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Panel on Constitutional Affairs

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for the meeting on 17 May 2010**

Code of Practice on Employment under Disability Discrimination Ordinance

Purpose

This paper provides background information on the Code of Practice on Employment under the Disability Discrimination Ordinance (Cap. 487) ("the Code") and summarizes the major issues raised by Members of the Legislative Council ("LegCo").

Background

2. The Disability Discrimination Ordinance ("DDO") came into effect on 20 September 1996. The current Code has been in use since 1997 to provide general guidelines to employers in Hong Kong on implementing equality of employment opportunities for persons with disability.

3. Under section 65 of DDO, the Equal Opportunities Commission ("EOC") may issue codes of practice containing such practical guidance as it thinks fit for the purposes of -

- (a) the elimination of discrimination;
- (b) the promotion of equality of opportunity between persons with a disability and persons without a disability generally; and
- (c) the elimination of harassment and vilification.

When proposing to issue a code of practice, EOC "shall prepare and publish (otherwise than in the Gazette) the code, shall consider any representations made to it about the code and may modify the code accordingly". In the course of preparing any code of practice for eventual publication, EOC is also required to consult with such associations, organizations, associations of organizations or bodies as appear to the Commission to be appropriate, including any of the associations, organizations,

associations of organizations or bodies specified by the Secretary for Labour and Welfare by notice in the Gazette.

4. The Code is subject to negative vetting by LegCo. A failure on the part of a person to observe the Code does not render that person liable in any proceedings. However, relevant provisions of the Code shall be admissible in evidence for the determination of any questions arising from any proceedings under DDO.

Relevant issues raised by Members

5. EOC issued the current Code for public consultation before its publication in the Gazette in November 1996, and briefed the Panel on Home Affairs on 25 October 1996. Panel members raised queries on the provisions of the Code relating to arrangement of pre-employment medical examination, provision of exception where absence of disability was genuine occupational qualification, and guidelines for dismissals, redundancies and other unfavorable treatment of employees. EOC's responses were as follows -

- (a) A medical doctor in a pre-employment medical examination would mainly examine whether an applicant was physically fit for a job and free from infectious disease. With the possible adoption of the suggestion for employers to inform applicants about details of the medical examination, applicants would be in a better position to judge the relevance of the medical examination to the job;
- (b) the provision for exception where absence of disability was a genuine occupational qualification was drawn up in accordance with section 12 of DDO; and
- (c) the phrase "or not materially different" in the provision relating to guidelines for dismissals, redundancies and other unfavourable treatment of employees was added to avoid possible abuse by employers in the interpretation of "same circumstances" in the provision.

6. The current Code was gazetted on 15 November 1996. The House Committee formed a subcommittee to study the Code, together with the Code of Practice on Employment under the Sex Discrimination Ordinance ("SDO"), the Sex Discrimination (Formal Investigations) Rules, the Sex Discrimination (Investigation and Conciliation) Rules, the Disability Discrimination (Formal Investigations) Rules and the Disability Discrimination (Investigation and Conciliation) Rules.

7. On the provisions of the Code relating to equal pay for work of equal value, the majority of Subcommittee members supported the principle, but had different views on the time frame within which employers were expected to implement the principle. Some Subcommittee members expressed concern about the sentence "Employers

should maintain the principle of equal pay for equal work and are encouraged to consider progressive implementation of equal pay for equal work in the relevant provision in the Code. They considered that it might allow employers to procrastinate implementation of the principle of equal pay for equal value. These Subcommittee members also queried whether "the existence of internal labour shortage in a particular job classification" and "economic factors" should be relevant considerations for individual differences in pay for work of equal value. Some other members expressed the view that overseas countries had experienced difficulties in implementing the principle, and relevant provisions in the Code relating to the principle should be deleted.

8. According to EOC, it realized that there was a lack of local expertise and established method to assess whether two jobs were of equal value and such assessment would be a very complex and costly exercise. In view of these limitations, the Code encouraged employers to consider progressive implementation of equal pay for work of equal value and, in particular, encouraged large organizations in both the public and private sectors to take the lead. EOC undertook to commission a feasibility study in 1997 to study the basis on which the principle of equal pay for work of equal value could be implemented in Hong Kong.

9. Members may wish to note that EOC commissioned a Feasibility Study on Equal Pay for Work of Equal Value in 1997 and a Consultancy Study on the same subject matter in 2000. A set of guidebooks to strengthen public understanding on the concepts of Equal Pay for Equal Work and Equal Pay for Work of Equal Value, for the purpose of eliminating pay discrimination on the ground of gender have been issued.

Recent development

10. EOC issued the proposed revised Code on 8 April 2010 for public consultation until 8 July 2010.

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