

Guidance on Amendments to the Anti-discrimination Ordinances



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

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1. Introduction

- 1.1 The Equal Opportunities Commission (EOC) is Hong Kong's statutory body responsible for the implementation and enforcement of the anti-discrimination ordinances, namely the Sex Discrimination Ordinance (SDO) (Cap 480), the Disability Discrimination Ordinance (DDO) (Cap 487), the Family Status Discrimination Ordinance (FSDO) (Cap 527) and the Race Discrimination Ordinance (RDO) (Cap 602).
- 1.2 The EOC works towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, breastfeeding, disability and family status; as well as the elimination of sexual harassment, harassment on grounds of breastfeeding, and harassment and vilification on the grounds of disability and race. The EOC also promotes equality of opportunities between men and women, between persons with and without a disability and irrespective of family status and race.
- 1.3 Amendments have been made by the Government to the four anti-discrimination Ordinances, following the EOC's Discrimination Law Review of the existing anti-discrimination Ordinances and recommendations for reform. The EOC welcomes the amendments as they improve the protections from discrimination and harassment in many respects.

Purpose and contents of the Guidance

- 1.4 This EOC practical Guidance explains the effect of the recent amendments to the four anti-discrimination Ordinances in Hong Kong, in order that all sectors of society to which they apply can better understand the new provisions, prevent discrimination, and promote equal opportunities for the groups affected by the legislation.
- 1.5 The amendments have been made to the four anti-discrimination Ordinances by the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020¹ and by the Sex Discrimination (Amendment) Ordinance 2021.² All of the amendment provisions of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 came into operation on 19 June 2020, apart from the provisions relating to breastfeeding discrimination and related provisions, which will come into operation on 19 June 2021. The Sex Discrimination (Amendment) Ordinance 2021 introduced protections from harassment of breastfeeding women, and will also come into operation on 19 June 2021. This means that all the provisions providing protections from breastfeeding

¹ <https://www.gld.gov.hk/egazette/pdf/20202425/es1202024258.pdf>

² <https://www.elegislation.gov.hk/hk/2021/3!en>

discrimination and harassment will come into operation at the same time, on 19 June 2021.

Application of the Guidance

- 1.6 For all of the new provisions (apart from those relating to breastfeeding discrimination and harassment), this Guidance explains:
- The legal scope and legal effect of the provisions;
 - Where relevant, examples to explain the concepts and operation of the laws, such as direct and indirect discrimination, and harassment; and
 - Where relevant, recommended good practice measures and examples of such measures to help relevant stakeholders better promote equality and prevent discrimination in the specific area of law.
- 1.7 The examples are provided for illustrative purposes only. Readers should be mindful that each case bears its own uniqueness, and should refrain from sole and direct application of any example to a particular situation.
- 1.8 In relation to the provisions on breastfeeding discrimination and harassment, the EOC has produced two separate sets of Guidance: one for the employment and related sectors; and the other relating to the provision of goods, facilities and services; education; disposal and management of premises; clubs; and the Government.³ This Guidance only provides a brief overview of the breastfeeding provisions.
- 1.9 This Guidance should be read with the other provisions of the four anti-discrimination Ordinances, and other relevant Codes of Practice and Guidance on the four anti-discrimination Ordinances which are available on the EOC website.⁴

³ The Guidance relating to the breastfeeding provisions will be available on the EOC website <https://www.eoc.org.hk>

⁴ The Code of Practice on Employment under the Sex Discrimination Ordinance http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=cops_sdo_2;
the Code of Practice on Employment under the Disability Discrimination Ordinance (2011) http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ddocop_e.pdf;
the Code of Practice on Education under the Disability Discrimination Ordinance http://www.eoc.org.hk/eoc/otherproject/eng/color/youthcorner/education/cop_edu/cop_edu_b.htm;
the Code of Practice on Employment under the Race Discrimination Ordinance http://www.eoc.org.hk/eoc/Upload/UserFiles/File/rdo/RDO_CoP_Eng.pdf;
the Code of Practice on Employment under the Family Status Discrimination Ordinance http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=cops_fsdo_2;
and the EOC Resource Centre for the Ordinances http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=resource_centre_sdo.

1.10 This Guidance aims to provide practical guidance, but it is not a substitute for legal advice. Any stakeholders affected by the new provisions should consult legal practitioners for advice on the requirements and effect of the amendments on their particular situations.

2. Discrimination and harassment against breastfeeding women

- 2.1 Amendments have been made to the SDO to prohibit various forms of conduct, including direct discrimination, indirect discrimination, harassment and victimisation of women on the ground of breastfeeding. These provisions will come into operation on 19 June 2021.
- 2.2 The amendments relating to breastfeeding apply to a wide range of sectors of public life: employment and related sectors, such as work of barristers; education; the provision of goods, facilities and services; disposal and management of premises; clubs; and the Government.
- 2.3 Given that the amendments relating to breastfeeding have far-reaching implications for many sectors, as stated above, the EOC has published two sets of Guidance relating to the breastfeeding provisions: one for the employment and related sectors; and another for all other sectors.⁵ Please refer to the two sets of Guidance for the effect of the breastfeeding provisions, and recommended good practice to promote equality and prevent breastfeeding discrimination and harassment.

⁵ The Guidance relating to the breastfeeding provisions is available on the EOC website:
<https://www.eoc.org.hk/eoc/GraphicsFolder/showcontent.aspx?content=Resource%20Centre>

3. Racial discrimination and harassment by association

3.1 The amendments expand the protection from racial discrimination and harassment in relation to discrimination by association. Previously, the RDO only provided protection from racial discrimination and harassment in relation to the race of “*near relatives*”. The amendments expand the scope of protection to cover an “*associate*”, in the same terms as the existing protections from disability discrimination by association.

3.2 The prohibition on racial discrimination and harassment by association applies to key areas of public life: employment and related sectors, such as partnerships or vocational training, barristers, and employment agencies; education; the provision of goods, facilities and services; disposal and management of premises; and clubs.

(a) Definition of associate

3.3 “*Associate*” is defined to include:

- 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.⁶

3.4 A “*carer*” is defined to include:

- The Director of Social Welfare;
- Any officer of the Social Welfare Department authorised in writing by the Director of Social Welfare; and
- Any person specified in Schedule 6 of the RDO.⁷

(b) Direct racial discrimination and racial harassment by association

3.5 The RDO prohibits racial discrimination by association in relation to direct discrimination and racial harassment.

3.6 Direct racial discrimination by association occurs where a person (“*the discriminator*”) discriminates against another person (“*relevant person*”):

- On the ground of the race of an associate of the relevant person;

⁶ Section 2(1) of the RDO

⁷ Section 2(1) of the RDO

- The discriminator treats the relevant person less favourably than the discriminator treats or would treat another person not having an associate of the same racial group as the associate of the relevant person.⁸

3.7 In order to determine whether there is direct racial discrimination by association, a comparison must be made between:

- A person having an associate who is of a particular racial group; and
- A person not having an associate who is of that group.

3.8 The relevant circumstances in one case must be the same as, or not materially different from the other case.⁹

Example: direct racial discrimination by association

Sam has been in a relationship with his female cohabiting partner Bhavani for the last three years. Sam is Chinese and Bhavani is Indian. The couple wish to rent a flat in Sheung Wan, which is advertised with a real estate agency. The couple meet the landlord of the flat to view it and as soon as the landlord realises that Bhavani is Indian, the landlord tells the couple he refuses to rent it to them, as he believes Indians permanently and badly affect the smell of flats due to their type of cooking. The refusal to rent the flat is likely to be unlawful direct racial discrimination by association against Sam, as well as direct racial discrimination against Bhavani.

3.9 Racial harassment by association is unlawful in two situations. Firstly, it is unlawful where a person:

- On the ground of the race of an associate of another person;
- Engages in unwelcome conduct (which may include an oral or a written statement);
- 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.¹⁰ This can be described as “*unwelcome conduct racial harassment*”.

⁸ Section 5 of the RDO

⁹ Section 8(6) of the RDO

¹⁰ Section 7(1) of the RDO

Example: racial harassment by unwelcome conduct

Hoi-lung is a Chinese boy and a student at a secondary school in Hong Kong. One of his good friends at school is a Nigerian boy and student called Ali. The Chinese students at the school repeatedly harass Ali because of his African race, calling him “*black dog*”. They also harass Hoi-lung, calling him a “*black dog lover*”, and that they both smell like dirty dogs. This is likely to be unwelcome conduct amounting to unlawful racial harassment of Ali, and unlawful racial harassment by association against Hoi-lung.

3.10 Secondly, racial harassment by association is unlawful where a person (the first person):

- On the ground of the race of an associate of a person (the second person);
- Alone or together with other persons, engages in conduct (which may include an oral or a written statement);
- That creates a hostile or intimidating environment for the second person.¹¹ This can be described as “*hostile or intimidating environment racial harassment*”.

Example: racial harassment by creating a hostile and intimidating environment

Yuen-wai is a Chinese woman and works in an office where one of the other employees named Abdullah is Pakistani. They have been work colleagues and friends for several years. Some new employees start at the company. They do not like Abdullah and start putting up news reports about “*South Asian terrorists*” outside Abdullah’s work station. They also make derogatory comments within hearing distance of Yuen-wai about Asian women being prostitutes who spend time with South Asian men. Although these acts are not made directly towards Abdullah or Yuen-wai, they are likely to have created a hostile and intimidating environment for both Abdullah and Yuen-wai, and likely to be unlawful racial harassment against Abdullah, as well as unlawful racial harassment by association against Yuen-wai.

(c) Good practice to prevent discrimination or harassment

3.11 All stakeholders affected by the amendments should ensure that their policies and practices are updated to take into account the amendments, to prevent racial discrimination and harassment by association. These include key sectors, such as

¹¹ Section 7(2) of the RDO

employers, education and service providers, and those responsible for disposing or managing premises.

3.12 As a good practice, it is recommended that employers and education providers should:

- Amend their relevant policies relating to preventing racial discrimination and harassment to ensure that it covers the expanded definition of racial discrimination;
- Provide training to employees, and in the case of the education sector, training to professors, teachers, other staff members and students on the effect of the amendments and how to prevent discrimination.

Example: updating racial discrimination policies and training

An employer has 20 staff members and of those, two are Indian and the others are all Chinese. The employer becomes aware that the protections from racial discrimination by association have been expanded to cover business relationships, which could include work relationships. As the employer wishes to promote the importance of preventing racial discrimination at their workplace, the employer amends the racial discrimination policy to cover the broader definition of racial discrimination by association. The employer also provides training to all staff members about the changes, and the other amendments to the anti-discrimination laws.

4. Racial discrimination and harassment by imputation

- 4.1 The protection from racial discrimination has also been expanded to cover racial discrimination by imputation.
- 4.2 Racial discrimination by imputation involves situations where a person is believed, perceived or attributed to be of a particular race or racial group, even when they are not in fact of that race or racial group. The concept is similar to the protections from disability discrimination where a disability is imputed to a person.¹²
- 4.3 Racial discrimination is now unlawful where the race or racial group of a person is imputed. This covers:
- A “*race*” meaning a race, colour, descent or national or ethnic origin is imputed to a person;¹³ and
 - A “*racial group*” meaning a group of persons defined by reference to race, colour, descent or national or ethnic origin to which a person is imputed to fall within.¹⁴
- 4.4 The prohibition on racial discrimination by imputation applies to key areas of public life: employment and related sectors, such as partnerships or vocational training, barristers, and employment agencies; education; the provision of goods, facilities and services; disposal and management of premises; and clubs.

(a) Direct and indirect racial discrimination and racial harassment

- 4.5 The RDO prohibits racial discrimination by imputation in relation to direct discrimination,¹⁵ indirect discrimination,¹⁶ and racial harassment.¹⁷
- 4.6 Direct racial discrimination by imputation occurs where on the ground of the imputed race of a person, that person is treated less favourably than the discriminator treats or would treat another person not of the same race.

¹² Section 2 of the DDO, definition of disability

¹³ Section 8(1)(a) of the RDO

¹⁴ Section 8(1)(d) of the RDO

¹⁵ Section 4(1)(a) of the RDO

¹⁶ Section 4(1)(b) of the RDO

¹⁷ Section 7 of the RDO

Example: direct racial discrimination by imputation

An employer receives applications for a sales position. A woman named Janeb Ismail applies for the job and sends her CV, which indicates she has suitable work experience for the role. Janeb is in fact ethnically Chinese, but is married to a Muslim Pakistani man and has taken on a Muslim first name and her husband's surname. As the employer believes that Janeb is of South Asian ethnic origin and does not want South Asians to work there, Janeb is refused an interview. This is likely to be unlawful direct racial discrimination by imputation.

4.7 Indirect racial discrimination by imputation occurs where a discriminator applies to a person a requirement or condition, which he/she applies or would apply equally to persons not of the same racial group the person is imputed to belong to but:

- The proportion of persons of the same racial group as the person is imputed to belong to, who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;
- Which the discriminator cannot show the requirement or condition to be justifiable, irrespective of the imputed race of the person to whom it is applied; and
- Is to the detriment of the other person because that person cannot comply with it.¹⁸

Example: indirect racial discrimination by imputation

An employer requires all his employees, who all have Chinese last names, to exhaust all their annual leave around Chinese Lunar New Year time for easy leave management. The employer assumes (imputes) that the staff members are all Chinese and therefore would be happy to accept the requirement without any difficulty. In fact, two female staff members are ethnically Pakistani, but took their Chinese husbands' names when they married. The requirement puts the two female staff members at a disadvantage, as they want to save some leave for Pakistani festivals. This is likely to be unlawful indirect racial discrimination by imputation, unless the requirement can be justified.

4.8 Racial harassment by imputation is similar to direct racial discrimination by imputation. It occurs where a person is racially harassed because of their imputed race. In particular, it occurs in two possible situations. Firstly, where a person:

¹⁸ Section 4(1)(b) and section 8(1)(d) of the RDO

- Harasses another person on the ground of the imputed race of a person by engaging in unwelcome conduct (which may include an oral or a written statement); and
- 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.

This can be described as *“unwelcome conduct racial harassment”*.¹⁹

4.9 Secondly, racial harassment by imputation occurs where a person:

- Harasses another person on the ground of the imputed race of that other person by;
- Alone or with others engages in conduct (which may include an oral or a written statement);
- That creates a hostile and intimidating environment for that other person.

This can be described as *“hostile and intimidating environment racial harassment”*.²⁰

Example: racial harassment by imputation

A taxi driver picks up a passenger who he believes is of Pakistani ethnic origin, when in fact he is of Greek ethnic origin. The taxi driver says he does not like Pakistanis, as they are all fake refugees in Hong Kong, criminals and a threat to society. He tells the passenger he is a dirty “Ah cha” dog and should go back to his country. The passenger tells the driver he is not of Pakistani ethnic origin, but is ignored by him. The passenger feels shocked, intimidated and humiliated by the conduct and words of the taxi driver. This is likely to be unlawful racial harassment by imputation in relation to the provision of taxi services, either being unwelcome conduct or creating a hostile and intimidating environment.

(b) Good practice to prevent race discrimination and harassment by imputation

4.10 All stakeholders affected by the amendments should ensure that their policies and practices are updated to take into account the amendments, and ensure that they adhere to the principle of equality and prevent racial discrimination and harassment by imputation. These include key sectors, such as employers, education and service providers, and those responsible for disposing or managing premises.

¹⁹ Section 7(1) of the RDO

²⁰ Section 7(2) of the RDO

4.11 It is recommended that employers and education providers should amend their relevant policies relating to preventing racial discrimination to ensure that it covers direct and indirect racial discrimination, and racial harassment by imputation. In situations where it is more likely to arise, it is recommended that training be provided to students and relevant staff on the concept of racial discrimination by imputation, and how to avoid treating people based on stereotypes, assumptions and unconscious bias, which may result in racial discrimination by imputation.

Example: training by recruitment agency on racial discrimination by imputation and unconscious bias

An employer who is a recruitment agency becomes aware of the changes in the racial discrimination laws to cover racial discrimination by imputation. The employer wants to ensure that all staff members involved in considering candidates will avoid possible racial discrimination against them, including, for example, racial discrimination by imputation based on candidates' names or appearance. The employer provides training to all recruitment staff members on the meaning of racial discrimination by imputation, how unconscious bias can lead to such discrimination, and case studies on how to avoid such possible racial discrimination.

5. Harassment in common workplaces

- 5.1 The amendments provide new protections from sexual, breastfeeding, disability and racial harassment in relation to work situations. The protections from sexual, breastfeeding, disability and racial harassment applies to situations of employment relationships and similar forms of work situations and relationships, such as a principal and contract worker, partnerships, principal and agent relationships, and barristers, pupils and persons giving instructions to barristers.²¹
- 5.2 The amendments to the SDO, DDO and RDO provide protection from sexual, breastfeeding, disability and racial harassment in common workplaces.²² This covers situations where there is no employment or other similar work relationship referred to previously, but there is a common workplace. The amendments are important to ensure that there is protection from harassment in common workplaces where previously none existed.
- 5.3 As stated previously, the EOC has published two sets of Guidance relating to the breastfeeding provisions: one for the employment and related sectors; and another for all other sectors. The protections from breastfeeding harassment in common workplaces are discussed in detail in the Guidance on the breastfeeding provisions in employment and related sectors.

(a) Protection from sexual, disability and racial harassment in common workplaces

- 5.4 The amendments to the SDO, DDO and RDO provide similar protections from harassment. It is unlawful for a workplace participant to sexually harass, harass on the ground of the disability, or harass on the ground of the race of another workplace participant, at the workplace of both persons.²³

(i) Meaning of terms

- 5.5 A “*workplace*” is defined as a place:
- At which the person works as a workplace participant; or
 - That the person attends as a workplace participant.²⁴

- 5.6 A “*workplace participant*” is defined as:

²¹ See sections 23, 40(6) and (7) of the SDO; sections 22, 39(4) and (5) of the DDO; sections 24, 39(7) and (8) of the RDO

²² See section 23A of the SDO which covers both sexual harassment and harassment of breastfeeding women; section 22A of the DDO; and section 24A of the RDO

²³ Section 23A(1) of the SDO; section 22A(1) of the DDO; and section 24A(1) of the RDO

²⁴ See section 23A(2) of the SDO; section 22A(2) of the DDO; and section 24A(2) of the RDO.

- An employee;
- An employer;
- A contract worker;
- A principal of a contract worker within the meaning of sections 13(1) of the SDO, 13(1) of the DDO and 15(1) of the RDO;
- A commission agent;
- The principal of a commission agent within the meaning of sections 20(1) of the SDO, 20(1) of the DDO and 22(1) of the RDO;
- A partner in a firm;
- An intern; or
- A volunteer.²⁵

5.7 Some of the workplace participants are defined in the legislation to explain in more detail their meaning.

5.8 An “intern” is defined as “a person who is engaged by another person for an internship but is not an employee of that other person”.²⁶ An “internship” is defined as:

*“(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or
(b) any other period of work that is usually described as an internship.”²⁷*

5.9 As an internship is defined to include a pupillage in a barristers’ chambers, the meaning of “pupillage” is also relevant. The Ordinances state that:

“pupil, pupillage, tenancy and tenant have the meanings commonly associated with their use in the context of a set of barristers’ chambers.”²⁸

5.10 A “volunteer” is defined as “a person who performs volunteer work other than in the capacity of an employer or employee”.²⁹

(ii) Sexual harassment

5.11 Sexual harassment in common workplaces is unlawful in two situations. Firstly, where a person:

- Makes an unwelcome sexual advance, or an unwelcome request for sexual favours to another person; or

²⁵ See section 23A(2) of the SDO; section 22A(2) of the DDO; and section 24A(2) of the RDO

²⁶ Section 23A(2) of the SDO; section 22A(2) of the DDO; and section 24A(2) of the RDO

²⁷ Section 23A(2) of the SDO; section 22A(2) of the DDO; and section 24A(2) of the RDO

²⁸ Section 36(4) of the SDO; section 33(4) of the DDO; and section 35(4) of the RDO

²⁹ Section 23A(2) of the SDO; section 22A(2) of the DDO; and section 24A(2) of the RDO

- 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.³⁰

5.12 Secondly, sexual harassment is unlawful where:

- A person, alone or together with other persons, engages in conduct of a sexual nature;
- Which creates a hostile and intimidating environment for another person.³¹

5.13 Conduct is “*of a sexual nature*” where it includes making a statement of a sexual nature to a person, or in their presence, whether the statement is made orally or in writing.³² Sexual harassment applies equally where a woman or man is sexually harassed, and irrespective of the sex of the person who is doing the sexual harassment.³³

Example: sexual harassment of an intern

Candy is a Hong Kong university student studying business. During her studies she goes on a summer internship for six weeks at a multinational financial institution. During the internship she is not employed by the financial institution as she has no contract of service, and receives no payment apart from reimbursement of her travel expenses. While doing the internship she is assigned to a team where a male supervisor employed by the financial institution starts making suggestive requests and comments to Candy, such as “*You have a really hot body*” and “*I’m sure I could get you a job if you come back to my place sometime*”. This is likely to be unlawful sexual harassment by the supervisor of the intern in a common workplace.

Example: sexual harassment of a consignment worker

Daisy works as a promoter of electronic products on consignment in a large retail shop. She is an employee of the promoting company and not an employee of the retail shop. Jenny is an employee of the retail shop and works in the same section where Daisy works. On several occasions Jenny makes sexual advances on Daisy, asking her to engage in sexual activity with her, which humiliates and intimidates Daisy. This is likely to be unlawful sexual harassment by Jenny of Daisy in a common workplace.

³⁰ Section 2(5)(a) of the SDO

³¹ Section 2(5)(b) of the SDO

³² Section 2(7) of the SDO

³³ Section 2(8) of the SDO

(iii) Disability harassment

5.14 Disability harassment in common workplaces is unlawful where a person:

- Harasses another person by engaging in unwelcome conduct on account of the other person's disability;
- In circumstances where 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.³⁴

Example: disability harassment of a volunteer

A charity provides donated food supplies to disadvantaged people and employs Mr Wong. The charity regularly engages volunteers who help in the office. Mr Suen has been a volunteer at the charity for one year. There is no employment relationship between Mr Suen and the charity. Mr Suen is a paraplegic in a wheelchair. While Mr Suen is working in the office, on several occasions Mr Wong makes derogatory comments about Mr Suen and his disability, such as “Why are we using a disabled worker for this work, he is useless”, and in a sarcastic tone says “Mr Suen, how can you have any friend when you are disabled and in a wheelchair?”. This conduct is likely to be unlawful disability harassment by Mr Wong of Mr Suen in a common workplace.

(iv) Racial harassment

5.15 Racial harassment in common workplaces is unlawful in two situations. Firstly, where a person:

- On the ground of the race of another person;
- Engages in unwelcome conduct (which may include an oral or a written statement);
- In circumstances where 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.³⁵

5.16 Secondly, racial harassment is unlawful where a person:

- On the ground of the race of another person;

³⁴ Section 2(6) of the DDO

³⁵ Section 7(1) of the RDO

- Alone or together with other persons, engages in conduct (which may include an oral or a written statement);
- That creates a hostile or intimidating environment for the other person.³⁶

Example: racial harassment of a commission agent

A Filipino woman Mrs Diego worked as a promoter of electronic products in a large retail shop. She was an employee of the promoter company, not an employee of the retail shop. A Chinese female employee of the retail shop named Mrs Chang works as a cashier and in the same workplace as the Filipino promoter, in the electronics section of the shop. Mrs Chang regularly makes sarcastic jokes and comments about Filipinos, referring to them as only good for being domestic workers, that they all steal, and are likely to have affairs with your husbands. These comments are made by Mrs Chang in front of Mrs Diego, and Mrs Chang knows that Mrs Diego is Filipino. Mrs Diego feels humiliated by the comments. This is likely to be unlawful racial harassment of Mrs Diego by Mrs Chang, by creating a hostile and intimidating environment in a common workplace.

(b) Other forms of unlawful acts relating to harassment in common workplaces

5.17 The amendments also make reforms regarding who is liable for unlawful acts, and types of unlawful acts. These reforms are related to the operation of the existing provisions.

5.18 Under the existing provisions there is liability of employers and principals for the acts of employees and agents, which is known as vicarious liability.³⁷ This means an employer and principals are liable for the sexual, disability and racial harassment by an employee or agent, for example in relation to employment situations, if they harass a fellow employee. A defence exists for an employer where they prove that they took such steps as were reasonably practicable to prevent an employee from doing an act or acts of that description.³⁸ There is no defence available to a principal in equivalent situations.

5.19 Under the existing provisions there is also liability for an employee or agent where they knowingly aid an employer or principal to commit an unlawful act.³⁹

³⁶ Section 7(2) of the RDO

³⁷ Section 46(1) and (2) of the SDO; section 48(1) and (2) of the DDO; and section 47(1) and (2) of the RDO

³⁸ Section 46(3) of the SDO; section 48(3) of the DDO; and section 47(3) of the RDO

³⁹ Section 47(1) and (2) of the SDO; section 49(1) and (2) of the DDO; and section 48(1) and (2) of the RDO

(i) Liability of persons engaging interns and volunteers

5.20 The amendments make not only the interns and volunteers liable for any unlawful acts, but also the persons who engage the interns and volunteers. This is similar to the concept of vicarious liability of employers and principals as described above.

5.21 The provisions state that an act done by an intern or volunteer in the course of an internship or performing volunteer work is to be treated as an act done:

- By the intern or volunteer; and
- By the person who engaged the intern or volunteer, whether or not the act was done with the knowledge or approval of the person.⁴⁰

5.22 The provisions apply to any proceedings relating to the SDO, DDO and RDO, but do not apply for the purposes of any criminal proceedings.⁴¹

5.23 Where proceedings are brought under the SDO, DDO and RDO against the person engaging the intern or volunteer, there is a defence where they prove that they took reasonably practicable steps to prevent the intern or volunteer:

- From doing the act; or
- From doing acts of that description in the course of the internship or performing the volunteer work.⁴²

Example: liability of person engaging a volunteer for the act of sexual harassment

A registered charity in Hong Kong provides support services for the elderly. They have 10 employees and also volunteers doing volunteer work on a regular part-time basis. One of the female employees Wai-chong has regular interactions with one of the male volunteers Henry who works three days a week at the office of the charity. Henry makes sexual advances on several occasions to Wai-chong, asking whether he can kiss her and tries to touch her breasts. Wai-chong is shocked by the behaviour and after several weeks makes a complaint to the management of the charity. The management took no steps to prevent the sexual harassment, and as a result, the charity, as well as Henry, is likely to be liable.

⁴⁰ Section 46A(3) and (6) of the SDO; section 48A(3) and (6) of the DDO; and section 47A(3) and (6) of the RDO

⁴¹ Section 46A(2) of the SDO; section 48A(2) of the DDO; and section 47A(2) of the RDO

⁴² Section 46A(4) and (7) of the SDO; section 48A(4) and (7) of the DDO; and section 47A(4) and (7) of the RDO

(ii) Liability of interns and volunteers for aiding unlawful acts

5.24 The amendments also make interns and volunteers liable where they knowingly aid another person to do an unlawful act. They will be treated as having done the unlawful act themselves.⁴³

5.25 This includes situations where the person who engages the intern or volunteer is liable for an act of the intern or volunteer, as the intern or volunteer is deemed to aid doing the act by the person engaging him/her.⁴⁴

5.26 An exception applies in certain circumstances. An intern or volunteer will not be liable for knowingly aiding another to do an unlawful act if:

- He/she acts in reliance of a statement made to him/her by another person that, by reason of any provision of the SDO, DDO or RDO, the act which they aided would not be unlawful; and
- It is reasonable for him/her to rely on the statement.⁴⁵

5.27 A person who knowingly or recklessly makes a statement referred to above which is false or misleading commits an offence.⁴⁶

Example: intern knowingly aiding disability harassment

An accounting firm with eight partners has an internship programme for university students to gain work experience. The students are not employees and not paid during their internships. During one summer period, the accounting firm has three students doing internships at the same time. One of the interns Cora has a physical disability and is a wheelchair user. The second intern Jackie, while at the office of the firm, makes derogatory comments about Cora, such as she is “*amazed she was given the internship as it is obvious a disabled person shouldn’t work as an accountant*”. Suzy is the third intern and is present when Jackie makes the comments. She also holds onto Cora’s wheelchair to deliberately prevent Cora from moving away while Jackie makes the comments. Suzy is likely to be liable for knowingly aiding the unlawful act of Jackie and be treated as also committing the unlawful act of disability harassment of Cora.

⁴³ Section 47(1) of the SDO; section 49(1) of the DDO; and section 48(1) of the RDO

⁴⁴ Section 47(2A) and (2B) of the SDO; section 49(2A) and (2B) of the DDO; and section 48(2A) and (2B) of the RDO

⁴⁵ Section 47(3) of the SDO; section 49(3) of the DDO; and 48(3) of the RDO

⁴⁶ Section 47(4) of the SDO; section 49(4) of the DDO; and 48(4) of the RDO

(c) Good practice to prevent common workplace harassment

5.28 It is important that all stakeholders who are affected by the new protections from sexual, racial and disability harassment are fully aware of the amendments, in order that harassment can be prevented, and respectful work environments can be ensured.

5.29 This means that employers and employees; principals and contract workers; principals and commission agents; partners in a firm; barristers and pupils; and interns and volunteers should all fully familiarise themselves with the new provisions and how they are affected by them. In particular, it is recommended that affected stakeholders:

- Amend their policies relating to preventing harassment (e.g. in employment, partnerships, and barristers chambers) to cover common workplaces;
- Amend the policies and procedures relating to the handling of complaints and investigations to include complaints relating to common workplace harassment;
- Given the complex nature of the concepts, provide detailed training on the amendments and their effect to all workers in an organisation's workplace affected by the amendments as workplace participants; and
- Review the effectiveness of the revised policies, training and practices relating to common workplace harassment to consider how improvements can be made to better prevent such harassment.

5.30 In relation to training on the provisions, it is recommended that it covers:

- The scope of what is a common workplace;
- The types of workplace participants covered;
- The meaning of sexual, disability and racial harassment;
- Who is liable for sexual, disability and racial harassment in relation to common workplaces; and
- Scenarios of possible common workplace harassment and how to prevent it.

5.31 Stakeholders may also wish to approach the EOC for any training it provides on the new protections from sexual, racial and disability harassment.

Example: revision of policies and training on common workplace harassment

A statutory Government-funded body offers summer internships to university students every year to provide them with work experience. The internships are not paid and the interns are not considered employees. Despite this, as the interns work in common workplaces (as defined in the anti-discrimination Ordinances) of the statutory body, the interns are protected from harassment.

The statutory body decides to amend all its policies relating to sexual, disability and racial harassment to cover common workplaces; make all employees and interns aware of the changes to the law and policies; and provide detailed training to all employees and interns on the effect of the new provisions. The training includes a module on who is liable for the harassment, including liability of the statutory body where they cannot prove that they took reasonably practicable steps to prevent the harassment.

6. Harassment against providers of goods, facilities and services

- 6.1 Amendments have been made to the DDO and RDO to provide protection from disability and racial harassment where a person providing goods, facilities or services is harassed by a person acquiring, seeking to obtain or using those goods, facilities or services.
- 6.2 The amendments mirror similar protections from sexual harassment of those providing goods, facilities or services introduced in 2014.⁴⁷ The EOC has previously published Guidance on the effect of those protections from sexual harassment.⁴⁸
- 6.3 Previously, in the context of providing goods, facilities or services there was only protection from sexual, disability and racial harassment where a person harassed another person in the course of offering to provide or providing the goods, facilities or services.⁴⁹

(a) Protections from disability harassment of providers

- 6.4 The amendments provide that it is unlawful for a person who:

- Wants to acquire goods or services;
- Is acquiring goods or services;
- Wants to make use of facilities; or
- Is making use of facilities;

to harass another person with a disability who, whether for payment or not, provides the goods, facilities or services.⁵⁰

- 6.5 Disability harassment is unlawful where a person:

- Harasses another person by engaging in unwelcome conduct on account of the other person's disability;
- In circumstances where 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.⁵¹

⁴⁷ See sections 40(1A) and 41(6) and (7) of the SDO

⁴⁸ Sexual Harassment — The Sex Discrimination Ordinance Protects Providers of Goods, Facilities or Services, http://www.eoc.org.hk/EOC/Upload/UserFiles/File/leaflets/N3812_EOC_leaflet_Final_for%20preview_2015_0504.pdf

⁴⁹ See sections 40(1) of the SDO; section 38(1) of the DDO; and section 39(1) of the RDO

⁵⁰ Section 38(1A) of the DDO

⁵¹ Section 2(6) of the DDO

- 6.6 The protection from disability harassment applies to all harassment that occurs in Hong Kong, but also applies outside Hong Kong if such disability harassment occurs on a relevant ship, aircraft or dynamically supported craft.⁵²
- 6.7 The protections from disability harassment will apply outside Hong Kong where they occur on:
- Any ship registered in Hong Kong;
 - Any aircraft or dynamically supported craft registered in Hong Kong and operated by a person who has their principal place of business, or is ordinarily resident, in Hong Kong; or
 - Any ship, aircraft or dynamically supported craft belonging to or possessed by the Government.⁵³

Example: disability harassment of a service provider

Nathan works as a bartender in Hong Kong. He has a physical disability from a car accident when he was a child, and lost his left hand. One of the regular customers in the bar, on several occasions, makes insulting comments about Nathan, saying he is a “cripple”, “freak” and he can’t believe the bar gave him a job given his disability. This is likely to be unlawful disability harassment of Nathan by the customer.

(b) Protections from racial harassment of providers

6.8 The amendments provide that it is unlawful for a person who:

- Seeks to obtain or use goods, facilities or services; or
- Is provided with goods, facilities or services;

to racially harass another person concerned with the provision of the goods, facilities or services.⁵⁴

6.9 Racial harassment is unlawful in two situations. Firstly, where a person:

- On the ground of the race of another person;
- Engages in unwelcome conduct (which may include an oral or a written statement);

⁵² Section 40(7) of the DDO

⁵³ Section 40(3) of the DDO

⁵⁴ Section 39(1A) of the RDO

- In circumstances where 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.⁵⁵

6.10 Secondly, racial harassment is unlawful where a person:

- On the ground of the race of another person;
- Alone or together with other persons, engages in conduct (which may include an oral or a written statement);
- That creates a hostile or intimidating environment for the other person.⁵⁶

6.11 The protections from racial harassment applies to all harassment that occurs in Hong Kong, but also applies outside Hong Kong if such racial harassment occurs on a relevant ship, aircraft or dynamically supported craft.⁵⁷

6.12 The protections from racial harassment will apply outside Hong Kong where they occur on:

- Any ship registered in Hong Kong;
- Any aircraft or dynamically supported craft registered in Hong Kong and operated by a person who has their principal place of business, or is ordinarily resident, in Hong Kong; or
- Any ship, aircraft or dynamically supported craft belonging to or possessed by the Government.⁵⁸

Example: racial harassment of a service provider

Rita works for a Hong Kong-registered airline as a flight attendant. Rita is of Indian racial origin, is a Hong Kong permanent resident and was born in Hong Kong. During a flight from Hong Kong to Mumbai and while the plane is in international airspace, a male passenger on the plane served by Rita says to Rita several times *“All you Indians smell, I don’t want to be served by you. Why don’t you go back to India where you belong!”* The customer says the comments loudly so that several other passengers can hear him. This is likely to be unlawful racial harassment against Rita by the customer, even though the racial harassment occurred in international air space, not in Hong Kong.

⁵⁵ Section 7(1) of the RDO

⁵⁶ Section 7(2) of the RDO

⁵⁷ Section 40(7) of the RDO

⁵⁸ Section 40(3) of the RDO

(c) Good practice to prevent providers from being harassed by service users

6.13 It is important that all stakeholders affected by the new protections from racial and disability harassment of services providers are aware of the amendments and their effect. This means employers who provide goods, facilities or services should make their employees aware that they are protected from disability and racial harassment by service users such as customers. Where possible, businesses or other organisations providing goods, facilities or services should also make service users aware that they should not harass their staff on grounds of disability or race.

6.14 Given that the protections from disability and racial harassment are similar to the protections from sexual harassment of service providers by service users, it may also be helpful to consolidate the policies and practices regarding the three forms of harassment.

6.15 It is recommended that the following measures are taken:

- Providing training to staff members about the amendments and how they are protected from sexual, disability and racial harassment by service users;
- Ensuring that there is a clear complaint and investigation procedure for any incidents of possible sexual, disability and racial harassment in such circumstances;
- Where it is relevant and harassment is more likely to occur, service providers should provide information to service users that it is unlawful to sexually harass, or harass on grounds of disability or race any staff providing the goods, facilities or services.

Example: complaint and investigation procedure for harassment

A restaurant employs a number of Filipino women and men as serving and bar staff. Given that previously these staff members have sometimes experienced sexual and racial harassment by customers of the restaurant, the restaurant informs all staff members of the amendments, and introduces a clear written form and procedure for staff members to make any complaints about any sexual, disability or racial harassment by customers. The form allows an employee to provide the employer restaurant with information about the incident or incidents, including what happened, the customer's name if known, date, time, place and witnesses. The restaurant agrees to investigate any complaints and provide any information to the employee, if they wish to make a complaint to the EOC or file proceedings in the District Court.

Example: providing information to service users to prevent harassment

A cafe in Hong Kong employs several persons with intellectual disabilities in customer-related roles, such as waiting staff. The cafe wishes to promote the employment of people with disabilities given they are very under-represented in employment. Several of the staff members with disabilities have previously reported being harassed because of their disabilities by customers. When the amendments are introduced, the cafe puts up a message in all menus that *“Our cafe is an equal opportunities employer for people with disabilities. Please treat our staff with the dignity and respect they deserve. Any disability harassment of them is unlawful and appropriate action will be taken.”*

7. Harassment against prospective and existing members of clubs

- 7.1 Amendments have been made to provide protection from sexual, breastfeeding, and disability harassment where the management of a club harasses prospective or existing members under the SDO and DDO. There is already protection from racial harassment in equivalent circumstances in relation to clubs under the RDO.⁵⁹
- 7.2 A “club” is defined under the SDO and DDO as *“an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association.”*⁶⁰
- 7.3 Under the SDO and the DDO, there is protection from direct and indirect sex discrimination, breastfeeding discrimination, and disability discrimination in relation to clubs.⁶¹ In particular, those provisions provide that it is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who has applied or is a member of the club. The amendments extend protections in clubs to sexual, breastfeeding, and disability harassment.
- 7.4 As stated previously, the EOC has published two sets of Guidance relating to the breastfeeding provisions: one for the employment and related sectors; and another for all other sectors. The protections from breastfeeding harassment in clubs are discussed in detail in the Guidance on the breastfeeding provisions in other sectors.

(a) Protections from sexual harassment in clubs

- 7.5 It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to sexually harass a woman or man who is, or has applied to be, a member of the club.⁶²
- 7.6 Sexual harassment is unlawful in two situations. Firstly, 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;

⁵⁹ Section 39(1) of the RDO

⁶⁰ Section 2(1) of the SDO and section 2(1) of the DDO

⁶¹ Section 37 of the SDO, section 39A of the SDO, and section 34 of the DDO

⁶² Section 39A of the SDO

- 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.⁶³

7.7 Secondly, sexual harassment is unlawful where:

- A person, alone or together with other persons, engages in conduct of a sexual nature;
- Which creates a hostile and intimidating environment for another person.⁶⁴

7.8 Conduct is “*of a sexual nature*” where it includes making a statement of a sexual nature to a person, or in their presence, whether the statement is made orally or in writing.⁶⁵ Sexual harassment applies equally where a woman or man is sexually harassed, and irrespective of the sex of the person who is doing the harassment.⁶⁶

Example: sexual harassment in clubs

Winnie applies to be the member of a country club in Hong Kong. The manager of the club has met Winnie several times and invites her to the club to speak informally with him about the conditions for joining the club. In the manager’s office the manager tells Winnie he thinks she is very beautiful and starts caressing her face and shoulders in a sexual manner. Winnie feels shocked and humiliated by this conduct and leaves shortly afterwards. This is likely to be unlawful sexual harassment of Winnie.

(b) Protections from disability harassment in clubs

7.9 It is also unlawful for a club, the committee of management of a club or a member of the committee of management of a club to harass a person with a disability who is, or has applied to be, a member of the club.⁶⁷

7.10 Disability harassment is unlawful where a person:

- Harasses another person by engaging in unwelcome conduct on account of the other person’s disability;

⁶³ Section 2(5)(a) of the SDO

⁶⁴ Section 2(5)(b) of the SDO

⁶⁵ Section 2(7) of the SDO

⁶⁶ Section 2(8) of the SDO

⁶⁷ Section 38A of the DDO

- In circumstances where 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.⁶⁸

Example: disability harassment in clubs

Edmund is 14 years old, has mild autism and is a member of a martial arts club in Hong Kong. His parents encouraged him to take up martial arts as it is a good sport for children with autism. One of the new Committee members of the club notices Edmund and that he has a disability. The Committee member tells Edmund and his parents that *“Autistic children shouldn’t be doing martial arts at our club, it’s not for crazy children who have major mental problems and can’t socialise with others.”* Edmund and his parents feel very offended, humiliated and intimidated by the comments. The comments by the Committee member are likely to be unlawful disability harassment of Edmund.

(c) Good practice to prevent harassment in clubs

7.11 All clubs affected by the amendments should take steps to ensure that those working at the clubs and all the members of the committees of management of clubs, are aware of the effect of the changes.

7.12 It is recommended that the following measures be taken:

- Amending relevant policies regarding non-discrimination and harassment to cover sexual and disability harassment of prospective and existing members (in addition to racial harassment which is already unlawful);
- Informing all staff, committees of management and members of the club about the changes in the law and its effect to protect prospective or existing members from sexual and disability harassment; and
- Updating any procedures for considering complaints of discrimination and harassment to include sexual and disability harassment.

Example: good practice relating to harassment provisions in clubs

A country club in Hong Kong becomes aware of the changes in the laws to protect prospective and existing members of clubs from sexual and disability harassment. In the past, several members have expressed concerns about sexual harassment of members by management of the club. As a result the club devotes one of its newsletters to update all management and members about the changes in the law, and what changes are being made

⁶⁸ Section 2(6) of the DDO

to the club's policies and procedures to investigate any complaints of discrimination and harassment. The club also holds a sharing session for all members in which they can discuss the effect of the changes, and what further improvements can be made in the club to prevent sexual, disability and racial harassment in the future.

8. Awarding damages for indirect discrimination

- 8.1 Amendments have been made regarding the circumstances in which damages can be awarded to a claimant if he/she has brought a claim of discrimination before the District Court.
- 8.2 Previously, in relation to claims of indirect discrimination on grounds of sex, marital status and pregnancy under the SDO; indirect discrimination on ground of family status under the FSDO; and indirect race discrimination under the RDO, no award of damages could be made if the respondent proved that the requirement or condition concerning the indirect discrimination was not applied with the intention of treating the claimant unfavourably on those grounds. If the respondent proved that they did not intend to discriminate, no damages for the indirect discrimination could be awarded. This contrasted with the DDO where there was no equivalent provision.
- 8.3 The above provisions under the SDO, FSDO and RDO have all been repealed by the amendments.⁶⁹
- 8.4 The amendments aim to ensure that claimants are sufficiently compensated for any unlawful indirect discrimination that they experienced as found by the court, and to ensure consistency in the provisions regarding compensation across the four anti-discrimination Ordinances. The amendments therefore have an effect that, whether or not the respondent intended to discriminate against a claimant for the purpose of a claim of indirect discrimination, does not determine whether an order of damages should be made.

Example: damages for indirect sex discrimination

A company introduces a new policy that no staff members are allowed to work part-time, as the management believes that part-time work reduces the efficiency of the organisation. At the time of the policy being introduced, the company has 10 staff members. Eight are men and two are women. All the men work full-time, and both women work part-time three days a week, as they spend the other time caring for their baby children. When the policy is introduced, the two women complain to management that it will severely put them in disadvantage because of their caring responsibilities, and it will not be possible for them to arrange alternative care. Both women have received good appraisals for their work while working part-time.

⁶⁹ Section 76(5) of the SDO, section 54(6) of the FSDO and section 70(6) of the RDO have all been repealed.

The two women bring claims in the District Court of indirect sex discrimination relating to the requirement to work full-time. The company provides no evidence why it considers that part-time workers are less efficient. The Court decides that the requirement that all staff work full-time disproportionately and adversely affects the two women and that there is no justification for the policy. Although it is not proved that the company intended to discriminate against the women on the ground of their sex, as a result of the amendments to the SDO, the Court awards the two women damages for the indirect sex discrimination.

9. Making a complaint and the role of the EOC

- 9.1 Where a person believes he/she has been discriminated against or harassed on grounds relating to any of the amendments, they can lodge a complaint with the relevant person in the particular sector.
- 9.2 The person may also lodge a complaint in writing with the EOC within 12 months from the time of the incident. On receiving the complaint, the EOC will investigate into the matter and attempt conciliation. If the case cannot be resolved through conciliation, the complainant can apply for legal assistance from the EOC. The complainant can also consider applying for legal aid from the Legal Aid Department or use his/her own resources to initiate legal proceedings before the District Court of his/her own accord within 24 months from the time of the incident.
- 9.3 For further information relating to making a complaint to the EOC, please see below.

How to contact the EOC and make a complaint:

Anyone who feels that he/she has been discriminated against, harassed or vilified as specified in the four anti-discrimination Ordinances may lodge a complaint **in writing** to the EOC and submit the complaint to the EOC through one of the following channels:



Letter by Mail



[Online form on the EOC website](#)



Fax



In person at the EOC office



Telephone (for enquiries only)



SMS service (For enquiries by people with hearing impairment/speech difficulties)

Enquiry related to anti-discrimination ordinances: [On-line Enquiry Form](#)

Complaint related to anti-discrimination ordinances: [On-line Complaint Form](#)

Enquiry and complaint related to EOC's services: [On-line Form](#)

Contact the EOC

Tel: (852) 2511 8211 (for general enquiries only)

Fax: (852) 2511 8142

Address: 16/F, 41 Heung Yip Road, Wong Chuk Hang, Hong Kong.

Email: eoc@eoc.org.hk (for general enquiries only)

SMS service: 6972566616538 (For enquiries by people with hearing impairment/speech difficulties)

(For enquiries and complaints about discrimination under the anti-discrimination Ordinances, please make use of the above online forms.)