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Panel on Constitutional Affairs

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 16 March 2009**

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) on the draft Code of Practice (CoP) 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 CoP on Employment has been issued by EOC. EOC published the public consultation document on the draft CoP on 13 October 2008, and the end of the consultation period was extended from 8 December 2008 until 19 January 2009. According to the EOC's plan, the CoP on Employment will be introduced into the Legislative Council (LegCo) for negative vetting in March 2009 and should be ready for issuance by April 2009.

4. The CoP on Employment 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

5. The Panel was consulted on the draft CoP on Employment at its meeting held on 17 November 2008. The major issues raised at the meeting are summarized in the following paragraphs.

Overall approach and content of the draft Code

6. 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.

7. 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.

8. 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 CoP on Employment 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.

9. According to EOC, the CoP on Employment 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 Code

10. Some members expressed concern that given the Code as presently drafted, 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. Queries raised by members on specific provisions of the draft Code included the following -

- (a) the meaning of "race" under section 2.1;
- (b) what would constitute a justifiable requirement or condition under section 4.1.1.2;
- (c) what would be the scope of the term " things" and the time frame during which the act of a previous employer would still be covered under section 4.2.5; and
- (d) whether the victim's presence would be required in circumstances constituting racial harassment under section 4.3.1.

Members also commented on the terms used and the content of some illustrations in the draft Code.

11. EOC and the Administration made the following responses -

- (a) the meaning of "race" in the Code should adhere precisely to section 8(1)(a) of RDO which defined "race" in relation to a person as the "race, colour, descent or national or ethnic origin" of a person;
- (b) the CoP on Employment 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;
- (c) EOC would provide more illustrations to elaborate on the legal principle of justifiability and other relevant terms in the Code; and
- (d) the victim's presence or otherwise was used to differentiate between unwelcome conduct harassment and hostile environment harassment under sections 4.3.1 and 4.3.2 respectively.

EOC undertook to consider members' views in revising specific provisions of the draft Code and the wording used in the illustrations contained therein.

Consultation

12. 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 pointed out that EOC had an obligation under section 63 of RDO to consult appropriate organizations which should include ethnic minorities on the draft Code. They also considered that EOC's failure to do so would constitute indirect discrimination. These members requested that EOC should proceed as a matter of priority with translation of the draft Code into the languages of ethnic minorities and schedule additional public consultation sessions for them when the translated versions were available.

13. EOC explained that under section 63(14) of RDO, a failure to observe any provision of the Code would not in itself lead to any liability, but any code of practice issued under section 63 shall be admissible in evidence in any relevant proceedings before the Court. In the light of the legal implications of the Code, EOC had not arranged to provide translated versions of the Code in the languages of ethnic minorities because it was not certain whether these translated versions could meet the accuracy requirement for legal purposes. However, EOC undertook to consider members' request.

14. Members may wish to note that EOC had subsequently published translation of the draft Code into six different languages including Urdu, Nepali, Tagalog, Thai, Hindi and Indonesian. Two more public consultation sessions with provision of simultaneous interpretation in different minority languages had been scheduled.

Relevant papers

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

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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" [LC Paper No. CB(2)265/08-09(03)]</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" [LC Paper No. CB(2)291/08-09(01)] (<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 [LC Paper No. CB(2)508/08-09(01)] (<i>Chinese version only</i>)</p> <p>Equal Opportunities Commission's response to the position paper of the Society for Community Organization [LC Paper No. CB(2)523/08-09(01)]</p> <p>Minutes of meeting [LC Paper No. CB(2)827/08-09]</p>