Chapter 7

UNLAWFUL HARASSMENT*

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1. Introduction

Introductory notes. It is unlawful to engage in sexual harassment, disability harassment and racial harassment in Hong Kong.[1] This chapter will consider each of these types of unlawful harassment. However, it will focus mainly on sexual harassment which, of the different types of unlawful harassment, is the more common type of complaint received by the Equal Opportunities Commission (EOC).[2] Although some acts of harassment may constitute criminal offences, the scope of this chapter will be restricted to the civil aspects of the relevant laws. **7.001**

2. The Framework

Definition of "harassment" generally. Unlawful harassment is specifically defined in the anti-discrimination legislation. The definitions of unlawful harassment as set out in each of the three anti-discrimination ordinances are by and large the same except that the Disability Discrimination Ordinance (DDO), unlike the Sex Discrimination Ordinance (SDO) and the Race Discrimination Ordinance (RDO), it does not include the concept of a "hostile or intimidating environment" as a form of unlawful harassment.[3] **7.002**

Two types of unlawful harassment. There are generally two types of unlawful harassment, namely, *quid pro quo* and "hostile environment". Judge Poon provided a good summary of the two types of unlawful harassment in *Chen v Taramus Rus*[4] where Her Honour said: **7.003**

> "As s.2(5)(a) of the SDO was copied directly from the s.28A of the Australian federal legislation, it is thus interpreted to prohibit both *quid pro quo* harassment and "*hostile environment*" harassment. *Quid pro quo* harassment occurs when an employer or other persons specified in the Ordinance is *in a position of power,* makes unwelcome sexual advances to the victim, in return for a benefit or under threat of a detriment. *Hostile environment harassment* occurs when the harasser engages in unwelcome sexual conduct in relation to the victim *which creates a hostile environment* for the victim.
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> s.2(5)(b) provides an alternative broader definition of hostile environment harassment which does not require that the sexual conduct be 'in relation to' the victim."

Consider the United Kingdom cases with care. There is not a large body of case law in Hong Kong on unlawful harassment. However, as the Hong Kong anti-discrimination legislation, in particular the SDO, is based to an extent on the **7.004**

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1 Sections 23,24,39 and 40 of the Sex Discrimination Ordinance (Cap.480) (SDO); ss.22, 23, 37, 38 and 39 of the Disability Discrimination Ordinance (Cap.487) (DDO) and s.24, 25, 38 and 39 of the Race Discrimination Ordinance (Cap.602) (RDO).

2 According to the Equal Opportunity Commissions (EOC) Annual Report 2008/2009, from Apr 2008 to Mar 2009, the EOC handled 132 employment-related complaints which involve sexual harassment and 22 employment-related complaints which involve disability harassment.

3 Section 2(5) of the SDO and s.7 of the RDO.

4 (Unrep., DCEO 2/1999, [2000] HKEC 649) at para 62.

Australian federal anti-discrimination legislation some guidance may be gleaned from the Australian cases. While cases in the United Kingdom can provide guidance they should be considered against their historical background. One of the first major pieces of anti-discrimination legislation introduced into the United Kingdom was the Sex Discrimination Act 1975. This Act did not include a statutory concept of unlawful harassment and as such there was no specific redress for victims of sexual harassment. Any claim for unlawful harassment had to be brought as a form of direct discrimination. As a consequence, a complainant would need to prove that he or she suffered a detriment due to less favourable treatment,[5] an element which has been removed by the statutory definition of sexual harassment.[6] In the United Kingdom, harassment was not a freestanding cause of action before 1997 (when the Protection from Harassment Act was enacted). The definition of unlawful harassment was only incorporated into the Sex Discrimination Act in October 2005. The UK case authorities decided under the "old" discrimination law should therefore be read with this historical context in mind.

3. Areas where Harassment is Unlawful

7.005 **Areas where harassment is unlawful.** The anti-discrimination ordinances do not make all types of harassment unlawful. Instead, the anti-discrimination ordinances give protection from in particular areas namely (1) employment[7] (including partnerships and vocational training etc.), (2) education,[8] (3) provision of goods, facilities or services,[9] (4) access to, disposal and management of premises[10] and (5) practising as barristers.[11] These relevant sections of the legislation provide the legal basis of a claim for unlawful harassment and any alleged harassment that does not fall within one of the prescribed areas will not be unlawful. The areas covered by the anti-discrimination ordinances are discussed in more detail in Chapter 2.

7.006 **Sexual harassment in the employment area.** Of the different areas of unlawful harassment, employment is perhaps the area where unlawful harassment occurs more relative to the other areas.[12] Although Part III of the SDO is headed "Discrimination and Sexual Harassment in Employment Field", the sections under that Part encompass

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5 *Driskel v Peninsular Business Service Ltd* [2000] IRLR 151.

6 See para 7.012.

7 SDO ss.23 and 24; DDO ss.22 and 23; and RDO ss.24 and 25. For example, see *Chen v Taramus Rus* (fn 4) where the Plaintiff commenced proceedings for unlawful sexual harassment was made under SDO s.23.

8 SDO s.25; DDO s.24; and RDO s.26. *Yuen Sha Sha v Tse Chi Pan* [1999] 2 HKLRD 28 was the first case involving a claim of sexual harassment under the SDO. In this case, both the plaintiff and defendant were university students. The male defendant admitted to secretly video recording the female plaintiff in her hostel room at the University. The plaintiff commenced proceedings under SDO s.39(3).

9 SDO s.28; DDO ss.26 and 27; and RDO s.27. In *Wong Kwok Mui v Lee Yuen Tim* (unrep., DCEO 9/1999, [2001] HKEC 249) the plaintiff, who was a pupil of the defendant, commenced proceedings under SDO s.40(1) against the defendant for alleged acts of sexual harassment during the course of receiving martial arts instructions. However, as the judge held that there was no unwelcomed advance or conduct, His Honour did not need to consider whether the giving of martial art instructions amounts to the provision of goods, facilities or services within s.40(1).

10 SDO ss.29 and 30; DDO ss.25, 28 and 29; and RDO ss.28 and 29.

11 SDO ss.23, 24 and 40; DDO ss.22, 23, 37, 38 and 39; and RDO ss.24, 25 and 39.

12 According to the EOC Annual Report 2008/2009, from Apr 2008 to Mar 2009, the EOC handled 132 employment-related and 9 non-employment related sexual harassment complaints.

areas broader than the traditional employment area. In addition to prohibiting sexual harassment by an employer of a person seeking employment[13] or an employee[14] or by an employee against a person seeking employment or another employee[15] the SDO prohibits sexual harassment under Part III in the following arrangements:

(a) contractor arrangement;[16]

(b) partnership;[17]

(c) commission agent;[18]

(d) organisation of works, organisation of employers and other trade unions and the like;[19]

(e) authorities or bodies conferring authorisation or qualification;[20]

(f) the provision of training which would help fit an individual for employment;[21] and

(g) employment agency[22].

4. Common Features of Unlawful Harassment

7.007 **A single act may suffice.** SDO s.2(5) refers to "an unwelcome sexual advance" or "an unwelcome request for sexual favours" while the DDO and RDO refer to "unwelcome conduct" in the definition of harassment. The use of the singular, at least in respect of the SDO, makes it clear that a single act may give rise to unlawful harassment.

7.008 **Unnecessary for a series of incidents.** It is unnecessary for there to be a series of incidents or a "continuous or repeated course of conduct"[23] to amount to unlawful harassment. A single act may also constitute unlawful harassment.[24]

7.009 **A real or hypothetical comparator is not required to prove unlawful harassment.** The Hong Kong statutory definitions of harassment differ from the definitions of direct discrimination in that in the case of harassment in comparison with a real or hypothetical comparator is not required.[25] There is no requirement for there to be less favourable treatment for there to be unlawful harassment.

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13 SDO s.23(1).
14 SDO s.23(2).
15 SDO s.23(3).
16 SDO s.23(4) and (5).
17 SDO s.23(6) and (7).
18 SDO s.23(9) and (10).
19 SDO ss.24(1) and 16.
20 SDO ss.24(2) and 17.
21 SDO s.24(3).
22 SDO s.24(4).
23 See for example *Ma Bik Yung v Ko Chuen* [1999] 2 HKLRD 263, where a single incident of abusive and insulting behaviour by a taxi driver constituted both discrimination and harassment.
24 *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, EAT.
25 This is apparent from the statutory definitions of unlawful harassment.

7.010 **Complainant bears the burden of proving unlawful harassment.** The burden of proof rests with the complainant to prove unlawful harassment. The Court in *Wong Kwok Mui v Lee Yuen Tim*[26] said:

> "the burden [of proof] remains on the Plaintiff. It is not enough that the Defendant lies about certain things, albeit crucial things. What remains to be established is that the Defendant made unwelcome advances or engaged in unwelcome conduct in circumstances reasonable people would anticipate it to be unwelcome."

7.011 In *L v Equal Opportunities Commission*[27] the plaintiff was a former employee of the EOC who had commenced proceedings for unlawful disability discrimination and harassment, Judge Muttrie said at para 170:

> "This is a claim in tort, at the end of the day, and the plaintiff has to establish fault on the balance of probabilities. Section 3 does not provide a presumption of discrimination and it does not shift the onus of proof to the defendants."

7.012 **Liability of employers and principals.**[28] Employers and principals may be held vicariously liable for any act of unlawful harassment by an employee committed in the course of employment.[29] The key issue in establishing employer liability will be whether the act of harassment was committed in the course of employment.

5. Sexual Harassment

(a) The statutory definition

7.013 **Sexual Discrimination Ordinance.** The SDO (enacted in 1995 and came into force in 1996) prohibits sexual harassment in a number of areas including employment, education, disposal or management of premises and provision of goods, facilities and services.[30] The majority of cases have been in relation to sexual harassment in the context of employment.[31] Section 2(5) of the SDO defines "sexual harassment" as follows:

> "a person (howsoever described) sexually harasses a woman if—
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> (a) the person—
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> (i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or

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[26] (Unrep., DCEO 9/1999, [2001] HKEC 249).
[27] (Unrep., DCEO 1, 6/1999, [2002] HKEC 1390).
[28] For a more detailed discussion on vicarious liability and preventive measures that may be taken by the employers to avoid incurring liability for unlawful harassment and defences available to the employers, please refer to Chapter 9.
[29] SDO s.46(1), DDO s.48(1) and RDO s.47(1).
[30] See para 7.005–7.006.
[31] Fn 12.

(ii) engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or

(b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her."

7.014 **Two types of sexual harassment.** From the definition of harassment in the SDO sexual harassment can broadly be categorised into two types, namely, *quid pro quo*[32] and "hostile environment" harassment.[33,34]

7.015 ***Quid pro quo* sexual harassment.** *Quid pro quo* sexual harassment is "one on one" sexual harassment and typically involves a supervisor or a person in a position of power making an unwelcome sexual advance to a subordinate or the victim in return for a benefit or under threat of a detriment. Examples of conduct that may be regarded as *quid pro quo* sexual harassment include:

- unwelcome sexual advances such as leering and lewd gesture, inappropriate touching or grabbing or deliberating brushing up against another person;
- unwelcome suggestions or requests for sexual favours (even if intended to be humorous) such as suggestions that sexual cooperation or the toleration of sexual advances may further a person's career; and
- unwelcome verbal, non-verbal or physical conduct of a sexual nature, such as sexually derogatory or stereotypical remarks, obscene gestures, jokes about sex or gender in general, repeated invitations to go out where the victim has previously declined or persistent questioning of a person's private life.

7.016 **"Hostile environment" harassment.** Section 2(5)(b) of the SDO provides an alternative arguably broader definition of hostile environment harassment. This type of harassment occurs when one or more persons engage in conduct not directed at anyone in particular, but such conduct creates a hostile or intimidating environment. Some examples of this could be explicit or smutty conversations, sexual or obscene jokes between co-workers, display of sexually offensive pictures or posters or computer images, or circulation of offensive email messages around the workplace. The two types of unlawful sexual harassment are discussed below.

7.017 **Who can sexually harass or be harassed?** The definition of sexual harassment in the SDO refers to the circumstances where a "person" engages in sexual harassment of a "woman". A "person" is defined in s.3 of the Interpretation and General Clauses Ordinance to include any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine

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[32] SDO s.2(5)(a)(i) and (ii).
[33] SDO s.2(5)(b).
[34] *Chen v Taramus Rus* (fn 4) at para 62.

or compensation. A "woman" is defined to include a female of any age. Section 2(8) of the SDO states that "[a] provision of Part III or IV framed with reference to sexual harassment of women shall be treated as applying equally to the treatment of men" and the relevant provisions shall have effect with such modifications as are necessary. Accordingly, both men and women are able to claim sexual harassment in the same way and, a harasser may be male or female.[35] A "man" is defined in the SDO to include a male of any age.[36]

7.018 **A man can be sexually harassed by a woman or a man.** Both men and women could be made a subject of sexual harassment.[37] Given the language used in the definition of sexual harassment and s.2(8) of the SDO it is unlawful for a man to sexually harass another man and similarly a woman to sexually harass another woman. There is no requirement under the SDO that the sexual harassment be of a victim who is of the opposite sex to the harasser. As such, for example, a male who is subject to unwelcomed conduct of a sexual nature by another male may be able to make a claim of unlawful sexual harassment under the SDO.

(b) *Quid Pro Quo* harassment

7.019 **The conduct must be unwelcomed.** Not all conduct of a sexual nature will amount to unlawful sexual harassment. A common element to the two limbs of the definition of *quid pro quo*" harassment in s.2(5)(a)(i) and (ii) is that it must be "unwelcome". If the relevant conduct is not unwelcomed it will not amount to unlawful sexual harassment. This is illustrated in the following passage cited by Judge Poon in *Chen v Taramus Rus*[38] from the Australian case of *O'Callaghan v Loder*:

> "Anti-discrimination laws cannot be taken to proscribe or discourage consensual sexual activity, whether in the workplace or elsewhere. Hence the initial requirement that the sexual activity should be unsolicited and unwelcome. A person who makes advances, knowing that they are reciprocated, cannot be guilty of unlawful discrimination. Nor can a person who makes advances genuinely believing them to be welcome, so long as the circumstances are not such that he should, objectively, have realized that they were unwelcome. In other words, if an employer continues to make advances to the employee, against the employee's objections, then even though the employer might personally believe that the objections were not meant seriously, and that his advances were quite welcome, nevertheless he can still be guilty of discrimination. The test then will be whether the circumstances were such that he should have realized that his approaches were unwelcome."

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[35] For example, in *Chen v Taramus Rus* (fn 4) the alleged harasser was female.
[36] SDO s.2.
[37] For example, *Chen v Taramus Rus* (fn 4) a male employee alleged sexual harassment by a female colleague.
[38] *Ibid*., at para 62 citing *O'Callaghan v Loder* [1984] EOC 92-023.

Consider all the circumstances in determining if conduct unwelcomed. Judge Poon said in *Chen v Taramus Rus*[39] **7.020**

> "The Court, in considering whether the complainant welcomed the conduct, may consider all the circumstances, including the plaintiff's testimony in Court, as well as his behaviour at the relevant time. If the advances were solicited, procured, or invited by the plaintiff at the material time, it can hardly be said that such advances were unwelcome. Although the plaintiff is not required to prove that he expressly objected to the harasser or to any other representative of the employer about such unwelcome conduct, it is certainly one factor for the Court to consider in deciding whether the conduct alleged was unwelcome or not."

Morison J in *Reed v Stedman*[40] elaborated on the enquiry as to whether conduct is welcomed when His Honour said at page 302: **7.021**

> "[a]s to whether the conduct is unwelcome, there may well be difficult factual issues to resolve. In general terms, some conduct, if not expressly invited, could properly be described as unwelcome. A woman does not, for example, have to make it clear in advance that she does not want to be touched in a sexual manner. At the lower end of the scale, a woman may appear, objectively, to be unduly sensitive to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct she had made it clear that she found such conduct unwelcome. It is not necessary for a woman to make a public fuss to indicate her disapproval; walking out of the room might be sufficient . . . Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment. (emphasis added)"

Relevance of previous consensual relationship. It is not far fetched to see that a sexual harassment allegation could be used as a weapon as retaliation when a previous consensual relationship turns sour. If the relationship between the alleged harasser and the complainant is or was consensual or reciprocal, then naturally, a claim for sexual harassment must fail. It is not always easy to draw the line between lawful and unlawful conduct when the same incident could be viewed differently by the parties involved. In *Chen v Taramus Rus*[41] Judge Poon dismissed the claim because on the evidence it was established that there had been a consensual relationship. Judge Poon, in his judgment, cited the Australian case of *Hardy v Kelly*.[42] In that case, it was held that in the context of friendship between the complainant and the respondent, the respondent would not have realised that his behaviour was unwelcome to the complainant. The complainant did not make it clear to the respondent that she did not welcome the relationship between them. This caused the respondent to be under the impression **7.022**

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[39] [2000] HKDC 14 at para 63.
[40] [1999] IRLR 299, EAT.
[41] Fn 4.
[42] [1991] EOC 92-369.

that he could rely on their friendship to say things to her which otherwise he would not have said to other employees. It was held that on the basis of such findings the complainant had not established on the balance of probabilities that the respondent had sexually harassed her.

7.023 **Conduct must be unwelcomed at the relevant time.** In the Australian case, *Ashton v Wall*,[43] the correct test was said to be "not how the complainant viewed the advances and sexual conduct *in retrospect,* after she had had time to dwell upon the one-sided nature of the relationship, and the futility of what had occurred but, viewed objectively, whether the advances and the acts of sexual conduct were unwelcome at the time they happened, and whether the respondent reasonably understood that his conduct was unacceptable".

7.024 **Complainant's immediate reaction to alleged conduct not pre-requisite for sexual harassment.** It is perhaps not uncommon for a victim to not immediately react or complain about conduct giving rise to sexual harassment. This does not, however, mean that such conduct is not "unwelcome" and thereby give the harasser a license to harass. There is no legal requirement for the victim to indicate to the harasser that his or her conduct is unwelcome for a court to find unlawful sexual harassment. The Employment Appeal Tribunal (EAT) in *Wileman v Minilec Engineering Ltd*[44] recognised that there may be cases where no complaint has been made and the matter is borne with increasing irritation and distress because the victim is frightened of her boss or frightened of losing her job. Although a victim is not required to prove that he/she expressly objected to the conduct of the harasser, it is a factor a Court may take into consideration in deciding whether the conduct alleged was unwelcome or not.[45] The Court will also look at whether the victim had the power to stop the sexual harassment. In *Wong Kwok Mui v Lee Yuen Tim*[46] the female plaintiff was a pupil of the male defendant at his Wing Tsun classes. The plaintiff alleged acts of sexual harassment during the course of receiving martial arts instructions. The Court, having regard to the plaintiff's background and character and on evidence, dismissed the claim on the basis that it was within the plaintiff's power to put a stop to such harassment but she did not take any action although it was practicable to do so.

7.025 **Sexual advance or request for sexual favour.** The expressions "sexual advance" and "request for sexual favours" used in the definition of sexual harassment are not further defined in the SDO. However, they perhaps need not be as the plain and ordinary meaning of these expressions should be relatively clear. The advance or favour must be "sexual" in nature. It is also clear from the plain language of the definition of "sexual harassment" that a single "sexual advance" or "request for sexual favours" would be sufficient (assuming the other elements are satisfied) to constitute unlawful sexual harassment. There is also no requirement that the sexual advance or the sexual favours be accepted or provided by the recipient of such sexual advance or request for sexual

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[43] [1992] EOC 92-447.
[44] [1988] IRLR 144.
[45] *Chen v Tamara Rus* (fn 4).
[46] Fn 26.

favours to constitute sexual harassment. It is sufficient only that the sexual advance or request for sexual favour be made (assuming the other elements are made out). In the area of employment, a sexual advance or request for sexual favours will typically involve an act representing an abuse of power when a person in a position of power, such as an employer or a supervisor, misuses that position in order to gain sexual favours from the victim, in return for a benefit or under threat of a detriment.[47] The victim may consider that he/she had no choice but to submit to these sexual advances because they do not wish to put their career and livelihood in jeopardy.

7.026 **Sexual advance or request for sexual favour made "to her".** Section 2(5)(a)(i) refers to a sexual advance or request for sexual favour made "to her". It is therefore clear that the sexual advance or request for sexual favour must be made to the victim and not some other person.[48]

7.027 **Conduct of a sexual nature.** The expression "conduct of a sexual nature" is defined in s.2 of the SDO to include "making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing" It should be noted that this is a non-exhaustive definition. The statement of a sexual nature could be made "to" the complainant or "in her presence". It is unnecessary to show that the conduct was related to the victim's sex, only that it was sexual. The conduct may take any form, such as oral, written, or the displaying of pictures. The type of conduct that has been held to be conduct of a sexual nature covers a wide range of circumstances.[49] Guidance on the meaning of "conduct of a sexual nature" may be found from the Australian case of *AB v Adult Multicultural Education Services*[50] where Judge Davis stated:

> "It is clear from section 85 of the Act that 'conduct of a sexual nature' is confined to words or conduct of a sexual nature which can be characterised as sexual or sexually related. The term has a broad scope and essentially relates to matters which have to do with sexual activity or attraction or relationships. It may refer to physical activities such as touching, pinching or patting in a sexual manner, or may refer to other words or conduct, such as commenting on parts of a person's body regarded as having a sexual function, requesting sexual intercourse, explicit language, indecent exposure, offensive telephone calls, offensive hand or body gestures. Whether conduct or a statement is 'sexual' may depend on the

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47 *Chen v Taramus Rus* (fn 4) at para 62.

48 See also comments of Woo J in *Ratcliffe v Secretary for Civil Service* [1999] 4 HKC 237 at para 31.

49 For example, *Bennett v Everitt* (1988) EOC 92-244; *Kiel v Weeks* (1989) EOC 92-245; *Horne v Press Clough Joint Venture* (1994) EOC 92-556; *Hooper v Mt Isa Mines* (1997) EOC 92-879; *Doyle v Riley* (1995) EOC 92-748; *Bebbington v Dove* (1993) EOC 92-545; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health and Community Services* (unreported, HREOC, 17 Sept 1993); *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127 and *Freeshore v Kozma* (1989) EOC 92-249.

50 [2006] VCAT 1862 at para 18. The reference to "section 85 of the Act" is a reference to the definition of "sexual harassment" in the Equal Opportunity Act 1995 (Vic) which is similar to SDO s.2(5)(a). The expression "conduct of a sexual nature" is defined in s.85(2) to include:
"(a) subjecting a person to any act of physical intimacy; (b) making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence; (c) making any gesture, action or comment of a sexual nature in a person's presence."; see also *Te Papa v Woolworths Ltd trading as Safeway*[2006] VCAT 1222 at para 7.

> circumstances, including where and when and how the conduct occurred, and the understanding of the participants at the time."

7.028 In *Johanson v Michael Blackledge Meats*,[51] a case which involved an allegation of sexual harassment in the provision of goods, namely, a dog bone prepared in the shape of a penis and sold by the defendant to the female plaintiff. Federal Magistrate Driver said at para 84:

> "Clearly, the sale of an ordinary dog bone is not conduct of a sexual nature. However, the provision of a dog bone shaped so as to resemble a human penis is conduct of a sexual nature. The test here is objective and it does not matter whether the perpetrator intended to act in a sexual way or, indeed, was aware that he or she was acting in a sexual way…"

7.029 **Conduct of a sexual nature "in relation to" the complainant.** Section 2(5)(a)(ii) of the SDO covers unwelcome conduct of a sexual nature "in relation to" the complainant. This can be contrasted with s.2(5)(a)(i) of the SDO which deals with "unwelcome sexual advance, or an unwelcome request for sexual favours, to her".[52] It would appear that the scope of application in s.2(5)(a)(ii) is broader than s.2(5)(a)(i). In *Ratcliffe v Secretary for Civil Service*[53] the Court of Appeal considered the Police Headquarters Order No 18 of 1995 Part One which contained the same definitions in s.2(5)(a)(i) and (ii) of the SDO. This case concerned an appeal of a judicial review application made by a police officer against the decision that he should be compulsorily retired for violating the Police Headquarters Order. The male applicant (who faced three complaints of sexual harassment against a woman colleague working under his command and was subject to disciplinary proceedings) argued that the requirement "in relation to" must mean "relating to" or "about" the complainant and should be interpreted to exclude sexual comments that were made to a woman but were not actually about her. The relevant conduct in question was a conversation the applicant had with the female colleague in her office, which contained references to what sexual services, short of sexual intercourse, might be offered by a prostitute. This argument was rejected by Woo J who agreed with the Court of First Instance judge who held:[54]

> "The conversation complained of amounted to conduct in relation to the complainant because the conversation was *with* the complainant. The conversation did not have to be about the complainant for the conversation to be a conversation in relation to her. If Mr Kwok's argument was correct, leaving pornographic photographs on a woman's desk would not be conduct in relation to her if she did not feature in them."

7.030 Woo J elaborated with the following example:[55]

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[51] 163 FLR 58.
[52] See para 7.024.
[53] Fn 48.
[54] *Ibid*., at paras 29 and 30.
[55] *Ibid*., at paras 32 and 33; see also the comments of Rogers V-P in *Chen v Taramus Rus* (fn 4) at para 9.

> "Section 2(5)(a)(ii) covers unwelcome conduct of a sexual nature engaged in by a person in relation to the complainant although the conduct, as in this case a conversation, was not "in respect of" her but "with" her. For example, if a man tells dirty stories to a woman in a partitioned room of a restaurant and such stories are unwelcome to her, applying the objective standard of the reasonable man, then sexual harassment is constituted. I think the interpretation proposed by Mr Kwok is too restrictive and does not take fully into account the provisions of section 2(7) of the Ordinance.
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> On the other hand, if a man tells such stories to willing listeners inside the same room, but the stories are, unknown to the man, overheard by ladies in the adjoining room, no sexual harassment can be committed since the stories are not unwelcome conduct of a sexual nature "in relation to" those ladies who are in the other room because they are not present in the room of the story-teller, nor are they the addressees of the stories."

7.031 **Acts of voyeurism can amount to conduct of a sexual nature.** The first case concerning unlawful sexual harassment in Hong Kong after the enactment of the SDO was *Yuen Sha Sha v Tse Chi Pan*.[56] This case concerned the video taping of the plaintiff by the defendant without her consent in her room at a college hostel. The plaintiff, a female university student, discovered a camcorder hidden in a paper box with its lens directed towards her wardrobe. The defendant had videotaped the plaintiff changing clothes in front of the wardrobe and on occasions her body was exposed. The Court held that "[c]learly the Defendant's video taping of the Plaintiff without her consent of her dressing and undressing is sexual in nature and is undeniably unwelcom". In separate proceedings[57] commenced by the girlfriend of the male defendant in *Yuen Sha Sha v Tse Chi Pan*[58] against Yuen Sha Sha. The plaintiff, who was Yuen Sha Sha's roomate, alleged that she had been unlawfully sexually harassed by Yuen Sha Sha and her boyfriend in allowing her boyfriend to stay overnight in the same room of the hostel.[59] The Court of Appeal considered whether such alleged conduct amounted to conduct of a sexual nature in relation to the plaintiff. Rogers JA said:[60]

> "If a pleading contained an allegation that a particular type of conduct which was of a sexual nature had taken place and that an inference to the effect should be drawn from the fact that two students of opposite sex had slept in the same bed on a number of occasions, absent compelling evidence to the contrary, that inference is one which it could be expected would be drawn. But if, as is the case here, there is no identification of the conduct of a sexual nature which is said to have taken place

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56 Fn 8.

57 *Ng Hoi Sze v Yuen Sha Sha* [1999] 3 HKLRD 890.

58 Fn 8.

59 It had been submitted by Yuen Sha Sha before the Court of Appeal that given the history of the matter, this was a nuisance action brought perhaps in revenge for the complaints which had been made by Yuen Sha Sha against the Plaintiff and her boy friend and perhaps on other occasions, the action was prosecuted with a view to persuading Yuen Sha Sha not to pursue her claim in the case heard by Judge Wong.

60 *Ng Hoi Sze v Yuen Sha Sha* (fn 57) at para 11.

> which the Plaintiff would have found offensive, humiliating or intimidating the pleading, on its face, must be deficient. It is not pleaded that the Court should draw an inference from the fact that the students slept in the same bed that any particular type of conduct took place. When this matter was drawn to the attention of M. Sarony, S.C., counsel appearing on behalf of the Plaintiff, he requested an adjournment to take instructions. That adjournment was granted. After the adjournment, counsel indicated that he could make no further pleading in this regard."

7.032 As the plaintiff had not identified the conduct of a sexual nature, it was held that the pleading was bad and that the Judge in the court below was correct in refusing the amendment to incorporate this claim.

7.033 **Declarations of love can amount to conduct of a sexual nature.** Conduct is capable of being regarded as unwelcome conduct of a sexual nature notwithstanding that it consists of the making of absurd promises or declarations of love.[61] In the Australian case of *Hall v A & A Sheiban Pty Lts*[62] it was alleged by one of the female plaintiffs that the male defendant employer "offered to 'wait' for her after her current relationship with her boyfriend finished", and that defendant, who was 45 years her senior, said he loved her. At first instance, the court rejected the plaintiff's allegations and said that even if the alleged comments had been made, the judge could not believe that defendant was serious or that the plaintiff would have taken the defendant seriously. On appeal to the Federal Court, Wilcox J, although not being able to overturn the finding of fact in the Commission below, disagreed with the Commission's suggestion that, as a matter of law, a statement by a male employer to a female employee that he would wait for her, or that he loved her, is incapable of amounting to sexual harassment because it is not to be taken seriously.[63] Wilcox J also commented that:

> "…there may be comments, incapable of serious belief, which are not given and received in a relationship of personal equality and which do fall within the concept of sexual harassment…It might be distressing to a female employee to have the ardour of her male employer constantly pressed upon her, in circumstances where she reasonably apprehends that any protest will jeopardise her continued employment. The circumstances that the ardour is ludicrous, and that the employer is 45 years older than the employee, might tend to exacerbate, rather than to alleviate, any distress."

7.034 **Subjective and objective test for sexual harassment.** Section 2(5)(a) of the SDO requires that the unwelcome sexual advance, request for sexual favours or conduct of a sexual nature must be in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated that the victim would be offended, humiliated or intimidated. This part of the statutory definition for sexual harassment imparts both a subjective and an objective test. It was argued, in the case *Chen v*

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[61] *Hall v A & A Sheiban Pty Ltd* 85 ALR 503 at para 32.
[62] *Ibid*.
[63] *Ibid*.

Taramus,[64] that the test for "unwelcome" should be an objective test. The Court of Appeal held that s.2(5)(a) of the SDO imports both a subjective and an objective test. In *Chen v Tamara Rus*[65] His Honour Rogers VP (and with whom Le Pichon JA and Cheung JA agreed) said at para 9:

> "When it speaks of an unwelcome sexual advance, or an unwelcome request or unwelcome conduct, the word 'unwelcome' must relate to the parties concerned. In particular the matter must be unwelcome in relation to the person who is the object of the advance, request or conduct. Once it is established that such an event has taken place which was unwelcome to the person concerned, it is then a matter of objective of assessment as to whether it was such that it should have been anticipated that the person concerned would have been offended or humiliated or intimidated."

7.035 **Subjective test for "unwelcomed" conduct.** Judge Poon in *Chen v Taramus Rus*[66] said at paras 62 and 63:

> "The question is: whether the actual complainant welcomed the conduct at the relevant time, not whether a 'reasonable person' would have welcomed it. Section 2(5)(a) imports both a subjective and an objective test. This is best illustrated in the Australian case of *O'Callaghan v Loder & Anor* [1984] EOC 92-023:-
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> > 'Anti-discrimination laws cannot be taken to proscribe or discourage consensual sexual activity, whether in the workplace or elsewhere. Hence the initial requirement that the sexual activity should be unsolicited and unwelcome. A person who makes advances, knowing that they are reciprocated, cannot be guilty of unlawful discrimination. Nor can a person who makes advances genuinely believing them to be welcome, so long as the circumstances are not such that he should, objectively, have realized that they were unwelcome. In other words, if an employer continues to make advances to the employee, against the employee's objections, then even though the employer might personally believe that the objections were not meant seriously, and that his advances were quite welcome, nevertheless he can still be guilty of discrimination. The test then will be whether the circumstances were such that he should have realized that his approaches were unwelcome'."

7.036 The Court, in considering whether the complainant welcomed the conduct, may consider all the circumstances including the plaintiff's testimony in Court, as well as his behaviour at the relevant time.[67] The Court will consider the complainant's subjective feelings to determine whether he/she regards the conduct as undesirable or offensive. If a positive conclusion is reached, the Court will then objectively assess the complainant's feelings by reference to the surrounding circumstances such as his/her behaviour, oral testimony of the parties and witnesses and any letters or

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64 Fn 4 at para 62.
65 *Ibid*.
66 *Ibid*.
67 *Ibid*., at para 63.

messages exchanged between them to establish that the circumstances were such that a reasonable person would have anticipated that the complainant would be offended, humiliated or intimidated by the sexual conduct complained of.

7.037 **A reasonable person must regard victim would be offended, humiliated or intimidated.** What is reasonable will depend upon the particular circumstances of the case. Factors that might be relevant include the complainant's age, ethnicity, religion, the circumstances in which the harassment occurred and the nature of the relationship between the parties. In this regard, the case *Tsang Lai Man v Wong Lung Shan & Datacraft (HK) Ltd*[68] may shed some light on the "reasonable person" requirement imparted by the SDO. One of the disputed issues of this case was whether calling the plaintiff a "bakgu" constitutes sexual harassment. The Court accepted that in that particular context this term could only mean "northern lass" and was part of the local vernacular. The Court went on to find that the term was so commonly used that it would be a surprise if the use of it would cause any red faces. Nonetheless, if said to a woman, she may take it as an affront to her dignity and may associate it with being a prostitute. The question is what and how far the reaction would be. The Court examined the evidence and held that it was not proved that the admitted acts and conduct (including calling the plaintiff a "bakgu") were unwelcome.

(c) Hostile or intimidating environment

7.038 **Conduct of a sexual nature creating a hostile or intimidating environment is sexual harassment.** Apart from"*quid pro quo*" sexual harassment s.2(5)(b) SDO sets out unlawful sexual harassment where "a person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating environment for her". This definition in the SDO was amended on 3rd October 2008 to remove the word "work" which appeared before the word "environment".[69] This broadened the scope of the definition in that the conduct no longer needed to take place in a "work environment" and extended to the non- work context. As expressed by Judge Poon, "this category of harassment is addressed only to circumstances where the perpetrator of the sexual harassment engages in conduct such as unwelcome physical contact, telling lewd jokes, or putting up obscene picture in the office".[70] In the work context, this type of sexual harassment is also known as "hostile work environment harassment" and can occur when verbal or physical conduct of a sexual nature substantially interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Display of sexual material in the workplace, leaving obscene material on a workmate's desk or circulation of emails with sexual contents can create a hostile work environment.

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[68] (Unrep., DCEO 1/2000, 12 April 2001).

[69] L.N. 222 of 2008.

[70] *Chen v Taramus Rus* (fn 4) at paras 65.

Conduct creating a hostile or intimidating environment "for her". Section 2(5)(b) refers to the creation of a sexually hostile or intimidating environment "for her". Judge Poon noted in *Chen v Taramus Rus*[71] that "s.2(5)(b) provides an alternative broader definition of hostile environment harassment which does not require that the sexual conduct be "in relation to" the victim". In this regard, see paragraph 70026 above and the case of *Ratcliffe v Secretary for Civil Service*.[72] **7.039**

There must be conduct of a sexual nature. A pre-requisite for "hostile or intimidating environment" sexual harassment is that there must be "conduct of a sexual nature". In this regard, see the discussion at paragraph 70025. The decision of the Equal Opportunity Tribunal of Western Australia in *Horne v Press Clough Joint Venture*,[73] is a clear example of hostile environment sexual harassment. The Tribunal found that it would be offensive to make the two female trade assistants (who were the only women working on a site of over 600 men) to work in an environment with displays of sexual posters including posters of naked women with genitals exposed, a poster of a man and woman engaged in anal sex, a poster of women having sex together, and a full length female nude poster which had been used for dart practice and stabbed several times in the heart, head and genitals. **7.040**

6. Disability Harassment

(a) Statutory definition

Disability harassment defined in the DDO. Harassment of a person with a disability in the relevant prescribed areas is unlawful under the DDO. Section 2(6) of the DDO provides that a person (the "harasser") harasses another person (the "harassed person") if the harasser: **7.041**

> "engages in unwelcome conduct (which may include an oral or written statement) on account of [the harassed person's] disability, or on account of the disability of an associate of that [harassed] person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the [harassed] person would be offended, humiliated or intimidated by that conduct."

There is no equivalent of the hostile work environment harassment similar to that in the SDO[74] under the DDO. **7.042**

The elements of disability harassment. The elements of unlawful disability harassment are: **7.043**

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[71] Fn 4.
[72] Fn 48.
[73] [1994] EOC 92-556 and 92-591.
[74] See para 7.032–7.034

(a) the conduct must be unwelcomed,

(b) it must be done "on account of" the harassed person's disability or the disability of an associate of the harassed person, and

(c) the circumstances must be that which a reasonable person would have anticipated the harassed person would be offended humiliated or intimidated.

7.044 **The conduct must be unwelcomed.** If the conduct is not unwelcomed then it will not amount to unlawful disability harassment, even if the other elements are met.[75]

7.045 **The conduct must be done on account of disability.** There must be causation in that the conduct must be done on account of the harassed person's disability or the disability of an associate.[76] Judge Muttrie in *L v Equal Opportunities Commission*[77] said, at para 48:

> "48. The plaintiff must show for discrimination that the less favourable treatment was "on the ground of" the disability (section 6). For the purposes of harassment he must show that the unwelcome conduct was "on account of" the disability (section 2(6)). These words I think mean the same thing in both cases; but they give rise to some difficulty. The defendant argues that the plaintiff must prove a causal link between the disability and the less favourable treatment; see Driver, Federal Magistrate, in *Chung v University of Sydney* [2001] FMCA 94, affirmed on appeal by Spender J at [2002] FCA 186 where it is stated:
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> > *To substantiate a complaint of discrimination it is not sufficient for you to show that you have a disability and that you have suffered unfair treatment. It is necessary to show that at least one reason for being treated less favourably than other students is based on your disability.*"

7.046 **Harassed person's disability or the disability of an associate.** The causal link or the reason for the conduct need not be the harassed person's disability. There will also be unlawful disability harassment if the relevant conduct is done on the ground of the disability of an associate of the harassed person[78] and assuming the other elements are satisfied. The expression "disability" is defined broadly in the DDO[79] and covers a disability that presently exists, previously existed but no longer exists, may exist in the future or is imputed to a person. The definition of "disability" will include most if not all of the reasons for which sickness leave is taken, including the common cold or stress. For this reason, treating an employee or a colleague badly because he or she has been on sick leave may, depending on the particular circumstances, constitute disability harassment.[80]

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[75] See para 7.018.
[76] Fn 27 at paras 50, 65 and 144.
[77] *Ibid*.
[78] Please refer to Chapter 3.
[79] Please refer to Chapter 3.
[80] Revised Code of Practice on Employment under the DDO, Cl.7.39.

Subject and objective test. Similar to unlawful sexual harassment, it was held in *L v Equal Opportunities Commission*[81] that there are two tests for harassment, the subjective and the objective tests. The Court stated that "the plaintiff has to prove that the conduct complained of was unwelcome to him, and also that a reasonable person having regard to all the circumstances would have anticipated that he would be offended, humiliated or intimidated by it.[82] This is reiterated in the judgment of Judge To in the case *Aquino Celestina Valdez v So Mei Ngor Betty*.[83] The Judge said: **7.047**

> "this definition of harassment imports both a subjective and an objective element. The harassing conduct must be unwelcome and unsolicited and on account of a person's disability which a reasonable person having regard to all the circumstances would have anticipated that the person subject to the conduct would be offended, humiliated or intimated by that conduct. Section 11 [of the DDO] applies equally to harassment so that if there are two or more reasons for the harassing act, so long as the employee can prove one of the reasons is his disability, the harassing act is taken to be performed on account of the employee's disability. Similarly, in considering harassment, the court should always bear in mind the cumulative effect of all the alleged harassing incidents on the disabled employee."

(b) Conduct constituting disability harassment

An example of disability harassment. Disability harassment is a relatively new legal concept in the United Kingdom and there has not been much development in the cases in Hong Kong or Australia either. Since the DDO has adopted similar to concepts to disability harassment as the sexual harassment provisions in the SDO, reference may be made to the sexual harassment cases for guidance. *Ma Bik Yung v Ko Chuen*[84] was the first case under the DDO. The case is an example of conduct that would constitute disability harassment. The defendant, a taxi driver, initially refused the patronage of the plaintiff who had a disability and was in a wheelchair. However, after accepting the fare he then throughout the journey repeatedly made rude remarks (such as "[d]o you think not being able to walk and in a wheelchair is everything! I too had an operation on my leg.") about her disability and did not provide any assistance to the plaintiff despite her requests. The Court, upon examining of the evidence, had little difficulty finding in favour of the plaintiff in respect of the claim of disability harassment. It was held that the defendant's behaviour and the remarks were clearly "on the ground of" the plaintiff's disability and his conduct throughout the entire incident constituted disability harassment. The plaintiff was awarded damages of HK$10,000. **7.048**

Examples in the EOC's Code of Practice on Employment. At the time of writing, the EOC is undertaking the exercise to revise the "Code of Practice on Employment under the Disability Discrimination Ordinance" which has been in use for more than **7.049**

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81 Fn 27.
82 Fn 27 at para 65; see para 7.029.
83 (Unrep., DCEO 3/2004, [2005] HKEC 1407).
84 [2000] 1 HKLRD 514.

10 years since 1997. The draft revised code of practice contains various illustrations including conduct constituting disability harassment and may be viewed as a source of reference against the backdrop of having only a few authorities in this area.

7. Racial Harassment

(a) Statutory definition

7.050 **Race Discrimination Ordinance.** The Race Discrimination Ordinance (RDO) came into force in July 2009 and contains a similar statutory definition of unlawful racial harassment as the other anti-discrimination legislation. Section 7 of the RDO provides that:

> "(1) a person harasses another person if, on the ground of the race of that other person or a near relative of that other person, the first-mentioned 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.
>
> (2) a person ("the first-mentioned person") harasses another person ("the second-mentioned person") if, on the ground of the race of the second-mentioned person or his or her near relative, the first-mentioned 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-mentioned person."

(b) Conduct constituting racial harassment

7.051 **Acts constituting racial harassment.** As the RDO is relatively new, there have been to date no Hong Kong cases on racial harassment. Guidance may be gleaned from some UK cases (albeit decided under the "old" discrimination law) for indication of acts that may constitute racial harassment. As pointed out above,[85] one-off comments such as "we used to buy you when you were slaves"[86] or "get this typing done by the wog"[87] may, depending on the circumstances of the particular case, amount to racial harassment. In *De Souza v Automobile Association*,[88] the victim, who was a coloured woman and employed as a secretary/personal assistant to the employer's then motor manager, overheard her manager refer to her as "the wog" whilst she was standing outside his office. The remark was not directed towards her and not intended to have been overheard by her. The case was decided under the Race Relations Act 1976 which required the court to find detriment. Although one-off comments can amount

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[85] See para 7.008.

[86] *Commission for Racial Equality v United Packing Industry Ltd* CRE Report, 1980, p 20.

[87] *De Souza v Automobile Association* [1986] ICR 514.

[88] *Ibid*.

to a detriment, on the facts of the case, the office manager was held not to have discriminated against the victim. In finding against the victim, May LJ explained that although the victim had been "considered" less favourably, she had not been "treated" less favourably.[89]

7.052 **Racially hostile environment.** The UK case of *Burton and Rhule v De vere Hotels*[90] is an example of what amounts to a "racially hostile environment". In this case, two black waitresses were subjected to racially offensive remarks made by a guest speaker and other guests at a social function which took place at the premises of the hotel employer. At first, the speaker talked about the sexual organs of black men. When he noticed the waitresses, he then made a racially offensive remark by saying: "*Very nice, that's how I like my cocoa*". He then compounded that by making a remark that was both racially and sexually offensive to the effect that "*darkies were good at giving blow jobs".* Subsequently, a number of guests also made further racist and sexist remarks about the waitresses when they were trying to perform their duties. This case is also important in that it concerns employers' liability for unlawful harassment committed by a third party (who was not even an agent of the employer) on its employees. This is discussed further in Chapter 9.

7.053 **EOC Code of Practice on Employment.** The Code of Practice on Employment under the Race Discrimination Ordinance provides the following examples of acts which may be regarded as racial harassment:

(a) Racially derogatory remarks or insults; for example, name calling which people of certain racial group may find offensive or impolite should be avoided;

(b) Display of graffiti or slogans or other objects offensive to certain racial groups;

(c) Racist jokes, banter, ridicule or taunts; for example, laughing at the accent or habits of people belonging to certain racial groups;

(d) Using a disparaging or offensive tone when communicating with people on the ground that they belong to certain racial groups;

(e) Ostracise people because of their racial group;

(f) Imposing excessive workloads or unrealistic performance targets on people on the ground of race; or

(g) Unnecessarily picking on individuals from particular racial groups.

7.054 These illustrations can be a useful point of reference for the interpretation of relatively new piece of anti-discrimination legislation.

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[89] Note: s.1(1) of the Race Relations Act is concerned with the "treatment".

[90] [1996] IRLR 596.