

Anti-discrimination Laws in Hong Kong

24 October 2019

Outline

1. Unlawful acts under the anti-discrimination ordinances
2. Legal liability
3. How to prevent discrimination

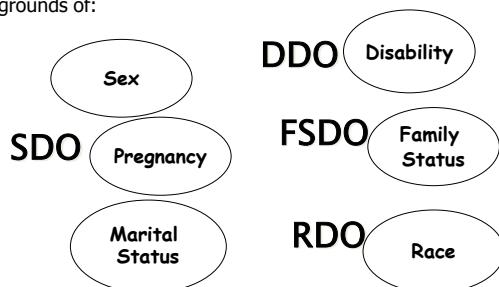
Part 1 Anti-Discrimination Ordinances

Anti-Discrimination Ordinances

- ① Sex Discrimination Ordinance (SDO), 1996
- ② Disability Discrimination Ordinance (DDO), 1996
- ③ Family Status Discrimination Ordinance (FSDO), 1997
- ④ Race Discrimination Ordinance (RDO), 2009

Prohibited Grounds of Discrimination

It is unlawful to discriminate against a person on the grounds of:



SDO: Prohibited Grounds of Discrimination

1. Sex – Male / Female
2. Pregnancy
3. Marital Status –
 - a. Single
 - b. Married
 - c. Separated
 - d. Divorced
 - e. Widowed

DDO: Definition of Disability

- ▶ Total or partial loss of the person's bodily or mental functions
- ▶ Total or partial loss of a part of the person's body
- ▶ The presence in the body of organism causing/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
- ▶ A disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment that results in disturbed behavior

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7

DDO: Definition of Disability

The definition applies to a disability that:

- 🕒 Presently exists
- 🕒 Previously existed but no longer exists
- 🕒 May exist in the future
- 🕒 Is imputed to a person

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8

DDO: Protection for "Associates"

The law protects associates of a person with disability from discrimination. Associates include:

- ➔ Spouse
- ➔ A person living together on a genuine domestic basis
- ➔ A relative
- ➔ A carer of the person
- ➔ A person having a business, sporting or recreational relationship

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FSDO: Definition of Family Status

- Person has a responsibility for the care of an immediate family member
- An immediate family member related by:
 - ⇒ blood
 - ⇒ marriage
 - ⇒ adoption
 - ⇒ affinity

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RDO: Definition of Race

- Race, color, descent, national origin, ethnic origin
- It is unlawful to discriminate against a person on the ground of his/her near relative's race

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What is Meant by Race ?

- **Race**
- Have different bodily features, cultures and ways of life
- e.g. European, Asian

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What is Meant by Race ?

–Colour

- Have different skin colours

13

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What is Meant by Race ?

–Descent

–RDO S.8(1)(c)

- Forms of social stratification, such as systems of inherited status - people are divided into different classes by birth.

14

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What is Meant by Race ?

–National Origin

- National origin ≠ nationality
- The national origin of a person can be different from his nationality
- E.g. a person of Indian origin – his/her nationality is British

15

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What is Meant by Race ?

–Ethnic origin

- A distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history
- E.g. Jew, Sikh

16

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Near Relatives

- Near relative means:
 - The person's spouse
 - Parents/grandparents of the person/spouse
 - Brothers/sisters of the person/spouse & the spouses of such brothers/sisters
 - Children of the person & the spouses of such children (including children born out of wedlock, adopted children and step children)
 - Grandchildren of the person & the spouses of such grandchildren

17

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Equal Opportunity is about...

- respecting differences of each other
- giving people a fair chance to prove what they are capable of
- not letting irrelevant factors come into play when decisions are made

18

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Unlawful Discriminatory Acts

A) Discrimination	B) Harassment	C) Vilification
<ul style="list-style-type: none"> • Direct Discrimination • Indirect Discrimination • Victimization 	<ul style="list-style-type: none"> • Sexual Harassment • Disability Harassment • Racial Harassment 	<ul style="list-style-type: none"> • Disability Vilification • Racial Vilification

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19

1. Direct Discrimination

- To treat a person **less favorably** than another person in comparable circumstances
- on the ground of his/her sex, marital status, pregnancy, disability, family status or race.

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2. Indirect Discrimination

- Impose the **same requirement / condition** on everyone
- Some groups are **less able to comply** with the requirement /condition & suffer a **detriment** as a result
 - Men/women, pregnant women, persons with a particular marital status
 - Persons with a disability
 - Persons with family status
 - Persons from a particular racial group
- The requirement / condition **cannot be justified**, i.e. not fair & reasonable

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Exception of the DDO: Unable to Perform the Inherent Requirements of the Job

A person is unable to perform

- **Inherent Requirements** of the job due to his/her disability

OR

- Requires **Accommodation** to perform the Inherent Requirements and providing such accommodation to the job applicant / employee would impose **Unjustifiable Hardship** on employer

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Unjustifiable Hardship

All relevant circumstances considered including:

- Reasonableness of any accommodation
- Benefit / detriment to all persons concerned
- Effect of the disability concerned
- Financial implication

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3. Victimization

- ❑ To treat a person less favorably because the person intends to do / has:
 - brought proceedings against discriminators
 - given evidence or information in connection with proceedings against discriminators
 - done anything under the SDO/DDO/FSDO/RDO
 - alleged that discriminators have committed unlawful discriminatory acts

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24

4. Sexual Harassment

Two types of sexual harassment:

- ➡ Person-to-person Sexual Harassment
- ➡ Hostile or Intimidating Environment

Person-to-Person Sexual Harassment

A sexually harasses B if :

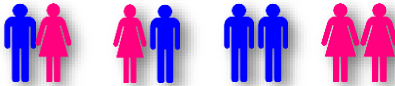
- A makes an **unwelcome** sexual advance, or an unwelcome request for sexual favors to B; or
- A engages in other unwelcome conduct **of a sexual nature** in relation to B

Subjective Test

- A reasonable person, having regard to all the circumstances, would have anticipated that B would be **offended, humiliated or intimidated.**

Objective Test

Person-to-Person Sexual Harassment



M vs F F vs M M vs M F vs F

Some Examples (1)

- Comments on somebody's figure
- Questions of a sexual nature about a person's private life or talk about personal sexual life
- Requests for kiss/hug/sex
- Sexual comments or jokes (including those via whatsapp/ wechat/ email)
- Staring or leering at a person / parts of a person's body
- Displays of sexual materials such as articles/ photos

Some Examples (2)

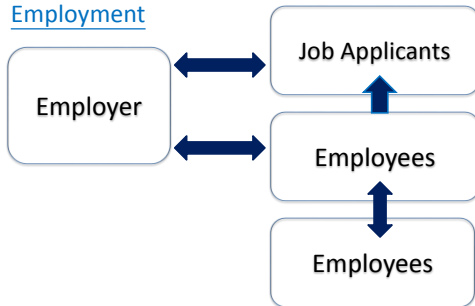
- Unwelcome physical contact such as brushing against another's body
- Touching or fiddling with a person's clothing
- Standing or sitting too close – invasion of personal space
- Taking photos of the sensitive parts of a person's body

Conduct of a Sexual Nature

- ◆ Physical
- ◆ Visual
- ◆ Verbal
- ◆ Intentional / unintentional
- ◆ Single / repeated incidents

Relationships Governed

Employment



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31

Employment

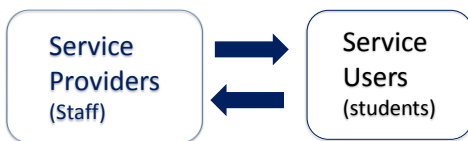
- In and outside the workplace, including overseas business trip
- During and outside working hours
- Examples: overseas business trips
- The key is the essential nexus between the subject incident and the employment that needs to be established

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32

Relationships Governed

Provision of GFS

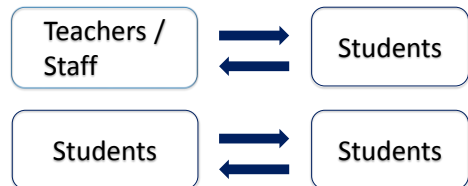


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Relationships Governed

Education



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Sexual Harassment - Hostile or Intimidating Environment

- A person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for other(s).
- Example:
 - Open discussion of sexual jokes
 - Use of sexually explicit photos or pictures as computer wallpaper or screensaver
 - Browse of sexually offensive websites
 - Display of sexually offensive posters and calendars

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35

More Examples...

- Anyone uses sexually suggestive cartoons in teaching a subject not related to sex.
- During lunch time, some students rate female students who are playing in the playground. As a result, some female students avoid staying there.
- A group of students hijack classroom discussion and turn it to sexual topics. Some students feel offended and do not want to join the discussion.

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36

5. Disability / Racial Harassment

➤ X harasses Y if X engages in **unwelcome** conduct against Y on the ground of Y's **disability/race**

Subjective Test

➤ A **reasonable person**, having regard to all the circumstances, would have anticipated that Y would be **offended, humiliated** or **intimidated**.

Objective Test

Examples

Based on disability or race -

- Derogatory remarks, insults, name calling and offensive jokes
- Display of objects offensive to certain disability/racial groups
- Laughing at the accent, habits or clothing styles of people belonging to certain racial groups

Racial Harassment

It is also unlawful if -

- A person (alone or together with others)
- On the ground of another person's race (or the race of his/her near relative)
- Engages in conduct (which may include an oral or a written statement) which creates a **hostile or intimidating environment**

6. Disability / Racial Vilification

Activity in public inciting

- hatred towards
 - serious contempt for; or
 - severe ridicule of
- persons on the ground of their disabilities or race.

7. Serious Disability/Racial Vilification

Activity in public:

- a) Threatening physical harm to the persons on the ground of their disabilities or race, or damages towards premises or property of those persons
- b) Inciting others to commit the act in (a)

⚠ **Criminal offence:**

Fine at level 6 (\$50,001 – 100,000) & imprisonment of up to 2 years

Part 2 Legal Liability

Applicable Fields

The fields covered relate to our public life.

Examples:

- ◆ Employment
- ◆ Provision of goods, facilities and services
- ◆ Education
- ◆ Access to premises (DDO only)
- ◆ Disposal or management of premises
- ◆ Sporting activities
- ◆ Clubs
- ◆ Government activities, etc

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43

Employment

Employees:

- Pay levels, benefits, promotion, transfer, training
- Terms of employment
- Dismissal, redundancy or other detriment

Applicants:

- Arrangement of offering employment
- Terms and conditions of employment
- Deliberately not employ

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44

Provision of Goods, Facilities and Services (GFS)

Unlawful to discriminate against a person by refusing or deliberately omitting to :

- Provide GFS
- Provide GFS on like terms
- Provide GFS in like manner

Paid or Unpaid GFS

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Education

Unlawful to discriminate against a person by:

- Refusing to admit the person
- In the terms of admitting the person as a student (e.g. higher tuition fee)
- Expelling the person from school

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46

Employee's Liability

- Individuals are **personally liable** for their own unlawful discrimination/harassment/sexual harassment under the law.
- It is unlawful to:
 - ❖ **instruct** someone to discriminate against or harass another person
 - ❖ **pressure** someone to discriminate against or harass another person
 - ❖ **knowingly aid** someone to discriminate against or harass another person

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47

Legal Liability Impact vs. Intention

- **Impact** of behavior, not **intention**, establishes unlawful acts in law
- Possible to discriminate / harass unintentionally and it is no defense to say "Sorry, I didn't mean it!"

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48

Employer's Liability – Vicarious Liability

- The employer is liable for their employees' unlawful discriminatory acts **in the course of their employment** whether with or without employer's knowledge or approval
- An employer is not liable only if it has taken **reasonably practicable steps** to prevent its employees from performing unlawful discriminatory acts in the course of their employment.

Reasonably Practicable Steps

These include but are not limited to:

- ☑ Developing and implementing an **equal opportunities policy**
- ☑ Developing a **complaint resolution procedure**
- ☑ **Appointing a person** in the organization to take responsibility for equal opportunities issues
- ☑ **Awareness training for employees** about what is unacceptable and unlawful behavior in the workplace

Part 3

How to Prevent Discrimination

Responsibilities of EO Advisors

- **Law:** understand the EO Ordinances
- **Policy:** know the EO policy of your organization
- **Attitude:**
 - Respect differences of each other
 - Try to stop discrimination/harassment if you witness the behavior
 - Be open-minded

Responsibilities of Managers

- Ensure that all your team members are aware of the company policy and understand it
- Ensure that the working environment is free of harassment materials such as pornographic posters
- Act as a role model. Do not engage in any act that might be seen as discrimination or harassment
- Act immediately if you witness or are told about any discrimination or harassment by following complaints handling procedures
- Early Intervention

MAJOR PRINCIPLES OF HANDLING COMPLAINTS FROM YOUR STAFF

1. Prompt Handling

- Legal liability - “knowingly aiding”
- Sufficient meeting time and safe place
- Approach
- Individual interview
- **Don’t**: only listen but no follow-up action

55

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2. “Victim-friendly” Approach

- Sensitivity
 - Handling staff: male or female?
 - Appropriate use of language
 - **Don’t**: raise biased questions
- Show empathy but not perceived as advocating for either party
- Maintain impartiality
- **Don’t**: request complainant to repeat details of incident unnecessarily

56

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3. Natural Justice and Fairness

1. **The hearing rule**: adequate opportunity is provided to complainants and respondents to present their cases
2. **The non-bias rule**: deciding authority must be unbiased
3. **The evidence rule**: decisions should not base on mere speculation or suspicion

57

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4. Balance of Probability

- Civil standard of proof
- Eye-witness is not a must

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5. Confidentiality

- “Need-to-know” basis
- File records: how to keep? Who can keep?

59

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6. No Victimization

- The law recognizes the risks when people complain about unlawful treatment
- It is **unlawful to victimize** someone for bringing a complaint
- **Don’t**: transfer a complainant to another office or position without mutual agreement

60

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7. Providing Other Resources

- Thorough explanation of internal complaint processes
- **Other channel to seek redresses:** e.g. the EOC and the District Court.
- Where to get emotional supports, psychologist sessions, counseling, etc

61

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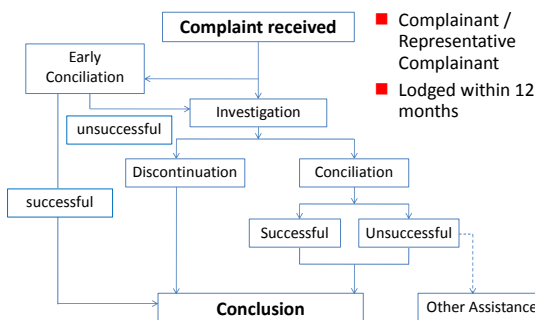
What victims can do if being discriminated or harassed?

1. Say "NO" to the discriminator or harasser
2. Write down what happened: date, time, place, details of the incident
3. Discuss with the persons you trust
4. Lodge a complaint with your employer or the EOC
5. Institute civil proceedings at the District Court if needed

62

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EOC's Complaint Handling Procedures

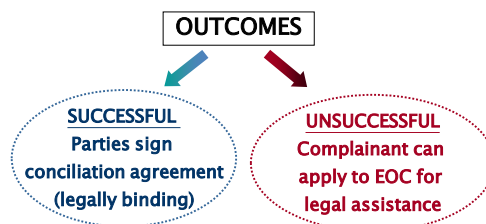


63

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Conciliation

- Voluntary participation of both parties
- Confidential
- Role of the EOC – impartial conciliator



64

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Time Bar

- EOC – 12 months
- Court – 24 months

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65

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66

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