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香港人權監察就「《殘疾歧視條例》僱傭實務守則修訂本」的意見書
2011 年 5 月 23 日

香港人權監察感謝立法會在今年 4 月 28 日發出的邀請本會於五月六日到立法會公聽會，就「《殘疾歧視條例》僱傭實務守則修訂本」表達意見，鑑於時間緊迫，當日只有六名團體代表到場，不少沒出席的團體代表指他們連細閱修訂本的時間也沒有，遑論提供書面意見，最理想的做法是押後通過修訂本，惟人權監察明白現實上難以做到，故在此最後階段，提出以下十點建議，期望立法會議員和平等機會委員會認真考慮。

1. 「修訂本 2.8 段」: 右邊的索引是條例第 14(4)條，查該條文並非說明「受僱用中」的概念，應將標題及該段提到的「受僱用中」改爲「視爲在該機構執行工作」。至於「受僱用中」(英文版爲 “is the course of his employment”) 是有關條例第 48 條有關僱主轉承法律責任的概念。(見附件 1：條例第 14(4)條及第 48(1)條)

2. 「修訂本 3.4.2 段」:「將來的殘疾—現在雖未出現，但在將來可能變成的殘疾[7]」。註釋 7 是「見 *K 及其他人 訴 律政司司長* [2003]3 HKC 796」。我們建議刪去「現在雖未出現，但在將來可能變成的殘疾」，而代之以「過往的殘疾的復發風險」。註釋 7 所指的案例明確指出，每個人均有患病或有其他殘疾的風險，將來的殘疾肯定不應作如此過於廣泛的解釋，正確的理解應指過去的殘疾的復發風險 (the risk of recurrence of a past disability)。而註釋 7 不應只列出案例的首頁，還應列出有關段落，故註釋 7 應寫成「見 *K 及其他人 訴 律政司司長*[2003] 3 HKC 796, 804A-805D, 806F (判案書第 20-23 段) (見附件 2)

3. 「修訂本 4.21 段及 8.10 段」: 此兩段所提及的「情感創傷」(英文版 injury to feelings) 應改爲「感情的傷害」。《個人資料 (私隱) 條例》第 66(2)條，”injury to feeling” 的中文本乃「感情的傷害」，而現時判案書亦不會將 ”injury to feelings”譯作「情感創傷」。

4. 「修訂本 5.13 段」: 該段引述了 Cosma 案例，該案例指搬運工人受傷後一段時間，仍未能復原，由於他未能執行原本職務，故解僱此工人並不違法。人權監察認爲應增加此案例一些背景描述，以減少僱主濫用此案例來解僱員工的情況 (參考 Cosma 判案書第 22-25, 43-49 段)，見附件 3) (間線部分爲本會的修改建議)：

「*Cosma v Qantas Airways Ltd.* [2002] FCA 640：

Cosma 先生受僱於航空公司，任職停機坪搬運工人，他 1991 年工作時受傷。

長時間放病假後，他被安排擔任一些文書及其他輕省的工作一段長近六年的時間，作爲康復計劃的一部分。但有關安排未能協助他重新執行搬運工人的原本職務，加上公司未能在公司內安排其他長期工作適合 Cosma 先生，(見判案書第 46-48 段)，附件 1)，而公司不可能無了期爲他安排替工，公司遂解僱他。法庭裁定 Cosma 先生因其他殘疾而無法執行他作爲搬運工人的工作固有要求，故有關解僱並不違法。」

5. 「修訂本 7.22 段」:「一般而言，僱主可要求員工在申請病假時附上醫生證明，說明該僱員的病況及建議的缺勤時間，某些情況下，可能需要更詳細的醫療報告。」誠如梁耀忠議員在公聽會指出，上述條文可能被僱主濫用，例如缺勤一小時，僱主也要求員工出示醫生證明。此外，醫生證明書(俗稱醫生紙) 一般只描述疾病概況，如發燒、感冒或背痛，倘僱主按上述引文要求僱員提供醫生證明，「說明」病況，那僱員便需申請醫療報告，此做法通常無必要和擾民。故建議刪去上述條文，倘議員認爲未必恰當，可考慮以下修訂 (間線部分爲本會的修改建議)：

「一般而言，僱主可要求員工在缺勤一定的日數 (a number of days) 後，申請病假時附上醫生證明書，~~說明~~指明該僱員的病況及建議的缺勤時間，某些情況下，可能需要更詳細的醫療報告…」

6. 「修訂本 8.3 段」：有關「僱用條款」方面，主要有 (但不限於) 下列各項：「8.3.1 薪金及福利」。我們建議修訂爲：「8.3.1 薪金 (時薪、日薪還是月薪？膳食時間及休息日是否有薪？) 及福利」，鑑於此乃最低工資實施後的首份僱傭實務守則，宜將薪金最具爭議之處列出，減少勞資雙方糾紛，尤其殘疾人士薪金方面通常遇到不利情況，若在此提醒勞資雙方將僱傭條款清楚訂明，將令僱傭合約更爲明確，減少爭議。

7. 「修訂本 8.5 段」：誠如李鳳英議員在公聽會上表示，這部分應先說明何謂「同工同酬」和「同值同酬」，否則，市民不明白箇中含意，將更難落實有關原則。查現行守則 (1997 年版) 本已清楚界定何謂「同工同酬」及「同值同酬」，且說明薪酬高低的考慮因素，故此，人權監察建議將現行守則的 13.3 至 13.9 段，加在「修訂本 8.5 段」之前，現將 13.3 至 13.9 段引述如下：

「同工同酬

13.3. 在僱傭條款及條件方面，僱主應維持同工同酬的原則，換句話說， 有殘疾和沒有殘疾的僱員從事「同類工作」或相同工作時，有權享有相同的薪酬。「同類工作」指性質大致 相同的工作，而就僱傭條款及條件而言，兩者所做的工作實際上並無重大分別。

13.4. 職位名稱、職責說明或合約規定的責任有別，未必意味工作有所不同，關鍵在於在職人士 實際執行的工作。有關工作是否屬「同類工作」的問題，可就其涉及的工作類型以及所需的技能和 知識而作概括性考慮。

同值同酬

13.5. 與同工同酬有關的原則就是同值同酬。有殘疾的僱員承擔職務的工作要求若與其沒有殘疾的 同事的要求一般高，即使兩者擔任不同工作，他們仍應獲得相同的薪酬和福利，換句話說，同等價值 的工作應獲得相同薪酬。

13.6. 從外國經驗所得，不同員工擔任的工作雖不同，但仍可按照工作對員工要求的努力、技術、責 任感及工作條件等作比較。 僱主可根據市場供求及個人工作表現釐定個別職員的薪酬，卻不應純以殘疾 爲理由而支付較低薪酬予擔任相同價值工作的有殘疾的僱員。

13.7. 僱主應維持同工同酬的原則，並宜考慮逐步實施同值同酬。執行這原則需要對同一機構內的不同 工作崗位進行客觀和專業的評估，或實行其他經事實證明爲不含歧視成份而又能達致酬勞均等的方法。公營 或私營的大機構，如具備良好的人力資源部門，均可率先執行。

薪酬高低的考慮因素

13.8. 薪酬有高低之分並非歧視的表現。每人情況不同，應作個別考慮。從外國經驗所得， 同工或同值卻不同酬的原因有下列幾方面：

13.8.1. 所評估的工作表現不同；

13.8.2. 服務年資不同；

13.8.3. 依照客觀的工作標準重估及調低僱員的職級；

13.8.4. 職位屬臨時見習性質；

13.8.5. 某一工作類別在機構內出現人手短缺；

13.8.6. 職位在再評級時被調低，但擔任該職位的員工繼續按先前的薪酬水平支薪；

13.8.7. 按區域釐定工資，例如因爲僱員在不同地點工作而獲得額外報酬；及

13.8.8. 經濟因素，例如某類熟練技工暫時出現短缺。

13.9. 此外，該等考慮因素必須：

13.9.1. 確實存在(例如沒有殘疾的僱員比有殘疾的僱員經驗豐富)；

13.9.2. 是薪酬高低的真正原因(即僱主必須訂定一套全體僱員同樣適用 的工資釐定制度，亦會對富經驗的員工予以獎勵)；

13.9.3. 爲薪酬差距提供合理解釋(即經驗豐富員工獲得較高薪酬並非不合理)；及

13.9.4. 達到僱主所定的預期目標(例如，有證據顯示，由於沒有殘疾的僱員的經驗豐富， 他的工作表現要比有殘疾的僱員出色)。」

8. 「修訂本 8.21.6 段」:「若僱員的表現差強人意 (英文版是 “in case of poor or marginal performance”)，僱主應及早採取行動，讓有關員工作出改善，糾正問題。此舉可避免僱員在「年終」才突如其來知悉其表現欠佳 。」查成語「差強人意」原本是指「尚能使人滿意」(見《辭海》)，與現今一些人用作形容「未能令人滿意」並不一致，容易造成混亂，甚至曾有傳媒質疑問責官員運用該成語的事例(如『「強差人意」與「差強人意」』(明報，2008 年 12 月 23 日)。因此，在實務守則中，不宜使用這些含義有爭議的文字，而應將上文「差強人意」改爲「表現差劣或欠佳」。

9. 「修訂本 10.7 段」：此段說明了「受僱用中」的含意，可是沒說明下班後的僱員社交活動或有組織的宴會，即使在工作地點以外或正常工作時間以外進行，亦屬工作有關的社交活動，即「受僱用中」的活動，因而僱主亦需承擔轉承法律責任。因此，人權監察建議在「修訂本 10.7 段」後加入《種族歧視條例僱傭實務守則》第 4.1.2(2)段的文字：

> 「英國裁判庭裁定，下班後舉行的僱員社交活動或有組織的宴會，縱然在工作地方以外或正常工作時間以外進行，在有關案情中仍屬受僱用中的活動[48]。究竟某項在工作時間或工作場所以外的活動是否屬於受僱用中的活動，十分視乎每宗個案的具體情況。建議僱主採取合理實際措施，藉採用守則第五章所闡述的良好僱用措施和程序，防止歧視和騷擾。」(註釋 48：*Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81，是一宗性別歧視的案例，但對《種族歧視條例》的應用有參考作用)

10. 在所有例子前加上編號，如在「修訂本 2.5 段」的首個例子加上例子 1，該段第二個例子爲例子 2，「修訂本 2.7 段」的例子則成爲例子 3，如此類推，此做法的原因有二：一，方便引述，否則，該例子便需引述爲第 2.5 段的第 2 個例子，相當冗長；二，加上例子編號的做法與《種族歧視條例僱傭實務守則》的做法一致。

最後，本會感謝立法會「殘疾歧視條例僱傭實務守則修訂本」小組及平等機會委員會就修訂實務守則所作的努力，惟修訂本尚有相當多可改善之處，本會在此階段只重點提出上述十項修訂建議，期望得到立法會和平機會的接納。本會就其他條文的意見，可參考本會在 2010 年 7 月 8 日及 2011 年 5 月 6 日的意見書 (立法會文件編號分別是 CB(2)2079/09-10(01) 及 CB(2)1706/10-11(01))

香港人權監察主席
莊耀洸律師

附件 1

《殘疾歧視條例》第 14(1)(4)條、第 48(1)條

章： 487 標題： 殘疾歧視條例
條： 14 條文標題： **在香港的機構的僱用一詞的涵義**

(1) 就本條例而言，除非僱員完全或主要在香港以外地方工作，否則其僱用須視爲在香港的機構的僱用。

(4) 如僱員並非在機構執行工作，而是其所執行的工作源自該機構，或(如其所執行的工作亦非源自該機構)其工作是與該機構有最密切的關連，則就本條例而言，**該工作視爲在該機構執行**。

Chapter: 487 Title: DISABILITY DISCRIMINATION ORDINANCE
Section: 14 Heading: **Meaning of employment at establishment in Hong Kong**

(1) For the purposes of this Ordinance ("the relevant purposes"), employment is to be regarded as being at an establishment in Hong Kong unless the employee does his work wholly or mainly outside Hong Kong.

(4) Where work is not done at an establishment it shall be **treated** for the relevant purposes **as done at the establishment** from which it is done or (where it is not done from any establishment) at the establishment with which it has the closest connection.

章： 487 標題： 殘疾歧視條例
條： 48 條文標題： **僱主及主事人的法律責任**

(1) 任何人在其**受僱用中**所作出的任何事情，就本條例而言須視爲亦是由其僱主所作出的，不論其僱主是否知悉或批准他作出該事情。

Chapter: 487 Title: DISABILITY DISCRIMINATION ORDINANCE
Section: 48 Heading: **Liability of employers and principals**

(1) Anything done by a person **in the course of his employment** shall be treated for the purposes of this Ordinance as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

附件 2

K 及其他人 訴 律政司司長 (DCEO 3, 4, 7/1999) 判案書第 13, 20-23 段

DCEO 3, 4, 7/99

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINSTRATIVE REGION

EQUAL OPPORTUNITIES ACTION NO. 3, 4, 7 OF 1999

Between

K Y W	Plaintiffs
AND	
Secretary for Justice sued for and on behalf of Fire Services Department and Hong Kong and Excise Department	Defendant

Coram: H.H. Judge Christie in Court

Date of Judgment: 27 September 2000

JUDGMENT

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13. 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) 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;

(f) a disorder or malfunction that results in the persons learning differently from a person without the disorder or malfunction; or

(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,

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*

……

"A disability that may exist in the future"

20. **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%.

"Disability" is a relative term. An interpretation of paragraph (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.

21. 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.

22. 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 U.K. 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).

23. In these ways, references in Hong Kong / Australian legislation to present, past and future in paragraphs (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 **paragraph (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**.

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附件 3

Cosma v Qantas Airways Limited 第 1, 22-25, 43-49 段

***Cosma v Qantas Airways Limited* [2002] FCA 640**

FEDERAL COURT OF AUSTRALIA

JUDGE: HEEREY J

DATE: 21 MAY 2002

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 The applicant Silvano Cosma claims that in July 1997 he was dismissed by his employer the respondent Qantas Airways Limited on the ground of his disability contrary to s 15(2)(c) of the *Disability Discrimination Act 1992* (Cth) (the Act). That provision relevantly is as follows:

"It is unlawful for an employer ... to discriminate against an employee on the ground of the employee's disability ... (c) by dismissing the employee."

.....

Applicant's injury

22 On 13 September 1991 the applicant injured his right shoulder when lifting a heavy bag onto an aircraft. He returned to work on 2 November but aggravated the injury. He was absent from work from 28 January to 14 February 1992. On 5 April 1992 his doctor declared him unfit for all work and on 7 April he underwent surgery on the shoulder.

Qantas rehabilitation program

23 At all times during the applicant's employment Qantas had a rehabilitation program. By the mid 1990s it had become somewhat more structured but at all material times it involved essentially the following stages. First, the employee would be provided with assistance aimed at returning him or her to the pre-injury employment position. This included rehabilitation assessments which involved liaison with the employee and treating medical practitioners. The employee would be provided with alternative or modified duties in line with physical capacity, the aim being to return him or her to the pre-injury position in a graduated way. Secondly, if after a period of about twelve months from the date of injury medical advice indicated that the employee was unable to return to the pre-injury position in the foreseeable future, the employee would be provided with vocational assistance aimed at providing him or her with the necessary skills to find alternative work within Qantas or, failing that, elsewhere. Thirdly, if such a permanent alternative position had not been obtained, the employee would be given written notice of termination on a specified future date.

24 An employee undergoing this program would be assigned to a Rehabilitation Case Manager. Those responsible for the applicant were Mr Dermot Moody from 1992 to 1995, Mr Barry McDonnell from mid 1995 to mid 1996 and Ms Leanne Jackson from June 1996.

25 These three persons gave evidence and were cross-examined. I formed the impression that they performed their duties in a thoughtful and conscientious way and did the best they could to assist the applicant. For his part, the applicant was a good employee who enjoyed working at Qantas and wanted to stay there as long as he could.

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Applicant's post injury work history

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43 In July 1996 Ms Jackson took over as the applicant's Rehabilitation Case Manager. About this time she met with Mr Moody and Mr McDonnell to discuss the applicant's rehabilitation situation. They agreed that it appeared because of the longevity of the applicant's attempted return to work and his continued desire to be placed in a permanent clerical position it was unlikely that he would return to his pre-injury position in the foreseeable future and that they should seek approval from Comcare for him to participate in a suitable training or vocational program to assist him to find a suitable alternative position.

44 In about September 1996 the applicant accepted a temporary clerical position in Aircraft Ground Support Equipment (AGSE) replacing a worker who had taken maternity leave. He enjoyed this work and remained in it until the employee returned from maternity leave in about May or June 1997.

45 In late 1996 and early 1997 Ms Jackson had a number of interviews with the applicant. On 12 February 1997 Ms Jackson and Mr Moody signed a letter addressed to the applicant which inter alia stated:

"As you are aware we have discussed the current direction of rehabilitation within Qantas, and your return to work and injury status.

Progress with your rehabilitation to date, as well as current medical information indicates that you will not return to your pre-injury duties in the foreseeable future.

We are now progressing to the next stage in your rehabilitation program which will offer vocational assistance to evaluate redeployment options, as well as the possibility of retraining / reskilling.

This will be a structured program involving the use of external resources where required. The program format will be in group and / or individual sessions."

46 The letter then discussed details of the program. In early 1997 the applicant participated in the program. It was conducted by a consultant in conjunction with Qantas and lasted for about six to eight weeks with one or two sessions a week including such matters as the preparation of resumés and application letters and techniques for job interviews. Mr Moody and Ms Jackson made enquiries within Qantas to see whether they had any permanent vacancies available. Unfortunately there appeared to be very few.

47 On 17 April 1997 Ms Jackson met with the applicant. He asked whether it would be possible for him to stay on in AGSE. She said that there was no permanent vacancy available. She said that Qantas was unable to continue to indefinitely sustain him in alternative duties. She mentioned the ultimate possibility of termination of his employment. Further discussions took place in May and June.

Termination

48 On 8 May 1997 Mr Alan Bourke, Qantas Employee Relations Manager for Victoria and Tasmania, wrote to the applicant stating inter alia:

"Following a review of your current injury status it is evident that you continue to be unable to perform your pre-injury duties.

In light of this the company will continue to attempt to seek appropriate redeployment opportunities for the next two months.

At the conclusion of this period and if your current medical certificate still prevails, and if no appropriate redeployment of opportunities are available, we have no alternative but to terminate your services.

...

The effective date will be 11 July 1997.

There will continue to be opportunities for you to participate in redeployment activities where appropriate for the two months period."

49 Employment was duly terminated on 11 July 1997.

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