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The Disability Discrimination Ordinance, the UN Convention on the Rights of Persons with Disabilities, and Beyond: Achievements and Challenges after Ten Years of Hong Kong Anti-discrimination Legislation

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The Disability Discrimination Ordinance, the UN Convention on the Rights of Persons with Disabilities, and Beyond: Achievements and Challenges after Ten Years of Hong Kong Anti-discrimination Legislation¹

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Abstract

The enactment of the Hong Kong Disability Discrimination Ordinance in the mid-1990s was a significant step in efforts to ensure the enjoyment human rights for persons with disabilities in Hong Kong. The Ordinance, and the Equal Opportunities Commission established to promote and implement the legislation and helping to implement met with much criticism, from those concerned that it would have deleterious effects for Hong Kong, as well as from those concerned that it did not go far enough to address the disadvantage and exclusion suffered by persons with disabilities. Ten years of the legislation provides an opportunity to reflect on these concerns, the progress that has been made, and measures that may need to be taken to address new challenges, in the light of developments under comparable legislation in Australia and the United Kingdom. The adoption at the end of 2006 by the United Nations General Assembly of the Convention on the Rights of Persons with Disabilities and its likely ratification by China means there is a need to examine the possible implications of the Convention for Hong Kong disability law and practice. The paper concludes with a number of proposals for steps that should be taken to review disability law and practice in Hong Kong as China moves towards ratification of the Convention.

INTRODUCTION

The decade or so which has passed since the enactment of the Disability Discrimination Ordinance and related anti-discrimination legislation in Hong Kong and the establishment of the Equal Opportunities Commission, have been years of significant progress in the development of law, policy and practice in the field of disability and human rights, at the international, regional and national levels. In this paper my purpose is to identify what I consider to be some of the highlights of those developments, and to explore a number of questions to which they give rise about how we advance the struggle to ensure that persons with disabilities are fully recognised as equal members of our communities and in practice both claim

¹ This paper is a revised version of a keynote presentation at the conference *Our Ten Years under the DDO – Moving Forward, Changing Cultures*, organized by the Hong Kong Equal Opportunities Commission, Hong Kong, 24 January 2008.

and exercise the rights they are guaranteed by international, national and local proclamations.

In this paper I touch on three general topics:

- The significance of the relatively new United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol
- Reflections on the last decade or so of disability discrimination law in Australia and Hong Kong
- Proposals for how the struggle to ensure that human rights guarantees are realised in practice are advanced

I offer these comments with two significant reservations. The first is a hesitancy based in the important lesson from the disability movement – encapsulated in the slogan “Nothing about us without us” – that disability law, policies and programmes must be based on the lived experience of persons with disabilities and be developed and implemented with their full participation. My lived experience of disability has -- so far, at any rate – been very limited, largely seen through the eyes of family members. Similarly, although I was closely involved in Hong Kong’s equality legislation in its early life, not living in Hong Kong over the last few years means that I have far less to say about its operation in practice than nearly everyone else in this room. My comments are thus very much grounded in the perspective of human rights and international law, and comparative experience, and are intended to raise questions as much as provide answers. Fortunately, the structure of the seminar’s program allows for extensive discussion of the links between law and policy, and everyday experiences.

Achievements so far

At the outset, it is important to acknowledge how much has been achieved over the last couple of decades in terms of law, policies and changes in attitudes.² This has been as a result of the enormous efforts of persons with disabilities and their representative organisations, governments, independent human rights bodies such as the Equal Opportunities Commission, and other civil society actors. Compared with the situation 15 years ago, enormous progress has been made.³ We have legislative and policy arrangements addressing disability discrimination and endeavouring to achieve equality, we hear far less of the objections to such measures than we once did (on grounds of their inappropriateness as social engineering, or their likely disastrous impact on our employers and economies), and technological innovation has brought many new opportunities for promoting full inclusion and participation.

But it is equally important to recognise how far we have to go, and that the progress we have made started from a relatively low baseline. The struggle is a

² See generally Carole J Petersen, “Hong Kong’s First Anti-Discrimination Laws and Their Potential Impact on the Employment Market”, (1997) 27*Hong Kong Law Journal* 324.

³ See Theresia Degener, “Report: International Disability Law — A New Subject on the Rise: The Interregional Experts’ Meeting in Hong Kong, December 13-17, 1999” (2000) 18 *Berkeley Journal of International Law* 180.

long-haul one and will continue to require the commitment of considerable time, resources and energy by all of us, whatever roles we play. Changing minds and changing infrastructure can take decades, and new technology brings with it not only new possibilities for inclusion but new barriers to participation as well.

In reflecting on the changes made here and elsewhere, a number of things become apparent:

- Many important changes, particularly in individual cases, have been remarkably easy to make, and relatively low-cost (the case studies published by commissions in Hong Kong, Australia and the UK show the effectiveness of conciliation or mediation of individual disputes in many (though not all cases).⁴
- The addition of a legal, rights-based framework has been important not just in formal legal arenas such as the courts, but in everyday situations – it helps to empower persons with disabilities as rights-holders and to legitimate and make more persuasive their claims to fair treatment. We have seen this not only in the area of equal opportunity law, but also under the more general human rights statutes that have been introduced, such as the UK Human Rights Act 1998.⁵
- Complaint-based systems alone produce some benefits – especially for the individuals concerned – but have been less effective in bringing about systemic change, unless used as a springboard for other strategies, such as public inquiries or formal investigations.⁶
- Disability discrimination legislation has been much more effective in addressing the exclusion of persons with mobility, sensory and other physical impairments than of those who have an intellectual disability or suffer from mental illness.
- Many of the problems of exclusion are the result of complex social structures that are complex and require long-term strategies to address, meaning that in some cases we will be waiting for decades to achieve the goals we have set for ourselves – full accessibility of most physical infrastructure is perhaps the most obvious example.

⁴ See, e.g., Margaret Doyle, “Enforcing rights through mediation”, in Disability Rights Commission, *DRC Legal Achievements: 2000–2007*, Legal Bulletin Issue 12, Legacy Edition (2007), 57-64; Australian Human Rights and Equal Opportunities Commission (HREOC), “Disability complaint outcomes”, available at http://www.hreoc.gov.au/disability_rights/decisions/decisions.html. In relation to Hong Kong, see Carole J Petersen, “Investigation and Conciliation of Employment Discrimination Claims in the Context of Hong Kong”, (2001) 5 *Employee Rights and Employment Policy Journal* 627.

⁵ See, as regards the latter, British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2006), Summary.

⁶ See Disability Rights Commission, *DRC Legal Achievements: 2000–2007*, Legal Bulletin Issue 12, Legacy Edition (2007) 116 (Key cases), 134 (Formal investigations)

1. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

In December 2006 the General Assembly of the United Nations adopted the Convention on the Rights of Persons with Disabilities and an Optional Protocol to the Convention.⁷ The Convention was the first universal human rights treaty of the 21st century (a race to the line with the Convention on Enforced Disappearance, adopted a week later).

The adoption of the Convention represented the outcome of five years of negotiations, although proposals for such an instrument go back a quarter of a century. While the Convention was adopted at the universal level, we should note the contribution of the Asia-Pacific region to the process. Individual countries from the region were very active at the international level; the PRC was a strong supporter of a convention which pursued the goals of equality and inclusion of persons with disabilities, though not always as supportive of a strong rights and enforcement framework as one might have hoped. In addition, through the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), many countries and civil society organisations of the region made significant contributions. This took place in particular through a number of meetings in 2003 considering the desirable form and content of a convention, and resulting in the adoption of a draft convention (the Bangkok Draft), which was influential in the earlier discussions of what a new convention should look like. Many of the elements of the Bangkok Draft are reflected in the final text of the Convention.

In fact “the Convention” is two treaties – the Convention itself and an Optional Protocol to the Convention containing an individual complaints procedure and an inquiry procedure. As of the end of February 2008, 125 States had taken the first step of signing the Convention and 71 States had signed the Optional Protocol. While signature is an important first step, the critical step is that of ratification or accession – only then does a State become fully bound by the provisions of the Convention. By the same date there were 17 ratifications of the Convention – which needs 20 ratifications to enter into force – and 11 ratifications of the Protocol – which needs 10 ratifications to become effective and which will therefore come into force at the same time the Convention comes into force, very likely before mid-2008.

China signed the Convention on 30 March 2007, the day it was opened for signature, and the signature presumably applies to Hong Kong. However, China has not yet ratified the Convention, and has neither signed nor ratified the Optional Protocol to the Convention. Australia is in a similar position. But I assume that ratification of the Convention in both cases will occur in the near future (hopefully during 2008).

⁷ Adopted by the General Assembly on 13 December 2006 in GA Res 61/106; the Convention and the Optional Protocol were opened for signature on 30 March 2007

Significance of the Convention

The Convention represents a major legal and policy advance. It represents a strong affirmation at the international level of the rights of persons with disabilities, and underlines the change in thinking that has taken place from charity-based models to a rights-based framework grounded in a social model of disability. The Convention represents a development at the international level from non-binding international standards on disability to formally binding legal obligations for those countries which become party to the Convention. It is intended to build on existing human rights standards and articulate what is specifically needed to ensure that persons with disabilities actually enjoy those rights. Some rights are simply restated in the form in which they appear in other documents, but most are given detailed content to address the problems which face persons with disabilities in fully enjoying their rights.

Content

The Convention combines civil and political rights with economic, social and cultural rights⁸ – and includes what might be called “hybrid rights”, some of them innovations (such as the right to accessibility, the right to live independently and to be included in the community, and the right to personal mobility). Like other human rights treaties, the Convention represents a minimum standard which does not undermine other international or national provisions which are more conducive to the realization of the rights of persons with disabilities.⁹

The Convention establishes a body of independent experts, the Committee on the Rights of Persons with Disabilities, to be elected by States parties. The Committee has the role of monitoring the implementation of the Convention, mainly through the consideration of reports which States parties are obliged to submit on a regular basis. The Optional Protocol provides for an individual complaints procedure under which a person who considers that his or her rights under the Convention have been violated and who has not been able to obtain a remedy at the national level may bring the complaint to the Committee. The Committee will also have the power to initiate inquiries on its own motion if it receives reliable information

⁸ The Convention is organized as follows:

- Introductory: Preamble and arts 1-8, 11
- Civil and political rights: arts 10, 12-23, 29
- Economic, social and cultural rights: arts 24-28, 30
- Other – statistics, international cooperation, and national implementation and monitoring: arts 31-33
- International monitoring – Committee on the Rights of Persons with Disabilities, etc: arts 34-40
- Miscellaneous and procedural: arts 41-50.

⁹ CRPD, art 4(4)

indicating grave or systematic violations of the Convention in a State party. Both these procedures are optional, and thus only bind those countries which agree to submit themselves to them by ratification of the Optional Protocol.

General obligations

The Convention imposes wide-ranging obligations on States parties Under the Convention, States parties undertake (among other things):

- to refrain from discrimination on the ground of disability in all areas of life
- to take positive measures to ensure that persons with disabilities in fact enjoy equality
- to provide legislative and other guarantees of equality and non-discrimination
- to ensure that private persons and entities do not engage in discrimination
- to undertake relevant research and to disseminate information in accessible formats,
- to raise awareness about disability and combat stereotypes and prejudices
- to establish national implementation and monitoring structures and procedures

General guarantees and recognition of particular groups

The Convention contains a number of important general guarantees, which include:

- A general statement of the right of persons with disabilities to equality before and under the law, and to the equal protection and benefit of the law without discrimination, and an obligation to prohibit discrimination and guarantee effective legal protection against discrimination (art 5)
- A recognition that women and girls with disabilities and are subject to multiple discrimination and an obligation on States parties to take appropriate measures to ensure that women and girls with disabilities enjoy equally fundamental freedoms and human rights (art 6)
- A specific obligation on States parties to ensure that children with disabilities enjoy equally fundamental freedoms and human rights and to ensure that children with disabilities have the right to express their views on all matters affecting them (art 7)

Immediate obligations or progressive realization?

Article 4(2) of the Convention makes it clear that when economic, social and cultural rights have immediately realizable components, States parties are under an obligation to take the necessary steps – and in any case States Parties are obliged to carry out analysis and to set out a definite and measurable plan for the realization of other dimensions of those rights. The starting-point is the language of the Convention itself – sometimes it is clear that rights are to be immediately guaranteed; in other cases “appropriate measures” may require immediate action, or steps to be taken over time (or both).

Innovations in the Convention

Although the Convention was not intended to introduce any new human rights, it contains a number of innovations (whether these are innovatory applications of existing rights or new rights might be the subject of debate). These include:

- Right of accessibility (art 9) -- a wide-ranging right to ensure equal access “to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”
- Specific provision to ensure “the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.” (art 11)
- Right of living independently and to be included in the community (art 19)
- Right to personal mobility (art 20)
- Freedom of expression (art 21) – recognition of right of persons with disabilities to communicate “through all forms of communication of their choice”; “communication” is broadly defined in article 2 to include:
“languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”.
- Obligation on State to provide information to persons with disabilities in accessible formats, to accept and facilitate the use of sign languages etc in official interactions, and to urge private entities to provide information and services in accessible and usable formats
- Obligation on States parties to take appropriate measures to recognize and promote the use of sign languages
- A specific provision on international cooperation (art 32), the only detailed provision of its kind in UN human rights treaties

- A specific provision on national implementation and monitoring (art 33), Participation of civil society, in particular persons with disabilities and their representative organizations in monitoring the implementation of the Convention.

Significance

The Convention has many possible ramifications for Hong Kong, once it is ratified by the PRC and applies to Hong Kong. At the outset, the critical questions the Convention makes us revisit are whether laws and policies in relation to disability issues (and indeed more generally) are being developed and implemented with the full participation of persons with disabilities at the design and implementation phases, and whether they reflect an approach which recognises that persons with disabilities are full citizens with rights to inclusion and full participation in all aspects of social life.

But let me focus on two specific implications of the Convention of particular relevance to the present discussion. The first is the need that will arise for an overall review of Hong Kong law, policy and practice in light of the Convention's standards. The second is the special role accorded to national human rights institutions and their sub-national counterparts such as the EOC in the implementation of the Convention.

Article 4(1) (b) of the Convention requires States parties to ensure that laws, policies practices and customs which constitute discrimination against persons with disabilities are modified or abolished. The *Handbook for Parliamentarians on the Convention*, published in late 2007 by the Inter-Parliamentary Union and the United Nations, suggests that

“one of the most important steps a State should take as soon as possible after it has become a party to the Convention, and preferably after it has signed the Convention, is to undertake a comprehensive review of existing law to determine to what extent it is consistent with the treaty. The State should also identify any new legislative and policy measures to be undertaken in order to give effect to the Convention. A detailed timetable or this legislative review and reform should also be developed.”¹⁰

The second aspect is the role of national human rights institutions. Article 33 of the Convention requires States parties to designate one or more focal points within government in relation to implementation of the Convention and to consider establishment of a coordination mechanism. Equally importantly, it requires States parties “to designate, establish, maintain or strengthen a framework, including one or more national institutions established with regard to the Paris Principles, to promote, protect and monitor implementation of the Convention.” In short, this means that there is an important role that the Equal Opportunities Commission

¹⁰ UN-DESA, UNOHCHR and Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the rights of persons with disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), at 71-72

may play in relation to implementation of the Convention in Hong Kong. As the Convention arguably has a broader scope than the Disability Discrimination Ordinance, the question of whether the EOC's mandate should be expanded, arises. I will return to these two issues at the conclusion of this paper, following brief reflections on some of the recent developments under disability discrimination legislation in Australia, and Hong Kong.

2. REFLECTIONS ON THE OPERATION OF DISABILITY DISCRIMINATION LEGISLATION IN AUSTRALIA, HONG KONG AND THE UNITED KINGDOM

Of course, we all know that a focus on disability discrimination law is only a part of the story – much more goes into developing an effective strategy to address disability issues and to achieve equality than the enactment of such legislation. This includes not only protections against discrimination and guarantees of equality under other instruments such as the Basic Law, but also other legislation, policies and programmes, ranging from education to social welfare to transport and development policy. But anti-discrimination law is an important component of any strategy.

Australia

Australia has had disability discrimination legislation for some time at the State and federal levels: the federal Disability Discrimination Act 1992 commenced operation in 1993.¹¹ So at the federal level the experience is only slightly longer than the experience in Hong Kong under the Disability Discrimination Ordinance,¹² though some State legislation in the field goes back almost three decades. The Disability Discrimination Act 1992 (Cth), one of a number of similar State and federal statutes, has many similarities to the Hong Kong legislation. This is not surprising, since the DDO drew in certain respects on Australian models (though, significantly, not on the enforcement side, where the UK model was used).

An overview of the operation of the Disability Discrimination Act in its first ten years offered the following assessment:¹³

“There is no doubt there have been many achievements.

Thousands of disability discrimination complaints have been dealt with.

¹¹ I am particularly grateful to David Mason, Director, Disability Rights Policy, Human Rights and Equal Opportunities Commission, who was kind enough to share his insights on the operation of the Australian federal legislation with me.

¹² For a good overview of the first decade of the Disability Discrimination Act, see HREOC, *Don't judge what I can do by what you think I can't: Ten years of achievements using Australia's Disability Discrimination Act* (2003), available at http://www.humanrights.gov.au/disability_rights/dont_judge.htm.

¹³ HREOC, *Don't judge what I can do by what you think I can't*, supra note 12 (“1.1 Preface”)

Standards for accessible public transport have been adopted and already widely implemented.

Telecommunications access has improved for deaf people and other people with disabilities.

Negotiations on standards for improved access to buildings and education are in the final stages, and there are many practical instances of improved access in these areas.

Captioning of television programs has increased, with further increases being negotiated.

There has been widespread adoption by the banking and financial service industry of standards for disability access to ATMs, internet banking, EFTPOS and phone banking.

Hundreds of service providers, particularly local governments and universities, have developed voluntary action plans for improved disability access.

It also has to be acknowledged that there are areas where individuals and advocates have expressed concern and frustration over the limits to the law, and where progress has been more difficult than was hoped when the legislation was passed.

There is clearly still a long way to go towards an equal and accessible Australia that enables people with disabilities to participate fully in the life of our nation. But, as with any long journey, it is useful and encouraging to look at what progress we have made so far, before returning our attention to the road ahead.”

An important part of the Australian legislation is the investigation and conciliation of individual complaints, and the litigation of these in the courts if they cannot otherwise be settled. However, although many of these complaints have led to satisfactory outcomes for the individual complainants and sometimes had broader effects, the most significant impact of the legislation has come from other strategies.

One of the approaches used by the federal Human Rights and Equal Opportunity Commission is to make use of its power to conduct inquiries to take up systemic issues, in some cases using a small number of complaints as the basis for launching a public inquiry.¹⁴ The inquiries undertaken by the Commission have covered a wide range of topics and have been characterised by attempts to bring about systemic solutions, in collaboration with DPOs and industry groups. They have included inquiries into access to election procedures, access to electronic commerce and new information and service technologies; television, video and other captioning; assistance animals and health regulation; accessibility of consumer

¹⁴ See generally HREOC, “About public inquiry processes”, available at http://www.hreoc.gov.au/disability_rights/inquiries/inquiries.html#about, and

electronics and appliances; employment and disability, telecommunications, and various transport-related issues.¹⁵

Another power which the Australian Commission has used creatively has been the power which it has under the Disability Discrimination Act to grant exemptions. Granting of an exemption immunises a person against a claim under the Act for the period of the exemption (up to five years). The Commission describes its approach to exemptions as follows:¹⁶

[T]he Commission has *not* been prepared to grant exemptions simply to certify that discrimination may continue, on the basis of unjustifiable hardship or other defences. ...

However, the Commission has been prepared to grant exemptions on condition that the applicant makes and meets commitments to improve access or opportunity within a reasonable period. To grant an exemption in such circumstances (rather than leaving an applicant to raise possible hardship defences in response to complaints if access is not provided) can be appropriate as a means of promoting achievement of the objects of the DDA.”

The Commission conducts a transparent public inquiry into exemption applications, allowing interested groups to submit their views, and giving a reasoned decision – all these documents are normally made available on the Commission’s website. A quick review of the exemptions granted show how it has been effectively used as a technique to get individual and organisations to develop specific targeted plans to eliminate conditions which might otherwise violate the Act.

The Disability Discrimination Act also provides for *action plans* to be filed with the Commission on a voluntary basis. While these do not provide immunity against a complaint under the Act, nevertheless they must be taken into account in the consideration of any such complaint. The Commission sees them as “a way for an organisation to plan the elimination, as far as possible, of disability discrimination from the provision of its goods, services and facilities”.¹⁷ The Commission has published some 400 action plans on its website.¹⁸

Another important dimension of the Commission’s work has been the development of Disability Standards, instruments which translate the broad stipulations in the Act not to discriminate and to make reasonable adjustments into detailed but flexible standards about how this can be done in particular contexts. (They are a

¹⁵ See HREOC, “Inquiries and consultations”, available at http://www.hreoc.gov.au/disability_rights/inquiries/inquiries.html#about.

¹⁶ HREOC, “Exemptions under the Disability Discrimination Act”, available at <http://www.humanrights.gov.au/disability%5Frights/exemptions/exemptions.html#past>

¹⁷ HREOC, “Why action plans?”, available at http://www.hreoc.gov.au/disability_rights/action_plans/index.html.

¹⁸ HREOC, “Register of Disability Discrimination Act Action Plans”, available at http://www.hreoc.gov.au/disability_rights/action_plans/Register/register.html

little like Codes of Practice under Hong Kong discrimination legislation; they are formally made by the Attorney-General on the advice of the Commission, and are laid before Parliament before they come into effect). These Standards have been developed in partnership with the relevant industries, the most effective way to adopt standards which are based in industry-specific knowledge and to ensure they enjoy support from those working in the relevant sectors.¹⁹ The Commission may also issue Guidelines under the Act to provide guidance in the implementation of various measures.

The Standards and Guidelines which have been adopted so far include *Disability Standards for Accessible Public Transport* (2002), *Disability Standards for Education* (2005); *Guidelines on insurance and superannuation* (revised March 2005), and *Advisory note on accessibility of World Wide Web pages* (1999).²⁰ The Commission has also drawn up draft *Employment Standards*, and a set of draft *Standards on Access to Premises* is well on its way towards completion.

There is much more, of course, but these examples show the variety and flexibility of the tools available to and used by the Australian Human Rights and Equal Opportunity Commission, and the variety of issues they have been able to address through their use.

Hong Kong – a view from a distance

Rather than attempt the hazardous task of offering an overall evaluation of the operation of the Disability Discrimination Ordinance and the Equal Opportunities Commission, let me offer a number of specific observations about features of the last ten years that struck me in reviewing those developments. It is clear that the EOC has done considerable work in the areas of community education and engagement, in the conciliation of complaints²¹ and the development of a number of Codes of Practice and other publications offering guidance on disability and other issues within its mandate, among its other achievements.

The EOC has carried out a number of formal investigations/inquiries under the somewhat cumbersome powers it possesses which are derived from the UK legislation on sex and race discrimination. In addition to the important formal investigation under the Sex Discrimination Ordinance into the Secondary School Places Allocation System²², in the field of disability these comprise the Richlands Gardens report,²³ and the report on the training needs of staff of the Immigration

¹⁹ See HREOC, “Disability Standards and Guidelines”, available at http://www.hreoc.gov.au/disability_rights/standards/standards.html.

²⁰ For details, see *ibid.*

²¹ See Carole J Petersen, “A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong’s Disability Law” (2005) 25(4) *Disability Studies Quarterly*.

²² *Formal Investigation Report on Secondary School Places Allocation (SSPA) System* (1999)

²³ *Report on Case Study of Kowloon Bay Health Centre (Richland Gardens)* (1999)

Department in dealing with persons with disabilities²⁴ (2001). A significant formal investigation into accessibility in some 60 publicly accessible premises is well-advanced and the report expected soon. One should also not overlook the important research studies the Commission has been involved in, including those relating to equal pay and baseline surveys on gender and disability.

It is in the nature of the perspective of external critics and advocates that they consider that human rights or equal opportunity commissions can never do enough – they can always do more and, of course, government should always provide the resources necessary for this. I am not exception in this regard, and my comments on the Equal Opportunities Commission should be so understood.

When one compares the work of the EOC with that of the Australian Human Rights and Equal Opportunity Commission or the recently disbanded Disability Rights Commission in the UK (2000-2007), each of these overseas bodies appears to have devoted more resources to public inquiry/formal investigation functions than has the EOC. Some of HREOC's inquiries I have already mentioned; the UK DRC carried out three formal investigations of this type in its less than seven years of existence: into health inequalities experienced by persons with mental health conditions and/or learning disabilities, employment requirements of "good health" in professions such as teaching, nursing and social work (the *Maintaining Standards Formal Investigation*), and into web accessibility for persons with disabilities.²⁵

Investigations and inquiries can require significant resources – which are always in short supply. However, given the potential impact that such inquiries can have, this is an area that the EOC could consider in its planning over the next few years. Inquiries may be a particularly good vehicle for addressing non-employment related areas, from which a significant proportion of disability discrimination complaints consistently arise.²⁶

When one looks at the litigation brought under the DDO, it is clear that the courts have not been a major forum for the advancement of the battle for equality for persons with disabilities. There have been relatively few cases which have gone to court under the DDO, and only a handful of those have been at all significant in their legal or broader impact. Most have involved the resolution of heavily fact-dependent disputes, though a number have contributed to the interpretation of the legislation, and a couple have had a major impact on the development of the law

²⁴ *Study Report on the Procedures and Training Needs of the Immigration Department in Handling Persons with Disabilities* (2001)

²⁵ See Disability Rights Commission, *Celebrating the Journey: Impact Report 2000-2007* (2007), 18

²⁶ A significant percentage of DDO complaints have been in non-employment related area, compared with SDO complaints. From 1999 until 2005 never less than a quarter of complaints and in most years more than a third of DDO complaints related to areas other than employment. In 2006 and 2007 around 20% of claims were non-employment related. Over the same period the percentage of non-employment related SDO claims was in the range of 5%-10%.

and on policy and practice. Perhaps the clearest example is the cases against the disciplined services in the disability area, *K, Y and W v Secretary for Justice sued for and on behalf of Fire Services Department and Hong Kong and Excise Department*,²⁷ in which the court held that it was unlawful to discriminate against persons on the ground that certain relatives of the plaintiffs had suffered from particularly forms of mental illness. But otherwise, it is hard to point to a case of major importance in the elaboration of the law or in its broader impact on the advancement of the rights of persons with disabilities.²⁸ Nor have there been significant disability cases brought under the equality guarantees of the Basic Law or the Bill of Rights Ordinance. This contrasts with a number of significant cases brought elsewhere, most particularly in the United Kingdom under the Disability Discrimination Act and Human Rights Act.

There may be a number of reasons for this, some of them very good ones. But it is now probably the time to examine whether the Commission is supporting the “right type” of cases (or whether the right type of cases are to be found), whether it needs to be more strategic in the cases it supports, and whether the issue of a formal right of the EOC to commence proceedings in its own name (other than by way of judicial review) should be reconsidered. The experience of other jurisdictions may be instructive in this regard, though the context is of course an important factor.

C. LOOKING FORWARD

At this conference we are reviewing the past decade or so of Hong Kong’s anti-discrimination law. The adoption of that legislation in 1995 represented one stage in a debate about equality legislation that had been going on for some years before then. An important part of that debate took place 15 years ago in relation to the adoption of the Hong Kong Bill of Rights. The issue was how the broader equality and non-discrimination guarantees of the ICCPR (and the ICESCR) should be given effect to under Hong Kong law – in particular the desirability of a detailed and wide-ranging anti-discrimination law, and the need for a non-judicial enforcement body that would be accessible to those who were subject to discrimination of any sort. Instead of a broad anti-discrimination law and a human rights commission to enforce that law and other guarantees of the Bill of Rights and the ICCPR, Hong Kong was given, somewhat grudgingly, legislation addressing a small number of important grounds of discrimination and a

²⁷ [2001] 3 HKC 796

²⁸ The only case to reach the Court of Final Appeal, *Ma Bik Yung v Ko Chuen* [2001] HKCFA 56, [2001] 4 HKC 119, concerned the specific issue of the validity of an apology as a remedy under the DDO. See Carole J Petersen, “Implementing Equality: An Analysis of Two Recent Decisions under Hong Kong’s Anti-Discrimination Laws”, (1999) 29 *Hong Kong Law Journal* 178, 188-192, and “The Failure of the Hong Kong Court of Appeal to Recognize and Remedy Disability Discrimination”, (2000) 30 *Hong Kong Law Journal* 6 (cited by the Hong Kong Court of Final Appeal in *Ma Bik Yung v Ko Chuen*, [2001] 4 HKC 119, at 132).

commission with a relatively limited mandate, the latter modelled on a rather clunky British model.²⁹

Things have moved on since then – in the UK, there is now a Human Rights Act, a proposed single Equality Act, and unified Equality and Human Rights Commission with extensive powers. In Hong Kong, we have moved some way – draft racial discrimination legislation is wending its snail-like way through the legislative process almost 40 years after the Racial Discrimination Convention was applied to Hong Kong and required that such legislation be adopted; the EOC has made important strides in the many aspects of its activities, and in other areas Hong Kong institutions have adopted law and policies intended to address many significant aspects of discrimination and exclusion of particular groups in Hong Kong society.

But now is the time to take stock. This year is a highly opportune time to undertake a number of reviews in relation to disability issues as well as other areas of equality law and practice. The arrival of the Convention on the Rights of Persons with Disabilities and, one assumes, China's likely ratification of the treaty in the near future and its application to Hong Kong, should be accompanied by a thorough review of Hong Kong law, policy and practice in the light of the Convention's framework, and a detailed review of the equality and human right implementation framework (since they are intimately linked). What I suggest is the following:

First, the establishment of an independent review body comprising disability experts (including from DPOs), legal experts, representations of community organizations, the EOC, and others with relevant expertise – but not civil servants -- in order to carry out a detailed public inquiry into relationship between the Convention on the Rights of Persons with Disabilities and Hong Kong law and practice, to recommend to the Government and the Legislature the steps that need to be taken to implement the Convention in Hong Kong. Government will also no doubt be carrying out its own internal review of the implications of the Convention for Hong Kong, but the importance of an open public discussion about the issue is critical and cannot be readily achieved by an internal inquiry.

Second, the establishment of a second independent review (perhaps overlapping in membership with the first) comprising discrimination and other legal experts, community representatives, the EOC, and others with relevant expertise (but not civil servants) to review the operation of Hong Kong's laws with regard to equality and non-discrimination. A focus on the Disability Discrimination Ordinance might be thought particularly suitable, but the similarity of three Hong Kong anti-discrimination statutes and the common role the EOC plays in relation to each of them means that it is difficult to separate examination of one from a consideration of the others. In addition, the review should not be confined to the three existing anti-discrimination statutes but should also examine the guarantees of equality under the Bill of Rights Ordinance and, more importantly, the Basic Law, and consider in particular whether the EOC should be given a mandate in relation to

²⁹ Carole Petersen, "Equality as a human right: the development of anti-discrimination law in Hong Kong", (1996) 34 *Columbia Journal of Transnational Law* 335

equality obligations under the Basic Law, the ICCPR and ICESCR, and other treaties which apply to Hong Kong and which contain equality provisions.

Indeed, the inquiry should also consider whether Hong Kong is now ready for a fully-fledged human rights commission as was proposed more than a decade and a half ago, a question that is now back on the agenda. It may be too optimistic to expect this as an outcome when Hong Kong's political masters scandalously refuse to allow its citizens to exercise the full democratic rights to which they are entitled and which they have been denied for so long under different sovereigns. But it seems a sensible time to revisit these issues.

So far as the Commission itself is concerned, there are a number of areas in which it could show leadership – areas in which the issue are important, complex and in which others have failed to address fully the rights of persons with disabilities.³⁰ There has been relatively little by way of substantive new initiatives undertaken by the EOC in recent years, and this is a type of activity through which the Commission can make a significant difference. Issues which might form the basis of formal inquiries or investigation by the Commission in the coming years – using both the Ordinance and the Convention as frameworks for analysis and conducted in collaboration with the relevant industry groups -- could include:

- Mental health services generally, and the availability of insurance in this area, in the context of the right to health without discrimination (here the reports of the Australian HREOC into homelessness and mental health services might provide useful background)
- The extent to which inclusive education policy has been translated into reality, in the light of the right to education without discrimination
- Accessibility in the field of information and communications technology, and well as consumer devices and appliances³¹
- Access to transport – from home to transport to work and back again, which would supplement the important work done in the production of the *Design Manual Barrier Free Access 2007*
- Procurement as a strategy for ensuring compliance with disability standards both by those who provide services to government, as well as those who provide equipment.

³⁰ This section is based on comments and presentations made during the Seminar about pressing issues facing persons with disabilities and draws on comments made as part of the final panel at the seminar.

³¹ See, e.g., the work being undertaken by the Australia HREOC in relation to consumer electronics and home appliances and Tim Noonan, “The Overlooked Consumers – 20% of the Australian population with Disabilities and Older People”, available at http://www.hreoc.gov.au/disability_rights/consumer/TheOverlookedConsumers.htm . In relation to access to banking and financial services, see Sev Ozdowski, “Electronic financial services – a review of progress”, 7 July 2005, available at http://www.humanrights.gov.au/disability_rights/inquiries/ecom/bank05.htm.

There are no doubt many others, but the need to adopt a systemic approach through such inquiries seems to be the most effective way to advance the disability agenda.

CONCLUSION

The struggle to achieve equality and inclusion for persons with disabilities has seen some significant progress over the past decade or more in Hong Kong and elsewhere. But it is easy to lose sight of the fact that their progress has required the commitment and energy of thousands, and has often been achieved in the face of official or public indifference or opposition.

Yet there is so much more to be done. In a society which has the material resources to address inequality it is hard to see why that cannot be done. It is up to all of us in this room – and many beyond it to continue the struggle. As Bruce Maguire – a blind Australian who successfully challenged the Sydney Olympic Organising Committee for its failure to make information about the 2000 Sydney Olympics available in Braille, put it in a phrase he attributed to Anita Roddick, founder of *The Body Shop*,³² “advocacy is the rent we pay for living on this earth”.

³² Bruce Maguire, “Making a difference - Reflections on using the Disability Discrimination Act”, April 2003, available at <http://www.e-bility.com/articles/dda.php>