Re: Revised Code of Practice on Employment under the Disability Discrimination Ordinance for Public Consultation

Submission of the Hong Kong Bar Association

1. The Hong Kong Bar Association ("HKBA") submits its comments on the Revised Code of Practice on Employment ("Revised Code of Practice") under the Disability Discrimination Ordinance ("DDO") of the Equal Opportunity Commission ("EOC") for public consultation.

General Observations

2. The Revised Code of Practice has become a much more lengthy document (ie over 120 pages). Bearing in mind that most employers in Hong Kong operate in small to medium sized businesses, the HKBA would register the concern that the Revised Code of Practice may not be comprehensible to the average employer, while more substantial employers have the resources to receive equal opportunities advice either from human resources experts or from lawyers.

3. The Revised Code of Practice cites legal cases. They are helpful. But there is a risk that they can be taken out of context by unsophisticated readers. This is a particularly important matter to note since cases from foreign jurisdictions are cited; it must be brought to the readers' attention that legal cases from jurisdictions outside Hong Kong are not binding on the courts of Hong Kong and decide questions specific to the constitutional, statutory and other contexts of the corresponding jurisdiction. A suitable warning may be necessary at paragraphs 1.4 and 1.13.

4. The Revised Code of Practice uses examples. Most of the examples portray employers as the "culprits". There is no clear message to delinquent employees not to abuse the DDO. The inclusion of such a message is desirable

in the light of known instances of abuses. The EOC itself was at the receiving ends of unmeritorious claims in two cases.

5. The Revised Code of Practice should have an index of keywords with corresponding paragraph references or a glossary containing definitions of keywords; see, for example, the Code of Practice on Employment and Occupation under the Disability Discrimination Act 1995 [England].

6. The Revised Code of Practice may have in an annex a list of names and contact details of organizations and government offices that provide specific services for employers as well as for persons with disabilities.

Specific Observations

7. Paragraph 1.4 – The citation in footnote 1 should be *Teval (UK) Ltd v Goubatchev* [2009] UKEAT 0490_08_2704.

8. Paragraph 1.11 – It is doubtful whether the ordinary reader would understand the advice that "[a] a purposive approach should be adopted when making reference to this Code". The presumed purposes of the Revised Code of Practice, outlined at paragraph 1.5, have not been referred to in this paragraph.

9. Paragraph 2.6 - It is advisable to change the words "employment related situations" to "possible situations in the field of employment or work". As it is, the expression tends to suggest, for instance, that barristers (DDO section 33) are in employment relationships.

10. Paragraph 2.11 – The last sentence in the paragraph should rephrased to indicate clearly what needs to be established. Further, in the example given, the last sentence should end with "in the course of the affected person's employment".

11. Paragraphs 3.1 and 3.2 – A reference should be made specifically to Article 27 of the Convention on the Rights and Persons with Disabilities. Footnotes 4 and

5 should refer to the "Preamble" of the Convention on the Rights of Persons with Disabilities.

12. Paragraph 3.6.2 – In the example given, the first sentence should be rephrased to say that "she would develop liver cancer in the future".

13. Paragraph 4.1 – In the example given, the second sentence should be rephrased to say that "G, a candidate with mobility disability, was refused an opportunity to have an interview".

14. Paragraph 4.5 – In footnote 7, the first sentence should begin with: "There has yet been a court decision ...".

15. Paragraph 4.6 – In the example given, the last sentence should begin with: "It is likely that J's dismissal would amount to victimization, ...".

16. Paragraph 4.7 – It is necessary to clarify the matter that is intended to be referred to with respect to the phrase "not made in good faith".

17. Paragraph 4.8 – The first sentence should be rephrased to say that the DDO, "like the other anti-discrimination ordinances, have provisions in respect of special measures ...".

18. Paragraph 4.9 – While the HKBA appreciates that this paragraph is intended to further explain the special measures within the meaning of the DDO section 50, it does so not in accordance with the terms of section 50 but introduces the concept of "substantive equality" and four criteria for assessing whether a measure qualifies as being "reasonably intended to provide for substantive equality". Since there has yet to be any court decision on what qualifies as a special measure within the meaning of section 50 or other similar provisions in other anti-discrimination ordinances, it is necessary to state the essential terms of the concept of "substantive equality", its relevance to the proper understanding of section 50 and the sources of reference that have been used in drafting this paragraph.

19. Paragraph 4.13 – Footnote 8 cites the EOC's view in the *Tong Wai Ting* case. However, the EOC's view in that case has not been published or otherwise made accessible. If it is intended to refer to the judgment in that case, then it is necessary to cite the law report of that judgment.

20. Paragraph 4.19 - Under the DDO section 6(a), the comparator has simply to be a "person without disability" and not ". . .or without the same disability". However, in practice, the comparator may have some but not the same disability as the complainant. It is just a reflection of the actual situation and the inference to be drawn from it (see the example that follows in Paragraph 4.20). It may be better to describe situations where the comparator has some disability but "not the same disability" separately thus reflecting the drafting of section 6(a). The authorities are conflicting as to whether "inter-disciplinary group comparison" is allowable under section 6(a) & section 8 (see *M v. Secretary for Justice* [2009] 2 HKLRD 298, CA; c.f. *Aquino Celestina Valdez v. So Mei Ngor Betty* (unreported, 12 September 2005, DCEO 3/2004) at paragraph 9 (per Judge To)).

21. Paragraph 5.17 – In the first sentence, the words "to be undertaken" are redundant.

22. Paragraph 5.18 – In relation to the example, line 6 of the second paragraph should read: ". . .the boss was the only <u>other</u> staff. . ."

23. Paragraph 6.9 - The inherent requirement of a chauffeur should be the ability to safely and lawfully drive a car on the road. A driving licence is simply a form of proof. It is possible to have someone who has been issued with and holds a valid driving licence but is unable to fulfill the inherent requirement due to a recent injury leading to disability.

24. Paragraph 7.17 – It is not clear how the example illustrates an issue relating to disability discrimination since the decision taken by the employer is commented to be "likely to be considered unreasonable and harsh".

25. Paragraph 7.18 – The last sentence appears redundant.

26. Paragraph 7.31 - Employers in such a situation may readily ask whether the "disabled" employee would be sufficiently covered by the motor vehicle insurance. Some explanation or assurance should be given.

27. Paragraph 8.10 – In footnote 28, it is slightly misleading to say that: "The timeframe for lodging a complaint with the EOC is 12 months". In fact, the DDO section 80(4)(c) only says that the EOC may not investigate if the compliant is lodged more than 12 months after the incident complained of. It is better for the Revised Code of Practice to make clear and refer to Paragraph 12.6, which is self-explanatory.

28. Paragraph 8.15 - If the need to make employees redundant in order for the business to survive is established, is there anything wrong to first let go those who are least productive as a matter of fact?

29. Paragraph 8.18.7 - The communication should be properly documented to minimize the risk of dispute in a subsequent complaint.

30. Paragraph 9.13 – It is better to specify that level 6 fine is currently $100,000 under Schedule 8 to the Criminal Procedure Ordinance (Cap. 221).

31. Paragraph 10.6 - It may be more useful to refer to *Lister v. Hesley Hall Ltd* [2001] ICR 665 since *Lister* is an equal opportunity case. It is only necessary to mention that *Lister* was applied by the Court of Final Appeal in *Ming An Insurance Co (HK) Ltd v. Ritz-Carlton Ltd* [2002] 3 HKLRD 844, (2002) 5 HKCFAR 569. The correct citation of *Ming An* is [2002] 3 HKLRD 844.

32. Paragraph 10.17.2 – In relation to the second example, the principal would only not be held liable if he had no knowledge of the "disability harassment" and it was not foreseeable on the facts. However, if the "harassment" is a natural consequence of the implementation of the discriminatory policy laid

down by the principal so that the principal may reasonably be taken to have authorized it, he may still be liable.

33. Paragraph 11.23 – Since the term "natural justice" is used, it may be necessary to give a short explanation of its meaning.

34. Paragraph 11.26 – In the last shaded box at page 111, the words "the managers" should read "such employees".

Hong Kong Bar Association

Dated: 2nd June 2010