

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 family status. This present a challenge to all of us - to accept and value differences, and to dispense with stereotypical assumptions concerning people with family status. Employers are encouraged to recast the conventional notion of 'suitability' and focus on the 'ability' of a person rather than the family status.

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 Family Status 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
Family Status Discrimination Ordinance**

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Introduction

1. Purpose of the code

- 1.1 This Code of Practice (the Code) is issued by the Equal Opportunities Commission (EOC) in accordance with the Family Status Discrimination Ordinance (FSDO) ¹. The FSDO aims to eliminate discrimination on the ground of family status and stipulates protection for persons with family status. Family status means the status of having responsibility for the care of an immediate family member ².
 - 1.2 The FSDO gives protection to employees who have responsibility for the care of an immediate family member to engage in employment without being subjected to discrimination.
 - 1.3 The Code is designed to help employees, their colleagues, employers and other concerned parties to understand their responsibilities under the FSDO. 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 ground of family status and victimisation in employment.
 - 1.4 Used in conjunction with the Codes of Practice on Employment issued by the EOC under the Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO), this Code provides guidance on the procedures and systems that can help prevent discrimination and to deal with unlawful acts in employment.
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2. Application of the code

- 2.1 The Code applies to employment in Hong Kong in any establishment ³, unless the employee does his or her work wholly or mainly outside Hong Kong ⁴.
 - 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 ⁵, 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 FSDO.
 - 2.4 The Code has to deal in general terms with discrimination on the ground of family status. In adopting the Code, employers may take into consideration the size and structure of their organisations. Small businesses may require simplified procedures but should nevertheless ensure that their practices comply with the FSDO and the spirit of the Code.
 - 2.5 In addition to the Code, the EOC will, from time to time, issue guidelines on good management practices to assist organisations in implementing the recommendations set out in this Code.
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3. Definitions

- 3.1 **Family status** in relation to a person means that person has responsibility for the care of an **immediate family member**. An immediate family member is a person who is related by blood, marriage, adoption or affinity. ⁶ The types of blood relationships covered by this definition may

include mother, father, brother, sister, son, daughter, grandmother, grandfather, grandchild, aunt, uncle, cousin, nephew and niece. Relationship of marriage is that of husband and wife who are lawfully married. Relationships of affinity are those created by marriage, and these may include, for instance, mother-in-law and father-in-law.

- 3.2 The definition of family status refers to the status of having responsibility for the care of a particular person who is an immediate family member, and the operative factor is whether there exists a specific relationship of being usually responsible for the care of such a person. For example, if a man has an aunt who has been living with him and his wife for years, then he has established family status in relation to his aunt as he has assumed the responsibility for her care. However, if that man has a sick sister who lives in her own home with her husband and children, there does not appear to be a relationship of responsibility for the care of the sister, then he might not have established family status in such circumstances.
- 3.3 For practical purposes, listed below are the definitions of discrimination (direct and indirect) and victimisation that apply throughout this document.
- 3.3.1 Direct discrimination occurs when, in comparable circumstances, a person who has family status is treated less favourably than a person who does not have family status. ⁷
- 3.3.2 Indirect discrimination occurs when the same requirement is applied to persons with family status and persons without family status, but is in practice discriminatory in its effect. When an employer applies a certain requirement to all persons irrespective of their family status and, as a result, the proportion of persons with family status who can comply with it is considerably smaller than the proportion of persons without family status who can comply, and it is to the detriment of those with family status, it may be discriminatory. However, if the employer can demonstrate that the requirement is justifiable the imposition of such a requirement would not be unlawful. For example, applying a requirement to applicants that employees must be able to re-locate overseas at short notice could exclude a large proportion of applicants with family responsibilities and could be to their detriment because those applicants with family responsibilities may not be able to re-locate overseas at short notice. However, it would **not** be indirect discrimination if the employer has justifiable grounds for such a condition or requirement for the particular job. ⁸
- 3.3.3 Victimisation arises where a person (the discriminator) treats another person (the person victimised) less favourably than another person in comparable circumstances because the person victimised or a third person has done or intends to do the following: ⁹
- (i) bring proceedings against the discriminator or any other person under the FSDO;
 - (ii) give evidence or information in connection with proceedings brought by any person against the discriminator or any other person under the FSDO;
 - (iii) otherwise do anything under or by reference to the FSDO in relation to the discriminator or any other person; or
 - (iv) allege that the discriminator or any other person has committed an act which is unlawful under the FSDO.

Implications of the FSDO on Employment

4. General liability

- 4.1 According to the FSDO, 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. The liability of employees and employers, agents and principals as described in this section shall not apply for the purpose of criminal proceedings ¹⁰.

- 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, in any legal proceedings under the FSDO, this Code shall be admissible in evidence and, if any provision of this Code appears to the court to be relevant to any questions arising in the proceedings, it shall be taken into account in determining that question.¹¹
- 4.3 When the EOC investigates a complaint of discrimination 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 FSDO.¹²
- 4.5 This Code may be used as a guide 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.¹³

5. Discrimination in employment on the ground of family status

- 5.1 Under the FSDO, it is unlawful to discriminate in employment on the ground of family status. 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 family status could lead to discrimination. Do not, for example, assume that persons with family status would not commit to their work. If they are thereby refused employment on this ground, it would be unlawful.
- 5.3 As family status is a ground of discrimination, employers should not directly or indirectly discriminate against persons who have the responsibility for the care of an immediate family member. However, under the FSDO,¹⁴ restriction of employment in the following situations is exempted :
- (i) where the person concerned is an immediate family member of an employee of *the employer*; **or**
 - (ii) where the person concerned is an immediate family member of an employee of *another employer*,
and there is a significant likelihood of collusion between the person and that employee
and the collusion would result in damage to the business of the employer concerned.
- 5.4 An employer who wishes to claim the exemption referred to in paragraph 5.3 has the onus to demonstrate, after making reasonable enquiries, that there is a significant likelihood of collusion and that the collusion would result in damage to the employer's business.

- 5.5 Restrictions of employment may include refusing to offer a job, or stipulating restrictive terms in a job offered or restrictive conditions on existing employment.
- 5.6 What is considered to be damage to the business of the employer will depend on the nature of the business and the individual facts in each case.
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6. Discrimination in employment by way of victimisation

- 6.1 Under the FSDO, it is unlawful to discriminate in employment by way of victimisation. Victimisation in employment occurs if a person treats another person less favourably because the person being victimised or any other person has done or intended to do the following ¹⁵:
- 6.1.1 make a complaint of discrimination under the FSDO;
 - 6.1.2 act as a representative on behalf of a person complaining of discrimination (whether the complaint is made to the EOC or within the organisation);
 - 6.1.3 give evidence or information in connection with any proceedings under the FSDO, e.g. acting as a witness in a court case;
 - 6.1.4 provide information to the EOC for the purposes of an investigation by the EOC;
 - 6.1.5 provide information to the organisation in respect of a complaint of discrimination; or
 - 6.1.6 allege that someone has committed an act which is unlawful under the FSDO. ¹⁶
- 6.2 Victimisation in employment also covers the situations listed under paragraph 5.1 of this Code.
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7. Positive action

- 7.1 The FSDO allows for positive action whereby an act targeting persons with family status 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.
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8. Partnership, membership in workers' and employers' organisations and employment agencies

- 8.1 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.
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Practical Guidelines for Employers

9. Eliminating discrimination in employment

- 9.1 The primary responsibility of each employer is to ensure that there is no discrimination at work on the ground of family status. The FSDO makes it unlawful to discriminate on such ground.
- 9.2 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 the way is left open for discrimination to occur.

- 9.3 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:
- 9.3.1 make faster decisions because the criteria for decisions are clear;
 - 9.3.2 make better decisions because the criteria directly relate to work performance; and
 - 9.3.3 form the basis for effective job evaluation.
- 9.4 **Consistent selection criteria** should not make reference to family status. They should be specifically related to the job, such as:
- 9.4.1 the type of experience the job holder should have, e.g. merchandising experience;
 - 9.4.2 the amount of experience required for the job, e.g. five years experience;
 - 9.4.3 the educational qualifications, if necessary, e.g. a diploma in merchandising;
 - 9.4.4 the specific technical and managerial skills, e.g. use of certain computer software, proficiency in Cantonese and English;
 - 9.4.5 the personal qualities required for the job, e.g. willingness to travel, willingness to meet people of different backgrounds; and
 - 9.4.6 the physical and other skills required for the job, e.g. eye-hand co-ordination for delicate assembly work.
- 9.5 In line with good management practice, it is recommended that employers:
- 9.5.1 develop **consistent selection criteria** as one of the first steps in establishing a fair recruitment practice; and
 - 9.5.2 from time to time re-examine the criteria to see whether they still apply or need to be modified.

10. Guidelines for recruitment

- 10.1 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.
- 10.2 Do not assume that only persons without family status are able to do certain kinds of work. For example, employees with small children to care for can work late shifts just as easily as those without small children to care for.
- 10.3 Employers should ensure that family 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.
- 10.4 In addition, employees handling applications and conducting interviews should be trained to avoid acts of discrimination.

• Advertising

- 10.5 Employers should ensure that the contents of advertisements are based on **consistent selection criteria**.¹⁸ In line with good management practice, it is recommended that employers:
- 10.5.1 advertise for jobs on the basis of **consistent selection criteria** in order to encourage applications from suitable applicants, regardless of family status, and ensure that persons with family status will not be treated less favourably than

persons without family status or will not be indirectly discriminated against;

- 10.5.2 review all advertising materials and accompanying literature relating to employment to ensure that such materials do not present persons with family status in stereotypical roles. Persons with family status should not be portrayed as being of limited use to an organisation because they have responsibility for the care of an immediate family member. Their contribution may be equally as significant as that of persons without family status; and
- 10.5.3 avoid asking for information about children or dependants at the application stage as this may indicate an intention to discriminate on the ground of family status (although asking about dependants after an offer of employment is made is acceptable where the request relates to information for dependant benefits).

- **Shortlisting**

- 10.6 In line with good management practice, it is recommended that employers:
 - 10.6.1 use **consistent selection criteria** as the basis for shortlisting, matching these objective standards against the corresponding experience and capability of each applicant;
 - 10.6.2 guard against making assumptions in general about the capabilities of persons on the ground of family status, which may not be true of the individual. For example, if the job involves a lot of travelling, do not assume that an applicant with young children cannot perform the duties of the job; and
 - 10.6.3 train personnel staff to recognise the danger of such generalisations and to use objective comparisons when shortlisting.

- **Vetting applications**

- 10.7 In line with good management practice, it is recommended that employers:
 - 10.7.1 avoid asking questions on application forms which could lead to discrimination on the ground of family status, for example:
 - The number of children and plans to have children
 - The child care arrangements
 - The number of dependants and care arrangements
 - 10.7.2 with the exception of positive action, ¹⁹ process applications from persons with and without family status in exactly the same way.

- **Interviewing**

- 10.8 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:
 - 10.8.1 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 be brought to their attention that it is unlawful to instruct or put pressure on others to discriminate;
 - 10.8.2 only ask questions at job interviews that relate directly to the essential requirements of

- the job. For example, if it is an essential requirement of the job that the employee be available to work late on a regular basis, ask the applicant whether they are able to work late on a regular basis, do not ask whether they have any family responsibilities;
- 10.8.3 ensure that, where it is necessary to assess whether personal circumstances will affect performance of the job (for example, where it involves extensive travel or unsociable hours), interviewers discuss this objectively without questions about family status, children and domestic obligations;
- 10.8.4 collect information related to dependant benefits necessary for personnel records only after a job offer has been made;²⁰ and
- 10.8.5 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.²¹
- 10.9 It is a good practice to record, immediately after the interview, the assessment that each interviewer has formed of 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 family status bias.

- **Post-hiring enquiries**

- 10.10 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 FSDO 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 10.7.1 for example of pre-employment questions that should be avoided.)
- 10.11 As an example, it is acceptable, after hiring, to request information regarding dependants 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

- 10.12 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 FSDO and follow the recommendations in this Code as far as practicable.
- 10.13 Where appropriate, employers should specify that vacancies are open to persons regardless of family status when notifying employment agencies or employment services. This is especially important when a job has traditionally been viewed as one done by a person without family status.

11. Guidelines for terms and conditions of employment, benefits, facilities and services

- 11.1 Under the FSDO, it is unlawful to discriminate on the ground of family status in the terms and conditions of employment or access to benefits, facilities or services. This applies both to 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.
- 11.2 In addition to ensuring that persons with family status are not treated less favourably than persons without family status, employers may also consider taking a more flexible approach to certain conditions of employment²² such as flexible working hours.

12. Guidelines for promotion, transfer and training

- 12.1 It is unlawful for employers to discriminate on the ground of family status in the way they give opportunities for promotion, transfer or training. In line with good management practice, it is recommended that employers:
- 12.1.1 where an appraisal system exists, examine the assessment criteria to ensure that employees are promoted on merit and the criteria adopted are not discriminatory. Objective standards for performance measure should be established as far as possible;
 - 12.1.2 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;
 - 12.1.3 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 who are eligible; ²³
 - 12.1.4 assess all possible candidates, and if promotion is by nomination, ensure that everyone suitable is considered and that nobody with potential has been overlooked;
 - 12.1.5 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; ²⁴
 - 12.1.6 review and change rules which restrict or preclude transfer between certain jobs if they are found to be discriminatory; and
 - 12.1.7 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 employees with and without family status, the cause should be identified and, if necessary, remedied to ensure that it is not discriminatory.
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13. Guidelines for dismissals, redundancies and unfavourable treatment of employees

- 13.1 It is unlawful to discriminate on the ground of family status by dismissing the employee or subjecting him or her to any other detriment. In line with good management practice, it is recommended that employers:
- 13.1.1 ensure that persons with family status are not disciplined or dismissed for performance or behaviour which would be overlooked or condoned in persons without family status;
 - 13.1.2 review redundancy procedures affecting a group of employees so as to ensure that there is no discrimination and to remove any effects which could be disproportionate and unjustifiable;
 - 13.1.3 ensure that conditions of access to voluntary redundancy benefits are available on equal terms to all employees regardless of family status in the same or similar circumstances;
 - 13.1.4 ensure that when there is re-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; and
 - 13.1.5 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. ²⁵
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14. Guidelines for grievance procedures

- 14.1 In line with good management practice, it is recommended that employers:
- 14.1.1 take particular care to ensure that employees who have in good faith taken action under the FSDO do not receive less favourable treatment than other employees, for example by being disciplined or dismissed;
 - 14.1.2 design an internal grievance procedure or designate an officer to deal with complaints concerning family status discrimination and victimisation within an organisation. These procedures should be communicated to all staff and be reviewed from time to time;
 - 14.1.3 advise employees to use the internal grievance procedures, where appropriate, but without prejudice to the individual right to apply to the EOC or the court;
 - 14.1.4 deal with all complaints of discrimination or victimisation 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
 - 14.1.5 handle disciplinary procedures uniformly.
- 14.2 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.²⁶

Equal Employment Opportunities Policies

15. Formulating a policy to eliminate discrimination on the ground of family status

- 15.1 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.
- 15.2 The organisation should also use employment procedures and practices which do not discriminate on the ground of family status and which provide equal opportunities for all employees. The details of the policy will vary according to the size of the organisation.
- 15.3 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.
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16. Implementing the policy

- 16.1 To ensure that the policy is fully effective, it is recommended that employers should :
- 16.1.1 involve employees in the development and review of the policy;
 - 16.1.2 state the policy clearly;
 - 16.1.3 ensure that overall responsibility for implementing the policy rests with senior management;
 - 16.1.4 make the policy known to all employees and, where reasonably practicable, to all job applicants;

- 16.1.5 provide training to all employees who may be involved in human resource matters; and
 - 16.1.6 make all new recruits aware of the equal opportunities policy.
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17. Monitoring the policy

- 17.1 It is recommended that the policy be monitored regularly to ensure that it is working in practice. To this end, consider setting up a joint committee consisting of management and employee representatives.
- 17.2 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.
- 17.3 In a large and complex organisation a more formal analysis may be useful. 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.
- 17.4 Sensible monitoring will show, for example, whether persons with family status:
 - 17.4.1 do not apply for employment or promotion, or that fewer apply than might be expected;
 - 17.4.2 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
 - 17.4.3 are concentrated in certain jobs, sections or departments.
- 17.5 Employers should review information obtained from monitoring to ascertain whether or not the pattern of employment and deployment indicates any unlawful discrimination.

The Employee's Role

18. The employee's responsibilities

- 18.1 While the employer has the main responsibility for eliminating discrimination and providing equal opportunities, employees at all levels, especially when they are acting as agents of their employer, have responsibilities too.
- 18.2 Employees may be personally liable for acts committed by them in the course of their employment. They should therefore observe the requirements of the FSDO and follow the recommendations of this Code where applicable.

19. Eliminating discrimination

- 19.1 Employees can be proactive in helping to eliminate discrimination on the ground of family status by becoming familiar with the subject, so that they do not inadvertently discriminate against someone or inadvertently aid their employer to do so.
- 19.2 Whenever appropriate, employees could also encourage their employer to formulate policies against discrimination and to implement preventive measures.
- 19.3 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.