INFORMATION PAPER ON AFFIRMATIVE ACTION AND SPECIAL MEASURES

Prepared by Equal Opportunities Commission

Definition

Affirmative action is an umbrella term for policies and initiatives designed to eliminate past and present discrimination. Examples of affirmative actions include target system, quota system, special measures and so forth. Affirmation action embodies two conflicting strategies for the achievement of the following goals:

(i) to reach out and encourage historically disadvantaged groups (e.g. women, persons with disabilities, ethnic minorities etc.) to compete equitably; and

(ii) to permit preferential treatment in the belief that preference will remedy past discrimination.

EOC Values

2. Prior to setting out the types of affirmative action and special measures, it is pertinent to reiterate here the values of the EOC. These values form the basis for the EOC's proposals to the Government in the next section.

3. In the past few years, the EOC has consistently delivered three messages on equal opportunities to the community:

For the individual	–	Right to development, which is an important extension to the right to life and survival.
For the business	–	Social accountability means marketability. This means equal opportunities and good practices help to sell products and services.
For the community	–	Enhancement of human capital sustains development and alleviates poverty. This in turn reduces reliance on social security, enhances social cohesion and leads to sustainable development.

4. An equal opportunities framework built on these values is one that is designed to alleviate poverty and promote social cohesion by advancing human potential and the equitable treatment of the individual. It enables an individual to maximize his/her own abilities and thus achieve greater self-sufficiency. This in turn leads to lesser dependency on social security and reduces the strain on the public purse. Anti-poverty measures are directly pegged on the capacity of the individual to develop.

5. An equal opportunities framework also helps to ensure the development of social cohesion through equitable distribution of resources to different sections in the community. The international covenant obligations, such as those under the International Covenant on Economic, Social and Cultural Rights, are designed to ensure that the rights of the individual to development and to an equitable share of the community resources are respected.

EOC Proposals to Government

6. In May 2002, the EOC wrote to the Secretary for the Treasury on the possibility of incorporating a reward scheme in the tender system to promote the employment of persons with disabilities (PWDs). The EOC suggested that the Government could require all tenderers for service and product delivery to government to stipulate whether they had equal opportunities practices and special measures with regard to employment of PWDs and otherwise, based on which the Government could provide incentive points for the tenderers. This suggestion was not made in the context of only encouraging employment of PWDs but to promote equal opportunities overall since it is part of the laws of Hong Kong that all tender documents and contracts with government are entered into on the basis that the parties comply with law.

7. The Secretary for Treasury replied that in recognition of the many variations in the nature of products or services procured by bureaux and departments, Controlling Officers of individual bureaux and departments had the discretion to determine what tender specifications or tender evaluation criteria should apply in their procurement exercises, provided these were within the broad tender-related parameters set out in the Stores and Procurement Regulations and Financial Circulars. The Secretary then gave a few examples of where Controlling Officers had exercised their discretion and offered contracts to non-governmental organisations (NGOs) that engaged PWDs.

8. In June 2002, the EOC also wrote to the then Secretary for Health and Welfare on the possibility of the Government establishing any kind of voluntary quota system for the employment of PWDs. The Secretary replied that the Government had no plan to introduce a quota system for the government in employment of PWDs at this stage. However, in a letter from the Commissioner for Rehabilitation to the Alliance for Employment Quota System in January 2003, the Commissioner stated that the Rehabilitation Advisory Committee (RAC) Employment Sub-Committee had endorsed a package of measures to be taken by the Administration to promote the employment of PWDs. These measures include, inter alia, encouraging government departments, public bodies and subvented organisations to set up their own indicators for the employment of PWDs.

9. The EOC welcomes the discretionary measures taken by some Controlling Officers and the recent response from the RAC. However, the EOC is of the view that current government approach is fragmented and requires better co-ordination. The EOC recommends that the Government should systematically review its procedures and practices concerning tendering, licensing, contracting-out, funding and employment and consider the feasibility of in-building voluntary affirmative action schemes in these procedures and practices.

10. To consider the types of voluntary schemes that could be incorporated into existing procedures and practices, the Government should capitalise on the creativity of the business sector, i.e. the potential tenderers, by asking the businesses to propose affirmative action schemes that they consider workable in the context of their business operations. (For examples of affirmative action schemes in employment, procurement and contracting-out, please see paragraphs 14-19 for schemes in the U.S., and paragraphs 20-23 for schemes in South Africa and Namibia.) To focus and develop this area of work, the EOC would welcome the Government setting up a task force to conduct the aforementioned review. The EOC would be most happy to assist in whatever ways it can.

11. Set out below and for reference only are examples of special measures in the Hong Kong context and affirmative action measures in other parts of the world.

Special Measures in Hong Kong

12. The Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO) and Family Status Discrimination Ordinance (FSDO) all have provisions in respect of special measures to be taken. These are measures which are taken in recognition of existing inequality of opportunities due to, for example, de facto inequality in the availability of resources among persons of different sexes, with and without disabilities or types of disabilities, and family status. These measures aim to enable disadvantaged groups to overcome the inequality of resources and opportunity. However, the law does not impose any obligation to take special measures, it only allows such measures to be taken. For example, in order to overcome certain inequality against persons with visual impairment, special measure is taken for the benefit of these persons, this would be allowed by the law and persons with other types of disabilities cannot say that the measure is unlawfully discriminatory against them.

13. In order to come within the provisions of special measures, a measure must be reasonably intended to provide for substantive equality. It has to be shown that there is existing substantive inequality of resources and opportunities to be redressed, or that the beneficiary of the measure has some special need to be addressed. The measure has to be rationally connected to the aim of redressing the inequality or special need. Further, the measure must be proportional to the substantive inequality or special need. Lastly, since the special measure is to tackle existing inequalities, it must only last as long as such inequalities still exist and no longer. The need for special measures must be assessed from time to time, in order to ensure that it does not have the consequence of maintaining unequal or separate standards.

Affirmative Action in the U.S.

14. In the U.S., affirmative action measures are provided for under the following laws:
- Executive Order 11246, as amended; [1]
- Section 503 of the Rehabilitation Act of 1973, as amended; [2] and
- Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.[3]

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[1] Available at: www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm.

[2] Available at: www.dol.gov/esa/regs/compliance/ofccp/sec503.htm.

15. The U.S. Department of Labor is responsible for administering the abovementioned laws through its Office of Federal Contract Compliance Programs (OFCCP). Taken together, these laws ban discrimination and require federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, colour, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran. Government contractors are also required to take affirmative action to ensure that equal opportunity is provided in all aspects of employment. A summary of requirements is as follows:

	Executive Order 11246, as amended	**Section 503 of Rehabilitation Act of 1973, as amended**	**Section 4212 of Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended**
Covered employers	Federal contractors, federally-assisted construction and subcontractors with government contracts in excess of US$10,000	Federal contractors, federally-assisted construction and subcontractors with government contracts in excess of US$10,000	Federal contractors, federally-assisted construction and subcontractors with government contracts in excess of US$25,000
Affirmative Action requirements	- Contract must include a clause that a contractor agrees to take affirmative action to employ, advance in employment and treat all persons without regard to their race, colour, national origin, sex or religion without discrimination in all employment practices. . - Save for construction contractors, any contractor with 50 or more employees and a contract of US$50,000 or more must develop and implement a written affirmative action programme for each of its establishments. - For construction contractors, the OFCCP issued a specific national goal of 6.9% of the workforce to be female. This operates as a target and not a quota.	- Contract must include a clause that a contractor agrees to take affirmative action to employ, advance in employment, and treat qualified individuals with disabilities without discrimination in all employment practices. - Any contractor with 50 or more employees and a contract of US$50,000 or more must develop and implement a written affirmative action programme for each of its establishments.	Contract must include a clause that a contractor agrees to take affirmative action to employ, advance in employment, and treat qualified special disabled veterans, veterans of the Vietnam era and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorised, without discrimination in all employment practices.

[3] Available at: www.dol.gov/esa/regs/statutes/ofccp/4212.htm.

Diversity Procurement and Contracting in the U.S.

16. The U.S. Department of Transport (DOT) has the responsibility of ensuring that companies competing for DOT-assisted contracts are not disadvantaged by unlawful discrimination. Since 1980, the DOT has administered the Disadvantaged Business Enterprise (DBE) programme, designed originally as an ethnic minority and women's business enterprise programme.

17. The DBE programme ensures equal opportunity in transportation contracting markets, addresses the effects of discrimination in transportation contracting, and promotes increased participation in federally-funded contracts by small, socially and economically disadvantaged businesses, including minority and women owned enterprises. The entire DBE programme will expire in 2004 unless reauthorised by Congress.

18. The Transportation Equity Act for the 21st Century of 1998,[4] which authorises federal surface transportation programmes for highways, highway safety, and transit for the 6-year period 1998-2003, provides that at least 10% of the amounts made available for any Federal-aid highways, mass transit, and transportation research and technology programme be expended with certified DBEs. This 10% statutory goal applies to the DOT as an aspirational goal on a national level rather than a quota. If states fail to meet their own goals, there is no federal sanction or enforcement mechanisms, and the DOT has never sanctioned any state for not meeting its goal.

19. To be eligible for the DBE programme, individuals must prove they are economically and socially disadvantaged. Where economic disadvantage is concerned, an individual must not have a personal net worth exceeding US$750,000. The burden of proof is on the applicant.

Procurement Policy in South Africa and Namibia

20. The aim of the South African (SA) government's procurement policy is to redress the imbalances created under apartheid by favouring historically disadvantaged people in the awarding of tenders, as well as to ensure transparency and accountability.

21. A plethora of terms have been used to define those who are seen as having been disadvantaged in the past but preference is given primarily to disadvantaged people in terms of race, gender and disability.

22. Regulations define what is meant by a "Historically Disadvantaged Individual" (HDI) and allows a maximum of 10% of the tender adjudication criteria to be allocated for HDI status when the contract is over R500,000 in value. For contracts of under R500,000 in value, a maximum of 20% may be allocated for social goals.

23. The procurement policy in Namibia contains social goals to uplift the rural poor and create employment in the country. Although its primary aim is to ensure that contracts are awarded to the best bid in an open, competitive bidding process, the policy does permit price preferences according to certain approved socio-economic goals and strategies. There is a formula for working out the extent of preference to be granted. The

[4] Available at: www.fhwa.dot.gov/tea21/pl105178.pdf.

main price preference is to favour consultants and contractors domiciled in Namibia, but there are other price preference criteria for tenderers, who provide employment in small scale industries in Namibia, or in communal areas or notified underdeveloped areas, and for tenderers who are implementing the government's affirmative action policy. The following price preferences apply:

i. Namibian domicile – 5% to persons domiciled or companies incorporated in Namibia;
ii. small scale Namibian industries – 2% if more than 10 but less than 25 workers are employed; 3% if more than 24 but less than 50 workers are employed; and 5% if more than 50 workers are employed;
iii. employment creation in communal or underdeveloped areas – 2% if more than 10 but less than 25 people are employed; 3% if more than 24 but less than 50 people are employed; and 5% if more than 50 people are employed; and
iv. where a tenderer implements the approved affirmative action policy a 2-3% price preference may be granted, depending on the merits of the case; i.e. structured training programmes, employment for women and PWDs, and other programmes benefiting disadvantaged Namibian citizens.

Employment Quota System

24. In late 2000, the EOC undertook its own literature and Internet research into employment quota systems in five countries, namely Austria, France, Germany, Japan and Taiwan. The information summarised below is accurate up to the year 2000:

a. **Origin**: the quota system began as a special measure for war-injured soldiers in Europe and has grown to become an integral part of employment policies for PWDs in more than 30 countries worldwide.[5] Its main aim is to counter discrimination and equalise employment for PWDs who are under-represented in employment.

b. **Definition**: the quota system is a system that requires, through legislation, private and/or public sector employers, who employ a certain minimum number of workers, to ensure that a given proportion of employees consist of designated PWDs. A levy scheme may sometimes operate alongside the quota. In some schemes, the levy is a financial contribution made by employers who have failed to meet their quota obligation. In others, the levy is an alternative means for employers to fulfil their quota obligation. The levy amount is determined by the government and is usually a fixed monthly sum for each unfilled quota place. In broad terms, the funds collected are redistributed as grants and subsidies to employers and workers with a disability and have also been used to support educational and training programmes and sheltered workshops.

c. **Key features of mandatory quota systems**:

   i. ***Guiding principle*** – the idea of a social obligation to employ PWDs based on a historical welfare approach to disability.

[5] Quota system operates in the following countries: Angola, Austria, Azerbaijan, Belgium, Byelorussia, China, Czech Republic, Egypt, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Lithuania, Luxembourg, Malaysia, Mauritius, Morocco, Pakistan, Poland, Romania, the Russian Federation, the Slovak Republic, Spain, Taiwan, Thailand, the Philippines, Tanzania, Tunisia, Turkey, Ukraine and Vietnam.

ii. ***Legislative framework*** – the quota system is usually borne of a legal instrument and will include definition of disability, the establishment of the register for PWDs, the quota percentage, employers subject to the quota and, if appropriate, the levy rate.

iii. ***As a component of disability employment policy*** – the quota never exists in isolation and is always implemented alongside other measures, e.g. supported employment, reserved employment, sheltered workshops, vocational training and so forth.

iv. ***Quota percentage*** – generally ranges between 1% - 6% of the total number of employees per employer subject to the quota. The percentage in Asia tends to range from 1% - 2% while in Europe, it is commonly from 4% - 6%. Some legislation gives power to governments to vary this percentage, e.g. the German Government can vary the quota anywhere between 4%-10%. Some quota percentages are outside the usual range, such as in Thailand, which has the smallest quota at 0.5% for employers with a minimum of 200 employees. Italy sets a 7% quota for employers with a minimum of 50 workers but also applies a sliding scale to smaller employers. Hence, employers with 36-50 employees must employ two PWDs; employers with 15-35 workers must employ one PWD if a new worker is taken on; and businesses with more than 35 telephone lines must reserve 51% of switchboard operators' posts for people with a visual impairment.[6]

v. ***Eligibility criteria for the quota*** – different approaches to defining disability ranging from itemising the types of medical conditions and impairments (e.g. autism, visual impairment) to describing the loss of functions and body parts. Some may even specify the degree of incapacity. These approaches reflect in part different historical development of disability policies and the priorities in individual countries. For example, the German system focuses on assisting severely disabled persons with 30% or more incapacity and those with less than 30% incapacity are not eligible to register for the quota. In Taiwan, the degree of incapacity will not discount a PWD from registering for the quota. Official registration as a PWD is usually required but some countries have extended eligibility beyond that of the register, e.g. in France, the quota includes unregistered employees in receipt of partial invalidity pension.

vi. ***Counting method*** – Some systems count each PWD as a single unit while others also count certain characteristics as single units, such as severity of disability or age. For example, in Japan, the hiring of one physically disabled person is counted as two PWDs if his/her disability is more severe than the criteria set by law. In Germany, PWDs considered particularly difficult to employ may count as three PWDs for each one employed. In some countries, the quota may be fulfilled directly by employing PWDs; or indirectly by sub-contracting with sheltered workshops, paying the levy, providing training, etc. In calculating the number of compulsory places, one compulsory place usually

[6] Although 51% seems a much higher percentage than the one normally set for quotas or reserved employment schemes, the outcome up to December 1997 showed that the placement experience for people with a visual impairment was largely positive. There were enough positions available to employ almost all those expressing an interest, particularly where they had a professional qualification.

represents one employee, but there can be great variations between countries. For example, training places are excluded in Germany but could count towards the quota in Poland even though they are of a temporary nature. In Germany, part-time workers who are severely disabled may be counted as a whole unit (one quota place), if the reduced working hours is necessary on account of the disability.

vii. ***Employers subject to the quota*** – some systems apply either solely to the public sector or the private sector while some apply to both. The minimum number of employees per employer varies. The current trend in Europe is to reduce the number to ensure that small to medium size organisations are not entirely excluded. For example, the quota in Luxembourg now starts with employers of at least 25 employees instead of the previous 50 or more, and Spain is looking to reduce the number from 50 employees to 25.

viii. ***Exemptions for employers*** – some schemes offer exemptions to assist employers who may have genuine difficulties recruiting PWDs, such as the "exclusion rate" scheme in Japan's quota system. That scheme can discount particular jobs in specified industrial and business sectors for which the employment of physically disabled persons is recognised as unfeasible. The only industry with total exclusion is the shipping industry.

ix. ***Levy and grant system*** – some quota systems have a levy-grant component while others have only the levy fund. The levy is imposed on employers who fail to meet their quota obligations. The amount may be one standard amount; calculated from the basic minimum wage of particular jobs; or based on the national minimum wage. The levy is usually applicable to both the public and the private sectors but is sometimes only applicable to one, such as in Korea where the public sector is exempt from the levy. The levy fund is usually used to invest in measures that will improve the employability of PWDs; as a financial incentive for employers to employ a difficult-to-place category of PWDs, or to finance other disability-related activities, which do not necessarily promote the employment of PWDs.

Target System in Australia

25. Australia is one of few countries that have introduced rights-based anti-discrimination law for PWDs and on which the DDO in Hong Kong is based. It also operates a national target system, a form of voluntary quota, for employing PWDs. The Australian target system is summarised as follows:

a. Established in early 1990's, the target is applicable only to the public sector. It constitutes one component of an overall disability employment policy. Other components include: persuasion policies focusing on marketing and placing PWDs in jobs and giving national recognition to employers through the "Employers of the Year Award"; supported wage system; mobility allowance for PWDs in training or employment for at least eight hours per week; sales tax exemption for aids and appliances; wage subsidy schemes; grants for workplace modifications; and sheltered employment.

b. In 1993, the Federal Government developed the "1993 Equal Employment Opportunity: A Strategic Plan for the Australian Public Service for the 1990s", requiring government departments to **maintain the employment of PWDs at 4% and to increase it to 5% by the year 2000**. Government departments were to set their own performance indicators for hiring PWDs and to apply these targets at all management, clerical and professional levels. Departments were also required to lodge disability action plans (DAP) with the Human Rights and Equal Opportunity Commission (HREOC) by 1997.

c. In addition, the Commonwealth Disability Strategy (CDS) was launched in 1994 to support implementation of the *Disability Discrimination Act 1992* (Commonwealth) (DDA). The CDS established a ten-year planning framework for Commonwealth organisations and in the area of employment, the CDS was aimed at eliminating discriminatory practices of employers and programme administrators.

d. Under the target system, disability is defined according to the definition under the Disability Discrimination Act 1992 (Commonwealth). [Note: this definition is almost identical to the one under the DDO in Hong Kong.]

e. There is no register for PWDs. Job applicants and employees are asked if they have any disabilities for monitoring purposes but disclosure is on a voluntary basis.

f. Since 1994, the Federal Government had conducted two reviews in 1995 and 1997 and reported the overall progress as good and reasonable respectively. In contrast, the review undertaken in 1997 by the Australian National Audit Office (ANAO), an independent statutory authority set up to provide audits of all government practices and processes, found a downward trend in the employment of PWDs from 5.3% in 1992 to 4.9% in 1995 and 4.6% in 1996.

g. One reason put forward by the Federal Government for the downward trend was that Commonwealth departments and agencies had been under significant pressure to make efficiency gains, which had resulted in a rigorous review of activities, substantial downsizing and contracting out of traditionally lower level positions. With those positions that remained, a substantial degree of flexibility in work capacities was now demanded. In these circumstances it has been difficult for Commonwealth Departments and Agencies to both focus on, and achieve real progress in relation to, employing PWDs.

h. The voluntary nature of the target scheme meant that any department failing to develop measure and performance indicators for employing PWDs was not subject to any penalties. It also became known that the lodgement of DAP with HREOC had not been particularly successful. At the end of August 1997, three years after the launch of the CDS, only 13 out of 69 departments and agencies had lodged DAPs, representing 19% success rate. To date, no comparative studies have been conducted to show that Australia is any more successful with improving the employment of PWDs with its voluntary measures than countries that impose mandatory measures.

Equal Opportunities Commission
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