Inadequate education opportunities for physically or mentally disabled children, including autistic children.
  3. Virtually impossible for many disabled persons to have access to buildings, transport, etc. which requires the relevant government departments to work on changes in existing structure if possible and on designs of future construction.
  4. Schools could no longer exercise the power to expel students on the ground of marital status, pregnancy.

**Note:** This is very far from an exhaustive list of government programs affected by the Equal Opportunities Bill. This merely serves as a stimulator for your discussion with Anson Chan. If you need supporting documents, I can send it to you tomorrow.

# The Office of Anna Wu, Legislative Councillor

Rm 415 Central Government Offices (West Wing), Ice House St. Hong Kong  
Tel (852) 537-2467 Fax (852) 530-2018

## FACSIMILE MESSAGE

TO Jonathan Daw NO OF PAGES (INCLUDING THIS ONE) 1  
FROM Adam Mayes DATE 14/2/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY  
MESSAGE

### Further questions re. procedural approach to EOB & SDB

As I mentioned to your secretary, Anna (if she can schedule it) and I would like to talk with you again about the procedural options to reconcile the two bills (together, possibly, with an additional disability discrimination bill).

We would be interested to know if you have further developed your ideas about 'marrying' the bills at the committee stage of one of them.

We would also like to discuss in general ways to expand the jurisdiction of the Equal Opportunities Commission [EOC] established by Part VII of the SDB. In case it is helpful, these are some of the specific queries that come to mind:

1. In committee stage of consideration of the SDB, would the requirement of relevancy to the bill's subject matter bar —
  - 1 1 amendments placing non-sex-related grounds of discrimination included in the EOB under the jurisdiction of the EOC; or
  - 1 2 amendments giving the EOC such jurisdiction over discrimination matters as may be conferred by any other enactment?
2. If, after passage of the SDB, a separate, subsequent amendment bill sought to make changes to the SDB (particularly to the EOC's jurisdiction) —
  - 2 1. would relevancy constraints still apply?
  - 2 2. would there be an issue of financial implications?
3. I would also like to clarify —
  - 3 1. what limits apply to 'consequential amendment' of existing Ordinances ancillary to passage of a bill, and
  - 3 2. the distribution of control between the House Committee and Members- or Officers-in-charge of a bill over a bill's timing, both with respect to when 2d Reading resumes and with respect to the order of consideration for bills on a given date

Look forward to talking to you, thanks.

布政司署  
規劃環境地政科  
香港花園道近美利大廈



**FAX**

GOVERNMENT SECRETARIAT  
PLANNING, ENVIRONMENT  
& LANDS BRANCH  
MURRAY BUILDING, GARDEN ROAD  
HONG KONG

中文編號 OUR REF. (32) in PELB(CR)150/46/1(94)II

英文編號 YOUR REF.

HB/C/61

Tel: 2848 6007

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16 February 1995

Clerk to Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Hong Kong  
(Attention: Mr Colin CHUI)

Dear Sir,

Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill

I refer to your letter of 8 February 1995 and paragraph 9 of the draft record of meeting held on 20 January 1995.

The Administration has sought legal advice on whether Government has any civil liability to male indigenous villagers if Government stops or discontinues with the small house policy. The answer is no.

Thank you for your attention.

Yours sincerely,

( Thomas Law )  
for Secretary for Planning,  
Environment and Lands

C.c. SEA (Attn: Miss Susie Ho)

TOTAL P.01



**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

**1 Recruitment**

An employer is able to recruit the best person for the job by implementing recruitment procedures that are not discriminatory. This means that an advertisement for a vacant position should succinctly state the requirements for the position. The application form likewise should ask for information relevant to the skills and experience necessary to undertake the job. Finally, the interview should be carried out in a professional manner which seeks to identify whether a particular applicant can fulfil those job requirements.

**2 Advertisements**

A leading manufacturer of xxxxxx in Hong Kong invites applicants for the following vacancies:

**Personnel Assistant** -Male, F6 or above with computer knowledge -Relevant experience is preferable -Good command of English and Chinese

**Personnel Clerk** - Female, 18 to 23 years of age - F5 graduate - Relevant experience preferable - Good command of English and Chinese

This advertisement is discriminatory in at least three ways. Firstly, the responsibilities of either of the positions could be performed by a male or a female. Secondly, in the case of the second job vacancy the age limit is discriminatory. Thirdly, because the more senior position calls for male applicants only, qualified female applicants could think that this company would not promote women. This could discourage some women from even applying for a position with this company.

**EMPLOYMENT APPLICATION FORM**

**JOB APPLIED FOR:**

**SURNAME**

**OTHER NAMES**

**ADDRESS**

**PHONE NUMBERS**

(W)

(H)

**ARE YOU 18 OR OLDER** YES

NO (PLEASE CIRCLE)

**EDUCATION:** Please list formal qualifications:

**EMPLOYMENT HISTORY:**

**OTHER RELEVANT EXPERIENCE:**

If required, would you be able to undertake travel outside of Hong Kong ? (Please circle one of the options below)

Yes

Occasionally

Rarely

No

If required, would you be able to work outside the normal hours, given sufficient advance notice? (The normal working hours are 9am to 6pm Monday to Friday and 9am to 1pm on Saturday. (Please circle one of the following)

Yes

Occasionally

Rarely

No

Disability If the applicant has a disability that affects the job then the interviewer can discuss ways in which reasonable accommodation can be organised. The applicant may well be able to offer suggestions about possible methods if necessary

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特種中心  
三十一樓



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WAN CHAI  
HONG KONG

本局編號 OUR REF

來函編號 YOUR REF

電話 TEL NO

圖文傳真 FAXLINE

HAB/CR/1/2/21 Pt. 22

2835 1373

2834 6176

20 February 1995

Mrs. Anna Lo  
Clerk to the Bills Committee to Study  
the Equal Opportunities Bill and the Sex  
Discrimination Bill  
Legislative Council Building  
8 Jackson Road  
Hong Kong

Dear Anna,

Sex Discrimination Bill

At the Bills Committee Meeting on 13.1.1995, Members questioned the need for clause 68(7) of the Sex Discrimination Bill. Taking into consideration Members' views and having consulted the Secretary for Education and Manpower, we have concluded that Clause 68(7) could be removed.

I should be grateful if you would convey the above to Members of the Bills Committee for information

With regards,

Yours sincerely,

*Susie Ho*

(Susie Ho)

for Secretary for Home Affairs

TOTAL P.01

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香港灣仔  
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130 HENNESSY ROAD,  
WAN CHAI,  
HONG KONG.

本署編號 OUR REF: HAB/CR/1/2/21 Pt 22

20 February 1995

來函編號 YOUR REF.:

2835 1373

電話 TEL NO.:

傳真號碼 FAXLINE 2834 6176

Mrs. Anna Lo,  
Clerk to the Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill,  
Legislative Council,  
Ground Floor,  
Legislative Council Building,  
Central.

Dear Anna,

### Sex Discrimination Bill

At the Bills Committee Meeting on 10.2.95, the Hon. Anna Wu requested the Administration to provide her with a list of the questions on the Equal Opportunities Bill which we raised in August 1994. A list of such questions is enclosed. I should be grateful if you would forward the list to the Hon. Anna Wu and other Members of the Bills Committee for information.

With regards,

Yours sincerely,

Susie Ho

(Miss Susie Ho)  
for Secretary for Home Affairs

bcc P(2)

7 12

Questions raised by the Administration on  
the Hon Anna Wu's Equal Opportunities Bill

I Scope/Model of legislation

1. On what basis has the Hon Anna Wu come to the conclusion that it is necessary to legislate on the specific list of areas of discrimination presently included in her bill?
2. Has the Hon Anna Wu done any consultation in Hong Kong on these areas? What is the target/subject of her consultation? What is the response?
3. We understand that South Australia for example has gone through a ten years' period of evolution, starting with legislation in one or two specific areas first, before moving on to comprehensive legislation. Has the Hon Anna Wu looked into the advantages and disadvantages of such an approach? Why should Hong Kong not follow such an evolutionary development?
4. What is the Australian experience in implementing such legislation?
5. How effective is the legislation in eliminating discrimination in Australia?
6. Has there been reservations/criticisms levelled at such legislation in Australia? If yes, what are these criticisms about, and how does the Hon Anna Wu intend to deal with similar criticisms in Hong Kong?

II Implications on employers/employees, the market and the economy

7. Since the Bill covers a wide range of areas and the employment sector features in every Part, has an assessment been made on the economic implications of the Bill on the employment sector?
8. Has Australia, in the deliberation process, thoroughly examined the possible impact of the legislation on the Australian economy? If yes, what is the assessment?
9. Has subsequent follow-up assessment been done by the Australian Administration to understand the actual impact of the legislation after implementation, on the economic, social and legal fronts? If yes, what is the impact?
10. Would the Bill increase rigidity in the labour market in the sense that it could reduce both the employees' ability to compete and the employers' freedom to choose?
11. Consider the case of an employer who is considering promoting person A instead of person B because the former is superior in terms of his behaviour and attitude to work. However, performance and attitude are not something easily quantifiable and the employer can be subject to charges of discrimination if person B happens to have traits commonly considered as grounds of discrimination. To avoid litigation, would an employer be deterred from exercising his rights to make a suitable promotion decision?

12. Similarly a landlord may prefer to rent his premise person A instead of person B mainly because of t unwelcome behaviour and attitude of person B but th again person B may possess traits that are common groun of discrimination. Would Clauses 22, 54, 73, 98 e deter the landlord from exercising his rights to make sensible commercial decision?

13. Would the Bill (given its wide coverage) significantl increase the constraints on employment and indirectly th cost of labour to employers, so that the employers may

(a) reduce investment in Hong Kong?

(b) replace workers by machinery?

(c) avoid going through the open market process?

In all instances employment opportunities could reduce in the longer term.

14. Similarly, would the various constraints on commercial letting of premises in due course adversely affect

(a) investors' intention to invest in property?

(b) investors' willingness to supply premises for rental purposes?

(c) investor's willingness to resort to open-market process?

In all instances, supply of rental premises could reduce over time.

15. Is the Bill more on the side of employees and customers and is at the expense of the employers and providers of goods & services?



### III Education and labour market

16. Many employers impose a retirement age upon employees. In the civil service, for example, the retirement age is 55/60. What is the implication of abolishing this compulsory age of retirement?
  
17. Some educational institutions may have a lower age limit for admission. (For example, 17 for the Open Learning Institute) Would that fall foul of the relevant provisions what does not seem to provide for exception?
  
18. Is it lawful for a Christian School to recruit only teachers of the same faith for subjects like Geography?

### V Welfare

19. What about adoption? Would the Bill oblige Government to change its current adoption practice and allow for example gay/lesbian couples to adopt children or people below a certain age to adopt children? How about the current restriction imposed on the age and background of the persons applying for adoption of a child and the priority given to local applicants?
  
20. There seems to be no exception for limiting access to certain places to persons below a certain age or limiting the sale of certain articles to minors. Is that true?

21. Would the HOB affect the classification system for films, obscene and indecent articles?
22. Part IV of the Bill makes discrimination on grounds of sexual preference unlawful. Would this have an effect on the grant of a lawful marriage between homosexuals or lesbians?

I am wondering whether I should propose a motion debate to flush out the government's position on human rights protection including equal opportunities. Instead of a motion debate, we could, for instance, consider a series of oral questions for government to answer.

We need also to go back to government on the questions they have presented to us. In return, we should also present them with our list of questions. However, we have to be careful that we do not solicit more technical questions than are on the government list. Since there is no meeting this week, I will concentrate on the paper that Eric gave me some while back and that is on consultation. Perhaps we could also give consideration to the economic impact paper and then cross refer the questions to our papers.

AW



By Fax

21 February 1995

本署編號 OUR REF : CSO/ADM/TC 10/94

來函編號 YOUR REF :

Miss Polly Yeung  
Clerk to the LegCo Panel on Constitutional Affairs  
LegCo Secretariat  
LegCo Building  
8 Jackson Road, Central  
Hong Kong

Dear Miss Yeung,

**LegCo Panel on Constitutional Affairs**  
**Notes of Meeting on 16 January 1995**

At the meeting of the LegCo Panel on Constitutional Affairs on 16 January, Members asked for information about the five additional courts to be set up by the Judiciary to deal with cases involving the Bill of Rights and Equal Opportunities. The Administration undertook to provide a written reply.

Subject to the availability of funds, the Judiciary have plans to set up an additional court each at the High Court, District Court and Magistrates' Courts level to handle cases involving the Bill of Rights. The Judiciary aims to put these three courts in place in the third quarter of 1995. It also has plans to open two additional courts, one each at the High Court and the District Court, to deal with cases involving Equal Opportunities once the Sex Discrimination Bill, which is currently before the Legislative Council, has become law.

The object of establishing these five additional courts is to enable the Judiciary to handle cases involving the Bill of Rights and Equal Opportunities within a reasonable period of time, without lengthening the waiting time for other cases. Although these additional courts are intended primarily to handle cases involving the Bill of Rights and Equal Opportunities, they will also take on other cases if they have any spare capacity. This accords with the Judiciary's policy of making full use of the judicial resources available.

Yours sincerely,

(Miss Annie Tam)  
for Director of Administration



**EMPLOYERS' FEDERATION OF HONG KONG**  
**香港僱主聯合會**

2 March 1995

Mrs Anna Lo  
Bills Committee to study  
the Equal Opportunities Bill &  
the Sex Discrimination Bill  
Legco Building  
8 Jackson Road  
Central  
Hong Kong

Dear

*Anna,*

**Equal Opportunities in Employment**

The Employers' Federation of Hong Kong, as you may be aware, is the leading trade union of Employers in Hong Kong. Our membership of 305, comprises a large proportion of Hong Kong's leading employers with over 380,000 employees in aggregate.

We strongly support equal opportunities and non discrimination in employment and are firmly committed to promote them both among our own members and as a principle to be adopted by all employers and their employees in Hong Kong.

We therefore make this submission to you that you may be aware of the initiatives we have been undertaking and to request that you take account of our views in regard to the Bills currently under your consideration. The submission is confined to the employment arena, being that in which our Federation is specifically involved.

Our views, which follow, reflect the submissions already made by us to the Secretary for Education and Manpower in response to the Government Green Paper on Equal Opportunities in December 1993 and to the Hon. Anna Wu in May 1994 in response to the Proposal to Promote Human Rights and Equal Opportunities.

Having already stated our support for equal opportunity in employment, our basic belief is that good employment practice in these matters is best achieved through promotion and education and through commitment by employers to an accepted Code of Practice.

To this end, since early 1994 we have been working jointly with other leading chambers of commerce and employer organisations to develop guidelines for Equal Employment Opportunity and good employment practice relating thereto. These have now been completed and, subject to final approval by our respective organisations, will be published soon. These guidelines will be widely promoted and distributed and we shall all be recommending them to our members as representing good employment practice to be observed by them.

Unit C3 12, F United Centre 95 Queensway Hong Kong Tel 528 0536 Fax 865 5285

電話 295 5285 傳真 865 5285

..P.2

We have made the point in our earlier submission that Hong Kong does not have serious sex discrimination problems in employment either in absolute terms or by comparison with other countries which have introduced stringent control legislation. We submit therefore that the initiatives which we are taking in support of Government's own role in promotion and education will do more to continue to change attitudes - both of employers and of their employees - than any interventionist legislation and that they will help Hong Kong to become a model to other economies in the practise of equal opportunity in employment.

We continue to prefer a self regulatory approach to the issue without resort to legislative requirements as to attitudes and behaviour.

We recognise however that your panel is concerned with legislation that has already been tabled and that there is extensive community support for some form of legislation to mandate equal opportunity.

To the extent therefore you deem legislation to be appropriate we strongly urge that it should encourage and support voluntary initiative and be evolutionary and consensus building in its approach.

We strongly oppose hard legislation. This would be confrontational and destroy the good working relationships between employers and employees which are essential to Hong Kong's economic success. It substitutes conflict and litigation for consensus and education to change attitudes.

**We do not support the EQUAL OPPORTUNITIES BILL.**

**Our concerns are that:-**

1. It is relatively interventionist.
2. It may override normal employment relationships.
3. It will impose subjective value judgement on what does or does not constitute discrimination.
4. Its scope is too broad and revolutionary rather than evolutionary, accruing experience of success.

We are prepared to support the SEX DISCRIMINATION BILL subject to amendment.

We do so because:-

1. It allows mediation and the promotion of equal opportunity by the Equal Opportunities Commission.
2. It provides for Codes of Practice as a basis for establishing what is good employment practice in equal opportunity.
3. It focuses on one big area to gain experience and test the effectiveness of legislation of this kind using a step to step approach.
4. The area of sex discrimination is one in which there is widely held agreement that equal opportunity must be practised. Community attitudes at all levels in some other areas of perceived discrimination have not been tested

P 3

Our areas of concern with the Sex Discrimination Bill on which we seek amendment are as follows -

**1) Liability of employers**

It is stated in clause 39 section (1) that employers will be responsible for any discriminatory act by their employees in the course of employment, whether or not it was done with the employers' knowledge or approval. We believe certain acts such as sexual harassment is an individual act and employers should not be held liable under such circumstances.

**2) Codes of Practice**

Section 61(3) requires the Commission to consult with such organisations representing employers . . . as appear to the Commission to be appropriate in the course of preparing any Code of Practice. We recommend that the Commission should be specifically required to consult those employer organisations represented on the Labour Advisory Board.

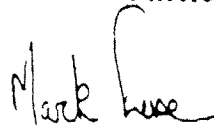
**3) Genuine Occupational Qualification**

The definitions in Section 11 are exclusive in nature and provide no latitude for any circumstance not specified therein where a genuine occupational qualification may apply. We recommend that the Equal Opportunity Commission should be empowered to consider specific cases on application and rule thereon.

To conclude we are prepared to support the Sex Discrimination Bill with amendment but do not support the Equal Opportunities Bill. We emphasise however that education and promotion remain the most effective means to promote equal opportunities and non discrimination in Hong Kong.

Finally we request that the panel make a time available for us to explain our standpoint to you and answer any questions which you may have.

Yours sincerely



Mark Leese  
Chairman

ccn/ML/MNS/1

To: Anna Wu and Team, 8452504 and 5302018  
Andrew Byrnes, 5593543

From: Carole Petersen

Re: Suggested Questions for Susie Ho at March 3 Bills Committee

The following are some suggested follow-up questions that we may want to raise with Susie Ho on the SDB before she moves on to enforcement. Several of them refer back to questions that we asked her before, but to which she has not yet responded. I put the question on protective legislation (including some embarrassing examples of clearly patronizing regulations on schedule 2) at the end as it's a bit long (question 12).

We also might want to raise a procedural question about when the Bill's Committee is going to hear public submissions on the SDB. Linda Wong of the Women's Coalition told me that she asked to make an appearance on the SDB and Anna Lo told her that they would have to wait until after the Disability Bill is introduced. Anna Lo suggested that the submissions could not be scheduled until April or May. This seems a bit late, particularly as Susie is clearly trying to wrap up her presentation of the SDB soon. Shouldn't Bills Committee members hear comments on the SDB now while the issues are fresh in their minds?

Suggested Questions for Susie Ho on the SDB

1. Student to Student Sexual Harassment: At a prior Bills Committee meeting (which Susie Ho attended) Anna stated that she would like to expand the definition of sexual harassment in the EOB to include "student to student" harassment in education. There were no objections to this from members of the Bill's Committee. In light of this, Anna asked Susie if the government would also be willing to include it in the SDB. Susie said that she would have to check. Does she have an answer yet?

2. Voluntary Affirmative Action: The EOB has a general exemption for voluntary acts which on the surface may appear to be discriminatory but are actually designed to achieve equality for those who have been victims of discrimination. For example, if an engineering firm that has always advertised only for "male engineers" wants to show a preference for female engineers for a period of time to help redress the effects of its past discrimination, this would not be prohibited under the EOB. In contrast, the SDB would prohibit it. This seems extremely unfair. Would the government be willing to amend the SDB so as to include an exemption for voluntary affirmative action where it is designed to redress past discrimination?

-continued . . .



Note: Questions 3-11 below have all been raised by many (at least 13) women's organizations in the form of objections to the Government's SDB. (See Coalition of Women's Orgs. Submission).

3. Rural Elections: The right to vote and participate equally in elections is one of the most fundamental rights. When asked why this was not covered in the SDB, Susie Ho previously stated that the government was "waiting" to see if there was really a need to compel villages to permit women to participate in the elections. But it is now clear that at least some villages will openly defy the plan to introduce a one-person one-vote system, and the government has conceded that this is the case in the Home Affairs Panel. (See Eastern Express article, Feb 28, p. 2.) Moreover, it is very likely that other male-dominated villages are telling the government now that they will change (in the hope of thus avoiding legislation), but will resume discriminating (either with outright rules or by intimidating women) once the attention has shifted away from the issue. Why won't the government agree to cover this issue in the SDB, so that individual women will have a right to take action if they are not allowed to fully participate?

4. Small House Policy: The Government's only reason for exempting this policy is that it claims it needs time to reform it. Would the government agree to limit the exemption for the SHP to one year, or at the most two years? (If not, why should the Legislature, or the public believe the government when it claims that it is working on the problem as fast as it can?)

5. Exemptions for Disciplined Services: Would the government agree to an amendment narrowing the scope of this exemption, by adding (to Schedule 4, Part 2) the following language: "which is reasonably necessary under the circumstances of the job". If not, the government is simply giving itself a blanket exemption to discriminate.

6. Codes of Practice: Stella Hong told the Women's Coalition that they should not worry about the government's intention to delay enforcement of the employment provisions until the Codes are issued because employers and employee groups are "already busy drafting codes". Could Susie explain to the Bills Committee exactly what is happening with regard to these codes? For example, was this a project started by the government or by the employers/employees? What are they using as their model? And how does this effort fit into the SDB which states that the EOB will issue the codes?

7. 5 year exemption for small businesses: Women's organizations have objected to this as being too long, particularly since the employment provisions will not even go into effect until after the "codes of practice" are issued. Would the government agree to at least shorten this exemption, for example, to 1 or 2 years?

-continued . . .

8. Sexist language: The government could have used non-sexist language in its bill, but chose not to, which has greatly disappointed women's organizations. Would the government agree to amendments that do not change the effect of the bill, but put the SDB into non-discriminatory language?

9. Marital Status: The SDB would only prohibit discrimination on this ground in the area of employment. There have been many complaints about discrimination in housing against single mothers. Would the government be willing to expand this ground of discrimination to include: housing; education; the provision of goods and services?

10. Pregnancy: Again, why is this only covered with regard to employment? Would the government agree to extend this ground to include: housing; education; and the provision of goods and services?

11. Family Responsibility: This ground of discrimination is conceptually quite similar to marital status and pregnancy, but has been left out of the SDB. Yet it is serious area of discrimination, particularly in the employment area. Would the government be willing to add it to the SDB?

12. Protective Legislation: There are three general questions that we should ask (with more detailed questions and examples below)

(1) How does the government justify exempting each of the Regulations on Schedule (2)? Many of these are extremely patronizing of women, essentially treating them like incompetent children (see examples below); and

(2) Can Susie provide us the submissions that she says were in favour of maintaining the "protective legislation" listed on Schedule 2. Were these submissions in response to the Green Paper or in response to the SDB itself? This is significant because the Green Paper's annex on protective legislation does not contain many of the regulations on Schedule 2 (particularly many of the really patronizing ones). Thus any response to the Green Paper cannot be taken as support for everything on Schedule 2.

(3) We pointed out earlier that there appears to be a contradiction between Clause 49, Schedule 2, and Clause 11(2)(g) (see explanation below). Susie said she would get back to us on it: ask her whether she has reviewed it, whether she agrees there is a contradiction between these clauses, and whether the government plans to propose any amendment to remedy it. (See more details below.)

-continued . . .

Detailed Examples for Question 12(1) above

(i) Sale of Liquor by Women: Schedule 2 would exempt Regulation 29 of the Dutiable Commodities (Liquor) Regulations. This regulation restricts the employment of women in premises licensed to sell liquor much more strictly than the employment of men. For example, while males under the age of 15 cannot be employed, women under the age of 18 cannot be employed at all after 8:00 pm and can be employed only with special permission before 8:00 pm. What is the justification for maintaining discriminatory regulations relating to the sale of liquor? Surely, if it is deemed unwise to employ 17 year-old females in a licensed establishment, it should also be unwise to employ 17 year-old males.

(ii) Underground work: Schedule 2 also exempts Regulation 4 of the Women and Young Persons (Industry) Regulations, which prohibits the employment of women underground and in any industrial undertaking involving tunnelling. This is clearly discriminatory and was repealed in the United Kingdom (as violating the same language used in Clause 49 of the SDB).

(iii) Cleaning Machinery. Schedule 2 also exempts Regulation Site (Safety) Regulation 46(1) which states that:

"No woman or young person is permitted to clean any dangerous parts of any machinery or plant in the construction site while the machinery or plant is in motion by the aid of any mechanical power."

What is the justification for exempting this regulation? What special risk is involved that affects women but not men? If there is no special "sex specific" risk, then it seems that either this regulation should apply to both men and women, or that it should be repealed altogether. It is clearly patronizing of women.

(iv) Requirement of Male Supervision. Schedule 2 also exempts Regulation 36 of the Dangerous Goods (General) Regulations which requires that:

"While work is being carried on in any danger building there shall be present on duty in the building at least one male supervisor ... and at least one male supervisor for every 20 persons."

Can Susie explain why this must be perpetuated?

Is it any wonder that employers tend to advertise for males for all supervisory positions when the laws of Hong Kong perpetuate the stereotype that men should be in control?

-continued . . .

Detailed Explanation for Question 12(2) above (Contradiction among Clauses 49, 11(2)(g), and Schedule 2).

Schedule 2 appears to exempt all of the regulations listed there, and Clause 11(2)(g) appears to make sex a "genuine occupational qualification" if the job needs to be done by a man in order to comply with any of the regulations at Schedule 2.

But Clause 49 seems to set forth a much narrower test for exempting protective legislation. Clause 49 exempts acts done to comply with legislation on Schedule 2 providing that those acts are also "acts done for the protection of women". Clause 49 then defines this phrase to include acts for the purpose of protecting women as regards (i) pregnancy and maternity; and (ii) other circumstances giving rise to risks specifically affecting women. (See 49(2)). This definition of "acts done for the protection of women" was added to the UK Act in 1989 to ensure that women are only excluded from jobs which could harm them as regards their reproductive capacities. It does not include jobs which involve risks to both men and women. Thus in 1989, the UK repealed many restrictions on the employment of women: for example, working underground, cleaning machinery, etc...

Question: Was it the government's intention to exempt all of the regulations on Schedule 2? If so, there is a contradiction with Clause 49. If not, why doesn't the government cull through these regulations now and eliminate those that would not satisfy the test in Clause 49?

It would also appear that Clause 11(2)(g) (Genuine Occupational Qualification) would need to be amended as it states that sex is a GOQ if the job must be done by a man because it is covered by a regulation on Schedule 2. But Clause 49 exempts only regulations which appear on Schedule 2 and protect women from a risk that "specifically affects women".

-END-

To : Anna Wu, Andrew Byrnes, Carole Petersen and Team  
From : Eric Chow  
Date : 2 March 1995  
Total 3 pages

Proposed amendment for consideration:

1. Deferring commencement date of various Parts

1.1. Option A: Parts on sex, family status, age, sexuality, disability (immediate effect), Parts on race, religious and political conviction (deferred one year), Parts on spent conviction, union membership (abandoned in EOB, propose amendment in Cap 57 and Cap 297)

- Putting five Parts into immediate effect is nice, however, it may still be argued, by the government and Legco Members, as too much at one time. They would argue that family status and sexuality discrimination is not a social problem that requires immediate fix.
- Also, singling out race, religious and political conviction for deferment may be too risky since both are highly controversial and of limited grassroots support.

1.2. Option B: Parts on sex, family status, age, sexuality, disability (immediate effect), Parts on race, religious and political conviction, spent conviction, union membership (deferred one year)

- Similar problem with Option A.

1.3. Option C: Parts on sex, family status, age, disability (immediate effect), Parts on sexuality, race, religious and political conviction (deferred one year), Parts on spent conviction, union membership (deferred one year Or abandoned in EOB, propose amendment in Cap 57 and Cap 297)

- The argument is to adopt "incremental" approach where only grounds that are now causing severe problems (gender-related and disability) will come into immediate effect while the rest will be effective one year later.
- The concern is that is gender-related and disability discrimination is taken care in the first stage, there would be no strong voices monitoring the rest.

1.4. Option D: Parts on sex, age, disability (immediate effect), Parts on family status, sexuality, race, religious and political conviction (deferred one year), Parts on spent conviction, union membership (deferred one year Or abandoned in EOB, propose amendment in Cap 57 and Cap 297)

- This "incremental" approach would make it very difficult for the government and Legco Members (probably the business as well) to say no as they cannot deny that sex, age and disability discrimination is causing severe social problems now.
- At the same time, the deferment of the remaining Parts (such as family status, sexuality, race, etc.) would force many vocal NGOs, women groups in particular, to keep an eye on the progress on these other Parts.

Note: Lee Cheuk Yan is quite open towards deleting Part X (union membership) so long as the government concedes to include reinstatement when amend~~ment~~ the provisions in Employment Ordinance regarding union membership

2. Delete "punitive or exemplary damages" from cl.234(2)(f)

- This suggestion is purely based on political concerns. I presume the majority of the population tend to associate punitive damage with the scenario in the Courts of the US (or other Western countries) where millions of dollars are awarded to the plaintiff in addition to compensatory damage (Remember that only award of this scale, but not the small ones, would receive media coverage.) This means that we would have little (though not zero) support from Legco Members, or from the public at large, to put in punitive damage. But in exchange, we would have huge business resistance (e.g. The HK Assn. of Banks) for keeping it.
  - Until and unless we have actually succeeded in amending the government bill to ensure the existence of Equal Opportunities Commission, Members would still assume that complaints brought under the EOB need to go to the court and thus would result in costly litigation. Punitive damage would be a sufficient excuse to rally business opposition.
3. Add ~~an~~ general exception on to allow the government to review existing legislation within one year.
- This exception should make us look reasonable, and it should alleviate the concern that passing the EOB would have unpredictable impact on existing laws.
  - However, this exception does not include administrative programmes, meaning that policies like Small House Policy would not be given this grace period.
  - The argument for drawing this distinction is that existing laws, but not administrative programmes, have been scrutinized by the legislature at some stage.
4. Add ~~an~~ general exception on “Acts done under statutory authority/ Acts done in compliance with legislation”
- Again, this exception is to make us look reasonable.
5. Add an exception on “Legal capacity and welfare of children” in Part VIII (age)
- This should be able to deal with the concerns about the effect of EOB on the legal capacity, legal entitlements, and the legality of film classification, drinking age, smoking age, etc.
6. CL183 - Retirement My suggestion on this clause is to leave it absolutely open for the Council to decide on whatever direction they think HK should follow. If we are asked to take a position on whether compulsory retirement age should be abolished, I’m inclined to take a more conservative approach, i.e. preserving status quo. Here’s some of the pros and cons on abolishing it for consideration:
- Pros: Theoretically, abolishing compulsory retirement age is consistent with the philosophy of the EOB, i.e. employees should not be removed because of their age. They should only be asked to retire if they are not capable to perform the job. Setting a compulsory retirement age is simply arbitrary.
  - Pros: Without a good (or reasonable) social security system or pension system (not even in foreseeable future), abolishing it would allow some elderly, who would run into great financial difficulties after retirement, to continue to work and thus be able to live in dignity.
  - Cons: The issue is very complicated. It is so closely tied to many other labour as well as social policies. The economic impact of abolishing it is too difficult to ascertain. In particular, although other countries’ experience (like US or Australia) may suggest its impact, the fact that these countries have a comprehensive pension

or social security system and HK doesn't cast doubt on applying these foreign experience to the local context

- Cons Age discrimination in relation to retirement basically affects everyone in the working population once in the life span, whatever sex, marital status, sexuality, race, religion, etc one has or belongs to Unlike age discrimination in employment which affects women more than men, retirement age affects everyone. To a certain extent (not absolute, though), compulsory retirement age make people gain, in terms of better promotion prospect, when they are young, and then loss when they turn old. Besides, abolishing retirement age may not be in the interest of gender equality, because it would allow those now occupying the senior positions (usually men), who have taken advantage of institutional discrimination against women (or other minorities) previously, to stay forever
7. Add a qualified exception (probably a subclause under cl.112 Measures to achieve equality) to clarify that localization policy is not unlawful if it is intended to ensure persons of a particular race have equal opportunities (implying that they have to be disadvantaged previously).
- The rationale here is to explicitly address the concerns of the government and business sector about the legality of their existing localization policies. My perception is that quite a few companies are using "localization" as a camouflage to hide their racist motivation in kicking out expatriates.
  - The exception would not be a lot different from cl.112, which is intended to permit affirmative action, in substance. The effect, however, would be to make the business and government unable to use the myth that "localization" would be banned under the EOB as an excuse to go against Part IV on race discrimination.

#### Policy issues that remain unresolved:

8. Same sex marriage (or other entitlements for homosexuals, e.g. housing)
9. Adoption by homosexuals or by "non-locals".

#### Remarks

I feel a bit guilty for having to suggest these concessions to amend the EOB downwards. Strategy-wise, however, I suppose the best way to make the EOB survive is to make it a real threat to the government as well as the business sector that the EOB can get passed. Unless the EOB remains a real threat, it is unlikely that the government would be pressured into further substantive concession. The EOB needs attention and we want it to be treated seriously. Also, if the EOB is eventually put to the vote, we need to have the support from the undecided Members to have a tight result. Otherwise, three government votes could simply go to abstention, which would be far less embarrassing to the HK government and to Patten.

The whole thing is becoming critical shortly. I suppose our team must be ready to tell what kind of amendments we think are acceptable to concede. We must be able to tell the Members before the undecided make up their mind, probably very soon. Otherwise, it may be too late to propose concessions later on.

TO Adam, for distribution to Anna and the rest of the team  
FROM Andrew  
RE Some possible general questions on the enforcement aspects of  
the Sex Discrimination Bill for 3 March 1994.  
DATE 2 March 1994

**SOME GENERAL QUESTIONS ON THE APPARENT FAILURE OF  
THE ADMINISTRATION TO TAKE INTO ACCOUNT CRITICISMS  
OF THE UK LEGISLATION IN ITS PREPARATION OF THE SEX  
DISCRIMINATION BILL**

**1. Is the government aware that the enforcement bodies themselves, commentators and practitioners have made fundamental criticisms of the enforcement provisions in the UK Sex Discrimination Act and Race Relations Act, in particular as regards the powers and functions of the Equal Opportunities Commission and the Commission on Racial Equality – which it has chosen to replicate?**

For example, the assessment by Ellis that “It is clear . . . that the legislation in this area is of such unparalleled complexity as to undermine its usefulness very considerably.” Evelyn Ellis, *Sex Discrimination Law* (Gower, 1988) at 256

The Commission on Racial Equality has endorsed a judicial description of the enforcement structure as a ‘spider’s web’ in which the Commission has been caught up because the protection appropriate to law enforcement powers has been added to the protection appropriate to a report-making process.

**2. Has the government given any consideration to whether and how the defects and shortcomings identified in the UK legislation should be avoided in the Hong Kong legislation in this area?**

~~Why has the government chosen to replicate the system of enforcement which exists under the UK Sex Discrimination Act and Race Relations Act, even though these enforcement mechanisms~~

**3. Is the government aware of the proposals made by the Commission on Racial Equality for radically revamping the enforcement structure of the Race Relations Act (to correspond to concerns which apply equally to the Sex Discrimination Act)? What consideration has the government given to these proposals? Why has the government not decided to incorporate those changes in the Sex Discrimination Bill?**

The CRE proposed that its law enforcement function (formal investigations, non-discrimination notices, etc) should be given to an independent tribunal (in the case of the UK the industrial tribunals)



**A. A** Is the government aware of the proposals made by the EOC for improving the enforcement aspects of the Sex Discrimination Act within the existing framework? What consideration has the government given to these proposals? Why has the government not decided to incorporate those changes in the Sex Discrimination Bill?

EOC proposes

- repeal of the provision requiring that an opportunity be given for pre-investigation representations "which [the EOC] sees as unduly formal, time-consuming and restrictive of the Commission's powers")
- repeal of the provisions for representations against a non-discrimination notice, since "this merely duplicates the respondent's right of appeal against the notice"
- conferral of power to order changes to practice or procedure by means of a non-discrimination notice
- conferral of power on Commission to issue a complaint in the appropriate court/tribunal alleging unlawful discrimination by any person

Equal Opportunities Commission, *Equal Treatment for Men and Women: Strengthening the Acts -- Formal Proposals* (March 1988), pp 16-22

NB the UK government has rejected many of the proposals, basically because it seems that the government does not particularly want to enhance the functioning of the EOC. However, the Hong Kong government has not included even those few issues which the UK government was prepared to act or which it was prepared to discuss further with the EOC (eg the availability of damages in an indirect discrimination claim, presently available under neither the SDA or the Sex Discrimination Bill)

[Some more detailed questions can follow -- I doubt we will have time this Friday to ask as many as we might like ]

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Issues relating to religious conviction discrimination

1. Introduction

- 1.1. The Equal Opportunities Bill raises two separate sets of issues relating to religion.
- 1.2. First is the matter of protecting individuals against discrimination based on the religious conviction they hold. Part VII of the Bill protects individuals from discrimination on the basis of their religious convictions. The clauses in this Part operate in the same way and in the same areas of activity as the Parts concerning other grounds of discrimination. That is, direct and indirect discrimination is prohibited, in areas including work, education, accommodation, provision of goods, services and facilities, government administrative activity, etc.
- 1.3. Second is the matter of minimising legal interference in religious practices and activities which may themselves involve a degree of discrimination. Clauses 228 & 229 are exceptions which attempt to strike a reasonable balance in situations where the right to be treated equally conflicts with the right to freedom of religious practice.

2. Direct discrimination

- 2.1. Direct discrimination on the ground of religious conviction means targeting someone for unfavourable treatment because of their beliefs. Such targeting is clearly contrary both to the principle of non-discrimination and to freedom of conscience and religion.

EXAMPLE: It would be unlawful for a hotel to refuse to book a convention because it is sponsored by a Muslim religious organisation.

EXAMPLE: It would be unlawful for the government to confine the use of community halls by religious bodies to weekdays while such restriction does not apply to other community organisations

- 2.2. **Unfamiliar and unconventional religions are covered, providing they meet the definition of religion.** Such unfamiliar groups are often precisely the ones most in need of protection. However, nothing in the Bill protects any group from investigation or prosecution on ordinary, objective legal grounds.

EXAMPLE: It would be unlawful for an employer, after hearing that an employee has joined a fundamentalist Christian sect, to drop plans to promote that employee because the employer considers the group's beliefs irrational.

- 2.3. As usual, however, materially different circumstances may justify treating a person with particular beliefs less favourably than colleagues who do not share them.

EXAMPLE: An employer may lawfully fire an employee who spends a significant part of his worktime proselytising his co-workers.

- 2.4. Members asked whether discrimination not against a particular religion, but in favour of a person's own religion would be covered. Such discrimination is unlawful under the Bill, because it unfairly disadvantages those who do not share the person's beliefs. In a secular society based on equal opportunity, it would create an unreasonable and uncontrollable loophole to exempt a person from the law on the ground that he conducts his ordinary activities (e.g. his business, his management of property, his provision of services to the public) in a religious way.

EXAMPLE: It would be unlawful for an entrepreneur who wishes to run a "Christian business" to restrict employment to his co-religionists.

- 2.5. Exceptions do provide, however, for privileged treatment on religious grounds in certain circumstances — generally, by institutions or in relation to positions that have a specifically religious character. These exceptions involve freedom of religion issues and will be discussed later.

- 2.6. Members also asked about overtime payments for Sunday work. It is reasonable for an employer to adopt Sunday as the week's rest day because Sunday is the conventional rest-day in Hong Kong (while it is also the Christian Sabbath). It is therefore not ordinarily discriminatory for an employer to pay overtime for Sunday work, even though he does not make similar payments for work on other religion's Sabbath days. An employer who makes a point of paying overtime for Sunday work because it is the Christian Sabbath, however, may be open to a claim of direct discrimination by workers who are not co-believers.

### 3 Indirect Discrimination

3.1 Members' queries mostly concerned indirect discrimination. Indirect discrimination concerns general rules, requirements or practices which, without targeting a particular religion, nevertheless have a disproportionate adverse impact on believers. Provided the rules are reasonable in formulation and application, such rules are permissible despite adverse impact on religious minorities. This means the rule must have an objectively justifiable purpose, and if there is more than one way to meet that purpose, there must be some flexibility in applying the rule. Mere inconvenience does not excuse inflexibility, but hardship does.

3.2. It is clear that rules made to ensure safety, hygiene, etc. need not ordinarily take account of conflicting religious practices.

**EXAMPLE:** A Sikh construction worker cannot claim on the ground of a religious rule of dress to be exempt from a requirement to wear a helmet on construction sites.

**However, if the company knows that certain jobs will never require helmets, an inflexible rule applied to all employees is unreasonable.**

**EXAMPLE:** A construction company has a rule that every employee must be prepared to wear a helmet. It cannot, on the basis of this rule, refuse to hire a Sikh who will not wear a helmet if there is no prospect that he will ever visit a construction site where a helmet is required (for example, he is applying to work as a bookkeeper).

3.3. Members asked whether an employer can require uniform dress despite an employee's objections on religious grounds. There may be various reasonable grounds for requiring uniform dress, e.g. to preserve hygiene (such as, a requirement to wear a cap or hair-net during food preparation) or to make impersonation of employees more difficult. However, it may be unreasonable to enforce these rules with unnecessary strictness. For example, other ways of covering the head may be equally effective in preserving hygiene and an ID badge may serve as well as a uniform for security purposes.

3.4 While employers may reasonably adopt uniform policies, strict adherence to such policies on grounds of customer preference or promoting company spirit may not be reasonable, because these notions are usually highly subjective. In many cases, it will be possible to accommodate the employees' objections to

wear uniform on religious grounds while meeting the employers' goals of uniform appearance.

- 3 5 Members queried about interaction of religious holidays and working schedules  
Under the Bill, some effort should be made to accommodate employees' religious scheduling requirements

EXAMPLE: A hospital may be required to show reasonable flexibility in allowing a Catholic doctor to adjust her work shifts in order to accommodate the needs to go to Mass on Sundays.

An employer, however, need not take account of an employee's religious schedule if it would cause operational hardship

EXAMPLE: Where employees work in teams, changing one employee's schedule may have extensive knock-on effects that cause hardship.

- 3 6 Clauses 148(3) and 150(2) relate to workplace religious practices. These provisions require employers and principals to make reasonable accommodation for workers' religious practices in the workplace. This requirement is essentially the same as described above for indirect discrimination but is expressed in a separate subsection for avoidance of doubt.

- 3 7 **As in cases of indirect discrimination, some effort to accommodate workers' religious practices is required, but not if it involves hardship to the employer**

EXAMPLE: In most workplaces, it would not be unreasonable for an employee to ask permission to retire into a storeroom or other back room to pray briefly at prescribed times. (The employer might reasonably count this against rest-time in a workplace.)

EXAMPLE: In most workplaces, it would not be unreasonable for an employee to ask permission to place a small shrine in a back office

- 3 8 Employers need only accommodate workplace religious practices that are recognised as necessary or desirable by the workers' co-religionists.

EXAMPLE: An employer need not permit a worker to place a shrine at work if members of that religion do not conventionally worship in the workplace

#### 4 Clause 228 — Exceptions for religious bodies

- 4 1 This clause is an exemption from equal opportunity law in deference to the freedom of religious exercise guaranteed by the Bill of Rights. It is intended to

grant an exemption with respect to all forms of discrimination in relation to activities with an inherently religious character.

- 4.2 It exempts core religious activities, such as the training and appointment of ministers of religion [(a) & (b)], and the appointment of persons in relation to the conduct of religious observances [(c)] It also exempts in general the internal activities and organisation of religious bodies [(d)]. This exemption extends to any act or practice of a body established for religious purposes, if the act or practice is either in conformity with religious doctrine or necessary to avoid injury to religious susceptibilities.
- 4.3 The conflict between the principle of equal opportunity and freedom of religion is most acute where the influence of a religious body extends beyond its internal affairs to affect the general public. Judgements whether the exemption applies are difficult and will depend on the circumstances. For precisely that reason, it is best to define the principle in statute and leave specific, circumstantial determinations to the courts.

**EXAMPLE:** It may be genuinely necessary to avoid injury to religious susceptibilities that, for example, only men be employed for any position within the church, even positions with little religious content such as gardening or janitorial services.

**EXAMPLE:** It may be genuinely necessary to avoid injury to religious susceptibilities that certain church services to the public, such as provision of emergency accommodation, be made available only to believers, or be withheld from unmarried couples living together, etc.

**EXAMPLE:** A church may set up a network of outreach services to the public which, however, it offers (for genuinely religious reasons) on a discriminatory basis. Such a network may at some point reach a level of organisational independence from the church, such that it no longer amounts to a body established for religious purposes but is instead essentially a service provider and hence falls outside the scope of the exemption. This may be particularly likely if services are offered on a commercial basis.

#### 5 Clause 229 — Exception for educational bodies established for religious purposes

- 5.1 Clause 229 exempts certain forms of discrimination by schools that are conducted according to religious teachings. Like clause 228, it is provided in deference to the principle of religious freedom. In particular, by allowing religious schools greater educational autonomy, the clause is intended to respect the wish of parents regarding the kind of education (including religious education) their children should receive.

- 5 2 Schools run by religious orders, in particular Catholic and Protestant schools, form the main trunk of the school system in Hong Kong. In 1993, out of a total 480 secondary schools, 235 (49.0%) are either Catholic or Protestant schools (with a total of 235,214 students enrolled, which equals 51.6% of total enrolment). For primary school, 261 (41%) out of a total 635 are either Catholic or Protestant schools while the enrolment in these schools accounts for 54.1% (or 262,575 students) of total enrolment. Statistics on religious schools appear in Appendix A.
- 5 3 Primary school places in government and aided schools are allocated through a centralised system. Under this system, 65% of the places are filled by individual schools based on a standardised point system designed by the Education Department. (The remaining 35% are allocated by computer, based on parents' choice.) Several of the factors on the basis of which this system awards points might imply family status or religious conviction discrimination. Examples include points for a parent teaching full time or a sibling studying in the school, or a parent being a school manager or graduate of the school; or for a child of the same religious affiliation as the school.
- 5 4 The majority of secondary school places are allocated through the Secondary School Places Allocation System (SSPA System). Generally, allocation is based on merit (measured by internal assessment of primary schools and the Academic Aptitude Test), parents' choice of schools within a School Net, and a computer-generated random number. Religious conviction or family status are not factors under this method. Under the SSPA System, however, government, aided and caput schools are allowed to retain up to 10% of places as discretionary places to admit students based on criteria which vary greatly from one school to another. Schools may fill these discretionary places based on students' merit (through internal examination), connection to the school (e.g. parents are staff, graduates, or benefactors of the school), or religious conviction, etc.
- 5 5 It is reasonable that religious schools may wish to maintain a minimal percentage of students having the same religion in order to preserve an atmosphere favourable to its provision of religious education. Indeed, the existing admission schemes in both primary and secondary schools allow only a small fraction of places allocated based on religious conviction. Besides, it would be undesirable that schools are not allowed to give preference based on religious belief, because otherwise it would be possible, for example, that a child of Muslim parents may be randomly sent by the computer to a Protestant school against their wishes.
- 5 6 Subsections (1) & (2) apply to such schools' employment practices (covering respectively employment and contract work), and exempts any discrimination undertaken in good faith to avoid injury to religious susceptibilities.

- 57 Subsection (3) applies to such schools' admission practices, and exempts discrimination in good faith in favour of adherents of the same religion. Such discrimination may not, however, be on the basis of race, disability or age; and may not be directed against any particular sub-group of non-believers.

EXAMPLE: A Catholic school may lawfully give preference to Catholics, but cannot have a policy of excluding Muslims (while admitting Buddhists).

- 58 Allocation of places on the basis of family connections to the school, as described above, is not covered by a specific exemption. The discretion to allocate a small fraction of places on this basis is given to all schools. These factors, however, generally appear to be reasonable under the circumstances. For instance, it would facilitate parents to take their children to school; it could encourage patronage of benefactors, former students; also, allowing family members to receive education from the same school may enhance family bonds.
- 59 To the extent that existing admission practices might appear unlawful, however, schools should not be forced to defend the legality of the scheme designed by the government. Therefore, a further provision should be added to clause 229, permitting discrimination in admissions in compliance with the government's standard admission schemes. Challenges to the scheme could still be mounted against the Administration.

#### 6. Clause 163(1) — Exception for certain employment in connection with religion

- 6.1 This subsection provides that private schools and hospitals with religious affiliations may lawfully consider applicants' religious beliefs when hiring employees whose duties relate to religious observances or practices.
- 6.2 This subsection could be deleted because it merely duplicates in part the effect of 228(c), which generally exempts employment practices for positions connected with religious observances or practices. Also, it is difficult to define what "private educational authority" [in 163(1)(a)] means in Hong Kong, because there are very few schools with no government subvention. Clause 229(1) & (2) covering religious schools provide a sufficient exception.

Office of Anna Wu  
3 March 1995



Table 1 Number of, Enrolment in Secondary Day School Locations by Sector by Religious Background of School, 1993

	No religion	Catholic	Protestant	Buddhism	Taoism	Confucian	Muslim	Te
<u>Government</u>	39	-	-	-	-	-	-	-
<u>Aided</u>	97	85	115	23	8	1	1	3
<u>Private</u>	73	18	17	2	-	-	1	1
<u>All sectors</u>	209	103	132	25	8	1	2	48
<u>Enrolment</u>	187271	99812	135402	22288	8910	1340	912	45593

Table 2 Number of, Enrolment in Primary Day School Locations by Sector by Religious Background of School, 1993

	No religion	Catholic	Protestant	Buddhism	Taoism	Confucian	Muslim	Others
<u>Government</u>	47	-	-	-	-	-	-	-
<u>Aided</u>	267	84	128	20	9	2	1	-
<u>Private</u>	26	23	26	-	-	-	1	1
<u>All sectors</u>	340	107	154	20	9	2	2	1
<u>Enrolment</u>	197246	123200	139375	12559	10403	1791	473	14 489

Source *Enrolment Survey 1993 (Detailed Tables)*, Education Department

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Mrs. Anna Lo,  
Clerk to the Bills Committee to Study the  
Equal Opportunities Bill and the  
Sex Discrimination Bill,  
Legislative Council,  
Legislative Council Building,  
Central

Dear Anna,

**Sex Discrimination Bill (SDB)**

At the Bills Committee Meeting on 3.3.95, Members expressed concern over the status of the Codes of Practice to be drawn up by the Equal Opportunities Commission (EOC) and the time it will take for the Commission to develop such Codes of Practice.

Clause 61 of the Sex Discrimination Bill empowers the Equal Opportunities Commission to develop Codes of Practice which contain practical guidance for the purposes set out in subclause (1). These Codes of Practice carry legal effect but they do not have legislative effect.

We propose that the provisions in the SDB in respect of employment matters will be brought into force after the Code of Practice on the subject has been prepared. There are good reasons for adopting such an approach. The principle of providing for equal terms of employment, equal opportunities in recruitment, promotion and provision of training etc. are set

out in Clause 10 of the SDB. The purpose of developing a code of practice in employment matters is to provide guidance to assist both employers and employees to comply with the legislation in areas such as equal pay for equal work and the development of a working environment free from sex discrimination. The Code would also assist the staff in the EOC to assess, for example, whether an aggrieved person has a case against his employer. In addition, Clause 61(14) of the Bill stipulates that 'any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question', hence the Code would be useful to the court in proceedings under the Ordinance.

It would be most appropriate for the EOC, an independent statutory body, to develop the Codes of Practices and to consult relevant organisations in the process. We hope that this open approach will help to ensure that the Code of Practice is practicable and meet the needs of its users. To bring the provisions in relation to employment into force before the Commission issues the relevant code of practice may give rise to uncertainties for the different parties involved. This could undermine the effective enforcement of the SDB.

The development and issue of the Code of Practice would be the first task of the EOC. It is expected to complete this task within six to nine months. We hope that the SDB can be enacted as soon as possible to enable the early establishment of the EOC.

I should be grateful if you would convey the above to Members of the Bills Committee for information.

Yours sincerely,

Susie Ho

(Miss Susie Ho)  
for Secretary for Home Affairs

Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill

The Equal Opportunities Commission under the SDB:  
Problems and Recommendations

1. Terms of reference

1.1. SDB cl 56(1) sets out functions that are the terms of reference for the EOC. The core functions are identical to those of the EOC's UK counterpart. The UK courts, however, have significantly narrowed these terms of reference in decisions that are likely to be followed by courts in Hong Kong.

1.2. The widest aspect of the EOC's terms of reference are its functions of working towards the elimination of discrimination, and of promoting equality of opportunity between men and women generally [56(1)(a) and (b)]. These terms of reference, however, could in fact prevent the EOC from looking into matters that are not addressed by the SDB, or at areas that are exempted or omitted from the SDB. This is because according to UK courts, "discrimination" in this context refers only to discrimination as defined and made unlawful by the SDB itself. (The function of "promoting equality of opportunity" adds nothing to this because it is interpreted as a restatement in positive terms of "working towards the elimination of discrimination," with the same restricted meaning.)<sup>1</sup>

1.3. Such restricted terms of reference are particularly inappropriate in relation to government. The EOC may be left legally disabled from addressing areas of administrative activity in which the government is already bound not to discriminate by the Bill of Rights Ordinance, but which are not also covered by the SDB, such as the conduct of rural elections or the acts of immigration or customs officers.<sup>2</sup>

1.4. The EOC's terms of reference not only limit the EOC's enforcement efforts to areas addressed by the SDB, but limit the EOC's research and educational powers as well [57]. It is doubtful whether the EOC, under its current terms of reference,

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<sup>1</sup> See *Home Office v. Commission for Racial Equality* [1982] 1 Q.B. 385.

<sup>2</sup> Although clearly covered by the Bill of Rights Ordinance (Cap. 383), none of these examples is likely to be covered by SDB cl. 25 (goods, facilities and services) because UK courts have interpreted language identical to that clause as applying only to administrative acts that are similar to acts that could be done by private persons. Lord Fraser, *R. v. Entry Clearance Officer, Bombay ex parte Amin* [1983] 2 AC 818 at 835.

could lawfully undertake research or educational initiatives concerning, for example, domestic violence, stereotyping in schoolbooks or advertisements, divorce or family law and policy.

1.5. The EOC is authorised to review the working of the SDB and propose amendments to it [56(1)(e)]. Until and unless such amendments are enacted, however, this function does not effectively loosen the restrictions described above. The EOC's UK counterpart, for example, sought to launch an investigation into immigration matters, arguing that it might thereby uncover reasons to amend the UK Sex Discrimination Act to cover immigration. The UK court held the investigation was outside the authority of the EOC because the investigation properly concerned the UK Immigration Act rather than the Sex Discrimination Act itself.

1.6. This also indicates that it may not be within the EOC's terms of reference to examine laws other than the SDB that touch on equal opportunity concerns, such as the domestic violence provisions of the Crimes Ordinance or the maternity provisions of the Employment Ordinance, unless there is an argument that the law in question is directly inconsistent with the SDB.<sup>3</sup>

## 2. Enforcement through the courts

2.1. The EOC's enforcement powers are substantially the same as those available to its UK counterpart. Like the UK commission, but unlike comparable commissions in other common law jurisdictions, the EOC has little power to bring equal opportunity matters directly to the courts. It has no power to bring proceedings in its own name with respect to any of the acts of discrimination prohibited in the main part (Parts III-IV) of the SDB.

2.2. The EOC may bring limited proceedings with respect to unlawful advertisements, instructions to discriminate, and pressure to discriminate [36-38 and 74], or against persistent discrimination by a person previously found to have unlawfully discriminated [73]. In each of these circumstances, the District Court may enjoin the unlawful act, but may not order compensation for any injured parties.

2.3. The EOC may also conciliate claims brought to it, and if conciliation fails may render financial or legal assistance to individual claimants [76-7].

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<sup>3</sup> There is no parallel in UK law for three of the functions conferred on the EOC: working towards the elimination of sexual harassment; encouraging conciliation of claims under the SDB; and performing functions imposed on it by other enactments (which will permit the EOC to take on any additional powers conferred on it by the administration's forthcoming disability discrimination bill) [56(1)(c), (d) and (f)]. None of these functions, however, effectively loosens the restrictions described above.

### 3. Enforcement through formal investigations

3.1. Instead of a broad power to litigate, the principal enforcement power given the EOC is to launch formal investigations of suspected discriminators, and to issue enforcement notices against any unlawful discrimination uncovered. The complex legal procedure for formal investigations, however, has been widely criticised in the UK for radically undermining their effectiveness. In a judgement concerning the procedure, Lord Denning remarked "I am very sorry for the commission, but they have been caught up in a spider's web spun by Parliament, from which there is little hope of escaping."<sup>4</sup> Another UK expert observed:

3.2. "In reality, the formal investigation and [enforcement] notice powers have proved to be ineffective. The complexity of the legislation governing these powers ensures that formal investigations tend to be lengthy and costly battles full of legal minefields. They are often unsuitable methods for analysing and resolving issues of sex discrimination. Consequently, few formal investigations are started. Even less are completed."<sup>5</sup>

3.3. A simplified summary of the procedure is as follows. At the outset of a formal investigation that the EOC envisions might lead to an enforcement notice, the EOC must draw up terms of reference specifying both what unlawful acts they have reason to believe have been committed, and by whom. The EOC must hold a preliminary inquiry before finalising these terms, at which the targeted individuals are given an opportunity to make representations against the proposed terms. If, during the course of the subsequent investigation, the EOC uncovers indications of unlawful acts or liable individuals not already specified in the terms of reference, it must redraft the terms and hold a renewed preliminary inquiry. No particular procedure is provided for the conduct of the investigation itself, but the rules of natural justice may sometimes require that additional hearings be given to the parties investigated. At the conclusion of the investigation, if the EOC believes an enforcement notice would be appropriate, it must again invite opposing representations by the investigated parties.

3.4. If the EOC finally does issue an enforcement notice, the parties affected may appeal the notice in District Court. All of the EOC's findings of fact are opened for re-examination on appeal, and the District Court's decision may itself be appealed through normal judicial channels. Only after conclusion of the judicial appeals

<sup>4</sup> Lord Denning MR, *Com. Racial Equality v. Amari Plastics (C.A.)* [1982] 1 Q.B. 1194 at 1203.

<sup>5</sup> David Pannick, *Sex Discrimination Law* (Oxford U. Press, 1985) at 275. See also Ellis, concluding that "It is clear . . . that the legislation in this area is of such unparalleled complexity as to undermine its usefulness very considerably." Evelyn Ellis, *Sex Discrimination Law* (Gower, 1988) at 256.

process will the enforcement notice become binding on the affected parties.<sup>6</sup>

3.5. Both the UK's EOC and the Commission for Racial Equality (which shares, in relation to race discrimination, the same powers as the EOC) have made extensive recommendations to streamline the formal investigation procedure, and to enable the EOC to bring ordinary proceedings in court as an alternative to formal investigations.<sup>7</sup>

#### 4. Recommendations

4.1. **The EOC's terms of reference should be widened by linking them to the non-discrimination provisions (Articles 1 and 22) of the Bill of Rights, and to relevant international treaties and instruments.**

— First, as part of its law enforcement task against sex discrimination, the EOC should be able to take action on the basis of the Bill of Rights as well as the SDB.

— Second, in carrying out its research, advisory and educational tasks with respect to sex discrimination, the EOC should not be restricted to enforceable legislation (the SDB and the Bill of Rights), but should also be guided by other relevant instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Declaration on the Elimination of Violence Against Women.

— Third (and bearing in mind that the EOC is due to administer disability discrimination law as well as the SDB), the EOC should be able to study and make recommendations on the way forward for Hong Kong with reference to other international instruments concerning equal opportunity, such as the Declaration on the Rights of Disabled Persons, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, etc.

4.2. **The EOC should be empowered to bring proceedings in its own name for any type of claim under the SDB. It is particularly important that the EOC be able to bring proceedings in its own name against government and public authorities, and that it be able to seek declaratory judgements (e.g., concerning the legality of discriminatory rules of law). In proceedings brought by the EOC, the District Court should be able to order any remedies that would be available in proceedings brought**

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<sup>6</sup> For a more detailed review of the procedure, see George Applebey and Evelyn Ellis, "Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies," (1984) Public Law 236; David Parnick, *id.* at 275-84.

<sup>7</sup> See Equal Opportunities Commission, *Equal Treatment for Men and Women: Strengthening the Acts — Formal Proposals* (March 1988); Commission for Racial Equality, *Race Relations Act 1976 — Time for a Change?* (July 1983).

by an individual (e.g., compensation for injured parties).

4.3. **Unnecessary procedural obstacles to formal investigations should be removed to streamline the process, in line with the recommendations made in the UK by the EOC and the Commission for Racial Equality.**

4.4. **There should be adequate financial assistance for claimants under the SDB. The relationship between the availability of assistance from the EOC and from Legal Aid needs to be clarified.**

Office of Anna Wu

10 March 1995



**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Proposed amendments to the Sex Discrimination Bill  
discussed with Home Affairs Branch, 17 March 1995

EOB = Equal Opportunities Bill

EOC = Equal Opportunities Commission

EqT = "Equal Treatment for Men & Women Strengthening the Acts," Formal  
Proposals of the UK EOC, 1988

SDB = Sex Discrimination Bill

1 General remarks

- 1.1 A unified law should, in relation to all significant grounds of discrimination, provide both rights of action and an Equal Opportunities Commission
- 1.2 Any law relating only to sex discrimination should cover all discrimination closely related to sex discrimination, including discrimination on the grounds of family responsibility, age and sexuality.
- 1.3 Sexist drafting (e.g. "unlawful to discriminate against a woman," the EOC "chairman") should be eliminated.

2 Part I — Preliminary

- 2.1 Interpretation according to Bill of Rights and relevant international treaties and instruments should be made explicit  
[cf EOB 7]
- 2.2 Effect on prior inconsistent laws should be made explicit  
[cf EOB 8, Bill of Rights Ordinance (Cap 383) s 3]
- 2.3 Application to acts done for two or more reasons should be made explicit  
[cf EOB 4]
- 2.4 Meaning of discrimination should explicitly include discrimination against a person on ground of status of person's relative or associate  
[cf EOB 6]
- 2.5 Definition of "marital status" [SDB 2(1)] should include status of being de facto spouse
- 2.6 Definition of "sexual harassment" [SDB 2(5)] should explicitly cover —  
(a) in the employment field, creation of a sexually hostile work environment, and  
(b) in all other fields, substantial interference with enjoyment of the relevant activity

3 Part II — Discrimination

- 3.1 Marital status discrimination [SDB 6] should be covered in all areas
- 3.2 Pregnancy discrimination [SDB 7] should be covered in all areas
- 3.3 Victimization [SDB 8] should be redrafted to undo narrowing effect of UK court judgments  
[cf Eq T 3.9]

#### 4 Part III — Employment Field

- 4.1 Part III should commence immediately upon assent, not following promulgation of Codes of Practice
- 4.2 Commission agents should be explicitly covered, both with respect to discrimination as such and with respect to sexual harassment [cf EOB 14 & 29(2)]
- 4.3 The exceptions for death and retirement benefits [SDB (4)] should be reviewed for consistency with principle and clarified
- 4.4 The 5-year exemption for small employers [SDB 10(3), (6)-(8)] should be deleted
- 4.5 The GOQ for work in single-sex hospitals, prisons, and special care facilities [SDB 11(2)(e)] duplicates other GOQs in part and is otherwise inconsistent with the principle of the bill, and should be deleted [cf EqT 3 19]
- 4.6 The GOQ for work covered by protective legislation [SDB 11(2)(g)] should be deleted (see also 7 3 below).
- 4.7 The GOQ for work likely to involve duties outside Hong Kong in places where discriminatory laws or customs apply [SDB 11(2)(h)] is inconsistent with the principle of the bill and should be deleted
- 4.8 In the exemption for employment for purposes of organised religion [SDB 19], reference should be made to the susceptibilities of the religion as such and the reference to “a significant number of followers” should be deleted.
- 4.9 **Sexual harassment in the employment field [SDB 20-1] should be extended to cover harassment of a domestic worker by any co-resident of the employer.** [cf. EOB 29(1)(d)]

#### 5 Part IV — Other Fields

- 5.1 Clubs should be explicitly covered in order to avoid exemption of “private” clubs from SDB 25 (as construed by the UK courts) [cf EOB 25, EqT 3 23]
- 5.2 Administration of laws and government programmes should be explicitly covered to avoid an exemption under SDB 25 (as construed by the UK courts) for state activities that are “dissimilar” to acts of private persons [cf EOB 27, EqT 3 26]
- 5.3 Political elections and appointments should be explicitly covered, with particular reference to Village Representatives [cf EOB 28]
- 5.4 For purposes of the small dwellings exception [SDB 28], the definition of “near relative” [SDB 2(4)] should include a de facto spouse
- 5.5 The exception [SDB 30(1)(a)] for single-sex hospital services and special care facilities duplicates other exceptions in part and is otherwise inconsistent with the principle of the bill, and should be deleted
- 5.6 Sexual harassment in other fields [SDB 32] should be extended to cover harassment of students by students and of educational staff by students

## 6 Part V — Other Unlawful Acts

- 6.1 Discriminatory advertisements [SDB 36 & 74] should carry a fixed financial penalty and be actionable by any person (rather than enjoinable only, on action by the EOC exclusively), and should therefore be made a criminal offense subject to private prosecution [cf EOB 225]

## 7 Part VI — General Exceptions

- 7.1 The exception for sport, etc [SDB 42] should not apply to young people of school age [cf EOB 41(2)(d), EqT 3 30]
- 7.2 The limited exceptions for positive discrimination [SDB 45-47] should be replaced by general exceptions for special measures and for measures to achieve equality [cf EOB 37, Convention on the Elimination of All Forms of Discrimination Against Women, Art 4]
- 7.3 The exceptions for protective legislation [SDB 49, 50, 52 & Sch 2] should be deleted
- 7.4 The exemption for acts done to safeguard the security of Hong Kong, as certified by the Chief Secretary [SDB 51], should be deleted
- 7.5 The exemption of certain discrimination within the disciplinary services [SDB 54 & Sch 4 Pt 2 s 1] should be deleted
- 7.6 The exemption of the Small House Policy [SDB 54 & Sch 4 Pt 2 s 2] should be deleted
- 7.7 The exemption of marital status discrimination in employment benefits and civil service benefits [SDB 54 & Sch. 4 Pt 2 s 3] should be deleted.

## 8 Part VII — Equal Opportunities Commission

- 8.1 The EOC should have a general power to bring proceedings in its own name in relation to any unlawful act or practice within its terms of reference [cf EqT 4 17]
- 8.2 The EOC's enforcement functions [SDB 56] should be extended by reference to relevant provisions of the Bill of Rights
- 8.3 The EOC's functions [SDB 56] with respect to research, education, promotion, advice and conciliation should be extended by reference —  
(a) to relevant provisions of the Bill of Rights, and  
(b) to relevant international treaties and instruments
- 8.4 The procedure for formulating Codes of Practice [SDB 61(2)-(9)] should be simplified
- 8.5 In relation to formal investigations into named persons [SDB 63(4), as construed by the UK Courts] —  
(a) the EOC should be empowered to initiate such investigations whether or not it believes that the named persons committed unlawful acts and  
(b) the right to make pre-investigation representations to the EOC should be extended, within a strict time limit, to any person named in the terms of reference [cf EqT 4 8, 4 12]
- 8.6 The EOC should be empowered to obtain information in connection with any formal investigation without prior approval by the Chief Secretary. The requirement of such approval in connection with investigations other than into named persons [SDB 64(2)] should be deleted

## 9 Part VIII — Enforcement

- 91 The District Court's power to relax rules of evidence should be made explicit in the SDB [cf EOB 235]
- 92 The District Court's power to vary the rule of costs should be made explicit in the SDB, with no award of costs as the general rule [cf EOB 237]
- 93 The District Court should have the power to order any appropriate remedy, including reinstatement in particular [cf EOB 234]
- 94 The restriction barring damage awards for indirect discrimination if the discrimination was unintended [SDB 68(5)] should be deleted
- 95 The requirement for prior notice to the Chief Secretary of proposed actions against government schools [SDB 68(7)] should be deleted [as previously agreed]
- 96 Enforcement notices [SDB 69] should be authorised to include, in addition to a requirement that a person cease an act of unlawful discrimination, a requirement that the person cease any specific practice(s) that led to the unlawful discrimination [cf EqT 4 16]
- 97 The right of a person to make representations to the EOC opposing the EOC's issuance of an enforcement notice against that person [SDB 69(5)] duplicates the right of appeal against the notice once issued, and should be deleted. [EqT 4.15]
- 98 **Assistance from the EOC by way of conciliation [SDB 76] should be available for any claim of discrimination alleging an act that is inconsistent with relevant provisions of the Bill of Rights or of international treaties and instruments, whether or not the act is unlawful under the SDB**
- 99 When the EOC publishes a formal investigation report that finds unlawful discrimination, a new period of time should begin during which any persons who claim to have suffered from the reported discrimination may institute proceedings, even though the regular period to institute such proceedings [SDB 78] may have expired before the investigation concluded [cf EqT 4 15]

## 10 [Part IX — Miscellaneous no suggested amendments]

### 11 Consequential Amendments

- 111 The amendments to the District Court Ordinance (Cap 336) need further study
- 112 The Bill of Rights Ordinance (Cap 383) should be amended to clarify its application to all pre-existing legislation, whether relied upon by public authorities or others (reversing the effect of *Tam Hing-yeo v Wu Lai-wai* (1991) 1 HKPLR 261, [1992] 1 HKLR 185)

Office of Anna Wu  
28 March 1995

# PRESS STATEMENT

## Legislative Councillor Anna Wu

30 March 1995

Anna Wu: 843-7353

Eric Chow: 537-2466 or 1128635 x8939

Adam Mayes: 537-2467 or 1128028 x1325

*Ms. Wu summarises her position on equal opportunity legislation as follows:*

### Reaction of the business community

The publication of equal opportunity guidelines sponsored by five major chambers of commerce is a welcome development. These guidelines demonstrate that the business community already appreciates, perhaps more than the Administration, how valuable equal opportunity can be both for business and for the community at large. The Chambers should especially be applauded for addressing matters that the Administration is still ignoring or even actively resisting, such as race and age discrimination.

The forward-looking attitude exemplified by the guidelines comes as no surprise. In the last few months, my staff have contacted a variety of companies that placed non-discriminatory job advertisements in local papers, in order to survey the extent to which equal opportunity policies and practices are already taking shape in the business community. The response has been encouraging.

### Equal Opportunities Bill

Since I first proposed the comprehensive Equal Opportunities Bill last year, the Administration has introduced two competing bills of its own and will likely put forward other limited policy commitments of one sort or another. For the Legislative Council, formulating a coherent legislative scheme for equal opportunities is turning into a more and more complicated exercise.

**My staff and I are exploring various ways of restructuring the Equal Opportunities Bill, both to reflect any compromises reached with the Administration and to make legislators' lawmaking task as smooth as possible.**

If the Administration presents a truly satisfactory bill of its own on disability discrimination, for example, I am open to the possibility of withdrawing Part VI of the Equal Opportunities Bill which also deals with disability. In any case, the full range of equal opportunity measures will remain before the Council, however they may be distributed between the various bills.

I also plan to enable legislators to express their preferences as simply and directly as possible — for example by voting separately on each type of discrimination covered by the Equal Opportunities Bill.

**I will of course introduce a number of amendments to the bill in response to the views expressed by legislators and the public during the bills committee's detailed considerations over the past nine months.**

Examples include a new clause clarifying that the bill does not prohibit compulsory retirement as such; amendments to strengthen and clarify the sexual harassment provisions; a new clause to further ensure that the age discrimination provisions do not interfere with laws and restrictions that protect the well-being of young persons; amendments to provide a temporary exemption for laws with age discrimination implications, to enable orderly review and amendment of them; and amendments to extend the protection of the bill to cover domestic helpers more fully.

#### Disability Discrimination Bill

My staff and I have recently begun discussing the Administration's draft Disability Discrimination Bill with the responsible officers from the Health and Welfare Branch.

**I'm impressed by the Health and Welfare Branch's forward-looking approach to this area, and by their willingness to consider suggestions. Although I have not yet seen the full text, I have solid expectations of this bill. If these expectations are met by the version finally gazetted, I will be pleased to support the bill and to consider withdrawing Part VI of the EOB.**

#### Sex Discrimination Bill

Much disagreement might have been avoided if Home Affairs had been willing to talk with me at the drafting stage the way Health and Welfare is now doing. Home Affairs gave no real hint of the SDB's details until its final version was gazetted last October. Early discussions might have warned the Administration how far out of step parts of it would be with public and legislative opinion.

(Both Branches, of course, might have avoided a great deal of work if they had been willing to amend the Equal Opportunities Bill — drafts of which I passed to the Administration as early as December 1993, long before work had begun on either government bill — instead of reinventing the wheel on their own.)

**I have discussed on 17 March with the Administration a detailed list of amendments that need to be made to the SDB.**

These amendments deal both with technical matters, and with some policy issues of vital importance (the list will be tabled in the bills committee tomorrow). Among other things, I am asking that the SDB clearly authorise the Courts to reinstate workers victimised by discrimination in cases where that is the most appropriate remedy, and I am asking for deletion of the SDB's broad exemptions such as for the Small House Policy. The government must also agree to bring the legislation into force as soon as it is enacted, instead of delaying the commencement of the employment provisions indefinitely until Legco approves Codes of Practice that will be drafted by the future Equal Opportunities Commission.

**I have also proposed to the Administration that provisions be added into the SDB to address age discrimination, family responsibility discrimination, and sexuality discrimination.**

Women's groups have made emphatically clear their dissatisfaction with any sex discrimination proposal that ignores family responsibility and, especially, age. With respect to sexuality, recent decisions of the UN Human Rights Committee make it quite clear that protection against sexuality discrimination must be considered an integral part of sex discrimination law. A sex discrimination law that omits protection against sexuality discrimination would, in effect, deliberately single out and exclude one, particularly vulnerable group — such an omission would be entirely contrary to the basic principle of equal opportunity.

If the Administration can accept the substance of the amendments I am proposing, the SDB may yet prove worthy of legislators' support. I expect to hold further discussions with the Administration on these subjects.

### Equal Opportunities Commission

**I have explained to the Administration that the proposed Equal Opportunities Commission must be given the authority to monitor the full range of equal opportunity matters.**

It is not enough for the Equal Opportunities Commission to be narrowly concerned with administering the SDB. The Bill of Rights already imposes a wider range of equal opportunity standards on the government, and in the next few months Legco will certainly enact detailed equal opportunity laws that bind the private sector as well — laws that will very likely go further than the Administration's own belated proposals. The Administration must take account of these realities as it formulates plans for a Commission. Last year, Governor Patten vetoed my proposal for a comprehensive Human Rights and Equal Opportunities Commission. The Administration must now provide an adequate substitute body for monitoring and enforcement, at least with respect to equal opportunities.

Other amendments also need to be made to the Equal Opportunities Commission. The Administration, it seems, made no attempt to learn from the difficulties experienced by the UK's Equal Opportunities Commission but simply copied the UK legislation. By all means we should take what is good from the UK model, but we needn't bring along the bad as well. I will continue discussing this with the Administration.

— end —

**Note to Members of the Bills Committee**  
**studying the Equal Opportunities Bill**  
**and the Sex Discrimination Bill**

Economic implications of the Equal Opportunities Bill

OVERALL IMPLICATIONS OF THE BILL

1. Although the Hong Kong economy is largely market-oriented and does not favour government intervention, it is far from a pure laissez faire economy. It is recognised by the Financial Secretary that the commitment to consensus capitalism, a consensus about the need to encourage free enterprise while promoting equity, is important to Hong Kong's remarkable success. Hong Kong has substantial legislation and policies regulating the private sector economy because they are considered necessary to protect business interests or the public interest at large. The importation of labour policy is an example of government intervention on the market mechanism and is an artificial impediment to the employment of local people.
2. **The Equal Opportunities Bill intends to remove arbitrary exclusions from access to jobs and to protect employees or applicants against discrimination. In that it is a regulatory framework, it is intended to impose rules of conduct and thus may increase rigidity in the labour market.** However, it is widely accepted that the government has special social responsibilities towards the disadvantaged and the vulnerable and that certain social causes, such as the right to be treated equally, justify regulating business activities. Hong Kong already has laws against child labour, laws against unsafe working conditions and laws prohibiting discrimination against trade union members and pregnant employees.
3. The Bill does not require employers to practise affirmative action that reduces flexibility in the labour market. It also does not require employers to employ a minimum percentage of employees from groups that have traditionally suffered discrimination. Furthermore, there are exceptions in the Bill to allow differential treatment in situations where a particular sex, race or age is a genuine occupational qualification of the position. Thus, the Bill does not force employers into contractual relationship with incompetent applicants and it would not prevent employers from employing the most qualified person for the job.
4. The Bill requires that employers not judge individuals based on the characteristics of the group (gender, race, age, etc ) to which they belong. Instead, employers are expected to evaluate the qualities of individual applicants in the recruitment process.



Eliminating statistical discrimination could involve more screening time and thus increase recruitment costs in terms of having proper advertisements and interviews. However, employers could benefit from having broader choices and making better selection based on merit (such as credentials, experience) rather than presumptions of individual's ability. This reinforces ordinary good business practice in a meritocratic system. In addition, employers should be able to minimise any increase in screening time by properly drafting advertisements which specify the job requirements.

5. Although employers' private costs for human resources management may be low because of statistical discrimination, the costs to society, in terms of social welfare payment and inefficient use of human capital, may be high if qualified applicants are rejected simply because of their group characteristics. The use of fair and open employment practices is crucial to alleviate skill shortages in many areas.
6. The Bill could affect the determination of terms and conditions of employment (for instance, wages) through existing market forces. Nevertheless, materially different circumstances, such as different productivity, working capability, would still justify differential pay. The Bill merely requires that, for instance, women, local Chinese, homosexuals, blind persons, etc. not be paid less simply because of their sex, race, sexuality or disability. Indeed, by artificially increasing labour supply in the local labour market, the importation of labour scheme has already disrupted the market mechanism in the adjustment of wage and provision of training for local discouraged workers.
7. By eliminating discrimination on the basis of sex, family status and age, the Bill would help homemakers, women who have left the labour market to bear children or displaced workers to return to the work force. It would require employers to reasonably accommodate employees with family responsibilities, thereby allowing more experienced employees to retain their jobs. Thus, it would increase labour supply and help to relieve the acute labour shortage which has adversely affected the economy. Expansion of the workforce would dampen inflation. Indeed, the increase in the size of the workforce over the last two years is one of the three major factors in reducing inflation. Also, it would ease the unemployment pressure faced by the displaced workers and improve their economic well-being.
8. Eliminating discrimination in hiring, terms of employment, firing, etc. affords those who have traditionally suffered discrimination more employment opportunities. This will encourage self-reliance and provide greater incentives for them to receive more education and training. The Bill would therefore enhance human capital, a precious resource for the Hong Kong economy.

- 9 Similarly, for the provision of accommodation, landlords would be expected to evaluate the relevant qualities, such as the ability to pay rent, of prospective tenants or buyers. Eliminating statistical discrimination (where, for example, single parents or racial minorities are often considered less reliable to pay rent on time) may require more screening time, but this should have minimal cost implications, if any, to the landlords and should not affect the profit level. Therefore, the Bill should not affect the supply of residential or commercial premises. Again, differential treatment could be justified under materially different circumstances. In addition, leasing of premises on which owners (or near relatives) continue to reside is not covered by the Bill because of privacy concerns.
- 10 Providing access to vehicles for everyone, except for the disabled in certain circumstances, would not incur any additional expenses to the public transport system. Reasonable accommodation is required to provide access for the disabled persons, any additional costs involved should be absorbable by the public transport companies. In situations where such provision would amount to unjustifiable hardship, the providers could claim an exemption under the Bill. Thus, the cost implications, if any, on other consumers should be minimal.
11. Generally, for the provision of goods and services, it would be disadvantageous to a commercial provider if certain prospective buyers are excluded because of discrimination. Eliminating discrimination would expand the provider's market for the goods or services involved. Likewise, in situations where such provision for the disabled would amount to unjustifiable hardship, the providers could claim an exemption under the Bill.
12. Although the customer base may be expanded, the Bill may affect the banking business to the extent that the Bill requires that provision of banking services, such as granting loans, not be based on group characteristics which are discriminatory. This may mean more costs involved in conducting more detailed evaluation of individuals' merit, e.g. the ability to repay loans. Nevertheless, materially different circumstances (such as individuals' financial circumstances) could still justify differential treatment.
- 13 It is inevitable that some claims of discrimination will be made under the Bill. Some of these are expected to be settled by conciliation while some unresolved disputes would be litigated in courts. Under the Bill, the court could order remedies which include compensatory damages, reinstatement or punitive damages. In some circumstances, these would have financial implications on the parties (including employers, service providers, government, etc.) who committed discrimination. While there are concerns that the Bill would encourage frivolous litigation, high legal costs are already a deterrence against it. Moreover, the Bill does not prevent the court from

awarding legal costs in frivolous litigation or where allegations are made in bad faith. Redress of claims of discrimination is important to achieve social harmony. Establishing an Equal Opportunities Commission responsible for conciliation of claims of discrimination under the Bill is highly recommended. This was the intention of the draft Human Rights and Equal Opportunities Commission Bill, which was unfortunately rejected by the Governor.

#### SEX, MARITAL STATUS AND PREGNANCY

14. Discrimination on the basis of pregnancy in employment is already prohibited by the Employment Ordinance (Cap 57). The Bill supplements the existing legislation by creating civil liability where victims of discrimination may be awarded damages or be reinstated. Since employers should have already conformed their conduct to existing criminal law provisions, this Bill should, therefore, have limited impact on them.
15. Provisions in relation to prohibiting sexual harassment may involve additional administrative costs or financial resources in terms of educating staff and handling complaints. Nevertheless, measures to provide a work environment free of sexual harassment would reduce the financial losses it causes as a result of absenteeism, lower productivity and higher staff turnover, thereby cutting recruitment and training costs involved in getting replacements. For instance, it is estimated that sexual harassment cost the United States Federal Government \$267 million during the period May 1985 and May 1987. These figures represent the costs of replacing employees who left their jobs, paying sick pay to employees who missed work, and reduced individual and group productivity.
16. The Bill does not prohibit discrimination based on sex or marital status in relation to the terms of superannuation and provident funds; or in relation to the terms of insurance policies provided it is based on actuarial or statistical data and is reasonable.

#### FAMILY STATUS OR FAMILY RESPONSIBILITY

17. The Bill would require employers to reasonably accommodate employees with family responsibilities, for instance, in terms of work schedule. However, where materially different circumstances exist, such as inability to meet the job requirements, differential treatment is justified. Otherwise, Part III of the Bill would not have economic implications in particular.

#### SEXUALITY

18. Part IV of the Bill would not have economic implications in particular.

## RACE

- 19 Part V of the Bill would not have economic implications in particular.

## DISABILITY

20. The Bill would not affect refusal to hire disabled persons if they would be unable to carry out the inherent requirement of the job.
- 21 The Bill would require that reasonable accommodation be provided for the disabled in employment, education, access to places and vehicles, provision of goods and services, accommodation, etc. This will result in additional expenses for the employers, service providers or people involved. To the extent that such costs would amount to unjustifiable hardship, an exemption is available under the Bill.
22. The Bill requires that building approvals for new buildings, or for renovations of existing buildings requiring approval, should not be granted unless the relevant authority is satisfied that reasonable access will be provided for people with disabilities. Although Government buildings are exempted under the Buildings Ordinance, they are in fact designed in accordance with the "Design Manual - Access for the Disabled 1984" (which is being updated), as are most non-domestic buildings in the private sector. The legislation will not, therefore, increase construction costs greatly, if at all, in either sector.
- 23 The Bill does not prohibit discrimination based on disability in relation to the terms of insurance policies, superannuation and provident funds if it is based on actuarial or statistical data and is reasonable (or, if such data is not available, is reasonable).

## RELIGIOUS AND POLITICAL CONVICTION

- 24 Reasonable accommodation of the religious practices of individuals in employment and in other areas is expected. However, it should have minimal impact, if any at all, on business operations. Otherwise, Part VII of the Bill would not have economic implications in particular.

## AGE

- 25 Making compulsory retirement age unlawful is regarded as controversial and could impact on payments under various retirement schemes, human resources planning (including the structure of promotion). An amendment to the Bill will be proposed to exempt compulsory retirement age. Further study and public discussion are desirable

26. The Bill could affect certain existing legislation that is age discriminatory, such as the long service payment under the Employment Ordinance (Cap 57). Possible repeal of such provisions that are inconsistent with the Bill may create uncertainties on business operations. Therefore, amendments will be proposed to exempt acts done in compliance with a statute and to give the Administration a period of time not exceeding one year to review existing laws that may be inconsistent with the Bill.
27. The Bill does not prohibit discrimination based on age in relation to the terms (including premium charge) of insurance policies, superannuation and provident funds provided it is based on actuarial or statistical data and is reasonable.

#### SPENT CONVICTION

28. Employers are already obliged under the Rehabilitation of Offenders Ordinance (Cap 297) not to discriminate on the basis of spent conviction. The clauses in this Part are subject to Cap 297. Since employers should have already conformed their conduct to existing criminal law provisions, this Bill should, therefore, have limited impact on them.

#### TRADE UNION MEMBERSHIP

29. **Discrimination on the basis of trade union membership in employment is already prohibited by the Employment Ordinance (Cap 57).** The Bill supplements existing legislation by creating civil liability where victims of discrimination may be awarded damages or be reinstated. Since employers should have already conformed their conduct to existing criminal law provisions, this Bill should, therefore, have limited impact on them.

#### CONCLUSION

30. The Bill would have certain cost implications to business operations while at the same time it would have positive economic impact on the aggregate level. It is difficult to quantify in figures the costs and benefits. There is no evidence, however, suggesting equal opportunity legislation has caused any adverse impact on the economy in countries where similar laws have been adopted. It is difficult to give a full assessment of the economic implications of the Equal Opportunities Bill or other similar anti-discrimination legislation because it is virtually impossible to isolate numerous inter-related factors that are affecting the economy simultaneously.

Office of Anna Wu  
31 March, 1995

URGENT

For Comments and endorsement  
by April 3, 1995

THE HONG KONG COUNCIL OF SOCIAL SERVICE

POSITION PAPER ON SEX DISCRIMINATION BILL

BACKGROUND

1. In June 1994, the Government had announced the introduction of a legislation prohibiting sex discrimination in Hong Kong and the establishment of the Equal Opportunities Commission (EOC) as its enforcing machinery.
2. The Hong Kong Council of Social Service (HKCSS) has the following comments on the proposed Sex Discrimination Bill (SDB):

OVERALL COMMENTS

3. The introduction of the Bill denotes a great leap forward in affirming Government's commitment on gender equality.
4. The Bill clearly states that sexual inequalities had existed in important spheres of life and there are indirect discrimination against women, attributing from traditional sexual stereotyping, prescribed cultural norms and social attitude.

SPECIFIC COMMENTS

Scope of the Legislation

5. However, the Council is disappointed that the Bill is not comprehensive and narrow in its scope of protection on women's right.
  - 5.1 It does not cover provisions to outlaw discriminations on areas such as provision of goods, management of premises, welfare services, religious conviction, sexuality, education and facilities.
  - 5.2 Marital status and pregnancy discrimination still remain legal in all areas except employment.
  - 5.3 It does not mention any protection for women being discriminated against family responsibility, domestic violence, sexual assault and rape.
  - 5.4 No provision had been stated to forbid discrimination in Rural Village Representatives election. It is doubtful that the government desired to continue and perpetuate such unjust practice in blocking women from voting and candidacy.

- 5.5 No provision had been stated to guard against age discrimination; which becomes a growing problem as a person aged over 30 find himself/herself being excluded from job market. It is a great disappointment to the Bill that the whole issue of age is neglected.

### Spectrum of Exemptions

6. It is also disappointed to note that the Bill provides a wide range of exemptions which may legitimize several forms of unjustifiable discriminations and create loopholes and grey areas defeating the objective of promoting equal opportunities for men and women in Hong Kong.

- 6.1 A five year exemption is granted to small businesses with five or fewer employees.

In Hong Kong, the small businesses had employed at least 400,000 people (1993 figure). The 5-year grace period is too long to be well-justified. There is no justification for such a long 'adjustment period'.

- 6.2 Exemption to small House Policy in the New Territories

This exemption means a denial of the female inheritance rights of Land endorsed in the New Territories Land (Amendment) Bill. This will reinforce male patriarchy of economic advantage and political domination over rights of female in rural Villages. Government has failed to change it despite it is discriminatory and against the Bill of Rights.

- 6.3 Exemption to religious institutions

As an employer, religious institutions should not be permitted to discriminate against either sex.

- 6.4 Exemption to occupations where sex is a genuine qualification

This exception should be amended so as to assure that discrimination is reasonably applied under the circumstances and nature of the job.

- 6.5 Exemption to all "protective legislation"

These would continue to forbid women to enter into construction and industrial work.

## The Equal Opportunities Commission (EOC)

7. Enforcement is a vital concern. The EOC should be an effective guardian with speedy, accessible, affordable procedures and available support. Rights and Welfare of the victims should be accorded top priority. The commitment of EOC in conducting studies, promotional activities and public education programmes and initiating research on gender-related topics are most welcomed.

Besides,

- 7.1 The EOC should have power of adjudication. It is recommended that a tribunal should be set up under the EOC. It should not solely be playing a 'negotiating' and 'conciliating' role on any complaints or only for reducing the number of disputes to be resolved by proceeding.
- 7.2 Procedures for filing complaints, conducting formal investigation, issuing enforcement notice etc should be simple, informal and non-technical. The EOC should be allowed to draw up its own procedures.
- 7.3 Apart from the annual report and reports of formal investigation, the EOC should also disclose relevant information, with the privacy and identity of the victims protected and preserved, of conciliation cases it handles for public educational purposes and to increase its transparency.
- 7.4 The EOC should have wide representations, including grassroots women, women organisers, lawyers, social workers, interested individuals or non-governmental organizations etc. to address gender-related discrimination adequately.
- 7.5 The EOC should apply sanctions to any violation of legislative provisions and set targets for removal of existing discrimination through practical and available steps within a reasonable time frame.
- 7.6 The EOC should have the monetary support to provide legal assistance to victims or concerned parties in litigation of discriminatory cases, especially those cases not eligible for legal aid.
- 7.7 Monetary support should be available for the EOC to bring up individual cases or class action to the court.

## Code of Practice

8. To avoid any lengthy delay, the EOC should develop and issue Codes of Practice within a year after its formation. The code of practice would contain practical guidance for the public to comply with the legislation, possess legal binding power and clear and enforceable principles.



## SUMMARY

9. To reiterate, the following essential aspects should be incorporated into the Bill:
  - 9.1 Areas for exemptions should be further deliberated to prevent loophole and legitimize discrimination unless the circumstances are well-justified.
  - 9.2 Scope of legislation covered should be extended to all types of organization, i.e. public and private, as well as individuals.
  - 9.3 Specific provisions prohibiting discrimination in the enforcement of law and the administration of government programmes should be added.

March 29, 1995

反歧視大聯盟對性別歧視條例草案的意見  
與政務科何淑兒小姐的會見

Annex B

反歧視大聯盟支持制定一條全面的反歧視法案及成立平等機會委員會以有效處理社會歧視的問題。

性別歧視條例草案除應包括性別歧視及性騷擾之外，亦應包括年齡，家庭責任及性傾向有關的歧視。

香港工人目前失業及開工不足的情況日趨嚴重，尤以三十歲以上的婦女搵工更難，政府應立例消除就業上的年齡歧視。

婦女在就業上的同工不同酬情況亦十分嚴重，所有行業的平均工資，男性為每月 \$ 8256，而女性則只有 \$ 6837，為男性的83%。在42項行業中婦女工資高過男性的只有8項（如進出口，旅行社及空運，地產，股票以及理髮及美容等）。

對於因家庭責任或家庭崗位如已婚僱員及單親家庭的原因而遭受歧視的亦應予以法律上的保障。

本會認為政府的性別歧視法例一經簽署，便應付諸實行，而不須待頒佈實務守則後才施行。這些守則可作為指引而應以性別歧視法例為依據。同時社會上對性別歧視的討論已相當多，因此無須為小僱主提供5年寬限期。

婦女在選舉中平等投票權應獲明確規定，以保障新界婦女的權利受到維護。

性別歧視條例草案中的平等機會委員會應有權就其職權範圍內的不法行為採取法律行動。

本會對政府上星期向立法局平等機會法案委員會所表達將於通過性別歧視法案後以一年時間研究是否擴大其範圍，認為缺乏誠意，本會表示不滿，並重申要求政府將年齡，家庭責任及性傾向有關的歧視包括在性別歧視條例草案內。

本會要求政府盡速引入消除傷殘及其他歧視的法案，以法例保障人權法所宣示的人人平等，不受歧視的原則得以落實。

反歧視大聯盟  
主席 麥海華

1995年4月7日

# 對性別歧視條例草案有關有組織宗教能否得以豁免之意見

## 前言

基督教信仰歷來對世界各國的自由、平等及人權觀念起著極大的構成及推動作用。基督教認為人類無分男女，皆為上帝所創造，生而平等，是基督教信仰的基礎。香港的基督教教會及團體自十九世紀中開始，亦為改善本地婦女處境，進行了不少教育及倡議政策訂定的工作。

香港基督教協進會為本地教會之聯合性組織，過去四十一年來皆對社會上有違平等公義原則的現象，向大眾及政府積極提出意見。本會對近年日益浮現的性別歧視問題深表關注，並對政府即將設立性別歧視條例以落實推動兩性平等深表歡迎。

## 背景：

本文內容乃根據下列兩次會議撮要而成：

1. 3月8日舉行的“性別歧視條例草案”香港教牧諮詢大會，由香港基督教協進會婦女事工委員會聯同香港婦女基督徒協會及香港基督徒學會合辦。
2. 4月7日香港基督教協進會社會關注委員會會議

香港基督教協進會理解到基督徒群體有以下三項不同態度存在，本會將就此問題繼續探討。

## 內容：

- I 贊成有組織宗教得以豁免。政府及宗教團體應尊重政教分離的原則；對宗教團體內部的運作應盡量不予干涉為佳，繼續享有訂立宗教規條及任命神職人員的自由。
- II 反對有組織宗教能得以特別豁免。宗教團體作為社會上一重要意識傳遞架構，對社會價值體系影響重大；本港教會亦擔承佔總數量達六成的社會服務工作及不少各層面之教育工作，理應以身作則，實踐兩性平等的原則，不能借宗教之名歧視婦女。
- III 認為宗教團體基於本身的歷史發展、神學觀、教制的傳統因素及其信念的慣例，有組織宗教在聖職人士之任命或委任，可獲得豁免。而當宗教團體作為一個普通僱主，即非聖職人員的聘用、授權或授予資格時，皆須遵照“條例”進行（包括僱用過程及訂立僱員條款上）。

香港基督教協進會  
4月11日



香港婦女勞工協會  
HONG KONG WOMEN WORKERS ASSOCIATION

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## 〈性別歧視條例〉草案意見書

就政府去年提交〈性別歧視條例〉草案於立法局後，適逢貴組進行第一輪公聽會，本會於當日對草案內容已表達初步意見。

近半年來，形勢瞬息萬變，婦女在就業上遭受的年齡歧視，已達到非常嚴重及不合理的地步。本會現針對〈性別歧視條例〉草案中所包涵範圍的意見。

### 1. 政府態度

自政府發表〈男女平等綠皮書〉以來，本會一直提出婦女在就業上所遭遇的年齡及家庭責任歧視問題嚴重，而這些歧視乃性別歧視造成。去年六月，政府發表制訂〈性別歧視條例〉草案後，政府終於亦承認香港是存在有性別歧視問題。

然而，政府對婦女及勞工團體所提出將年齡及家庭責任歧視納入草案內的建議，一直都置若罔聞。但團體不斷反映婦女遭遇上述歧視問題日趨嚴重（尤其是年齡歧視），政府竟將就業方面的年齡歧視交由教統科處理，同時表示不作任何諮詢工作，也不會納入今年通過的〈性別歧視條例〉草案內。

政府表示教統科及政務科只作內部研究工作，在今年既開始，研究期為一年，對於這決定，本會表示非常憤怒！政府竟漠視過去幾屆團體不斷提交的意見，是對上述歧視以拖延手法處理，缺乏誠意去消除性別歧視！



## 2. 男女年齡歧視性質不同

社會上認為現時年齡歧視男女都有同樣存在，其實兩者所遭遇年齡歧視性質是有所不同。

男性主要因政府輸入外勞，僱主要廉價勞工，將一些「年紀較大」的工人擠出勞動市場；女性的年齡歧視，本質上是性別歧視所造成，再加上上述原因，令情況更為惡劣。

原因是社會上對婦女工作能力繆誤，認為婦女才達30歲，其工作能力會遞減或做事頑固及對事物接收力弱，對已婚婦女認為其照顧家庭而不會全力工作等。

相對來說，這種觀念，對男性則相反，認為30歲以上男性專業才開始；已婚更視為平穩成熟。

同時，婦女的年齡每樣貌有相關連，對其市場價值有密切關係。這種情況，以服務銷售業最為明顯，視聘用的婦女員工如店內出售商品一樣，是招徠客人的技倆，將婦女形象「商品化」。現時工業轉型，服務行業為主流，僱用很多員工，將婦女商品化的觀念，會影響婦女平等就業機會，這問題十分重要，要立刻處理。

因此，縱使男女同樣出現年齡歧視問題，但是婦女所受的打擊會較為嚴重。



### 3. 婦女遭受年齡歧視招式層出不窮

婦女工作能力隨年齡遞減及視為商品的觀念，導致婦女在就業上遇到的不平等情況，簡直層出不窮。

由於經濟轉型，工作形態及模式隨之而轉變。服務業工作特色是工時長及輪班工作，僱主多以兼職或長教工條件聘用。一些可以開放予30歲以上婦女的職位，多是工資低、無保障及工作條件苛刻工作。而一些條件及保障較佳的工作，亦基於上述觀念，大部份僱主要求聘用年輕婦女。

面對僱主利用年齡限制，使30歲以上婦女求职或轉工遭遇困難。現時僱主的苛刻工作條件，簡直像60年代沒有勞工法例處境一樣，沒有任何在工作上的保障。明知有資格受勞工法例保障，亦怯於搵工困難，只可啞忍。現時普遍上，婦女遭遇工資及工作條件隨年齡增長而日趨低落情況十分嚴重；同時，每天指定工作8-10小時，每週工作七天，亦視為時薪兼職。雖然達到享有勞工法例資格，卻沒有休息日及年假等基本福利。

這情況是跨行業出現，如貿易公司的信差及文員、連鎖快餐店（除經理及廚師外）的員工、超級市場的收銀及理貨員、零售業的信貸員、銀行櫃位員……等等。可以看到，香港婦女經濟地位正日益低落及邊緣化，對基層婦女影響既廣且深。



#### 4. 總結

本會對政府提出〈性別歧視條例〉草案，推動兩性平等，消除性別歧視的目標是支持的，認為草案能進一步推動及針對現時婦女面對歧視問題，其內容應作修訂，將範圍擴大及涵蓋年齡及家庭責任歧視，使婦女有一個平等權利！

香港婦女勞工協會

一九九五年四月七日

關注婦女權益小組  
 對平等機會條例草案及  
 性別歧視條例草案之意見書

DOCUMENT 127

二 我們是一班來自大角咀、旺角區的社區中心婦女組員，作為地區上的婦女，我們對於基層婦女面對的性別歧視有切身感受，更是關注。自九二年我們便開始參與支持男女平等的社會事件，爭取行動。而在多年婦女權益爭取中，政府對解決婦女面對歧視外境的態度，由否認、拖延到今日，政府在各方壓力下，承諾援引聯合國婦女公約，提出性別歧視條例草案，建議中有財政撥款，成立平等機會委員會及特別法庭處理有關訴訟；同時胡玉紅議員提出平等機會條例私人草案中，亦有針對性別歧視之範疇，這種轉變對保障婦女不受歧視似乎有積極作用；以下我們就保障婦女不受歧視之草案（法例）的要求提出意見。

對兩條草案之整體意見：

基於平等公義社會的渴求，我們是支持消除社會上任何形式的歧視，所以在審議中條例內容上，我們基本上是支持平等機會條例草案，但礙於私人草案不涉及任何財政承擔，實在令人擔心法例精神推行的可行性。而政府提出的〈性別歧視條例〉可說是政府面對兩性平等問題行出的第一步，但這一步實在太不是以保障婦女被歧視的處境。我們希望通過的法例除了有實質的推行財政外，更重要的是能全面保障婦女不受歧視。在此希望兩條法例能夠互取對方的良好精神，廣範吸取意見下完成。

法例訂立之基本精神：

消除性別歧視法例訂立的原意是改善婦女在社會上面對的種種歧視處境，所以有關消除性別歧視的基本精神，除了推廣兩性平等觀念外，更重要的是針對婦女實際處境，保障不受任何形式的歧視。



現時政府建議中的條例過於狹窄，實際未能十合婦女困境；例如：年齡歧視、家庭責任等都未提及。

所謂「婦女三不政策」，婦女就業受到嚴重的歧視，而這種歧視是將女性作為性象徵以招徠的工具，是女人汁難兼造，將女性作「花瓶」等對女性歧視觀念形成，是對女性直接歧視。這種觀念的剝奪或奪去婦女的經濟獨立和就業權利，使女性被迫依附男性；部份被虐婦女在沒有獨立能力，只可忍受丈夫的不合理對待，同時使婦女無法得到真正的平等機會！

四) 豁免/例外條款：

例外條款基本上是有需要的，但現在一切的法例，對於一些根據性別歧視、傳統觀念的規定在沒有反省下，便延續下去。例如在僱用豁免條件，部份政府機動部隊只招聘男性，甚至對於宗教的豁免方面，莫是教會內經常被批評有性別歧視，而教會內亦意見不一，所以條例一刀切似乎只是將法例收窄，更將部份被歧視處理置於門外。因此，我們建議必須設立審批制度，由申請豁免機構提出充分理由，或者上訴途徑，以酌情處理。

五) 特別法庭的設立：

建議將由特別法庭處理有關性別歧視訴訟，而現時一般法官都未必對兩性平等觀念有清晰的概念，可是法官的裁決是絕對影響法例執行，若使法例更能貫徹執行，在選取法官時必先以其態度開放程度為考慮，同時有需要要求該法官接受有關訓練。

而訴訟費用是直接影響弱能否行使其權利，而現法律援助的審查限額過於苛刻，所以在成立法庭的同時，更需要考慮資助有關受害人能夠不受訴訟費用限制。

## 平等机会委员会的组成:

平等机会委员会是法例主要的推广及执行机制，平等机会委员的决策，维系着妇女的权益。而現時基层妇女受到的不平等对待更是尖锐，所以要保障妇女不受歧视，適切针对妇女面对的歧视处境，必须要有一个适当的渠道了解及反映妇女被歧视情况。因此我们要求委员会的组成必须有基层妇女代表，以反映她们的需求及困境。

## 1) 法例推广:

法例订定后我们依然担心妇女未必受惠，<sup>因此</sup>妇女未必知道自己的权利，申诉途径。所以法例的推广工作必需能够渗透到不同的社区群体，如社区宣传、在社区内设立接触点、资助一些地区上妇女团体去推广，使妇女有足够的途径知道法例的内容及保障的权利。

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明利综合家庭社会服务中心

关注妇女权益小组

一九九五年四月十一日

**SUBMISSION  
BY THE HONG KONG FEDERATION OF WOMEN  
ON THE SEX DISCRIMINATION BILL, 1994**

The Community Affairs Sub-committee of the Hong Kong Federation of Women ("HKFW") having studied the "Sex Discrimination Bill" ("the Bill") gazetted by the Hong Kong Government on the 14th October 1994, respectfully submits as follows :

1. HKFW supports the Government's move to ban sex discrimination through legislation, but is concerned that in enforcing the law, the harmonious relationship between employers and employees may be disturbed, therefore it supports Government's proposal to establish the Equal Opportunities Commission ("the Commission") and its decision to enforce the provisions relating to employment only when the codes of practice have been formulated. It also proposes the setting of a ceiling for the amount of compensation to be awarded in sex discrimination and sexual harassment claims, the strengthening of the advisory role of the Commission and the training of judges in dealing with sex discrimination and sexual harassment cases.

2. In responding to the City & New Territories Administration's consultation on the Green Paper on Equal Opportunities for Women and men (see HKFW Quarterly Issue No.

1), HKFW supported the banning of all forms of discrimination against women through legislative measures, but urged that the Government should do so through education, censuring and criticism to achieve such purpose and give to the victims the right to sue for compensation through legislation after a period of time. Sections 10(3) and (5) and the intention to delay enforcement of the labour related provisions until the formulation of the codes of practice are consistent with the spirit of our recommendation.

3. There are special features in our labour law which are inconsistent with the Bill :

- (1) According to the Employment Ordinance, every employer has the right to choose his or her employee, and to dismiss him/her on the giving of one month's notice or payment of one month's wages in lieu of the same, even though the employment or dismissal is due to sex discrimination. In the United Kingdom, the law prohibits unfair dismissal.
- (2) In dealing with labour dispute, the court will not make any order requiring the employer to employ the employee or requiring the employee to serve the employer. This is because when the basis of mutual trust is destroyed, there is no way for the employment relationship to continue and the Court will not compel it to continue. Therefore, if the employer has sexually harassed the employee or discriminated against him/her, the employee

is normally compelled to quit and claim damages against the employer, such damages is normally calculated on one month's wages. It is also settled law that no compensation for injury of feeling may be claimed in the case of wrongful dismissal.

- (3) The government has always adopted the principle of positive non-intervention. In recruitment of employees the employer will look at supply and demand and proceed on the basis that the best shall survive. The competitiveness of Hong Kong products depends very much on the free labour market.

**Sex discrimination is caused by traditional cultural and social factors that have existed for thousands of years and is not something that can be changed overnight. The purpose of the Bill is to declare sexual discrimination and sexual harassment unlawful so as to remove the disparity between men and women, thus creating a new cause of action.**

4. The criminal sanctions contained in the Bill are mainly to prevent false allegation, provision of false information or the refusal to provide information (see Sec. 18(5), 36(5), 40(4) and 64(4)). Apart from these provisions is the remedy of civil claim. The Bill simply states that claims may be made the subject of civil proceedings in like manner as any other claim in tort. In assessing damages in tort, we apply principles like restitution in integrum, causation, novus actus interveniens etc. However, damages in different kinds of tort

(e.g. personal injuries, defamation, trespass to land, trespass to person etc.) are assessed differently, and there are precedents of over a thousand years that serve as guidelines, but there is no such precedents for sex discrimination and sexual harassment cases in Hong Kong which are new causes of action. Recently, an internationally known firm of solicitors had an award made against them for US\$7.1 Million, which after reduction on appeal still came to more than US\$3 Million. In the recent case for sexual harassment involving a Hong Kong merchant in United States, the plaintiff is claiming more than US\$4 Million. Some people are of the view that such astronomical figure would only be awarded in a jury trial in the States. However, since we have no yardstick to follow, no one can predict what will happen when such cases are dealt with in Hong Kong.

5. Previously, HKFW suggested that sex discrimination and sexual harassment cases should be dealt with in the Labour Tribunal so as to reduce costs (no legal representation is allowed in cases tried before the Labour Tribunal), but the Labour Tribunal has rejected jurisdiction on the ground that they are too complicated and the present Bill intends to deal with the same through a special court at the District Court level where parties may be entitled to legal aid. Therefore some greedy employee might try his/her luck using public fund to prosecute his/her claim in hope to gain substantial compensation if he/she succeed, and the employer would be

reluctantly compelled to pay some compensation in order to avoid the trouble and incurring legal costs to defend himself/herself. Such litigation would harm the relationship between the employer and employee.

6. HKFW therefore submits that the criteria for assessing damages should be clearly laid down in the Bill. When the law creates a new cause of action, often it will provide a ceiling for the amount recoverable so that citizens may know the consequences of their wrongful act. When the Fatal Accidents Act 1846 created a new cause of action for dependents of a deceased, the criteria for assessing damages were laid down in s.2. When the Trade Union and Labour Relations Act was first enacted, the criteria for assessment of damages for wrongful dismissal were also laid down although these criteria now no longer apply (Halsbury's Laws of England, 4th Ed., Vol 12, para. 1123, note 8). Under Sec. 15 of the Employment Ordinance, an employer who wrongfully dismisses his employee during her pregnancy must pay to the employee the usual wages in lieu of notice, 7 days' pay and the wages which she would be entitled during the period of her maternity leave had she not been dismissed. In England, the amount for compensation under the Sex Discrimination Act 1975, must not exceed the amount for the time being specified in the Trade Union and Labour Relations Act 1974, Sch. I, para. 20(I)(b), which was £5,200 but revised by the Unfair Dismissal (Increase of Compensation Limit) Order 1989 to £8,925. It is therefore no novelty that

damages or compensation recoverable under a statute be limited.

7. According to the Casebook of Decisions on Sex Discrimination and Equal Pay 1976-1988, awards for injury of feeling ranged from £100 - 3,000 (see Birmingham IT Case No. 8097/94, Leeds IT Case 35839/86, Dr. Noone v. North West Thames Regional Health Authority and Alexander v. The Home Office) and according to the 1992 Survey of Industrial Tribunal Applications, the awards made in respect of sex discrimination cases were as follows :-

	<u>Nos.</u>	<u>£</u>
Less than £100	0	0.0
£100 - £149	2	3.1
£150 - £199	0	0.0
£200 - £299	3	4.6
£300 - £399	3	4.6
£400 - £499	1	1.5
£500 - £749	10	15.4
£750 - £999	1	1.5
£1,000 - £1,499	15	23.1
£1,500 - £1,999	9	13.9
£2,000 - £2,999	5	7.7
£3,000 - £3,999	6	9.2
£4,000 - £4,999	3	4.6
£5,000 - £5,999	2	2.1
£6,000 - £6,999	4	6.2
£7,000 - £7,999	0	0.0
£8,000 and over	1	1.5
All	65	100.0
Median Award		£1,416

with over 50% of the awards under £1,500. Bearing in mind that in Hong Kong, the basic measure for wrongful dismissal is the sum the employee would have earned (net of tax) in the period of notice he should have been given, or in the case of a fixed term contract without any notice provision, the sum he



would have earned to the date of expiry of the contract, the award would be considerably less if applied to Hong Kong. Furthermore, there is the plaintiff's obligation to mitigate the loss. Since the purpose of the Bill is not to create new economic rights but to eliminate discrimination against women, any adverse effect of the dismissal on the plaintiff's reputation and skill would be vindicated by the court condemning the conduct of the defendant, which is itself more important than the pecuniary award the plaintiff will obtain. If the amount of claim is limited, it would discourage frivolous litigation so that only those with genuine claims will bring their cases before the court and it would not be worthwhile for the greedy ones to try their luck for the limited amount.

Although the Rules Committee has power to make rules prohibiting the court from awarding costs against the applicant, we feel that it should be discretionary and shall not apply to every case in order to avoid abuse of process of the court. We also agree that there should be time limit of one year for prosecuting the claims.

8. We support the establishment of the Equal Opportunities Commission. Its role as the promoter of equal opportunities and in elimination of discrimination, its advisory status and its duty in carrying out the functions under the Ordinance are important in ensuring the effectiveness of the Bill. In particular, its assistance to the aggrieved persons and power

of conciliation are important. Therefore, it is most important that information relating to sex discrimination and sexual harassment be readily accessible to the public in order to enable them to decide whether or not to file a claim with the court.

9. The advisory role of the Committee is also important. In other countries, the Commission would visit factories and enterprises to discuss with them how working conditions can be improved so as to avoid sex discrimination and sexual harassment and how to deal with the staff's complaints. This is well within the scope of Sec. 57. Judging from the good work done by the Bribery Prevention Advisory Committee of the ICAC, much could be achieved through such role.

10. Formulation of Codes of Practice is another important role of the Commission. It is noted that the term is in plural number which implies that there may be different Codes of Practice to suit different types of establishments or trades. Anti-discrimination practice can only be sustainable if those who are most affected by it will participate in the formulation of the Code. In many of the larger firms or institutions in Hong Kong, there are already codes of practice but what is suitable to them may not be suitable for smaller firms or establishments. We agree that until the code of practice is gazetted, proceedings should not be taken as education of the public is necessary for the effectual handling of complaints.

We also agree that small businesses should be given a 5 year period to get acquainted with the provisions of the law and to adjust its staff structure accordingly.

11. HKFW would reiterate the call for more women or gender-sensitized persons to be appointed to the bench (see HKFW Quarterly Issue No. 3). As anti-discrimination practice is new to the judiciary as well as to the legal profession, it takes time for the judges of the special court to acquire the skill in dealing with such claims and to combine the experience of other countries with the local situation in such a way as to provide redress to the claimants and justice for all.

12. At present, Hong Kong is facing a number of challenges in maintaining its prosperity : the high production cost, the removal of manufacturing sectors to China, the financial stringency strategy of PRC etc. It is a matter of survival rather than expansion for our labour market. If in moving towards equality, we arbitrarily introduce to the society new standards and rules which would disturb the harmonious relationship between employers and employees, we will be restricting women's right to work and their right of getting employment because entrepreneurs will look elsewhere for their business opportunities if such standards and rules make it too complicated for them to operate in Hong Kong. The advancement of equality for men and women must be made sustainable to our economic development and not just high-flown ideology.

13. In fact, the enforcement of sex discrimination legislation is by no means easy. If the law includes other forms of discrimination, it will even be more complicated and beyond the comprehension of those affected and those enforcing it. According to the experience in New South Wales, sex discrimination claims rank far above race, racial vilification, physical impairment, homosexuality, marital status, compulsory retirement, intellectual impairment and victimization etc. as the major ground of complaints received by their Anti-Discrimination Board in 1991/92, and many of the complaints were outside the scope of the Equal Opportunities Act. After consultation with the Anti-Discrimination Board, only a small portion of them went to court. Therefore, we cannot support the "Equal Opportunities Bill" motioned by the Hon. Anna Wu because it covers too wide a scope and it will unduly burden the court with cases many of which would have been thrown out since the latter Bill does not provide for the establishment of the Equal Opportunities Commission or the screening of cases by it. If we have acquired sufficient experience from the Sex Discrimination Bill, then we may extend legislative protection to other fields of discrimination, otherwise we would be ~~better than~~ opening up the Pandora's Box, not knowing what the law would lead us to, as a result, even what we wish to achieve for eliminating discrimination against women would be lost.

14. However, we support the Hon. Anna Wu's proposal that protection should be extended to discrimination on the ground of age because women are more seriously affected on this ground than men. Due to the change in the mode of industry, we often find it difficult to get a job not that they are physically unfit, but simply because the young are preferred. We would also urge the Government to schedule a time frame for the elimination of other forms of discrimination contained in the Equal Opportunities Bill so that in due course there will be human rights for all.

# 香港各界婦女聯合協進會對 性別歧視條例草案意見書

香港各界婦女聯合協進會（婦協）社會事務小組經研究政府于一九九四年十月十四日刊登在憲報的「性別歧視條例草案」，發表了以下意見：

婦協支持政府立法消除性別歧視，但顧慮在執行時擾亂現時勞資關係，因此支持政府建議在平等機會委員會（委員會）制定實務守則後才開始施行與僱傭事宜有關的條文，婦協亦建議在性別歧視及性騷擾案件設立賠償上限，加強委員會的諮詢工作，同時積極培訓法官處理性別歧視和性騷擾案的專長。

婦協于一九九三年十二月四日呈政務總署回應「男女平等機會綠皮書」（見婦協季刊第一期）即支持立法消除對婦女一切形式歧視，但主張先以教育、譴責和批評去推動，經過一個時期，以立法給予僱員追討賠償的機會。現時草案第10(3)條及(5)條，以及暫緩執行僱傭事宜有關條文，直至實務守則訂定為止，都符合這個精神。

現時本港勞資關係，在法律上有獨特的地方，和草案不甚吻合：

- 一、按僱傭條例，僱主有權選擇他們的僱員，有權以一個月通知或多付一個月工資，開除僱員，就算是基于性別歧視的理由，也不受任何限制，英國則有不公平解僱法律，沒有理由，

不能隨意開除員工。

- 二、在處理勞資糾紛時，法庭不會下令要求僱主必須僱用僱員，或僱員必須為僱主服務，這是根據衡平法的原則，因為當互相信任的基礎已被摧毀時，僱傭關係便沒法繼續存在，因此即使僱主作出不合理行為，導致僱員被迫辭職，僱員也只能要求賠償損失，通常以一個月薪金計算，而法律上僱主無須支付僱員精神上的損失。
- 三、政府一向採取積極不干預政策，僱主在招聘方面，完全取決于市場的供求，因此僱聘在優生劣汰原則下進行。香港產品的競爭力，有賴勞工自由市場。

性別歧視，是千多年來傳統文化與社會因素所形成，並非一朝一夕可以更改的觀念，現時新法例草案，把性別歧視和性騷擾列為非法行為，使之成為前此所未有的起訴理由，目的在達致男女平等。

草案的刑事責任部份，主要是防止誣告，提供假資料，或拒絕提供資料（見第18(5)、36(5)、40(4)及64(4)節，除外就是民事訴訟，申請禁制令和追討賠償。草案簡單地說追討賠償，用民事侵權的原則：（即恢復以前狀況，考慮損失因何引起，以及有無第三者介入等等），但並沒有說清楚計算方式，不同的民事侵權，賠償損失的計算不同：例如因疏忽引致的傷亡、誹謗、霸佔土地、侵害人身等，都有計算的方法，這些案件，有千多年的案例可作參考，而性別歧視和性騷擾在香港無例可援。最近美國一家國際知名的律師行，因性騷擾被裁決要付七百一十萬美元的賠償，雖然上訴後減少，仍要付三百多萬美元之賠償金，近日美國

一宗與香港商人有關的性騷擾案，原告索償達四百萬美元。有人認為，在美國賠償額由陪審員去決定，才会有天文數字，但是如果在香港沒有已定的尺度，很難預料裁決的結果會是怎樣。

婦協以前建議，性別歧視與性騷擾案件，應在勞資審裁處去處理，以減少訴訟費(勞資審裁處雙方都不能聘請律師出庭代表)，可是勞資審裁處以太複雜為理由，拒絕受理，所以現時草案改由地方法院去處理，僱員(或僱主)都可以申請法律援助。因此，有些貪婪的僱員，不惜以公費去提出訴訟，僱主為了避免麻煩，被迫付出一些代價去和解，以減少訟費的負擔。這些訴訟損害僱傭雙方的和諧關係。

當法律創立新的責任，許多時也會定一個上限，讓市民知道他們要負的責任究竟會達到什麼程度：

在英國，當一八四六年意外傷亡條例首次給予死者扶養遺屬起訴權時，賠償計算方法在法律上闡明。同時，英國的工會及勞資關係法案最初通過時，亦有把不公平解僱的賠償辦法開列出來，香港的僱傭條例第15節，說清楚一個女僱員因懷孕被開除時，賠償金額限于代替通知終止合約期內的薪金，加上七天薪金和產假期內應得的薪金。在英國一九七三年通過性別歧視法案時第65(2)節規定賠償額不超過五千二百英鎊，在一九八九年增加到至高不超過八千九百二十五英鎊。

按照英國性別歧視案件訴訟案例，七六至八八年間的判例，精神損失賠償由一百英鎊至三千英鎊不等，而按1992年工業審裁處的性別歧視案普查，50%以上案件的總賠償額低於一千五百英鎊：



賠償額	案件數目	比率
少于100英鎊	0	0%
100-149英鎊	2	3.1%
150-199英鎊	0	0%
200-299英鎊	3	4.6%
300-399英鎊	3	4.6%
400-499英鎊	1	1.5%
500-749英鎊	10	15.4%
750-999英鎊	1	1.5%
1000-1499英鎊	15	23.1%
1500-1999英鎊	9	13.9%
2000-2999英鎊	5	7.7%
3000-3999英鎊	6	9.2%
4000-4999英鎊	3	4.6%
5000-5999英鎊	2	2.1%
6000-6999英鎊	4	6.2%
7000-7999英鎊	0	0%
8000英鎊-以上	1	1.5%
	共65件	100%

中位數字 一千四百一十六英鎊

在英國，就業有保障，香港沒有。通常在香港不合法解僱只需付給僱員一筆等于應給予通知期的薪金，即一個月薪金，所以在香港賠償解僱計算應比英國少，而且新條例的通過目的並不是為創造新的經濟權益，而是在移風異俗。如果法庭裁定僱主有性騷擾或性別歧視行為，那就是受害人的最大滿足。如果賠償金有上限，就會減少無謂的訴訟，真正受損害的人才會到法庭去討個

公道，而非抱僥倖心理去作一次賭博。。至于上限若干，應由政府諮詢後才作出決定。

草案特別聲明法庭有權免除申請人支付訴訟費，可能鼓勵濫用訴訟程序。我們認為只在適當的案件才可以行使這個權力。我們亦同意所定十二個月起訴時限。

婦協支持平等機會委員會的設立，特別是因為它在提倡男女平等機會和消除歧視的功能，以及提供資訊及援助方面，可以保證條例的實施。委員會必須容易為公眾接觸，幫助申請人了解什麼是性別歧視或性騷擾，俾決定是否起訴。委員會亦可調解勞資在這方面的糾紛。從廉政公署防止貪污委員會的工作可見到，委員會可以產生極大作用，協調勞資關係，改善工作環境以避免性別歧視或性騷擾，協助勞資雙方如何處理投訴和有關問題。

訂立實務守則亦是十分重要，不同行業可能要有不同的實務守則，反性別歧視方法必須由受它最大影響的人共同參與策劃，才能有持續性。現時香港許多大洋行和機關在這方面已有指引，但是適合它們的未必適合小型企業，因此我們同意要在實務守則訂下來以後才執行僱傭方面的條文，我們亦認為公眾需要一段時間接受教育，因此同意小型企業應有五年時間改變職工架構去適應。

婦協一直要求更多婦女和熟識婦女問題的人獲提升或加入司法行列，去處理這類案件（見婦協季刊第三期）。法官與法律界亦需時日去熟習這些案件的原則，吸取其他國家的經驗，結合本地情況，使申請人得到補救辦法，而人人得到公正的裁決。

現時香港經濟正面臨許多挑戰，包括生產成本高漲，工業向內地遷移，國內的宏觀調控及經濟收緊。這些情況都影響投資等等。勞工方面保持現狀已不易，如果在爭取男女平等的同時，我們使勞資關係惡化，使工商業在港運作太複雜，結果投資者選擇他去，反而損害婦女就業的機會，那就是得不償失。因此在爭取男女平等機會時，我們不能單靠唱高調，而必須顧及經濟發展的承受力。

其實性別歧視條例的實施，並非容易的事。我們需要一段時間去適應。按澳洲南威爾斯省的經驗，性別歧視佔所有歧視之首，其他種族、弱能、同性戀、婚姻狀況、年齡、弱智佔較少部份。而且其他方面的歧視較難界定，故此我們不贊成胡紅玉議員提出的私人草案「平等機會條例草案」。如果性別歧視和性騷擾方面做好，就可以伸展到其他方面。否則我們通過一條法律，不能控制它的實施，等于把病毒從彭多娜的盒子放出來，不可收拾，而一切受歧視的人都得不到好處。

況且「平等機會條例草案」，沒有委員會去做諮詢調解工作，一切糾紛交由法庭處理。因而使工作繁重的法庭，增加更大而無謂的負擔。澳洲的經驗告訴我們，很大部份的申訴，都不入此法案範圍，結果只有少數案件需由法庭處理。

但是我們支持胡議員的建議，把年齡歧視加入現有草案。由於香港工業在轉型中，服務行業正在擴大。有些行業在選擇婦女員工時，對年齡稍大的有不公平的例子，日見普通。許多時並非因為她們的體力幹不來。年齡歧視對婦女影響較大。我們亦建議政府考慮情況，制定時間表，把其他方面的歧視，續步以立法消除，以保障人權。

**A SUBMISSION TO LEGISLATIVE COUNCIL  
FROM "HORIZONS"  
ON  
EQUAL OPPORTUNITIES BILL**

Date : 3. April 1995

## OBJECTIVE OF SUBMISSION

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- ◆ Give an overview on the lifestyle difficulties unique to gay men and lesbian women in Hong Kong
- ◆ Introduction to HORIZONS' services for the people of Hong Kong
- ◆ Findings, Observations and Conclusions fro HORIZONS' phone counselling services
- ◆ Show how the Equal Opportunities Bill, together with HORIZONS' vision, will benefit society at large and help integrate gay and lesbian people as contributing members of society

## DIFFICULTIES FACED BY GAYS & LESBIANS IN HK

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Though there are increasing evidence from mental health researchers that homosexuality is inherent in human nature, the general environment in HK for gays & lesbians has been prohibitive and discouraging

The typical homosexual in HK lives under constant stress & pressure from various sources, which includes

- Family : Fear of being rejected / fulfilment of obligatory familial duties like getting married and producing offsprings
- The workplace : Fear of ridicule / job security once sexual orientation is exposed / discovered
- Peer Pressure : Fear of being ridiculed, rejected or being the recipient of various types of abuse, blackmail etc.

## DIFFICULTIES FACED BY GAYS & LESBIANS IN HK

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The situation is further aggravated by sensational media reports which reinforces distorted stereotypes like

gay sexual behaviour = promiscuity / perversity  
 gays = Transvestite / effeminate / paedophile  
 gays = AIDS = Death

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These recurrent negative messages are internalised by the individual, which leads to homosexuals :

- ◆ Having low self worth / self-esteem and self-confidence
- ◆ Do not accept themselves and their condition
- ◆ Frustrated with life from lack of a caring, supportive and healthy environment
- ◆ Distant relationships with family and peers

Therefore it comes as no surprise that significant numbers of homosexuals are driven to an unhealthy lifestyle of the stereotypical "underground" subculture, and feel no need to live responsibly

## HORIZONS' SERVICES

- ◆ HORIZONS is a Government registered voluntary organisation which aims at providing counselling and support of lesbians, gays, their family and their friends; and is not political in nature

- ◆ Our core operations include :-

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The Counselling Hotline

Manned by volunteers trained rigorously, it provides over-the-phone peer counselling service on "coming out", relationship and safer sex issues; in co-operation with other social service organisations like AIDS CONCERN

The Support Groups

Provides more in-depth peer counselling support in a group situation. Focus more on interaction, learning and reflection

Special Interests Groups

Offers wholesome alternatives to the stereotypical "scene", with the hope of encouraging healthy personal development in a warm, caring and friendly environment



## INDICATIONS FROM OUR PHONELINE REPORTS

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- ◆ Ever since the inauguration of our phoneline service in Jan 1992, we have received 5,000 calls from gays and lesbians
- ◆ 18%\* of them are what we term as "Coming Out", which they are confused about their sexuality, and its implications on their personal, professional and social life. This confusion would have been unnecessary had there be a more permissive and accomodating social climate towards gays & lesbian
- ◆ 20%\* of the calls touched on same-sex relationship issues. Most of them are unable to sustain a long term relationship with a same sex partner out of social pressure, and resigned to promiscuity as a form of denial of its existence
- ◆ 55% comprises of what we term as information calls which reflect a general lack of support systems and a general feeling of helplessness and frustration towards themselves being gay/lesbian
- ◆ We reinforced safer sex practice on every call we receive
- ◆ We also received occasional callers regarding issues of blackmail, physical abuse, rape and even suicides
- \* These calls are of more serious nature, which usually take more time

## HORIZONS' VISION & THE EQUAL OPPORTUNITIES BILL

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- ◆ HORIZONS believes that people should be recognised equally regardless gender and sexual orientation, and be granted equal life opportunities. This is essential for maximising the potential of each individual to contribute towards society
- ◆ Through empowering gays & lesbians in accepting their sexual orientation, get over with their self doubt and move on; we believe our counselling and support service has a lot in common with the spirit of the Equal Opportunities Bill
- ◆ Though we do not expect the Equal Opportunities Bill to change the current social environment for gays & lesbians overnight, we see this more as a cornerstone in fostering social acceptance and nurture understanding and love of the less-understood segments of society, therefore providing new opportunities for personal growth and development, which will in turn encourage them to make bigger and better contributions towards HK society

**THANK YOU FOR YOUR ATTENTION**

**Kong Kin Pong  
For and on behalf of  
HORIZONS  
G.P.O. Box 6837**

The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong  
Tel (852) 537-2467 Fax (852) 530-2018

FACSIMILE MESSAGE

TO Jonathan Daw NO OF PAGES (INCLUDING THIS ONE) 5  
Stephen Lam  
FROM Adam Mayes DATE 4/4/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY  
MESSAGE .

Draft letter to President re. relevancy of amendments to SDB

The captioned letter is attached. We would very much appreciate hearing any  
comments, views or suggestions you may have.

Thanks,

6 April 1995

**DRAFT**

The Hon. Sir John Swaine, KBE, QC, JP  
President of the Legislative Council  
Legislative Council Building  
8 Jackson Road  
Hong Kong

Dear Sir John,

Relevancy to the Sex Discrimination Bill of amendments  
concerning family responsibility, age and sexuality

I would like to seek your advice on whether certain amendments I propose to make to the Sex Discrimination Bill [SDB] are, under Standing Order 45(4)(a), relevant to its subject matter. The amendments concerned are:

1. Amendments to prohibit discrimination on the ground of family responsibility, in much the same manner that Parts II-IV of the SDB now prohibit sex discrimination (cf. Part III of the Equal Opportunities Bill).
2. Amendments similarly prohibiting discrimination on the ground of age (cf. Part VIII of the Equal Opportunities Bill).
3. Amendments similarly prohibiting discrimination on the ground of sexuality (cf. Part IV of the Equal Opportunities Bill).

My reasons for believing the amendments to be relevant follow.

*General principles of the bill*

Notwithstanding its short title, the bill's ambit is wider than sex discrimination as such. The bill addresses marital status and pregnancy discrimination as well (cl. 6-7), even though both are distinct from sex discrimination and the former bears no intrinsic connection to sex discrimination at all.

The essential subject matter of the bill is discrimination against women, not sex discrimination as such. The bill originated from public concern about women's position in society, and is meant to fulfil the Administration's law-making obligations under the Convention on the Elimination of All Forms of

Discrimination Against Women soon to be extended to Hong Kong. The bill's language clearly signals its concern for women in particular, for example in Parts III and IV which define each of the discriminatory acts prohibited by the bill in terms of "discrimination against women."

The bill targets several types of discrimination — sex discrimination, marital status discrimination and pregnancy discrimination — in order to dismantle the immense variety of traditional attitudes and practices that place women at a disadvantage in society. Although none of these three types of discrimination is *per se* discrimination against women, all three fit properly into the bill on the basis of a realistic assessment of their effects, which in practice fall mainly on women. Age discrimination and family responsibility discrimination, despite their omission from the bill as it now stands, are equally significant types of discrimination against women and merit a place in the bill on the same basis.

The principle of even-handedness, or equal treatment, is fundamental to anti-discrimination law. Because of this, although each form of discrimination brought into the bill is included because of its relevance to women, each also carries with it implications that may extend beyond discrimination against women in particular. For example, the bill recognises — despite the language of Parts III and IV cited above — that the protection of sex discrimination law must be extended to men as well as women. The bill as it stands, however, does not recognise another important dimension of sex discrimination, namely its relation to discrimination on the ground of sexuality. This dimension should be considered implicit in the bill because of the interpretation of "sex" adopted for anti-discrimination purposes under the International Covenant on Civil and Political Rights.

#### *Discrimination on the ground of family responsibility*

The bill's provisions relating to marital status already cover family responsibility discrimination in part, and draw the full range of family responsibility issues into the bill by implication. As a practical matter, marital status discrimination can be coherently considered only when considered together with family responsibility discrimination.

The bill (cl. 2(1)) defines marital status as the status of being single, married, married but separated, divorced or widowed. Family responsibility may be defined as having responsibility for the care of another person, or the status of being a particular relative or the relative of a particular person (cf. cl. 3(1) of the Equal Opportunities Bill). As can be seen from these definitions, marital status may be understood as a subcategory of family responsibility. The bill as it now stands chooses to cover only the narrower scope of discrimination of this type, a troublesome choice both in practice and in principle.

In principle, family responsibility discrimination has greater relevance to women than marital status discrimination. Women overwhelmingly bear

responsibility for care of children, and it is discrimination against women on this basis that is the main concern expressed by women's groups, not discrimination on the basis of marital status as such.

In practice, the issues raised by the two types of discrimination overlap to a degree that make separate consideration of them problematic. Marital status distinctions are commonly used as a proxy for family responsibility considerations. Prohibiting marital status discrimination encourages the substitution of distinctions based on family responsibility, which may or may not represent a real improvement. Benefit arrangements, for example, are often made on the assumption that married persons have larger households than unmarried persons. Whether tying such arrangements directly to household size makes them more reasonable depends on the definition of "household" adopted, in light of the benefits at stake — a consideration missed by a marital status analysis of the issue. Such issues can be dealt with effectively only if both, related types of discrimination are considered.

#### *Discrimination on the ground of age*

Although the bill as it stands accords no recognition to age discrimination, the impact of that form of discrimination on women is probably more severe than that of marital status discrimination. Women's groups have consistently shown great concern about age discrimination, which in the employment field often blocks re-entry into the workforce by women who left work to assume child-care responsibilities. The consultation exercises undertaken by both the Administration and the bills committee have shown a widespread public perception that age discrimination is a serious burden on women. My own office has received some 2,000 individually-signed petitions from women distressed by age restrictions. These views have been and will continue to inform legislators' deliberations on this bill.

A partial remedy for discriminatory age restrictions may sometimes be available by treating the restrictions as indirect sex discrimination. Because the sex discrimination approach to age restrictions depends on comparison with men in the same circumstances, however, its effectiveness is seriously undermined by widespread sex segregation in the labour market. Only a direct, age discrimination approach can effectively resolve this predicament. The Administration's reluctance to address age discrimination does not alter the fact that it is a significant form of discrimination against women, and should not arbitrarily delimit the Legislative Council's consideration of a bill addressing that subject matter.

#### *Discrimination on the ground of sexuality*

Discrimination on the basis of sex may reasonably be held to include discrimination based on sexuality. This was made clear by the Human Rights Committee established under the International Covenant on Civil and Political

Rights [ICCPR], which has adopted the view that the reference to “sex” in the ICCPR’s anti-discrimination provisions (arts. 2(1) and 26) is to be taken as including sexual orientation (*Nicholas Toonen v. Australia*, Communication No. 488/1992, 31 March 1994).

Section 4 of the Bill of Rights Ordinance (Cap. 383) provides that all legislation enacted after its commencement shall, to the extent it admits of such a construction, be construed so as to be consistent with the ICCPR as applied to Hong Kong. The ICCPR has special relevance to the SDB because upon enactment the bill will serve as a partial fulfilment of obligations under the ICCPR (as well as other international instruments) to combat discrimination. The bill is also a partial fulfilment of the Administration’s commitment during consideration of the Bill of Rights Ordinance to enact detailed, subsequent legislation to fill the gaps left by that Ordinance’s application to the Government and public authorities only.

While the Human Rights Committee’s views on the ICCPR are not formally binding as a matter of international law, they are highly authoritative. The Administration has regularly relied on the Committee’s General Comments and on its decisions under the First Optional Protocol (such as the *Nicholas Toonen* decision cited above) in the Administration’s own legal advice as well as in cases before the courts under the Bill of Rights Ordinance. “Sex” for purposes of the bill may therefore already include sexuality as well as biological sex. While the Administration has offered the opinion that the sexual harassment clauses of the bill (cl. 20-1, 32-3) cover harassment by persons of the same sex as well as by those of the opposite sex of the victim, it has not made clear the bill’s general relation to sexuality discrimination as such. Amendments to clarify this matter are integrally relevant to the bill.

At your convenience, please feel free to respond separately with respect to each of the three sets of proposed amendments. I look forward to hearing from you, and thank you for your consideration and advice.

Yours sincerely,

Anna Wu

cc. Legal Adviser



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立法局秘書處  
Legislative Council Secretariat

6 April 1995

Mr Adam Mayes  
c/o the Hon Anna WU's office  
Rm 415  
Central Government Offices  
West Wing  
Ice House Street  
Hong Kong

Dear Adam

**Draft letter to the President**  
**re: relevancy of amendments to SDB**

Thank you for your fax of 4 April 1995. On the form of the draft letter my comments are-

1. It would be better to make it clear that Hon Anna WU is seeking a "private ruling" rather than mere advice. I enclose an extract from Erskine May on the practice re private rulings.
2. It may not be clear to the President just what amendments are proposed. The "cf." Formula in para 1 gives some indication but it would be helpful to be more specific, otherwise the President will be in doubt about the actual proposed amendments on which he is requested to rule. This does not necessarily mean that the detailed drafting must be supplied, but at least the substance of the proposed amendments should be identified (possibly by reference to clauses or parts of clauses in the EOB?).

On the substance of the letter, my views are-

1. The President's function (as Chairman of the Committee of the Whole Council) at committee stage is concerned with relevancy rather than merits of amendments.
2. Even on the widest construction of the SDB it would, I think, be difficult for him to accept that amendments prohibiting age discrimination, similar to clauses 164-187 of the EOB, are relevant to the SDB for the purposes of Standing Order 45(4)(a).
3. Amendments prohibiting discrimination on the ground of family responsibility or status, similar to clauses 43-50 of the EOB, would, arguably, be relevant to clause 6 and Part III (employment) since the proposed definitions of 'marital status' (SDB) and 'family responsibility or family status' (EOB) share a common conceptual basis (albeit that the latter is more extensive). However, the express limitation in the SDB to the employment field (Clause 6(1)) seems to me to be clearly intended to limit the scope of the bill to that field (insofar as marital status discrimination is concerned). Whether such a limitation is right in principle is an interesting question, but it raises issues which the President may consider are too substantial to be dealt with at Committee Stage.
4. The difficulty for amendments prohibiting discrimination on the ground of sexuality, similar to clauses 62-86 of the EOB lies, in my view, in the fact that although sexuality (or sexual orientation) is of course connected with gender, or biological sex, the former raises issues (e.g. fair treatment for homosexuals) on which the legislature may have diverse views (e.g. how best to legislate). Accordingly the President may face problems in allowing sexuality amendments to be introduced at committee stage since the issues will not have been debated at second reading. The President's difficulties in this regard will not be much reduced by the Toonen decision because it does not deal with the question which the President has to decide, namely whether this bill actually contains within its provisions sufficient material to rule sexuality as being within its scope. If the question for the President was "should the bill contain sexuality provisions?", then Toonen would be relevant (although the answer would be that even accepting a requirement under the ICCPR to legislate to prevent sexuality

4. (Continued)

discrimination, such requirement does not of itself mean that sex discrimination and sexuality discrimination provisions must go forward together in one bill). Hence I believe that a ruling on sexuality amendments will involve the President in a difficult balancing exercise in procedural terms. Quite apart from the task of resolving the question of relevance. I think he would also be concerned that de novo controversial amendments at committee stage might themselves generate last minute "further" amendments, leading to confusion in an already complicated piece of legislation. This could possibly be cured by a postponement of committee stage, but such a decision is not within the power of the President.

I hope the above is of assistance. Please feel free to discuss at any time.

Yours sincerely

(Jonathan Daw)  
Legal Adviser

[c:LA/Letter/Mayes]

breaches of privilege (see p 127). His action cannot be criticised incidentally in debate or upon any form of proceeding except a substantive motion (see p 325). His authority in the chair is fortified by many special powers which are referred to below. Confidence in the impartiality of the Speaker is an indispensable condition of the successful working of procedure, and many conventions exist which have as their object not only to ensure the impartiality of the Speaker but also to ensure that his impartiality is generally recognized. He takes no part in debate either in the House or in committee. He votes only when the voices are equal, and then only in accordance with rules which preclude an expression of opinion upon the merits of a question. Until recently his seat was often uncontested at a general election and (belonging to no party) he stands as 'the Speaker seeking re-election'.<sup>1</sup>

***Duties of the Speaker under usage.*** It is the duty of the Speaker to preserve the orderly conduct of debate by repressing disorder when it arises, by refusing to propose the question upon motions and amendments which are irregular, and by calling the attention of the House to bills which are out of order (and securing their withdrawal). He rules on points of order submitted to him by Members on questions either as they arise or in anticipation, but any notice of a question seeking a ruling must be notified to him privately and not placed upon the paper. The opinion of the Speaker cannot be sought in the House about any matter arising or likely to arise in a committee.<sup>2</sup> The Speaker is always ready to advise Members of all parties who consult him privately whether upon any action which they propose to take in the House or upon any questions of order which are likely to arise in its proceedings. Such private rulings of the Speaker generally settle the questions at issue, but they may, if necessary, be supplemented by rulings given from the chair.<sup>3</sup>

The Speaker's rulings, whether given in public or in private, constitute precedents by which subsequent Speakers, Members, and officers are guided. Such precedents are collected and in course of time may be formulated as principles, or rules of practice. It is largely by this method that the modern practice of the House of Commons has been developed.

A few examples may be given of motions and bills which for some irregularity the Speaker has not allowed to proceed.

***Motions.*** A motion which would create a charge upon the people and is not recommended by the Crown (pp 691-692); a motion touching the rights of the Crown, which has not received the royal consent (pp 561-562); a motion which anticipates a matter which stands for the future consideration of the House (pp 327-328), or which raises afresh a matter already decided during the current session (p 326)—these are examples of motions upon which the Speaker refuses to propose a question.

***Bills.*** The Speaker has ruled a private bill out of order on the ground that it should have been introduced<sup>d</sup> as a public bill (p 307), and has directed the

<sup>1</sup> See Report of the Select Committee on Parliamentary Elections (the Speaker's Seat), HC 98 (1938-39).

<sup>2</sup> HC Deb (1986-87) 114, c 676; *ibid* (1987-88) 125, c 464

<sup>3</sup> For the publication of certain private rulings in the Official Report, see p 5.

To Anna Wu  
From Eric Chow  
Date 6 4 95

Subject Suggestions regarding the Chambers' submission to the bills committee

**Employers' main arguments against the EOB:**

- the EOB is interventionist, even compared to the SDB, and thereby has adverse impact on the economy;
- discrimination can be better dealt with through education, rather than legislation;
- the EOB is too revolutionary and too much, a step-by-step approach (like the SDB) should be adopted instead;
- the EOB does not have an Equal Opportunities Commission, thus causing a lot of litigation;
- small business would have major difficulties in complying with the EOB (because the Bill is huge, there is no commission and there is no grace period);
- the EOB adopts the "punitive approach" (for instance, punitive damage can be awarded).

Since time would be very limited, it wouldn't be very helpful to spend time reiterating some old points or arguments (for instance, the fact that our proposed commission is rejected by the Governor, education is not adequate). I think we should specifically focus on age. It may be easier to pin them down on certain major issues (i.e. put it on record) by asking simple, short questions such as "do you agree...?"

**Suggestions on some issues that we should pin down the Chambers:**

1. whether they agree that government intervention can be justified under certain circumstances, such as labour shortage or where basic rights are involved;
2. whether they agree that the right to be treated equally is a basic right and so should be protected;
3. whether they agree that labour shortage or skill shortage is a problem adversely impacting on Hong Kong's economy, if so, whether they support Government's labour importation schemes to mitigate the problem;
4. whether they agree that age limits are widely imposed by employers and are creating difficulties for women over 30 (or men over 40) who are finding jobs;
5. whether they agree that promoting equal opportunity could expand the work force and thus alleviate labour shortage or skill shortage;
6. whether they consider fair and open employment practices are important to maintain social harmony and equal employment opportunity is an important element of such practices, and if so, whether it should be more preferable that all employers are adopting such practices as equal employment opportunity policies;
7. how many employers would openly commit to be bound by the guidelines for employers to promote equal employment opportunity;
8. whether they could put forward any concrete evidence that suggests that equal opportunity legislation (without imposing affirmative action) adversely affected any economy

# The Office of Anna Wu, Legislative Councillor

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Tel (852) 537-2467 Fax (852) 530-2018

## FACSIMILE MESSAGE

TO Anna Wu NO OF PAGES (INCLUDING THIS ONE): 5  
Andrew Byrnes  
Carole Petersen  
FROM Adam Mayes DATE 7/4/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY  
MESSAGE

### Re. Jonathan Daw's comments on draft letter to the President

- 1 Jonathan's substantive comments are surprising and very discouraging!
  - 1.1 Jonathan's view of what constitutes the subject matter of the bill is far narrower than ours. For example, he sees the limitation of marital status discrimination to the employment field only as limiting the principle of the bill — this implies that we may not even be able to amend the bill to extend marital status and pregnancy to the other areas of activity! Under this view, our argument that the subject matter of the bill is "discrimination against women" (making age relevant) is far-fetched indeed.
  - 1.2. He also view sexuality discrimination as introducing new considerations that cannot be accommodated at the committee stage. He doesn't seem impressed by the argument that the bill probably covers sexuality anyway under the Toonen decision (which would mean that these issues ought really be discussed at 2d reading anyway)
  - 1.3 If these comments represents the advice he will be giving the President, I think we need to meet him again, not really for advice but more in order to change his thinking, at least about the relevancy of sexuality and (something we didn't even realise would be at issue) of amendments extending family responsibility to all areas of activity.
- 2 As regards Jonathan's formal comments, I can easily redraft the introductory part to take them into account
  - 2.1 I think we can provide the President with adequate detail about the amendments by proposing new SDB clauses 7A, 7B & 7C defining "discrimination against a woman" on the ground respectively of age, family responsibility and sexuality. Those grounds would then be read into the substantive prohibitions and exceptions in SDB Parts III-VI
  - 2.2 This is not the drafting approach we adopted for the EOB (which has separate substantive parts for each ground), but the ruling should be the same in principle however we decide ultimately to amend the SDB (even if we ultimately want to add separate parts à la the EOB)

## **LEGISLATIVE COUNCIL BRIEF**

### **DISABILITY DISCRIMINATION BILL**

#### **INTRODUCTION**

At the meeting of the Executive Council on 11 April 1995, the Council ADVISED and the Governor ORDERED that the Disability Discrimination Bill should be introduced into the Legislative Council.

#### **BACKGROUND AND ARGUMENT**

2. On 19 July 1994, the Council ADVISED and the Governor ORDERED that

- (a) disability discrimination legislation should be enacted; and
- (b) the purview of the Equal Opportunities Commission, to be set up under the Sex Discrimination Bill, should be expanded to cover discrimination on the ground of disability.

3. In developing the Bill, we have looked at disability discrimination legislation elsewhere in the world. We have also examined the Sex Discrimination Bill which was introduced in the Legislative Council on 26 October 1994. Since it is proposed that the Equal Opportunity Commission should enforce the provisions of both the Sex Discrimination Bill (the SDB) and the Disability Discrimination Bill, the language and relevant provisions of the latter are based on the former. The other provisions relevant to people with a disability are based on the Australian Disability Discrimination Act 1992.

4. While the Bill will give people with a disability the means to fight against discrimination, harassment and vilification, we believe that public education also has a major role to play. Between 1993/94 and 1996/97, we are spending \$34 million on activities to promote a more positive attitude in the community towards people with a disability.

## **THE BILL**

5. The Bill will make discrimination and harassment on the ground of disability unlawful in specific areas including: employment; education; access to premises; provision of goods, facilities and services; clubs and sporting activities; and design of, and alteration or additions to, buildings.



### Definition of Disability

6. We based this key definition on that in the Australian Disability Discrimination Act since we wanted as wide a definition as possible to give maximum opportunity for people with a disability to seek redress under the legislation. The definition centres on the fact of physical or mental impairment whether past, present, future or imputed. It, therefore, covers a wide range of physical and mental disabilities including, for example, blindness, deafness, downs syndrome dyslexia and mental illness. People with HIV/AIDS will also be covered by the Bill, but where their condition could pose a direct threat to the health of others it will not be unlawful to discriminate against them.

### Definition of Discrimination (Clause 6)

7. Equally important is the definition of discrimination. A person discriminates against another person :

- (a) if, on the ground of that person's disability, he treats him less favourably than he treats someone without a disability ;
- (b) if he applies to that person a requirement or condition which he would apply equally to a person without a disability,
  - but with which a much smaller number of people with a disability could comply;
  - which he cannot show to be justifiable ; and

- which is to that person's detriment because he cannot cope with it; or
- (c) if he treats that other person less favourably because that other person has an associate with a disability. This would mean, for example, the owner of a restaurant who throws out the mother of an HIV positive child, when she is there on her own, because he feels she is also HIV positive would be acting unlawfully. All provisions in the Bill covering discrimination against or harassment and vilification of persons with a disability also cover their associates.

### General Exemptions

8. The Bill provides for two general exemptions: "unjustifiable hardship" and "genuine occupational qualification".

- (a) "Unjustifiable hardship" (clause 4)

This means that employers, landlords, transport operators and so on, may defeat a claim of discrimination by proving that it would cause them "unjustifiable hardship" to make the necessary changes to meet the needs of the person with a disability. In determining "unjustifiable hardship", all of the relevant circumstances of a case would be taken into account. These would include the financial circumstances of the alleged discriminator, the feasibility and cost of making the changes and the detriment likely to be suffered by

any others concerned, such as other employees, tenants or passengers.

(b) “General Occupational Qualification” (clause 12)

This means that it is not against the law to discriminate against a person where the absence of a disability is genuinely required for the job to be performed. For example, where a person with a disability could not take a particular role in a play or film because of his disability or where personal services could be most effectively provided by someone without a disability. The Bill expands this provision (which is based on that in the SDB) to cover the concept of “inherent requirements of the job” (which is in the Australian Disability Discrimination Act) since this also takes into account a person’s past training, qualifications or experience and his performance in determining whether a person would be able to carry out the inherent requirements of the particular employment.

Discrimination by Employers (clauses 11 - 14 and clause 45)

9. The Bill makes it unlawful for an employer to discriminate against a person with a disability in his recruitment arrangements, his terms of employment or his refusal to employ a person with a disability. We propose, in line with the SDB, that for a grace period of five years this should not apply to small firms or concerns where the number of employees does not exceed five. 70% of businesses in Hong Kong fall

into this category. The Governor in Council is empowered to change both the grace period and number of employees.

10. Employers will be liable for the discriminatory acts of their employees. But they will have the defence that they have taken such steps as were reasonably practicable, for example, issued general guidance to their employees that discriminatory behaviour towards applicants for employment or their fellow employees will not be acceptable, to prevent their employees from committing the relevant acts. The Bill will not, however, make employers vicariously liable for any criminal conduct on the part of their employees.

11. Discrimination on the part of others, such as partners in a firm, trade unions and professional or trade qualifying bodies is covered in a similar way.

#### Discrimination in Education (clause 22)

12. The Bill makes it unlawful for an educational establishment to discriminate against a student, or prospective student, by denying or limiting his access to any benefit, facility or service it provides, by expelling him, by refusing to accept his application or in the terms on which it admits him. But it will not be discriminatory to decline to admit a student if he is not reasonably capable of performing the tasks which would reasonably be required for a particular course. The defence of "unjustifiable hardship" also applies to this provision.

Premises, Goods, Services and Facilities (Clauses 23 - 28)

13. Provisions covering all these areas make it unlawful for the owners of premises, landlords and providers of goods, services or facilities to discriminate against a person with a disability by refusing to :

- (a) allow him access to or use of premises ;
- (b) dispose of premises to him ;
- (c) provide him with goods, services or facilities.

Examples of areas covered are : hotel and residential accommodation, banking and telecommunications services, transport and recreational facilities.

14. Again, “unjustifiable hardship” may be pleaded. Exemptions are also granted to landlords who live in the premises themselves (or whose near relatives do so) and for small premises (where there is accommodation for only two households in addition to the landlord).

Discrimination in Clubs and Sport (clauses 32 and 33)

15. It will be unlawful for a club with 30 or more members to discriminate against a person with a disability by refusing him membership, by the terms on which it offers him membership, or by limiting his access to any of the club’s benefits. This does not apply if any special arrangements the club would have to make would impose “unjustifiable hardship” upon it.

16. It will also be unlawful for a person to discriminate against another person with a disability by excluding him from a sporting activity, unless that person is not reasonably capable of doing that particular sport, or the activity is organised only for a specific disability group and that other person does not have that disability.

Harassment and Vilification (Clauses 20, 34 - 36 and Clauses 43 and 44)

17. Harassment is defined as "unwelcome conduct" which could be anticipated would offend, humiliate or intimidate a person. Harassment of a person with a disability by employers, members of educational bodies, including students, providers of goods, services and facilities and landlords will be unlawful.

18. Vilification, defined as inciting hatred towards, serious contempt for, or severe ridicule of, people with a disability, will also be against the law. If the vilification is judged to be serious, that is if physical harm is threatened, it will be a criminal offence and the person guilty liable to a fine and/or imprisonment of two years.

Special Measures (clause 47)

19. This general exemption means that it will not be unlawful to provide special measures or services, such as special schools or sheltered workshops, to be provided for people with a disability. The Bill does not therefore, guarantee absolute equality in all areas whatever the cost, r

does it prohibit special treatment for people with a disability which might appear to be discriminatory, but which is, in fact, in their interests.

### Equal Opportunities Commission

20. The Bill's provisions will be enforced by the courts and by the Equal Opportunities Commission to be set up under the SDB. It is the Administration's intention, therefore, to bring into effect the provisions in the SDB relating to the setting up of the Commission first. Then, when it is set up, the provisions relating to discrimination on the grounds of sex and disability can be brought into effect. Its functions in relation to disability, set out in clause 60, will be to :-

- “(a) work towards the elimination of discrimination against persons with a disability;**
- (b) promote equality of opportunity between persons with a disability and persons without a disability ;**
- (c) work towards the elimination of harassment and vilification ;**
- (d) in the case of any act alleged to be unlawful by virtue of this Ordinance, encourage persons who are concerned with the matter to which the act relates to effect a settlement of the matter by conciliation etc. ;**
- (e) keep under review the working of this Ordinance and, when it is so required by the Governor or otherwise thinks it necessary draw up and submit to the Governor proposals for amending this Ordinance;**  
**and**

- (f) perform such other functions as are imposed on it under the Ordinance or any other enactment.”

21. To carry out its functions, the Commission will be empowered among other things:

- (a) to issue codes of practice containing practical guidance to help members of the community to comply with the legislation ;
- (b) to conduct formal investigations, either on its own initiative or at the request of the Chief Secretary ;
- (c) in the course of such investigations, to serve enforcement notices on persons who have committed an unlawful discriminatory act, or an act of harassment or vilification ;
- (d) where persons persistently commit such acts, to apply to the District Court for an injunction to restrain them from so doing ;  
and
- (e) where conciliation has failed (and experience in Australia indicates that most complaints are likely to be settled through conciliation), to help the complainant by, for example, giving advice, and arranging for assistance by a solicitor or counsel to take the case to the District Court..



22. In relation to codes of practice, and in line with the approach we are taking with the SDB, the provisions relating to employment in the Bill will only come into force when the code of practice on employment has been issued by the Commission.

#### Building approvals (Clause 82)

23. This Clause ensures that plans for new buildings, and for alterations or additions to existing buildings, shall not be approved by the relevant authority unless it is satisfied that reasonable access will be provided for people with a disability. In deciding what is reasonable the authority would take into account whether the provision of such access would be practicable and whether it would impose “unjustifiable hardship” on the developer.

24. To help the building sector to comply with the Bill, we will issue a revised “Design Manual - Access for the Disabled 1984”. Representatives of disability groups, private sector architects and relevant Government Departments are on the Working Group, chaired by Architectural Services Department, reviewing the Manual.

## PUBLIC CONSULTATION

25. Between July 1994 and February 1995, we consulted a wide of organisations representing both people with a disability and those might be affected by the Bill. These comprised the Joint Council for Physically and Mentally Disabled, 37 disability groups and following:-

- the Labour Advisory Board ;
- the Land and Building Advisory Committee ;
- the Board of Education ;
- the Building Committee of the Hong Kong Housing Authority
- the Telecommunications Users & Consumers Advisory Committee ;
- transport operators (KMB, CMB, MTR, Yaumatei Ferry Co Ltd. etc.);
- broadcasters (ATV, TVB, Cable TV) ;
- the banking sector (Hong Kong Association of Banks and the Deposit Taking Companies Association).

26. The Joint Council and the disability groups welcomed our proposals. But they were concerned that :

- (a) the definition of "disability" should be as broad as possible ;
- (b) parent and carers who faced discrimination should also have the right to redress; and

- (c) the Bill should be more proactive and contain requirements that action should be taken within a certain period to remove discriminatory practices and measures. For example, that all buses should be accessible to people with a disability within 10 years of the Bill's enactment.

27. We have drafted the Bill to cover the first two points (see paragraphs 6 and 7 above), but do not think that the Bill should address the third. This is because the purpose of the Bill is not to address the question of services for people with a disability and how or when they should be provided, but to enshrine in law their right not to be discriminated against. The Americans with Disabilities Act does require improvements to be made within a specific timeframe, for example, it provides that all key stations in rapid rail and light rail systems must be accessible "as soon as practicable but in no event later than the last day of a 3-year period beginning on the effective date" of this provision. But it also states that if this is too expensive at a particular station, "...the Secretary may extend the three-year period up to a thirty-year period.....".

28. We do not propose to follow this approach because :-

- (a) to attempt to specify in the Bill precisely the provisions most appropriate for each sector affected would seriously delay the Bill while such provisions were negotiated with the sectors concerned; and

- (b) we believe that in Hong Kong, it is more appropriate to con-  
to work with transport operators and the like, to improve  
services for people with a disability through, for example  
Governor's summits on transport and employment for pe  
with a disability. The Administration will take the initiati  
discuss with the transport operators what reasonable,  
practicable plans could be drawn up for future improveme  
These could cover, for example, a continuing improvemen  
the Rehabus service and the investigation into the feasibility  
using wheelchair-accessible buses in Hong Kong. Since 19  
the bus companies have been purchasing only bu  
recommended by the Disabled Person's Transport Advise  
Committee in the U.K. (which have special features such  
lower steps and pushbells, handrails with non-slip surfaces a  
contrasting colour handrails and step edges).

29. Almost without exception the bodies listed in paragraph  
supported the legislation in principle. The strongest concerns were voice  
by the transport operators, especially bus service operators. They we  
worried about :-

- (a) the technical difficulties and costs involved in adapting buses  
make them accessible;
- (b) the possible inconvenience to and effect on the safety or fares o  
other passengers, given the fact that in Hong Kong buses ar  
crowded, roadspace is limited, fares are low and bus services ar

operated by commercial enterprises without any Government subsidy;

- (c) the difficulties involved in employing people with a disability as, for example, bus or train drivers; and
- (d) more generally, whether the complainant or the company would bear the burden of proof in a case.

30. As explained earlier, the concept of "unjustifiable hardship" covers costs, and reasonableness of any modification as well as any detriment likely to be suffered by others. As employers, they could apply for exemption under the Bill's provisions on "genuine occupational qualification" and "inherent requirements of the job". On the burden of proof, it is a well established legal principle that it is for those wishing to rely on a statutory exception, in this case the company, to bring themselves within it.

31. The Broadcasters' main points were that live programmes are difficult to caption and increasing T.V. captioning would increase costs. These concerns would be addressed by the defence of "unjustifiable hardship".

32. The Labour Advisory Board felt that the legislation should be implemented in phases, for example, for the blind first, and that appropriate tax concessions should be made. We do not believe that implementing the legislation for different disability groups separately

would be acceptable to people with a disability. Neither is it acceptable on policy grounds : it would be impossible to divide people into different groups and difficult to decide which should take priority. As for tax concessions, this option was fully examined in the Green Paper on Rehabilitation in 1992. Having assessed carefully the practicability and implications of such concessions, and taking into account public comments, we concluded that the option should not be pursued further. We believe, as do the disability groups, that employment of people with a disability should be on the basis of their abilities. Our aim of community acceptance would be undermined if they were given jobs only because their employers would get tax concessions.

## **FINANCIAL & STAFFING IMPLICATIONS**

33. We estimate that the Equal Opportunities Commission will require start-up capital expenditure of \$5 million and about \$36 million per year in recurrent expenditure to perform its functions in relation to sex discrimination. We estimate that the Equal Opportunities Commission will require an additional annually recurrent expenditure of \$18.2 million to expand its purview to work for people with a disability.

34. As in the case of the SDB the Bill will also have resource implications for the Judiciary although these cannot be assessed precisely at this stage. Cases will be brought before the District Court and may also have to be referred to the High Court. The Judiciary Administration envisages that in order to cope with these additional cases involving equal opportunities, as well as existing litigation from the Bill of Rights

Ordinance, without lengthening existing court waiting times, the establishment of one additional court each at the District Court and the High Court will be required. This will cost a total of \$12.4 million each year.

35. The Education Department (ED) is carrying out a School Improvement Programme to provide additional rooms and facilities to 240 schools to be completed by August 1997. Most of these schools at present do not provide access for people with a disability. ED is examining the technical feasibility and necessity of providing such access in these schools. It would be reasonable to take into account in this process the provision of schools in the district already having such access. Assuming that it is feasible and necessary to provide such access in all of them, the maximum additional capital costs would be in the rough order of \$600 million.

## **ECONOMIC IMPLICATIONS**

36. The Hong Kong economy is basically market oriented with little artificial impediment in the employment of local people. While the Bill will make discrimination unlawful, it will not impose conditions to reduce flexibility in the labour market by, for example, introducing a mandatory quota system in the employment of people with a disability.

37. But the Bill will require (as explained in paragraph 23) new buildings, private and public, to provide reasonable access for people

with a disability. Since the cost of providing special facilities, for example, ramps and special toilets for those with physical disabilities, braille lift buttons for those visually impaired, flashing alarms for those who are hearing impaired, is only a very small proportion of the total cost of new buildings, the Bill is unlikely to increase building development costs greatly.

38. Another area of potential concern is transport, particularly for operators of bus services (as elaborated in paragraph 29). There will be additional capital and operating costs involved in providing over time a public bus service which is partly or wholly accessible to people with a disability. It is not possible to estimate the additional operating costs at this stage. But the additional capital cost of a wheelchair-accessible bus would clearly be significantly higher. But as explained in paragraph 8(a), operators will be able to defend themselves against a complaint of discrimination, either in the Equal Opportunities Commission or in court, on the ground that they would suffer "unjustifiable hardship" if required to alter all existing buses and purchase only fully accessible buses in future.

#### **LEGISLATIVE TIMETABLE**

39. We will introduce the Bill into the LegCo on 3 May 1995.



**PUBLICITY**

40. A press conference will be held on 11 April 1995 to announce the introduction of the Bill into the Legislative Council. A spokesperson will be available to handle media enquiries.

Subject officers: Ms A E Shepherd  
Principal Assistant Secretary  
Tel: 2810 3195

**Health and Welfare Branch**

11 April 1995

File Ref.: HW CR 2/5091/94 (95) Pt. 15

# PRESS STATEMENT

## Legislative Councillor Anna Wu

11 April 1995

Anna Wu: 843-7353

Eric Chow: 537-2466 or 1128635 x8939

Adam Mayes: 537-2467 or 1128028 x1325

### Reaction to announcement of the Disability Discrimination Bill

I welcome Exco's approval of the Disability Discrimination Bill. From the information I have about the details of the Disability Discrimination Bill, the Health and Welfare Branch appear to have taken an effective and forward-looking approach to the problem.

In substance, it seems that the government's new bill takes very nearly the same approach to disability matters as the Equal Opportunities Bill I introduced to the legislature nine months ago. While I would have preferred that the government support my efforts instead of duplicating them, I nevertheless welcome this announcement — it is not a moment too soon for government to take positive, legislative action against disability discrimination.

I reiterate my willingness to support and co-operate with the government in any way possible provided that the Disability Discrimination Bill is constructive and effective. I am willing to drop the disability discrimination part (Part VI) of the Equal Opportunities Bill in favour of the government bill in order to facilitate its passage. I hope that other policy branches would be willing to take an equally cooperative attitude in other areas of discrimination affecting the community.

I also urge the government to provide adequate resources for sustained programmes in the following areas:

1. education to eradicate discrimination against the HIV carriers, against the mentally ill and against down syndrome children;
2. tangible measures to provide employment opportunities to the disabled, for example, special training, job matching and incentives such as tax deductions and assistance for equal opportunity employers;
3. tangible measures to improve access to public transport, facilities and services for the disabled.

An effective Equal Opportunities Commission is unquestionably the best way to ensure that Hong Kong continues to move ahead towards equal opportunities for the disabled. To do so, the EOC must have clear responsibility not only for law enforcement but also for the long term development of voluntary change in the private sector. I therefore urge the government to widen the unnecessarily narrow ambit of responsibility given the EOC by the Sex Discrimination Bill.

# The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong

Tel (852) 537-2467 Fax (852) 530-2018

## FACSIMILE MESSAGE

TO Jonathan Daw NO OF PAGES (INCLUDING THIS ONE) . 2  
Stephen Lam  
FROM Adam Mayes DATE 12/4/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY  
MESSAGE :

### Re. subjects of discussion for meeting of Thursday, 13 April

1. The difficulties you mention concerning the relevancy of the proposed amendments relating age, sexuality and family responsibility turn on whether these amendments may be considered *too substantial to be dealt with at Committee Stage*. This is a different approach to relevancy than that taken in our letter; I hope you can again clarify for us how best to approach the issue.
  - 1.1. Your comments focus on the practical necessity of limiting amendment at Committee Stage to matters that have been debated in principle at 2d reading. This implies that the scope for Committee Stage amendment is limited by the scope of prior debate at 2d reading.
  - 1.2. The scope of debate at 2d reading is itself determined, I thought, by the President's view of the "subject matter" of the bill. Hence the letter's focus on the question, "*what is the subject matter of the bill?*" as a question logically precedent to any conclusions about what may or may not be dealt with at Committee stage.
2. We had taken for granted the relevancy of amendments removing the restriction of marital status and pregnancy discrimination to the employment field only. Perhaps we should raise this matter in our letter also.
  - 2.1 It does seem to me that if those restrictions constitute a limit on the scope for relevant debate and amendment of the bill, so would every other exemption and exception contained in it. Removal of *any* exception carries policy implications that will require debate at 2d reading (e.g. Sched 4, Pt 2, 2 re the small house policy, or cl 10(4) & 14(4) re death and retirement benefits). I had thought that the very need to place an exemption or restriction in a bill would indicate that the related policy issues were *relevant* for purposes of debate and amendment.
  - 2.2 Compare the amendments allowed to the New Territories Land (Exemption) Bill
    - 2.2.1 That bill took care to have effect only on land other than "rural land." Rural exemption from the NTO carried quite radically different policy implications than non-rural (urban) exemption. For urban land, the purpose was simply to rectify title, because the NTO had so long been ignored in practice. On rural land, however, the NTO had been correctly applied, thereby preserving tradition while injuring women's rights.

- 2.2.2 The policy issues raised by rural exemption are not merely different from urban, but far more complex and controversial. *Avoiding* those policy issues was whole point of the NTL(E) Bill's circuitous drafting. Nonetheless, amendments were allowed extending the bill to rural land.
- 2.2.3 Not only did this raise different and difficult policy issues, it required a great deal more change to the bill itself than the SDB amendment at issue. The NTL(E) Bill amendments significantly lengthened the bill, requiring an extensive rewrite of the bill's operative clause (cl 3), addition of lengthy transitional provisions, and addition of detailed cross-references to 3 other Ordinances (3 new consequential amendments in disguise, really).
- 2.3 Similar arguments could be made, I think, in reference to the amendments to the COMAC (Am't) Bill. The bill allowed COMAC to take complaints directly rather through the Legco Members, the amendments allowed COMAC to undertake investigations on his own initiative, a matter with quite distinct implications.
- 3 If there is time, perhaps you could expand on the brief conversation we had about how best to add discrimination cases (arising under whatever bill may eventually be enacted) into the Legal Aid Ordinance's new, special provision on Bill of Rights cases.
- 3.1 The immediate decision we face is merely whether to raise the issue in the bills committee for the Legal Aid (Am't) Bill, or the one for the EOB/SDB. Hence (in case it's any easier) we need only to measure the *relative* risks of trying to amend either one or the other of the two bills, rather than reach any strong conclusions.

# Helpers for Domestic Helpers

Telephone 2739 6193

St Andrew's Church  
138 Nathan Road  
Kowloon  
Hong Kong

Clerk to the Bills Committee  
Equal Opportunities and Sex Discrimination Bills  
Legislative Council Secretariat  
LegCo Building  
8 Jackson Road  
Central  
Hong Kong

FAO Mrs Anna Lo

19th April 1995

Dear Madam,

As an interest group which was represented in October 1994 when these Bills were considered, while confirming our support for the Equal Opportunities Bill, we should like to put forward the following supplementary representations:

1. We would ask the Committee to consider the exceptions in the Bill which affect domestic helpers, eg. in sections 13(3), 44(3), 88(3), 148(4), 165(3), 190(3) and 207(3). Whilst we can appreciate that some members of society may prefer to be able to use the exemption in section 13(3) to employ a female rather than a male to care for their small children, we cannot see the reason for exempting domestic helpers from other parts of the Bill's protection. In particular, why should all employees but domestic helpers be granted equal treatment free from discrimination on family status (s.44(3)), religious or political beliefs (s.148(4)), age (s.165(3)) and trade union membership (s.207(3))? The last exception is simply unjustifiable. Domestic helpers do not have the protection of an Unfair Dismissal law. They should at least be free to join a union without it influencing their ability to find a job.
2. Most advanced societies have a Racial Discrimination law. Do not allow Hong Kong to become known as technologically advanced but socially and morally backward.
3. If an Equal Opportunities Tribunal is created, please ensure that provision is made for interpreters to be provided by the Tribunal for those who need them. Our experiences so far with MECAB (which does not provide interpreters) is that foreign domestic helpers are often unable to present their cases properly because of inadequate language skills. It is of no use to have a tribunal to provide redress if those who need it cannot adequately represent themselves. We would ask that if interpreters are not to be provided, that complainants can be represented by a MacKenzie friend.

*Helpers for Domestic Helpers is a voluntary welfare and support group for foreign domestic helpers operating under the auspices of St John's Anglican Cathedral. Our services are open to any domestic helper irrespective of nationality or religion and are completely free of charge.*

We are grateful to you for giving us the opportunity to make further representations

Yours faithfully,

Mrs S L Evans

for "Helpers for Domestic Helpers"

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Proposed amendments to the Sex Discrimination Bill  
discussed with Home Affairs Branch, 17 March 1995

EOB = Equal Opportunities Bill

EOC = Equal Opportunities Commission

EqT = "Equal Treatment for Men & Women Strengthening the Acts," Formal  
Proposals of the UK EOC, 1988

SDB = Sex Discrimination Bill

1. General remarks

- 1.1. A unified law should, in relation to all significant grounds of discrimination, provide both rights of action and an Equal Opportunities Commission.
- 1.2. Any law relating only to sex discrimination should cover all discrimination closely related to sex discrimination, including discrimination on the grounds of family responsibility, age and sexuality.
- 1.3. Sexist drafting (e.g. "unlawful to discriminate against a woman," the EOC "chairman") should be eliminated.

2. Part I — Preliminary

- 2.1. Interpretation according to Bill of Rights and relevant international treaties and instruments should be made explicit.  
[cf. EOB 7]
- 2.2. Effect on prior inconsistent laws should be made explicit.  
[cf. EOB 8; Bill of Rights Ordinance (Cap 383) s 3]
- 2.3. Application to acts done for two or more reasons should be made explicit.  
[cf. EOB 4]
- 2.4. Meaning of discrimination should explicitly include discrimination against a person on ground of status of person's relative or associate  
[cf EOB 6]
- 2.5. Definition of "marital status" [SDB 2(1)] should include status of being de facto spouse
- 2.6. Definition of "sexual harassment" [SDB 2(5)] should explicitly cover —  
(a) in the employment field, creation of a sexually hostile work environment, and  
(b) in all other fields, substantial interference with enjoyment of the relevant activity

3. Part II — Discrimination

- 3.1. Marital status discrimination [SDB 6] should be covered in all areas
- 3.2. Pregnancy discrimination [SDB 7] should be covered in all areas
- 3.3. Victimization [SDB 8] should be redrafted to undo narrowing effect of UK court judgments  
[cf Eq T 3.9]

### Part III — Employment Field

- 4.1 Part III should commence immediately upon assent, not following promulgation of Co. Practice
- 4.2 Commission agents should be explicitly covered, both with respect to discrimination as and with respect to sexual harassment  
[cf EOB 14 & 29(2)]
- 4.3 The exceptions for death and retirement benefits [SDB (4)] should be reviewed for consistency with principle and clarified
- 4.4 The 5-year exemption for small employers [SDB 10(3), (6)-(8)] should be deleted
- 4.5 The GOQ for work in single-sex hospitals, prisons, and special care facilities [SDB 11(2) duplicates other GOQs in part and is otherwise inconsistent with the principle of the bill, should be deleted  
[cf. EqT 3 19]
- 4.6 The GOQ for work covered by protective legislation [SDB 11(2)(g)] should be deleted (also 7.3 below)
- 4.7 The GOQ for work likely to involve duties outside Hong Kong in places where discriminatory laws or customs apply [SDB 11(2)(h)] is inconsistent with the principle of bill and should be deleted
- 4.8 In the exemption for employment for purposes of organised religion [SDB 19], reference should be made to the susceptibilities of the religion as such and the reference to “a significant number of followers” should be deleted.
- 4.9. **Sexual harassment in the employment field [SDB 20-1] should be extended to cover harassment of a domestic worker by any co-resident of the employer.**  
[cf. EOB 29(1)(d)]

### 5 Part IV — Other Fields

- 5.1 Clubs should be explicitly covered in order to avoid exemption of “private” clubs from SD 25 (as construed by the UK courts)  
[cf EOB 25, EqT 3.23]
- 5.2 Administration of laws and government programmes should be explicitly covered to avoid exemption under SDB 25 (as construed by the UK courts) for state activities that are “dissimilar” to acts of private persons  
[cf EOB 27, EqT 3 26]
- 5.3 Political elections and appointments should be explicitly covered, with particular reference Village Representatives  
[cf EOB 28]
- 5.4 For purposes of the small dwellings exception [SDB 28], the definition of “near relative” [SDB 2(4)] should include a de facto spouse
- 5.5 The exception [SDB 30(1)(a)] for single-sex hospital services and special care facilities duplicates other exceptions in part and is otherwise inconsistent with the principle of the bill and should be deleted
- 5.6 Sexual harassment in other fields [SDB 32] should be extended to cover harassment of students by students and of educational staff by students



## 6 Part V — Other Unlawful Acts

- 6.1 Discriminatory advertisements [SDB 36 & 74] should carry a fixed financial penalty and be actionable by any person (rather than enjoinable only, on action by the EOC exclusively), and should therefore be made a criminal offense subject to private prosecution [cf EOB 225]

## 7 Part VI — General Exceptions

- 7.1 The exception for sport, etc [SDB 42] should not apply to young people of school age [cf EOB 41(2)(d), EqT 3 30]
- 7.2 The limited exceptions for positive discrimination [SDB 45-47] should be replaced by general exceptions for special measures and for measures to achieve equality [cf EOB 37, Convention on the Elimination of All Forms of Discrimination Against Women, Art 4]
- 7.3 The exceptions for protective legislation [SDB 49, 50, 52 & Sch 2] should be deleted
- 7.4 The exemption for acts done to safeguard the security of Hong Kong, as certified by the Chief Secretary [SDB 51], should be deleted
- 7.5 The exemption of certain discrimination within the disciplinary services [SDB 54 & Sch 4 Pt 2 s 1] should be deleted
- 7.6 The exemption of the Small House Policy [SDB 54 & Sch 4 Pt. 2 s 2] should be deleted
- 7.7 The exemption of marital status discrimination in employment benefits and civil service benefits [SDB 54 & Sch. 4 Pt. 2 s 3] should be deleted.

## 8. Part VII — Equal Opportunities Commission

- 8.1 The EOC should have a general power to bring proceedings in its own name in relation to any unlawful act or practice within its terms of reference [cf EqT 4 17]
- 8.2 The EOC's enforcement functions [SDB 56] should be extended by reference to relevant provisions of the Bill of Rights
- 8.3 The EOC's functions [SDB 56] with respect to research, education, promotion, advice and conciliation should be extended by reference —  
(a) to relevant provisions of the Bill of Rights, and  
(b) to relevant international treaties and instruments
- 8.4 The procedure for formulating Codes of Practice [SDB 61(2)-(9)] should be simplified
- 8.5 In relation to formal investigations into named persons [SDB 63(4), as construed by the UK Courts] —  
(a) the EOC should be empowered to initiate such investigations whether or not it believes that the named persons committed unlawful acts, and  
(b) the right to make pre-investigation representations to the EOC should be extended, within a strict time limit, to any person named in the terms of reference [cf EqT 4 8, 4 12]
- 8.6 The EOC should be empowered to obtain information in connection with any formal investigation without prior approval by the Chief Secretary the requirement of such approval in connection with investigations other than into named persons [SDB 64(2)] should be deleted

- 9.1 The District Court's power to relax rules of evidence should be made explicit in the S [cf EOB 235]
- 9.2 The District Court's power to vary the rule of costs should be made explicit in the SD, no award of costs as the general rule [cf EOB 237]
- 9.3 The District Court should have the power to order any appropriate remedy, including reinstatement in particular [cf EOB 234]
- 9.4 The restriction barring damage awards for indirect discrimination if the discrimination was unintended [SDB 68(5)] should be deleted
- 9.5 The requirement for prior notice to the Chief Secretary of proposed actions against government schools [SDB 68(7)] should be deleted [as previously agreed]
- 9.6 Enforcement notices [SDB 69] should be authorised to include, in addition to a requirement that a person cease an act of unlawful discrimination, a requirement that the person cease at specific practice(s) that led to the unlawful discrimination [cf EqT 4 16]
- 9.7 The right of a person to make representations to the EOC opposing the EOC's issuance of an enforcement notice against that person [SDB 69(5)] duplicates the right of appeal against the notice once issued, and should be deleted [EqT 4 15]
- 9.8 Assistance from the EOC by way of conciliation [SDB 76] should be available for any claim of discrimination alleging an act that is inconsistent with relevant provisions of the Bill of Rights or of international treaties and instruments, whether or not the act is unlawful under the SDB
- 9.9 When the EOC publishes a formal investigation report that finds unlawful discrimination, a new period of time should begin during which any persons who claim to have suffered from the reported discrimination may institute proceedings, even though the regular period to institute such proceedings [SDB 78] may have expired before the investigation concluded [cf EqT 4 15]

10. [Part IX — Miscellaneous] no suggested amendments]

11. Consequential Amendments

- 11.1 The amendments to the District Court Ordinance (Cap 336) need further study
- 11.2 The Bill of Rights Ordinance (Cap 383) should be amended to clarify its application to all pre-existing legislation, whether relied upon by public authorities or others (reversing the effect of *Tam Hing-yee v Wu Tai-wai* (1991) 1 HKPLR 261, [1992] 1 HKLR 185)

Office of Anna Wu  
28 March 1995

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Restructure of EOB

1. Re-gazette relevant Parts of EOB as three separate bills:
  - 1st bill will address discrimination on the grounds of *age, family status, and sexuality*.<sup>1</sup>
  - 2nd bill will address *race* discrimination.<sup>2</sup>
  - 3rd bill will address discrimination on the ground of *religious/political beliefs, union membership, and spent conviction*.<sup>3</sup>

Note that EOB Parts II and VI concern the same grounds as the SDB and DDB (sex, marital status, pregnancy and disability), and need not be re-gazetted.

2. With House Committee approval, introduce the new EO bills to the EOB/SDB Bills Committee to replace the EOB.

Amendments and proposals

1. To the SDB, with respect to sex, marital status, and pregnancy discrimination—
  - 1.1 amend in line with points 1.3-7.7 of list discussed between Anna Wu and Home Affairs Branch (attached; previously tabled in bills committee 31 March).
2. To the DDB, with respect to disability discrimination — to be considered after introduction of DDB.
3. To the new EO bills, with respect to age, family status, and sexuality discrimination; race discrimination; and religious/political belief, union membership, and spent conviction discrimination —
  - 3.1 amend to clarify that mandatory retirement ages remain lawful.

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Including EOB Parts III, IV and VIII, as well as the preliminary Part I and the enforcement Parts XI-XIV

Including EOB Part V, as well as Parts I and XI-XIV

Including EOB Parts VII, IX and X, as well as I and XI-XIV

- 3.2 re. age discrimination, add exemption for the legal entitlements obligations or disqualifications of persons under 18 and for law the welfare of persons under 18
  - 3.3 re. age discrimination, add temporary exemption (expiring in one year but renewable by Legco resolution) for review of laws generally
  - 3.4 re. sexuality discrimination, add temporary exemption (expiring in one year but renewable by Legco resolution) for review of laws and regulations governing eligibility for marriage and for adoption.
  - 3.5 remove exceptions for hiring of domestic helpers.
  - 3.6 add exception for school admissions done in compliance with government formulated admission schemes. (The exception would not apply to government discrimination in formulating the admission schemes.)
  - 3.7 make additional, technical amendments as discussed in bills committee
4. With respect to the Equal Opportunities Commission and other enforcement matters —
- 4.1 amend SDB in line with points 8.1-11.2 of list discussed between Ann. Wu and Home Affairs Branch (attached; previously tabled in bills committee 31 March).
  - 4.2 amend DDB for consistency.
  - 4.3 amend new EO bills to provide for administration and enforcement by the Equal Opportunities Commission.

Office of Anna Wu  
20 April 1995



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Dr. Leong Chi Kung,  
Chairman, Committee to Study the  
Equal Opportunities and  
Sex Discrimination Bills,  
Legislative Council Building,  
Central, Hong Kong

21 April, 1995

Dear Dr. Leong,

**SEX DISCRIMINATION BILL**  
**EQUAL OPPORTUNITIES BILL**

The Association is grateful for having been given the opportunity to meet the Bills Committee to study the above in order to supplement its submissions. Given the shortage of time, we were not able to deal fully with all the implications of some of the questions.

Some of the statements made by questioners seem to have been predicated upon the assumption that banks discriminate against disabled persons and that they are taking no action on this front. Telephone banking was also mentioned as a solution to the problem of providing banking services to the visually impaired.

On the contrary, the Association has issued circulars recommending its members to avoid discrimination against the visually impaired. Those banks which comprise our Technical Operations Sub-Committee, the body entrusted with looking at such matters, have stated that they will support the Association's stance of not discriminating against such persons. We fully agree that telephone banking offers an opportunity to serve the blind and those banks offering such a service do not, as far as we know, discriminate. Furthermore, that body has actively been searching for technological solutions to serving the disabled (e.g. with voice-assisted cash dispensers and A.T.M.s with braille key-pads) and we are also in active dialogue with representatives of the Association of the Blind in order to exchange information on such matters.

The foregoing does not, of course, address the problem of the risk being run by banks in providing such services, as detailed in our submission.

...../2

*Chairman* Standard Chartered Bank  
*Vice Chairman* The Hongkong and Shanghai Banking Corporation Limited  
*Secretary* Paul Lowndes M.A. (Cantab.), A.C.L.B.

*Incorporated by Ordinance Cap 364*

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There was also the suggestion during the questioning that banks should not discriminate in their hiring policies against persons with spent convictions. We would be interested to learn how our questioners would view the situation where a member bank, in compliance with the legislation, employs a person who has a spent conviction for dishonesty and that person subsequently carries out a fraud for a substantial sum. Ultimately such losses would have to be borne either by the bank's depositors or its shareholders. The justification for such losses being absorbed by these parties is not apparent to us and they might not be to your constituents, many of whom entrust their savings to banks or look to bank shares as a safe investment. Whilst we are not against the subsequent employment of such persons we do not feel it appropriate that any parties should be compelled to employ them in positions of trust.

There was a suggestion that the position taken by the Association was incompatible with its supportive stance on the Hong Kong Bill of Rights Bill. We have re-visited our submission dated 12.12.90 to the Legco Ad-hoc Group and note that the Association identified a number of important defects in the Bill, not all of which were fully remedied in the final form of the legislation. One of those concerns related to the application of Article 22 (discrimination) to the private sector and the problems that could result. A copy of that submission is available if the Bills Committee needs it, but we mention this matter principally to set the record straight on the Association's stance vis-a-vis that Bill.

Yours sincerely,

P.P. P.R. Lowndes  
Secretary

Exceptions for Protective Legislation  
in the Sex Discrimination Bill

Under clause 11(2)(g) of the Sex Discrimination Bill (SDB), being a man is a genuine occupational qualification for a job where the job needs to be held by a man because of restrictions imposed by a provision specified in Schedule 2 of the Bill. Under Clause 49, in relation to employment and vocational training, it is not unlawful for a person to do an act in relation to a woman if it was necessary to do so to comply with a provision in Schedule 2 and for the protection of the woman concerned. Schedule 2 sets out a number of legislative provisions which aim at protecting the safety, health and welfare of women by limiting or prohibiting their employment in certain trades, tasks or certain periods of time. A detail list of the matters covered by these legislative provisions is at Annex A.

Annex A

The Women and Young Persons (Industry) Regulations, Cap. 57 sub. leg.

2. The provisions in these Regulations generally prohibit women from being employed in underground work in mines or in any other industrial undertaking involved in tunnelling work. They also prohibit women from being employed in dangerous trades; restrict the carrying of weights by women; they restrict the hours of employment of women, their overtime and shift work in industrial undertakings. They also prohibit work during meal or rest intervals and work on rest days for women employed in industrial undertakings.

The Factories and Industrial Undertakings Regulations, Cap 59 sub. leg.

3. The provisions in these Regulations prohibit women from cleaning any dangerous parts of machinery and mill gearing in a notifiable workplace while the machine is in motion.

The Construction Sites (Safety) Regulations, Cap 59 sub. leg.

4. These Regulations contain provisions which prohibit women from cleaning dangerous parts of any machinery or plant in construction sites while the machinery or plant is in motion.

5. Removal of the protective legislative provisions in the above Regulations would undermine the safety, health and welfare of women employed in industrial undertakings and construction sites. Similar protection for female workers are in fact provided by the International Labour Organization (ILO) in the form of standards set out in a number of Conventions and Recommendations. A list of relevant Conventions is at Annex B. It has been Government's policy to protect women from exploitation at work and safeguard their safety and welfare by enacting protective legislation and is in line with ILO principles. As women has long enjoyed the protection rendered by the above provisions, the impact upon female worker would have to be carefully assessed before we decide to remove such protective provisions. More importantly, with the removal of these protective provisions, Hong Kong will not be able to continue to comply with the application of some ILO Conventions, in particular ILC No. 45. This would be seen as a regressive step and a lowering of labour standards.

The Dutiable Commodities (Liquor) Regulations, Cap 109 sub. leg.

6. The Regulations contain provisions governing the minimum age above which persons may be allowed to work on licensed premises where liquor is sold or supplied for consumption on that premises. They place restrictions on the time when female persons under 18 could be employed in licensed premises. The purpose of this Regulation is to protect young persons under 15 and young females under 18 from working in licensed premises, in particular bars and karaoke establishments.



7. Members of the Urban Council and Regional Council Liquor Licensing Boards have expressed concern on the employment of male persons under 18 on licensed

premises and action is now being taken to expand the scope of the Regulations to cover male persons under 18. Before the relevant legislative amendments are in place, we would need to provide for an exception in the SDB to cover the present provisions in the Dutiable Commodities (Liquor) Regulations.

**The Dangerous Goods (General) Regulations. Cap 295 sub. leg.**

8. Under Regulation 36, where work is being carried on in any danger building, there shall be present on duty in the building at least one male supervisor. The Secretary for Works has now reviewed this provision and is of the view that the reference to a male person can now be deleted. This would be done by making a committee stage amendment to the Bill.

Women and Young Persons (Industry) Regulations, Cap 57, sub. leg.

Regulation 4 prohibits women from being employed in underground work in any mine or quarry, or in any other industrial undertaking involved in tunnelling work.

Regulation 5 prohibits women from being employed in dangerous trades

Regulation 6 restricts the carrying of weights by women in industrial undertakings.

Regulation 8 restricts the hours of employment of women employed in industrial undertakings

Regulation 10 restricts overtime work of women employed in industrial undertakings.

Regulation 11 restricts the shift work of women employed in industrial undertakings.

Regulation 13 prohibits work during meal or rest intervals for women employed in industrial undertakings.

Regulation 14 prohibits work on rest days for women employed in industrial undertakings.

The Factories and Industrial Undertakings Regulations, Cap 59, sub. leg.

Regulation 25(1) prohibits women from cleaning any dangerous parts of machinery in a notifiable workplace while the machine is in motion

Regulation 25(2) prohibits women from cleaning any mill-gearing in a notifiable workplace while the mill-gearing is in motion

The Construction Sites (Safety) Regulations, Cap 59, sub. leg.

Regulation 46(1) prohibits women from cleaning the dangerous parts of any machinery or plant in construction sites while the machinery or plant is in motion by the aid of any mechanical power.

The Dutiable Commodities (Liquor) Regulations, Cap 109, sub. leg.

Regulation 29 gives guidance regarding the minimum age above which persons may be allowed to work on licensed premises. The general rule is that no licensee shall employ on the licensed premises-

- (a) at any time any person under the age of 15;
- (b) between the hours of 8 p.m. to 6 a.m. any female under the age of 18 years; or
- (c) between the hours of 6 a.m. and 8 p.m. any female under the age of 18 years except with the permission of the Liquor Licensing Board.

The Dangerous Goods (General) Regulations, Cap 295, sub. leg.

Regulation 36 provides that while work is being carried on in any danger building, there shall be present on duty in the building at least one male supervisor; and if more than 20 persons are employed at any one time in such building there shall be at least one male supervisor for every 20 persons

International Labour Conventions on Employment of Women

Night Work (Women)(Revised) Convention (No.89)

It prohibits night work by women in industry

Underground Work (Women) Convention (No. 45)

It prohibits employment of women in underground work in any time. [This Convention applies to Hong Kong.]

Maximum Weight Convention (No. 127)

It limits the manual transport of loads by women workers.

Proposed Amendments put forward

by the Hon. Anna Wu

to the Sex Discrimination Bill :

Employment Field

The Hon. Anna Wu has put forward a number of proposed amendments to the Sex Discrimination Bill (SDB). The Administration's response to some of the proposals in respect of the Employment field (Part 4 in AW 033195-1) is set out below.

Part III of the Bill should commence immediately upon assent, not following promulgation of Codes of Practice (Item 4.1)

2. The Administration's position with respect to the Code of Practice in Employment is set out in the letter of 9.3.95 to the Bills Committee.

Annex

A copy of the letter is annexed for Member's information.

Commission agents should be explicitly covered, both with respect to discrimination as such and with respect to sexual harassment (Item 4.2)

3. The Administration agrees with this proposal.

The 5-year exemption for small employers should be deleted (Item 4.4)

4. Anti-sex discrimination legislation is a new area of law and it will have an extensive impact upon employers. It is important to provide for a reasonable transitional period to provide small employers with the opportunity to better understand the operation of the Bill and benefit from the experience of large business establishments. The concept of providing for a grace period for small business establishments is not new. It was raised by some Members of the Women Affairs Sub-committee of the Legislative Council in 1993. This arrangement is supported by the Hong Kong General Chamber of Commerce (in their letter of 23.3.95 to the Bills Committee). Clause 10(8) of the Bill empowers the Governor-in-Council to amend this transitional period and the size of business establishments. We prefer to retain the 5 year exemption and if necessary, review the number in light of operational experience.

The GOO for work in single-sex hospitals, prisons, and special care facilities duplicates other GOOs in part and is otherwise inconsistent with the principle of the Bill, and should be deleted (Item 4.5)

5. There are good reasons for providing genuine occupational qualification (GOQ) for work in single sex hospitals, prisons and special care

facilities. The exception will, for example, allow prisons with male inmates to be staffed by male officers. The same applies to single-sex boys/girls homes and homes for the elderly, whether they are publicly or privately operated. Exceptions presently provided under other GOQs in the SDB may not cover all such institutions and special care facilities.

**The GOQ for work covered by protective legislation should be deleted**

**(Item 4.6)**

6. The Administration's views on this proposal is set out in a separate submission (SDB 1/95) to the Bills Committee.

**The GOQ for work likely to involve duties outside HK in places where discriminatory laws or customs apply is inconsistent with the principle of the Bill and should be deleted (Item 4.7)**

7. The exception in Clause 11(2)(h) is relevant to jobs where incidental duties are carried out abroad. Under this Clause, the onus is upon the employer claiming the GOQ to show that it is the laws or the customs of a foreign country which result in, for example, the women being unable to perform the job duties effectively. The Administration feels that this is a reasonable GOQ which covers situations where for example a job involved duties in a country where by virtue of the local customs, the local staff would

not obey the instructions of a woman because of her sex. In fact a parallel provision is included in the UK Sex Discrimination Act and the UK EOC has no difficulty with this provision.

In the exemption for employment for purposes of organised religion, reference should be made to the susceptibilities of the religion as such and the reference to "a significant number of followers" should be deleted  
(Item 4.8)

8. Clause 19 of the Bill in effect disapplies Part III to employment for purposes of an organised religion where such employment is restricted to persons of one sex so as to comply with the doctrines of the religion concerned or to avoid offending the religious susceptibilities of a significant number of its followers. We notice that a similar provision is contained in the UK Sex Discrimination Act and so far it has not caused any difficulty with the UK Equal Opportunities Commission. The submission made by the Hong Kong Christian Council does not oppose to this specific aspect of the Bill. The Administration is of the view that we should respect the views of members of religious groups in Hong Kong and hence the reference to "religious susceptibilities" should be retained.



Sexual harassment in the employment field should be extended to cover harassment of a domestic worker by any co-resident of the employer  
(Item 4.9)

9. We would like to know what persons are included in this term "co-resident". We also want to know whether the proposal is that an employer will incur civil liability for any acts of sexual harassment committed by any of his co-residents, regardless of whether it was done with his knowledge or approval. Lastly we would like to know what defences, if any, it is proposed to give the employer in such situations.

10. While we fully support the principle to eliminate sexual harassment in employment, sexual harassment which occurs in a private household context is a new concept as demonstrated by the questions raised in paragraph 9, which should be carefully dealt with.

Proposed Amendments to the  
Sex Discrimination Bill  
put forward by the Hon. Anna Wu :  
Preliminary Section

The Hon. Anna Wu has put forward a number of proposed amendments to the Sex Discrimination Bill. The Administration's response to some of the proposals contained in the Preliminary section of Ms. Wu's paper AW 033/95-1 are set out below.

Application to acts done for two or more reasons (Item 2.3)

2. The Administration would like to know more about the effect of such provision. Would the inclusion of such provision mean that where an employer dismisses his employee primarily because of his poor performance, then no matter how justifiable is this dominant reason for the dismissal, the employer would still be considered as acting unlawfully and would incur civil liability under the SDB if sex discrimination features as a very minor reason for the decision to dismiss the employee?

Meaning of discrimination should explicitly include discriminating against a person on grounds of status of person's relative or associate (Item 2.4)

3. The definitions of 'relative' and 'associate' in the Equal Opportunities Bill are very wide and includes persons who have a business, sporting or recreational relationship with each other. The Administration would like to know the need and relevance of such a proposal in the context of sex discrimination, for example whether there are instances where a person discriminated against in his employment, education etc. for reason of the sex of another person who only has a business, sporting or recreational relationship with him.

Definition of "marital status" should include status of being de facto spouse (Item 2.5)

4. The term 'de facto spouse' requires definition. The definition provided in the Equal Opportunities Bill is very wide. Under that definition, a person is a de facto spouse of another person where these two persons, whether of the same or the opposite sex, live together as partners on a bona fide domestic basis, although not legally married to each other.

5. The Administration has difficulty with the proposal to regard de facto couples, including de facto couples of the same sex, as having the same status as married persons. The Administration does not think the members of

the community are prepared to give recognition to de facto relationships in the same way as they would to married relationships .

Your faxline : 077 8024

Total : 4 pages

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27 April 1995

Clerk to the Bills Committee to study the  
Equal Opportunities Bill and the  
Sex Discrimination Bill,  
c/o Legislative Council,  
8 Jackson Road,  
Hong Kong

Dear Anna,

**Bills Committee to study the  
Sex Discrimination Bill**

Further to my earlier fax, I enclose herewith a fourth paper in respect of the proposed amendments to the SDB. I do not propose to discuss this paper at tomorrow's meeting but it would be useful if the Hon. Anna Wu could provide a written reply to the questions raised therein.

With best regards,

Yours ever,

( Miss Susie Ho )  
for Secretary for Home Affairs

Encl.

Proposed Amendments put forward  
by the Hon. Anna Wu to the  
Sex Discrimination Bill (SDB) :  
Administration of Laws and Government Programmes

The Hon. Anna Wu has put forward a proposal to make it explicit that the administration of laws and Government programmes should be covered to avoid an exemption under SDB 25 (as construed by the UK courts) for state activities that are dissimilar to acts of private persons (Item 5.2 in AW033195-1). Reference was made in AW033195-1 to Clause 27 of the Hon. Anna Wu's Equal Opportunities Bill (EOB).

2. The Administration would like to ask the Hon. Anna Wu to clarify the following matters -

- (a) whether the reference to the 'exemption under SDB 25 as construed by the UK courts' is a reference to the decision in Regina v Entry Clearance Officer Ex parte Amin (1983)2 AUER 864;

- (b) in clause 27 of the Equal Opportunities Bill -
- (i) does the reference to 'a person' includes a private individual who is not acting under the authority of the Government of Hong Kong?
  - (ii) what does 'a law' mean? Does it mean legislation? If not, can actual examples be given of the performance of a function under a law which is not a statutory law?
  - (iii) what is meant by 'a Government programme'? Does it mean a programme operated by the Government of Hong Kong?
  - (iv) What is meant by the phrase 'under a law or for the purposes of a government programme'? Can examples be given of any functions performed for a government programme which is not a function under a law?
  - (v) What is meant by the phrase any other responsibility for administration of a law or the conduct of a government

programme? Can examples be given of these other  
responsibilities which are neither a function nor a power?



**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Additional proposals concerning the Equal Opportunities Commission  
established by the Sex Discrimination Bill

1. EOC composition and organisation

1.1. The EOC is closely modelled on the UK Equal Opportunities Commission, which administers sex discrimination matters only.<sup>1</sup> The Hong Kong EOC, however, will bear responsibility for a variety of matters other than sex discrimination. The Disability Discrimination Bill already proposes to widen the EOC's responsibilities, and the EOC will likely be given further responsibilities under any other equal opportunity legislation enacted in Hong Kong.

1.2. The Administration should provide assurances that the UK-style EOC can be effectively adapted to carry out the wider and more complex responsibilities proposed for it in Hong Kong. In particular, the breadth and complexity of these responsibilities make it important that:

- the EOC should be equipped with specialised expertise in relation to each of its several areas of responsibility; and
- the EOC should interact on a regular, structured basis with non-governmental organisations serving the affected communities.

2. EOC litigation powers

2.1. As previously discussed with Home Affairs Branch, the EOC should have a general power to bring proceedings in its own name in relation to any unlawful act or practice within its terms of reference (see the list of proposed SDB amendments tabled 31 March, item 8.1). Along with this general litigation power, the EOC should be given two other, related powers.

2.2. The EOC should have the power to appear, by leave of the court, in any proceedings relating to equal opportunity. This enables the EOC to assist the courts in

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<sup>1</sup> A separate body (the Commission for Racial Equality) administers race discrimination law in the UK and the UK Parliament is considering establishment of a third body (the National Disability Council) to administer proposed legislation against disability discrimination.

interpreting and developing Hong Kong's equal opportunity law in light of the growing body of relevant foreign and international jurisprudence.

2.3 In cases in which a plaintiff who has received assistance from the EOC (under SDB cl. 77) chooses no longer to pursue his or her claim, the EOC should have the power, by leave of court, to take over the proceedings in its own name.

### 3. EOC power to examine proposed legislation

3.1. The EOC should have the power to examine any proposed legislation (including subsidiary legislation) that it considers may affect equality of opportunity, and report the results of the examination to the sponsor of the legislation. (An analogous power has been proposed for the Privacy Commissioner under the Personal Data (Privacy) Bill, cl. 8(1)(d).)

Office of Anna Wu  
27 April 1995

平等

EQUAL EMPLOYMENT OPPORTUNITY

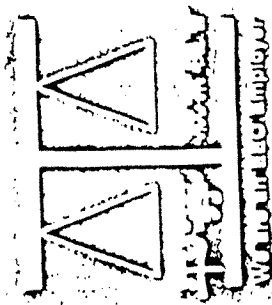
就業機會

OPPORTUNITY



對僱主及人力資源管理的指引

Guidelines for Employers & Human Resource Management



May 1995

# Guidelines for Employers & Human Resource Management

## A Practical Guide

This booklet is a practical guide to Equal Employment Opportunity\* (referred to as EEO) for employers and human resource managers. The booklet is presented in the following sections:

- 1. Definition - What is EEO?
- 2. Rationale - Why is this important to Hong Kong?
- 3. Best Practice - Guide to EEO.
- 4. Implementation - Steps to good employment practices and EEO.
- 5. Appendices - Sample policy statements for EEO.

\*This document was sponsored by the joint associations working group and was prepared by Dr. Iain McEwan of the Hong Kong Productivity Council (HKPC). The views expressed in the document represent those of the joint associations and not necessarily those of Dr. McCormick or HKPC.

## Foreword

These guidelines are sponsored by the following five associations who all support the use of fair employment practices and equality of opportunity in the workplace.

- The Hong Kong General Chamber of Commerce
- The Chinese General Chamber of Commerce
- The Chinese Manufacturers' Association of Hong Kong
- Employers' Federation of Hong Kong
- Federation of Hong Kong Industries

They believe Hong Kong has done much to foster equality of employment opportunity through the wide spread availability of vocational and professional education. They also believe that promotion, education and voluntary self-regulation are the best methods to ensure that both employers and employees practise equal employment opportunity in the workplace.

All businesses in Hong Kong are strongly encouraged to be good corporate citizens through the voluntary adoption of these good employment practices. These guidelines will be subject to review as and when necessary.

## EQUAL EMPLOYMENT OPPORTUNITY

### 1. Definition - What is EEO?

EEO is a commitment by an organisation to be fair in the way it deals with all aspects of its employment practices. This means that the organisation does not permit discrimination of any kind against any person on the grounds of:

- (a) gender
- (b) age
- (c) marital status
- (d) religion or creed
- (e) race, ethnic origin or colour
- (f) nationality or national origin
- (g) disability

where the factor does not impede the employee's ability to do the job.

## 2. Rationale - Why is this important to Hong Kong?

Hong Kong has become prosperous as a result of its open, fair and competitive society. EEO is one part of being an open fair and competitive society. Hong Kong needs EEO for two reasons - skill shortages and social harmony.

### Skill Shortages

Currently Hong Kong suffers from skill shortages in many areas. These skill shortages can be minimised by using the largest pool of talent possible. That is, skill shortages can best be overcome through the use of skilled and talented people no matter what their gender, age, marital status, religion, race, nationality, or disability.

### Social Harmony

Hong Kong prides itself on its low level of racial and social conflict. Its economic success is a result of people being interested in fighting competitors in the market place rather than fighting other groups in society. Social harmony in Hong Kong can be maintained through the use of fair and open practices in all social areas including employment practices.

# EQUAL EMPLOYMENT OPPORTUNITY

## 3. Best Practice - Guide to EEO

This section describes the employment practices which will help eliminate discrimination in the workplace. It recommends the establishment and use of consistent criteria for selection, training, promotion, redundancy and dismissal. Without this consistency, decisions can be subjective and practices will not always be fair.

### 3.1 Genuine Job Qualifications (GJQs)

When any organisation is recruiting, training or promoting staff then it is recommended that a simple set of job qualifications be written to assist in this process. These qualifications should cover such topics as:

- the type of experience the job holder should have  
e.g. merchandising experience
- the amount of experience required for the job  
e.g. five years experience
- the educational qualifications, if necessary  
e.g. a diploma in merchandising
- the specific technical and managerial skills  
e.g. ability to speak Cantonese and English
- the personal qualities required for the job  
e.g. enthusiasm and high energy levels
- the physical and motor skills required for the job  
e.g. eye-hand coordination for debate assembly work

Job qualifications should only address requirements that are specifically related to the job - hence the term Genuine Job Qualifications or GJQs. It can be seen that none of the above examples of job requirements identify gender, marital status, age, religion, race, nationality, disability or other characteristics which are not related to the job.

### Ensuring Fairness

The best way to ensure fairness in employment practice is to use a set of GJQs whenever recruitment, training or promotion decisions are being made. GJQs are also very good management practice as they help organisations to:

- make faster decisions because the criteria for decisions are clear, and
- make better decisions because the criteria directly relate to work performance.

There are very few instances in which GJQs will include statements requiring someone of a particular sex or religion or other group in society to do the job. Exceptions can arise where considerations of privacy and decency or authenticity are involved. For example exceptions may include specifying the gender of a person to supervise changing rooms or the religion of a person required to undertake religious ceremonies.

Job requirements change over time and therefore it is recommended that from time to time organisations examine the job requirements to ensure that they are still relevant and are GJQs.

## 3.2 Deciding who to Recruit

It is recommended that all recruitment decisions be made on the basis of GJQs. Where written documents are developed and produced (i.e. job descriptions and person specifications) they should be done so on job content and the required ability to carry out a given job, not on any other non job criteria.

### Recruitment & Gender:

It should not be assumed that only men or only women will be able to perform certain kinds of work.

For example, it has been found in a number of countries that women prison officers are very effective in maintaining harmony and discipline in men's prisons. The idea of women working inside men's prisons may not sound like a good idea yet practice has shown it to be otherwise.

Using men to run a company's reception area is also an unusual practice but some companies find that combining reception and security tasks is an effective and efficient means of overall office administration.

### Recruitment & Age:

Just as it is important not to make assumptions about a specific job requiring a person of one particular sex, it is also important not to make assumptions about the age of the job holder unless age is *essential*.

For example, some firms have found that people near retirement or those returning to the workforce can be just as hard working and up to date with current job practice and technology as their younger counterparts. Therefore, the specification of age should only be retained if it is absolutely necessary for doing the job.

### Recruitment & Marital Status, Religion, Race, Nationality, and Disability:

There are very few circumstances where marital status, religion, race, nationality or disability will impact on an individual's ability to carry out a job. Unless they represent GJOs, they should not be used as a basis for recruitment.

### 3.3 Advertising

Job advertising is often the most visible and public means of displaying good or bad employment practices. Some job advertisements are based on GJOs while many others are based on age, sex, attractiveness and other characteristics which foster discrimination and social disharmony. Requesting applicants to send in a photo can in itself be seen as a discriminatory practice if appearance is not needed for the job.

To get the best possible staff it is recommended that companies advertise using neutral terms and only request information based on GJOs. Examples are given below.

## EQUAL EMPLOYMENT OPPORTUNITY

Recommended Advertising	Not Recommended
<p>Mr. Ltd wishes to hire a senior merchandiser with at least five years experience in the fashion or clothing industry.</p> <p>This advertisement uses GJOs, that is years of experience and work experience in a particular sector of industry.</p>	<p>Mr. Ltd wishes to hire a 25 to 35 year old male merchandiser who is looking for promotion within the company.</p> <p>This advertisement is discriminatory because the age and sex of the worker are not essential job requirements. The position of merchandiser can be effectively filled by either men or women from a wide age range.</p>
<p>Mr. Ltd wishes to hire a secretary with at least two years experience working for a medium sized firm and who is prepared to undertake some reception and public relations functions.</p> <p>This advertisement uses GJOs, that is years of experience and work experience in a particular sector of industry.</p>	<p>Mr. Ltd wishes to hire an attractive 18 to 21 year old girl who must undertake successful dates and also entertain clients of the firm.</p> <p>This advertisement is discriminatory because it seeks attractiveness, age and sex requirements which are not GJOs.</p> <p>In addition the advertisement requires the person to entertain clients. To test the fairness of this requirement it is useful to ask the question, "could I expect both male and female employees to undertake this duty?" If the answer is yes then it is probably fair and reasonable. However if the answer is no then it is probably an unfair practice.</p>

The above examples show that job advertising can be carried out in such a way as to encourage applications from both sexes. And by placing carefully worded advertisements in publications likely to reach both sexes, employers will access the widest possible range of suitable candidates upon which to choose from.

Recruiting employees solely or primarily by word of mouth restricts the choice of available applicants and is not a recommended practice for EEO employers.

### 3.4 Selection Tests

If selection tests are used they should relate specifically to the job and/or career requirements and measure an individual's actual or inherent ability to do or train for the work or career. Tests which measure personality characteristics which are not clearly job relevant are not recommended.

### 3.5 Applications and Interviewing

#### Consistent Application Processing

It is good practice to ensure that personnel staff, line managers and all other employers who may come into contact with job applicants are trained in developing and using GJOs as a basis for filling jobs. And all applications should be processed in exactly the same way regardless of grouping (e.g. male or female, married or single, Chinese or non-Chinese, able or disabled). Furthermore, all persons handling applications and conducting interviews should be trained in good employment practices. Such training is readily available in Hong Kong.

#### Careful Questioning

During recruitment interviews, questions should relate directly to the requirements of the job. Information required to assess GJOs relating to personal circumstances (e.g. if the job involves unusual hours or extensive travel) must be gathered in as objective a manner as is possible. Detailed questions based on assumptions about marital status, children and domestic obligations should not be asked. It is also recommended not asking questions about marriage plans or family intentions as they could be construed as showing bias against women. Information necessary for personnel records can be collected after a job offer has been made.

Recommended Questioning	Not Recommended
<p>This position requires the person to travel extensively and will involve a number of overnight stopovers. Is this for a problem for you?</p> <p>The question above is recommended because it uses GJOs. That is, the requirement to travel and stay out of Hong Kong for business purposes. The question is asked in a neutral manner without reference to family or other circumstances.</p>	<p>If you have young children this position will not be suitable as you will have to stay out of Hong Kong for business reasons. Do you have young children?</p> <p>The interviewer was not intended to be discriminatory just this question is highly biased against applicants with young children. The question is unfair because the applicant may have young children who can easily be looked after by a spouse, grandparent or domestic helper. If this is the case then business travel would not be a problem.</p>

**3.6 Appraisal, Promotion and Training**  
 It is recommended that where an appraisal system is in operation, the assessment criteria should again be based on CJOs. That is, the organisation should use objective criteria related to specific performance levels such as:

- sales generated
- production targets achieved
- number of training courses run
- number of key clients retained and so on

when assessing the person's performance level. These objective criteria should also become the basis for promotion decisions.

When general ability and personal qualities are the main requirements for promotion to a post, care should be taken to consider all favourable candidates no matter their gender, age, race, disability or other related factors. When promotion decisions are made we recommend that appropriate records be kept so that decisions are not only fair but can also be demonstrated to be so.

When considering which employees should be sponsored to receive training the main criterion should be the likely increased contribution of those individuals to the organisation as a result of the training. Training availability should not be decided on the basis of gender, age, marital status, religion, race, nationality or disability.

**3.7 Health and Safety**  
 There should be very few situations where company policy or practice provide for significant differences in treatment between groups of different gender, age, marital status, religion, race, nationality or disability in terms of health and safety. There should be well founded reasons if such differences are maintained or introduced.

**3.8 Terms of Employment, Benefits, Facilities and Services**  
 It is recommended that all terms of employment, benefits, facilities and services be reviewed to ensure no discrimination is made on the grounds of gender, age, marital status, religion, race, nationality or disability. For example, part-time work, company cars, housing and health benefits if available to one person in a particular grade or level of staff or management should be available to all persons who hold the same job rank or level in the organisation.

**3.9 Grievances, Disciplinary Procedures and Victimisation**  
 Grievances  
 Organisations should take care to ensure that all grievances from staff are handled using the same types of procedure. For example, if there is a complaint against a supervisor or manager then the same investigation process should be undertaken regardless of the ~~person's~~ ~~employee's~~ marital status, gender, race, nationality or

It is recommended that all employees have the right to raise any grievance with their manager and that if employees wish, they can be accompanied by another employee of the firm to act as their representative when discussing matters with management. If the situation is very complex and problematic it can be useful to appoint an outside person to help settle the grievance.

**Disciplinary Procedures**  
 Disciplinary procedures should also be handled in a uniform manner without reference to gender, age, marital status, religion, race, nationality or disability. Employees should be advised of the organisation's rules of conduct and what disciplinary procedures will be enacted if these rules are infringed.

When handling disciplinary cases the organisation should treat employees in accordance with the principles of natural justice. For example, when dealing with a complaint against staff the staff concerned should be clearly told about the nature of the complaint against them, given the chance to explain the situation, helped to improve and warned of future consequences before any decisions are made about dismissal.

**Discrimination, Victimisation or Harassment**  
 Particular care should be taken in dealing effectively with all complaints of discrimination, victimisation or harassment. It should not be assumed that they are made by those who are over sensitive.

One type of victimisation is sexual harassment. This includes a range of unwanted behaviours which whether intentional or not create feelings of unease, humiliation, discomfort, cause offence, exclusion, withdrawal, or which threaten or appear to threaten job security. Examples of sexual harassment include:

- sexual teasing or suggestive remarks, sexist jokes and patronising or derogatory behaviour;
- verbal or physical threats or abuse, including sexually derogatory or stereotyped remarks and statements;
- an offensive manner of communication e.g. leering and lewd gestures, touching, grabbing or brushing up against others;
- the display or circulation of sexually offensive material and sexually suggestive material;
- unwarranted, intrusive or persistent questioning about a person's marital status, sexual interest or orientation; and
- suggestion that sexual favours may further a person's career or that not offering them may adversely affect their career.

It is recommended that all cases of alleged sexual harassment be thoroughly but sensitively investigated and that firms treat all forms of victimisation as misconduct which is liable to disciplinary action.

## E Q U A L E M P L O Y M E N T O P P O R T U N I T Y

## E Q U A L E M P L O Y M E N T O P P O R T U N I T Y

## 5. APPENDICES

These appendices aim to provide practical and workable examples of good employment policy and practice. Such policies should be regarded as illustrative only and will need careful consideration and possible modification before being used by any organisation.

### APPENDIX 1

This is an example of a policy statement from a U.K. professional services firm.

#### EQUAL OPPORTUNITIES

The firm is committed to a policy of equal opportunity which aims to ensure that no job applicant or employee receives less favourable treatment on the grounds of gender, age, marital status, religion, race, nationality or disability.

#### POLICY

All partners and staff are responsible for observing the policy. Any member of the firm who contravenes the policy may be personally liable and have legal action taken against him/her.

#### Recruitment

All candidates for employment will be considered equally regardless of gender, age, marital status, religion, race, nationality or disability.

We will consider candidates with physical disabilities where the disability does not impede the candidate's ability to do the job.

Interviewers should be trained and should be aware of our Equal Opportunities Policy when interviewing candidates.

Application forms and interview notes of all unsuccessful candidates should be kept for a minimum of six months. This information is important evidence in cases of alleged discrimination.

#### Promotions, Pay and Training

Selection criteria for promotions, pay increases and training will be based solely on performance and potential.

Decisions regarding promotions and pay increases will be based on an annual assessment of employees' performance and contribution to the firm.

#### Communicating the Policy

Personnel and appointed managers are responsible for communicating and implementing the policy. Staff should be made aware of the consequences of behaviour or incidents which contravene the policy.

All recruitment advertising and brochures must state that the firm is an equal opportunities employer.

#### Monitoring the Policy

The National Director of Personnel will monitor and review the effects of the policy at regular intervals.

#### Complaints

All complaints of victimisation, discrimination or harassment will be dealt with under the firm's grievance procedures and will be thoroughly investigated.

Any acts of discrimination, victimisation or harassment which are proven will be viewed as serious offences under the firm's disciplinary procedures.

Any person who has a discrimination claim brought against him or her must contact the National Personnel Manager for guidance.

## EQUAL EMPLOYMENT OPPORTUNITY

### 3.10 Dismissals and Redundancies

As with other areas of employment practice care needs to be taken when considering dismissals and redundancies. Organisations should develop in writing, an objective process to follow when dealing with dismissals and redundancies.

If voluntary redundancy is offered to employees it should be done strictly on the basis that the particular job in the company is no longer required, rather than on any other grounds. Compulsory redundancy decisions should be made on the basis of which jobs are being eliminated and the performance of individual workers rather than matters of gender, age, marital status, religion, race, nationality or disability.

### 1. Implementation - Steps to Good Employment Practices & EEO

This section of the booklet describes the steps that can be taken by employers who want to formally implement good employment practices and EEO.

#### 1.1 Developing Policy

A well written EEO policy will act as a guide for everyone in the organisation to understand what is important and how to implement good employment practice. Such a policy is a commitment by an employer to the development and use of employment procedures and practices which do not discriminate on grounds of gender, age, marital status, religion, race, nationality or disability and which provide genuine EEO for all employees. Samples of policy statements are given in Appendix I and II.

#### 1.2 Implementing the Policy

An EEO policy must be seen to have the active support of management at the highest level. To ensure that the policy is fully effective, the following procedure is recommended:

- (a) the policy should be clearly and simply written
- (b) overall responsibility for implementing the policy should rest with senior management
- (c) the policy should be made known to all employees and, where reasonable and practicable, to all job applicants.

#### 1.3 Monitoring

It is recommended that the policy is monitored regularly to ensure that it is working in practice. For example, if monitoring remuneration levels in a small firm with a simple structure it may be adequate to assess the distribution and payment of employees from personal knowledge. In a large and complex organisation however, a more formal analysis may be necessary such as an analysis of pay and benefits by sex, grade and payment in each unit.

## EQUAL EMPLOYMENT OPPORTUNITY



### Job Descriptions

Ensure that there are no unnecessary requirements which discriminate against a particular ethnic religion, disabled or other groups.

### Advertisements and Recruitment Literature

Ensure advertisements or other recruiting materials in brochures with photographs, it is important to show many groups. This is particularly important for school leavers and graduates.

### Employment Agencies

Ensure that they are briefed with respect to our policy to ensure fairness and avoid discrimination in the presentation of candidates.

### During Employment

Selection criteria for promotion and training should not discriminate against ethnic groups and should be based only on performance and potential.

### APPENDIX II

A summary of the Equal Opportunities Employment Policy

#### EQUAL OPPORTUNITY POLICY \*

1. The firm is an equal opportunity employer. This means that the firm does not permit discrimination on the grounds of:
  - (a) race or ethnic origin
  - (b) religion or national origin
  - (c) sex
  - (d) marital status
  - (e) disability
2. Direct discrimination is defined as treating a person less favourably than others as they would be treated in the same or similar circumstances.
3. Indirect discrimination occurs when a requirement or condition is applied which, while it is not aimed at or not adversely affects a considerably large proportion of people of one race, sex or marital status than another, and cannot be justified on grounds other than race, sex or marital status.
4. The firm rejects discrimination as defined in paragraphs 2 and 3 above, as misconduct and any employee of the firm who discriminates against any other person will be liable to disciplinary action.
5. The firm will ensure that equal opportunity principles are applied in all its personnel policies and in particular in the procedure relating to recruitment, training, development and promotion of staff. In applying the policy to the disabled, the provision that the disabled does not prevent the fulfilment of the job from being carried out.

## EQUAL EMPLOYMENT OPPORTUNITY

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## 一個實用的指引

本手冊乃為僱主及人力資源經理撰寫之平等就業機會 (或簡稱 LEO) 實用指引, 並包括有以下章節

1. 定義
  - 何謂「平等就業機會」?
2. 理由
  - 平等就業機會為何對香港如此重要?
3. 最佳做法
  - 良好僱傭方法指引
4. 實踐
  - 實踐良好僱傭方法及平等就業機會的步驟
5. 附錄
  - 平等就業機會政策條文的樣本

註：此文件係由「連續三年僱傭機會所香港」及「僱傭機會明瞭」提供。由僱傭會。

# 平等就業機會

## 對僱主及人力資源管理的指引

### 前言

員工指示規定由下述員工團體協助推行，他們都支持工作地方應有公平僱傭方法及平等機會

- 香港僑商會
- 香港中華總商會
- 香港中華廠商聯合會
- 香港勞工聯合會
- 香港工業總會

他們相信香港已「做了很多工作」，但最核心的職業訓練及職業教育，去促進平等就業機會，我們卻都「沒有做好」，我們教育及工作市場確保僱主和僱員都能在「工作地方推行平等機會」最佳方法。

香港所有商業團體目前採用良好僱傭方法，如有需要，本指引將作適高修改。

### 1. 定義 - 何謂「平等就業機會」？

「平等就業機會」意謂，僱傭承諾去將公平的原則應用於所有僱傭程序上，也就是說，這項承諾不會因為以下任何因素而歧視任何人，包括

- a. 性別
- b. 年齡
- c. 婚姻狀況
- d. 宗教志願
- e. 種族 族裔或膚色
- f. 國籍或出生地
- g. 傷殘缺陷

例如：因下列因素而妨礙其工作能力

# 平等就業機會

## 2. 理由 - 平等就業機會為何對香港如此重要？

香港今日之繁榮，有賴一個開放、平等及富競爭能力的社會。「二十一世紀委員會」實在是一個開放、平等及其競爭力的社會的組成部份。香港需要「二十一世紀委員會」的兩人理由：技術人員短缺和社會和諧。

### 技術人員短缺

現時香港多個行業均缺少技術人員，只有盡量善用現有人力資源，才可減輕這種情況。換言之，充份利用所有現時有技術有才幹的人，而不論其性別、年齡、婚姻狀況、宗教、國籍或身體傷殘，將是解決人才短缺的最佳辦法。

### 社會和諧

香港，向以少種族及階級和諧而引以為榮，香港的經濟成長有新/們在市場上勇躍了競爭多於派系鬥爭，香港的整體和諧，可確在各各方面，包括就業、採收、上開政府所則面得以維持。

## 3. 最佳做法 - 平等就業機會指引

以下指引將描述何謂良好僱傭方法，旨在消除工作地方之歧視情況，僱傭者實應如何認識，其之標準應以應用於甄選、培訓、提升、遷徙及解僱等皆宜。如單方或單此標準，僱傭之決定將可能是主觀及大不公平。

### 3.1 真正工作條件要求 (GJQA)

每個機構最好有一套完整之工作條件要求，以便於招聘、培訓及提升員工。這類工作條件要求應包括以下各項

- 該職位所需之工作經驗  
例如：進出口經驗
- 經驗之程度程度  
例如：五年經驗
- 如有需要，教育程度  
例如：進出口文憑
- 特殊之技術及管理技能  
例如：能與說流利廣東話及英語
- 擔任此類工作之個人特質  
例如：熱心及精力充沛程度
- 工作所需的屬性和即應的要求  
例如：耐運裝配工作需耐和了解調的能力



### 3.4 甄選測試

如果招聘程序中有甄選測試，這必須與工作或職業要求有關，並必須是應徵個人的實際或模擬工作表現，以決定應徵者是否能夠從事或受訓後從事有關之工作或職業。如果測試只為衡量性格特質而與此無關，便不應進行。

#### 3.4.1 應徵及面試

統一的處理應徵方式  
人事編任部門經理及所有與應徵者有接觸的人士都應該有適當的培訓去製訂及使用「真正工作條件要求」以作為招聘之基礎。

對所有應徵者都應一視同仁，不應有所區分，無論男女、已婚或未婚、中國或外籍、健康或殘疾，而所有處理應徵者或會見應徵者的人士都應有良好的訓練方法的訓練，香港現時所有公司和組織。

#### 3.4.2 小心處理面試問題

面試中提出的問題必須與工作直接有關，如果任何涉及個人情況而與真正工作條件有關的問題，例如在真正的工作時間及較多的外地公幹，亦須各觀地提問，而不能有太多問及個人婚姻、子女及多知言目的面試問題。至於有關個人婚姻或家庭計劃等問題，真正的工作時間及有關問題在聘僱女性時，人事編任所訂的資料亦應在聘用應徵者時才考慮。

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## 平等就業機會

適宜採用的提問方式	不適宜採用的提問方式
「你現時是否正考慮任何問題？」 「你現時有何問題？」	「如你有在工作的話，請問你滿不會適合這份工作？ 「你現時有何問題？」 「你現時有何問題？」
「你現時是否正考慮任何問題？」 「你現時有何問題？」	「你現時是否正考慮任何問題？」 「你現時有何問題？」

### 3.6 評估、擢升及培訓

如果公司有考核制度，其評估標準亦應以「真正工作條件要求」為根據。換言之，一個機構應按照工作表現而訂立各觀標準，例如

- 營業額
- 已完成之生產目標
- 已開辦之培訓課程
- 能保證之主要客戶數目等

去評估個人的表現水平。這些各觀的標準亦應是擢升決定的準則。

如果擢升到某個職位所須考慮的主要因素是個人的「知識、能力及技巧」，那麼所有合資格的人選人都應被一併考慮，而不要限在他們的性別、年齡、種族、婚姻狀況或其他因素。事實上所有擢升紀錄都應保留，以示公平。

當機構考慮去資助應徵者受培訓時，主要的決定因素是他/她是否有足夠的知識、個體情況、更多貢獻。當然，此等決定不能基於性別、年齡、婚姻狀況、種族、國籍或身體殘障。

### 3.7 員工健康與工作安全

除極少例外情形下，公司在政策或習慣上，都不應該因不同性別、年齡、婚姻狀況、宗教、種族、國籍或身體殘障，對員工健康及工作安全問題作出區別。如果有區別的說話，理由必須十分充分，因為這誠有特別危險的員工，而在工作環境中作出此等區別是例外。

### 3.8 僱傭條件、福利、設施與服務

對於員工的僱傭條件、福利、設施與服務，應是時時檢討，以確保在僱傭條件、年齡、婚姻狀況、種族、宗教、國籍或身體殘障情況而有所區別。例如，如僱傭條件、公司政策、住屋、醫療福利、如果對某等殘、廢或管理層應用的話，那麼所有屬於該等殘或廢的員工，應能享用。

### 3.9 冤情、紀律處分程序及通告

#### 冤情

每間機構都應有糾正的冤情處理程序，例如某職員以為其上司行政處理、調查程序或必須「報」，而不滿其職員之性別、年齡、婚姻狀況、種族、宗教、國籍或身體殘障情況。



## 5. 附錄

這些附錄旨在為良好僱傭政策及方法提供實際可行的例子。這些附錄只是例子而已。個別機構有意採用，必須小心考慮及作出適當修改。

### 附錄一

平等機會政策

#### 平等機會

本公司平等機會政策，確保本公司僱員或應徵者都不會因為性別、年齡、婚姻狀況、種族、宗教、國籍或身障情況而受到不公平對待。

#### 政策

所有本公司僱員及應徵者均受此政策。如任何個人違反此政策，本公司定必追究事可或自地追究其法律行動。

#### 聘用

所有申請應徵者都必須符合下列各項：年齡、種族、宗教、婚姻狀況或身障

我們通常聘用在學校的應徵人士。如該名應徵者不從事工作，

可應徵者面試。面試者應有適當的培訓及了解有關政策

所有應徵者應在表格及面試之筆記。應徵者應在面試前，編寫應徵者簡歷及投函。這些會與身障人士

#### 薪金、薪酬及培訓

所有僱員，如無特別規定，應按公司之表現及業績而計算。

所有僱員及應徵者均應享有平等之培訓及發展機會。

#### 政策之傳達

所有僱員及應徵者均應知悉及理解此政策。所有僱員亦必須了解及遵守此政策之內容。

所有僱員及應徵者均應知悉及理解此政策。所有僱員亦必須了解及遵守此政策之內容。

#### 政策之監察

各地分公司人事經理應在對政策作出任何修訂時，負責監察及檢討。

#### 投訴

所有有關投訴者，其投訴或報復的投訴，應必須附帶本公司之申訴程序處理，並得到職位的調查。

如有任何個人投訴有歧視情況，必須與各地分公司人事經理接觸，以尋求指引。

#### 工作概述

所有僱員應知悉及理解此政策。所有僱員亦必須了解及遵守此政策之內容。

## 廣告及招聘資料

所有附有照片的招聘廣告，應避免有種族或其他的偏見；如能顯示一個多元的組合，則最為理想。這對中學或大學畢業生，尤其重要。

## 僱傭代理人

公司應法向僱傭代理人關明公司之政策，及確保在初步甄選過程中必須公允及避免歧視。

## 任職期內

在提升及培訓的選拔中，不應有種族歧視事項以工作表現及潛能為準。

## 附錄(二)

平等機會政策之另一例子。

### 平等機會政策(一)

- 1. 本公司(平等機會)。
- 本公司不會在招聘因其在以下方面而歧視之。此包括

- 膚色
- 信仰或宗教
- 種族或族裔
- 國籍或來自國家
- 年齡
- 性別
- 婚姻狀況
- 身體殘疾

- 2. 「在歧視」的定義是一個人在同一環境中，較其他人所應有的待遇為差。
- 3. 「間接歧視」的定義是任何一條件或要求下，有意或無意地對同一種族、性別或種族狀態的人作出的影響較於其他人為大，而除了種族、性別或種族狀態以外，不能作其他解釋。
- 4. 本公司對第2及3段的歧視行為，視為嚴重不當行為。任何僱員以歧視其他僱員，將受到紀律處分。
- 5. 本公司確保平等機會原則而用在所有之人事政策上。凡以應付招聘、培訓、發展及晉升程序上，至於僱員上的聘用政策，祇要確保情況對工作不構成影響，則僱傭人等應獲一致。

# 平等就業機會

此手冊由以下之機構共同製作：  
This booklet has been produced by:



香港總商會  
The Hong Kong General  
Chamber of Commerce



香港中華總商會  
The Chinese General  
Chamber of Commerce



香港中華廠商聯合會  
The Chinese Manufacturers'  
Association of Hong Kong



僱主聯合會  
Employers' Federation  
of Hong Kong



香港工業總會  
Federation of  
Hong Kong Industries

在工團日益發達及僱主及人力資源管理、即、在識別及執行人力分配及促進工商界與僱主之間之溝通及計劃、以確保僱主和僱員都能在工地方自行工作機會。

It is intended to be used by employers and human resource management as a guide to the implementation of good employment practices and the establishment of Equal Employment Opportunities in the workplace.

Copies of this booklet are available from:

The Hong Kong General Chamber of Commerce  
221 United Centre, 70 Queenway, 1901-1902, Hong Kong

The Chinese General Chamber of Commerce  
201-202, 100 Queenway, Hong Kong

平等

EQUAL EMP

對僱主及  
Guidelines for Emp



**Disability Discrimination Bill**

**Legal Service Division Report**

**Objects of the Bill -**

To -

- (a) render unlawful discrimination against persons on the ground of their or their associates' disability and harassment and vilification of such persons; and
- (b) require the Equal Opportunities Commission ("the EOC") proposed under the Sex Discrimination Bill to work towards the elimination of such discrimination, harassment and vilification and to promote equality of opportunity between persons with a disability and persons without a disability.

**Date of First Reading**

- 2. 3 May 1995.

**LegCo Brief Reference**

- 3. HW CR 2/5091/94(95) Pt. 15 dated 11 April 1995, from Health and Welfare Branch.

**Comments**

- 4. This Bill is substantially based on the provisions of the Sex Discrimination Bill (which itself is based upon the Sex Discrimination Act of the United Kingdom (c. 65)) and the Australian Disability Discrimination Act 1992.



5. The Bill makes discrimination and harassment on the ground of disability unlawful in the employment field, education field, provision of premises, goods, services and facilities and makes discrimination unlawful with respect to a person with disability in miscellaneous areas.

6. The Bill provides specific exceptions from its operation corresponding to given areas of discrimination. For example, it is not against the law to discriminate against a person where the absence of a disability is a genuine occupational qualification for the job to be performed.

7. The Bill also contains general exceptions from its operation. For example, it provides that any special measures taken in respect of persons with a disability to, for example, give equal opportunities with other persons will not be rendered as unlawful under the Bill.

8. The enforcement of the provisions of the Bill will be carried out by the court and the EOC that is to be set up under the Sex Discrimination Bill upon its enactment. A person may lodge with the EOC a complaint alleging that an unlawful act has been committed contrary to the Bill and, subject to certain exceptions, the EOC is then bound to investigate the act and to endeavour, by conciliation, to effect a settlement of the matter to which the act relates. If such conciliation fails, the EOC may assist an aggrieved person in bringing his case to the District Court. The EOC will also issue Codes of Practice so that all parties involved will have practical guidelines to follow regarding how they are expected to behave in any given sector. The provisions relating to employment in the Bill will only come into effect when the Codes have come into effect.

9           The Bill, upon its enactment, will bind the Government

### **Comparison between the Disability Discrimination Bill and the Equal Opportunities Bill**

10.           Since the subject matter of the captioned Bills overlap to a certain extent, it may be useful here to draw a brief comparison between them.

11           The subject matter of the Disability Discrimination Bill overlaps, in substance, Part VI of the Equal Opportunities Bill. They both cover similar scope of grounds of discrimination, namely, disability and harassment. The definition of “disability “ under the captioned Bills are substantially the same. Under the Disability Discrimination Bill, “harassment” is defined as “unwelcome conduct” that could be anticipated would offend, humiliate or intimidate a person. Under the Equal Opportunities Bill, threats, abuse, insults or taunts on the grounds of disability constitute unlawful harassment when the victim suffers any disadvantage for objecting, or reasonably believes objection would result in disadvantage. Both Bills also cover similar scope of areas of discrimination. They cover the employment field, education field, provision of premises, goods, services and facilities and other miscellaneous areas.

12.           To oversee the implementation of the provisions of the Disability Discrimination Bill, the Bill provides for the establishment of a statutory body, the Equal Opportunities Commission. The Equal Opportunities Bill does not make provision for the establishment of any similar body (principally because of the difficulties faced by a Private Member under Standing Order No 23).

## Public Consultation

13. The LegCo Brief states that between July 1994 and February 1995, the Administration consulted a wide range of organisations representing both people with a disability and those who might be affected by the Bill. The Administration has taken on board some of their suggestions in the Bill.

14. The Administration briefed Members of LegCo Panel on Welfare Service on the Bill at its meeting held on 21 April 1995.

## Recommendation

15. In light of the substantial policy issues involved, Members will no doubt wish to form a bills committee to examine the Bill in detail. In deciding whether to take the matter further, Members may wish to note that the Bills Committee study the Equal Opportunities Bill and the Sex Discrimination Bill has generally concluded scrutiny of the policy issues in both Bills and commenced consideration of committee stage amendments to the Bills on 21 April 1995.

(Stephen LAM)  
Assistant Legal Adviser  
3 May 1995

SL REPORT DISABLE

# DOCUMENT

Proposed Amendments put forward by  
the Hon Anna Wu to the Sex Discrimination Bill (SDB) :  
Exceptions for Death or Retirement Benefits

The Hon. Anna Wu has suggested in her paper AW033195-1 that the exceptions for death and retirement benefits in Clause 10(4) of the SDB should be reviewed for consistency with the principle and clarified.

## Clause 10(4)

2. By virtue of Clause 10(4) of the Bill, it would not be unlawful for the employer to treat male and female employees and applicants for employment differently concerning 'provision in relation to death or retirement'. Government recognises that different types of retirement schemes and different death benefits are presently provided by employers. Such schemes and benefits may render different treatment to male and female employees. The purpose of providing the exception in Clause 10(4) is to ensure that such arrangements would not be made unlawful by virtue of the provisions in the Sex Discrimination Bill.

3 Provisions in relation to death and retirement is a complicated matter. In the private sector, many employers provide retirement and/or death benefits for their employees. A majority of such employers provide these benefits to their employees under locally established retirement and/or death benefit schemes which follow Hong Kong practice, that is to say, they treat male and female members in the same way.

4. There are however, a number of international firms or their local subsidiaries which provide retirement and/or death benefits under schemes of their head offices of foreign designs which may have different treatment for females and males. In most of these cases where treatment differ, females have a lower eligibility requirement for entitlement to normal retirement or early retirement benefit. These provisions may be regarded as discriminatory against male members who are entitled to reduced benefits despite having the same age and earnings history. There are also cases, for example, in a defined contribution pension scheme, where female pensioners are paid a lesser amount as they are expected to have a longer life span. Such differential treatment between male and female employees is made on the basis of different life expectancy between male and females, notwithstanding that the same amounts have been accumulated under the scheme for males and females with the same age and pensionable earnings. Similarly, a pension scheme may allow pensioners to convert their pensions into a lumpsum and apply different commutation factors to male and females of the same age.

5. Clause 43 of the Bill provides an exception for "treatment of a person in relation to any class of insurance business, or similar matter involving the assessment of risk ...". The person relying on the exception has to prove that the differential treatment was effected by reference to actuarial or other data from a source on which it was reasonable to rely and was reasonable having regard to the data and other relevant factors.

6. We understand that some pension schemes do not have a reliable actuarial basis for the conversion of an accumulated sum into a pension for life (in the case of a defined benefit pension scheme) or for the commutation of pensions into lump sums; they only make broad reference to the gender of the employees in question. As these schemes may not involve the assessment of risk by reference to actuarial or other reasonable data, they will not be able to take advantage of the Clause 43 exception. To continue with their operation, such schemes have to rely on the exception provided under Clause 10(4) of the Bill.

7. In other respects male and females are treated differently under local as well as foreign retirement and/or death benefit schemes. These include, for example, the qualifying service for normal retirement and death benefit for surviving spouse. The Administration does not have information on the features of all retirement and/or death benefit schemes covering employees in Hong Kong. It is therefore unsafe to remove the exception in Clause 10(4).

8. In the public sector, there are a number of obsolescent statutory provisions which provide different retirement and death benefits for male and female civil servants. An outline of the relevant provisions and the present position with respect to these statutory provisions is annexed. As can be seen from the information at the annex, the statutory provisions in respect of the civil service have already been amended and the remaining relating to the Auxiliary Police Force will be amended shortly. Equal treatment is already provided for new officers joining the civil service. The differential death or retirement benefits provided for male and female civil servants are obsolescent preserved rights and will fall away in time. Nonetheless, it is necessary to retain the exception in Clause 10(4) for the time being so as not to render such differential treatment unlawful and honour the preserved rights of the officers concerned.

9. The provision of death and retirement benefits for employees is a complex matter. In the UK, the Equal Opportunities Commission recognises that there "should be an orderly approach to the transition from the present position to a new regime, which look to the future rather than disturb what had been done in the past". The provisions in relation to death and retirement are presently still retained in the UK Sex Discrimination Act.

10. The Administration is of the view that, in the Hong Kong context, it is necessary to retain the exception in Clause 10(4) for the time being. In the

light of the operation of the legislation and should the need arises, the Equal Opportunities Commission could review the need to amend Clause 10(4) of the Bill.



Statutory Provisions which would fall within the exception  
at clause 10(4) of the Sex Discrimination Bill

- (a) The proviso to section 6(1) of the Pensions Ordinance (Cap. 89)(PO);
- (b) Section 11(1)(c) of the Pension Benefits Ordinance (Cap. 99)(PBO);
- (c) Section 7(1)(c) of the Pension Benefits (Judicial Officers) Ordinance [PB(JO)O];
- (d) Regulations 6, 13, 19 and 26(8A) of the Pensions Regulations (Cap. 89 sub. leg.)(PR);
- (e) Regulation 3 of the Widows and Orphans Pension (Application) Regulations (cap 94, sub. leg.) [WO(P)AR]
- (f) Regulation 17 of the Pension Benefits Regulations (Cap. 99 sub. leg.)(PBR);
- (g) The proviso to regulation 4(1) of the Royal Hong Kong Auxiliary Police Force (Pensions) Regulations (Cap. 233 sub. leg.)(RHKAPFR);  
and
- (h) Regulation 17 of the Pension Benefits (Judicial Officers) Regulations (Cap. 401 sub. leg.) [PB (JO)R]

Statutory Provisions which would  
fall within the exception  
provided under Clause 10(4) of  
the Sex Discrimination Bill

Marriage gratuity and pensionable service for female officers appointed to  
established offices before 17.11.1975

Section 6 of the PO, regulations 6, 13, 19, 26(8A) of PBR, section 11 of PBO, regulation 17 of PBR, section 7 of PB(JO)O and regulation 17 of PB(JO)R provide for arrangements on the marriage bar and pensionability of the service of female officers. These provisions on marriage bar/ marriage gratuity are obsolete. A synopsis of the matters involved are

Encl. 1 at enclosure 1.

2. Regulation 6 of PR provides that single female officers who were on the pensionable establishment on 17 November 1972, have an option to retire on marriage with gratuity and be re-employed on temporary month-to-month terms, to preserve their existing right after the lifting of the marriage

bar. This may appear to constitute discrimination against male officers who do not have such an option.

3. Regulation 19(6) of the PR, Regulation 17(4) of the PBR and Regulation 17(3) of PB(JO)R provide that in respect of female officers who married before 27 May 1966 and retired from service with marriage gratuity, their service prior to such retirement does not count for pension purposes. The policy on the lifting of the marriage bar was accepted by Government with effect from 27 May 1966 and service prior to that date is not counted for pension because it has been offset by the payment of a marriage gratuity. This is in accordance with the normal policy that changes in benefits should only take effect from a current date.

4. Female officers who were married prior to 27 May 1966 and who later opted to transfer to the permanent establishment in 1972, have now virtually all retired. The differential treatment prior to 1966 between male and female officers in this area is obsolescent and would disappear shortly.

#### Eligibility to join Widows and Orphans Pension Scheme (WOPS)

5. By virtue of the definition of "officer" under Regulation 3 of WOP(A)R, female officers are not eligible to join the WOPS. However, WOPS is now an obsolete scheme as no new members had been admitted since 1.1.1978. The WOPS has been replaced by the Surviving Spouses' and

Children's Pensions Scheme (SSCPS). With the enactment of PMO 1993, female officers are allowed to join, on a voluntary basis, the SSCPS and are in exactly the same position as male officers.

### The Auxiliary Services Pensions Ordinance

6. Regulation 4(1) of the Royal Hong Kong Auxiliary Police Force (Pensions) Regulations entitles the wife of an officer who died on duty to be eligible for the death gratuity and dependent pension. The Secretary for Security will be making amendments to the legislation to remove the anomaly to enable the spouse of an officer to be eligible instead. The exception in clause 10(4) should be retained in the meantime so as not to render the present practice provided under the Regulations unlawful.

Synopsis on Marriage Bar/Gratuity and Pensionability of  
Female Officers Appointed before 17.11.72

Historical Background

With the enactment of the Pensions Ordinance 1932, a marriage bar was introduced in order to bring the practice into line with that in the UK Civil Service. Thereafter female officers were required to retire on marriage and be then re-employed on temporary month to month terms. These officers were entitled to a marriage gratuity if they had 5 years service or more on marriage.

2. In 1965, the Salaries Commission recommended that the marriage bar should be removed and that married female officers should also enjoy the same pensionable terms of service as their male counterparts. This recommendation was accepted in principle by Government on 27 May 1966. After staff consultation, the Pensions (Amendments) Ordinance 1972 was enacted to remove the marriage bar with effect from 17 November 1972.

Pensionability of These Female Officers

3. Upon the lifting of the marriage bar, married female officers serving in established offices on November 1972 were given the option of remaining temporary month-to-month terms or transferring pensionable terms; or agreement terms as appropriate. female officers who were married before 17 November 1972 and who opted to transfer to pensionable terms, following arrangements apply -

(a) Those who had received a marriage gratuity (except those married before the policy change on 27 May 1966) were allowed to refund the marriage gratuity. Upon refund, their service before and after marriage would be counted full as pensionable service.

(b) Those married before 27 May 1966 were allowed to refund the marriage gratuity. Their service prior to marriage would not be counted for pension purposes. However, their post-marriage service would be counted in full for pension purposes. The counting of post-marriage service prior to 27.5.66 was amended from a reduced rate of 600/800 under

Old Pension Scheme and 675/800 under the New Pension Scheme to full rate for pension purposes by the Pensions (Amendment) Regulation 1994, Pension Benefits (Amendment) Regulation 1994 and the Pension Benefits (Judicial Officers) Amendment Regulation 1994.

- (c) In the case of those who did not receive a marriage gratuity, their service before and after marriage would be counted in full for pension purposes.

4. Single female officers who were serving in a established office on 17 November 1972, have a once-and-for-all irrevocable option of either retiring with a marriage gratuity and being re-employed on temporary month-to-month terms; or continuing to serve on pensionable terms. This is a preserved right for those appointed before 17.11.72.

(H/036)

⊖ ⊖

Proposed Amendments put forward

by the Hon. Anna Wu to the

Sex Discrimination Bill (SDB) :

Other Fields etc.

The Hon. Anna Wu has put forward a number of proposed amendments to the Sex Discrimination Bill (SDB), AW033195-1 refers. The Administration's response to some of the proposals in respect of the other fields, other unlawful acts and general exceptions (Parts 5, 6 and 7 in AW033195-1) is set out below.

Clubs should be explicitly covered in order to avoid exemption of "private" clubs from SDB 25 (Item 5.1)

2. We agree to include a provision to ensure that the activities of clubs would also be covered in the Sex Discrimination Bill.



Sexual harassment in other fields [SDB 32] should be extended to cover harassment of students by students and of educational staff by students (Item 5.6)

5. The Administration agrees with this proposal in principle.

Discriminatory advertisements [SDB 36 and 74 ] should carry a fixed financial penalty and be actionable by any person and should therefore be made a criminal offence subject to private prosecution (Item 6.1)

6. Clause 36 of the SDB makes it unlawful to publish an advertisement which indicates or might reasonably be understood as indicating an intention to do an act which is unlawful because of the provisions of Part III and IV of the Bill. By virtue of Clause 74 , proceedings in respect of a contravention of section 36 shall be brought only by the Commission : the Commission may apply to the District Court for an injunction restraining a person who has published a discriminatory advertisement from continuing such unlawful behaviour. The Administration considers it reasonable that the remedy should be in the form of a court order restraining the continuation of the unlawful act We do not believe that such acts are misconduct of so grave a nature as to warrant making it a criminal offence, in particular when it is noted that under the SDB liability may be

The limited exceptions for positive discrimination [ SDB 45-47 ] should be replaced by general exceptions for special measures and for measures to achieve equality (Item 7.2) .

9. The Administration agrees in principle to include a provision which will make measures intended to achieve equality not unlawful under the SDB.

The exceptions for protective legislation [ SDB 49, 50, 52 and Sch 2 ] should be deleted (Item 7.3)

10. This proposal was separately addressed in SDB Paper No 1/95.

The exemption for acts done to safeguard the security of Hong Kong, as certified by the Chief Secretary [ SDB 51 ], should be deleted (Item 7.4)

11. The Administration's position in respect of this proposal was explained to the Bills Committee at the meeting on 16.12.1994 (record of Bills Committee's deliberation at Annex A.).

status. The Administration feels that it is reasonable for an employer to provide a higher level of benefits for married employees because such employees will have a larger household. We are examining whether such an exception would create a loophole, i.e. whether employers may legitimately give a higher level of housing benefits to unmarried staff thus treating his married staff less favourably. If there is a loophole, we would consider whether such a loophole could be removed by effecting Committee Stage Amendments.

Extract of Notes of Meeting held on 15.12.94Required

## I. Meeting with the Administration

A. Exceptions for security related issues

Members questioned the need for exceptions from the SDB on security related matters under Clause 5, and Schedule 4. A Member raised whether it would be more appropriate to confer a discretionary power on the Equal Opportunities Commission to determine on legislations to be exempted instead of specifying the

exempted legislations under the SDB. In response, the Administration provided the following comments -

- (a) Due to the special nature of work and the operational need of disciplined services, the general exemption provisions under clause 11 of the SDB were inadequate for the purpose. At present the majority of offenders and prisoners were male. It was therefore necessary to have different treatment on the two sexes in respect of matters relating to recruitment, equipment of weapons and deployment of work.
- (b) It should be noted that under the SDB any differential treatment would be regarded as discrimination and the definition did not take into account whether or not the differential treatment was reasonable. There was thus a need for exemption in this respect. The initial legal advice was that these exemption provisions were not inconsistent with the BOR Ordinance. The Administration would give a written reply on the issue. It would also examine their compatibility with the provisions under the Letters Patent and the interpretation of discrimination under the International Covenant on Civil and Political Rights.
- (c) It was questionable whether the Commission should be vested with a discretionary power to decide which legislations should be exempted. Clause 58 already empowered the Commission to review the provisions specified in Schedules 2 and 4.
- (d) At Ms Anna WU's request, the Administration would examine and advise Members of any provisions of the EOB with which it was envisaged that disciplinary forces would have difficulty in complying.

Adm.

Adm.

4 May 1995

Miss Susie Ho  
Principal Assistant Secretary  
Home Affairs Branch  
31st Floor, Southorn Centre  
130 Hennessy Road  
Wanchai  
Hong Kong



Dear Miss Ho,

Questions about the Sex Discrimination Bill [SDB]

We would like to know the Administration's opinion on several matters pertaining to the SDB, as follows.

*1. District Court remedies*

**Can the Administration indicate what, specifically, are the remedies available in SDB proceedings? Are these remedies more limited than those explicitly made available in EOB proceedings (see EOB cl. 234), and if so, why should they be so restricted? In particular, as previously asked in Bills Committee meetings, can the Administration indicate whether reinstatement is available as a remedy in SDB proceedings?**

*2. Period within which proceedings to be brought*

Clause 78 of the SDB limits the period in which SDB proceedings may be brought, in general to one year following the act that is the basis of the complaint (plus a grace period for EOC conciliation, if any). Within what periods may other types of civil proceeding be brought, and why should SDB claims be more stringently limited?

*3. Equal pay*

In the Administration's opinion, will the SDB require (a) equal pay for the same or similar work and (b) equal pay for work of equal value, and on what basis is this opinion maintained? Does the Administration intend to make any more specific legislative provisions for matters of equal pay than is now contained in the SDB, and if so, in what manner?

The issue of equal pay arises because the SDB makes no explicit reference to it. Like the UK Sex Discrimination Act 1975 (and unlike sex discrimination legislation in most other jurisdictions), the SDB does not explicitly prohibit discrimination in contractual terms and conditions as such, but only in pre-contractual terms on which employment is offered (see SDB cl. 10(2); compare EOB cl. 13(2)(a)).

In the UK Sex Discrimination Act, this omission is explained by the existence of a separate UK Equal Pay Act 1970, which contains detailed provisions addressing discrimination in employment contracts. No provisions similar to the Equal Pay Act are made in the SDB, however.

In interpreting the SDB, the courts of Hong Kong will ordinarily be able to refer to UK court decisions interpreting the very similar language of the UK Sex Discrimination Act. No such guidance will be available with respect to equal pay, however, because all UK equal pay decisions are based on the Equal Pay Act, the provisions of which have no parallel in the SDB. In this regard, therefore, the SDB calls for clarification.

Thank you for your assistance.

Yours sincerely,

Anna Wu

cc. Clerk to the Bills Committee considering  
the Equal Opportunities Bill and the Sex Discrimination Bill

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4 May 1995

Mrs. Anna Lo,  
Clark to the Bills Committee to Study the  
Equal Opportunities Bill and the  
Sex Discrimination Bill,  
c/o Legislative Council,  
8 Jackson Road,  
Hong Kong  
(Faxline : 2845 2444)  
Dear Anna,

Bills Committee to Study the  
Equal Opportunities Bill and  
the Sex Discrimination Bill

Further to my earlier letter, I enclose herewith a third note SDB  
7/95, Proposed Amendments put forward by the Hon. Anna Wu to the Sex  
Discrimination Bill (SDB) Equal Opportunities Commission, for the Bills  
Committee's consideration

My apologies for the delay.

Yours sincerely,

Susie Ho

(Miss Susie Ho)  
for Secretary for Home Affairs

Paper No. SDB 7/95

Proposed Amendments put forward by the Hon. Anna Wu  
to the Sex Discrimination Bill (SDB):  
Equal Opportunities Commission

The Hon. Anna Wu has put forward a number of proposed amendments to the Sex Discrimination Bill (SDB) (AW 033195-1 refers). The Administration's response to some of the proposals in respect of the Equal Opportunities Commission (EOC)(Part 8 in AW 033195-1) is set out below -

The procedure for formulating Codes of Practice [SDB 61(2)-9] should be simplified.(Item 8.4)

2 Clause 61 of the Bill provides for the issue of codes of practice by the EOC for the purposes of the elimination of sex discrimination and the promotion of equality of opportunity between men and women generally. Subclause (2) provides that when the Commission proposes to issue a code, it shall first publish the code and consider representations made to it about the code. The Commission is also obliged, under subclause (3) to consult with the



- 2 -

appropriate organisations and laid the code in the Legislative Council for passage by resolution

3. The code is an important document providing guidance for all parties concerned and the court shall take into account the relevant provisions of the code in proceedings before it. We regard that the procedures for drawing up the code, as spelt out in clause 61 of the SDB, as appropriate.

In relation to formal investigations into named persons [SDB 63(4)], as construed by the UK Courts -

- (a) the EOC should be empowered to initiate such investigations whether or not it believes that the named persons committed unlawful acts, and
- (b) the right to make pre-investigation representations to the EOC should be extended, within a strict time limit, to any person named in the terms of reference (Item 8.5)

4. Under Clause 62 of the SDB, the Commission may, if it thinks fit, and shall if required by the Chief Secretary, conduct a formal investigation for any purpose connected with the carrying out of any of its functions under section 56(1).

5. There is a distinction between 2 types of investigations : (i) investigations of a general nature where the terms of reference do not confine it

embarks on a named person investigation, to have some grounds for suspecting or believing that the person named in the investigation has committed some act of sex discrimination.

The EOC should be empowered to obtain information in connection with any formal investigation without prior approval by the Chief Secretary, the requirement of such approval in connection with investigations other than into named persons (SDB 64(2)) should be deleted (Item 8.6)

8. Clause 64 of the Bill sets out the power of the EOC to obtain information. The Commission may require any person to furnish such written information as may be described in the notice, and may specify the time at which, and the manner and the form in which, the information is to be furnished; and the Commission may also require any person to attend at such time and place as is specified in the notice and give oral information about any matter specified in the notice

9. In the context of a named-person investigation, the EOC is empowered under Clause 64(2)(b) of the Bill to serve a notice and request for information as set out in paragraph 8 above.

10. Where the investigation is conducted at the request of the Chief Secretary (CS) or where the EOC is conducting an investigation of a general

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nature (i.e. the EOC has no belief or suspicion that there is an act of unlawful discrimination under the SDB), then the EOC is required under Clause 64(2)(a) to seek the CS's authorisation before it can issue a notice to require a person to furnish information or to attend any meeting. In an investigation requested by the CS, it is reasonable to expect the EOC to obtain the CS's authorisation before it issues a notice requiring information to be produced. In a general investigation, where the EOC has no belief of any unlawful act by any specific individual or organisation and where the investigation is basically exploratory in nature, it is reasonable to limit (by requiring the EOC to seek the authorisation of the CS) the EOC's power to obtain information in relation to any named person or the activities of any named organisation. Such a limitation would not inhibit the EOC from seeking information generally (e.g. by approaching a particular person or agency and seek information through mutual co-operation). Once the EOC forms a belief that a particular person or organisation might have committed some unlawful act of discrimination, it may initiate a named-person investigation. The EOC would then have the power to issue notices and seek information in the manner specified in paragraph 8 above.

Home Affairs Branch

May 1995

Ref HB/C/61

**Report to the House Committee on 5 May 1995**

**Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill**

**Purpose**

The Bills Committee to study the Equal Opportunities Bill and the Sex Discrimination Bill presents its interim report to the House Committee and seeks Members' advice on the way forward.

**The Bills**

2. The Equal Opportunities Bill (EOB) was introduced by Hon Anna WU Hung-yuk on 6 July 1994. It seeks to promote equality of opportunity in Hong Kong and to provide remedies in respect of discrimination relating to :

- sex, marital status or pregnancy
- family responsibility or family status
- sexuality or sexual preference
- race
- disability
- religious or political conviction
- age
- spent conviction

- union membership

3. The Sex Discrimination Bill (SDB) was introduced by the Administration on 26 October 1994. The main objects of the Bill are :

- (a) to render unlawful certain kinds of sex discrimination, discrimination on the ground of marital status or pregnancy, and sexual harassment; and
- (b) to establish an Equal Opportunities Commission (EOC) with the function, inter alia, of working towards the elimination of such discrimination and harassment and promoting equality of opportunity between men and women generally.

### **The Bills Committee**

4. At its meeting on 8 July 1994, the House Committee formed a Bills Committee to study the EOB. Dr Hon LEONG Che-hung was elected Chairman. Subsequent to the introduction of the SDB, the House Committee decided on 28 October 1994 that the Bills Committee to study the EOB should also study the SDB. Dr Hon LEONG Che-hung was elected Chairman of the re-constituted Bills Committee. A membership list is at **Appendix I**.

5. As at 30.4.95 the Bills Committee has held a total of 29 meetings, including 12 with the Administration. The Bills Committee has also held two rounds of meetings with deputations in October 1994 and March/April 1995. A list of these deputations is at **Appendix II**. Tables summarizing the main concerns raised by the deputations are at **Appendix III**. In addition to the deputations, written submissions from organisations/individuals have also been considered by the Bills Committee. Their views are similar to those expressed by the deputations. A list of the written submissions is at **Appendix IV**.

### **Present Position**

6. The Bills Committee has generally concluded scrutiny of the policy issues in both Bills and commenced consideration of Committee Stage Amendments (CSAs) to the Bills on 21 April 1995.

7 Members of the Bills Committee, the Administration and the deputations all support, in principle, the spirit of anti-discrimination legislation. But there are diversified views on the approach and timetable for introducing and implementing such legislations. The Administration prefers a step-by-step approach with introduction of the SDB, followed by the Disability Discrimination Bill (DDB) in May 1995, so that the social, economic and legal implications of adopting the legislative approach can be closely examined after the enactment of these two Bills. It also plans to conduct a study on the need for action to tackle discrimination relating to age, family status and sexuality no later than the end of 1995. This study is anticipated to be completed in 12 months. Some members agree to this progressive approach and urge the Administration to set out a concrete timetable for such legislation. Others consider that the EOB is a more comprehensive package of anti-discrimination legislation and should be enacted early. Some other members indicate support for the EOB, but not the SDB unless the Administration puts forward legislation against age discrimination in this legislative session.

### **Proposed re-structuring of the EOB**

8. At the Bills Committee meeting on 21 April 1995, Ms WU proposed to restructure the EOB into three separate bills each covering the different grounds of discrimination as stated in para 2 above. Discrimination relating to sex and disability will not be included as they are already covered by the SDB and DDB. The wording of the three bills would remain the same as in the relevant parts of the original EOB.

9. The purpose of the restructuring, as explained by Ms WU, is to facilitate Members in considering their preferences when eventually voting on the different parts of the EOB. As the aspects of discrimination covered by her proposed three separate bills have already been studied by the Bills Committee, she considers it useful and logical that these bills should be examined by the *same* Bills Committee *immediately* after going through the formality of re-gazetting and introduction. Ms WU's paper on her proposal to restructure the EOB and the amendments she proposes to the SDB and the EOB are at **Appendix V**.

10. The majority of members present at the Committee's meeting voted in favour of Ms WU's proposal (5 against 1, the Chairman did not vote). The Committee decided that Ms WU's proposal be submitted to the House Committee for consideration.

11 Ms WU has indicated that if her proposal is not supported by the House Committee, she will proceed with the EOB in the usual manner.

**Advice Sought**

12. The Bills Committee seeks the views of the House Committee on Ms WU's proposal which the Bills Committee supports.

LegCo Secretariat  
1 May 1995

Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill

Membership List

Dr Hon LEONG Che-hung, OBE, JP (Chairman)  
Hon Christine LOH Kung-wai (Deputy Chairman)  
Hon Mrs Selina CHOW OBE, JP  
Hon HUI Yin-fat, OBE, JP  
Hon TAM Yiu-chung  
Hon Andrew WONG, OBE, JP  
Hon Ronald Arculli, OBE, JP  
Hon Mrs Peggy LAM, OBE, JP  
Hon Mrs Miriam LAU Kin-ye, OBE, JP  
Hon J D McGregor, OBE, ISO, JP  
Hon Moses CHENG Mo-chi  
Rev Hon FUNG Chi-wood  
Hon Simon IP Sik-on, OBE, JP  
Dr Hon Conrad LAM Kui-shing, JP  
Hon Emily LAU Wai-hing  
Hon James TO Kun-sun  
Dr Hon YEUNG Sum  
Hon Zachary WONG Wai-yin  
Hon Roger LUK Koon-hoo  
Hon Anna WU Hung-yuk  
Hon LEE Cheuk-yan

Total 21 Members



Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill

List of deputations/individuals  
met in October 1994 and March/April 1995

1. Alliance for the Promotion of Rights for Grass-roots Women
2. \* Association for the Advancement of Feminism
3. British Chamber of Commerce in Hong Kong
4. \* Christians for Hong Kong Society
5. Coalition of Religious Bodies
6. Coalition of Women's Organisations
7. \* Concern Group on Single Parents
8. Employers' Federation of Hong Kong
9. Federation of Hong Kong and Kowloon Labour Unions
10. Federation of Hong Kong Industries
11. Helpers for Domestic Helpers
12. Hong Kong AIDS Foundation
13. Hong Kong and Kowloon Trade Union Council
14. Hong Kong Association of Banks
15. \* Hong Kong Association of Business and Professional Women
16. Hong Kong Christian Council
17. \* Hong Kong Confederation of Trade Unions

18. Hong Kong Council of Social Service
19. Hong Kong Council of Women
20. Hong Kong Federation of Trade Unions
21. Hong Kong Federation of Women
22. Hong Kong General Chamber of Commerce
23. Hong Kong Monitor
24. Hong Kong Ten Percent Club
25. Hong Kong Women Christian Council
26. \* Hong Kong Women Workers' Association
27. Horizons
28. Miss LUK Fung-ping
29. \* Movement Against Discrimination (MAD)
30. Mr Barrie Brandon
31. Mr Robin Adams & Mr Bill Proufit
32. Starbrook Sports International
33. Task Group on Anti-Discrimination Legislation for Disabled Persons
34. The Mongkok Kai-fong Association Ltd Chan Hing Social Service Centre

(\* Deputations met in both rounds)

Summary of Areas of Concern raised by deputations on the EOB Meeting with the Bills Committee on 27,28 and 31 October 1994

Name of organization/individual	Area of Concern	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Alliance for the Promotion of Rights for Grass-roots Women (爭取基層婦女權益聯盟)								✓			- Labour importation scheme being the main cause for discrimination - Ineffectiveness of re-training scheme
Movement Against Discrimination (反歧視人士聯盟)		✓	✓	✓	✓	✓	✓	✓	✓	✓	Support quota system in work for the disabled
Task Group on Anti-Discrimination Legislation for Disabled Persons (立法小組以保護殘疾人士小組)						✓					Support quota system in work for the disabled
Hong Kong Ten Percent Club (香港十分一會)				✓							Public education on liberty to choose sexual orientation important

Name of organization/individual	Area of Concern	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Hong Kong Monitor (香港監察)		✓	✓	✓		✓		✓			- Public discussion on controversial areas necessary - Freezing period be provided on controversial issues
Hong Kong Association of Business and Professional Women (香港商業專業婦女協會)		✓	✓					✓			Support setup of Women Commission
Hong Kong Women Christian Council (香港婦女基督徒協會)							✓				Have reservation on proposed exceptions relating to religious bodies
Hong Kong Women Workers Association (香港婦女勞工協會)		✓						✓			Equal Opportunities Commission's role in providing assistance in respect of proceedings should be emphasized

Name of organization/individual	Area of Concern	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Association for the Advancement of Feminism (新婦女協進會)		V						V			- Drawn to proposed exceptions relating to NF land  - Existing policy should be reviewed to assess its impacts on discrimination
Helpers for Domestic Helpers (家庭傭工協會)					V						Immigration legislation and policy should be covered by the EOI
Hong Kong Confederation of Trade Unions (香港職工聯盟)						V		V		V	- Labour importation scheme being the cause for discrimination  - Support quota system for the disabled in work
Mr Robin Adams and Mr Bill Proudfit				V							Public education on acceptance of persons irrespective of sexual orientation important

Name of organization/individual	Area of Concern	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Coalition of Religious Bodies (基督教團體關注平等機會法委員會)											<ul style="list-style-type: none"> <li>- Have reservation on proposed exceptions relating to religious bodies</li> <li>- Some job applicants' personal particulars need not be provided to employers</li> </ul>
Christians for Hong Kong Society (基督教徒關注香港協會)											<ul style="list-style-type: none"> <li>- Support exceptions relating to religious bodies</li> <li>- Public discussion on controversial issues necessary</li> </ul>
Hong Kong AIDS Foundation (香港愛滋病基金會)											<ul style="list-style-type: none"> <li>- Advocate equal treatment of PMHIV/AIDS as people with other disabilities</li> <li>- Request HIV/AIDS be covered by the EOB</li> </ul>

Name of organization/individual	Area of Concern	Sex Marital Status Pregnancy	Family responsibility	Sexuality	Race	Disability	Religious or political conviction	Age	Spent criminal conviction	Union membership	Remarks
Concern Group on Single Parents (用注平親人士會)		V									The need of single parent families should be considered in devising policy and legislation

**Summary of Areas of Concern raised by deputations on the EOB and SDB Meeting with the Bills Committee on 31 March, 7 and 13 April 1995**

Area of Concern Name of Organization/ individual	Equal Opportunities Bill (EOB)	Sex Discrimination Bill (SDB)						Remarks
		Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	Enforcement	
1. Hong Kong Association of Business and Professional Women (香港商業專業婦女協會)	✓	✓	✓	✓	✓	✓	Prefer the EOB but would support the SDB subject to amendments in its areas of concern	
2. Hong Kong Council of Women (香港婦女協會)	✓	✓	✓	✓	✓	✓	Support the EOB subject to wider definition of indirect discrimination and stricter test for justifying such discrimination	
3. Coalition of Women's Organisation (香港婦女團體聯席)		✓	✓	✓	✓	✓	Support the SDB subject to amendments in its areas of concern	



Area of Concern	Equal Opportunities Bill (EOB)	Sex Discrimination Bill (SDB)						Remarks
		Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	Enforcement	
4. Name of Organization/individual Employers' Federation of Hong Kong (香港僱主聯合會)	√	√				√	Not support the EOB Support the SDB subject to amendments in the area of employment	
5. Name of Organization/individual Federation of Hong Kong Industries (香港工業總工會)	√	√				√	Not support the EOB Support the SDB subject to amendments in its areas of concern	
6. Name of Organization/individual Hong Kong General Chamber of Commerce (香港總商會)	√	√				√	Not support the EOB Support the SDB subject to amendments in its areas of concern	

Area of Concern Name of Organization/ individual	Equal Opportunities Bill (LOB)	Sex Discrimination Bill (SDB)						Remarks
		Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	Enforcement	
7 British Chamber of Commerce in Hong Kong (香港義商會)								Support fair employment practices and equality of opportunity in the workplace Support promotion and education and voluntary self regulation in implementing equality of opportunity
8 Federation of Hong Kong and Kowloon Labour Unions (港九勞工社團聯會)	√	√						Not support the SDB Support the EOB subject to amendment in the area of discrimination relating to the ground of trade union membership

Area of Concern	Name of Organization/ individual	Equal Opportunities Bill (EOB)	Sex Discrimination Bill (SDB)						Remarks	
			Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	Enforcement		
	9 Hong Kong Association of Banks (香港銀行公會)	Express concerns on discrimination relating to family status, disability, age, spent conviction and sexuality		✓						Support either one of the two Bills subject to its proposed amendments in the areas of concerns
	10 Hong Kong and Kowloon Trades Union Council (港九工團聯合總會)		✓					✓		Urges the setting up of a Women's Commission and elimination of age discrimination
	11 Hong Kong Federation of Trade Unions (香港工會聯合會)	✓	✓					✓	✓	Not support the EOB Support the SDB subject to amendments in its areas of concern

Area of Concern Name of Organization/ individual	Equal Opportunities Bill (EOB)	Sex Discrimination Bill (SDB)						Remarks
		Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	Enforcement	
12 Hong Kong Confederation of Trade Unions (香港職工會聯盟)	√	√				√	Not support the SDB Support the EOB subject to the inclusion of the EOC	
13 Hong Kong Council of Social Service (香港社會服務聯會)		√	√		√	√	Support the SDB subjects to amendments in its areas of concern	
14 Movement Against Discrimination (反歧視大聯盟)		√	√	√		√	Support comprehensive legislation together with the setting up of the EOC The SDB should incorporate amendments in the areas of concern	

Area of Concern	Name of Organization/ individual	Sex Discrimination Bill (SDB)						Remarks
		Equal Opportunities Bill (EOB)	Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	
	15 Ms LUK Fung-ping (陸鳳萍女士)	√						Support the EOB which could eliminate discrimination on the grounds of political and religious conviction
	16 Hong Kong Christian Council (香港基督教協進會)			√				The SDB coupled with the EOC is a good mechanism to enforce legislation against sex discrimination
	17. Starbrook Sports International	√						Age discrimination in selecting judo players will adversely affect success in international competitions

Area of Concern	Sex Discrimination Bill (SDB)						Remarks
	Equal Opportunities Bill (EOB)	Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	
Name of Organization/ individual							
18. Hong Kong Women Workers' Association (香港婦女勞工協會)		√	√				Support the SDB subject to inclusion of provisions against discrimination on the grounds of age and family responsibility
19. Mongkok Kai fong Association Ltd. Chan Hing Social Service Centre (旺角街坊會陳慶社會服務中心)	√	√			√	√	Support enactment(s) which has (have) financial resources to implement and provides women with comprehensive protection from discrimination
20. Association for the Advancement of Feminism (新婦女協進會)		√	√		√	√	Support the SDB subject to amendments in the areas of .....

Area of concern Name of Organization/ individual	Sex Discrimination Bill (SDB)						Remarks
	Equal Opportunities Bill (EOB)	Scope of the Bill	Sex Discrimination in Employment Field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	
21 Hong Kong Federation of Women (香港各界婦女 聯合協進會)	√	√				√	Not support the EOB Support the SDB Propose the setting of a ceiling for compensation claims in sex discrimination and sexual harassment cases Type the Administration for a legislative timetable on other forms of discrimination contained in the EOB
22 Mr Barrie Brandon	√						Supports the EOB and hopes that it will be enacted as soon as possible

Area of concern	Equal Opportunities Bill (EOB)	Sex Discrimination Bill (SDB)						Remarks
		Scope of the Bill	Sex Discrimination in Employment field	Sex Discrimination in other Fields	General Exceptions	Equal Opportunities Commission (EOC) / Codes of Practice	Enforcement	
Name of Organization/ individual  23 Horizons	√							Support the EOB which could foster social acceptance and nurture understanding and love of the less understood segments of society
24 Concern Group on Single Parents (關注單親人工會)	√							Single parents and their children face discrimination relating to age, family responsibility/responsibility, family status, in the work place and in school



Bills Committee to study  
the Equal Opportunities Bill and  
the Sex Discrimination Bill

List of Written Submissions received

1. Hong Kong Social Workers General Union
2. International Conference on Violence Against Women
3. Mr FU Ming-yan
4. Mr HA Kwok-ping
5. Ms Ann D Jordan
6. Ms CHEUNG Suet-ha
7. Ms Greg Pearce
8. The Chinese Manufacturer's Association of Hong Kong
9. The Satsanga
10. Mr MA Hung-fai

After some further discussion, Members agreed that the new approach be tried out. The Secretariat would continue to explore ways to expedite the processing of bills

(5) **Further report by the Legal Adviser on outstanding bill**

**Credit Unions (Amendment) Bill 1995**

(LegCo Paper No LS 79/94-95)

Members noted the report and agreed to support the Bill, subject to the amendments to be introduced by the Administration

(6) **Legal Adviser's reports on bills referred to the House Committee under Standing Order No. 42(3A)**

(a) **Disability Discrimination Bill**

(LegCo Paper No. LS 80/94-95)

The Legal Adviser referred Members to the Paper and the fact that to a certain extent this Bill overlapped the Equal Opportunities Bill.

At the suggestion of the Chairman, Members agreed to discuss this item together with Agenda item 9(a), as they were inter-related.

Dr LEONG Che-hung, Chairman of the Bills Committee to study the Equal Opportunities Bill (EOB) and the Sex Discrimination Bill (SDB) reported on the progress of the Bills Committee, and Ms Anna WU's proposal to restructure her EOB i.e. to drop the parts relating to sex and disability which were covered by the two Government bills and to restructure the remaining parts into three separate bills. As the Bills Committee had generally completed scrutiny of the policy issues of the EOB and SDB, and the substance of the three restructured bills would remain the same, he recommended that after introduction of the three bills into LegCo, they should be referred to the same Bills Committee and need not wait in the queue. Dr LEONG also

expressed his concern about the poor attendance of members at meetings of the Bills Committee. On some occasions, there was not a quorum. He also expressed his disappointment at the unhelpful attitude displayed by some Government branches/departments in the course of the scrutiny of the two bills.

Ms Anna WU supplemented that her proposal to restructure the EOB was partly necessitated by the two bills subsequently introduced by the Administration, and was also aimed at facilitating Members, including non-Bills Committee members, in deliberating, moving amendments to and voting on the relevant parts of the EOB. Entrusting the three bills to the same Bills Committee would avoid loss of time and duplication of work.

After some discussion, Members agreed that Ms WU's three separate bills, after completing the required formalities and being introduced into LegCo and referred to the House Committee, should be assigned immediately to the same Bills Committee.

Members also agreed that the Disability Discrimination Bill should be assigned to the current Bills Committee. The membership of the Bills Committee could be extended to those Members who were interested only in the Disability Discrimination Bill.

- (b) **Dutiable Commodities (Amendment) Bill 1995**  
**Estate Duty (Amendment) Bill 1995**  
**Inland Revenue (Amendment) (No. 2) Bill 1995**  
(LegCo Paper No. LS 77/94-95)

Dr LEONG Che-hung said that the medical profession was concerned about a proposal in the Inland Revenue (Amendment) (No. 2) Bill 1995 relating to record keeping by a profession or business for tax assessment purposes. The Legal Adviser agreed to seek more information from the Administration.

Members agreed to support the other two Bills.

The Office of Anna Wu, Legislative Councillor

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FACSIMILE MESSAGE

TO Anna Wu NO. OF PAGES (INCLUDING THIS ONE): 5  
Andrew Byrnes  
Carole Petersen  
FROM: Adam Mayes DATE: 9/5/95

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MESSAGE:

Draft list of final SDB amendment proposals

The draft list is attached. (4 pages)

In order to keep the list shorter and Members' attention focused, I've dropped certain proposals. Are any of these too important to drop? Can we drop any others now on the list?

1. No change to procedure or effect of Codes of Practice (cl. 61). All we're doing in this respect is mandating immediate commencement to prevent delay during Code drafting.
2. No addition of de facto spouse to definition of "near relative" (for purposes of small dwelling exception. This seems trivial.
3. No deletion of "significant number of followers" from SDB religion exception. This seems trivial.
4. No exclusion of young schoolchildren from the cl. 42 sport exception. This seems trivial.
5. No deletion of the SDB's limited exceptions for affirmative action (cl. 47-9). Although redundant in light of the proposed new exception for measures to achieve equality, these clauses are inoffensive themselves.
6. No deletion of the GOQ for work in single-sex hospitals, prisons, and special care facilities. This GOQ is criticised as unnecessary and redundant by Pannick (Sex Discrimination Law, 1986) and by the EOC (EqT 3.19). But it already contains a requirement of reasonableness and is therefore not really offensive.
7. Earlier list included reference to further study of the consequential amendments to the District Court Ordinance, but no changes are now proposed (instead procedural clauses similar to the EOB's are proposed for the main Ordinance)
8. Consequential BORO amendment dropped (leave it to the EOBills and avoid drawing unnecessary attention to it!)

Also, there are several details to resolve about the final shape of the amended SDB. I've incorporated various provisional decisions into the listed proposals, but I expect we may want to consider some points after meeting Home Affairs Thursday

**DRAFT** Note to Members of the Bills Committee studying  
the Equal Opportunities Bill, the Sex Discrimination Bill  
and the Disability Discrimination Bill

Proposed committee-stage amendments to the Sex Discrimination Bill

(Revised list)

- | <i>(clause)</i>               | <i>(amendment)</i>   |
|-------------------------------|--|
|                               | <u>Part I — Preliminary</u>  |
| 1(2)                          | Amend to bring Ordinance into operation on 1 January 1996.   |
| 2(1)                          | Amend definition of "marital status" to include status of being de facto spouse.<br>[cf EOB 3(1)]  |
| 2(5)                          | Amend definition of sexual harassment to include sexual conduct that<br>— in the employment field, creates a sexually hostile work environment; or<br>— in other fields, substantially interferes with the victim's enjoyment of the relevant activity.<br>[cf EOB 29(3)(b), 30(2)(c)] |
| —                             | New clause directing Ordinance to be interpreted to give effect to relevant international obligations (including the ICCPR, ICESCR and CEDAW).<br>[cf EOB 7]   |
| —                             | New clause defining discrimination against a person to include discrimination on ground of relative's or associate's sex, marital status or pregnancy.<br>[cf DDB 2(6), 6(c); EOB 6]   |
| —                             | New clause repealing prior inconsistent laws to extent of inconsistency with Ordinance.<br>[cf EOB 8]  |
| —                             | New clause providing that an act done for two or more reasons, one of which is sex, marital status or pregnancy, deemed to be done by reason of sex, marital status or pregnancy.<br>[cf DDB 3; EOB 4]   |
|                               | <u>Part II — Discrimination</u>  |
| 4(1)(b),<br>6(1)(b)<br>& 7(b) | Amend definitions of indirect discrimination to include any practice with a disproportionately adverse impact on one sex / persons of a particular marital status / pregnant women.<br>[cf EqT 3.3] <sup>*</sup>   |
| 6                             | Amend definition of marital status discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field.   |
| 7                             | Amend definition of pregnancy discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field.  |

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<sup>\*</sup> EqT = "Equal Treatment for Men & Women Strengthening the Acts," Formal Proposals of the UK EOC, 1988

- 8 Amend definition of victimisation to include not only less favourable treatment as a result of anything done under or by reference to the Ordinance [cf. EqT 3.9]

Part III — Employment Field

- 10(2), Amend to expressly prohibit discrimination in terms and conditions of employment, add new subclause to clarify for avoidance of doubt that such discrimination includes unequal pay for work of equal value. [cf. EqT 2.20]
- ( )
- 10(3), Repeal. (Exemption for small employers.)  
(6)-(8)
- 10(4), Amend to expire in one year, subject to extension by Legco resolution. (Exceptions for  
14(4) & provisions relating to death and retirement, in connection with employment, partnership  
15(4) and trade unions, etc.)  
[cf. EqT 3.14]
- Government to add new clause prohibiting discrimination against commission agents (and to amend cl. 2(1) to add definition of “commission agent”).  
[cf. EOB 3(1), 14, 29(2)]
- 11(2)(h) Repeal. (Exception for work likely to involve duties outside Hong Kong where discriminatory laws or customs apply.)
- 20 Amend prohibition of sexual harassment to include harassment of a woman employed to perform domestic duties in the harasser’s residence, whether or not the harasser is the employer.  
[cf. EOB 29(1)(d)]

Part IV — Other Fields

- Government to add new clause prohibiting discrimination in clubs (and to amend cl. 2(1) to add definitions of “club” and “committee of management” of a club).  
[cf. DDB 2(1), 32; EOB 3(1), 25; EqT 3.26]
- New clause prohibiting discrimination in administration of laws and government programmes.  
[cf. EOB 27; EqT 3.23]
- New clause prohibiting discrimination in public elections and appointments.  
[cf. EOB 28]
- 30(1)(a) Amend to limit exception for single-sex hospital services and special care facilities to cases where the restriction to one sex is reasonable having regard to the essential character of the restricted services or facilities.  
[cf. SDB 11(2)(e)(iii)]
- 32 Government to amend prohibition of sexual harassment to include harassment of students by students, and of educational staff by students.

Part V — Other Unlawful Acts

- 36 & 74 Amend to make unlawfully discriminatory advertisements a criminal offense, subject to private prosecution (rather than merely enjoinable, on action by the EOC exclusively).  
[cf. EOB 225]

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FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen  
NO. OF PAGES (INCLUDING THIS ONE) : 1

FROM : Adam Mayes  
DATE : 10/5/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

Points for discussion with Home Affairs on Thursday

Thursday meeting with Susie Ho and Jeff Fox set for 9:30AM in CGO West, Rm. 330 (conference room on 3d floor).

- ✓ Equal Pay: effect of SDB, particularly in respect of equal pay for work of equal value.
- ✓ High court remedies: availability of reinstatement, comparison with EOB234.
- ✓ Period for bringing proceedings under SDB78 in comparison with other civil proceedings
- ✓ Protective legislation: consistency of Sch. 2 laws with UK language of SDB49 exception; consistency with ILO Conventions; redundant in light of new special measures exception?
- ✓ Admin. of laws and programmes: Relation of SDB to BORO; areas of government reservations about coverage of SDB.
- ✓ Death & retirement benefits: discuss new details on existing, sexist laws and arrangements
- ✓ hospital/prison GOQ: explain redundancy in light of privacy, etc. GOQs.
- ✓ EOC: Any room for agreement on anything? Connection to international obligations and standards; streamlined investigation; litigation in own name; deletion of CS/SHA checks on autonomy? (Note that the proposal to vet proposed laws is taken from the Personal Data (Privacy) Bill, cl. 8(1)(d).)
- ✓ Legal Aid: Suggest a consequential amendment to Legal Aid Ordinance?

Also, we can point out the following SDB amendment proposals that are already in DDB:

1. discrimination on ground of relative's or associate's status (DDB 2(6), 6(c))
2. act done for 2 or more reasons (DDB 3)

Proposed Amendment put forward by  
the Hon. Anna Wu to the Sex Discrimination Bill (SDB) :

Enforcement

The Hon. Anna Wu has put forward a number of proposed amendments to the Sex Discrimination Bill (SDB). The Administration's response to the proposals in respect of the Enforcement Section (Part 9 in AW033195-1) is set out below.

The District Court's power to relax rules of evidence should be made explicit in the SDB (Item 2.1)

2. Agreed in principle. It is also noted that the SDB amends the District Court Ordinance by adding a provision empowering the Rules Committee, in respect of proceedings under the SDB, to make rules to modify any rule of law or practice as to the proof of any matter or as to the reception or admissibility of any matter in evidence (proposed Section 73B(4) of the District Court Ordinance)



**The District Court's power to vary the rule of costs should be made explicit in the SDB, with no award of costs as the general rule (Item 9.2)**

3. Agreed in principle. It is also noted that under the proposed Section 73B(2)(d) of the District Court Ordinance, the Rules Committee, in respect of proceedings under the SDB, may make rules prohibiting the Court from making any order as to costs against a party to any proceedings under the SDB in such cases or circumstances as may be specified in the rules.

**The District Court should have the power to order any appropriate remedy, including reinstatement in particular (Item 9.3)**

4. Agreed in principle.

The restriction barring damage awards for indirect discrimination if the discrimination was unintended [SDB 68(5)] should be deleted (Item 9.4)

5. Clause 68(5) of the SDB provides that in respect of indirect discrimination<sup>1</sup>, no award of damages shall be made if the respondent proves that the requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of the claimant's sex, marital status or pregnancy. The burden of proof is upon the respondent (often the employer). Where the respondent can prove to the court that he/she has no intention to discriminate when he/she imposes the discriminatory condition or requirement, it is reasonable that the employer should not be liable to pay damages.

The requirement for prior notice to the Chief Secretary of proposed actions against Government schools [ SDB 68(7) ] should be deleted (Item 9.5)

6. Agreed. The Bills Committee was informed of the Administration's position on 20.2.1995.

---

Indirect discrimination against a woman for example means that if a person applies to her a requirement or condition which he applies or would apply equally to a man but -

- (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment because she cannot comply with it.

Enforcement notices [ SDB 69 ] should be authorised to include, in addition to a requirement that a person cease an act of unlawful discrimination, a requirement that the person cease any specific practice(s) that led to the unlawful discrimination (Item 9.6)

7. Agreed. Committee Stage Amendments will be prepared.

The right of a person to make representations to the EOC opposing the EOC's issuance of an enforcement notice against that person [ SDB 69(5)] duplicates the right of appeal against the notice once issued, and should be deleted (Item 9.7)

8. Strictly speaking, the right to make representations to the EOC does not duplicate the right to appeal. Nonetheless, we appreciate Members' wish to simplify the enforcement procedures and agree to remove this procedural step.

Assistance from the EOC by way of conciliation [ SDB 76 ] should be available for any claim of discrimination alleging an act that is inconsistent with relevant provisions of the Bill of Rights of international treaties and instruments, whether or not the act is unlawful under the SDB (Item 9.8)

9. The Administration does not agree with this proposal. The EOC is established under the SDB and its purview is confined to matters in the SDB. We do not agree that the EOC should handle matters outside the scope of the SDB.

When the EOC publishes a formal investigation report that finds unlawful discrimination, a new period of time should begin during which any person who claim to have suffered from the reported discrimination may institute proceedings, even though the regular period to institute such proceedings [ SDB 78 ] may have expired before the investigation concluded. (Item 9.9)

10. Clause 78 (1) provides that the "District Court shall not consider a claim under Clause 68 unless proceedings in respect of the claim are instituted before the end of a period of 12 months beginning when the act complained of was done." Subclause (3) further provides that "the District Court may consider any claim or application which is out of time, if, in all circumstances of the case, it considers that it is just and equitable to do so." An aggrieved person can rely on subclause (3) to ask for an extension of time to bring proceedings if she/he was awaiting the result of the EOC's investigation. Nonetheless, to put the matter beyond doubt, we are prepared to stipulate a period of 6 months, from the publication of the formal investigation report, to allow a person who claim to have suffered from the reported unlawful

discrimination, to institute proceedings. A Committee Stage Amendment will therefore be proposed.

The Bill of Rights Ordinance (Cap. 383) should be amended to clarify its application to all pre-existing legislation, whether relied upon by public authorities or others (reversing the effect of *Tim Hing-yeo v Wu Tai-wai* (1991) (Item 11.2))

11. We do not agree with this proposal which is foreign to the subject matter of the Sex Discrimination Bill.

Home Affairs Branch

May 1995

Sex Discrimination Bill

Matters raised by Bills Committee Members

Members of the Bills Committee to Study the Sex Discrimination Bill (SDB) have raised a number of questions on the Bill. The Administration's response to such questions is set out below.

**Partnership**

2. At the meeting on 9.12.94, Members expressed their wish to know more about the reasons for providing exceptions for partnerships with less than 6 partners from the provision of the SDB.

3. Clause 14 of the Bill makes it unlawful for partnerships consisting of not less than 6 partners to discriminate against persons seeking partnership or against existing partners. The reason for this exception is to cater for situations where a small group of persons act together and, through operation of law, is considered to have formed a partnership. We are of the view that such small partnerships should be excluded from the Bill.

4. Members may also wish to note the business sectors' views on the exception for partnership. In its submission, the Hong Kong General Chamber of Commerce pointed out that "there is a need to distinguish the ownership aspect from the employment aspect in relation to a position as partner in the firm. The former is a commercial decision and it should not be dictated by the law on the ground of gender. The latter should fall within the Ordinance". The Federation of Hong Kong Industries also stated that "Partnership should be excluded from the Bill. The offer of partnership to any person is an entirely private matter for any firm."

5. Taking into account the need to cater for "implied partnerships" and the strong views of the business sector, the Administration is of the opinion that the exception for partnerships of not more than 6 partners should be retained in the Bill.

#### Powers of the Equal Opportunities Commission

6. At the Meeting of the Bills Committee on 10 March, when Members considered the provisions in the SDB in respect of the Equal Opportunities Commission (EOC), Members asked about the powers of the EOC, in particular whether the EOC would have the power to look into matters related to sex discrimination but not made unlawful under the Bill. Members

also asked for details on the funds allocated for the purpose of setting up the EOC.

7. Clause 55 of the Bill provides for the establishment of the EOC. The functions of the EOC are set out in Clause 56 which states that the Commission shall, inter alia,

- “(a) work towards the elimination of discrimination;
- (b) promote equality of opportunity between men and women generally.”

These provisions mirror the ones enshrined in the UK Sex Discrimination Act [Section 53(1)(a) and (b)]. The legislative intent is to provide the EOC with wide powers to examine matters related to sex discrimination and promotion of equality of opportunity between men and women generally.

8. We have sought the advice of the Equal Opportunities Commission in the UK on whether the 1982 ruling in *Home Office v Commission for Racial Equality* has any impact on the EOC's operations. The UKEOC advised that the “ruling has had no adverse effects on the scope of the responsibilities of the EOC. We gave a very broad interpretation to section 53(1)(b) of the 1975 Act which promotes equality of opportunity between men



and women generally. .... If the Commission concluded that matters like wife battering raises issues of equal opportunities between men and women generally, then the Commission would consider itself entitled to take them forward. In the circumstances, it was not considered necessary or appropriate to seek legislative change or clarification as regards the Commission's powers."

9. In the light of the experience of the UKEOC, the Administration concludes that the powers of the EOC in the SDB are appropriate and adequate to tackle matters relating to equal opportunities between men and women generally.

10. On the budget of the EOC, we estimate that the setting up of the EOC will require a start-up capital expenditure of \$5 million and \$36 million per year in recurrent expenditure. We envisage that the Commission will have around 41 members of staff. These will include officers providing secretarial support to the Commission, officers providing assistance to the aggrieved parties, investigators, legal advisers and other supporting staff.

11. The Commission should conduct research or education by itself or in conjunction with third parties. In this connection, we do not envisage that

the Commission should indiscriminately provide direct financial assistance to third parties, hence clause 57(3) of the Bill provides that the Commission shall not provide financial assistance except with the approval of the Secretary for Home Affairs, generally or in any particular case

Legal Assistance to Individual Claimants

12. At the meeting on 10.3.95, the Administration undertook to reply to the question whether the proposed waiver of means test under the Legal Aid (Amendment) Bill 1995 would be applicable to legal aid applications on disputes arising from sex discrimination.

13. Under the Legal Aid (Amendment) Bill 1995, the Director of Legal Aid has the discretion to waive means test where the applicant has a meritorious civil claim in which the breach of BoRO is an issue. So far as civil proceedings under the Sex Discrimination Bill also raises breach of the BoRO as an issue, the Director of Legal Aid can exercise her discretion if she is satisfied the case has legal merits. Should SDB proceedings raise no BOR issue the legal aid applicant will be required to pass both the means and merits tests.

Exceptions under Clause 53

14. At the meeting of the Bills Committee on 13.1.95, having considered the provisions in Clause 53 of the Bill, Members asked for examples of matters which may provide for differential treatment of men and women under the New Territories Ordinance.

15. Section 13 of the New Territories Ordinance (Cap. 97) (the Ordinance) provides for the power of the High Court or the District Court to recognise and enforce Chinese custom or customary rights affecting the land covered by that Ordinance in any proceedings (except proceedings in relation to the general laws of inheritance in Hong Kong). The terms "Chinese custom" and "customary rights" are not defined in the Ordinance. However, when read together with other legislation, these would encompass, for example, customary succession. Where an owner of rural land was himself registered as owner other than as a manager under the Ordinance and died intestate before 24 June 1994, succession to the land concerned is dealt with in accordance with Chinese customary law.

12th May 1995

Mr Michael Suen JP  
Secretary for Home Affairs  
Home Affairs Branch  
31st Floor, Southorn Centre  
130 Hennessy Road  
Wanchai, Hong Kong



Dear Mr Suen,

Reorganisation of the Equal Opportunities Bill (EOB)  
into the Racial Discrimination Bill, the Anti-Discrimination (No 1) Bill  
and the Anti-Discrimination (No 2) Bill

I am sending for your information draft copies of the three bills I plan to gazette shortly to take the place of the EOB. The drafts are marked to highlight the changes made in relation to the EOB.

As explained and decided in House Committee, these new bills are intended to facilitate Members' decision-making process and after gazettal will be introduced directly into the Bills Committee considering the EOB, SDB and DDB. This should also facilitate Members' consideration of the Government bills, as I am dropping those Parts of the EOB that address the same grounds of discrimination as the Government bills.

The bills contain no substantive changes to any of the EOB's provisions. In the absence of any such changes, I trust that the Administration will view these bills as having no more charging effect than the EOB itself.

The bills draw their provisions defining discrimination and unlawful acts from EOB Part V for the Racial Discrimination Bill, EOB Parts III, IV and VIII for the Anti-Discrimination (No 1) Bill, and EOB Parts VII, IX and X for the Anti-Discrimination (No 2) Bill. Those EOB Parts providing for preliminary, enforcement and miscellaneous matters (I and XI-XIV) are reproduced in each of the three bills.

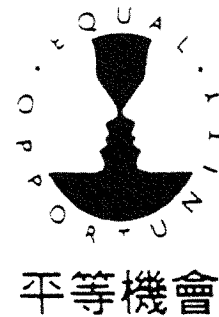
Yours sincerely,

*for* Anna Wu

cc Legco Legal Adviser

12th May 1995

Mr Michael Suen, JP  
Secretary for Home Affairs  
Home Affairs Branch  
31st Floor, Southorn Centre  
130 Hennessy Road  
Wanchai  
Hong Kong



Dear Mr Suen,

Amendment of the Bill of Rights Ordinance (Cap 383) in  
respect of its effect on pre-existing legislation

Pursuant to discussion in the Bills Committee considering the Equal Opportunities Bill and the Sex Discrimination Bill this morning, I am sending you a draft bill to amend the Bill of Rights Ordinance [BORO] in the same manner as the consequential BORO amendment made by clause 242 of the Equal Opportunities Bill.

As you know, an unexpected limitation on the BORO's effect emerged in 1991 from the Court of Appeals' decision in *Tam Hing-ye v. Wu Tai-wai* (1 HKPLR 261, [1992] 1 HKLR 185). As a result, although the BORO repeals inconsistent, pre-existing laws when these are relied on by Government, the same laws remain in force when relied upon by private citizens. Rectification of this serious and unintended anomaly in the BORO's effect is long overdue.

Miss Susie Ho this morning expressed Home Affairs' view that the proposed amendme it is not sufficiently related to the Sex Discrimination Bill [SDB] that it might be made consequentially to the SDB's enactment. While I disagree with this view, I would like to propose as an alternative that Home Affairs take the amendment forward as a separate, Government bill.

Amendment of the BORO in this respect is an important human rights matter, and I hope you will give the proposal serious consideration.

Yours sincerely,

for Anna Wu

# BILL OF RIGHTS (AMENDMENT) ORDINANCE

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A BILL

To

Amend the Hong Kong Bill of Rights Ordinance in order to provide for the more effective incorporation into the law of Hong Kong of the provisions of the International Covenant on Civil and Political Rights by providing the Hong Kong Bill of Rights Ordinance applies to all laws of Hong Kong

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof

**1. Short title**

This Ordinance may be cited as the Hong Kong Bill of Rights (Amendment) Ordinance.

**2. Effect on pre-existing legislation**

Section 3 of the Hong Kong Bill of Rights Ordinance (Cap 383) is amended by adding--

"(3) For the avoidance of doubt, it is hereby declared to be the intention of the legislature that the provisions of this Ordinance, including the guarantees contained in the Hong Kong Bill of Rights, apply to all legislation, whether that legislation affects legal relations between the Government, public authorities and private persons, or whether it affects only relations between private persons "

*[Cf Equal Opportunities Bill cl. 242]*

*Explanation Memorandum*

1 The purpose of this Bill is to amend Hong Kong Bill of Rights Ordinance (Cap. 383). As interpreted by the Court of Appeal (in Tam Hing-vee v Wu Tai-wai (1991) 1 HKPLR 261 [1992] 1 HKLR 135) the Bill of Rights Ordinance repeals inconsistent pre-existing legislation when that legislation is relied upon by the Government, but the same legislation nonetheless remains in force when relied upon by private citizens. Clause 2 of this Bill removes this anomaly by amending the Bill of Rights Ordinance to make it applicable to all legislation, not merely to legislation invoked by the Government or public authorities.



Hong Kong Federation of Women Lawyers

Submission on the Sex Discrimination Bill  
and the Equal Opportunities Bill

1. The Hong Kong Federation of Women Lawyers (HKFWL) submitted its views on the Hong Kong Government's Green Paper on Equal Opportunities between Women and Men in December 1993, and would like to refer to the said submission of the Federation's general position on the issue of equal opportunities (Annex 1).
2. The HKFWL welcomes the Government's introduction of CEDAW to Hong Kong and legislations to encourage and enforce gender equality. The Federation further hopes that the Women's Commission or the Equal Opportunities Commission set up under the legislation will not only investigate instances of sex discrimination but will also take up the duty to publicise and educate the community to practise gender equality on all levels of activities in its work to promote equal opportunities and eliminate discrimination.
3. Gender inequality is often based on traditional beliefs, social and cultural differences in our society. Public education is therefore as important as legislation to change traditional and cultural attitudes and prejudices.
4. Members of HKFWL are on the whole satisfied with the scope of the Sex Discrimination Bill (SDB) gazetted on the 14th October 1994. Our members, however, have the following views and reservations:

## Comments on Employment Provisions in SDB and EOB

### Policy

- (1) When individuals make decisions about entering into contractual relationships (whether employment or partnership relationships) with each other, freedom of contract should prevail.

Legislation to prevent discrimination on the basis of sex should not be introduced since restrictions on the sex of the other contracting party (whether employee or partner) may be reasonable in light of the subjective preferences of the individuals concerned.

Although such preferences may not pass a test of "objective reasonableness", they should be respected as part of the freedom of choice of the individual.

In fact, an employee is permitted to discriminate on grounds of sex as between prospective employers so that the freedom of choice of prospective employees is not affected.

- (2) Once individuals have chosen to enter into contractual relationships (whether employer/employee or partnership), there should be equality of treatment between the sexes. Legislation should be introduced to achieve such equality employment term and promotion prospects.

### Burden of proof to show unfair treatment

- (3) The burden of proof in both the SDB and the EOB is placed on the employer/partnership to show that the alleged discriminatory treatment is reasonable or justifiable.

The HKFWL agrees with the burden being so placed.

- (4) However, the HKFWL prefers the "reasonableness" test set out in the EOB.
- (5) The "reasonableness test" is a well-established test in the present law and there is a wealth of case law on how it should be applied.

### Pregnancy

- (6) At interviews conducted prior to entering into contractual relationships (whether employment or partnership relationships), questions about whether there is an existing pregnancy should be permitted. However, questions about intention to become pregnant should not be permitted as contrary to the privacy of the individual.

### Comments on Sexual Harassment

HKFWL members expressed a unanimous view that in complaints of sexual harassment cases, the test to apply must be an objective test and reasonably ascertainable (SDB S.2(5)-(7)). This view was expressed with particular reference to S.2(5) where it is anticipated the "victim" would be offended, humiliated or intimidated by the "offender's" conduct, advances or requests. Our members consider that the SDB is sufficient to cover areas set out in Ss.29-32 of the EOB.

Dated the 15th May of 1995

Hong Kong Federation of Women Lawyers

Views on Green Paper on  
Equal Opportunities for  
Women and Men

1. As regard to Chapter Eight in the said Green Paper, it suggested a few ways to enhance equal opportunities in Hong Kong, eg. Taxation, Changes in family law, Service Improvement, Public Education Charter for Women and Legislative Control,

2. It was felt that all these ways would be equally important and effective. However our federation would like to stress the importance in Legislative Control so that not only would those who are prejudiced against women would "know" they are offending the law, but at least they would not be "openly" indicating their prejudice and acting accordingly. At least, if legislation cannot change how people think, it would "criminalize" it so that those who profess such prejudices dare not show it in their daily attitude and especially in workplaces.

3. However for more effective long term changes, it was believed that public education and especially amongst young children in their textbooks content etc, more care should be paid towards revolutionizing traditional female roles. (eg. housewife at home, cooking and doing household chores.)

4. It should especially be stressed that extension of Cedaw to HK is essential. However the Charter for Women would be superfluous should Cedaw be extended.

5. Amongst all the legislation proposed it was felt that Equal Pay Act would be most important. It was pointed out that statistics in Chapter Three revealed appalling discrepancies and there should be legal venues from which women suffering discriminations could seek compensation through courts.

6. Sex Discrimination Act would again be effective, in the least, to set up standard and at most eliminate all discriminatory acts at all echelons in all fields of society.

7. It was felt that the other side of the coin would be that all protective legislations regarding women should be given up.

8. It was noted that at pg. 51 of the Green Paper, the cynicism expressed would not be conducive to progressive thinking and action-oriented attempt to achieve equal opportunities.

9. It was suggested that the Women Commission is both important and essential should Cedaw be extended to HK. It should take the role of a Cedaw Linked Commission with power to enforce and oversee the implementation of Cedaw. It was felt that a purely research-oriented Commission would have no teeth and would resemble some of the work that Universities are doing

already.

10. - Again an advisory body would not have sufficient deterrent and policing effect. In order for the Cedaw Linked Commission to be wholly respectable and effective as an independant body to execute Cedaw, it must have power to make enquiries, conduct research, recommend prosecution, and have its own staff for investigation, prosecution and coordination with other organizations or government departments.

11. It cannot be stressed enough that such Cedaw Linked Commission be established as soon as possible and staffed by adequate and well qualified officials, yet independent from government. It should be funded by government with budgets authorized by Legislative Council directly.

HONG KONG FEDERATION OF WOMEN LAWYERS

Submission on the New Territories Ordinance Cap. 97

The Problem

1. All land in the New Territories is Part II land under the New Territories Ordinance Cap. 97 (NTO) unless the governor grants an exemption therefrom. Section 13 of the NTO provides as follows:

In any proceedings in the High Court or District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any Chinese custom or customary right affecting such land.

2. Although the wording of the section does not suggest that it is mandatory for the court to apply Chinese customary law in *Tang Kai-chung v Tang Chik-shang* [1970] HKLR 276, 320 it was established that application of Chinese custom and customary right to land cases in the New Territories is mandatory. In the more recent case of *Kan Fat-tat v Kan Yin-tat* [1987] HKLR 516 Deputy Judge Robert Tang QC also held that the effect of s. 13 of NTO was that the Court must recognise and enforce any Chinese custom or customary right affecting land.
3. Some commentators are of the view that on a proper construction of the wording of section 13 the Court of Appeal might hold that the section should not be interpreted as mandatory but merely discretionary, depending on the facts and the circumstances. However, in the absence of any such challenge, the law at present is that section 13 is undoubtedly to be interpreted as mandatory. Support for this interpretation is to be found in Stroud's Judicial Dictionary 4th ed., Vol. 5 where the all-important word

"shall" is classified in two ways: (I) as implying futurity; or (II) as implying a mandate. Since its use in section 13 NTO cannot be implying futurity, it must imply a mandate.

4. Opinion is divided over whether Chinese customary law applies to all residents of the New Territories or just to the Indigenous Inhabitants. Some believe that the NTO applies to all land in the NT unless it has been exempted. On the one hand the Secretary for Home Affairs has stated that there is no decided case law that would apply Chinese customary law to succession rights of women to multi-storey buildings in the New Territories. On the other hand the Housing Authority has expressed concern that the NTO may cover inheritance of home ownership scheme flats in the New Territories even if non-indigenous New Territories women were involved.
5. The Intestates' Estates Ordinance, Cap. 78 and the Probate and Administration Ordinance, Cap. 10 do not apply to land in the New Territories (including New Kowloon) to which Part II of the NTO applies and unless such probates are obtained within three months of death (an almost impossible feat) Land Officers cannot register them. Although letters of administration have been granted to women in respect of Part II land, section 11 of the Intestates' Estates Ordinance specifically excludes Part II land from its provisions.
6. Stephen Selby concedes in his article entitled Everything You Wanted to Know about Chinese Customary Law (But Were Afraid to Ask) HKLJ (1991) 45, 77 that the most reasonable demands of equality for women cannot be entertained without going against custom. He further comments that



unfortunately, legislation cannot amend custom. His solution is to change the law to exclude the application of custom, with whatever consequences that might have in the long term for the cohesion of village communities.

7. In the near future legislation will be passed to ensure that non-Indigenous people are exempt from the application of section 13 NTO. However, this will only rectify the problem from the date such legislation is enacted and will do nothing to protect the rights of indigenous women and possibly of all women who live in the New Territories.
8. The law at present is anachronistic and discriminates harshly against indigenous women and possibly all women in the New Territories. Furthermore it contravenes Articles 1 and 22 of the Bill of Rights (BOR). This is, however, of little help since the BOR binds only the government and public officials. It will not assist a woman who wishes to challenge her right to succession against that of a male heir.
9. The situation is not assisted by the fact that discriminatory customary laws will not necessarily be protected from repeal by the Basic Law after 1997 since Article 40 protects only the lawful rights of the inhabitants of the New Territories and a law which may be held to contravene Article 25 of the International Covenant on Civil and Political Rights and Articles 24 and 39 of the Basic Law may not be considered lawful and, as Miriam Lau pointed out in her speech in the Legislative Council in the Bill of Rights debate, (Official Report of Proceedings of the Legislative Council, 27 June 1980, 1829) could therefore be repealed.

10. Members of the Heung Yee Kuk have argued in favour of preserving the status quo by relying on a provision of the Basic Law that Chinese customary laws should remain in force after 1997 to prevent any blows to the stability of their community. This is strange logic since the very same customary law they wish to preserve has disappeared in mainland China.

#### The Solution

11. The Hong Kong Federation of Women Lawyers (HKFWL) believe that the simplest and most efficient way of resolving this problem is to repeal section 11 of the Intestates' Estates Ordinance (IEO). Section 11 provides as follows:

(1) Nothing in this Ordinance shall be taken to affect the application of the provisions of Part II of the NTO (Cap. 97) to land to which Part II of that Ordinance applies and which has not been exempted by the Governor under section 7(2) or (3) of that Ordinance from the provisions of Part II of that Ordinance and the said provisions shall continue to apply to such land to the same extent and with the same effect as if this Ordinance had not been enacted.

(2) Land to which this section applies shall continue to devolve upon Intestacy in like manner as it would have devolved if this Ordinance had not been passed.

(3) In this section "land" has the meaning attached to it under section 2 of the NTO (Cap. 97).

Not only does this remove all obstacles to rightful inheritance by all women living in the New Territories but it also has the advantage of having been both researched and recommended by the Law Reform Commission as long ago as 1990.

12. Another advantage of repealing section 11 of the Intestates' Estates Ordinance is that the elimination of discrimination against New Territories women in intestate succession can be achieved without necessitating any

amendments to the NTC. This is important since sections 13 and 17 (for example) should remain in order to ensure that Tong, tao and clan properties, which are traditional rights alien to concepts of English law, can continue to be dealt with according to Chinese customary law. Such rights will then continue to be protected by the law before and after 1997.

13. It was precisely because succession to property followed well-established Chinese customary practice that traditionally, Chinese people did not prepare wills to deal with how they wished property to be distributed after their death. The custom of adopting a successor amongst an indigenous inhabitant's clansman is roughly equivalent to the English system of making a will and is the way in which indigenous inhabitants choose their successors. Therefore, the Intestates Estates' Ordinance is far more likely to apply to succession in the New Territories than the Probate and Administration Ordinance.
  
14. The HKFWL support the introduction of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which is already applied in Britain and China and which LegCo has resolved to adopt.

# The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Lee House St., Hong Kong.

Tel: (852) 2537-2467 Fax (852) 2530-2018

## FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen

NO. OF PAGES (INCLUDING THIS ONE) : 5

FROM : Adam Mayes

DATE : 16/5/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.  
MESSAGE :

### EOB amendments for discussion tomorrow (to finalise position)

1. all Parts — amend definition of indirect discrimination.
2. all Parts — repeal exceptions for domestic helpers.
3. age Part — amend to authorise compulsory retirement.
4. age Part — amend to authorise restrictions for the protection of minors.
5. age Part — amend to provide 1-year transitional review of age-discriminatory laws (*Renew*)
6. sexuality Part — amend to exempt eligibility for marriage and for adoption ~~OR REVEAL~~
7. race & sexuality Parts — *definition*
  - ✓ 7.1. Amend to cover student-student and student-staff harassment.
  - ✓ 7.2. Also re. harassment: employment coverage, hostile work environment, and substantial interference clauses need revision: *(Possible as part of regational?)*
8. all Parts — amend to exempt school admissions in compliance with government-formulated admission scheme (or only re. select grounds, e.g. family responsibility, race & rel/pol). — *expand to general exception* ~~PT 16 since~~
9. all Parts — amend qualifying bodies clauses to add requirement (like SDB 16(2)) that good character evaluation take account of past record of discrimination?
10. all Parts — old-age home exception applicable to all or only some grounds?
11. all Parts — religious schools' hiring and admissions exceptions applicable to all or only some grounds?  
[The old-age home and religious schools exceptions look a lot uglier in separate bills than they did in the EOB . . .]
12. race Part — keep exemption for clubs to benefit particular race (NB this is in addition to special measures/measures to achieve equality exemption)?
13. Title of new bills — as public discussion approaches, we should settle this.

### SDB amendments:

Discuss attached list (originally distributed to team last week) in light of meeting with Admin. and last Bills Comm. meeting.

**Note to Members of the Bills Committee studying  
the Equal Opportunities Bill, the Sex Discrimination Bill  
and the Disability Discrimination Bill**

Proposed committee-stage amendments to the Sex Discrimination Bill

**(DRAFT Revised list)**

*(clause)*

*(amendment)*

Part I — Preliminary

- 1(2) Amend to bring Ordinance into operation on 1 January 1996
- 2(1) Amend definition of "marital status" to include status of being de facto spouse.  
[cf. EOB 3(1)]
- 2(5) Amend definition of sexual harassment to include sexual conduct that  
— in the employment field, creates a sexually hostile work environment; or  
— in other fields, substantially interferes with the victim's enjoyment of the relevant activity.  
[cf. EOB 29(3)(b), 30(2)(c)]

New clause directing Ordinance to be interpreted to give effect to relevant international obligations (including the ICCPR, ICESCR and CEDAW).

[cf. EOB 7]

New clause defining discrimination against a person to include discrimination on ground of relative's or associate's sex, marital status or pregnancy.

[cf. DDB 2(6), 6(c); EOB 6]

New clause repealing prior inconsistent laws to extent of inconsistency with Ordinance.

[cf. EOB 8]

New clause providing that an act done for two or more reasons, one of which is sex, marital status or pregnancy, deemed to be done by reason of sex, marital status or pregnancy.

[cf. DDB 3; EOB 4]

Part II — Discrimination

- 4(1)(b), 6(1)(b) & 7(b) Amend definitions of indirect discrimination to include any practice with a disproportionately adverse impact on one sex / persons of a particular marital status / pregnant women.  
[cf. EqT 3.3]\*
- 6 Amend definition of marital status discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field
- 7 Amend definition of pregnancy discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field

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\* EqT = "Equal Treatment for Men & Women: Strengthening the Acts." Formal Proposals of the UK EOC, 1988.

8 Amend definition of victimisation to include not only less favourable treatment, but any detriment as a result of anything done under or by reference to the Ordinance  
[cf. EqT 3.9]

Part III — Employment Field

10(2), Amend to expressly prohibit discrimination in terms and conditions of employment, and add new subclause to clarify for avoidance of doubt that such discrimination includes unequal pay for work of equal value.  
[cf. EqT 2.20]

10(3), Repeal. (Exemption for small employers )  
(6)-(8)

10(4), Amend to expire in one year, subject to extension by Legco resolution. (Exceptions for  
14(4) & provisions relating to death and retirement, in connection with employment, partnership  
15(4) and trade unions, etc.)  
[cf. EqT 3.14]

— Government to add new clause prohibiting discrimination against commission agents (and to amend cl. 2(1) to add definition of “commission agent”).  
[cf. EOB 3(1), 14, 29(2)]

11(2)(g) Repeal. (Exception permitting exclusion of women from certain jobs under Sched. 2 protective regulations.)

11(2)(h) Repeal. (Exception for work likely to involve duties outside Hong Kong where discriminatory laws or customs apply.)

20 Amend prohibition of sexual harassment to include harassment of a woman employed to perform domestic duties in the harasser’s residence, whether or not the harasser is the employer.  
[cf. EOB 29(1)(d)]

Part IV — Other Fields

— Government to add new clause prohibiting discrimination in clubs (and to amend cl. 2(1) to add definitions of “club” and “committee of management” of a club).  
[cf. DDB 2(1), 32; EOB 3(1), 25; EqT 3.26]

— New clause prohibiting discrimination in administration of laws and government programmes.  
[cf. EOB 27; EqT 3.23]

— New clause prohibiting discrimination in public elections and appointments.  
[cf. EOB 28]

30(1)(a) Amend to limit exception for single-sex hospital services and special care facilities to cases where the restriction to one sex is reasonable having regard to the essential character of the restricted services or facilities  
[cf. SDB 11(2)(e)(iii)]

32 Government to amend prohibition of sexual harassment to include harassment of students by students, and of educational staff by students

Part V — Other Unlawful Acts

No. 36 & 74 Amend to make unlawfully discriminatory advertisements a criminal offense, subject to private prosecution (rather than merely enjoined, on action by the EOC exclusively). [cf. EOB 225]

Part VI — General Exceptions

Agreed. — Government to add new clause providing general exception for special measures and for measures to achieve equality. [cf. DDB 47; EOB 37; CEDAW, Art. 4]

No. 49-50, Amend to expire in one year, subject to extension by Legco resolution. (Exception for (cf. 142/97) 52 & acts done for the protection of women and for protective legislation.) Sch. 2

No. 51 Repeal. (Exemption for acts done to safeguard the security of Hong Kong.)

No. 54 & Amend to expire in one year, subject to extension by Legco resolution. (Exemption of (No.); Sch. 4 certain discrimination within the disciplinary services; of the Small House Policy; and of No. marital status discrimination in employment benefits and civil service benefits.)

Part VII — Equal Opportunities Commission

55 & Repeal 15(2), 16(2)-(3) and 17(2) of Schedule 5. (EOC expenditure, borrowing and Sch. 5 investment subject to direction or approval by Secretary of Home Affairs and/or Treasury.)

56(1)  New subclause giving EOC function of promoting observation of relevant international obligations (including the ICCPR, ICESCR and CEDAW) as they relate to equality of opportunity irrespective of sex, marital status or pregnancy.

56(1)  New subclause giving EOC function of examining any proposed legislation that it considers may affect equality of opportunity and reporting results to legislation's sponsor. [cf. Personal Data (Privacy) Bill, cl. 8(1)(d)]

57(3) Repeal. (Approval of Secretary for Home Affairs required for any financial assistance by EOC to outside research and educational undertakings.)

63(4) Amend to enable EOC to carry out an investigation into named persons or organisations for any purpose connected with its functions (irrespective of whether it believes unlawful acts have occurred). [cf. EqT 4.8]

63(4) Amend to give all named persons (irrespective of whether they are believed by the EOC to have committed unlawful acts) a right to make pre-investigation representations to the EOC, within 28 days after receiving notice of the proposed investigation. [cf. EqT 4.12]

New clause empowering EOC to bring proceedings in its own name with respect any : or practice made unlawful by Ordinance. [cf. EqT 4.17]

New clause empowering EOC to intervene by leave of court in any proceedings under the Ordinance

### Part VIII — Enforcement

- New clause providing that, in proceedings under Ordinance, District Court not bound by rules of evidence and may inform self as 'sees fit.  
[cf. EOB 235]
- New clause providing that, in proceedings under Ordinance, each party shall pay own costs unless court finds exceptional circumstances justify otherwise.  
[cf. EOB 237]
- 68(3)-(4) Amend to delete District Court's power to order any remedy obtainable in High Court, and replace with power to order any remedy the court considers just and appropriate, including reinstatement.  
[cf. EOB 234]
- 68(5) Repeal. (No damage awards for indirect discrimination unless the discrimination was intentional.)
- 68(7) Government to repeal. (Chief Secretary must be given prior notice of claims against government schools.)
- 69(2) Amend to authorise enforcement notices to include, in addition to a requirement that a person cease an act of unlawful discrimination, a requirement that the person cease any specific practice(s) that led to the unlawful discrimination.  
[cf. EqT 4.16]
- 69(5) Repeal. (EOC must give prior notice to persons against whom enforcement notice to be issued, and hear and take account of such persons' representations opposing issuance of enforcement notice; duplicates right to judicial appeal of enforcement notices.)  
[EqT 4.13]
- 76 Amend to enable EOC to conciliate complaints of acts inconsistent with relevant international obligations (including the ICCPR, ICESCR and CEDAW) as they relate to equality of opportunity irrespective of sex, marital status or pregnancy.
- 77 Amend to enable EOC to take over proceedings in own name if a claimant receiving EOC assistance withdraws from proceedings.
- 78(1)-(2) Amend to permit proceedings to be brought under the Ordinance for a period of 6 years from the act complained of.
- 78(4) Amend period within which proceedings under the Ordinance may be brought, to begin after conclusion of conciliation process
- 78( ) New subclause to provide an additional period within which proceedings under the Ordinance may be brought, of one year following publication of a formal investigation report that finds unlawful discrimination, for persons who claim to have suffered from the reported discrimination.  
[cf. EqT 4.15]

### Part IX — Miscellaneous

- 82(2) & Sch. 7 Consequentially amend section 5AA of the Legal Aid Ordinance (Cap 91) to allow the Director of Legal Aid to waive the means test for proceedings involving claims of discrimination under the Ordinance (as for proceedings involving claims under the Bill of Rights)

Office of Anna Wu



**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Proposed committee-stage amendments to the Equal Opportunities Bill

<u> GROUNDS OF DISCRIMINATION AFFECTED</u>	<u> AMENDMENT PROPOSED</u>
1. all	Amend indirect discrimination provisions to cover any practice with a disproportionately adverse impact on persons of the relevant status
2. all	Repeal exceptions for hiring domestic helpers
3. all	Amend work provisions to ensure that work as a barrister or as a barrister's pupil is covered [cf. SDB 31, 33(6)-(8)]
4. all	Amend qualifying bodies provisions to add requirement that qualifying bodies have regard to evidence of past, unlawful discrimination in making evaluations of good character. [cf. SDB 16(2)]
5. Age	Amend the retirement provision (EOB 183) to provide that mandatory retirement ages do not constitute unlawful age discrimination.
6. Age	<b>Add new clause exempting legal entitlements, obligations or disqualifications of persons under 18, and laws protecting the welfare of persons under 18.</b>
7. Age	<b>Add new clause exempting age discriminatory laws and acts done under their authority, to expire in one year unless extended by Legco resolution.</b>
8. Sexuality	<b>Add new clause exempting laws and policies governing eligibility for marriage and for adoption.</b>
9. Sexuality, Race	Amend provisions on harassment in education to cover harassment by students of other students, or of staff.
10. Sexuality, Race	Technical amendments to harassment provisions — (a) to ensure that coverage of harassment in work is complete; (b) to clarify definition of harassment by way of hostile work environment, and (c) to clarify definition of harassment by way of substantial interference with activities in other areas
11. all	Add new clause exempting school admissions in compliance with government-formulated admission schemes
12. Family responsibility, Race	Add new clause exempting admissions decisions made by private schools in order to accommodate students — (a) whose relatives study or work at the same schools, or (b) who previously studied or are likely in future to study in particular educational systems (e.g. in French schools or in Japanese schools)

Office of Anna Wu

18 May 1995

**Note to Members of the Bills Committee studying  
the Equal Opportunities Bill, the Sex Discrimination Bill  
and the Disability Discrimination Bill**

Proposed committee-stage amendments to the Sex Discrimination Bill  
Revised list

<u>CLAUSE</u>	<u>AMENDMENT PROPOSED</u>
	<u>Part I — Preliminary</u>
1(2)	Amend to bring provisions of Ordinance into operation on 1st January 1996 or on earlier dates as appointed by the Secretary for Home Affairs
2(1)	Amend definition of 'marital status' to include status of being de facto spouse [cf. EOB 3(1)]
2(5)	Amend definition of sexual harassment to include sexual conduct that — in the employment field, creates a sexually hostile work environment, or — in other fields, substantially interferes with the victim's activities [cf. EOB 29(3)(b), 30(2)(c)]
—	New clause directing Ordinance to be interpreted to give effect to relevant international obligations (including the ICCPR, ICESCR and CEDAW) [cf. EOB 7]
—	New clause defining discrimination against a person to include discrimination on ground of relative's or associate's sex, marital status or pregnancy. [cf. DDB 2(6), 6(c); EOB 6]
—	New clause repealing prior inconsistent laws to extent of inconsistency with Ordinance [cf. EOB 8]
—	New clause providing that an act done for two or more reasons, one of which is sex, marital status or pregnancy, deemed to be done by reason of sex, marital status or pregnancy [cf. DDB 3, EOB 4]
	<u>Part II — Discrimination</u>
4(1)(b), 6(1)(b) & 7(b)	Amend definitions of indirect discrimination to include any practice with a disproportionately adverse impact on one sex / persons of a particular marital status / pregnant women [cf. EqT 3 3]*
6	Amend definition of marital status discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field.
7	Amend definition of pregnancy discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field.
8	Amend definition of victimisation to include not only less favourable treatment, but any detriment as a result of anything done under or by reference to the Ordinance [cf. EqT 3 9]

\* EqT = 'Equal Treatment for Men & Women - Strengthening the Acts.' Formal Proposals of the UK EOC, 1988

Part III — Employment Field

- 10(2), Amend to expressly prohibit discrimination in terms and conditions of employment, ;  
( ) add new subclause to clarify for avoidance of doubt whether such discrimination incl  
unequal pay for work of equal value.  
[cf. EqT 2.20]
- 10(3), Repeal, or amend to expire on the sooner of 1st January 1997 or one year after  
(6)-(8) commencement of section. (Exemption for small employers.)
- 10(4), Amend to expire in one year, subject to extension by Legco resolution. (Exceptions ,  
14(4) & provisions relating to death and retirement, in connection with employment, partnersf  
15(4) and trade unions, etc.)  
[cf. EqT 3 14]
- New clause prohibiting discrimination against commission agents (also amend cl 2(1)  
add definition of “commission agent”).  
[cf. EOB 3(1), 14, 29(2)]  
Repeal. )
- 11(2)(g), Amend to expire in one year, subject to extension by Legco resolution.  
49-50, (Exceptions permitting exclusion of women from jobs covered by Sched. 2 protective  
52 & regulations, and exempting protective legislation and acts done for the protection  
Sch. 2 of women.)
- 11(2)(h) Repeal. (Exception for work likely to involve duties outside Hong Kong where  
discriminatory laws or customs apply.)
- 20 Amend prohibition of sexual harassment to include harassment of a woman employed  
perform domestic duties in the premises in which the harasser resides or is otherwise  
present, whether or not the harasser is the employer.  
[cf. EOB 29(1)(d)]

Part IV — Other Fields

- New clause prohibiting discrimination in clubs (and to amend cl. 2(1) to add definition  
of “club” and “committee of management” of a club).  
[cf. DDB 2(1), 32; EOB 3(1), 25; EqT 3.26]
- New clause prohibiting discrimination in administration of laws and government  
programmes.  
[cf. EOB 27; EqT 3 23]
- New clause prohibiting discrimination in public elections and appointments.  
[cf. EOB 28]
- 30(1)(a) Amend to limit exception for single-sex hospital services and special care facilities to  
cases where the restriction to one sex is reasonable having regard to the essential  
character of the restricted services or facilities.  
[cf. SDB 11(2)(e)(iii)]
- 32 Amend prohibition of sexual harassment to include harassment of students by student  
and of educational staff by students.

#### Part V — Other Unlawful Acts

- 36 & 74 Amend to make unlawfully discriminatory advertisements an offense, subject to a fine of \$30,000 for a first offense and \$100,000 for a second offense  
[cf. EOB 225]

#### Part VI — General Exceptions

- New clause providing general exception for special measures and for measures to achieve equality  
[cf. DDB 47, EOB 37, CEDAW, Art. 4]
- 51 Repeal (Exemption for acts done to safeguard the security of Hong Kong)
- 54 & Amend to expire in one year, subject to extension by Legco resolution  
Sch. 4 (Exemption of certain discrimination within the disciplinary services; of the Small House Policy, and of marital status discrimination in employment benefits and civil service benefits.)

#### Part VII — Equal Opportunities Commission

- 55 & Repeal 15(2), 16(2)-(3) and 17(2) of Schedule 5. (EOC expenditure, borrowing and Sch. 5 investment subject to direction or approval by Secretary of Home Affairs and/or Treasury.)
- 56(1)  New subclause giving EOC function of promoting observation of relevant international obligations (including the ICCPR, ICESCR and CEDAW) as they relate to equality of opportunity irrespective of sex, marital status or pregnancy.
- 56(1)  New subclause giving EOC function of examining any proposed legislation that it considers may affect equality of opportunity and reporting results to legislation's sponsor.  
[cf. Personal Data (Privacy) Bill, cl. 8(1)(d)]
- 57(3) Repeal. (Approval of Secretary for Home Affairs required for any financial assistance by EOC to outside research and educational undertakings.)
- 63(4) Amend to enable EOC to carry out an investigation into named persons or organisations for any purpose connected with its functions (irrespective of whether it believes unlawful acts have occurred)  
[cf. EqT 4 8]
- 63(4) Amend to give all named persons (irrespective of whether they are believed by the EOC to have committed unlawful acts) a right to make pre-investigation representations to the EOC, within 28 days after receiving notice of the proposed investigation  
[cf. EqT 4 12]
- New clause empowering EOC to bring proceedings in its own name with respect any act or practice made unlawful by Ordinance  
[cf. EqT 4 17]
- New clause empowering EOC to intervene by leave of court in any proceedings under the Ordinance

### Part VIII — Enforcement

- New clause providing that, in proceedings under Ordinance, District Court not bound by rules of evidence and may inform self as sees fit.  
[cf. EOB 235]
- New clause providing that, in proceedings under Ordinance, each party shall pay own costs unless court finds exceptional circumstances justify otherwise.  
[cf. EOB 237]
- 68(3)-(4) Amend to delete District Court's power to order any remedy obtainable in High Court and replace with power to order any remedy the court considers just and appropriate, including reinstatement.  
[cf. EOB 234]
- 68(5) Repeal. (No damage awards for indirect discrimination if discrimination unintentional)
- 68(7) Repeal. (Chief Secretary must be given prior notice of claims vs. government schools)
- 69(2) Amend to authorise enforcement notices to include, in addition to a requirement that a person cease an act of unlawful discrimination, a requirement that the person cease a specific practice(s) that led to the unlawful discrimination.  
[cf. EqT 4.16]
- 69(5) Repeal. (EOC must give prior notice to persons against whom enforcement notice issued, and hear and take account of such persons' representations opposing issuance of enforcement notice; duplicates right to judicial appeal of enforcement notices.)  
[EqT 4.13]
- 76 Amend to enable EOC to conciliate complaints of acts inconsistent with relevant international obligations (including the ICCPR, ICESCR and CEDAW) as they relate to equality of opportunity irrespective of sex, marital status or pregnancy.
- 77 Amend to enable EOC to take over proceedings in own name if a claimant receiving EOC assistance withdraws from proceedings.
- 78(1)-(2) Amend to permit proceedings to be brought under the Ordinance for a period of 6 years from the act complained of.
- 78(4) Amend period within which proceedings under the Ordinance may be brought, to begin after conclusion of conciliation process.
- 78( ) New subclause to provide an additional period within which proceedings under the Ordinance may be brought, of one year following publication of a formal investigation report that finds unlawful discrimination, for persons who claim to have suffered from the reported discrimination  
[cf. EqT 4.15]

### Part IX — Miscellaneous

- 82(2) & Sch. 7 Consequentially amend section 5AA of the Legal Aid Ordinance (Cap. 91) to allow the Director of Legal Aid to waive the means test for proceedings involving claims of discrimination under the Ordinance (as for proceedings involving claims under the Bill of Rights).

Office of Anna Wu  
18 May 1995

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Protection of domestic helpers against sexual harassment

1 General

1.1 Domestic helpers, especially those who live in their employers' households, are particularly vulnerable to sexual harassment by employers, members of the employer's family, relatives or visitors. The fact that many domestic helpers are from abroad and cannot escape even temporarily from workplace harassment by going home each day means that they may be relatively powerless to resist such abuse. There is thus a need to ensure that legislation prohibiting sexual harassment in the workplace is applicable to and effective for domestic helpers.

2. Coverage under the Sex Discrimination Bill

2.1. The Sex Discrimination Bill [SDB] provides the same protection against sexual harassment to a domestic helper as to any other employee. Liability for sexual harassment of a domestic helper would arise under the SDB in the following circumstances:

(a) Where the employer himself or herself is the harasser, the employer would be liable under cl. 20(2).<sup>1</sup>

(b) Where the harasser is someone other than the employer, the employer *may* be liable if

— the definition of sexual harassment in cl. 2(5) includes the creation or toleration of a *hostile working environment*; and

— the employer's level of knowledge and tolerance of the hostile working environment is sufficient to trigger liability.

2.2 In many cases, harassment of domestic helpers will be of type (b) where the harasser is someone other than the employer. For example, only one member of the resident family will generally sign a domestic helper's employment contract. It may thus be a woman who employs a helper, but the woman's husband who then harasses

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<sup>1</sup> Assuming that employment as a domestic helper in a private household falls within the phrase 'employed at an establishment in Hong Kong'

the helper. Under the present SDB, the helper would not be able to sue the husband (the actual harasser) because technically he is not her employer. If the employer could not be reached under a hostile environment theory, then the helper would be left with no remedy at all.

2.3 The SDB's vicarious liability provisions (cl 39) would not solve this problem, since the posulated harasser is not an employee or agent of the helper's employer. Nor would the Bill's secondary liability provisions (cill. 37-40) appear to help. The only possibility is cl. 40, which makes it unlawful for a person to aid another to do an act unlawful under the Ordinance. The word "aid", however, appears to contemplate a fairly high level of active encouragement. Moreover, there is the more fundamental problem that the co-resident's (or visitor's) act of harassment is in any case not unlawful under the SDB (since it does not fall within one of the prohibited categories of harassment; see cill. 20-21 and 32-33).

2.4. Accordingly, the provisions of the Sex Discrimination Bill do not appear either directly or indirectly to cover harassment of domestic helpers by members of the household who are not the helper's employer.

### 3. Recommendations

3.1. Clause 20(1) should be amended to include a provision which makes it unlawful for any person to harass sexually a person employed to perform domestic duties in the premises in which the harasser resides or is otherwise present, whether or not the harasser is the employer of the victim.

3.2. The SDB's definition of sexual harassment (cl. 2(5)-(6)) should also be amended to make clear that the definition includes hostile environment harassment as well as quid pro quo harassment. This would assist not only domestic helpers but *all* employees. Consideration should also be given to extending clause 20(1) to give other types of employees protection against workplace harassment by persons other than employers and co-workers, such as customers.

Office of Anna Wu  
18 May 1995

SDB Paper No. 10/95

Sex Discrimination Bill :

Comments made by employer organisations

Representatives of a number of employer organisations have presented their views on the Sex Discrimination Bill to the Bills Committee. The Administration's response to these views is set out below.

Partnerships

2. The Federation of Hong Kong Industries and the Hong Kong General Chamber of Commerce have both suggested that partnerships should be excluded from the Bill. This matter was covered under SDB Paper No. 9/95.

Transitional Period

3. The Federation of Hong Kong Industries and the Hong Kong General Chamber of Commerce both suggested that the transitional period of 5 years for business establishments with not more than 5 employees [ Clause



10(3) ] should be extended to firms with an employment size of not more than 10 persons.

4. We appreciate employers' concerns over the impact of the SDB on small business establishments. Nonetheless, we also note that some other organisations have suggested to reduce the length of the transitional period. On balance, the Administration is of the view that the provisions in the SDB in respect of the size of the business establishments as set out in Clause 10(3) is appropriate.

#### **Liability of Employers**

5. Clause 39(1) of the Bill provides that "anything done by a person in the course of his employment shall be treated for the purposes of this Ordinance as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval." The Employers' Federation of Hong Kong and the Hong Kong General Chamber of Commerce are of the view that employers should not be held liable for discriminatory acts by their employees. The employer should be liable only if the act done by his/her employee in the course of employment has obtained the employers' approval.

6. The Administration does not agree with this view. Clause 39(3) of the Bill provides that "in proceedings brought under this Ordinance against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description". We feel that Clause 39(3) which mirrors the provisions in the UK is adequate in protecting the employers' position in relation to proceedings under the Bill.

### Enforcement

7. Clause 68 of the SDB provides that proceedings are to be brought in the District Court and the remedies are to be damages, a declaration or an injunction. The Hong Kong Association of Banks and the Hong Kong General Chamber of Commerce have suggested that a cap should be imposed on the amount of damages for injured feelings.

8. In awarding damages, the court would take into account the relevant circumstances of each case. The Administration is of the view that we should not limit the court's discretion by imposing a cap on the amount of damages in general nor damages specifically for injured feelings. Such matters should be left to the court to decide

SDB Paper No. 11/95

Sex Discrimination Bill

Matters raised by Bills Committee Members

De facto Spouse

In the course of deliberation on the Sex Discrimination Bill, some Members have expressed concerns that couples of customary marriages were not protected under the Bill. The Administration undertook to examine this issue.

2. Under the Marriage Reform Ordinance (Cap. 178), a marriage shall constitute a "customary marriage" if it was celebrated in Hong Kong before 7 October 1971 in accordance with Chinese law and custom. A marriage celebrated in Hong Kong before 7 October 1971 by open ceremony and in the presence of 2 or more witnesses is regarded as a "modern marriage".

3. The Marriage Reform Ordinance provides that parties to a customary marriage or a modern marriage may apply to the Registrar of Marriages for the registration of their marriage provided that such marriage took place prior to 7 October 1971. Marriages entered into in Hong Kong on or after 7 October 1971 shall imply the voluntary union of life of one man with one woman to the exclusion of all others (i.e. a monogamous relationship) and may be contracted only in accordance with the Marriage Ordinance (Cap. 181). No man may take a concubine and no woman may acquire the status of a concubine after 7 October 1971. Polygamous relationships after 7 October 1971 are no longer legally recognised.

4. Upon the enactment of the Marriage Reform Ordinance, arrangements have been in place for parties to customary marriages and modern marriages which occurred before 7 October 1971 to register their marriages. Parties to customary marriages and modern marriages who have registered are accorded the same legal status as parties contracted in accordance with the Marriage Ordinance. For example, in relation to tax allowance available for married persons, tax return forms specify that the word "spouse" means the lawful husband or wife under a valid marriage recognised by Hong Kong law. Therefore, registered customary marriages and modern marriages would be treated in the same manner as marriages contracted under the Marriage Ordinance. According to available records, as of 30 April 1995, there have been 3062 customary marriages and modern marriages registered under the Ordinance.

5. Given the above arrangements, the Administration does not see the need nor find it appropriate to include *de facto* spouse under the definition of marital status in the Sex Discrimination Bill.

Sex Discrimination Bill (SDB)

Exceptions for Death or Retirement Benefits in Clause 10(4)

At the Bills Committee Meeting on 5.5.1995 Members, having considered SDB Paper No. 5/95, requested the Administration to further consider the proposal to "grandfather" the exception provided in Clause 10(4) so that it only applies to members of death or retirement schemes which are already in operation before the commencement of the provisions in the Sex Discrimination Ordinance.

2. Clause 10(4) of the SDB provides that it would not be unlawful for the employer to treat male and female employees and applicants for employment differently concerning 'provision in relation to death or retirement'. It is not the Administration's intention to encourage new retirement schemes which have yet to be set up to differentiate between male and female employees in relation to death or retirement benefits without any reference to actuarial data. In line with this principle, we now propose to effect a committee stage amendment to Clause 10(4) of the Bill. The amendment will limit this exception to members of death or retirement schemes which are already in operation on the commencement of Clause 10(4) of the Bill. All employees who obtain employment after the commencement of the Bill and those employees who are offered a scheme of retirement and benefits after such commencement will not be

covered by the exception. In providing death or retirement benefits to these employees, the employer shall not differentiate in the treatment of his/her employees on the ground of gender, unless such differential treatment falls within the ambit of Clause 43 of the Bill.

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Secretary for Home Affairs  
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19 May 1995

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The Hon Anna Wu  
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### Reorganisation of the Equal Opportunities Bill (EOB)

I refer to your letter dated 12.5.1995 which I received on 16.5.1995. We note the copies of draft bills on equal opportunities and we look forward to receiving the bills when they are ready. On the point raised in paragraph 3 of your letter, we shall, upon receipt of the final versions of the bills, study their contents to satisfy ourselves that they do not carry any charging effects.

(Michael M Y Suen)  
Secretary for Home Affairs

Joint Council for the Physically and Mentally Disabled  
(Rehabilitation Division, Hong Kong Council of Social Service)

Position Paper on Disability Discrimination Bill

People with disabilities in Hong Kong have long been advocating for a legislation to protect them from being discriminated on the ground of their disabilities and to ensure that they enjoy each and every rights which are being enjoyed by other citizens. The Joint Council welcomes the introduction of this long awaited legislation and wishes whole-heartedly that the Bill be passed in this legislative year so that relevant legal protection would be available to people with disabilities without further delay.

The Joint Council worked closely with the Administration during the drafting of the Disability Discrimination Bill. We are glad to see that the government has adopted various suggestions of the Joint Council and drafted the Bill to cover a wide range of people with disabilities and matters affecting them. The future Equal Opportunities Commission should also establish a close working relationship with the rehabilitation community including people with disabilities and rehabilitation workers.

Regarding the contents of the Bill, the Joint Council has the following comments and suggestions which we hope the government and legislative councillors would consider seriously:

Principles

1. A main objective of the Bill as to render unlawful discrimination against persons on the ground of their or their associates' disability and harassment and vilification of such persons is generally supported. This would certainly help to promote the full participation of and equal opportunities for people with disabilities.
2. The legislation should also encourage positive measures aimed at bringing about full participation and equal opportunities and the removal of existing discrimination.

Chinese Terminology

3. In the Bill, the Chinese term " 弱能 " is used to stand for "disability". Such a term appears rather negative as it seems to hint that people with disabilities are generally weaker and less capable. This message is indeed contradictory to the purpose of the Bill as to promote full participation and integration of people with disabilities. The following terms might be considered instead: " 殘疾 ", " 傷殘 ", or " 殘障 ".



#### Definition / Interpretation of Terms

4. The interpretation of "associate" and "carer" in s.2 does not specify clearly that rehabilitation workers of non-governmental organizations (NGOs) are included, though authorised officers of Social Welfare Department is mentioned explicitly. In fact, rehabilitation workers of NGOs have many opportunities to use community facilities together with people with disabilities and to face community opposition or harassment due to establishment of rehabilitation facilities, and they should also be protected by the Bill. For the sake of clarity, the following category of people should be included explicitly in the definition of carer: "employees of service organizations who are charged to deliver service to people with disabilities".
5. The definition of "club" is rather limited as the Bill requires the club to have its own facilities and that liquor is sold or supplied in its premises. While the clause related to the provision of liquor seems to be unnecessary, the definition also excludes organizations which do not have premises, e.g. fans clubs of singers. It is suggested that both the requirement of premises and provision of liquor be dropped from the definition of "club".
6. The definition of "disability" is broad enough to protect various kinds of people with disabilities. The clause "(d) the presence in the body of organisms capable of causing disease or illness" appears to include people with HIV as well if "organisms" include "virus". Confirmation of this point is needed and, if necessary, clarification should be made in the Bill.
7. The Bill protects people with disabilities from being discriminated but does not pay much attention to rehabilitation facilities. It is known that, apart from opposition of community residents, even government departments including Housing Department and Social Welfare Department might impose unreasonable obstacles to the establishment of rehabilitation facilities, e.g. lengthy consultation procedures. The Bill should make provisions so that the establishment of rehabilitation facilities would not be obstructed or delayed due to community resistance or unreasonable requirements imposed by government departments or other bodies. Rehabilitation organizations should also be able to file claims with the Court when necessary.

#### Discrimination in Employment Field

8. "Equal employment opportunities" is one of the major areas of concerns of people with disabilities which should be realized immediately. The government however proposes that enforcement in the area of employment shall not start until the endorsement of relevant code(s) of practice. This would certainly cause undue delay in the enforcement of such an important anti-discrimination provision. The Joint Council urges the government to make a firm commitment that the Bill's provision in the field of employment, as well as all provisions in all fields, would be enforced within 1 year after the endorsement of the Bill by the Legislative Council.

9. The Joint Council considers the proposed 5-year grace period for small firms unnecessary and recommends to drop such an exemption clause (s.11(3), (5) & (7) of the Bill). Dropping this provision would not only protect the interests of people with disabilities in the area of employment, but would also spread the message that all Hong Kong citizens should work together to materialize the principle of "equal opportunities and full participation". We understand that if small firms experience genuine difficulties in employing people with disabilities, they would be safeguarded by the provision of "unjustifiable hardship" in the Bill.
10. Genuine Occupational Qualification
  - 10.1 Section 12 of the Bill provides for "exception where absence of disability is genuine occupational qualification". As the Bill adopts a wide definition for disability, it is hard to imagine what kinds of job would require that "being a person without a disability is a genuine occupational qualification for the job [s.12 (1) (a)]." It is easily understandable that even if a certain group of people with disabilities is not qualified for a certain job, there are still other groups of people with disabilities who would fit all the requirements.
  - 10.2 Different from gender-related issues in employment where being male of female could be a job requirement, the present interpretation of the term "genuine occupational qualification" in disability field seems to be too vague to be applicable.
  - 10.3 The Joint Council supports the principle that people with disabilities should be employed according to their ability and considers that the provision of "inherent requirements of the particular employment [s.12 (2) (i)]" is adequate enough to protect employers from having to employ non-qualified employees. It is thus recommended that section 12 be modified to avoid the above-mentioned ambiguity, and where appropriate, the term "genuine occupational qualification" be re-defined or removed from the Bill.
11. The Bill does not render it unlawful if an employer request the same information from all its employees or job applicants, disregarding if they are people with disabilities or not. The Joint Council is concerned that employers might require all their employees or job applicants to provide such information which is irrelevant to the jobs, e.g. medical history including history of mental illness, since such information might affect employers in, say, selection of applicants. The Joint Council proposes that provision be made in the Bill so that employers would not be allowed to request information related to applicants' or employees' medical history or other information associate with disability which is irrelevant to the jobs. This would not only allow both people with and people without disabilities to maintain their personal privacy but would also reduce the chances of disability discrimination or alleged disability discrimination in workplace.

### Discrimination in Other Fields and General Exceptions

12. It is not clear whether the Bill covers public examinations run by the Examination Authority. If "examination" is not included under the definition of "services", appropriate amendment should be made so that people with disabilities taking such examinations would be protected from being treated unfairly.
13. Section 29 of the Bill allows exceptions for non-profit making bodies which may restrict their membership, and hence benefits, services and facilities to members, to people without disabilities. The Joint Council could not understand why such a provision is necessary. It is recommended that such a provision be withdrawn.
14. Section 35 of the Bill renders it unlawful for a person who provides goods, services or facilities to harass another person with a disability who wants to acquire the goods or services or to make use of the facilities. It is proposed that such protection should be extended to people with disabilities who are already using goods, services or facilities provided by the former.
15. Section 49 deals with "insurance" which is one of the major issues of concern of people with HIV or AIDS as they are now declined of almost all insurance packages. It is suggested that the future Equal Opportunities Commission should address this issue in relevant code(s) of practice.
16. Section 50 and 51 deals with "discriminatory training by certain bodies" and "other discriminatory training, etc." It allows training be provided for either "persons with a disability only, or persons without a disability only". Similar to the arguments listed in paragraph 6 above, it is hard to understand what kinds of training would be suitable for "persons without a disability only", especially in view of the wide range of disabilities adopted by the Bill. The Joint Council suggests that s.50 and s.51 be deleted from the Bill.
17. Section 56 of the Bill concerns about "Acts safeguarding security of Hong Kong" which appears out of place. It is suggested that the section be removed from the Bill.

### Equal Opportunities Commission and Enforcement

18. The Equal Opportunities Commission (the Commission) should be established as soon as possible and it shall develop close working relationship with the rehabilitation community and people with disabilities should be appointed as members of the Commission. As different disability groups have different concerns, it is essential that all these groups are consulted as appropriate. Representatives of concerned disability groups should thus be co-opted into concerned expertise committees.

19. The Commission should have adjudication power so as to reduce the barrier for victims of discrimination to launch complaints in District Court. It is recommended that a tribunal be set up under the Commission, similar to the practice in Australia. It is believed that a powerful Commission with a tribunal would, instead of reducing the number of conciliation cases, increase the chances of settling disputes through conciliation inside the Commission.
20. In order to help people with disabilities who have difficulties filing claims to the court, the Commission should be allowed more litigation power such as bringing up individual claims or class action. Moreover, rehabilitation organizations should also be allowed to represent people with disabilities in litigations.
21. The Bill specifies that the Commission "shall work towards the elimination of discrimination (s.60)" and the codes of practice may contain "practical guidelines ... for the purposes of the elimination of discrimination (s.63)". These points are generally supported but it is not sure whether the Commission and the codes of practice would encourage positive acts aimed at elimination of existing discrimination, e.g. to make public transport facilities and ordinary schools accessible. It is proposed that relevant clauses be added to the Bill to encourage such positive measures.
22. It is also suggested that the Commission should put high priority on drafting of codes of practice upon its establishment.
23. Procedures Adopted by the Commission
  - 23.1 The effectiveness of the Bill hinges very much with the power and functioning of the Commission. The Joint Council hopes that the Commission would adopt simple, informal and non-technical procedures so that people with disabilities could obtain assistance easily. Procedural obstacles mentioned in the following 2 paragraphs should be avoided.
  - 23.2 Section 65 of the Bill deals with the terms of reference for formal investigation. The Commission should be given full autonomy to start a formal investigation without being intervened by alleged discriminators or other parties, so as not to repeat the experience of United Kingdom's Commission for Racial Equality and Equal Opportunities Commission which had a record of taking many years to have the terms of reference settled before the formal investigation really commenced. Similar to the proposal made by UK's Commission for Racial Equality, the Joint Council proposes to simplify the procedures regarding "terms of reference".
  - 23.3 Procedures involving the Chief Secretary should be simplified or removed so as to avoid any procedural obstacles.

24. "Reinstatement" should be added to s. 70 as an option of remedies which might be granted to victims of discrimination in the field of employment.
25. According to s.78 and s.80, the Commission and the Court may not consider complaints or claims after the completion of a 12-month period following the complained act. The Joint Council proposes to extend the period to 6 year in line with the usual practice of other civil tort cases.
26. The need for class action and the parties who would be allowed to bring up class action should be further explored. The Joint Council suggests that both victims of discrimination and concerned parties, such as relatives or carers of the victims, should be allowed to bring up class actions.
27. Adequate legal assistance should be provided when conciliation fails and when the victims of discrimination decide to take up litigation. The Joint Council proposes that either (i) the Commission has the financial resources to provide all necessary forms of legal assistance to the victims; or (ii) to give the Director of Legal Aid a discretionary power to waive the means test for applying legal aid in cases where the future Disability Discrimination Legislation is concerned.
28. The Commission should be allowed to disclose relevant information of conciliation cases it handles for public educational purposes and to increase transparency. For the sake of sanction and public education, the Commission should also be empowered to publish the identity of discriminators when it believes that the latter has discriminated against people with disabilities on the ground of their disabilities and when conciliation fails.

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FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen  
NO. OF PAGES (INCLUDING THIS ONE) : 1

FROM : Adam Mayes  
DATE : 24/5/95

IF THE FAX IS INCOMPLETE, PLEASE NOTIFY US IMMEDIATELY.

MESSAGE :

Re. this Friday's (26 May) Bills Committee meeting

I talked to Susie Ho this afternoon about her plans for the meeting.

1. She hopes to provide the Administration's position on all remaining issues this Friday.
2. It is possible Michael Suen may attend, but not yet confirmed.
3. I queried her about the Administration's position on equal pay, in particular whether and how it would be required for work of equal value.
  - 3.1. The Administration has not finalised its position, but apparently it is intended by Home Affairs that eq. p. for work of eq. v. be covered by the SDB. Susie felt that "they could not run away" from this issue. This view is based on her impression that eq. p. for work of eq. v. is required by the sex discrimination laws of most or all other jurisdictions.
  - 3.2. Her view continues to be that the details, e.g. how to calculate eq. p. for work of eq. v., should be left for the EOC to provide in Codes of Practice. [Presumably this means copying the relevant parts (sec. 1, I think) of the UK Equal Pay Act into the Codes, in the manner provided for in SDB 61(13).]
  - 3.3. She still has no clear answer as to whether the terms of the SDB in fact require eq. p. for work of eq. v., or indeed on what authority such an opinion might be based (bearing in mind that the issue has never been raised in connection with the comparable wording of the UK-SDA).
  - 3.4. She suggested that the SHA might indicate in his 2d Reading speech that the Administration intends the SDB to require eq. p. for work of eq. v. She also suggested that the combination of the SHA's expression of intent and the EOC's drafting of Codes on the assumption the matter was covered would make the Courts reluctant to hold otherwise.
4. Her papers will not be ready for distribution until late tomorrow.

# The Office of Anna Wu, Legislative Councillor

Rm 415, Central Government Offices (West Wing), Ice House St., Hong Kong.  
Tel: (852) 2537-2467 Fax: (852) 2530-2018

## FACSIMILE MESSAGE

TO : Anna Wu  
Andrew Byrnes  
Carole Petersen

NO. OF PAGES (INCLUDING THIS ONE) : 1

FROM : Adam Mayes

DATE : 25/5/95

### Re. schedule for EO Bills & SDB, 2d reading resumption and amendment preparation

I talked to Stephen Lam about this today. (Jonathan Daw will also be attending tomorrow's meeting to advise on this matter.)

The scheduling is complicated by the public holidays on 2, 17 & 19 June, and by the fact that there will be no House Committee next week (because of the holiday on Friday, 2 June).

#### *For the SDB:*

1. Legco Legal Division expects it will finish drafting the SDB amendments 2 weeks after receipt of drafting instructions from the Bills Committee. Assuming the Bills Committee wraps up tomorrow, the amendments can be notified at the earliest on 9 June.
2. The SHA could give notice of 2d reading [2R] resumption in House Committee [HC] tomorrow. It would be too soon after wrap-up for the Bills Committee's to put a written paper on the SDB before the HC, but verbal notice is acceptable. Giving notice tomorrow, the SHA could set 2R resumption at the earliest for the 14 June sitting.
3. The deadline for notice of amendments to the SDB would then be 5 June. According to the Legal Division's time estimate, many or all amendments could not be notified by that date and would therefore be out of order. The SHA has the right to insist on 2R resumption on 14 June. Once 2R opens on that date, however, legislators can move a motion to defer debate (by majority vote).
4. Most likely then, either the SHA will be cooperative and ask for 2R resumption at the 21 June sitting, or he will insist on 14 June and legislators will then defer it by a motion to 21 June.

#### *For the EO Bills:*

1. The Government Printer will adjust to the 2 June holiday by gazetting bills on Thursday, 1 June. I think it is unlikely, however, that we will finish with the LD in time for a 1 June gazettal. I therefore assume gazettal on 9 June, with the subsequent formality of 1st reading on 14 June (Note also that we may be further delayed if the SHA makes trouble about financial implications.)
2. Under the ordinary procedure, the bills would go to House Committee on 16 June, for assignment to the existing EO-Bills Committee (in line with the earlier HC decision on the bills). The Bills Committee would formally wrap up consideration of the bills on 23 June, and in that afternoon's HC we could give verbal notice of 2R resumption for the 5 July sitting.
3. Alternatively, relying on the HC's earlier decision to put the new bills into the existing EO-Bills Committee, we could bypass another trip to the HC and instead take the bills straight to the Bills Committee for wrap-up on 16 June. This would make 2R resumption possible for the 28 June sitting. The Standing Orders require that bills go to HC after 1R, however, so we need to check with the Clerk to Legco about whether we can ignore that rule.

Total : 29 Pages

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政務科  
香港灣仔  
軒尼詩道一百三十號  
修頓中心  
三十一樓



**FAX OUT**

GOVERNMENT SECRETARIAT  
HOME AFFAIRS BRANCH  
31ST FLOOR, SOUTHWORN CENTRE  
120 HENNESSY ROAD,  
WAN CHAI,  
HONG KONG,

本署編號 OUR REF. : HAB CR 1/2/21 Pt. 26

來函編號 YOUR REF.:

電 話 TEL NO. : 2835 1373

傳真號碼 FAXLINE : 2834 6176

**URGENT**

May 25, 1995

Mrs. Anna Lo  
Clerk to the Bills Committee to Study  
the Sex Discrimination Bill and the  
Equal Opportunities Bill  
c/o Legislative Council  
8 Jackson Road,  
Hong Kong  
Fax No. 2877 8024

Dear Anna,

Bills Committee Meeting on 26.5.1995

I enclose herewith a table showing the proposed amendments to the Sex Discrimination Bill accepted by the Administration together with the relevant draft Committee Stage Amendments for discussion at tomorrow's Bills Committee Meeting. My apologies for the delay.

I look forward to seeing you tomorrow.

With best regards,

Yours sincerely,

*Susie Ho*

(Susie Ho)  
for Secretary for Home Affairs



Sex Discrimination Bill: Proposed Committee Stage Amendments  
accepted by the Administration

<u>Ref. No.</u>	<u>Outline of Proposed Amendment</u>	<u>Administration's Response</u>
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**Part I - Preliminary**

- |                |  |   |
|----------------|--|---|
| 1<br>C2<br>(5) | Definition of sexual harassment should cover (i) creation of a sexually hostile working environment in the employment field; and (ii) interference with enjoyment of activities in other fields. | Agree that (i) should be covered under the definition of sexual harassment. |
| 2              | Application to acts done for two or more reasons should be made explicit.  | Agreed. We shall adopt the approach in the Disability Discrimination Bill.  |

**Part II - Discrimination**

- |         |   |   |
|---------|---|---|
| 3<br>C6 | Amend definition of marital status discrimination to apply to any provision in Ordinance rather than only to provisions relating to employment field.                   | Agreed. Exceptions will be <u>needed</u> to cover Home Ownership Schemes applications; and provision of reproductive technology services.   |
| 4<br>C7 | Amend definition of pregnancy discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field.                       | Agreed. Exception will be needed to cover the provision of recreation facilities which may be hazardous to the health of the pregnant person.   |
| 5<br>C8 | Amend definition of victimisation to include not only less favourable treatment, but any detriment as a result of anything done under or by reference to the Ordinance. | Agreed, to the extent that the definition will be extended to cover circumstances where a person is victimised because of proceedings etc. taken out by another person under the SDB. |

Sex Discrimination Bill: Proposed Committee Stage Amendments  
accepted by the Administration

<u>Ref. No.</u>	<u>Outline of Proposed Amendment</u>	<u>Administration's Response</u>
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**Part III - Employment**

- |                 |   |   |
|-----------------|---|---|
| 6<br>C10<br>(3) | Repeal or amend the transitional period for small business establishments to expire on the sooner of 1.1.1997 or one year after the commencement of this section. | To (reduce) the transitional period to 3 years.   |
| 7<br>C10<br>(4) | To 'grandfather' the exception for death or retirement benefits.  | Agreed. Informed Bills Committee on 19.5.1995.  |
| 8               | New clause prohibiting discrimination against 'commission agents.'  | Agreed. Bills Committee informed on 28.4.1995.  |
| 9               | To make sexual harassment of an employer by an employee unlawful.   | Agreed. Bills Committee informed on 5.5.1995.   |
| 10<br>C19       | To improve the draft of Clause 19 which provides exceptions for employment matters in relation to organised religion.   | Agreed. Replace 'religious susceptibilities of a significant number of followers of that religion' by '...susceptibilities common to that religion' |
| 11<br>C20       | Sexual harassment in employment should be extended to cover harassment of a domestic worker by a co-resident of the employer.                                     | Agreed. The employer will not be made liable for the harasser's unlawful act.   |

**Sex Discrimination Bill: Proposed Committee Stage Amendments  
accepted by the Administration**

<u>Ref. No.</u>	<u>Outline of Proposed Amendment</u>	<u>Administration's Response</u>
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**Part IV - Other Fields**

- |           |   |   |
|-----------|---|---|
| 12        | New Clause prohibiting discrimination in clubs.   | Agreed. Bills Committee informed on 5.5.1995.   |
| 13        | To make provisions covering the administration of laws and Government programmes.   | Agreed. The Government would not discriminate in the performance of its functions and the exercise of its powers. |
| 14<br>C32 | To make amendments to cover situations where (i) one student sexually harasses another student; and (ii) a student sexually harasses a teacher. | Agreed. Bills Committee informed on 5.5.1995.   |
| ✓15       | New Clause providing general exception for special measures and for measures to achieve equality.   | Agreed. Bills Committee informed on 5.5.1995.   |

**Part VII - Equal Opportunities Commission**

- |     |   |   |
|-----|---|---|
| ✓16 | ECC should be empowered to bring proceedings in its own name. | Agreed in principle. In this regard, provisions will be made to empower SHA to make regulations, subject to LegCo's approval. |
|-----|---|---|

**Part VIII - Enforcement**

- |    |   |  |
|----|---|--|
| 17 | New Clause providing that, in proceeding under the Ordinance, the District Court may relax the rules of evidence. | Agreed. Bills Committee informed on 12.5.1995. |
|----|---|--|

Sex Discrimination Bill: Proposed Committee Stage Amendments  
accepted by the Administration

<u>Ref. No.</u>	<u>Outline of Proposed Amendment</u>	<u>Administration's Response</u>
18	District Court's power to vary the rule of costs should be made explicit, with no award of costs as the general rule.	Agreed. Bills Committee informed on 12.5.1995.
19 C68 (7)	To delete clause 68(7).	Agreed. Bills Committee informed on 20.2.1995.
20 C69 (2)	Amend Clause 69(2) to authorise enforcement notices to include a requirement that the person cease specific practices that led to the unlawful discrimination.	Agreed. Bills committee informed on 12.5.1995.
21 C69 (5)	The right of a person to make representation to the EOC opposing the issuance of enforcement notice duplicates the right of appeal against the notice once issue, and should be deleted.	Agreed. Bills Committee informed on 12.5.1995.
22 C78	Amend to permit proceedings to be brought under the Ordinance for a period of 2 years from the act complained of, or where applicable, two years after the conclusion of an unsuccessful conciliation process.	Agreed. Bills Committee informed on 19.5.1995.

Sex Discrimination Bill: Proposed Committee Stage Amendments  
accepted by the Administration

<u>Ref. No.</u>	<u>Outline of Proposed Amendment</u>	<u>Administration's Response</u>
23 C78	To extend the time period to institute proceedings after the EOC publishes a formal investigation report.	Agreed. Bills Committee informed on 12.5.1995. The time period will be extended to 2 years after the EOC has published a formal investigation report.
24	To eliminate 'sexist' drafting.	Reference to 'Chairman' will be replaced by 'Chairperson.
25	To expand the scope of the Director of Audit's power to examine the 'effectiveness' with which the EOC has expended its resources in performing its functions and exercising its powers.	Amendment proposed by the administration. This is a standard provision which applies to all new statutory bodies funded by Government.

# DRAFT

3rd draft: 28.5.95

## SEX DISCRIMINATION BILL

### COMMITTEE STAGE

Amendments to be moved by the Secretary for Home Affairs

Clause

Amendment Proposed

- 2(1) (a) By deleting the definition of "Chairman" and substituting -
- "Chairperson" ( ) means the chairperson of the Commission appointed under section 55(3)(a);
- "club" ( ) means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that -
- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises;"
- (b) By adding after the definition of "Commission" -

"commission agent" ( ) means commission agent as construed in accordance with section 13A;"

(c) By adding after the definition of "committee" -  
"committee of management" ( ), in relation to a club, means the group or body of persons (howsoever described) that manages the affairs of that club;"

(d) By adding after the definition of "dispose" -  
"dynamically supported craft" ( ) has the same meaning as in the Shipping and Port Control Ordinance (Cap. 313);"

2(5) . By deleting the clause and substituting -

"(5) For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if -

(a) the person -

(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her;  
or

(ii) engages in other unwelcome conduct of a sexual nature in relation to her,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or

- (b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her.

(5A) For the avoidance of doubt, it is hereby declared that paragraph (b) of subsection (5) shall not apply for the purposes of sections 32 and 33."

2

By adding -

"(8) Subject to subsection (9), in this Ordinance "existing statutory provision"

means any provision of -

- (a) any Ordinance enacted before this Ordinance was enacted;
- (b) any subsidiary legislation made -
  - (i) under an Ordinance enacted before this Ordinance was enacted; and
  - (ii) before, on or after this Ordinance was enacted.



(9) Where an Ordinance enacted after this Ordinance was enacted re-enacts (with or without modifications) a provision of an Ordinance enacted before this Ordinance was enacted, then that provision as re-enacted shall be treated for the purposes of subsection (8) as if it continued to be contained in an Ordinance enacted before this Ordinance was enacted."

New

By adding -

"3A. Act done because of sex, etc.  
and for other reason

If -

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the sex, marital status or pregnancy of a person (whether or not it is the dominant or a substantial reason for doing the act),

then, for the purposes of this Ordinance, the act shall be taken to be done for the reason specified in paragraph (b)."

6(1)  
and  
(2)  
and  
7

By adding "or IV" after "Part III".

8(1)

(a) By adding "or any other person ("the third person")" after "that the person victimised".

(b) By adding "or the third person, as the case may be," after -

- (i) "knows the person victimised"; and

(ii) "suspects the person victimised".

- 10
- (a) In subclause (2)(a), by deleting "; or" and substituting ";
  - (b) In subclause (2), by adding -
    - "(ab) in the terms of employment he affords her; or".
  - (c) In subclause (4), by deleting "Subsections" and substituting "Subject to subsection (4A), subsections".
  - (d) By adding -
    - "(4A) Subsections (1)(b) and (2) shall apply to provision in relation to death or retirement specified in Part I of Schedule 1A except in so far as any such provision made for a woman before the commencement of this section continues for that woman on and after that commencement."
  - (e) In subclause (6), by deleting "5th" and substituting "3rd".
- 14
- (a) In subclause (2)(b), by deleting "hovercraft" and substituting "dynamically supported craft".
  - (b) In subclause (4), by deleting "Subsection" and substituting "Subject to subsection (4A), subsection".
  - (c) By adding -
    - "(4A) Subsection (1)(b) and (d) shall apply to provision made in relation to death or

retirement specified in Part 2 of Schedule 1A except in so far as any such provision made for a woman before the commencement of this section continues for that woman on and after that commencement."

15(4) By deleting the clause and substituting -

"(4) Subject to subsection (5), this section shall not apply to provision made in relation to the death or retirement from work of a member.

(5) This section shall apply to provision -

(a) made in relation to the death or retirement from work of a member; and

(b) specified in Part 3 of Schedule 1A,

except in so far as any such provision made for a member before the commencement of this section continues for that member on and after that commencement."

New By adding after clause 18 -

"18A. Discrimination against commission agents

(1) This section applies to any work for a person ("the principal") which is available for doing by individuals ("commission agents") as the agents of the principal and who are remunerated, whether in whole or in part, by commission.

(2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a woman who is a commission agent -

- (a) in the terms on which he allows her to do that work;
- (b) by not allowing her to do it or continue to do it;
- (c) in the way he affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them; or
- (d) by subjecting her to any other detriment.

(3) The principal does not contravene subsection (2)(b) by doing any act in relation to a woman at a time when if the work were to be done by a person taken into his employment being a man would be a genuine occupational qualification for the job.

(4) Subsection (2)(c) shall not apply to benefits, facilities or services of any description if the principal is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public to which the woman belongs, unless that provision differs in a material respect from the provision of the benefits, facilities or services by the principal to his commission agents.

#### Government

#### 18B. Government

(1) Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the

Government to discriminate against a woman in the performance of its functions or the exercise of its powers:

(2) Subsection (1) shall not render unlawful -

(a) as regards a woman not having the right to enter and remain in Hong Kong, any act done under any immigration legislation governing entry into, stay in and departure from Hong Kong; or

(b) any act done in relation to a woman if it was necessary for that act to be done in order to comply with a requirement of an existing statutory provision."

19(1)  
and  
(2)

By deleting "of a significant number of" and substituting "common to".

20

By adding -

"(9) It is unlawful for the principal, in relation to work to which section 18A applies, to sexually harass a woman who is a commission agent.

(10) It is unlawful for a commission agent to sexually harass a woman who is a fellow commission agent.

(11) It is unlawful for a person who is seeking to be, or who is, employed by a woman at an establishment in Hong Kong to sexually harass her.

(12) It is unlawful for a person residing in any premises to sexually harass a woman -

(a) employed by another person at an establishment in Hong Kong (and

whether or not that other person also resides in those premises or those premises are that establishment); and  
(b) carrying out in those premises all or part of her work in relation to her employment (and whether or not she also resides in those premises).".

26 By adding -

"(4) In this section in relation to premises, "power to dispose" includes the power to sell, rent, let, sub-let or otherwise part with possession of those premises.".

New By adding after clause 28 -

"28A. Exceptions from section 25(1) for health and safety considerations

Section 25(1) shall not be construed as rendering unlawful discrimination falling within section 7 if the discrimination is imposed in order to comply with health and safety considerations which are reasonable in the circumstances.".

30(1)(b) By deleting "of a significant number of" and substituting "common to".

31(4) By deleting the clause.

New By adding after clause 31 -

"Clubs

31A. Discrimination by clubs

(1) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a woman who is not a member of the club -

- (a) by refusing or failing to accept her application for membership; or
- (b) in the terms or conditions on which the club is prepared to admit her to membership;

(2) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a woman who is a member of the club -

- (a) in the terms or conditions of membership that are afforded to her;
- (b) by refusing or failing to accept her application for a particular class or type of membership;
- (c) by denying her access, or limiting her access, to any benefit, service or facility provided by the club;
- (d) by depriving her of membership or varying the terms of membership; or
- (e) by subjecting her to any other detriment.

(3) Nothing in subsection (1)(b) or (2) renders it unlawful to discriminate against a woman if the discrimination occurs in relation to the use or enjoyment

of any benefit provided by the club where -

(a) it is not practicable for the benefit to be used or enjoyed -

(i) simultaneously; or

(ii) to the same extent,

by both men and women; and

(b) either -

(i) the same, or an equivalent,

benefit is provided for the use of men and women separately from each other; or

(ii) men and women are each entitled to a fair and reasonable proportion of use and enjoyment of the benefit.

#### Government

#### 31B. Government

(1) Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers.

(2) Subsection (1) shall not render unlawful -

(a) as regards a woman not having the right to enter and remain in Hong Kong, any act done under any immigration legislation governing entry into, stay in and departure from Hong Kong; or



(b) any act done in relation to a woman if it was necessary for that act to be done in order to comply with a requirement of an existing statutory provision."

32 By adding -

"(3) It is unlawful for a person who is a student of an educational establishment to sexually harass a woman who is seeking to be, or who is, a student of the establishment.

(4) It is unlawful for a person who is seeking to be, or who is, a student of an educational establishment to sexually harass a woman -

(a) who is, or is a member of, the responsible body for; or

(b) who is a member of the staff of, the establishment."

34(2) By deleting "hovercraft" wherever it appears and  
and  
(3) substituting "dynamically supported craft".

New By adding before clause 41 -

"40A. Special measures

Nothing in Part III, IV or V shall render unlawful an act that is reasonably intended to -

(a) ensure that persons of a particular sex or marital status, or who are pregnant, have equal opportunities with other persons in circumstances in relation to which a provision is made by this Ordinance:

(b) afford persons of a particular sex or marital status, or who are pregnant, goods or access to services, facilities or opportunities to meet their special needs in relation to -

(i) employment, education, clubs or sport; or

(ii) the provision of premises, goods, services or facilities;

(c) afford persons of a particular sex or marital status, or who are pregnant, grants, benefits or programmes, whether direct or indirect, to meet their special needs in relation to -

(i) employment, education, clubs or sport; or

(ii) the provision of premises, goods, services or facilities."

49(3) By repealing the clause.  
and  
(4)

50(1) By repealing "within the meaning of section 49".

55(3)(a) By deleting "Chairman" and substituting "Chairperson".  
and  
(5)

59(2) By adding -

"(ab) any provisions of any regulations made under section 80A which are specified in the

regulations as provisions which shall not be subject to subsection (1)";

68(7) By deleting the clause.

69 (a) In subclause (2)(a), by adding "(which may include discontinuing or changing any of his practices or other arrangements which occasioned those acts, in particular to avoid any repetition thereof)".

(b) By repealing subclause (3).

77(3) By adding "except to the extent permitted under rules made in accordance with section 73B of the District Court Ordinance (Cap. 336)" after "in, any proceedings".

78 (a) By deleting subclause (1) and substituting -

"(1) The District Court shall not consider a claim under section 68 unless proceedings in respect of the claim are instituted before the end of the period of 24 months beginning -

(a) when the act complained of was done; or

(b) if there is a relevant report in relation to that act, the day on which the report is published or made available for inspection under section 65,

whichever is the later."

(b) In subclause (2)(a), by deleting "12" and substituting "24".

(c) In subclause (6) -

(i) by deleting "(a) or (b)"; and

(ii) by deleting "any" and substituting "the".

(d) By adding -

"(7) In this section, "relevant report" ( ),  
in relation to an act referred to in subsection (1),  
means a report -

(a) published or made available for  
inspection under section 65; and

(b) from which it can reasonably be  
construed (and whether or not the  
report mentions, or was in any way  
prepared in consequence of, the act)  
that the Commission is of the opinion  
that the act or the class of acts to  
which the act belongs, is unlawful  
under a provision of Part III, IV or  
V."

New By adding -

"80A. Regulations to empower Commission  
to bring certain proceedings

(1) The Secretary for Home Affairs may make  
regulations -

(a) where any person may bring proceedings  
under section 68(1) but has not done so,  
empowering the Commission, in such  
circumstances as are specified in the  
regulations, to bring and maintain those

proceedings as if the Commission were the person;

(b) specifying which of the remedies referred to in section 68(3) shall be obtainable by the Commission in any such proceedings;

(c) for the purposes of enabling the Commission to bring and maintain any such proceedings (including any related purposes), specifying modifications to which any provisions of this Ordinance (including any subsidiary legislation) shall be read.

(2) Any regulations made under this section shall be subject to the approval of the Legislative Council."

81 By adding "1A," after "Schedule 1,".

Schedule 1 By deleting Part 2.

New By adding -

"SCHEDULE 1A (ss. 10(4A) 14(4A) 15(5) & 81

PROVISION IN RELATION TO RETIREMENT OR DEATH TO WHICH THIS ORDINANCE SHALL APPLY

PART I

PROVISION TO WHICH SECTION 10(1) (b) AND (2) SHALL APPLY

PART 2

PROVISION TO WHICH SECTION 14(1) (b) AND (d) SHALL APPLY

PART 3

PROVISION TO WHICH SECTION 15  
SHALL APPLY

Schedule 2 By deleting item 5.

Schedule 4 Part 1, item 1 (a) In the definition of "relevant office", in paragraph (f), by deleting the fullstop and substituting a semi-colon.

(b) By adding -

"reproductive technology procedure" ( ) means any medical treatment or scientific intervention directed at assisting human reproduction by artificial means, and includes in vitro fertilisation, artificial insemination, gender selection and manipulation of gametes or embryos outside the body."

Schedule 4, Part 2 (a) In item 3, by adding "(but excluding any discrimination against a person who is not single as compared with a person who is single)" after "status".

(b) By adding -

"4. Parts IV and V Any discrimination between persons of different marital status arising from the provision of any reproductive technology procedure.

5. Parts III  
IV and V Any discrimination between persons of different marital status arising from the provision of any facilities or services relating to the adoption of any infant within the meaning of section 2 of the Adoption Ordinance (Cap. 290).
6. Parts IV  
and V Any discrimination between persons of different marital status arising from the public housing scheme known as the Home Ownership Scheme or Private Sector Participation Scheme.
7. Parts III,  
IV and V Any discrimination between men and women arising from -
- (a) section 2(5)(a) of the Surviving Spouses' and Childrens' Pensions Ordinance (Cap. 79);
  - (b) section 18(1A) of the Pensions Ordinance (Cap. 89);

- (c) section 19 of the Widows and Orphans Pensions Ordinance (Cap. 94);
- (d) section 19(4) of the Pensions Benefits Ordinance (Cap. 99); or
- (e) section 20(4) of the Pensions Benefits (Judicial Officers) Ordinance (Cap. 401).

8. Parts III  
IV and V

Any discrimination between persons of different marital status arising from the proviso to regulation 4(1) of the Royal Hong Kong Auxiliary Police Force (Pensions) Regulations (Cap. 233 sub. leg.)."

Schedule 5, proposed sections 1, 3(1)(a), 6(2) and 7(b)(1) By deleting "Chairman" wherever it appears and substituting "Chairperson".



Schedule 5, proposed section 13(3) (a) By deleting "chairman" and substituting "chairperson".

Schedule 5, proposed section 19 (a) In proposed subsection (1), by deleting "and efficiency" and substituting ", efficiency and effectiveness".

(b) By adding -

"(5) Subsection (1) shall not operate to entitle the Director of Audit to question the merits of the policy objectives of the Commission."

Schedule 7 (a) By adding -

**"Dangerous Goods (General)  
Regulations**

**12A. Male supervisors to be employed  
in danger buildings**

Regulation 36 of the Dangerous Goods (General) Regulations (Cap. 295 sub. leg.) is amended by repealing "male" wherever it appears."

(b) In item 14, in the proposed section 73B of the District Court Ordinance (Cap. 336) -

(i) in the proposed subsection (2), by deleting "rules as to proceedings by or against the Crown." and substituting -  
"rules -

(a) as to proceedings by or  
against the Crown;

- (b) as to the persons who may appear in, conduct, defend and address the Court in, any proceedings therein;
- (c) to make special provision for any proceedings in the Court where regulations made under section 80A of the Sex Discrimination Ordinance ( of 1995) apply to the proceedings.";

(ii) by adding -

"(2A) Each party to any proceedings in the Court in the exercise of its jurisdiction under the Sex Discrimination Ordinance ( of 1995) shall bear its own costs unless the Court otherwise orders on the ground that -

- (a) the proceedings were brought maliciously or frivolously;
- or
- (b) there are special circumstances which warrant an award of costs.";

(iii) in the proposed subsection (3) -

- (A) in paragraph (c), by deleting "tribunal;" and substituting "tribunal.";

(B) by deleting paragraph (d).

(iv) by adding -

(3A) The Court in the exercise of its jurisdiction under the Sex Discrimination Ordinance ( of 1995) shall not be bound by the rules of evidence and may inform itself on any matter in such manner as it sees fit, with due regard to the rights of the parties to proceedings therein to a fair hearing, the need to determine the substantial merits of the case and the need to achieve a prompt hearing of the matters at issue between the parties.";

(v) in the proposed subsection (4), by deleting "Any" and substituting "Subject to subsection (3A), any";

(vi) in the proposed subsection (6), by adding -

"(ab) where there is any conflict or inconsistency between -

- (i) any rules made under subsection (2)(b); and
- (ii) any law and practice regulating the description of persons who may appear in, conduct, defend and

address the Court, in  
any proceedings therein,  
then these rules shall, to the  
extent of that conflict or  
inconsistency, as the case may  
be, prevail over that law and  
practice:".

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Proposed committee-stage amendments to the Sex Discrimination Bill  
not accepted by Administration

CLAUSE

AMENDMENT PROPOSED

Part I — Preliminary

1(2) Amend to bring provisions of Ordinance into operation on 1st January 1996, or on earlier dates as appointed by the Secretary for Home Affairs

2(1) Amend definition of “marital status” to include status of being de facto spouse [cf EOB 3(1)]

2(5) Amend definition of sexual harassment to include sexual conduct that ~~— in the employment field, creates a sexually hostile work environment, or — in other fields,~~ substantially interferes with the victim’s activities in fields other than the employment field [cf EOB 29(3)(b), 30(2)(c)]

**New clause directing Ordinance to be interpreted to give effect to relevant international obligations (including the ICCPR, ICESCR and CEDAW)**  
[cf EOB 7]

**New clause defining discrimination against a person to include discrimination on ground of relative’s or associate’s sex, marital status or pregnancy**  
[cf DDB 2(6), 6(c), EOB 6]

**New clause repealing prior inconsistent laws to extent of inconsistency with Ordinance**  
[cf EOB 8]

~~New clause providing that an act done for two or more reasons, one of which is sex, marital status or pregnancy, deemed to be done by reason of sex, marital status or pregnancy~~  
~~[cf DDB 3, EOB 4]~~

Part II — Discrimination

4(1)(b), 6(1)(b) & 7(b) Amend definitions of indirect discrimination to include any practice with a disproportionately adverse impact on one sex / persons of a particular marital status / pregnant women [cf EqT 3 3]\*

~~6 Amend definition of marital status discrimination to apply to any provision in Ordinance rather than only to provisions relating to employment field~~

~~7 Amend definition of pregnancy discrimination to apply to any provision in Ordinance, rather than only to provisions relating to employment field~~

\* EqT = Equal Treatment for Men & Women Strengthening the Acts Formal Proposals of the UK EOC 1988

- 8 Amend definition of victimisation to include not only less favourable treatment, but any detriment as a result of anything done under or by reference to the Ordinance  
[cf EqT 3 9]

Part III — Employment Field

- ~~10(2) Amend to expressly prohibit discrimination in terms and conditions of employment~~
- 10( ) New subclause to clarify for avoidance of doubt whether such discrimination includes unequal pay for work of equal value  
[cf EqT 2 20]
- 10(3), Repeal, or amend to expire on the sooner of 1st January 1997 or one year after  
(6)-(8) commencement of section (Exemption for small employers )
- 10(4), Amend to expire in one year, subject to extension by Legco resolution (Exceptions for  
14(4) & provisions relating to death and retirement, in connection with employment, partnership  
15(4) and trade unions, etc )  
[cf. EqT 3 14]
- ~~— New clause prohibiting discrimination against commission agents (also amend cl 2(1) to  
add definition of “commission agent”)  
[cf EOB 3(1), 14, 29(2)]~~
- 11(2)(g), Amend to expire in one year, subject to extension by Legco resolution  
49-50, (Exceptions in relation to Sched. 2 protective regulations and to acts done for  
52 & the protection of women.)  
Sch. 2
- 11(2)(h) Repeal. (Exception for work likely to involve duties outside Hong Kong where  
discriminatory laws or customs apply.)
- ~~20 Amend prohibition of sexual harassment to include harassment of a woman employed to  
perform domestic duties in the premises in which the harasser resides or is otherwise  
present, whether or not the harasser is the employer  
[cf EOB 29(1)(d)]~~

Part IV — Other Fields

- ~~— New clause prohibiting discrimination in clubs (and to amend cl 2(1) to add definitions  
of “club” and “committee of management” of a club)  
[cf DDB 2(1), 32, EOB 3(1), 25, EqT 3 26]~~
- ~~— New clause prohibiting discrimination in administration of laws and government  
programmes  
[cf EOB 27, EqT 3 23]~~
- New clause prohibiting discrimination in public elections and appointments  
[cf EOB 28]
- ~~32 Amend prohibition of sexual harassment to include harassment of students by students,  
and of educational staff by students~~

Part V — Other Unlawful Acts

- 36 & 74 Amend to make unlawfully discriminatory advertisements an offense, subject to a fine of  
\$30,000 for a first offense and \$100,000 for a second offense  
[cf EOB 225]

## Part VI — General Exceptions

~~New clause providing general exception for special measures and for measures to achieve equality~~

~~[cf DDB 47 EOB 37 CEDAW Art 4]~~

- 51 Repeal (Exemption for acts done to safeguard the security of Hong Kong )
- 54 & Amend to expire in one year subject to extension by Legco resolution  
Sch 4 (Exemption of certain discrimination within the disciplinary services, of the Small House Policy, and of marital status discrimination in employment benefits and civil service benefits )

## Part VII — Equal Opportunities Commission

- 55 & Repeal 15(2), 16(2)-(3) and 17(2) of Schedule 5 (EOC expenditure, borrowing and  
Sch 5 investment subject to direction or approval by Secretary of Home Affairs and/or Treasury )
- 56(1)() New subclause giving EOC function of promoting observation of relevant international obligations (including the ICCPR, ICESCR and CEDAW) as they relate to equality of opportunity irrespective of sex, marital status or pregnancy
- 56(1)() New subclause giving EOC function of examining any proposed legislation that it considers may affect equality of opportunity and reporting results to legislation's sponsor  
[cf Personal Data (Privacy) Bill, cl 8(1)(d)]
- 57(3) **Repeal. (Approval of Secretary for Home Affairs required for any financial assistance by EOC to outside research and educational undertakings )**
- 63(4) **Amend to enable EOC to carry out an investigation into named persons or organisations for any purpose connected with its functions (irrespective of whether it believes unlawful acts have occurred)**  
[cf EqT 4 8]
- 63(4) Amend to give all named persons (irrespective of whether they are believed by the EOC to have committed unlawful acts) a right to make pre-investigation representations to the EOC, within 28 days after receiving notice of the proposed investigation  
[cf EqT 4 12]

~~New clause empowering EOC to bring proceedings in its own name with respect any act or practice made unlawful by Ordinance~~

~~[cf EqT 4 17]~~

New clause empowering EOC to intervene by leave of court in any proceedings under the Ordinance

## Part VIII — Enforcement

~~New clause providing that in proceedings under Ordinance District Court not bound by rules of evidence and may inform itself as sees fit~~

~~[cf EOB 235]~~

~~New clause providing that in proceedings under Ordinance each party shall pay own costs unless court finds exceptional circumstances justify otherwise~~

~~[cf EOB 237]~~

- 68(3)-(4) Amend to delete District Court's power to order any remedy obtainable in High Court, and replace with power to order any remedy the court considers just and appropriate including reinstatement  
[cf EOB 234]
- 68(5) Repeal (No damage awards for indirect discrimination if discrimination unintentional)
- ~~68(7) Repeal (Chief Secretary must be given prior notice of claims vs government schools)~~
- ~~69(2) Amend to authorise enforcement notices to include, in addition to a requirement that a person cease an act of unlawful discrimination, a requirement that the person cease any specific practice(s) that led to the unlawful discrimination  
[cf EqT 4 16]~~
- ~~69(5) Repeal (EOC must give prior notice to persons against whom enforcement notice to be issued, and hear and take account of such persons' representations opposing issuance of enforcement notice, duplicates right to judicial appeal of enforcement notices)  
[EqT 4 13]~~
- 76 Amend to enable EOC to conciliate complaints of acts inconsistent with relevant international obligations (including the ICCPR, ICESCR and CEDAW) as they relate to equality of opportunity irrespective of sex, marital status or pregnancy
- 77 Amend to enable EOC to take over proceedings in own name if a claimant receiving EOC assistance withdraws from proceedings
- 78(1)-(2) Amend to permit proceedings to be brought under the Ordinance for a period of 6 years from the act complained of
- 78(4) Amend period within which proceedings under the Ordinance may be brought, to begin after conclusion of conciliation process
- ~~78( ) New subclause to provide an additional period within which proceedings under the Ordinance may be brought, of one year following publication of a formal investigation report that finds unlawful discrimination, for persons who claim to have suffered from the reported discrimination  
[cf EqT 4 15]~~

#### Part IX — Miscellaneous

- 82(2) & Sch 7 Consequentially amend section 5AA of the Legal Aid Ordinance (Cap 91) to allow the Director of Legal Aid to waive the means test for proceedings involving claims of discrimination under the Ordinance (as for proceedings involving claims under the Bill of Rights)

Office of Anna Wu  
25 May 1995





Our Ref. Gen/A1/JK

25th May 1995

Chairman of the Bills Committee  
c/o Legislative Council Secretariat  
8 Jackson Road  
Central  
Hong Kong

Dear Sir/Madam,

**Re: Views on the Disability Discrimination Bill**

The built environment of Hong Kong, in order to be in line with the spirit and mission of the Disability Discrimination Bill, must be barrier-free. Buildings such as Government, Medical/Health, Social/Recreational and other commercial or public facilities must be accessible and barrier-free to both visitors and staff alike.

The Government Secretariat's Planning, Environment and Lands Branch is in the process of reviewing the Building (Planning) Regulation No. 72 and the Design Manual-Access for the Disabled, 1984 to update and to broaden the scope of the Manual to include provisions for the sensory disabled such as visually impaired and hearing impaired persons. Any violation of the future Design Manual - Access for the Disabled would become a contravention of the legislation.

New buildings designed subsequent to 1984 must comply with the provisions set out under the Design Manual. In addition, it is proposed that under the revised Design Manual, buildings undergoing substantial alterations must also comply with the said Manual.

If the said revision is passed, architects, planners, designers and building contractors would have to comply with the revised building standards, thus mandating validity for the needs of the disabled community in terms of an environment that is barrier-free.

Our office, the Environmental Advisory Service has seen many cases where the disabled, both physically and sensory are permanently homebound and not permitted to enjoy the same employment, social, cultural and recreational opportunities offered to the able-bodied, due to the lack of proper access. Until present times, the majority of their access needs have generally gone unnoticed and unmet. The Disabled Discrimination Bill would afford them the chance to have many of their concerns answered and ensure them equal rights and equal opportunities among their fellow Hong Kong citizens.

All in all, the proposed legislation, namely the Disabled Discrimination Bill and the revised Design Manual-Access for the Disabled will ensure that access and barrier-free facilities will be provided to both able-bodied and disabled alike.

The Environmental Advisory Service, being the only "community and social" architectural advisory service in Hong Kong dealing with the design issues for the disabled would be most willing to assist in any architectural or technical aspects relating to the Disabled Discrimination Bill.

Yours Sincerely,

Joseph Kwan  
Director  
Environmental Advisory Service

Encl.

JK/RP/ml



香港失明人協進會  
HONG KONG ASSOCIATION OF THE BLIND

FAX TRANSMISSION

Date : May 25, 1995

Our Fax No : (852)2338-7850

Your Fax No : 2845-2444

To : Dr. the Honorable Leong Che-hung O.B.E.J.P.  
Convener of the Bill Committee  
on the Sex Discrimination Bill  
Legislative Council

From : Chong Chan Yau  
President

Dear Dr Leong,

We are concerned that the Sex Discrimination Bill which is being considered by your Committee may have implications for the Disabled Discrimination Bill (DDB) in relation to the procedures and working of the Equal Opportunities Commission. I therefore write to submit a position paper containing recommendations on the provisions in the DDB which may have a bearing on the relevant provisions of the Sex Discrimination Bill. We are concerned that your Committee's views and conclusion on the Sex Discrimination Bill may pre-empt the relevant discussion of the DDB. This is why we make this submission at this point of time. It is our position that the proposals we are putting forward have their own merit even for the purpose of the Sex Discrimination Bill. In particular the Equal Opportunities Commission should be allowed to conduct investigation without having to seek consent for the terms of reference of the investigation.

With best regards

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教育及資源中心  
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日語工場  
Staff-Jap Workshop  
香港九龍兩山徑兩山徑樓地下一至八號  
Unit 1-8, G/F, Nam Yai House, Nam Shan Estate, Kowloon, Hong Kong.

**Hong Kong Association of the Blind**  
**Position Paper on the Provisions of Equal Opportunities Commission**  
**as Contained in the Disabled Discrimination Bill**

1. The Equal Opportunities Commission (the Commission) shall establish close working relationship with the rehabilitation community and people with disabilities should be appointed as members of the Commission. As different disability groups have different concerns, it is essential that all these groups are consulted as appropriate. Representatives of concerned disability groups should thus be co-opted into concerned expertise committees.

2. The Commission should have adjudication power so as to reduce the barrier for victims of discrimination to launch complaints in District Court. It is recommended that a tribunal be set up under the Commission, similar to the practice in Australia. It is believed that a powerful Commission with a tribunal would, instead of reducing the number of conciliation cases, increase the chances of settling disputes through conciliation inside the Commission.

3. The Commission should be allowed more litigation power such as bringing up individual claims or class action to the court.

4. The Bill specifies that the Commission "shall work towards the elimination of discrimination (s.60)" and the codes of practice may contain "practical guidelines... for the purposes of the elimination of discrimination (s.63)". These points are generally supported but it is not sure whether the Commission and the codes of practice would encourage positive acts aimed at elimination of existing discrimination, e.g. the generally inaccessible public transport facilities. It is proposed that relevant clauses be added to the Bill to encourage such positive measures.

5. The effectiveness of the Bill hinges very much with the power of the functioning of the Commission. The Association hopes that the Commission would adopt simple, informal and non-technical procedures so that people with disabilities could obtain assistance easily. Procedural obstacles mentioned in the following 2 paragraphs should be avoided.

6. Section 65 of the Bill deals with the terms of reference for formal investigation. The Commission should be given full autonomy to start a formal investigation without being intervened by alleged discriminators or other parties, so as not to repeat the experience of United Kingdom's Commission for Racial Equality and Equal Opportunities Commission which had a record of taking many years to have the terms of reference settled before the formal investigation really commenced. The Association proposes to simplify the procedures regarding "terms of reference," which has also been proposed by the UK's Commission for Racial Equality.

7. Procedures involving the Chief Secretary should be simplified or removed so as to avoid any procedural obstacles.

8. "Reinstatement" should be added to s.70 as an option of remedies which might be granted to victims of discrimination in the field of employment.

9. According to s.78 and s.80, the Commission and the Court may not consider complaints or claims after the completion of a 12-month period following the complained act. The Association proposes to extend the period to 6 year in line with the usual practice of other civil tort cases.

10. The need for class action and the parties who would be allowed to bring up class action should be further explored. The Association suggests that both victims of discrimination and concerned parties, such as relatives or carers of the victims, should be allowed to bring up class actions.

11. Adequate legal assistance should be provided when conciliation fails and when the victims of discrimination decide to take up litigation. The Association proposes that either

(i) the Commission has the financial resources to provide all necessary forms of legal assistance to the victims; or

(ii) to relax the means test for applying legal aid in cases where the future disability Discrimination Legislation is concerned.

12. The Commission should be allowed to disclose relevant information of conciliation cases it handles for public educational purposes and to increase transparency.

26th May 1995

Mr. Michael Suen, JP  
Secretary for Home Affairs  
Home Affairs Branch  
31st Floor, Southorn Centre  
130 Hennessy Road  
Wanchai, Hong Kong

Dear Mr. Suen,

Equal Opportunities (Race) Bill,  
Equal Opportunities (Family Responsibility, Sexuality and Age) Bill and  
Equal Opportunities (Religious or Political Conviction, Trade Union Activities  
and Spent Conviction) Bill

Attached please find copies of the three captioned bills for your information.

As previously mentioned, the bills contain no substantive changes to any of the original Equal Opportunities Bill's provisions. The bills have been submitted to the Law Draftsman, who I expect will require only a few, minor corrections of an essentially typographic nature to be made.

I hope that these drafts will allow you to begin your examination of the bills in regard to their charging effect.

Yours sincerely,

Anna Wu

**Note to Members of the Bills Committee  
studying the Equal Opportunities Bill  
and the Sex Discrimination Bill**

Amendment of the SDB in respect of administration of laws and government  
programmes: Response to the Administration's questions

1. Proposed new SDB clause

1.1. The government is bound by international treaty obligations to ensure that all activities undertaken by or on behalf of the government are carried out without discrimination on the ground of sex, marital status and pregnancy (among other grounds). The government is also bound by the Hong Kong Bill of Rights Ordinance (Cap. 383) not to discriminate on these grounds (Bill of Rights, art. 1 and 22).

1.2. The effect of adding a new SDB clause prohibiting discrimination in the administration of laws and government programmes, similar to EOB cl. 27, is to ensure that:

- any area of government activity which does not fall within one of the explicit areas presently covered by the SDB will nonetheless be covered, so that the protection against discrimination afforded by the SDB will mirror, in relevant respects, that provided by the Bill of Rights;
- anyone who wishes to complain of discrimination by the government or by public authority in an area not already covered by the SDB will be able to bring a complaint to the EOC, rather than be forced to bring a more costly and time-consuming action before the courts.

2. Experience in the UK

2.1. A "catch-all" provision in relation to government activities is particularly important because the UK experience suggests that there may be important areas which are not covered under the UK Sex Discrimination Act [SDA] or the similar language of the Sex Discrimination Bill [SDB] in Hong Kong.

2.2. As discussed with the Administration in the Bills Committee meeting of 20th January 1995,<sup>1</sup> certain government activities — such as the operations of

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<sup>1</sup> See par. 12-13 of the minutes, Legco Paper No. HB 286/94-95. Also see fn. 2 of the Note to Members of the Bills Committee entitled "The Equal Opportunities Commission under the SDB: Problems and Recommendations," tabled 10th March 1995.



immigration officers — have been held not to be covered by the UK Race Relations Act. The result applies to the SDA as well, which in relevant part is identical to the Race Relations Act in language. The House of Lords' majority opinion interpreted the prohibition against discrimination in the provision of goods, services and facilities as applying only to those government acts "which are at least similar to acts that could be done by private persons" *R. v. Entry Clearance Officer, Bombay ex parte Amin* [1983] 2 AC 818 at 835. Certain administrative discrimination therefore falls outside the scope of the Act, since it does not come within any other category specified in it. This creates potentially a serious loophole, as the courts have not yet determined exactly which government activities are affected.

2.3. The general practice of the Hong Kong courts is to follow UK interpretations of statutes which are copied from or closely modelled on UK legislation. The Hong Kong courts would assume that the legislature was aware of the relevant UK case law and that, by using the same language, it intended the Hong Kong courts to interpret similar provisions in the same way. Therefore there is a real possibility that the Hong Kong courts would follow *Amin*, unless there is something in the SDB that displaces that presumption.

2.4. The main difference between the SDA and the SDB is the inclusion of specific reference in SDB cl. 25(2)(h) to examples of facilities and services the provision of which is governed by the Bill. Reference is made to the services of (i) the Urban Council, (ii) the Regional Council, (iii) any government department or (iv) any undertaking of the government. This may be viewed as going some way to dealing with the *Amin* problem, but the matter is by no means clear — the use of the word "services" in the context of these public bodies still leaves open the question in *Amin* whether "services" means only those government activities which have a private sector analogue. Would, for example, cl. 25 clearly cover the issue of a travel document by the immigration authorities or the issue of a building permit?

### 3 Sui generis government legal categories

3.1. There are a various areas of government activity that may not fall within the categories of activity already in the SDB. For example, the government possesses various prerogative powers which might not fall with the existing provision. The employment provisions of the Bill would arguably not apply to work as a civil servant if civil servants are considered Crown "servants" rather than employees. (Compare the situation in relation to barristers, for whom special provisions have been made because they are neither employed nor in partnership — are such provisions really necessary if one maintains that "services and facilities" is to be construed broadly?)

3.2. It is the Administration that is best suited to identify those types of government activity which are *sui generis* and which might therefore fall outside the categories of activities covered by the SDB.

#### 4. Conclusion

4.1. There is a significant possibility that not all areas of government activity will be covered by the SDB. If the Administration accepts that it is obliged not to discriminate in all areas of government activity, then there is no plausible reason for opposing an amendment which at the very worst will simply clarify the broad scope of the Bill, but which more likely will ensure coverage of areas not otherwise addressed. There appear to have been no problems resulting from the adoption of similar provisions in other countries.

#### 5. Responses to the Administration's specific questions (Paper No. SDB 4/95)

5.1. It seems worth reiterating that the principal matter to be resolved is whether the Administration agrees that the SDB's present coverage of government activity is not satisfactory. The Administration's 2nd through 5th questions in particular are essentially technical. Once it is agreed that a new SDB clause is needed, any technical suggestions from the Administration on ways to improve the language of EOB cl. 27 — whether by refinement or wholesale re-drafting — will be most welcome.

*Q1. Is the reference (in the list of proposed SDB amendments) to the "exemption under SDB cl. 25 as construed by the UK courts" a reference to the Amin decision?*

A1. Yes.

*Q2. In EOB cl. 27, does the reference to "a person" include a private individual who is not acting under the authority of the Government of Hong Kong?*

A2. It is not clear what the Administration means by "acting under the authority of the Government of Hong Kong." However, the provision would include a private individual who was assigned or who accepted a function in the carrying out of a government programme.

*Q3. In EOB cl. 27, what does "a law" mean? Does it mean legislation? If not, can actual examples be given of the performance of a function under a law that is not a statutory law?*

A3. Law would include legislation; it was intended to include prerogative powers, but this should probably be made explicit. The provision is intended to cover the exercise of prerogative powers (which would in at least some cases not be covered by the present SDB).

Q4. *In EOB cl. 27, what is meant by "government programme"? Does it mean a programme operated by the Government of Hong Kong?*

A4. "Government programme" is not confined to a programme actually operated by the government, but would also include a government-sponsored program where a private organisation would be providing services or engaging in activities on behalf of the government.

Q5. *In EOB cl. 27, what is meant by "under a law or for the purposes of a government programme"? Can examples be given of any function performed for a government programme which is not a function under a law?*

Q6. *In EOB cl. 27, what is meant by "any other responsibility for administration of a law or the conduct of a government programme"? Can examples be given of these other responsibilities which are neither a function nor a power?*

A5 & 6. This is intended to cover an exercise of the prerogative and also out of an abundance of caution. Although most government activities will trace their authority to a law, the courts may not necessarily view all actions taken under a very general law as the exercise of a power (this may be confined to the exercise of explicit powers).

Office of Anna Wu

19 May 1995

9) Reports by Panels/Bills Committees/Subcommittees

- (a) Report by Bills Committee to study the Equal Opportunities Bill, the Sex Discrimination Bill and the Disability Discrimination Bill

With the agreement of the Chairman, Dr LEONG Che-hung, Chairman of the Bills Committee, made an urgent verbal report on the latest development of the Sex Discrimination Bill.

Dr LEONG said that at the meeting held in the morning, the Bills Committee was advised by the Administration that it would resume the Second Reading debate on the Sex Discrimination Bill on 14.6.95. While the Bills Committee had generally concluded its study of the Bill, it had yet to make a report to the House Committee on its deliberations. In addition, the Legal Service Division would also require time to complete the drafting of the large number of Committee Stage amendments (CSAs). While it was appreciated that the Member in charge of a bill could give notice to resume the Second Reading debate on a particular day, the Bills Committee considered the resumption date of 14.6.95 proposed by the Administration unacceptable.

In spite of the Bills Committee's objection, the Administration had remained adamant and uncompromising. In the circumstances, Dr LEONG would like to seek the House Committee's support for the following proposed courses of action :

- (a) The Chairman should raise the matter with the Chief Secretary with a view to asking the Administration to defer the proposed resumption date for two weeks; and
- (b) failing that, he, in his capacity as the Chairman of the Bills Committee, would move a motion to adjourn the resumption of the Second Reading debate on the Bill.

In response to Members, the Legal Adviser said that the Administration had only made clear its position on a large number of CSAs considered by the Bills Committee that morning. The job facing the Legal Service Division was to identify the CSAs not accepted by the Administration but nevertheless supported by the

Bills Committee and to put these in legislative form. The lead time under the Standing Orders would require all CSAs to be drafted and submitted by 5.6.95, for the Bill to resume its Second Reading debate at the LegCo sitting on 14.6.95. In his view, the Administration had imposed a totally unrealistic timetable by choosing 14.6.95 as the resumption date.

Ms Anna WU updated Members on the present position on her three restructured bills. She had yet to receive advice from the Administration as regards "charging effect" of the bills. She was disturbed by the Administration's insistence on resuming the Second Reading debate on the Sex Discrimination Bill on 14.6.95. She said that she might also consider resuming the Second Reading debate on her Equal Opportunities Bill on the same day, if necessary.

In response to Mr Timothy HA, the Legal Adviser said that there could not be any guarantee that the drafting of the CSAs could be completed within two weeks. It would depend on whether there were other areas of work which required higher priority and whether there were conflicting amendments proposed by the Administration and the Bills Committee on the Sex Discrimination Bill. The latter would entail technical drafting complications and might necessitate further discussions by the Bills Committee.

Members were concerned about the Administration's insistence on resuming the Second Reading debate on the Bill prematurely, against the wish of the Bills Committee. Members agreed that there should be sufficient time to enable the Legal Service Division to draft the CSAs, the Bills Committee to report to the House Committee and Members, particularly non-Bills Committee Members, to consider the merits of the proposed amendments made by the Bills Committee and the Administration.

Assistant Secretary General 2 said that the early conclusion of the Sex Discrimination Bill would not vacate a slot for other Bills Committees as this Bills Committee had yet to continue to study the Disability Discrimination Bill and Ms Anna WU's proposed Private Member's bill(s).

After some further discussion, Members agreed to support Dr

LEONG's proposals. The Administration would be requested to defer the proposed resumption date for at least two weeks. The Chairman would raise the matter with the Chief Secretary.

- (b) **Report by the Bills Committee to study the Road Traffic (Amendment) Bill 1995**  
(LegCo Paper No. HB 771/94-95)

Mr Zachary WONG, Chairman of the Bills Committee, referred Members to the report, and the Administration's undertaking to conduct a review on several areas 12 months after the introduction of the legislation. Subject to the amendments moved by the Administration, the Bills Committee recommended that the Second Reading debate on the Bill should be resumed on 7.6.95. Dr LEONG Che-hung informed Members that he would move an amendment to lower the prescribed alcohol concentration limit.

Members agreed to support the Bill.

(10) **Any Other Business**

- (a) **Governor's Question Time on 1.6.95**

The Chairman advised that the Governor would answer questions on the following subjects:

- (a) The Court of Final Appeal;
- (b) Employment issues;
- (c) Preparations for the 1995 LegCo elections; and
- (d) Rehabilitation services for the severely mentally handicapped (as a follow up to the Governor's Question Time on 27.4.95)

Referring to the recent briefing to the LegCo Panel on Recreation and Culture by the Secretary for Recreation and Culture (Acting) and subsequent statements made by the Administration concerning the Broadcasting Bill, Mr MAN Sai-cheong suggested and Members agreed that the Governor be asked if he could answer questions on the subject. The Chairman would raise the matter with the Chief Secretary.

Note to Members of the Bills Committee  
studying the Legal Aid (Amendment) Bill 1995

Proposed amendment to permit waiver of the means test  
in relation to claims of unlawful discrimination

1. Proposed new amendment

1.1. Clause 4 of the Legal Aid (Amendment) Bill 1995 amends the Legal Aid Ordinance to give the Director of Legal Aid a discretion to waive the means test for meritorious cases in which a breach of the Hong Kong Bill of Rights Ordinance [BORO] is an issue. The Administration will propose a committee-stage amendment extending this discretion to cases alleging inconsistency with the International Covenant on Civil and Political Rights [ICCPR] as applied to Hong Kong.

1.2. **The Director should be similarly authorised to waive the means test for meritorious cases in which a claim of unlawful discrimination is made. Such a claim might be made under any of the several Bills now being considered that relate to discrimination, or under any other, future enactment that relates to discrimination.**

2. Relation of discrimination to the BORO

2.1. Article 22 of the BORO requires that "the law shall prohibit any discrimination." This mirrors the obligation to legislate against discrimination imposed on the Government by article 26 of the ICCPR.

2.2. The BORO itself, however, does not fulfil this obligation because it binds only the Government and public authorities, so that inter-citizen discrimination remains lawful. Members may recall that the original Hong Kong Bill of Rights Bill 1990 was amended to remove its application to inter-citizen relations on the ground that greater legislative detail was needed. The more limited BORO was then enacted in 1991 with the understanding that detailed legislation to restore the excised inter-citizen rights would follow.

2.3. Several Bills providing detailed inter-citizen rights in relation to discrimination are now being examined, including the Equal Opportunities Bill, Sex Discrimination Bill and Disability Discrimination Bill. Despite the lengthy delay since the BORO's enactment, these Bills as well as any future enactments prohibiting discrimination should be regarded as extensions of the BORO, and claims under them

should be placed on the same basis as BORO claims.

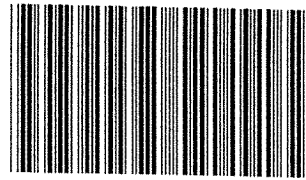
### 3 Practical need for legal aid

3.1. Cases in regard to which the Director is likely to waive the means test will be those involving serious allegations of discrimination. Because equality of opportunity is a fundamental right, it is essential that access to the courts be ensured for such cases.

3.2. The need for accessible remedies for discrimination is particularly emphasised by the ICCPR and BORO, which impose an obligation not merely to legislate against discrimination, but to "*guarantee to all persons equal and effective protection against discrimination.*" (ICCPR art. 26, BORO art. 22.) Making legal aid available on the basis of a claim's merit rather than a claimant's means is an important step towards such a guarantee.

Office of Anna Wu  
22 May 1995





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