

Definitions and Examples of Discriminatory Acts

There are four anti-discrimination ordinances in Hong Kong, namely the Sex Discrimination Ordinance (“SDO”), the Disability Discrimination Ordinance (“DDO”), the Family Status Discrimination Ordinance (“FSDO”) and the Race Discrimination Ordinance (“RDO”).

The definitions of the prohibited discriminatory acts under the four anti-discrimination ordinances in Hong Kong and examples of the prohibited discriminatory act as well as exception are set out below for reference. The examples are of illustrative purpose only and the list of examples is not exhaustive. For more information, please refer to the website of the Equal Opportunities Commission (www.eoc.org.hk). In case of discrepancies, the provision under the Ordinances shall prevail.

For the definition of sexual orientation harassment, reference is made to the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation issued by the Constitutional and Mainland Affairs Bureau. For more information, please refer to the relevant website (http://www.cmab.gov.hk/en/issues/code_of_practice.htm).

1a) Definition of Sexual Harassment

Sexual harassment occurs where a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to another person; or engages in other unwelcome conduct of a sexual nature in relation to another person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

Sexual harassment also includes a person, alone or together with other persons, engaging in conduct of a sexual nature which creates a hostile or intimidating environment.

The protection covers any compilation among staff, students and workplace participants. Workplace participants include employers, employees, interns, volunteers, partners in a firm, contract workers and their principals, as well as commission agents and their principals. The SDO also protects against sexual harassment between service users (e.g. visitors of the University) and workplace participants acting as service providers.

Sexual harassment may occur to any persons, regardless of gender and power composition, and between different or same sex. No matter whether the act is intentional or not, or even if the act is of a playful nature, it may amount to sexual harassment. A single incident may amount to sexual harassment. In determining whether a conduct constitutes sexual harassment, the entire record and the totality of circumstances will be considered.

1b) Example of Sexual Harassment

Examples of conduct which may amount to sexual harassment include:

- (i) Unwelcome sexual advances – e.g., leering and lewd gestures; touching, grabbing or deliberately brushing up against another person;

- (ii) Unwelcome requests for sexual favours (special attention to be paid on power difference between supervisor and subordinate, and teacher and student, though sexual harassment can occur in any power relationships) – e.g., suggestions that sexual co-operation or the toleration of sexual advances may further a person's career or affect a person's academic results;
- (iii) Unwelcome verbal, non-verbal or physical conduct of a sexual nature – e.g., sexually derogatory or stereotypical remarks; persistent questioning about a person's sex life;
- (iv) Conduct of a sexual nature that creates a hostile or intimidating environment – e.g., sexual or obscene jokes around the workplace/classrooms/campus/student hostels; games or activities with a sexual nature; displaying sexist or other sexually offensive pictures or posters; and offensive communications of a sexual nature (letters, phone calls, faxes, e-mail messages, etc.);
- (v) Sexual harassment by workplace participants – e.g. a contract worker/intern/volunteer says to another contract worker/intern/volunteer in the campus that s/he looks sexy and beautiful, and puts his/her hand on the other's waist;
- (vi) Sexual harassment by service users – e.g. a graduate uses the university library service and says sexual jokes at the counter. The remarks are heard by a library staff member.

2a) *Definition of Sex/Marital Status/Pregnancy/Breastfeeding Discrimination*

The SDO prohibits discrimination on the grounds of sex (male/female), marital status (the status of being single/married/married but separated/divorced/widowed) and pregnancy and breastfeeding (act of breastfeeding a child/expressing breast milk/feeding a child with her breast milk) (the "SDO Protected Attributes"). A further note on breastfeeding is that a breastfeeding woman is protected no matter whether the child is her biological one, and whether she is doing the act related to breastfeeding when the discriminatory incident happens.

Direct sex/marital status/pregnancy/breastfeeding discrimination occurs when on the ground of his/her sex, marital status, pregnancy or breastfeeding, a person is treated less favorably than another person in the same or not materially different circumstances but without the relevant SDO Protected Attributes.

Indirect sex/marital status/pregnancy/breastfeeding discrimination occurs if a condition or requirement which applies or would apply equally to a group of persons, but:

- (i) a smaller proportion of persons with a particular SDO Protected Attribute can comply with the condition or requirement;
- (ii) the condition or requirement is not justifiable; and
- (iii) it is to the detriment of the person who cannot comply with the requirement.

2b) *Example of Sex, Marital Status, Pregnancy or Breastfeeding Discrimination*

Sex discrimination: An employer refuses to employ an individual as a secretary because the applicant is a male. The employer believes that a female will do a better job.

Marital status discrimination: An employee is not being selected for promotion because s/he is married notwithstanding that s/he is the best qualified employee for the position.

Pregnancy discrimination: An employer terminates the employment of a female employee on her return from maternity leave without any legitimate reasons for termination.

Breastfeeding discrimination: Because of the extra time a breastfeeding employee has taken off to express milk twice a day, a supervisor gives her a lower appraisal rating and hence lower salary increase.

2c) *Example of Exception to Unlawful Sex/Marital Status/Pregnancy/Breastfeeding Discrimination*

If a person's sex is a genuine occupational qualification for the job, i.e. if the job can only be done by a male or a female, it is not unlawful for an employer to discriminate against a job applicant on the basis of sex.

The SDO allows for special measure whereby, an act targeting persons of a particular sex or marital status, or who are pregnant or breastfeeding 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.

3a) *Definition of Breastfeeding Harassment*

Breastfeeding harassment occurs where a person makes an unwelcome conduct on the ground that a woman is breastfeeding, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the woman would be offended, humiliated or intimidated.

Breastfeeding harassment also includes a person, alone or together with other persons, engaging in conduct that creates a hostile or intimidating environment for the breastfeeding woman.

The protection covers any compilation among staff, students and workplace participants. Workplace participants include employers, employees, interns, volunteers, partners in a firm, contract workers and their principals, as well as commission agents and their principals. The SDO also protects against breastfeeding harassment between service users (e.g. visitors of the University) and workplace participants acting as service providers.

Sometimes a person may joke about another person without the intention to harass. However, intention is not a relevant factor when considering liability for the unlawful act of harassment. A single incident may also amount to breastfeeding harassment. In determining whether certain conduct constitutes breastfeeding harassment, the entire record and the totality of circumstances will be considered.

3b) *Example of Breastfeeding Harassment*

Examples of conduct which may amount to breastfeeding harassment include:

- (i) Derogatory remarks, insults, name calling or offensive jokes;
- (ii) Abuse, whether verbal or written, such as notes, email or graffiti;
- (iii) Display of slogans or other objects offensive to breastfeeding women;
- (iv) Teasing breastfeeding women by mimicking breastfeeding gestures;
- (v) Breastfeeding harassment by workplace participants – e.g. in a co-organised event, when 2 employees see an officer from another organisation breastfeed a baby, they talk about her saying “it’s disgusting to see some women breastfeed in public”. One of them then comes up to the breastfeeding officer and tells her “it’s indecent to breastfeed at the event as it may offend other participants”;
- (vi) Breastfeeding harassment by service users – e.g. a visitor makes enquiry at the counter. S/he learns that the lady at the counter needs to pass the enquiry to another colleague for lactation break. The visitor says “how can you go for lactation break? I can’t believe you are allowed an extra break to express milk when you could do that at home.”

4a) Definition of Disability Discrimination

"Disability" is defined under the DDO to mean total or partial loss of a person's bodily or mental functions, total or partial loss of a part of the person's body, the presence in the body of organisms causing or capable of causing disease or illness, the malfunction, malformation or disfigurement of a part of the person's body, a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

A disability includes not only a disability which presently exists, but also a disability which previously existed but no longer exists, which may exist in the future or which is imputed to a person.

Direct disability discrimination occurs when on the ground of his/her disability or the disability of his/her associate, a person is treated less favourably than another person in the same or not materially different circumstances but without a disability. An associate, in relation to a person, includes a spouse of the person, another person who is living with the person on a genuine domestic basis, a relative of the person, a carer of the person and another person who is in a business, sporting or recreational relationship with the person.

Indirect disability discrimination occurs if a condition or requirement which applies or would apply equally to a group of persons, but:

- (i) a smaller proportion of persons with a disability can comply with the condition or requirement;
- (ii) the condition or requirement is not justifiable; and
- (iii) it is to the detriment of the person who cannot comply with the requirement.

4b) Example of Disability Discrimination

An employee who has recovered from psychiatric disorder is dismissed because the

employer thinks that his/her disability will relapse in the future.

An educational establishment denies admission to or expel a student on the ground of disability.

4c) *Example of Exception to Unlawful Disability Discrimination*

It is not unlawful for an employer to discriminate against a job applicant or an employee on the ground of disability, for example, if:

- (i) being a person without a disability is a genuine occupational qualification for a job, i.e. the essential nature of a job calls for a person without a disability;
- (ii) the person is not able to carry out the inherent requirements of the job;
- (iii) in order to assist the person to carry out the inherent requirements, it requires the employer to provide facilities or services which will cause unjustifiable hardship to the employer.

If a student, because of his/her disability, cannot meet the reasonable requirement of an educational establishment set to its students, the educational establishment may refuse to admit the student.

If a student, because of his/her disability, has special needs and requires accommodation, but the educational establishment cannot, after careful consideration, provide the accommodation due to unjustifiable hardship, the educational establishment may refuse to provide accommodation in the requested form. Other feasible form of accommodation should be identified by the parties together as far as possible.

The DDO allows for special measure whereby an act targeting persons with a disability 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.

5a) *Definition of Disability Harassment*

Disability harassment occurs where a person engages in an unwelcome conduct on account of the other person's disability or on account of the disability of an associate of that person in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated by that conduct.

The protection covers any compilation among staff, students and workplace participants. Workplace participants include employers, employees, interns, volunteers, partners in a firm, contract workers and their principals, as well as commission agents and their principals. The DDO also protects against disability harassment between service users (e.g. visitors of the University) and workplace participants acting as service providers.

Sometimes a person may joke about another person without the intention to harass. However, intention is not a relevant factor when considering liability for the unlawful act of harassment. A single incident may also amount to disability harassment. In determining whether certain conduct constitutes disability harassment, the entire record

and the totality of circumstances will be considered.

5b) *Example of Disability Harassment*

Examples of conduct which may amount to disability harassment include:

- (i) Derogatory remarks or insults on the ground of disability – e.g., name calling which persons with a particular disability may find offensive or impolite;
- (ii) Display of slogans or other objects offensive to persons with disabilities;
- (iii) Jokes, banter, ridicule or taunts made on the ground of a person's disability;
- (iv) Unnecessary intrusive personal inquiries in relation to a person's disability;
- (v) Comments or conduct because of a person's disability which are based on stereotypical assumptions about the person's capabilities or need for assistance;
- (vi) Disability harassment by workplace participants – e.g. a department organises a fun fair for colleagues and volunteers are invited. An employee visits a booth attended by a volunteer in a wheelchair, and says in a sarcastic tone "how can you have any friend when you are disabled and in a wheelchair?";
- (vii) Disability harassment by service users – e.g. a retired ex-employee uses the university's sports facilities. S/he sees a staff member with visual impairment and says "how can a blind person play ball games? Go back or don't disturb us!"

6a) *Definition of Disability Vilification*

Disability vilification occurs when a person engages in an activity in public to incite hatred towards, serious contempt for, or severe ridicule of a person or persons with a disability.

An act of vilification done with intent and involves threat of physical harm to persons with disability or their property is a criminal offence. The offence is known as serious vilification.

6b) *Example of Disability Vilification*

If a person speaks openly in public that persons with a disability are useless and a burden to society, this may amount to disability vilification.

7a) *Definition of Family Status Discrimination*

Family status means that the status of having 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.

Direct family status discrimination occurs when on the ground of his/her family status, a person is treated less favourably than another person in the same or not materially different circumstances but without a family status.

Indirect family status discrimination occurs when a condition or requirement which applies or would apply equally to a group of persons, but:

- (i) a smaller proportion of persons with a family status can comply with the condition

- or requirement;
- (ii) the condition or requirement is not justifiable; and
- (iii) it is to the detriment of the person who cannot comply with the requirement.

7b) *Example of Family Status Discrimination*

An employer transfers an employee with a new born child to another position despite the employee's refusal because the employer thinks that a woman with an infant will not be able to travel.

An educational establishment denies admission to, or expels a student, because s/he has a new born child.

7c) *Example of Exception to Unlawful Family Status Discrimination*

It is not unlawful for an employer to dismiss an employee or not to offer employment to an applicant if the employer finds that the individual's spouse is working for another company in a similar position and the employer believes that collusion is possible which would be harmful to the employer.

The FSDO allows for special measure 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.

8a) *Definition of Racial Discrimination*

Race in relation to a person means the race, colour, descent, national or ethnic origin of the person. The protection under the RDO also covers race or racial group that is imputed to a person but not the actual race or racial group of an individual.

Direct race discrimination occurs when on the ground of his/her or his/her associate's race, a person is treated less favourably than another person in the same or not materially different circumstances. An associate means a person's spouse, relative, carer, anyone living with the person on a genuine domestic basis, or anyone who is in a business, sporting or recreational relationship with the person. It is also direct discrimination to segregate a person on the basis of his/her race.

Indirect race discrimination occurs if a condition or requirement which applies or would apply equally to persons not of the same racial group as that other person but:

- (i) a smaller proportion of persons of the same racial group as that other person can comply with the condition or requirement;
- (ii) the condition or requirement is not justifiable; and
- (iii) it is to the detriment of the person who cannot comply with the requirement.

8b) *Example of Racial Discrimination*

An ethnic minority is not being selected for interview of a position which requires Chinese capability because the employer assumes that s/he cannot speak fluent

Cantonese based on his/her appearance in the photo on the application form.

A lady married to a man of another race has taken her husband's surname. The employer does not wish to hire the ethnic minorities and refuses to give her an interview assuming that she is an ethnic minority. This is likely a case of direct racial discrimination by imputation.

A blanket ban on beards for all staff and students may indirectly discriminate against some ethnic groups (who by their custom have to keep a beard), when compared to other racial groups, if information shows that the blanket ban is not justifiable.

8c) *Example of Exception to Unlawful Racial Discrimination*

A requirement that all employees or students cannot wear a turban may be indirectly discriminatory against a certain race, who cannot in practice comply with it, because they believe they would be losing their identity if they are not allowed to wear their turbans. However, if the condition is placed because the employees/students will have to wear a protective headgear in repair workshops, construction sites or vocational training class for safety reasons to protect them from the risk of injury then it may not constitute discrimination.

The RDO allows employers and other concerned parties to provide people from a particular racial group (or groups) goods, access to facilities, services, opportunities, grants, benefits or programmes to meet their special needs, when it is reasonably intended to ensure that they have equal opportunities.

9a) *Definition of Racial Harassment*

Racial harassment occurs where a person engages in an unwelcome conduct (which may include an oral or a written statement) on the ground of the race, colour, descent, national or ethnic origins of another person or an associate of that other person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated by that conduct.

Racial harassment also includes one or more persons engaging in conduct that creates a hostile or intimidating environment for the other person on the ground of the race of that person or his or her associate.

The protection covers any compilation among staff, students and workplace participants. Workplace participants include employers, employees, interns, volunteers, partners in a firm, contract workers and their principals, as well as commission agents and their principals. The RDO also protects against racial harassment between service users (e.g. visitors of the University) and workplace participants acting as service providers.

Sometimes a person may joke about another person without the intention to harass. However, intention is not a relevant factor when considering liability for the unlawful act of racial harassment. A single incident may also amount to racial harassment. In determining whether certain conduct constitutes racial harassment, the entire record and the totality of circumstances will be considered.

9b) *Example of Racial Harassment*

Examples of conduct which may amount to racial harassment include:

- (i) Racially derogatory remarks or insults; – e.g., name calling which persons of certain racial group may find offensive or impolite;
- (ii) Display of graffiti or slogans or other objects offensive to certain racial groups;
- (iii) Racist jokes, banter, ridicule or taunts – e.g., laughing at the accent or habits of persons belonging to certain racial groups;
- (iv) Using a disparaging or offensive tone when communicating with people on the ground that they belong to certain racial groups;
- (v) Ostracize people because of their racial group;
- (vi) Imposing excessive workloads or unrealistic performance targets on people on the ground of race;
- (vii) Unnecessarily picking on individuals from particular racial groups;
- (viii) Racial harassment by workplace participants – e.g. An ethnic minority is employed by the canteen service provider as cashier. An employee, checking the operation of the canteen, makes sarcastic jokes and comments in front of cashier counter about the cashier's racial group, referring them as second class citizens who can only take up menial jobs;
- (ix) Racial harassment by service users – e.g. A lecturer of ethnic minority gives a talk in a seminar, which is open to public. A participant says: "All people of your race can't speak fluently. I don't want to listen to you. Why don't you go back to where you belong!"

10a) *Definition of Racial Vilification*

Racial vilification occurs when a person engages in an activity in public to incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the ground of race, colour, descent, national or ethnic origins.

An act of vilification done with intent and involves threat of physical harm to persons of the targeted race, colour, descent, national or ethnic origins or their property is a criminal offence. The offence is known as serious vilification.

10b) *Example of Racial Vilification*

Posting derogatory remarks like "swine" and "meaner than dogs" targeting at persons of certain race in the campus or intranet.

11a) *Definition of Sexual Orientation Harassment*

"Sexual orientation" means heterosexuality (sexual inclination towards persons of the opposite sex), homosexuality (sexual inclination towards persons of the same sex), and bisexuality (sexual inclination towards persons of both sexes). Sexual orientation harassment is an unwelcome conduct on grounds of a person's sexual orientation. It can go beyond the treatment of persons of different sexual orientation themselves: harassment can affect people who are in some way associated with those persons. In determining whether certain conduct constitutes sexual orientation harassment, the entire

record and the totality of circumstances will be considered.

11b) Example of Sexual Orientation Harassment

Examples of conduct which may amount to sexual orientation harassment include:

- (i) Physical abuse, threats, offensive jokes, taunts and insults on ground of sexual orientation;
- (ii) People being taunted or insulted because, while they are not of a different sexual orientation themselves, they are known to have friends who are.

12a) Definition of Victimisation

Discrimination by way of victimisation occurs where a person is being treated less favourably because s/he has or is suspected to have done or intends to do the following in relation to the Equal Opportunities Policy or the four anti-discrimination ordinances:

- (i) Make an allegation or complaint against the discriminator or other persons for breach of the Equal Opportunities Policy or any of the four anti-discrimination ordinances;
- (ii) Bring proceedings against the discriminator or other persons;
- (iii) Give evidence or information in connection with proceedings brought by any person against the discriminator or any other persons;
- (iv) Do anything under or by reference to the Equal Opportunities Policy or any of the four anti-discrimination ordinances.

However, if after investigating a complaint of a prohibited discriminatory act, it is determined that the complaint was false and not made in good faith or that the individual has provided false information regarding the complaint, disciplinary action may be taken against the relevant individual. This is not victimisation.

12b) Example of Victimisation

A staff member lodged a sexual harassment complaint against his/her supervisor. Upon investigation, the alleged sexual harassment complaint was not substantiated. Thereafter, the supervisor unnecessarily picked on the staff and eventually terminated his/her employment and there is no evidence showing that the staff member has any performance issues.