

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

**The EOC's response to the summary of views received from deputations/individuals
on specific provisions of the Code of Practice on Employment
(the Code) under the Race Discrimination Ordinance (RDO)
(as at 15 June 2009)**

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
Chapter 2 - Meaning of Race under RDO	
Paragraph 2.1 - What is meant by race under RDO	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p> <p>Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]</p> <p>The Democratic Party (DP)</p> <p>Hong Kong Human Rights Monitor (HKHRM) [CB(2)1880/08-09(02)]</p>	<p><u>Paragraph 2.1.3</u></p> <p>The Law Society considers that the reference to “ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) and related documents” is unlikely to be of much use to employers, and it would be more helpful to include in the Code those sections of the ICERD documents which are considered relevant.</p> <p>EOC response</p> <p>The Code's footnote 10 gives an example of ICERD related documents (i.e., General Recommendation VIII of the Committee on the Elimination of All Forms of Racial Discrimination) which may be relevant.</p> <p><u>Paragraph 2.1.4</u></p> <p>SOCO considers it important to highlight the issues of religion and language in paragraph 2.1</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>to clarify the meaning of race under RDO, by inserting the heading “Religion” to paragraph 2.1.4 and inserting after paragraph 2.1.4(4) a paragraph with a heading about language to explain how the issue of language can be related to racial discrimination.</p> <p>EOC response</p> <p>The heading “Religion” with a new paragraph number [paragraph 2.2] is inserted. A new paragraph under the heading “Language” [paragraph 2.3] is inserted to make the point that treatment based on language may lead to racial discrimination or harassment. Cross-reference is made to other parts of the Code which deal with language issues.</p> <p>DP suggests providing more illustrations to paragraph 2.1.4(4) to explain how requirements or conditions relating to religion may indirectly discriminate certain racial groups.</p> <p>EOC response</p> <p>A cross-reference to Illustration 9 is inserted in new paragraph 2.2 to show that a blanket ban on beards may indirectly discriminates racial groups whose religious practice is to wear beards</p> <p>Employers’ Federation of Hong Kong is of the view that the interaction between the concept of race and the religion of an individual should be further explained in the Code.</p> <p>EOC response</p> <p>The paragraph on the interaction between race and religion [paragraph 2.2] is rephrased and a cross-reference to Illustration 9 is inserted to show how requirements or conditions having an impact on people’s religious practices may indirectly discriminates certain racial groups.</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>HKHRM suggests making the following amendments to the Chinese text of paragraph 2.1.4(2) to achieve consistency with the English text -</p> <p>(a) amend the phrase "民族包括一些其國家已不復存在的民族" to "民族包括一些其國家已不復存在的國家的民族"; and</p> <p>(b) amend the phrase "從未自成一國的民族" to "從未自成一民族國家的民族".</p> <p>EOC response</p> <p>The EOC takes the view that the Chinese wording in the Code as published in the gazette is clear and can better facilitate understanding.</p>
<p>Paragraph 2.2 - What is not regarded as an act done on the ground of race under the RDO</p>	
<p>The Hong Kong Bar Association [CB(2)1816/08-09(02)]</p> <p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p>	<p><u>Paragraph 2.2.2 – Illustration 1</u></p> <p>The Bar Association considers the illustration not readily understood. If the intended meaning of the fourth sentence is to indicate that the company in fact employs non-permanent residents of Hong Kong, it can be rephrased as "In fact, the company does not employ <i>only</i> people who are permanent residents of Hong Kong".</p> <p>EOC response</p> <p>The sentence is rephrased as suggested.</p> <p>The Law Society finds the statement "She meets all the requirements of the job" in the illustration irrelevant, misleading and should be deleted.</p> <p>EOC response</p>

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	<p>To establish a case of direct discrimination, it has to be shown that the treatment given to the claimant is on the ground of race. In the illustration, the reference to the job applicant meeting all the requirements of the job serves to highlight race as the ground for declining her application and to preclude possibilities that there may be other legitimate reasons.</p>
Chapter 3 - Scope of Part 3 of RDO	
Paragraph 3.3 - Work wholly or mainly outside Hong Kong	

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<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Hong Kong General Chamber of Commerce (HKGCC) [CB(2)1880/08-09(03)]</p>	<p><u>Paragraph 3.3.1</u></p> <p>The Law Society considers it inappropriate to present in the Code a method of determination of section 16(1) of RDO (i.e. meaning of working wholly or mainly outside Hong Kong) expressed with absolute confidence as if the UK cases somehow are binding on Hong Kong courts. Similarly, the illustrations in the Code on this point (which are absolutely specific) can prove misleading.</p> <p>EOC response</p> <p>This paragraph makes reference to UK cases (footnotes 29 to 32) which were decided under materially similar provisions. While these cases are not binding on Hong Kong courts, they are of reference value and are likely to be applied. The EOC takes the view that it is appropriate to refer to these cases on the basis that they are relevant references.</p> <p>HKGCC points out that when assessing how much of the “whole period of employment” of an employee is spent working in Hong Kong (as opposed to outside Hong Kong), it is not clear from paragraph 3.3.1(2) and illustration 4 whether the assessment should only be based on historical facts (i.e. contractual or prospective allocation of time between Hong Kong and outside Hong Kong for future purposes should be ignored).</p> <p>EOC response</p> <p>Relying on the case of <i>Carver v Saudi Arabian Airlines</i> [1999] ICR 991 referred to in footnote 31, paragraph 3.3.1(3) adopts a historical facts approach and explains that a person works mainly outside Hong Kong as long as the person has spent more time working outside Hong Kong than in Hong Kong. The paragraph is slightly amended to clarify this point. Case law on these issues is capable of further development. The EOC will keep these issues under review.</p>

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Paragraph 3.8.1 – Vocational training	
<p>HKSKH Lady MacLehose Centre (HKSKH) [CB(2)1816/08-09(01)]</p> <p>Hong Kong Unison [CB(2)1848/08-09(01)]</p> <p>Hong Kong Integrated Nepalese Society</p> <p>The Federation of Hong Kong & Kowloon Labour Unions (FHKKLU)</p>	<p>Hong Kong Unison and Hong Kong Integrated Nepalese Society consider that vocational training providers should be actively encouraged to cater to the needs of ethnic minorities as far as practicable in planning and designing training courses, e.g. by providing course information and material in English. More illustrations on good practice in this regard should be provided in the Code.</p> <p>EOC response</p> <p>Paragraphs [3.8.1(2) and 3.8.1(3)] have been amended to reinforce the encouragement to vocational training providers to cater to the needs of ethnic minorities, for example, by providing lecture notes or other course materials in English so that they may participate.</p> <p>HKSKH and FHKKLU suggest that examples should be added to illustrate when language requirement for vocational training courses can be regarded as commensurate with the contents of the course.</p> <p>EOC response</p> <p>A new paragraph is inserted [paragraph 3.8.1(4)] to elaborate with an example on language requirements of training courses being commensurate with the contents of the course.</p>
Chapter 4 - Rights and responsibilities under RDO	
Paragraph 4.1 - Responsibilities of employers and principals	
<p>The Hong Kong Bar Association [CB(2)1816/08-09(02)]</p>	<p><u>Paragraph 4.1.2 (1)</u></p> <p>The Law Society considers it inappropriate for the Code to recommend the adoption of a</p>

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<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]</p>	<p>specific policy of good employment practice, which imposes obligations upon employers over and above those required by RDO. This section should be rewritten to provide for a recommendation that an employer implements a policy which covers compliance with the restrictions in RDO. This point appears in various other paragraphs throughout the Code, each of which should be amended.</p> <p>EOC response</p> <p>This paragraph is rephrased to clarify that the recommendations on the contents of a policy of racial equality and on good employment practice and procedures are for employers to adopt as appropriate to the scale and structure of their organizations and available resources. As it is the purpose of the Code to give practical guidance to promote racial equality, the EOC takes the view that it is appropriate to include recommendations on good practice (such as racial equality promotion and monitoring) even though they may be over and above the minimum requirement of the law.</p> <p><u>Paragraph 4.1.2 (2)</u></p> <p>The Bar Association, Law Society and Employers' Federation of Hong Kong consider that the paragraph needs to be refined, as the case law is far more complex than implied in this paragraph. While the Code may have to indicate the possibility that certain after-work activities may in the context of RDO be regarded as "in the course of employment", it should at the same time emphasize that such a finding is very much fact-sensitive and it should not be taken that every social gathering "immediately after work" or every "organized party" involving work colleagues would be so held.</p> <p>EOC response</p> <p>Clarification is inserted in this paragraph to emphasize that whether an event occurring outside normal working hours or workplace comes within the course of employment</p>

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	<p>depends very much on the specific circumstances of each case.</p> <p><u>Paragraph 4.1.3</u></p> <p>The Law Society points out that normally an “agent” is not an employee, but this paragraph refers to “employment practice”. Clarification is considered necessary in this regard.</p> <p>EOC response</p> <p>This paragraph is rephrased to clarify recommendations of good practice and procedures in the workplace should be adopted as appropriate.</p>
Paragraph 4.2 - Rights of employees and workers and their roles	
<p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p>	<p>Paragraph 4.2.3 on employees' role should be expanded along the lines of paragraphs 24 to 25 of the Code of Practice on Employment under the Sex Discrimination Ordinance (SDO Code).</p> <p>EOC response</p> <p>This part of the Code is expanded as suggested [paragraph 4.2.3 to 4.2.14].</p>
Chapter 5 - Practising and promoting racial equality	
Paragraph 5.2 - Drawing up and implementing a policy	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]</p>	<p><u>Paragraph 5.2.1</u></p> <p>The Law Society and the Employers' Federation of Hong Kong opine that there are certain areas where the Equal Opportunities Commission (EOC) has overstepped the mark in advising employers. For instance, while employers should make best efforts in providing a</p>

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	<p>discrimination-free environment in the workplace, they are not under any obligation to “promote” racial equality or to monitor compliance with RDO.</p> <p><u>EOC response</u></p> <p>As it is the purpose of the Code to give practical guidance to promote racial equality, the EOC takes the view that it is appropriate to include recommendations on good practice (such as racial equality promotion and monitoring) even though they may be over and above the minimum requirement of the law.</p> <p><u>Paragraph 5.2.2(2)</u></p> <p>The Law Society considers that the word "disparately" used in this paragraph (and in numerous places elsewhere throughout the Code) should be amended. It points out that the actual wording in RDO refers to a considerably smaller proportion and recommends that the wording in the legislation be used.</p> <p>EOC response</p> <p>When explaining the legal elements of indirect discrimination in paragraph [6.1.1(2)], the Code refers to a considerably smaller proportion. When making recommendations of good practice, a less legalistic approach is adopted by referring to disparately adverse impact. The EOC takes the view that a less legalistic approach is appropriate in making recommendations of good practice for easier presentation and understanding.</p> <p><u>Paragraph 5.2.3</u></p> <p>The Law Society considers the statement "the spirit of practising and promoting racial equality must always be followed" misleading, as there is no obligation upon any employer to promote racial equality. Furthermore, it is pointed out that at common law, one rarely talks about</p>

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	<p>"spirit", unlike some other jurisdictions where the "spirit" of legislation can be used for construing legislative provisions.</p> <p>EOC response</p> <p>This paragraph states that the details of a policy on racial equality will depend on the scale and structure of the individual organization and the available resources. Organizations and business operating on a smaller scale with simple structure may adopt less formal practices than large sophisticated organizations with ample resources. The EOC takes the view that it is appropriate for small employers and organizations to follow the spirit of the law even when they adopt less formal practices.</p>
Paragraph 5.3.1 – Recruitment using consistent selection criteria	
<p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p>	<p>The Code does not provide a general explanation of the principles or benefits of using consistent selection criteria. SOCO suggests incorporating paragraphs 10.1 to 10.5 of the SDO Code, mutatis mutandis, into paragraph 5.3.1 [please refer to point 5 (Consistent selection criteria) on pages 4 and 5 of SOCO's submission for details].</p> <p>EOC response</p> <p>A new paragraph 5.3.1(3) is inserted to further elaborate on the principles and benefits of using consistent selection criteria.</p>
Paragraph 5.3.3 – Genuine Occupational Qualification	
<p>HKSKH Lady MacLehose Centre [CB(2)1816/08-09(01)]</p>	<p><u>Paragraph 5.3.3(1)(c)</u></p> <p>Examples should be included to illustrate the nature of the jobs covered under the situation specified in the sub-paragraph and explain the meaning of “authenticity”.</p>

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	<p>EOC response</p> <p>The Genuine Occupational Qualification provisions provide exceptions to the RDO. The Code explains in paragraph 5.3.3(2) that it is for the employer to show that the exception applies to a job and that the court will examine the claim strictly. Each case depends on its own facts. An example based on case law is also given to show that the exception may not apply when the job does not require direct contact with clients. The EOC will review the Code in the light of operation experience and case law development.</p>
Paragraph 5.3.4 - Advertising vacancies	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>HKSKH Lady MacLehose Centre (HKSKH) [CB(2)1816/08-09(01)]</p> <p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p> <p>Hong Kong Human Rights Monitor (HKHRM) [CB(2)1880/08-09(02)]</p> <p>Hong Kong General Chamber of Commerce (HKGCC) [CB(2)1880/08-09(03)]</p>	<p>Making reference to paragraph 11.5.2 of the SDO Code, SOCO suggests inserting the following under paragraph 5.3.4 -</p> <ul style="list-style-type: none"> - “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.” <p>EOC response</p> <p>Paragraph 11.5.2 of the SDO code is meant to address the then prevailing issue of explicit gender specific advertisements. In the race equality context, explicit race specific advertisement is uncommon. Paragraphs 5.3.4(3) and (4) of the Code recommends advertisement to be made in a manner that is inclusive of all racial groups.</p> <p><u>Paragraph 5.3.4(2)</u></p> <p>The Law Society considers that the statement “asking for ID numbers would be acceptable” should not be made as this is very unlikely to be acceptable in the light of the restrictions in the</p>

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	<p>Personal Data (Privacy) Ordinance.</p> <p>EOC response</p> <p>While requests for photographs or copies of ID card before the interview may lead to claims of discrimination, there is still a need for identification in the recruitment process. The EOC takes the view that request for ID numbers for identification purposes in the recruitment process is legitimate and permissible under privacy legislation. The codes under the SDO and DDO also contain similar statements.</p> <p><u>Paragraph 5.3.4(3)</u></p> <p>HKSKH suggests that where the job requires only the ability to speak but not read or write in Chinese, the Code should recommend (rather than encourage) employers, particularly large employers, to advertise in both Chinese and English. HKSKH is of the strong view that wording such as “employers are encouraged to” should be replaced by “employers are recommended to” or “employers should”, as appropriate, with a view to emphasizing the importance of ensuring racial equality in employment matters.</p> <p>EOC response</p> <p>The meaning of “should”, “recommend”, and “encourage” overlap considerably. The Code does not directly impose legal obligations. The EOC takes the view that the word “encourage” has used in the Code accurately to put emphasis on the importance of ensuring racial equality.</p> <p>HKGCC considers the recommendation to advertise in both Chinese and English too onerous, especially for small employers. If making such a recommendation is a must, then all recommendations should be qualified to the effect they are not mandatory.</p>

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	<p>EOC response</p> <p>Paragraph 5.3.4(3) states that the employers are encouraged to advertise in both English and Chinese where reasonably practicable. The Code does not directly impose legal obligations. The EOC takes the view that this topic has been dealt with appropriately.</p> <p>HKHRM suggests amending the Chinese rendition of the word "satisfactory" in paragraph 5.3.4(3) from "理想" to "良好" to achieve consistency with the Chinese text of paragraphs 5.3.1(1)(d) and 5.3.1(2).</p> <p>EOC response</p> <p>Amendment is made to the Chinese wording as suggested.</p>
Paragraph 5.3.5 - Shortlisting	
<p>HKSKH Lady MacLehose Centre [LC Paper No. CB(2)1816/08-09(01)]</p> <p>The Federation of Hong Kong & Kowloon Labour Unions</p>	<p>In respect of paragraph 5.3.5(1) and (2), EOC should consider adding that employers should also keep record of the selection criteria and marking system used in the shortlisting process.</p> <p>EOC response</p> <p>A new paragraph 5.3.5(3) (supplemented by a new footnote 57) is inserted to recommend keeping record as suggested.</p>
Paragraph 5.3.6 - Race related information	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p>	<p><u>Paragraph 5.3.6 (2)</u></p> <p>The beginning of this paragraph should be revised to read "Race-related information should only be sought for the purposes of making ...".</p>

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	<p>EOC response</p> <p>Revision is made as suggested.</p>
Paragraph 5.3.7 - Interviewing	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p> <p>Hong Kong Human Rights Monitor (HKHRM) [CB(2)1880/08-09(02)]</p>	<p>The Law Society suggests that reference should be made to the risk of holding interviews on days on which certain ethnic groups may not be able to attend.</p> <p>EOC response</p> <p>A new paragraph 5.3.7(2) is inserted to recommend accommodation for different racial groups in respect of interview times.</p> <p>SOCO suggests making reference to paragraphs 11.8 and 11.9 of the SDO Code and inserting-</p> <p>(a) at the beginning of 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...”; and</p> <p>EOC response</p> <p>Insertion made as suggested.</p> <p>(b) after paragraph 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.”</p>

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	<p>EOC response</p> <p>A new paragraph 5.3.7(4) is inserted as suggested.</p> <p>In relation to paragraphs 5.3.7(3) and 5.3.16(5), HKHRM suggests adding the words “at least” before “24 months” and deleting the phrase “or if this is not practicable, at least not less than 12 months” to the effect that records of recruitment process, and notes on dismissals and redundancies are kept for not less than 24 months.</p> <p>EOC response</p> <p>Revision is made as suggested.</p>
Paragraph 5.3.8 - Tests	
<p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p>	<p>SOCO suggests inserting after paragraph 5.3.8 information on post-hiring enquiries along the line of paragraphs 11.13 and 11.14 of the SDO Code.</p> <p>EOC response</p> <p>Paragraph 5.3.6(1) of the Code addresses the issues of pre-hiring questions connected the race of a person which may lead to claims of discrimination. Paragraph 5.3.6(2) and 5.3.17 deal with legitimate collection and use of race related information.</p>
Paragraph 5.3.9 – Recruitment through employment agencies or employment services	
<p>Association of Indonesian Migrant Workers in Hong Kong</p>	<p>HKGCC considers that the Code should clarify that if employers instruct the agency or employment services that there should be no discrimination in the recruitment process, the</p>

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<p>Hong Kong General Chamber of Commerce (HKGCC) [CB(2)1880/08-09(03)]</p>	<p>employer is not liable if the agencies/employment services are found to have infringed the provisions of RDO.</p> <p>EOC response</p> <p>Clarification inserted as suggested.</p> <p>Association of Indonesian Migrant Workers in Hong Kong suggests adding to the Code that an arrangement by employment agencies for underpayment to employees of certain racial groups is an act of discrimination on the ground of race.</p> <p>EOC response</p> <p>Insertion is made in paragraph 3.8.2(1) of the Code to state that employment agencies may not help employers to discriminate on the ground of race such as by arranging underpayment for workers from certain racial groups.</p>
<p>Paragraph 5.3.10 - Terms and conditions of employment, benefits, facilities and services</p>	
<p>HKSKH Lady MacLehose Centre (HKSKH) [CB(2)1816/08-09(01)]</p> <p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Society for Community Organization</p>	<p>SOCO suggests inserting under paragraph 5.3.10 various paragraphs relating to dress codes, equal pay for work of equal value, job titles, part-time work, and consideration for individual differences in pay, along the lines of paragraphs 12.1, 12.4, 12.5, 12.9 to 12.11, 12.13 and 12.15 of the SDO Code (please refer to point 9 on pages 6 to 8 of SOCO's submission for details).</p> <p><u>EOC response</u></p>

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<p>(SOCO) [CB(2)1835/08-09(02)]</p> <p>Hong Kong Human Rights Monitor (HKHRM) [CB(2)1880/08-09(02)]</p> <p>Hong Kong General Chamber of Commerce (HKGCC) [CB(2)1880/08-09(03)]</p> <p>Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]</p>	<p><u>Insertion is made in paragraph 5.3.10(1) with reference to paragraph 12.1 of the SDO code. Insertion is made in paragraph 5.3.10(4) of the Code with reference to paragraph 12.4 of the SDO code. Insertion is made in paragraph 5.3.10(5) with reference to paragraph 12.5 of the SDO code. Paragraphs 12.9 and 12.10 of the SDO code are meant to address issues arising in the gender equality context, which may not be directly applicable in the race equality context. A new paragraph 5.3.10(6) is inserted with reference to paragraph 12.11 of the SDO code. A new paragraph 5.3.10(10) is inserted with reference to 12.13 of the SDO code. Contents similar to paragraph 12.15 of the SDO code (dealing with dress code) is covered under paragraph 5.3.10(2) of the Code.</u></p> <p>HKSKH suggests adding a sub-paragraph under paragraph 5.3.10 to specify that employees of the same rank should be assigned broadly similar duties.</p> <p><u>EOC response</u></p> <p><u>Revision is made in paragraph 5.3.10(1) to specifically mention assignment of work.</u></p> <p><u>Paragraph 5.3.10(1)</u></p> <p>HKHRM suggests adding the words “terms, policies and conditions” (“條款、政策、條件”) after the word “rules” to provide better safeguards to employees.</p> <p><u>EOC response</u></p> <p><u>Revision is made as suggested.</u></p> <p><u>Paragraph 5.3.10(2)</u></p>

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	<p>The Law Society suggests that the reference to the UK case <i>Ahmad v Inner Education Authority</i> (1977)(ICR 490) in footnote 60 be removed, as there is no case law to suggest that Muslims should be considered a distinct ethnic group for the purposes of RDO.</p> <p>EOC response</p> <p>The reference to <i>Ahmed v Inner London Education Authority</i> [1977] ICR 490 is intended to show how employers consider accommodating the religious practices of employees. As accommodation of religious practices may promote racial equality, the EOC considers that the case is a useful reference, while making it clear that it is not a race discrimination case.</p> <p><u>Paragraphs 5.3.10(4) to (8)</u></p> <p>The Law Society, Employers' Federation of Hong Kong and HKGCC consider that the paragraphs on equal pay for equal work/work of equal value are inappropriate and misleading and should be deleted. It is pointed out that equal pay for equal work is an entirely separate issue from race discrimination and it goes beyond the scope of RDO to provide in the Code that employers should maintain the principle of equal pay for equal work.</p> <p>EOC response</p> <p>Although general principles of equal pay for equal value are mainly articulated in the context of gender equality, the issue of pay equality is not necessarily confined to the gender context, but is also capable of arising in the context of racial equality. The EOC takes the view that it is appropriate to include general principles of equal pay for equal</p>

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	<p>value in the Code in order to promote racial equality. These principles are also included in the code under the Disability Discrimination Ordinance (DDO).</p>
<p>Paragraph 5.3.12 - Language</p>	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Hong Kong General Chamber of Commerce (HKGCC) [CB(2)1880/08-09(03)]</p> <p>Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]</p>	<p>Employers' Federation of Hong Kong expresses concern about the need to justify pre-conditions which may have a differential impact on different races (e.g. language requirements) as well as the structuring of different remuneration packages for different applicants. It considers that paragraph 5.3.12 should be materially expanded, with relevant examples to be added.</p> <p><u>EOC response</u></p> <p><u>The focus of paragraph 5.3.12 of the Code is on language issues and it recommends employers to ensure that language requirement for a job should be commensurate with the satisfactory performance of the job. Cross-references to other parts of the Code which deal with language issues in specific contexts are also provided, including paragraph 6.1.1(2)(v) under which Illustration 13 provides an example based on case law of how the law may operate with regard to language requirement of a job. The EOC will keep this issue under review as it accumulates operation experience and in the light of case law development.</u></p> <p><u>Paragraph 5.3.12(1) and (2)</u></p> <p>HKGCC considers that paragraphs 5.3.12(2) and 6.1.1(1)(c) should be appropriately qualified to make it clear that accent requirement can be acceptable so long as it is commensurate with the satisfactory performance of a job as stated in paragraph 5.3.12(1).</p> <p><u>EOC response</u></p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p><u>Reading the Code as a whole (paragraphs 5.3.1(2) and 5.3.12(1)), it is clear that language requirement (including accent) can be acceptable so long as it is commensurate with the satisfactory performance of a job.</u></p> <p><u>Paragraph 5.3.12(3)</u></p> <p>The Law Society opines that EOC should clarify whether it is of the view that all relevant information relating to employment matters should be provided in a language (or languages) which can be read by all employees. If this is not the case, the paragraph should be amended.</p> <p>EOC response</p> <p>In the context of good practice, paragraph 5.3.12(3) states that, where the workforce includes people who are not proficient in the language of the workplace, employers should take reasonably practicable steps to ensure that they are provided with and understand information relevant to their employment. The Code does not directly impose legal obligations. The EOC takes the view that this topic has been dealt with appropriately.</p>
<p>Paragraph 5.3.13 - Promotion, transfer and training</p>	
<p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p> <p>Hong Kong Integrated Nepalese Society</p>	<p>SOCO suggests -</p> <p>(a) inserting before paragraph 5.3.13(1) a paragraph similar to paragraph 13.1 of the SDO Code; and</p> <p>EOC response</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>Paragraph 13.1 of the SDO code states that it is unlawful to discriminate in relation to promotion, transfer or training. Unlawful discrimination in promotion, transfer or training is dealt with in Chapter 6 of the Code. The focus of paragraph 5.3.13 of the Code is on good practice.</p> <p>(b) inserting after paragraph 5.3.13(6) a paragraph similar to paragraph 13.1.6 of the SDO Code.</p> <p>EOC response</p> <p>Insertion is made as suggested.</p> <p>Hong Kong Integrated Nepalese Society recommends stating in the Code that employers should ensure that employees of ethnic minorities are not treated less favourably in terms of training opportunities because of language.</p> <p>EOC response</p> <p>Paragraph 5.3.13(7)(a) recommends employers to examine policies, rules and practices regarding training to ensure that no one from any racial group is treated less favourably on the ground of race.</p>
<p>Paragraph 5.3.14 – Prevent harassment on the ground of race</p>	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p>	<p>SOCO recommends that, except for the examples mentioned in paragraph 5.3.14(3)(a)-(g), paragraph 5.3.14 should be re-drafted along the lines of SDO Code paragraphs 19-22 (please</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]	<p>refer to point 11 on pages 8 to 11 of SOCO's submission for details).</p> <p>EOC Response</p> <p>Insertion is made with reference to paragraph 19-22 of the SDO code.</p> <p><u>Paragraph 5.3.14(3)(f)</u></p> <p>The Law Society points out that while the imposition of excessive workload or performance targets on people on the ground of race is almost certainly to be unlawful under RDO, it does not amount to harassment as defined in section 7 of RDO.</p> <p>EOC response</p> <p>Harassment may take many forms. By reference to the sample anti-harassment policy appended to the Statutory Code of Practice on Racial Equality in Employment in the UK, unrealistic performance expectations and excessive workloads based on race are given as example of harassment.</p>
<p>Paragraph 5.3.16 – Dismissals, redundancies and unfavourable treatment of employees</p>	
HKSKH Lady MacLehose Centre (HKSKH) [CB(2)1816/08-09(01)] Society for Community Organization (SOCO)	<p>SOCO suggests inserting in paragraph 5.3.16 a paragraph similar to paragraph 14.1 of SDO Code.</p> <p>EOC response</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
[CB(2)1835/08-09(02)]	<p>Paragraph 14.1 of the SDO Code states that it is unlawful to discriminate by dismissing an employee or subjecting him or her to detriment. Unlawful discrimination by dismissal or subjection to detriment is dealt with in Chapter 6 of the Code. The focus of paragraph 5.3.16 of the Code is on good practice.</p> <p>HKSKH suggests adding a sub-paragraph under 5.3.16 to specify that the race of an employee (including race-related factors such as language, appearance and attire) should not be used as the ground for dismissals, redundancies and unfavourable treatment of employees.</p> <p>EOC response</p> <p>Insertion of a new paragraph 5.3.16(1) is made as suggested.</p>
Paragraph 5.3.17 – Monitoring	
The Law Society of Hong Kong [CB(2)1816/08-09(03)]	<p>Any suggestion that monitoring should be carried out by <u>all</u> employers should be removed from the Code. Whilst the monitoring of practices and policies and their impact is a useful exercise for large employers, it could amount to a very dangerous exercise when carried out other than with greatest care.</p> <p>EOC response</p> <p>The EOC takes the view that in order to promote racial equality, it is appropriate to encourage employers to take reasonably practicable steps to monitor and review racial equality situation with their organizations. Paragraph 5.3.17(3) of the Code recognizes that employers vary in scale and measures for monitoring may range from assessment through personal knowledge in small enterprises to formal processes in large organizations.</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
Chapter 6 – Unlawful acts under RDO	
Paragraph 6.1.1 – Racial Discrimination	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p> <p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p> <p>Unitarian Universalists Hong Kong [CB(2)1880/08-09(01)]</p> <p>Hong Kong Human Rights Monitor (HKHRM) [CB(2)1880/08-09(02)]</p>	<p>SOCO recommends that the Code should follow a similar structure as that of the SDO Code. Making reference to the SDO Code, SOCO suggests placing the contents of chapter 6 (types of discrimination, racial harassment, victimization, vilification and positive action) in an earlier part of the Code, say between chapters 2 and 3.</p> <p><u>EOC response</u></p> <p><u>The Code puts emphasis on good practice by placing the chapter on unlawful acts (chapter 6) after the chapter on good practice (chapter 5). This is in line with the general results and a specific suggestion from the consultation process.</u></p> <p><u>Paragraph 6.1.1 (1) – Direct Discrimination</u></p> <p>HKHRM suggests amending the word "作為" in the last sentence of the Chinese text of paragraph 6.1.1(1)(a) into "行為" to achieve consistency with other parts of the Chinese text.</p> <p>EOC response</p> <p>Amendment is made as suggested.</p> <p>Illustration 7 –The Law Society points out that it is not necessary that “another job seeker not of Pakistani origin would not have been declined” for unlawful discrimination to exist.</p> <p>EOC response</p> <p>To establish a case of direct discrimination, it has to be shown that the treatment given to</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>the claimant is less favourable to the treatment which would have been given to other person of a different racial group. The reference to another job seeker is to reflect and emphasize the required comparison.</p> <p>Illustration 8 – The Law Society points out that the fact that the two people mentioned in the illustration are “in the same or materially similar employment situation (such as they both do the same job and have similar experience and their performance are both good)” is not essential. It will constitute race discrimination if someone is paid less than they otherwise would have been on the ground of race, even without a direct comparator.</p> <p>EOC response</p> <p>To establish a case of direct discrimination, it has to be shown that the treatment given to the claimant is less favourable to the treatment which would have been given to other person of a different racial group. The reference to the two people is to reflect and emphasize the required comparison.</p> <p><u>Paragraph 6.1.1(2) – Indirect Discrimination</u></p> <p>Illustration 9 – The Law Society suggests revising the last few words to read “if information shows that the blanket ban is not justifiable, as face masks could have been used satisfactorily to meet health and safety standards”.</p> <p>EOC response</p> <p>Rephrased as suggested.</p> <p>Illustration 13 – Unitarian Universalists Hong Kong suggests either putting an illustration to demonstrate how language requirement can be considered indirect discrimination or deleting Illustration 13 from the Code so that a standard language requirement cannot be easily used as an excuse for screening out ethnic minorities or justifying indirect discrimination.</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>EOC response</p> <p>Paragraph 6.1.1(2)(v) of the Code states that requirement or condition in relation to academic or language standard can lead to claims of indirect race discrimination. Illustration 13 is based on case law which shows how such a claim may arise. The crucial issue is whether, on the facts of each case, the requirement or condition is relevant and appropriate to the job. Illustration 13 and the case reference facilitate understanding on this issue. Insertion is made to emphasize that each case depends on its own facts.</p>
<p>Paragraph 6.1.2 – Discrimination on the ground of near relative’s race</p>	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p>	<p>The action in Illustration 14 can still be regarded as race discrimination even if there is no subsequent appointment.</p> <p>EOC response</p> <p>To establish a case of direct discrimination, it has to be shown that the treatment given to the claimant is less favourable to the treatment which would have been given to other person of a different racial group. The reference to subsequent appointment of another manager is to reflect and emphasize the required comparison.</p>
<p>Paragraph 6.1.3 – Discrimination by way of victimization</p>	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p>	<p>The Law Society suggests to make it clear in Illustration 15 that victimization can occur even when the allegation of unlawful discrimination is without merit.</p> <p>EOC response</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	Insertion made as suggested.
Paragraph 6.3 – Unlawful racial harassment	
Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]	<p>The concept of racial harassment has been downplayed in the Code and there is insufficient details relating to the formulation of a policy on racial harassment.</p> <p>EOC response</p> <p>Treatment of harassment is enhanced in chapter 4 (new paragraphs 4.2.4 to 4.2.13) and in paragraph 5.3.14 of the Code.</p>
Paragraph 6.5 – Discriminatory advertisements	
HKSKH Lady MacLehose Centre (HKSKH) [CB(2)1816/08-09(01)]	<p>Language issues and relevant examples should be included in paragraph 6.5, for instance, by stating that it would be unlawful to specify a language requirement in the recruitment advertisement if it is not necessary for the satisfactory performance of the job, and to advertise solely in a language which is not required for the satisfactory performance of the job.</p> <p>EOC response</p> <p>The issue of language requirement leading to indirect discrimination is dealt with in paragraph 6.1.1(2)(v) of the Code and Illustration 13 based on relevant case law is given to facilitate understanding on this issue. The EOC will keep the issue under review in the light of operational experience and case law development.</p>
Paragraph 6.7 – Acts allowed under RDO	
The Law Society of Hong Kong [CB(2)1816/08-09(03)]	<u>Paragraphs 6.7.3 and 6.7.4</u>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
<p>Hong Kong General Chamber of Commerce (HKGCC) [CB(2)1880/08-09(03)]</p> <p>Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]</p>	<p>The Code is still unclear in the area of expatriate exceptions. The condition of expatriate employment may change over time (e.g. cessation of special skills, right of abode, etc.) which may create confusion and concern on the eligibility of expatriate terms. For instance, the Code does not explain whether a company is obliged to align an expatriate's employment terms after he has obtained permanent residency after staying in Hong Kong for seven years. Neither does it explain in detail how the exception in section 12 of RDO will apply in practice. More illustrations should be provided to explain how these exceptions will operate in practice.</p> <p>EOC response</p> <p>Paragraph 6.7.3(3) explains that the expatriate exception applies when an the employee's employment is renewed, promoted or transferred, so long as the benefit given to the employee is reasonable. Each case depends on its own facts. The EOC will keep these issues under review in the light of operation experience and case law development.</p>
Chapter 7 – When discrimination and harassment is encountered	
Paragraph 7.2 – Complaint handling by EOC	
<p>Hong Kong Unison [CB(2)1848/08-09(01)]</p>	<p><u>Paragraph 7.2.10</u></p> <p>The paragraph focuses on the advantages of conciliation. However, it is also important to remind complainants that conciliation can only be conducted with the mutual consent of both parties and that a mediation agreement would not be tantamount to a court order, with a view to facilitating parties concerned to choose the dispute resolution method most suited to their needs.</p> <p>EOC response</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	Insertion is made as suggested.
Paragraph 7.3 – Legal assistance by EOC	
<p>The Hong Kong Bar Association [CB(2)1816/08-09(02)]</p> <p>Hong Kong Unison [CB(2)1848/08-09(01)]</p>	<p><u>Paragraph 7.3.2</u></p> <p>The Bar Association opines that the range of factors highlighted in the paragraph has not been set out in clear order. It seems that the last sub-clause, namely “and whether the case reflects a widespread problem or the EOC’s strategic concerns”, refers to two factors that are not mutually exclusive which have been appended under that sub-clause as an afterthought.</p> <p>EOC response</p> <p>Insertion is made to clarify that a widespread problem indicated by EOC’s complaint handling experience is an example of EOC’s strategic concerns.</p> <p>Hong Kong Unison considers that elaboration should be made on the meaning of the phrase “EOC’s strategic concerns”.</p> <p>EOC response</p> <p>Insertion is made to clarify that a widespread problem indicated by EOC’s complaint handling experience is an example of EOC’s strategic concerns.</p>
Annex – Sample policy on racial equality	
<p>Society for Community Organization (SOCO) [CB(2)1835/08-09(02)]</p>	<p>The following should be incorporated into the sample policy:</p> <p>(a) An equal opportunities action plan will be drawn up, with racial equality targets and timetables, to show what steps the organization plans to take to achieve equality of</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>opportunity;</p> <p>EOC response</p> <p>Since the RDO does not impose an obligation to draw up and implement equality action plan, paragraph 3.8 of the policy appropriately deals with the issue of monitoring racial equality.</p> <p>(b) 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; and</p> <p>EOC response</p> <p>Since the RDO does not impose an obligation to draw up and implement equality action plan, paragraph 3.9 of the policy appropriately deals with the issue of taking action to promote equality and prevent discrimination in the light of monitoring and in consultation with employees and workers.</p> <p>(c) 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.</p> <p>EOC response</p> <p>The policy is intended to be an internal policy dealing with equality in employment. Customers and clients are outside the scope of the policy.</p>
Employers' Federation of Hong Kong [CB(2)1890/08-09(01)]	Small employers will find the Code difficult to observe. While it is appropriate for the Code to recommend the adoption of a specific policy, the sample policy set out in the Code is too

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>strenuous for small companies to comply with.</p> <p>EOC response</p> <p>Paragraphs 5.2.1 and 5.2.3 of the Code recognizes that employers vary in scale. The details of the policy will depend on the scale structure of the individual organization and the available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices as appropriate to the scale and structure of their organizations and available resources.</p>
Paragraph 3 of the sample policy – Implementation	
<p>The Law Society of Hong Kong [CB(2)1816/08-09(03)]</p>	<p><u>Paragraphs 3.4 and 3.5</u></p> <p>To include paragraphs of this nature (dealing with training and consultation) into the policy on racial equality is in effect imposing contractual obligations upon employers which do not exist in the legislation. It should at least be made clear to employers that they are not obliged to include these sections unless they wish to do so.</p> <p>EOC response</p> <p>Paragraphs 5.2.1 and 5.2.3 of the Code recognizes that employers vary in scale. The details of the policy will depend on the scale structure of the individual organization and the available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices as appropriate to their situation.</p> <p><u>Paragraph 3.7</u></p> <p>The paragraph is incorrect and should be re-drafted, as the only restriction should be that criteria and performance appraisals are not racially motivated.</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	<p>EOC response</p> <p>It is good employment practice to relate selection criteria and performance appraisals to the job or training opportunity. This will help to prevent race discrimination. Similar statements can be found in the sample anti-harassment policy appended to the Statutory Code of Practice on Racial Equality in Employment in the UK.</p> <p><u>Paragraphs 3.8 and 3.9</u></p> <p>It is inappropriate to impose an obligation upon employers to monitor.</p> <p><u>EOC response</u></p> <p>As it is the purpose of the Code to give practical guidance to promote racial equality, the EOC takes the view that it is appropriate to include recommendations on good practice (such as racial equality promotion and monitoring) which are over and above the minimum requirement of the law.</p> <p><u>Paragraph 3.10(2)(f)</u></p> <p>This does not necessarily amount to harassment.</p> <p>EOC response</p> <p>Harassment may take many forms. By reference to the sample anti-harassment policy appended to the Statutory Code of Practice on Racial Equality in Employment in the UK, unrealistic performance expectations and excessive workloads based on race are given as</p>

Deputation/Individual [LC Paper No. of submission]	Comments/Proposed amendments
	example of harassment.

Equal Opportunities Commission
17 June 2009