

31 October 2014

Dr York Y N Chow
Chairperson
Equal Opportunities Commission
19/F, Cityplaza Three
14 Taikoo Wan Road
Taikoo Shing
Hong Kong

Dear ~~Dr~~ Chow,



Discrimination Law Review

The Chamber welcomes the opportunity to comment on the proposals of the Equal Opportunities Commission (“EOC”) to modernise, harmonise and simplify Hong Kong’s laws on discrimination through the consolidation of all existing anti-discrimination ordinances into one single anti-discrimination ordinance.

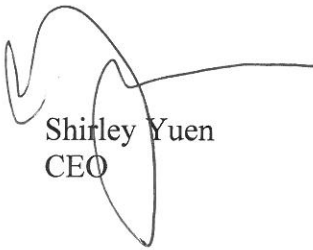
The Chamber’s response is underpinned by the firm belief that the Hong Kong market should be lightly regulated and where legislation is justified, it should be on the basis that these are narrowly framed to minimise any sort of disruptions or interference that could lead to a huge drain on resources, suppress economic growth, stifle job creation and limit competitiveness.

In the above context and as a general commentary, the Chamber regards the reform exercise to be distortive and fraught with problems. Although we support the principle of equal opportunity, we feel that the proposals put forward are antithetical to Hong Kong’s core principle of market freedom. To wit: The proposal to introduce the notion of comparable worth represents a marked departure from such ethos, namely, by allowing wages to be set arbitrarily by an outside authority whose interests may not be aligned with those of employers.

Other than concerns about inflationary pressure on operating costs that would inevitably arise, the Chamber also has serious reservations with the introduction of overly expansive provisions that lend themselves to broadly construed interpretations. Proposals such as extending the protected characteristic of marital status to include de facto relationships will likely have the undesirable effect of introducing ambiguities and uncertainties, which will in turn wreak havoc on internal processes and undermine business efficiency. At the same time, we wonder if the proposal should be reconsidered or deferred to Government in view of the associated confusion and controversy caused to the wider community.

In sum, the Chamber agrees unequivocally with the precept of equal opportunity as a matter of principle but resists any systematic effort that seeks to expand the concept of fairness at the expense of our free-enterprise system. We hope you will find our comments as attached to be useful in your deliberations.

Yours sincerely,



Shirley Yuen
CEO

HKGCC Comments on Discrimination Law Review

It is the view of the Chamber that legislation is a blunt tool and therefore the Hong Kong Administration should be careful when implementing regulatory measures to ensure that it does not unnecessarily and adversely impact Hong Kong's competitiveness in Asia. In fact, some within the Chamber membership have suggested a code of practice as a more useful and practical alternative as it fulfils the fundamental objectives of (1) explaining in detail provisions in the relevant ordinances, and (2) providing examples on the application of these legal concepts in everyday situations to promote a better understanding among stakeholders of their respective rights and responsibilities. We appreciate that such a code may not be legally binding in and of itself, but this would nonetheless be admissible as evidence in court. Furthermore, the court will take into account relevant parts of the code in determining any questions arising from proceedings under the legislations, which may in turn have the desired effect of encouraging compliance. A compelling example is the code of practice on personal data protection, which has proven to be quite effective in promoting compliance.

If it is the intent that legislation be eventually introduced, we suggest the formulation of a roadmap to facilitate such a transition and that proposed changes such as the introduction of protection for de facto relationships and equal pay for equal value, among others, be set aside in the meantime so that these can be taken up at the bureau or policy level rather than by the EOC.

With respect to the proposals as given in Review Document to expand the powers of the EOC and to set up a Human Rights Commission, we recognise that these are intended to facilitate and enhance the ability of the EOC to discharge its responsibilities more effectively. The Chamber fully supports the EOC in its mission to eradicate discriminatory practices and behaviour for the greater good of society. On the other hand, we are wary of the ramifications associated with the rise in bureaucracy that may result in diminishing market freedom and climbing compliance costs. We suggest that the EOC take into account the economic aspects of such an undertaking and work closely with the business community in crafting a broader and balanced mandate for itself.

Our broad comments on the rest of the Review Document are set out below.

1. Areas where the Chamber is not supportive of the proposals

(a) Expanding marital status to protect de facto relationships

We do not agree with the endeavour to 'push the envelope' when current legislation does not recognise de facto relationships. We have serious misgivings about the proposal, which we feel provides too much latitude in its redefinition of protected characteristic of marital status. Although some employers do or are happy to extend such benefits to partners of employees in de facto relationships, others may be less willing to do so on religious, cultural or moral grounds. It is perhaps worth emphasizing that this type of benefit is intended as a recruiting tool and should not be misconstrued as an entitlement. As such, the proposal is a misguided attempt to subrogate employer sovereignty and may have the unintended and undesirable effect of a roll-back in existing benefits because of the uncertainties surrounding employer obligations. Until there is clarity on how this would be implemented, we cannot support the notion of expanding the marital status protection in the Sex Discrimination Ordinance ("SDO") at

this time as this would have grave implications on costs arising from the significant increase in the number of persons who would be entitled to such benefits. Rather, we suggest that efforts be made to persuade and encourage businesses to consider expanding the scope of employment related benefits that are currently available only for spouses of employees to partners of employees in de facto relationships. We would also suggest that a comprehensive assessment on the potential cost impact to employers be carried out.

(b) Expanding race discrimination to protect nationality, citizenships and residency

Should the definition of "race" be expanded to include such protection due to discrimination on the grounds of "nationality, citizenship or residency", there will be an increased risk for employers in hiring, or not hiring, individuals with different nationalities or citizenships. This risk would also be impacted by the proposed removal of the overseas recruitment exemption (see 2(j) below). The Chamber would encourage the Government to identify the potential cost of such change before implementing the said provision by conducting a thorough impact assessment.

(c) Changing the test for direct discrimination

Replacing less favourable treatment on the grounds of the protected characteristics of "the person" with less favourable treatment on the grounds of the "protected characteristics" significantly broadens the protection. The Chamber is of the view that the underlying purpose of discrimination provisions should be to protect the characteristics of the individual making a claim and not that of a third party.

(d) Removing the criteria for a comparator to be an individual without a disability in direct disability discrimination

This change would further increase the difficulty of identifying the appropriate comparator (already a difficult exercise).

If the comparator can be an individual with or without a disability, then it could be any individual! This seems irrational, and a better approach to handle the concern would be to redefine the definition of "disability" (see 1(b) above).

(e) Removing the requirement of a comparator in direct pregnancy discrimination

This change would lead to uncertainty. To prohibit unlawful discrimination, it is necessary to compare the treatment between two individuals. Without a comparison of a pregnant woman with others, it is impossible to identify if the woman is being treated fairly or unfairly.

Furthermore, the characteristics of pregnancy are already covered by current legislation, and so there is no need to introduce such category independently.

(f) Introducing an equal pay for work of equal value provision

This introduction would mean that it is not necessary for an employee to demonstrate that any protected characteristic was the basis for discrepancy. In bringing a claim, an employee would simply have to demonstrate that he or she is receiving less pay for his

or her work compared to another individual who undertakes work of some value. This would establish a completely new industry in the development and implementation of job evaluation systems, and potentially have significant cost implications to all employers.

We are also uncomfortable with the proposal because it introduces technocratic complexities that could prove very disruptive to hierarchical pay in a workplace by ignoring the reality that individuals holding the same jobs would not be paid the same wages because of differences in skill, responsibility, effort and working conditions. The proposal carries the implicit (but flawed) assumption that wages do not reflect actual value and seeks to displace employers in the determination of wage levels. This would be tantamount to wage controls and could have dire consequences on supply and demand if the Statutory Minimum Wage is of any indication.

In addition and interestingly, all examples in the Review Document involving equal pay compares a man and a woman. Should an employee receive less pay due to their gender, they would have a claim under the current SDO. If the intention is that this equal pay provision only applies between men and women, then it is already covered by the SDO.

(g) Introducing a duty to make reasonable accommodation in disability discrimination

Should an employee becomes unable to continue in a current role due to a disability, the existing position is that an employer is simply required to take steps that would enable that employee to undertake such current job, and there is no obligation on the employer to take such steps if it imposes unreasonable hardship on the employer.

This new duty would place an obligation on employers to find a new role for that employee. The impact and potential costs of this significant change should be thoroughly considered before introducing such a duty.

(h) Introducing protection for discrimination by association

The issue here is similar to that discussed above, regarding a claim's particular characteristics. (see 2(c) above)

(i) Introducing an additional prohibition of harassment by third party

This proposal renders employers or service providers as easy and convenient targets. Recently, this form of harassment has been abolished in the UK legislation for being too burdensome on employers. As such, this introduction seems inappropriate in Hong Kong's regulatory environment, which is known for its "lighter touch".

(j) Removing the recruitment of employees from overseas with special skills, knowledge or experience exception relating to race discrimination

The Review Document proposes to rely on the "justification" exception in place of the removal. A general "justification" exception is unclear and it would be preferable to preserve the existing exception which offers more clarity to employers.

2. *Areas where the Chamber is in favour of the proposals*

(a) **Consolidating the four Ordinances**

The Chamber is of the view that the consolidation and harmonisation of the basic principles across the various prohibited attributes would simplify the regulation of discrimination issues. As such, we support this proposal.

(b) **Redefining the definition of "disability" to require substantial and/or longer term ailment**

Again, we entirely support this change. The current definition effectively means that every person is disabled and is clearly too broad.

(c) **Making it clearer in the legislation what needs to be established for indirect discrimination to be justified**

The Chamber recognises the importance of clarity. As such, any change to define "justification" more tightly is to be encouraged.

(d) **Introducing a defence for principals where they took reasonably practicable steps to prevent discrimination by an agent**

This brings the position into line with the protection for employers.

(e) **Introducing an additional prohibition of harassment at common workplaces**

The Chamber supports this change.