

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1642/08-09(03)

Ref : CB2/SS/14/08

**Background brief prepared by the Legislative Council Secretariat  
for the Subcommittee on Code of Practice on Employment  
under the Race Discrimination Ordinance**

**Purpose**

This paper gives a brief account of the discussions of the Panel on Constitutional Affairs (the Panel) relating to the Code of Practice on Employment under the Race Discrimination Ordinance (RDO).

**Background**

2. RDO was enacted on 10 July 2008 to make racial discrimination and harassment and other related acts unlawful in specified areas of activities, including employment, education and provision of goods, facilities, services and premises, in both the public and private sectors. The enabling provisions for the Equal Opportunities Commission (EOC) to implement RDO, namely sections 59 to 63, have come into effect on 3 October 2008. Under section 63 of RDO, EOC may issue codes of practice containing such practical guidance as it thinks fit for the purpose of -

- (a) the elimination of discrimination;
- (b) the promotion of equality of opportunity and harmony between persons of different racial groups; or
- (c) the elimination of harassment and vilification.

3. It is the Administration's plan that the substantive provisions of RDO will come into force around mid-2009 after the Code of Practice on Employment (the Code) has been issued by EOC. EOC published the public consultation document on the draft Code on 13 October 2008, and the end of the consultation period was extended from 8 December 2008 until 19 January 2009.

4. The Code does not directly impose any legal obligations nor does it have any binding legal effect, and failure to observe the Code will not in itself lead to any liability. However, the Courts will take into account any relevant parts of the Code in deciding cases.

## **Major issues raised by the Panel**

### The draft Code

#### *Overall approach and content of the draft Code*

5. When the Panel was consulted on the draft Code at its meeting held on 17 November 2008, some members expressed disappointment that the draft Code had failed to deal adequately with discrimination issues relating to language. They considered that as the original Clause 58 of the Race Discrimination Bill which provided for an exemption for the use of languages had not been incorporated as part of RDO, EOC should have explained in greater detail in the draft Code how language issues would constitute indirect discrimination and included more illustrations on the implications of the use of languages on employment matters.

6. These members also expressed the view that given its statutory role under RDO to work towards the elimination of discrimination and promote equality of opportunity and harmony between persons of different racial groups, EOC should have prepared a code of practice providing practical guidance for eliminating discrimination and promoting equality of opportunity in a positive, user-friendly and non-abstract manner. They urged EOC to consider re-drafting the Code as it was over-legalistic and merely used illustrations to explain the law instead of providing guidance.

7. The Administration and EOC responded that the original proposed exemption for the use, or failure to use, of particular languages in regard to the provision of goods, services and facilities had a lesser impact on the Code which was related to employment matters. RDO did not include provisions on discrimination on the basis of language although language barrier might lead to indirect discrimination, nor did it impose a positive duty to cater to the language needs of ethnic minorities.

8. According to EOC, the Code would be a compliance tool for the purpose of explaining the legal requirements under RDO to employers and employees. Its scope could not exceed that of the statutory provisions nor was it meant to address the inadequacies of RDO. Moreover, EOC well understood the importance of its role as a proponent and promoter of equal opportunities. Its "Good Management Practice Series" consisting of information leaflets in relation to anti-discrimination ordinances and relevant codes of practice would be revamped.

#### *Drafting of the draft Code*

9. Members made a number of queries on specific provisions of the draft Code. Some members expressed concern that members of the public might not know how to determine what would be a justifiable requirement or condition under RDO. It would cause confusion and uncertainties to the community as to whether an act would constitute indirect discrimination under the Ordinance. They were also worried that

employers and employees would have difficulties in determining their legal obligations under RDO.

10. EOC and the Administration responded that the Code was not intended to be a definitive statement of the law and whether a particular case would fall within the law would be judged ultimately according to the facts of each case and the principles derived from relevant case law. EOC would provide more illustrations to elaborate on the legal principle of justifiability and other relevant terms in the Code. EOC also undertook to consider members' views in revising specific provisions of the Draft Code and the wording used in the illustrations contained therein.

#### *Consultation of the draft Code*

11. EOC informed the Panel that the draft Code had only been published in Chinese and English, the two official languages, but information notes highlighting the contents of the draft Code in Chinese, English, and six other common languages of ethnic minorities i.e. Hindi, Indonesian, Nepali, Tagalog, Thai and Urdu were available. Some members expressed strong dissatisfaction that EOC as a public body for promoting equal opportunities had not provided translation of the Draft Code in the languages of ethnic minorities to enable their meaningful participation in the consultation process. They considered that EOC's failure to do so would constitute indirect discrimination.

12. In response to members, EOC had subsequently published translation of the draft Code into six different languages including Urdu, Nepali, Tagalog, Thai, Hindi and Indonesian. Simultaneous interpretation in different minority languages had also been provided in two public consultation sessions on the draft Code.

#### The revised draft Code

#### *Overall approach and content of the revised draft Code*

13. The Panel was consulted on a revised draft Code prepared by EOC at its meeting on 16 March 2009. According to EOC, substantial revision had been made to the draft Code to incorporate views received during public consultation as well as comments by members at the meeting on 17 November 2008. The wording and expressions in the draft Code had been revised to emphasize the spirit of RDO in promoting racial equality in the workplace. To facilitate better understanding of the application of RDO, illustrations and examples were provided in the revised draft Code to demonstrate what would and would not constitute an unlawful act in employment situations. The structure of the revised draft Code also strengthened the emphasis on good employment procedures and practices.

14. EOC further advised the Panel that to address the concerns about indirect discrimination relating to language and other employment issues, the revised draft Code recommended employers to discharge their responsibilities by ensuring that all

rules, policies and practices were related to specific job requirements or organization needs, and they were encouraged to make effort to accommodate cultural practices of employees. Illustrations and examples derived from relevant case law were given to demonstrate how principles relating to justification might be applied in particular situations and what measures employers could consider in accommodating employees.

15. Some members expressed concern that the content of the revised draft Code was not easy to comprehend. As a result, an employer might have difficulty in determining what would and would not constitute an unlawful act in employment situations, not to mention that he might not be aware of the availability of the Code. While the illustrations and examples could serve educational purposes, they were not all-embracing.

16. EOC explained to the Panel that it had been a taxing experience for EOC to concoct the different scenarios in the employment field and teach people how the legislation might be applied before the law was being implemented. The ideal situation was to prepare a code after the legislation had been implemented for awhile and experience had been accumulated. As to how a case would be handled in reality, EOC advised that it depended very much on the facts of each particular case. As it was not possible for EOC to provide an exhaustive list of illustrations and examples, EOC hoped that following the implementation of RDO, case law would be made available for future reference.

### *Publicity*

17. Members considered it important to make employers understand how to prevent infringing the rights of a person of a different race in employment. They enquired about the publicity work launched by EOC to promote the Code and whether more resources would be allocated to enable EOC to organize workshops for employers and employer associations.

18. EOC responded that it would promote understanding of the Code by holding discussion forums and workshops with employers and other relevant parties. It would also make use of other forums such as its EO Club whose members consisted of employers, companies and human resources managers to promote understanding of the rights and responsibilities of employers under RDO. In addition, EOC had an enquiry hotline in place to answer enquiries from the public.

19. In response to the enquiry as to whether the promotional materials published by EOC were available in other languages, EOC advised that it was prepared to make available the Code in six other common languages of ethnic minorities. At present, promotional materials for the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487) and the Family Status Discrimination Ordinance (Cap. 527) had been published in Chinese and English, the two official languages. With the impending implementation of RDO, EOC would consider which

promotional materials should also be published in other languages. EOC had sought legal advice as to whether each and every single material published by EOC should be translated into languages other than Chinese and English, and the answer was negative. However, EOC would provide ethnic minorities with the relevant information to let them understand the work of EOC. Promotional leaflet would be translated into other languages on a need basis.

### **Relevant papers**

20. A list of relevant papers which are available on the LegCo website is in the **Appendix**.

Council Business Division 2  
Legislative Council Secretariat  
21 May 2009

## Code of Practice on Employment under the Race Discrimination Ordinance

## Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Constitutional Affairs Panel	17 November 2008	<p>Equal Opportunities Commission's submission on "Public Consultation on the Code of Practice on Employment under the Race Discrimination Ordinance" [<a href="#">LC Paper No. CB(2)265/08-09(03)</a>]</p> <p>Position paper of the Society for Community Organization on "Public Consultation on the Code of Practice on Employment under the Race Discrimination Ordinance" [<a href="#">LC Paper No. CB(2)291/08-09(01)</a>] (<i>Chinese version only</i>)</p> <p>Submission on Draft Code of Practice on Employment under the Race Discrimination Ordinance from the Hong Kong Catholic Commission for Labour Affairs [<a href="#">LC Paper No. CB(2)508/08-09(01)</a>] (<i>Chinese version only</i>)</p> <p>Equal Opportunities Commission's response to the position paper of the Society for Community Organization [<a href="#">LC Paper No. CB(2)523/08-09(01)</a>]</p> <p>Minutes of meeting [<a href="#">LC Paper No. CB(2)827/08-09</a>]</p>
	16 March 2009	<p>Equal Opportunities Commission's submission on "Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance" [<a href="#">LC Paper No. CB(2)1050/08-09(07)</a>]</p> <p>Background brief on "Code of Practice on Employment under the Race Discrimination Ordinance" prepared by the Legislative Council Secretariat [<a href="#">LC Paper No. CB(2)1050/08-09(08)</a>]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		<p>Submission to Equal Opportunities Commission on "Race Discrimination Ordinance Code of Practice on Employment" by Hong Kong Unison Limited [LC Paper No. CB(2)1083/08-09(03)] <i>(English version only)</i></p> <p>Submission on " Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance (March 2009)" from Society for Community Organization [LC Paper No. CB(2)1083/08-09(04)] <i>(English version only)</i></p> <p>Joint submission on Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance from Hong Kong Unison and Hong Kong Human Rights Monitor [LC Paper No. CB(2)1103/08-09(02)]</p> <p>Marked-up version of the revised draft of the Code of Practice on Employment under the Race Discrimination Ordinance provided by Mr Y K CHONG [LC Paper No. CB(2)1401/08-09(01)] <i>(Chinese version only)</i></p>