

### Chairperson's Foreword

Hong Kong has become successful due to its fair, open and competitive society. Equality of opportunities in employment ensures that all suitable people compete equally and effectively on the basis of their abilities, aptitude and knowledge. This is an important element in sustaining Hong Kong's success.

Legislation on family status discrimination was introduced in Hong Kong not only to ensure equality of opportunities in certain area, but to reflect the growing needs of the Hong Kong community in:

***upholding civil rights*** - Hong Kong has made significant advances in protecting individual rights and respecting human dignity. The elimination of discrimination on the ground of family status in employment signifies a progressive society and contributes to the development of civil rights for people in Hong Kong.

***maintaining social harmony*** - Hong Kong prides itself on its low level of 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 social areas including employment.

***ensuring better use of skills and resources*** - By tapping into the largest pool of available talent, Hong Kong employers can enhance the quality of their staff and thereby improve their competitive edge. Creating this pool means including all skilled and talented people regardless of their sex. This present a challenge to all of us - to accept and value differences, and to dispense with stereotypical assumptions of the male or the female. Employers are encouraged to recast the conventional notion of 'suitability' and focus on the 'ability' of a person rather than the gender.

***achieving organizational success*** - Organizations which incorporate equality of opportunities into their organizational strategy will be improved by seeking to develop the abilities of all employees. There is indeed a close link that exists between affording equal opportunities in organizations and good employment practice. In some cases an initial cost may be incurred in implementing equal opportunities policies, but this will be more than compensated for by better employment relationships and better use of human resources.

This Code of Practice on Employment is offered to assist employers and employees in understanding the requirements of the Sex Discrimination Ordinance. In the long term, the Equal Opportunities Commission hopes to create, with the support of the community, an environment where there is no barrier to equal opportunities and no discrimination.

**Code of Practice on Employment**  
**under the Sex Discrimination Ordinance**

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## **Introduction**

### **1. Purpose of the Code**

- 1.1. This Code of Practice is issued by the Equal Opportunities Commission (EOC) in accordance with the Sex Discrimination Ordinance (SDO).<sup>1</sup> It aims to eliminate discrimination on the grounds of sex, marital status and pregnancy, sexual harassment and victimisation in employment and to promote equal employment opportunities between men and women.
- 1.2. The EOC believes that it is very important for employers, employees, and the general public to be aware of the principles prohibiting discrimination on the grounds of sex, marital status and pregnancy, sexual harassment and victimisation in employment. This Code is designed to help employees, their colleagues, employers and other concerned parties to understand their responsibilities under the SDO. The Code also provides guidance on the procedures and systems that can help to prevent discrimination and to deal with unlawful acts in employment.

### **2. Application of the Code**

- 2.1. The Code applies to employment in Hong Kong in any establishment,<sup>2</sup> unless the employee does his or her work wholly or mainly outside Hong Kong.<sup>3</sup>
- 2.2. The Code applies to employment relationships in both the public and private sectors, the employment of contract workers, selection of partners in partnerships,<sup>4</sup> memberships in workers' or employers' organisations, the conferral of professional or trade authorisations or qualifications, employment-related training, the provision of services by employment agencies and the appointment of commission agents.
- 2.3. Employers are encouraged to follow the guidelines and the recommended good practices in this Code, unless there are justifiable grounds for not doing so. In all cases, reference should be made to the

provisions of the SDO .

- 2.4. The Code has to deal in general terms with discrimination on the grounds of sex, marital status and pregnancy, and sexual harassment. In adopting the Code employers may take into consideration the size and structure of their organisations. Small businesses, for example, will require simplified procedures and it may not always be reasonable for them to carry out all the Code's recommendations. However, small firms should ensure that their practices comply with the SDO and the spirit of the Code.
- 2.5. In addition to the Code the EOC will, from time to time, issue guidelines on good employment practices to assist organisations in implementing the recommendations set out in this Code.

### 3. Definitions

- 3.1. In line with the SDO, the Code stipulates equal protection for men and women.<sup>5</sup> For practical purposes, listed below are the definitions of discrimination (direct and indirect), sexual harassment and victimisation that apply throughout this document.
  - 3.1.1. *Direct discrimination* means treating a person less favourably than another person in comparable circumstances, because of a person's sex, marital status<sup>6</sup> or pregnancy.
  - 3.1.2. *Indirect discrimination* consists of applying the same treatment as between the sexes, persons with different marital status and persons who are pregnant or not, but is in practice discriminatory in its effect. For example, applying a certain minimum height or weight requirement to applicants could exclude a large proportion of female applicants and could be to their detriment. This would constitute indirect discrimination unless there was justification for a minimum height or weight requirement in the particular job.
  - 3.1.3. *Sexual harassment* consists of any unwelcome sexual behaviour in circumstances where a reasonable person would have anticipated that the harassed person would be offended, humiliated or intimidated. It includes unwelcome sexual advances, unwelcome requests for sexual favours, and other unwelcome conduct of a sexual nature. It also includes creating a sexually hostile work environment.
  - 3.1.4. *Victimisation* arises where a person (the discriminator) treats another person (the person victimised) less favourably than other persons in comparable circumstances because the person victimised or a third person has done or intends to do, or is suspected to have done or to intend to do, the following:
    - 3.1.4.1. bringing proceedings against the discriminator or any other person under the SDO;
    - 3.1.4.2. giving evidence or information in connection with proceedings brought by any person against the discriminator or any other person under the SDO
    - 3.1.4.3. otherwise doing anything under or by reference to the SDO in relation to the discriminator or any other person; or
    - 3.1.4.4. alleging that the discriminator or any other person has committed an act which is unlawful under the SDO.

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### The implications of the SDO in employment

#### 4. General liability

- 4.1. According to the SDO, an act done by a person in the course of his or her employment may render both that person and his or her employer liable. Similarly, an act done by a person as agent for another may render both the agent and principal liable. Employers are legally responsible for the actions of their employees, done in the course of their employment, whether or not these were done with the employer's knowledge or approval.<sup>7</sup>
- 4.2. A failure on the part of a person to observe any of the recommendations contained in this Code does not automatically render him or her liable to any proceedings. However, if a person is accused of discrimination, sexual harassment or victimisation, failure to implement the recommendations outlined in this Code could be used as evidence in a court of law.<sup>8</sup> This applies to both employers and employees, as well as agents and principals.
- 4.3. When the EOC investigates an alleged discriminatory act or conducts a formal investigation the EOC will also take compliance of this Code into account.
- 4.4. It is also unlawful to instruct, induce, threaten or knowingly aid others to commit unlawful acts under the SDO.<sup>9</sup>
- 4.5. This Code may be used as a guidance for employers as to what steps it is reasonably practicable for them to take to prevent their employees from committing unlawful acts. Where the Code offers specific guidelines to employers and they follow such guidelines, the fact they did so will assist a court to determine that they have taken all reasonable steps practicable.<sup>10</sup>

## 5. Discrimination in employment on the grounds of sex, marital status, and pregnancy

- 5.1. Under the SDO, it is unlawful to discriminate in employment on the ground of sex, marital status or pregnancy. This includes the following situations:
- 5.1.1. treating an applicant or an employee less favourably;
  - 5.1.2. discriminating against a person when selecting a partner (in a firm consisting of not less than six partners);
  - 5.1.3. discriminating against a person seeking to be a member (or a person who is a member) of an organisation of workers or employers, or professionals;
  - 5.1.4. discriminating against a person seeking an authorisation or qualification which is needed for a particular profession or trade;
  - 5.1.5. discriminating against a person seeking or undergoing training which would help the person to fit for that employment;
  - 5.1.6. discriminating against a person in relation to services offered by an employment agency; and
  - 5.1.7. discriminating against a person who is a contract worker or a commission agent.
- 5.2. Acting upon stereotypical assumptions based on sex, marital status or pregnancy could lead to discrimination.

## 6. Sexual harassment in employment

- 6.1. Under the SDO, sexual harassment in employment is unlawful. Without limiting the meaning of sexual harassment as defined in the SDO, the following behaviour can be regarded as sexual harassment:<sup>11</sup>
- 6.1.1. unwelcome sexual advances - e.g. leering and lewd gestures; touching, grabbing or deliberately brushing up against another person;
  - 6.1.2. unwelcome requests for sexual favours - e.g. suggestions that sexual co-operation or the toleration of sexual advances may further a person's career;
  - 6.1.3. unwelcome verbal, non-verbal or physical conduct of a sexual nature - e.g. sexually derogatory or stereotypical remarks; persistent questioning about a person's sex life; and
  - 6.1.4. conduct of a sexual nature that creates a hostile or intimidating work environment - e.g. sexual or obscene jokes around the workplace; displaying sexist or other sexually offensive pictures or posters.
- 6.2. Under the SDO, sexual harassment in employment includes the following situations:<sup>12</sup>
- 6.2.1. sexually harassing a person who is employed or seeking to be employed either by the employer or by someone else within the same organisation;
  - 6.2.2. sexually harassing a contract worker or a commission agent;
  - 6.2.3. sexually harassing a fellow contract worker or a fellow commission agent;
  - 6.2.4. sexually harassing an employer or potential employer;
  - 6.2.5. sexually harassing a person who is a partner or is seeking partnership and is applicable to persons proposing to form themselves into a partnership;
  - 6.2.6. sexually harassing a person who is employed by another person and whose employment requires him or her to carry out his or her duties in any premises where the harasser is a person residing in the premises;
  - 6.2.7. sexually harassing a person who is seeking to be, or is a member of, an organisation of workers or employers or professionals;
  - 6.2.8. sexually harassing a person seeking an authorisation or qualification which is needed for a particular profession or trade;
  - 6.2.9. sexually harassing a person seeking or undergoing training which would help the person to fit for employment; and
  - 6.2.10. sexually harassing a person in relation to services offered by an employment agency.
- 6.3. A series of incidents may constitute sexual harassment. However, depending on the circumstances, it is not necessary for there to be a series of incidents. One incident may be sufficient to constitute sexual harassment.
- 6.4. On the other hand, an employee may be the victim of a hostile work environment where he or she is harassed in a pattern of incidents that may not be, in and of themselves, offensive, but when considered together amount to sexual harassment.

## 7. Discrimination in employment by way of victimisation

- 7.1. Under the SDO, it is unlawful to discriminate in employment by way of victimisation. Victimisation in

employment may occur where a person:<sup>13</sup>

- 7.1.1. makes a complaint of discrimination under the SDO against the discriminator or another person;
  - 7.1.2. acts as a representative on behalf of a person complaining of discrimination (whether the complaint is made to the EOC or within the organisation);
  - 7.1.3. gives evidence or information in connection with any proceedings under the SDO, e.g. acting as a witness in a court case;
  - 7.1.4. provides information to the EOC for the purposes of investigation by the EOC;
  - 7.1.5. provides information to the organisation in respect of a complaint of discrimination; or
  - 7.1.6. alleges that someone has committed an act which is unlawful under the SDO.<sup>14</sup>
- 7.2. Victimisation in employment also covers the situations listed under paragraph 5.1 of this Code.

## 8. Positive Action<sup>15</sup>

- 8.1. The SDO allows for positive action whereby, an act targeting persons of a particular sex or marital status, or who are pregnant would not be unlawful if it is reasonably intended to ensure that these persons have equal opportunities in employment, or to provide them with goods, access to services, facilities, opportunities, grants, benefits or programmes to meet their special needs in relation to employment.

## 9. Partnership, membership in workers' and employers' organisations and employment agencies

- 9.1. The principles underlying this Code should be applied, where applicable, in the selection of partners in partnerships, admission to membership in workers' and employers' organisations, provision of services by employment agencies, and selection and treatment of contract workers and commission agents.

### Practical guidelines for employers

## 10. Eliminating discrimination in employment

- 10.1. The primary responsibility of each employer is to ensure that there is no discrimination at work on the ground of sex, marital status or pregnancy. The SDO makes it unlawful to discriminate on such grounds.
- 10.2. This section describes good management practices which will help to eliminate discrimination. It recommends the use of **consistent selection criteria** for recruitment, promotion, transfer, training, dismissal and redundancy as well as terms and conditions of employment. These criteria and terms and conditions should be made known to all employees and job applicants upon request. Without this consistency, decisions can be subjective and leave the way open for discrimination to occur.
- 10.3. Developing a set of **consistent selection criteria** for all aspects of employment is one of the most important steps in eliminating discrimination in the workplace. This can be done by reference to the duties and responsibilities that would need to be carried out in the job. The application of **consistent selection criteria** is good management practice as it helps organisations to:
  - 10.3.1. make faster decisions because the criteria for decisions are clear;
  - 10.3.2. make better decisions because the criteria directly relate to work performance; and
  - 10.3.3. form the basis for effective job evaluation.
- 10.4. Save for a few exceptions, such criteria should not make reference to sex, marital status or pregnancy. They should be specifically related to the job, such as:
  - 10.4.1. the type of experience the job holder should have, e.g. merchandising experience;
  - 10.4.2. the amount of experience required for the job, e.g. five years experience;
  - 10.4.3. the educational qualifications, if necessary, e.g. a diploma in merchandising;
  - 10.4.4. the specific technical and managerial skills, e.g. use of certain computer software, proficiency in Cantonese and English;
  - 10.4.5. the personal qualities required for the job, e.g. willingness to travel, willingness to meet people of different backgrounds; and
  - 10.4.6. the physical and other skills required for the job, e.g. eye-hand co-ordination for delicate assembly work.
- 10.5. In line with good management practice, it is recommended that employers:
  - 10.5.1. develop **consistent selection criteria** as one of the first steps in establishing a fair recruitment

practice; and

10.5.2. from time to time re-examine the criteria to see whether they still apply or need to be modified.

- **Exception where sex is a Genuine Occupational Qualification (GOQ)<sup>16</sup>**

- 10.6. Sex discrimination by an employer in recruiting for a job, or in providing opportunities for promotion or transfer to, or training for, a job is not unlawful where a person's sex is a ***genuine occupational qualification*** (GOQ)<sup>17</sup> for the job. The criteria for determining whether a person's sex is a GOQ for a particular job are set out in the SDO and are explained below:
- 10.6.1. the essential nature of the job calls for a man or woman for reasons of (i) physiology (excluding physical strength or stamina); or (ii) authenticity in dramatic performances or other entertainment, e.g. actors and actresses, artists'; models and fashion models;
  - 10.6.2. the job calls for a man or a woman to preserve decency or privacy, e.g. changing room or bathroom attendants for the respective sexes;
  - 10.6.3. the job is likely to involve the employee working or living in someone else's house and have significant physical or social contact with the person living there;
  - 10.6.4. the nature or location of the establishment makes it impracticable for the employee to live somewhere else other than in the premises provided by the employer and no suitable premises are available, e.g. a resident janitor at a single-sex school where there are no separate accommodation or sanitary facilities for the other sex;
  - 10.6.5. the employing establishment is a hospital, prison or other establishment for persons requiring special supervision or attention (only that part of the establishment dealing with such persons may claim sex as a GOQ);
  - 10.6.6. the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be performed by one sex, e.g. a female counsellor at a shelter home for battered women; and
  - 10.6.7. the job needs to be held by a man because it is likely to involve the performance of duties outside Hong Kong in a place where the customs or laws are such that the duties could not be performed effectively by a woman, e.g. a sales manager who is required to spend considerable time in countries where customs forbid the involvement of women in this type of work.
- 10.7. The GOQ is not an automatic exception for general categories of jobs; in every case it will be necessary for the employer to show, if the exception is to be claimed, that it applies to the particular job in question.

## 11. Guidelines for recruitment

- 11.1. Employers should make all recruitment decisions on the basis of ***consistent selection criteria***. In this way, each individual can be assessed according to his or her capabilities to carry out a given job and will not be judged by irrelevant considerations.
- 11.2. Do not assume that only men or only women are able to do certain kinds of work. For example, men can be good secretaries and women can be good fire-fighters.
- 11.3. Employers should ensure that sex, pregnancy or marital status is not used as a ground for determining who should be offered employment. This applies no matter whether recruiting by advertisement, through employment agencies or through career offices in educational establishments.
- 11.4. In addition, employees handling applications and conducting interviews should be trained to avoid acts of discrimination.

- **Advertising**

- 11.5. Employers should ensure that the contents of advertisements are based on ***consistent selection criteria***.<sup>18</sup> In line with good management practice, it is recommended that employers:
- 11.5.1. advertise for jobs on the basis of ***consistent selection criteria*** in order to encourage applications from suitable applicants of both sexes and ensure that no single sex will be treated more favourably than the other;
  - 11.5.2. review all advertising materials and accompanying literature relating to employment to ensure that such materials do not present men and women in stereotypical roles. Use job titles, headlines and illustrations with care. Replace titles with sex implications by gender-neutral ones, or pair them with the other sex equivalent, e.g. waitress. Where there is no suitable word, it may be necessary to put "male or female" in brackets after the job title;
  - 11.5.3. avoid requests for photographs and copies of ID cards at the application stage as this may indicate an intention to discriminate on the ground of sex although asking for ID numbers

would be acceptable. However, requests for photographs and copies of ID card can be made at the interview stage for identification purposes;

- 11.5.4. where jobs are traditionally held by persons of one sex, consider including statements such as "the post is equally open to men and women" as this will send out a clear message that applicants from both sexes are welcome;
- 11.5.5. place advertisements in publications likely to reach both sexes, but not publications that are predominantly read by either men or women; and
- 11.5.6. where vacancies are to be filled by promotion or transfer, publish the information to all eligible employees so that there is no restriction on applications from either sex.

- **Shortlisting**

- 11.6. In line with good management practice, it is recommended that employers:
  - 11.6.1. use **consistent selection criteria** as the basis for shortlisting, matching these objective standards against the corresponding experience and capability of each applicant;
  - 11.6.2. guard against making assumptions in general about the abilities of persons on the ground of sex, marital status or pregnancy which may not be true of the individual; and
  - 11.6.3. train personnel staff to recognise the danger of such generalisations and to use objective comparisons when shortlisting.

- **Vetting applications**

- 11.7. In line with good management practice, it is recommended that employers:
  - 11.7.1. avoid questions on application forms which could lead to discrimination on the ground of sex, marital status or pregnancy, for example: indication of marital status, i.e. married, divorced, single, separated, widowed information about spouse number of children and plans to have children child-care arrangements information about "head of the household" or "principal wage earner"
  - 11.7.2. with the exception of positive action,<sup>19</sup> process applications from men and women in exactly the same way.

- **Interviewing**

- 11.8. An interviewer who seeks evidence of skills and abilities and who relies on facts rather than generalised hunches will be less likely to be biased. In line with good management practice, it is recommended that employers:
  - 11.8.1. ensure that personnel staff, line managers and all other employees who may be involved in staff recruitment receive training on lawful, non-discriminatory practice. It should also be brought to their attention that it is unlawful to instruct or put pressure on others to discriminate;
  - 11.8.2. only ask questions at job interviews that relate directly to the essential requirements of the job;
  - 11.8.3. ensure that, where it is necessary to assess whether personal circumstances will affect performance of the job (for example, where it involves unsociable hours or extensive travel), interviewers discuss this objectively without questions about marital status, children and domestic obligations;
  - 11.8.4. collect information necessary for personnel records after a job offer has been made;<sup>20</sup> and
  - 11.8.5. keep records of interviews to show the reasons why applicants were or were not appointed. Although it may not be necessary to keep such records indefinitely, it is advisable for employers to keep them for a period of not less than 12 months.<sup>21</sup>
- 11.9. It is a good practice to record, immediately after the interview, the assessment that each interviewer has formed on the applicant's ability to match the **consistent selection criteria**. This will not only ensure a logical assessment of the applicant's strengths and weaknesses but will also serve as a valuable explanation and defence against any unfounded suggestion of sex bias.

- **Medical information**

- 11.10. While employers may be concerned for the health, safety and welfare of their employees, they should not inquire about an applicant's child-bearing plans.
- 11.11. However, employers should point out if certain work conditions may have adverse effects, e.g. women should be made aware that exposure to some hazardous materials (e.g. lead or radioactive materials) could pose a danger to an unborn child.



- **Tests**

11.12. If tests are to be used for selection purposes, it is recommended that employers:

- 11.12.1. use selection tests that are specifically related to the job and/or the career requirements and should measure an applicant's actual or potential ability to do or train for the job;
- 11.12.2. use professionally designed tests wherever possible. These can contribute important objective information about the applicant, e.g. intelligence, aptitude and skills. They have the advantage that they produce numerical scores which do not depend upon opinion or subjective interpretation; and
- 11.12.3. review tests regularly to ensure that they remain relevant and free from any bias, either in content or in scoring.

- **Post-hiring enquiries**

- 11.13. Employers should draw a distinction between pre-employment and post-hiring enquiries, as there are some questions that could give rise to allegations under the SDO if asked before the applicant has been hired. It is therefore recommended that an employer should not ask questions which might subsequently give rise to any such allegation. (See paragraph 11.7.1 for examples of pre-employment questions that should be avoided.)
- 11.14. As an example, it could be valid after hiring to request information regarding the spouse and number of children for medical benefits or educational allowances, or people to notify in case of emergency.

- **Recruitment through employment agencies and employment services**

- 11.15. Where recruitment is done through employment agencies, employment services provided by the Labour Department, and educational establishments or non-government organisations, the employer should advise them that they should comply with the SDO and follow the recommendations in this Code as far as practicable.
- 11.16. Where appropriate, employers should specify that vacancies are open to persons of both sexes when notifying employment agencies, or employment services. This is especially important when a job has traditionally been done by persons of one sex.

## **12. Guidelines for terms and conditions of employment, benefits, facilities and services**

12.1. Under the SDO, it is unlawful to discriminate, on the ground of sex, marital status or pregnancy, in the terms and conditions of employment or access to benefits,<sup>22</sup> facilities or services. This applies to both existing contracts and new ones. Benefits may be in the form of fringe benefits, commissions, bonuses, allowances, pensions, health insurance plans, annual leave, merit and performance pay, or any other benefits available to employees generally.

- **Equal pay for equal work**

- 12.2. In respect of the terms and conditions of employment, employers should maintain the principle of equal pay for equal work. That is, a female employee is entitled to equal pay when she is doing "like work" or the same work as that of a man. "Like work" means work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of employment.<sup>23</sup>
- 12.3. Different job titles, job descriptions or contractual obligations do not necessarily imply that the work is different. It is what the job-holders actually do that matters. The question of whether the two jobs are "like work" can be answered by a general consideration of the type of work involved and the skill and knowledge required to do them.
- 12.4. Examples of "like work" are:
- 12.4.1. male and female tellers working in the same bank;
  - 12.4.2. women working in an employment agency supplying clients with temporary staff and men supplying permanent staff in the same agency; and
  - 12.4.3. foremen and line supervisors working in different sections of a production line.

- **Equal pay for work of equal value**

12.5. Sex discrimination in pay may occur because women and men tend to be segregated into different jobs.

Frequently the jobs done mainly by men have a higher status and are more highly rewarded than those done by women. Such differences can be reinforced by discriminatory recruitment, selection and promotion procedures which restrict the range of work persons of each sex perform.

- 12.6. A related principle to equal pay for equal work is that of equal pay for work of equal value. Where women undertake work as demanding as that of their male colleagues, even though the work is different, women should receive the same pay and benefits. That is, jobs of equal value warrant equal pay.
- 12.7. Overseas experience suggests that different jobs done by a man and a woman can be compared on the basis of the demands made on a worker in terms of effort, skill, responsibility and working conditions.<sup>24</sup> Employers can set individual pay rates based on market forces and individual performance but should not pay a class of workers less for doing work of equal value on the basis of sex.
- 12.8. Employers should maintain the principle of equal pay for equal work and are encouraged to consider progressive implementation of equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory. Large organisations in both the public and private sectors with a structured human resources department could take a lead in this.

- **Job titles**

- 12.9. Some companies use different job titles for men and women who are doing essentially the same work. This can lead to jobs undertaken by women being given lower status and so lower pay. If the titles do not reflect a genuine difference in the nature of the work done, they should be changed so that the same title applies to both jobs.
- 12.10. Here are some examples of discriminatory job titles when the same work is being done by men and women within the same organisation:

Male job title	Female job title
Salesman	Shop Assistant
Personal Assistant	Secretary
Administrative Assistant	Secretary
Chef	Cook

- **Part-time work**

- 12.11. Where part-time workers do not enjoy pay or benefits in pro-rata with full-time workers, companies should review the arrangements to ensure that such arrangements are justified without regard to sex, marital status or pregnancy.

- **Considerations for individual differences in pay**

- 12.12. Individual differences in pay are not in themselves discriminatory. Each case should be considered on its own merits. According to overseas experience,<sup>25</sup> the following considerations are relevant in considering differences in pay for equal work or work of equal value:
- 12.12.1. different performance ratings;
  - 12.12.2. length of service;
  - 12.12.3. a re-evaluation and down-grading of the position of an employee based on objective work-related criteria;
  - 12.12.4. a temporary training position;
  - 12.12.5. the existence of internal labour shortage in a particular job classification;
  - 12.12.6. a reclassification of a position to a lower level, where the person continues to get the former level of pay;
  - 12.12.7. regional rates of pay, e.g. an employee is rewarded because the work is done in different locations; and
  - 12.12.8. economic factors, such as a temporary shortage in a particular type of skilled labour.
- 12.13. In addition, such considerations should
- 12.13.1. actually exist (e.g. the man has more experience than the woman);
  - 12.13.2. be genuinely the cause of the difference in pay (i.e. the employer should have a pay system which applies to men and women alike and consistently rewards experience, where appropriate);

- 12.13.3. account for the whole of the pay gap (i.e. the extra payment is not an excessive reward for the additional experience); and
- 12.13.4. have the effect which the employer sets out to achieve (e.g. there is evidence that, as a result of the male employee's experience, he does the work better than his female colleague)

- **Workplace policies**

- 12.14 Employers should maintain gender-neutral workplace policies to avoid discrimination under the SDO, e.g. a married employee should have the option of whether or not to add the surname of the spouse.
- 12.15 There are no provisions in the SDO that specify sex discrimination in relation to grooming codes (also referred to as dress codes) in employment. However, employers should take the following good practices into account when developing and implementing grooming codes for their staff:
  - 12.15.1. policies should only prescribe a particular form of grooming if it qualifies as a necessary and reasonable requirement of the job, e.g. policies may differentiate between employees who have to deal regularly with the public and those who do not have to;
  - 12.15.2. policies should be imposed on both sexes in an even-handed manner, e.g. if sales clerks are required to wear prescribed uniforms, this requirement should apply to both male and female sales clerks;
  - 12.15.3. policies should not subject one sex to any unfavourable treatment or detrimental effect;
  - 12.15.4. where practicable, it is recommended as good management practice that employers consult their employees when introducing grooming codes or changing existing ones; and
  - 12.15.5. policies should be reviewed periodically to take into account changing social conventions.

### 13. Guidelines for promotion, transfer and training

- 13.1. It is unlawful for employers to discriminate on the ground of sex, marital status or pregnancy in the way they give opportunities for promotion, transfer or training. In line with good management practice, it is recommended that employers:
  - 13.1.1. where an appraisal system exists, examine the assessment criteria to ensure that employees are promoted on merit and the criteria adopted are not discriminatory. Measurable standards for evaluating job performance should be established;
  - 13.1.2. organise selection for promotion along the same lines as recruitment. The **consistent selection criteria** for the posts should be compared with the detailed assessment of all candidates' abilities and qualities including their potential. The individual whose profile best fits the job requirements should be selected;
  - 13.1.3. where opportunities for promotion, training or transfer arise, specify the conditions for application to all staff who may be interested, and set out related procedures in writing for communication to all employees (irrespective of sex) who are eligible;<sup>26</sup>
  - 13.1.4. assess all possible candidates, and if promotion is by nomination, ensure that everyone suitable is considered and that nobody with potential has been overlooked;
  - 13.1.5. keep records of notes on promotions, transfers and training. It is advisable that employers keep such records for a period of not less than 12 months;<sup>27</sup>
  - 13.1.6. review and change rules which restrict or preclude transfer between certain jobs if they are found to be discriminatory. Employees of one sex may be concentrated in sections from which transfers are traditionally restricted without real justification; and
  - 13.1.7. examine policies and practices regarding selection for training, day release and personal development to identify direct and indirect discrimination. Where there is found to be an imbalance in training between the sexes, the cause should be identified and, if necessary, remedied to ensure that it is not discriminatory.

### 14. Guidelines for dismissals, redundancies and unfavourable treatment of employees

- 14.1. It is unlawful to discriminate on the ground of sex, marital status or pregnancy by dismissing the employee or subjecting him or her to any other detriment. In line with good management practice, it is recommended that employers:
  - 14.1.1. ensure that members of one sex are not disciplined or dismissed for performance or behaviour which would be overlooked or condoned in the other sex;
  - 14.1.2. review redundancy procedures affecting a group of employees predominantly of one sex so as to ensure that there is no discrimination and to remove any effects which could be disproportionate and unjustifiable;

- 14.1.3. ensure that conditions of access to voluntary redundancy benefits<sup>28</sup> are available on equal terms to male and female employees in the same or similar circumstances;
- 14.1.4. ensure that when there is down-grading or short-time working (for example, owing to a change in the nature or volume of an employer's business) the arrangements do not discriminate;
- 14.1.5. keep records of notes on dismissals and redundancies. Although it may not be necessary to keep such records indefinitely, it is advisable for employers to keep them for a period of not less than 12 months;<sup>29</sup> and
- 14.1.6. take all reasonably practicable steps to ensure that a standard of conduct or behaviour is observed to prevent members of either sex from being intimidated, harassed or otherwise subjected to unfavourable treatment.

## 15. Guidelines for grievance procedures

- 15.1. In line with good management practice, it is recommended that employers:
  - 15.1.1. take particular care to ensure that employees who have in good faith taken action under the SDO do not receive less favourable treatment than other employees, for example by being disciplined or dismissed;
  - 15.1.2. designate an internal grievance procedure or an officer to deal with complaints concerning sex discrimination, sexual harassment or victimisation within an organisation. These procedures should be communicated to all staff and be reviewed from time to time;
  - 15.1.3. advise employees to use the internal grievance procedures, where appropriate, but without prejudice to the individual's right to apply to the EOC or the court;
  - 15.1.4. deal with all complaints of discrimination, victimisation or harassment effectively. It should not be assumed that they are made by those who are over-sensitive. The rule of confidentiality should be observed and the right of both the complainant and respondent respected; and
  - 15.1.5. handle disciplinary procedures uniformly without reference to sex.
- 15.2. It is not victimisation if an employee is treated less favourably as a result of an allegation which is false and not made in good faith.<sup>30</sup>

## Equal employment opportunities policies

### 16. Formulating a policy to eliminate discrimination on the grounds of sex, marital status and pregnancy

- 16.1. A policy that promotes equality of opportunities for all will ensure the effective use of human resources in the best interests of both the organisation and its employees. It is a commitment by an employer to the development of his or her staff.
- 16.2. The organisation should also commit to use employment procedures and practices which do not discriminate on the ground of sex, marital status or pregnancy and which provide equal opportunities for all employees. The details of the policy will vary according to the size of the organisation.
- 16.3. To demonstrate a commitment to the equal opportunities policy, it is recommended that the responsibility for the policy should be held by a member of senior management.

### 17. Implementing the policy

- 17.1. To ensure that the policy is fully effective, it is recommended that employers:
  - 17.1.1. involve employees in the development and review of the policy;
  - 17.1.2. state the policy clearly;
  - 17.1.3. ensure that overall responsibility for implementing the policy rests with senior management;
  - 17.1.4. make the policy known to all employees and, where reasonably practicable, to all job applicants;
  - 17.1.5. provide training to all employees who may be involved in human resource matters; and
  - 17.1.6. make all new recruits aware of the equal opportunities policy.

### 18. Monitoring the policy

- 18.1. It is recommended that the policy be monitored regularly to ensure that it is working in practice. To this end, consideration could be given to setting up a joint committee consisting of management and employee representatives.

- 18.2. In a small firm with a simple structure it may be quite adequate to assess the deployment and pay scales of employees from personal knowledge.
  - 18.3. In a large and complex organisation a more formal analysis may be useful, for example, by sex, grade and pay in each unit. This may need to be introduced in stages as resources permit. Any formal analysis should be regularly updated and reviewed to enable any necessary action to be taken.
  - 18.4. Sensible monitoring will show, for example, whether members of one sex:
    - 18.4.1. do not apply for employment or promotion, or that fewer apply than might be expected;
    - 18.4.2. are not recruited, promoted or selected for training and development or are appointed/selected in a significantly lower proportion than their rate of application; and
    - 18.4.3. are concentrated in certain jobs, sections or departments.
  - 18.5. The employers should review information obtained from monitoring to ascertain whether or not the pattern of employment and deployment indicates any unlawful discrimination.
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### **Eliminating sexual harassment in employment**

#### **19. Eliminating sexual harassment in employment**

- 19.1. This part of the Code seeks to encourage the development and implementation of policies and practices which establish working environments free of sexual harassment.
- 19.2. A common characteristic of sexual harassment is that employees subjected to it will often be reluctant to complain to their employers. An absence of complaints about sexual harassment does not necessarily mean an absence of sexual harassment. It may mean that the recipients of sexual harassment think that there is no point in complaining because nothing will be done about it, or because it will be trivialised or the complainant subjected to ridicule, or because they fear reprisals.
- 19.3. Implementing the preventive and procedural measures outlined here should facilitate a favourable climate at work.
- 19.4. Both the policy and complaints procedures should be introduced after consultation or negotiation with employee representatives. Strategies to create and maintain a working environment in which the dignity of employees is respected are most likely to be effective where they are jointly agreed.
- 19.5. Employers should also make clear that employees have a duty and responsibility towards creating such an environment and in ensuring that sexual harassment does not occur.

#### **20. Formulating a policy**

- 20.1. As a first step in showing senior management's concern and its commitment to dealing with the problem of sexual harassment, employers should issue a policy statement which expressly states that sexual harassment at work is unlawful and will not be permitted and that employees have a right to complain should it occur.
- 20.2. A policy statement on sexual harassment should include:
  - 20.2.1. a message that management is committed to eliminating and preventing sexual harassment;
  - 20.2.2. a clear statement that sexual harassment will not be tolerated;
  - 20.2.3. the legal definition of sexual harassment;
  - 20.2.4. a behavioural definition of sexual harassment, i.e. some examples of conduct which could amount to sexual harassment;
  - 20.2.5. the options available for dealing with sexual harassment complaints, i.e. informal and formal;
  - 20.2.6. information about the organisation's internal complaint procedures, assuring employees that confidentiality will be observed;
  - 20.2.7. an assurance that no one will be victimised or penalised for coming forward with a complaint;
  - 20.2.8. the names and telephone numbers of officers who are responsible for dealing with complaints, providing information and advice, etc.;
  - 20.2.9. a note about disciplinary action; and
  - 20.2.10. a note that the complainant may lodge a complaint directly with the EOC or take action in the District Court.

#### **21. Implementing the policy**

- **Dealing with complaints**

21.1. A co-ordinator, preferably with special training, should be designated to establish and administer both informal and formal complaints procedures.

- **Promotion and education**

21.2. Effective and regular promotion of the policy is important to a successful programme against sexual harassment in that:

- 21.2.1. it warns that certain offensive conduct is unlawful;
- 21.2.2. it sends out a clear message that management will act against such behaviour;
- 21.2.3. it ensures that all persons in the organisation know what sexual harassment is;
- 21.2.4. it ensures that all persons in the organisation know what to do if they encounter sexual harassment and know that any complaint will be handled effectively and properly; and
- 21.2.5. it assures staff that they are unlikely to be disadvantaged by sexual harassment or be victimised by making a complaint.

21.3. In order to promote the policy, information may be disseminated through:

- 21.3.1. speaking at staff meetings;
- 21.3.2. distribution and re-circulation of policy statements;
- 21.3.3. posting notices; and
- 21.3.4. conducting training and refresher courses

- **Staff training**

21.4. The co-ordinator or any other staff member involved in the complaints handling procedures should receive adequate training to enable sensitive treatment of cases in relation to sexual harassment, for example:

- 21.4.1. **what is sexual harassment:** definitions and examples; the role of power in harassment situations; the reasons why some individuals harass; recognise harassment situations, e.g. who are the workers at risk;
- 21.4.2. **prevention of sexual harassment:** recognise the role of publicity, how to use publicity and available resources effectively; informal monitoring of the workplace; recognise symptoms of harassment; and alert staff of possible acts of sexual harassment; and
- 21.4.3. **dealing with harassment:** skills on responding to enquiries and maintaining privacy and confidentiality; non-judgmental listening skills; informing enquirers of alternative ways of handling harassment other than by making a formal complaint; knowledge of outside bodies that can be approached for assistance or to whom complaints can be made, e.g. the EOC.

## 22. Monitoring the policy

Regardless of whether an informal or formal complaints procedure is in use, it is good practice for employers to monitor and review complaints of sexual harassment and how they have been resolved, in order to ensure that the procedures are working effectively.

## The employee's role

### 23. The employee's responsibilities

- 23.1. While the employer has the main responsibility for eliminating discrimination and sexual harassment, and providing equal opportunities, employees at all levels, especially when they are acting as agents of their employer, have responsibilities too.
- 23.2. Employees may be personally liable for acts committed by them in the course of their employment. They should therefore observe the requirements of the SDO and follow the recommendations of this Code where applicable.
- 23.3. Employees should take note that, under the SDO, it is unlawful for them to sexually harass a co-worker, potential co-worker, an employer or a potential employer.

### 24. Eliminating discrimination

- 24.1. Employees can be proactive in helping to eliminate discrimination on the ground of sex, marital status or pregnancy by becoming familiar with the subject, so that they do not inadvertently discriminate against someone or inadvertently aid their employer to do so.
- 24.2. Whenever appropriate, employees could also encourage their employers to formulate discrimination policies and to implement preventive measures.
- 24.3. Employees are encouraged to be supportive of friends or colleagues who intend, in good faith, to lodge a complaint about discrimination, or have lodged such complaint.

## **25. Eliminating sexual harassment**

- 25.1. Employees have a clear role to play in helping to create a climate at work in which sexual harassment is unacceptable. They can contribute to preventing sexual harassment through an awareness and sensitivity towards the issue and by ensuring that standards of conduct for themselves and for colleagues do not cause offence.
- 25.2. Sexual harassment is not merely a "management problem" and still less a "women's (or men's) problem". All employees have responsibilities as well as rights in respect of the work environment that is created. Sexual harassment, particularly in its less severe forms, can be part of the usual code of behaviour in a workplace. To change this may require each employee to reconsider his or her own attitudes and conduct as well as those of his or her colleagues.
- 25.3. Employees can do much to discourage sexual harassment by making it clear that they find such behaviour unacceptable and by supporting colleagues who suffered such treatment and are considering making a complaint.
- 25.4. A major reason why few sexual harassment complaints are reported is that the person involved is afraid of co-workers' reactions. They do not want to run the risk of being accused by them of spoiling the work climate. Neither do they want to be told that they provoked the harassment themselves or that they cannot take a joke. When employees show through their words and their actions that they find sexual harassment unacceptable, this will provide substantial support to those who are harassed and make it easier for them to come forward to file a complaint.
- 25.5. Employees who are themselves recipients of harassment should, where practicable, tell the harasser that the behaviour is clearly unwanted and unacceptable. Once the offender understands clearly that the behaviour is unwelcome, this may be enough to put an end to it. If the behaviour persists, employees should inform management and/or their employee representative through the appropriate channels and request assistance in stopping the harassment, whether through informal or formal channels.
- 25.6. When telling the harasser that the behaviour is unwanted, if the employee does not want to confront the harasser alone, he or she may want to ask a co-worker or a friend to be present. An alternative to confronting the harasser in person is to write to him or her and keep a copy of the correspondence.
- 25.7. Where an employee feels uncomfortable or unsafe in confronting the harasser directly, the employee may choose to inform management and/or an employee representative in the first instance and request for steps to be taken to deal with the matter.
- 25.8. If the harassment continues, however, the employee should, if possible, seek advice on what to do next. The employee at all times has the option of seeking external assistance.
- 25.9. It is important for an employee subjected to sexual harassment to keep a record of the incident(s) so as to be able to recall exactly what has happened.
- 25.10. Employees are also encouraged to come forward with complaints as soon as possible after the alleged incidents as a lapse in time may, in certain circumstances, weaken a complainant's case.