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**Comments on the Code of Practice on Employment
under the Race Discrimination Ordinance**

**Submission to the Subcommittee on Race Discrimination (Formal Investigations)
Rules, Race Discrimination (Investigation and Conciliation) Rules and Code of
Practice on Employment under the Race Discrimination Ordinance
For the meeting on 12 June 2009.**

1. Introduction

This paper is submitted to the Subcommittee on Race Discrimination (Formal Investigations) Rules, Race Discrimination (Investigation and Conciliation) Rules and Code of Practice on Employment under the Race Discrimination Ordinance, for the meeting on 12 June 2009.

It aims to provide comments on the Code of Practice on Employment under the Race Discrimination Ordinance (the RDO Code). Although some improvements have been made, such as regarding language issues, it remains to be seen whether the Code will be similar to the spirit and wordings of the Code of Practice on Employment under the Sex Discrimination Ordinance (the SDO Code).

This paper points to areas and topics from the SDO Code, which have been left out in the RDO Code. It is recommended that the RDO Code follows a similar structure of the SDO Code.

2. Meaning of Race under the RDO

Include language and religion

It is important to highlight specific areas to clarify the meaning of race under the RDO. Especially the issues of religion and language should be singled out in para. 2.1 of the RDO Code, as there are many doubts in the community as to whether the RDO applies.

Recommendation 1:

Highlight para. 2.1.4(4) regarding religion by inserting the heading “Religion”.

Insert after para. 2.1.4(4) a paragraph with a heading about language and explain how this can be related to race. Make reference to the different paragraphs throughout the RDO Code where language is relevant.

3. Scope of Part 2 of the RDO

Include harassment and victimization

While the RDO Code includes an explanation of Part 3 of the RDO, the RDO Code does not from the outset explain issues in relation to harassment or positive action, as mentioned in Part 2 of the RDO. Rather the explanation of Part 2 of the RDO has been placed at the end of the RDO Code in Chapter 6. However, it is not recommended that Chapter 6 is copied without amendments. There is no mention of victimization in Chapter 6. It is therefore recommended that the explanation of Part 2 of the RDO includes an explanation of victimization as well.

Recommendation 2

With reference to the SDO Code para. 4-9 the RDO Code should include between Chapter 2 and Chapter 3 a chapter to explain Part 2 of the RDO.

The following areas should be highlighted: Types of discrimination under the RDO, racial harassment, victimization, vilification and positive action.

4. Rights and responsibilities of the employees

Include harassment

Although the RDO Code para. 4.2 does include some paragraphs on the employees responsibilities, it could be expanded much more.

Recommendation 3:

With reference to the SDO Code para. 24-25, insert the following:

“Eliminating discrimination

- Employees can be proactive in helping to eliminate discrimination on the ground of race by becoming familiar with the subject, so that they do not inadvertently discriminate against someone or inadvertently aid their employer to do so.
- Whenever appropriate, employees could also encourage their employers to formulate discrimination policies and to implement preventive measures.
- Employees are encouraged to be supportive of friends or colleagues who intend, in good faith, to lodge a complaint about discrimination, or have lodged such complaint.

Eliminating racial harassment

- Racial harassment is not merely a "management problem" and still less an "ethnic minority problem". All employees have responsibilities as well as rights in respect of the work environment that is created. Racial harassment, particularly in its less severe forms, can be part of the usual code of behaviour in a workplace. To change this may require each employee to reconsider his or her own attitudes and conduct as well as those of his or her colleagues.
- Employees can do much to discourage racial harassment by making it clear that they find such behaviour unacceptable and by supporting colleagues who suffered such treatment and are considering making a complaint.
- A major reason why few racial harassment complaints are reported is that the person involved is afraid of co-workers' reactions. They do not want to run the risk of being accused by them of spoiling the work climate. Neither do they want to be told that they provoked the harassment themselves or that they cannot take a joke. When employees show through their words and their actions that they find racial harassment unacceptable, this will provide substantial support to those who are harassed and make it easier for them to come forward to file a complaint.
- Employees who are themselves recipients of harassment should, where practicable, tell the harasser that the behaviour is clearly unwanted and unacceptable. Once the offender understands clearly that the behaviour is unwelcome, this may be enough to put an end to it. If the behaviour persists, employees should inform management and/or their employee representative through the appropriate channels and request assistance in stopping the harassment, whether through informal or formal channels.
- When telling the harasser that the behaviour is unwanted, if the employee does not want to confront the harasser alone, he or she may want to ask a co-worker or a friend to be present. An alternative to confronting the harasser in person is to write to him or her and keep a copy of the correspondence.
- Where an employee feels uncomfortable or unsafe in confronting the harasser directly, the employee may choose to inform management and/or an employee representative in the first instance and request for steps to be taken to deal with the matter.
- If the harassment continues, however, the employee should, if possible, seek advice on what to do next. The employee at all times has the option of seeking external assistance.
- It is important for an employee subjected to racial harassment to keep a record of the incident(s) so as to be able to recall exactly what has happened.
- Employees are also encouraged to come forward with complaints as soon as possible after the alleged incidents as a lapse in time may, in certain circumstances, weaken a complainant's case."

5. Consistent selection criteria

Include principles of consistent selection criteria

The RDO Code (para. 5.3) refers to the use of consistent selection criteria in relation to employment and provides examples. It is very useful that these criteria are mentioned in relation to each area, such as recruitment and advertising, but the code does not provide a general explanation of the **principles or benefits** of such criteria. Explaining such principles could further commit employers to use the criteria.

The RDO Code should refer to the SDO Code paragraph 10:

Recommendation 4:

Insert at the RDO Code paragraph 5.3:

“The primary responsibility of each employer is to ensure that there is no discrimination at work on the ground of race. The RDO makes it unlawful to discriminate on such a ground.

This section describes good management practices, which will help to eliminate discrimination. It recommends the use of ***consistent selection criteria*** for recruitment, promotion, transfer, training, dismissal and redundancy as well as terms and conditions of employment. These criteria and terms and conditions should be made known to all employees and job applicants upon request. Without this consistency, decisions can be subjective and leave the way open for discrimination to occur.

Developing a set of ***consistent selection criteria*** for all aspects of employment is one of the most important steps in eliminating discrimination in the workplace. This can be done by reference to the duties and responsibilities that would need to be carried out in the job. The application of ***consistent selection criteria*** is good management practice as it helps organisations to:

- make faster decisions because the criteria for decisions are clear;
- make better decisions because the criteria directly relate to work performance; and
- form the basis for effective job evaluation.
- Save for a few exceptions, such criteria should not make reference to race. They should be specifically related to the job, such as:
 - the type of experience the job holder should have, e.g. merchandising experience;
 - the amount of experience required for the job, e.g. five years experience;
 - the educational qualifications, if necessary, e.g. a diploma in merchandising;
 - the specific technical and managerial skills, e.g. use of certain computer software, proficiency in Cantonese and English;
 - the personal qualities required for the job, e.g. willingness to travel, willingness to meet people of different backgrounds; and
 - the physical and other skills required for the job, e.g. eye-hand co-ordination for delicate assembly work.

In line with good management practice, it is recommended that employers:

- develop *consistent selection criteria* as one of the first steps in establishing a fair recruitment practice; and
- from time to time re-examine the criteria to see whether they still apply or need to be modified.”

6. Advertising vacancies

Recommendation 5:

With reference to the SDO Code para. 11.5.2, insert at paragraph 5.3.4:

- “review all advertising materials and accompanying literature relating to employment to ensure that such materials do not present different races in stereotypical roles. Use job titles, headlines and illustrations with care. “

7. Interviewing

Recommendations 6:

With reference to the SDO Code para 11.8, insert at paragraph 5.3.7:

“An interviewer who seeks evidence of skills and abilities and who relies on facts rather than generalised hunches will be less likely to be biased. In line with good management practice, it is recommended...”

Recommendation 7:

With reference to the SDO code para. 11.9, insert after para 5.3.7 (3):

“It is a good practice to record, immediately after the interview, the assessment that each interviewer has formed on the applicant's ability to match the *consistent selection criteria*. This will not only ensure a logical assessment of the applicant's strengths and weaknesses but will also serve as a valuable explanation and defence against any unfounded suggestion of race bias.”

8. Post-hiring enquiries

Recommendation 8:

With reference to the SDO Code para. 11.3-11.4, insert after para. 5.3.8:

“Post-hiring enquiries

Employers should draw a distinction between pre-employment and post-hiring enquiries, as there are some questions that could give rise to allegations under the

RDO if asked before the applicant has been hired. It is therefore recommended that an employer should not ask questions which might subsequently give rise to any such allegation.

As an example, it could be valid after hiring to request information regarding.....”

9. Terms and conditions of employment, benefits, facilities and services

Recommendations 9:

With reference to the SDO Code para. 12.1. insert before the Race Code 5.3.10(1):

“Under the RDO, it is unlawful to discriminate, on the ground of race, in the terms and conditions of employment or access to benefits, facilities or services. This applies to both existing contracts and new ones. Benefits may be in the form of fringe benefits, commissions, bonuses, allowances, pensions, health insurance plans, annual leave, merit and performance pay, or any other benefits available to employees generally.

Recommendation 10:

With reference to the SDO Code para. 12.15, add the following after the RDO Code 5.3.10(2):

Employers should take the following good practices into account when developing and implementing grooming/dress codes for their staff:

- policies should only prescribe a particular form of grooming/dress code if it qualifies as a necessary and reasonable requirement of the job.
- policies should not subject one race to any unfavourable treatment or detrimental effect;
- where practicable, it is recommended as good management practice that employers consult their employees when introducing grooming/dress codes or changing existing ones; and
- policies should be reviewed periodically to take into account changing social conventions.”

Recommendation 11:

With reference to the SDO code para. 12.4, insert after RDO Code para. 5.3.10 (4):

“Examples of " like work" are:

- Chinese and Indian tellers working in the same bank;
- A Pakistani person working in an employment agency supplying clients with temporary staff and a Chinese person supplying permanent staff in the same agency; and
- foremen and line supervisors working in different sections of a production line.”

Recommendation 12:

With reference to the SDO Code para..12.9-12.11 insert after the RDO Code para. 5.3.10(7):

“Job titles

Some companies use different job titles for different races who are doing essentially the same work. This can lead to jobs undertaken by particular races being given lower status and so lower pay. If the titles do not reflect a genuine difference in the nature of the work done, they should be changed so that the same title applies to both jobs.

Here are some examples of discriminatory job titles when the same work is being done by different races within the same organisation:

| Chinese person’s job title | Nepali person’s job title |
|-----------------------------------|----------------------------------|
| Salesman | Shop Assistant |
| Personal Assistant | Secretary |
| Administrative Assistant | Secretary |
| Chef | Cook |

• **Part-time work**

Where part-time workers do not enjoy pay or benefits in pro-rata with full-time workers, companies should review the arrangements to ensure that such arrangements are justified without regard to race.”

Recommendation 13:

With reference to the SDO Code 12.5, insert before the RDO Code para 5.3.10 (5):

“Equal pay for work of equal value

Race discrimination in pay may occur because different races tend to be segregated into different jobs. Frequently the jobs done mainly by Chinese people have a higher status and are more highly rewarded than those done by ethnic minoriteis. Such differences can be reinforced by discriminatory recruitment, selection and promotion procedures which restrict the range of work persons of different races perform.”

Recommendation 14:

With reference to the SDO Code para. 12.13, in the RDO insert before para. 5.3.10(8) the heading:

“Considerations for individual differences in pay”

Recommendation 15:

With reference to the SDO code para. 12.13, in the Code insert after para. 5.3.10(8)(h) the following:

“In addition, such considerations should:

- actually exist (e.g. the person belonging to one race has more experience than the person belonging to another race);
- be genuinely the cause of the difference in pay (i.e. the employer should have a pay system which applies to all races alike and consistently rewards experience, where appropriate);
- account for the whole of the pay gap (i.e. the extra payment is not an excessive reward for the additional experience); and
- have the effect which the employer sets out to achieve (e.g. there is evidence that, as a result of the specific employee's experience, he/she does the work better than the other colleague, who belongs to another race)”

10. Promotion, transfer and training

Recommendation 16:

With reference to SDO Code para. 13.1, insert before 5.3.13(1) the following:

“ It is unlawful for employers to discriminate on the ground of sex, marital status or pregnancy in the way they give opportunities for promotion, transfer or training. In line with good management practice, it is recommended that employers: “

Recommendation 17:

With reference to the SDO Code para.13.1.16, insert after the RDO Code para. 5.3.13(6):

“Employees of one sex may be concentrated in sections from which transfers are traditionally restricted without real justification;”

11. Prevent harassment on the ground of race

The Race Code does mention harassment on the ground of race. However, it could be expanded much more by focusing in policies, education and training.

Recommendation 18:

With reference to the SDO Code para. 19-22, it is recommended that, except for the examples mentioned in the RDO code para.5.3.14(3)(a)-(g), that para. 5.3.14 is substituted with the following:

“Eliminating racial harassment in employment

- This part of the Code seeks to encourage the development and implementation of policies and practices which establish working environments free of racial harassment.
- A common characteristic of racial harassment is that employees subjected to it will often be reluctant to complain to their employers. An absence of complaints about racial harassment does not necessarily mean an absence of racial harassment. It may mean that the recipients of racial harassment think that there is no point in complaining because nothing will be done about it, or because it will be trivialised or the complainant subjected to ridicule, or because they fear reprisals.
- Implementing the preventive and procedural measures outlined here should facilitate a favourable climate at work.
- Both the policy and complaints procedures should be introduced after consultation or negotiation with employees. Strategies to create and maintain a working environment in which the dignity of employees is respected are most likely to be effective where they are jointly agreed.
- Employers should also make clear that employees have a duty and responsibility towards creating such an environment and in ensuring that racial harassment does not occur.

Formulating a policy

- As a first step in showing senior management's concern and its commitment to dealing with the problem of racial harassment, employers should issue a policy statement which expressly states that racial harassment at work is unlawful and will not be permitted and that employees have a right to complain should it occur.
- A policy statement on racial harassment should include:
 - a message that management is committed to eliminating and preventing racial harassment;
 - a clear statement that racial harassment will not be tolerated;
 - the legal definition of racial harassment;
 - a behavioural definition of racial harassment, i.e. some examples of conduct which could amount to racial harassment;
 - the options available for dealing with racial harassment complaints, i.e. informal and formal;
 - information about the organisation's internal complaint procedures, assuring employees that confidentiality will be observed;
 - an assurance that no one will be victimised or penalised for coming forward with a complaint;
 - the names and telephone numbers of officers who are responsible for dealing with complaints, providing information and advice, etc.;
 - a note about disciplinary action; and
 - a note that the complainant may lodge a complaint directly with the EOC or take action in the District Court.

Implementing the policy

Dealing with complaints

A co-ordinator, preferably with special training, should be designated to establish and administer both informal and formal complaints procedures.

Promotion and education

Effective and regular promotion of the policy is important to a successful programme against racial harassment in that:

- it warns that certain offensive conduct is unlawful;
- it sends out a clear message that management will act against such behaviour;
- it ensures that all persons in the organisation know what racial harassment is;
- it ensures that all persons in the organisation know what to do if they encounter racial harassment and know that any complaint will be handled effectively and properly; and
- it assures staff that they are unlikely to be disadvantaged by racial harassment or be victimised by making a complaint.

In order to promote the policy, information may be disseminated through:

- speaking at staff meetings;
- distribution and re-circulation of policy statements;
- posting notices; and
- conducting training and refresher courses

Staff training

The co-ordinator or any other staff member involved in the complaints handling procedures should receive adequate training to enable sensitive treatment of cases in relation to racial harassment, for example:

- ***what is racial harassment:*** definitions and examples; the role of power in harassment situations; the reasons why some individuals harass; recognise harassment situations, e.g. who are the workers at risk;
- ***prevention of racial harassment:*** recognise the role of publicity, how to use publicity and available resources effectively; informal monitoring of the workplace; recognise symptoms of harassment; and alert staff of possible acts of racial harassment; and
- ***dealing with harassment:*** skills on responding to enquiries and maintaining privacy and confidentiality; non-judgmental listening skills; informing enquirers of alternative ways of handling harassment other than by making a formal complaint; knowledge of outside bodies that can be approached for assistance or to whom complaints can be made, e.g. the EOC.

Monitoring the policy

Regardless of whether an informal or formal complaints procedure is in use, it is good practice for employers to monitor and review complaints of racial harassment and how they have been resolved, in order to ensure that the procedures are working effectively.”

12. Dismissals, redundancies and unfavourable treatment of employees

Recommendation 19:

With reference to the SDO Code para. 14.1, insert in the RDO Code para. 5.3.16:

“It is unlawful to discriminate on the ground of race by dismissing the employee or subjecting him or her to any other detriment. In line with good management practice, it is recommended that employers:”

13. Sample policy on racial equality and racial harassment

We wish to reiterate our concerns from our previous paper “*Comments on: Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance (March 2009)*” (LC Paper No. CB(2)1083/08-09(04)).

Recommendation 20:

The sample policy should include the following:

- An equal opportunities action plan will be drawn up, with racial equality targets and timetables, to show what steps the organisation plans to take to achieve equality of opportunity.
- The effectiveness of the policy and the plan will be monitored regularly. A report on progress will be produced each year, and published via the intranet, the website, the staff newsletter, notice boards, and the annual report.
- Customers and clients will be made aware of the policy, and of their right to fair and equal treatment, irrespective of race, colour, nationality or ethnic or national origins.

Recommendation 21:

Regarding para.3.10 of Sample policy on racial equality please refer to the above sections on harassment regarding how to formulate a policy on racial harassment.