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1 June 2009

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Ms. Flora Tai  
 Clerk to Subcommittee  
 Legislative Council  
 Legislative Council Building  
 8 Jackson Road  
 Central  
 Hong Kong

Dear Ms Tai

**Subcommittee on Race Discrimination (Formal Investigations) Rules, Race Discrimination (Investigation and Conciliation) Rules and Code of Practice on Employment under the Race Discrimination Ordinance**

Thank you for your letter dated 26 May 2009.

The Hong Kong Association of Banks (HKAB) has reviewed the Code of Practice on Employment under the Race Discrimination Ordinance. The comments of HKAB are contained in its submission to the Equal Opportunities Commission dated 5 December 2009. Please find enclosed a copy of the submission for the reference of the Subcommittee as requested.

Yours sincerely

Jennifer Cheung  
 Secretary

Enc.

Chairman The Hongkong and Shanghai Banking Corporation Ltd  
 Vice Chairmen Standard Chartered Bank (Hong Kong) Ltd  
 Bank of China (Hong Kong) Ltd  
 Secretary Jennifer Cheung

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5 December 2008

By fax (2511 8142) and post

Equal Opportunities Commission  
 19/F Cityplaza Three  
 14 Taikoo Wan Road, Taikoo Shing  
 Hong Kong

Dear Sirs

**Public Consultation on Code of Practice on Employment under the Race Discrimination Ordinance (Ordinance)**

We would like to submit our comments on the draft Code of Practice on Employment (Code) issued for public consultation by the Equal Opportunities Commission (EOC) by 8 December 2008.

1. **General comments**

Overall, the Code provides helpful guidance as to the interpretation and application of the Race Discrimination Ordinance (Ordinance). Please consider the following suggestions aimed at making the Code more user friendly and helpful to employers:

- (a) A summary of the salient points be added preceding each section of the Code to facilitate readers' comprehension.
- (b) The illustrations provided in the Code are insightful but should be expanded to explain how direct/indirect race discrimination would be evidenced. A number of illustrations in the draft Code simply refer to scenarios of different treatments between two races without clarifying what would constitute evidence of these having occurred on the basis of race.

It is noted that there is frequent use of persons of South Eastern Asian origin as the examples of being discriminated in the illustrations. To avoid misunderstanding, please consider diversifying the racial origin of the persons being used in the illustration.

- (c) The Code would also benefit by addressing the issue of whether employers (including banks) would be required to provide services to their employees in Chinese and English as well as translation services for those employees speaking other languages.

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 Vice Chairmen Standard Chartered Bank (Hong Kong) Ltd  
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- (d) Section 5 of the Ordinance covers liability for unlawful acts on the part of employees (agents) in addition to that of the employers (principals). We suggest that the Code should also give more guidance to employees / agents including their responsibilities to eliminate racial discrimination and harassment at the workplace.

2. Specific comments

- (a) Section 2.1.1 - Race

Illustration 1 covers a situation where an European and Asian person of different races work for the same employer and attain the same level of performance should be treated equally in relation to remuneration. This illustration is rather narrow as in addition to performance, criteria such as the employee's skills, potential, experience and market pay relativity would also influence remuneration decisions.

- (b) Section 2.2.3 - Length of residency

Under illustration 7, in a recruitment exercise if a candidate is chosen because he has lived the longest in Hong Kong compared to other candidates who are equally or even better qualified, it would not be unlawful racial discrimination. We suggest that the wording of this section be reviewed to ensure that it does not inadvertently present indirect discrimination in that its application should benefit one race to the exclusion of others.

- (c) Section 2.2.4 - Nationality, citizenship and status of 'other countries'

This section provides for exclusion of race discrimination arising from treating people differently on the basis of nationality, citizenship or residence. Since there can often be a link between, say, nationality and race or ethnic origin, we suggest that the wording of this section be reviewed to ensure that the potential link between nationality and race is emphasized and due care is then exhibited as part of an employer's policies and practices.

- (d) Section 4.1.1.2 - Indirect discrimination

This section provides that '[d]espite adversely affecting some racial groups or putting them in a disadvantage, the requirement or condition may be justifiable if its objective is legitimate and it is a proportional and appropriate means to achieve that objective'. While quoting examples of 'proportional and appropriate means' in the Code would be helpful, we suggest that the definition of 'proportional and



appropriate means' be further elaborated in section 6.2 which specifically deals with indirect discrimination.

- (e) Section 4.2.6 allows employers to continue any retirement arrangements made before the commencement of the Ordinance [s.10(4)& 10(5)]. It would be useful if practical examples could be provided to assist employers in implementing such arrangements.

- (f) Section 4.6.1 - Discriminatory advertisements

Clarification should be provided to the effect that job advertisements do not need to appear in both Chinese and English as this is not required either by the Basic Law or the Official Languages Ordinance.

- (g) Section 5.1.1 - Employer and principal liability

Section 5.1.1 provides that the employer can only escape from being held liable for employees' unlawful acts if he can show that he has taken *reasonably practicable steps* to prevent the employee from doing the act. While elaboration is provided in sections 5.4 and 8, more practical examples of what constitutes 'reasonably practicable steps' would be helpful.

Please also consider whether it is necessary to emphasize that it is only when an employee racially harassed another employee in the course of employment that the employer would become liable accordingly. This is to synchronize the requirements set out in section 47 of the Ordinance where it mentions that "[a]nything done by a person in the course of the person's employment is to be treated.....as done by that person's employer as well as by that person.....".

- (h) Section 7.3 - Employment of persons with special skills, knowledge or experience

Some illustration of the term 'reasonableness' would be helpful to provide practical guidance in addressing practical issues in the employment of expatriates.

- (i) Section 7.4 - Existing local and overseas employment terms

This provides that "[t]he continuation, extension or renewal of existing overseas and local terms of employment after the commencement of the Ordinance will not be unlawful". This should stress that the exclusion of overseas terms from the provisions of the Ordinance only applies in respect of existing and not new employees.



(j) Section 8.2 – Implementation

This section provides that for large organisations, the effective promotion and implementation of the equal opportunities policy may be delegated to a committee of the board or a body at directorate level. We suggest that the senior management in a large organisation may also delegate the day-to-day promotion and implementation of the policy to an appropriate department.

(k) Section 8.2.6 – Language

Please consider whether it is necessary to define the word 'use' to mean 'read, write and speak' the language concerned, to reflect the genuine occupational requirements in practice.

(l) Section 8.2.8 – Under-represented racial groups

Should section 8.2.8(iii) refer to the genuine occupational requirements in section 7.1 rather than the exceptions in section 7.2?

Please consider defining the term 'diverse racial backgrounds' in section 8.2.8(iv) to avoid any confusion in implementation.

Should there be any questions on the above comments, please feel free to contact our Manager Ms Stephanie Chan at 2521 1855 or our Senior Manager Ms Grace Law at 2521 1880.

Yours faithfully

Eva Wong  
Secretary