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**Paper for the Subcommittee on Revised Code of Practice on
Employment under the Disability Discrimination Ordinance**

This paper sets out the latest position of the Equal Opportunities Commission (EOC) in relation to the definition of future disability as set out in paragraph 3.4.2 of the Code of Practice on Employment under the Disability Discrimination Ordinance (2011) (LC Paper No. CB(2)1710/10-11(01)) (Code)¹.

Background

2. Paragraph 3.4.2 of the Code states that future disability means a disability that might develop in the future, with the case, *K & Ors v Secretary for Justice* [2000] 3 HKC 796 (Case), cited in footnote 7 for reference. An example is then given of an employee, who is a Hepatitis B carrier, being dismissed because her employer thinks that she would develop liver cancer in the future (Example). It is suggested that her employer could be liable for disability discrimination.

3. At the meeting of the Subcommittee held on 11 May 2011, the EOC, in response to our enquiry raised in respect of the definition of future disability as provided in the said paragraph, confirmed that the meaning so stated was accurate. We, however, explained that future disability, as held in the Case, means a future disability predicated by a past disability and the risk that it refers to is the possibility of recurrence of the past disability, not the risk of acquiring any disability (copy of the relevant extract of the Case is at Annex)². Accordingly, the definition of future disability as mentioned in that paragraph fails to indicate that a future disability is a future disability predicated by a past disability.

¹ Please note that the name of the Revised Code of Practice on Employment under the Disability Discrimination Ordinance is proposed to be changed to "Code of Practice on Employment under the Disability Discrimination Ordinance (2011)".

² Please see pages 805E to 806G of the Case. It should be noted that one of the deputations has also raised similar comment earlier.

Latest EOC's Position

4. On 12 May 2011, EOC informed the Legislative Council Secretariat that amendments would be proposed to paragraph 3.4.2 of the Code and the Example to reflect the meaning of future disability as held in the Case.

Encl.

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(iii) of the definition, in the form of his genetic risk of acquiring the disorder in the future. A

The definitions in s 2(1) (emphasis added) are set out below. Paragraph (g) includes schizophrenia:

‘disability’ (殘疾), in relation to a person, means —

- (a) total or partial loss of the person’s bodily or mental functions; B
 - (b) total or partial loss of a part of the person’s body;
 - (c) the presence in the body of organisms causing disease or illness;
 - (d) the presence in the body of organisms capable of causing disease or illness;
 - (e) the malfunction, malformation or disfigurement of a part of the person’s body; C
 - (f) a disorder or malfunction that results in the persons learning differently from a person without the disorder or malfunction;
 - (g) *a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour,* D
- and includes a disability that —
- (i) presently exists;
 - (ii) previously exists but no longer exists;
 - (iii) *may exist in the future; or*
 - (iv) *is imputed to a person* E

The above definition of ‘disability’ is almost a duplication of the Australian model, the difference being only in the enumeration of the last four paragraphs which appear as (h)-(k) in the definition in s 4(1) of the (Cth) Disability Discrimination Act 1992. Each of these four paragraphs is descriptive of the disabilities in (a)-(g) of the Hong Kong model, while arguably an improvement, does not change the meaning. F

The following decisions of the Australian Human Rights and Equal Opportunities Commission support both the plaintiffs’ and the defendant’s arguments, but without a close examination of the statutory language.

In *Ralph v Pemar Pty Ltd* (1999) HREOCA 16 the claimant’s associate had a Hepatitis C virus and therefore had a disability under (c) or (d) of the definition. The claimant was at risk of becoming infected because of the association but there was no evidence that he had become infected. He alleged discrimination both on the ground of the disability of his associate and on the ground of a disability imputed to him. The Commissioner upheld the complaint on both grounds. H

In *Beattie v Maroochy Shire Council* (1996) HREOCA 40 the claimant’s children were refused entry to a child care center on the ground that they had a disability which may ‘exist in the future’ in the form of any of the infectious diseases they had not been vaccinated against. The Commissioner held that ‘the fact that the children may at some undefined future time contract such an illness gives rise to the somewhat artificial I

A conclusion that at the relevant time each was subject to a disability as defined by the Act’.

There are, however, fundamental objections to each construction.

‘A disability imputed to a person’

B The objection is that the plaintiffs’ interpretation is not supported by the ordinary meaning of ‘impute’. The primary meaning, according to the New Shorter Oxford Dictionary is:

C to regard (esp. a fault or crime) as being done or caused or possessed by; attribute or ascribe to the discredit (less commonly, the credit) of.

D Neither FSD nor CED claimed or assumed that the plaintiffs had a mental disorder. They only attributed to them an increased lifetime risk of acquiring a disorder. That attribution of genetic risk did not mean that the plaintiffs were regarded as having the disability itself at the time of the discrimination. The disability, therefore, was not ‘imputed’ to them.

‘A disability that may exist in the future’

E The objection to importing future risk of acquiring a disability into the words ‘may exist in the future’ is that such a risk is shared by everyone. Aside from congenital disorders, which are present from birth, any person might one day, as a result of illness or other misfortune, acquire any of the disabilities set out in (a) to (g) of the definition. These include the disorder of schizophrenia. On the evidence in this case, the lifetime risk for the general population of developing schizophrenia has actually been quantified at 1%. F

G ‘Disability’ is a relative term. An interpretation of para (iii) as a disability in itself consisting of a risk, which the whole world shares, of acquiring any of the specified disabilities is an inherent contradiction. This objection is not overcome by interpreting (iii) as words of a special type, or degree, of risk. If that meaning were intended it would have been spelt out.

H It is not obvious, all the same, what other meaning ‘may exist in the future’ should have. If they are simply words of future tense they appear to be unnecessary, since a future event will one day be present. Para (i), which provides for present disabilities, also appears to be unnecessary. This suggests that (i) and (iii) are intended to explain (ii) and should be read together. On this view, (iii) refers to a future disability predicated by a past disability and the risk it refers to is the possibility of recurrence of the past disability, not the risk of acquiring any disability. I find support for this view in the Introduction to the Standard Rules on the *Equalisation of Opportunities for Persons with Disabilities* promulgated by the United Nations General Assembly (Resolution 48/96, Annex, of 20 December

1993) upon which all disability discrimination legislation is based. Paragraph 17 of the Introduction provides (emphasis added):

The term 'disability' summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be *permanent or transitory* in nature.

'Transitory' does not imply recurrence but it takes the definition a step in that direction. The concepts of transitory and recurring disabilities are especially apposite to mental disorders. These disorders are not identified by biological or neurological signs but by the appearance of symptoms. If the symptoms appear for a time, then disappear before re-appearing, a past disorder will have become present again. In relation to mental disorders, then, there is reason to incorporate in the definition references to time past and future.

Another possible reason for the reference to future time in (iii) is that it is intended to include degenerative conditions, such as multiple sclerosis, which have not progressed to the point of malfunction but, predictably, will do so. Such progressive disorders are included in the more detailed framework of the definition of disability in the corresponding UK legislation (Disability Discrimination Act 1995). They do not appear to come within (e) of the Hong Kong/Australian model without the assistance of (iii) ((j) in the Australian Act).

In these ways, references in Hong Kong/Australian legislation to present, past and future in paras (i), (ii) and (iii)/(h), (i) and (j) may relate to disabilities (e) and (g). How they could relate to the other disabilities is still not clear. Despite this difficulty, the interpretation I have arrived at is much to be preferred to the other possible interpretations because they are either otiose (future tense only), or oxymoronic (risk of acquiring any disability). In my view para (iii) of the definition does not mean that a genetic risk, or any kind of risk, of acquiring any disability is a disability in itself. Insofar as the paragraph imports risk, it refers only to the risk of recurrence of a past disability.

Discrimination on the ground of the disability of an associate

The parents' disabilities not having been imputed to the plaintiffs, and the plaintiffs' genetic liability (if any) to develop a mental illness in the future not amounting to a disability in itself, it will follow that the discrimination in each case was not on the ground of a disability of the plaintiff under s 6(a). The discrimination was only on the ground of the disability of an associate of the plaintiff under s 6(c).

A *The case of Y*

There is a dispute of fact as to whether Y's father suffered from the disorder of schizophrenia or a delusional disorder. Both disorders are within (g) of the 'disability' definition but the latter disorder does not carry an established genetic liability. The issue of which disorder the father of Y suffered from will be relevant to the issue of whether the discrimination was lawful or not and I will return to it later. In the meantime it is enough to note that FSD discriminated against Y on the ground of his father's disability.

Y's father, however, died several years before Y applied to FSD for employment. Because Y's associate was no longer living at the time of discrimination it is necessary to read 'associate' as 'associate or former associate' to establish a discrimination under s 6(c). In *Ryan v Dennis* (1998) HREOCA 36 Commissioner Innes held that an interpretation to this effect was necessary to achieve the objects of the Disability Discrimination Act. It is not an issue in this case. In his closing submission Mr Fleming for the defendant accepted that if the plaintiff had no disability and the discrimination was on the ground of the disability of the associate, 'it makes no difference to the legal argument'. The defence in DCEO 4/99 (para 4) admits that Y 'is a person with an associate with a disability' within the meaning of the Ordinance. I take this to amount to an admission that the above interpretation is correct.

THE LEGALITY OF THE DISCRIMINATION

The statutory provisions

Section 11(1)(c) makes it unlawful to discriminate against a person with a disability by refusing to offer that person employment. Section 12 provides for exceptions. Where, as in these cases, the discrimination is on the ground of a disability of an associate under s 6(c), both s 11 and s 12 must be read subject to s 2(7) which provides:

2(7) For the purposes of section 6(c), references in this Ordinance to —

- (a) a person with a disability (or words to the like effect) shall be construed to mean a person (and whether or not he has a disability) with an associate with a disability;
- (b) a person without a disability (or words to the like effect) shall be construed to mean a person without an associate with a disability.

Section 11, adapted in terms of s 2(7), provides (words in italics replacing those in parenthesis):

11. Discrimination against applicants and employees

- (1) It is unlawful for a person ('the employer'), in relation to employment by him at an establishment in Hong Kong, to discriminate against