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

Background brief prepared by Legislative Council Secretariat

Purpose

This paper provides background information on the Code of Practice on Employment under the Disability Discrimination Ordinance (Cap. 487) ("the Code") and gives a brief account of the discussions held by the Panel on Constitutional Affairs ("the CA Panel") on the draft revised Code issued by the Equal Opportunities Commission ("EOC") for public consultation.

Background

Statutory requirements

2. The Disability Discrimination Ordinance ("DDO") came into effect on 20 September 1996. The existing 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 a disability.

3. Under section 65 of DDO, 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 the Legislative Council ("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.

The existing Code

5. EOC issued the existing Code for public consultation before its publication in the Gazette in November 1996, and briefed the Panel on Home Affairs on 25 October 1996. Members of the Panel on Home Affairs had raised issues relating to arrangement of pre-employment medical examination, provision of exception where absence of disability was a genuine occupational qualification, and guidelines for dismissals, redundancies and other unfavorable treatment of employees.

6. The existing Code was gazetted on 15 November 1996. The House Committee formed a subcommittee to study the existing Code, together with the Code of Practice on Employment under the Sex Discrimination Ordinance (Cap. 480) ("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 existing 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 existing 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. 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 has been issued.

Discussions held by the CA Panel on the draft revised Code

10. EOC issued the draft revised Code on 8 April 2010 for public consultation until 8 July 2010. At its meeting on 17 May 2010, the CA Panel received views from the public on and discussed with EOC the draft revised Code. Some Panel members expressed concern whether barrier-free access facilities provided to persons with a disability in workplaces were adequate and enquired about the responsibility of employers in the provision of reasonable accommodation to employees with a disability. EOC explained that provision of barrier-free access facilities was not the sole responsibility of employers as developers and owners of commercial buildings also had their role to play. Under the provision of the existing Code, an employer had the responsibility to provide reasonable accommodation to an employee with a disability to fulfil the inherent requirements of a job. If an employer intended to defend that the disability had made the employee unable to carry out the inherent requirements of the job or there was unjustifiable hardship on the employer's part to provide accommodation to that employee, the court would tend to look into whether services or facilities had been considered or reasonably afforded to the employee with a disability.

11. Panel members also made various comments on the draft revised Code with a view to enhancing its readability and consistency. They stressed that the

existing Code which had been in use for 13 years should be made easily understood and user-friendly to employers and employees so that it would be effective in providing guidance to employers in Hong Kong on implementing equality of opportunities between persons with a disability and those without. EOC advised that the draft revised Code provided precedent cases to help people understand important concepts in DDO and thereby follow the spirit of equal opportunities enshrined in the Ordinance. EOC intended to update the Code every two to three years and would further refine the draft revised version to enhance its comprehensibility.

12. In response to the queries raised by deputations about the need to rewrite the Code and the inadequacy of the coverage of disability harassment in the draft revised Code, EOC explained that it decided to rewrite the Code because the drafting of the existing Code had been kept simple, and adhering to the original wording of DDO would provide a quick jumpstart on its implementation back in 1997. With 13 years' accumulated enforcement experiences and taking into account feedbacks from stakeholders, EOC came to the view that it was better to rewrite than to amend the existing Code. EOC further explained that it had received far more complaints on harassment under SDO than those on disability harassment in employment. However, EOC would consider beefing up the contents in respect of the coverage of disability harassment in the revised Code.

Relevant documents

13. A list of relevant documents available on the LegCo website (<http://www.legco.gov.hk/>) is in the **Appendix**.

Appendix

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

Relevant papers

Committee	Date of meeting	Paper
Panel on Home Affairs	25.10.1996 (Item IV)	Agenda Minutes
Panel on Constitutional Affairs	17.5.2010 (Item IV)	Agenda Minutes

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