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**Comments on:
Revised Draft Code of Practice on Employment
under the Race Discrimination Ordinance
(March 2009)**

1. Introduction

This paper is submitted in relation to the meeting in the Panel on Constitutional Affairs on 16 March 2009, under item IV: 'Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance'.

Society for Community Organization ('SoCO') welcomes the fact that the Equal Opportunities Commission ('EOC') has made revisions to the previous code in the new *Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance* ('revised draft code').

Improvements have been made to promote good practice and references to language are included. In the following we would like to highlight some points for further improvements to promote the Race Discrimination Ordinance ('RDO').

2. Time frame for other codes and guidelines

According to section 63 of the RDO the EOC may issue codes as it thinks fit for the purpose of promoting equality and eliminating discrimination. It is not limited to only publishing codes relating to employment but may use this power to issue more codes to promote race equality.

It is recommended that the EOC draw up a time frame for other relevant codes in relation to the RDO. Practical guidelines for those involved in housing, education and provision of goods, facilities and services would be highly recommended to prevent discrimination and promote understanding of the RDO.

In the meantime, guidelines for these areas could be issued. For instance the EOC has published a *Guideline for Taxi Services* in relation to the Disability Discrimination Ordinance. Similar guides could be useful for providers and recipients of goods, facilities and services. Special attention should be made to language and accent discrimination. Employers who provide goods, facilities and services may be concerned that their employees may discriminate against recipients of such goods etc. Therefore a practical guideline for the employees would support the employer in promoting equal opportunities and also avoid liability.

Question:

- a. **Does the EOC have any time frame for drawing up codes and guidelines in relation to housing, education and provision of good, facilities and services?**

3. Drawing attention to areas relevant for employers/employees

In this connection it would be useful in the final *Code of Practice on Employment under the Race Discrimination Ordinance* ('the Code') to mention areas relevant for employers and employees not directly touched upon in the Code. After para.1.4.4 could be added a new paragraph highlighting issues directly relevant for employers and employees, which have not been mentioned. Employers and employees should be made aware that there are issues in relation to employment in the different protected areas, such as education, housing, and provision of goods, facilities and services.

Question:

- b. **Will the Code include references to the protected areas, such as housing and education etc, where employment issues are relevant?**

4. More illustrations

The EOC has rightly included illustrations in the revised draft code for easy understanding. It would be useful if more examples could be included. While the revised draft code has 16 examples, the UK code has 25 examples. It would be useful if illustrative and relevant court cases from other jurisdictions could be included as well.

Question:

- c. **Will the Code make reference to more examples, especially cases decided in other jurisdictions?**

5. Discrimination based on language

The revised draft code mentions language in relation to hiring (para.5.3.12.(1)), discrimination and harassment based on accent (para.5.3.12(2)), employment matters, such as health and safety are communicated (para.5.3.12(3).)

Also mentioned are:

1. Consistent selection criteria in recruitment (para. 5.3.1(1)(d))
2. Consistent selection criteria in job requirement (para. 5.3.1(2))
3. Advertisements and using English and Chinese (para. 5.3.4(3))
4. Consistent selection criteria in shortlisting (para. 5.3.5(2))
5. Indirect discrimination and language (para. 6.1.1(2)(iv))
6. Positive action and language classes (para. 5.3.18(4))

There are a few other areas where it would be useful to highlight language especially regarding:

1. Direct discrimination (para. 6.1.(1)).
2. The course of employment: The code should list of relevant areas where language discrimination could occur such as performance assessment, training and development, promotion etc. (para. 5.3.13)).

As it is quite common for employers and employees to have questions about language and accent in relation to the RDO, it would be helpful if language and accent are highlighted in the different sections for easy overview.

Question:

d. Will language issues be mentioned in relation to direct discrimination and other areas such as training and promotion?

6. Rights and responsibilities of employees

6a. Rights of employees

The revised draft code still lacks to emphasize the rights of employees. The only rights mentioned in the revised draft code is the right to work free from discrimination and not to be instructed to discriminate (para. 4.2.1) all mentioned in one single paragraph:

“All employees and workers have the right to work free from discrimination or harassment on the ground of race. They are also entitled not to be instructed to discriminate or harass anyone on the ground of race.”(Revised draft code para. 4.2.1)

In contrast the United Kingdom’s “*Statutory Code of Practice on Racial Equality in Employment*” (November 2005) (‘the UK Code’) has 5 paragraphs (para. 6.1-6.5).

In order to see the difference between the revised draft code and the UK code, the following is an extract of the UK Code para. 6.1-6.5 with a highlight in bold of those paragraphs that have been included in the EOC’s revised draft code:

*“6.1 All workers (see the glossary at Appendix 7) **have the right to work free from unlawful racial discrimination and harassment.** They have the right not to be treated less favourably on racial grounds than a worker from another racial group:*

- a. in access to job opportunities;*
- b. in the terms and conditions on which they are employed;*
- c. in the opportunities they have for promotion, transfer or training; or in the access they have to benefits, facilities or services; and*
- d. in matters of dismissal or redundancy, or through exposure to any other detriment.*

6.2 Workers also have other rights, including the following:

- a. not to be subjected to unwanted behaviour that violates their dignity or*

creates an intimidating, hostile, degrading, humiliating or offensive environment for them;

b. not to be victimised for claiming unlawful racial discrimination or harassment, or for backing someone else's complaint under the Race Relations Act 1976 (RRA);

*c. **not to be instructed to discriminate unlawfully against, or harass, someone, on racial grounds, or to be put under any pressure, or inducement, to do so; and***

d. to take their complaint to an employment tribunal, if they are not satisfied with the way their employer has dealt with it; employees have the right to have their complaint considered under statutory grievance and disciplinary procedures (see para 4.66).

6.3 Workers who believe their employer or a colleague is harassing or discriminating unlawfully against them, on racial grounds, have several options. They can:

a. consult their trade union (if there is one where they work and they are a member of it) or workplace representative;

b. report the matter to their manager (unless this person is the alleged discriminator) and/or to someone in the personnel department (if there is one);

c. use informal procedures, such as mediation, and, if unsuccessful, the employer's grievance procedure, which must be followed if the employee is considering taking the matter to an employment tribunal (see paras 4.65 – 4.71); and

d. seek legal advice about pursuing their claim in an employment tribunal, if they are not satisfied with the result of the grievance procedure.

6.4 Employment tribunals have wide powers to order compensation, following a finding of unlawful racial discrimination. Awards of compensation may include:

a. past loss of earnings or other financial loss, including future loss;

b. injury to feelings;

c. personal injury, physical or psychological, caused by the discrimination or harassment; and

d. a further award for injury to feelings, in exceptional circumstances, to reflect the way in which the person bringing the claim of discrimination or harassment has been treated.

6.5 Employment tribunals can also make a declaration about the rights of the parties, or recommend that the employer take steps to reduce the effects of the discrimination on the complainant." (highlights in bold added.)

As can be seen the UK code provides much more detailed guidance to employees in that it:

1. Elaborates on what working free from discrimination could mean (para. 6.1),

2. Includes other rights such as not to be victimized and rights to seek redress at employment tribunals (para 6.2),
3. Informs about the right to seek legal advice and report racial discrimination (para. 6.3),
4. Highlights types of compensation available (para. 6.4)
5. Emphasizes the role of employment tribunals (para. 6.5).

6b. Responsibilities of employees

Employees have a significant role in preventing discrimination. However, the revised draft code does not sufficiently emphasize this. The role of the employee is mainly highlighted to make sure that he/she does make his employer liable under the RDO, rather than emphasizing his/her own responsibility (para. 4.2.2). Paragraph 4.2.3 is mainly written from a managerial perspective, where the employee is told to cooperate with the management (para. 4.2.3(3)) and take part in training related to equal opportunities (para. 4.2.3(1)). Such a managerial perspective does not encourage employees who read the Code to take responsibility and ownership of equal opportunities. The perspective is very much a top-down approach. It is recommended that the section is rewritten to suit the employees' perspective as well, thereby encouraging them to take part and feel committed. This in the end will also benefit the employer.

Again, it is useful to see the full section in the UK code (para. 6.6-6.10) and highlight (underlined highlights) the phrases that the EOC revised draft code has incorporated.

“Responsibilities

6.6 Responsibility for preventing unlawful racial discrimination or harassment and promoting equality of opportunity between people of different racial groups rests principally with employers. Employers are also liable for any unlawful acts of racial discrimination or harassment by their workers, unless they can show they have taken reasonably practicable steps to prevent such acts (see para 3.4 and Example 26, p 85.) However, individual workers do not escape responsibility: a worker, whatever his or her grade or racial group, may be held personally liable for his or her actions, if they are proved to be unlawful, even if the employer has a strong defence against liability (see paras 2.27 and 3.4).

■ Example O. *A manager, who discriminates unlawfully on racial grounds against another worker, may be held personally liable and made to pay compensation to that worker, especially if the employer can persuade an employment tribunal that the organisation took reasonable steps to prevent the manager from discriminating unlawfully.*

Rights

6.7 Workers are responsible for respecting the rights of their fellow workers, including their right to work free from unlawful racial discrimination or harassment.

6.8 *The following actions by individual workers would be unlawful:*

a. *discriminating on racial grounds against colleagues, junior staff, agency staff, contractors, or job applicants in the course of their employment;*

■ *Example P. A manager prefers to work with people whom he has worked with before on other jobs. Most of them are Asian. This could be indirectly discriminatory if teams are regularly put together on this basis and suitable workers from other racial groups are excluded as a result.*

b. *harassing someone at work because of their racial group, by behaving in a way that violates their dignity, or creates a hostile, humiliating, offensive, degrading or intimidating environment;*

c. *attempting to induce, pressurise or persuade other workers to discriminate unlawfully on racial grounds;*

■ *Example Q. A worker refused to be part of a team that included workers from particular racial groups, and induced other workers to refuse as well.*

d. *helping someone to plan or carry out an act of unlawful racial discrimination or harassment;*

■ *Example R. A manager gave one of her workers advice on getting a colleague from a particular racial group demoted.*

Example 26: Worker's liability

Hussain v Westcroft Castings Ltd (1), Mr A Scotson (2) and Mr H Irvine (3), Case No. 21858/94

A Pakistani worker at a small metal castings foundry, unable to cope any longer with the vicious abuse and harassment directed at him, brought racial discrimination claims against the company, one of the workers and his manager. His manager, having promised when he first complained that he would sort things out, responded the next time by asking him what he had done 'to stir this up'. He took no action whatever against the culprit. The tribunal found the manager's responses 'deplorably inadequate' and dismissed the company's defence that what had happened was merely 'jocular banter'. The tribunal also made clear that the size of the company has no bearing on 'the standards expected of reasonable employers when handling disciplinary matters'. Findings of unlawful direct discrimination were made against the company and the two named individuals.

e. *victimising a worker who has complained in good faith about racial discrimination or harassment, or taken legal action about it, or given evidence or information in a case of racial discrimination, even if the complaint is not upheld.*

6.9 *It is recommended that workers:*

a. cooperate with measures taken by management to promote equal opportunities and prevent unlawful racial discrimination and harassment, such as monitoring or positive action training; or work through their trade union or other workplace representatives to encourage management to take such measures;

b. take part in training on the organisation's equal opportunities policy;

c. follow the organisation's equal opportunities and anti-harassment policies;

d. alert management, and trade unions or other workplace representatives, to incidents of racial discrimination or harassment;

e. avoid infringing workers' rights to work in an environment free of unlawful racial discrimination or harassment; and

f. be alert to the possibility that apparently non-discriminatory rules, requirements, conditions, practices, provisions and criteria could put people from some racial groups at a particular disadvantage.

6.10 *As recruitment becomes more competitive, it is in the interests of all workers to take advantage of any training programmes their employers or trade unions provide, such as language training schemes, communication courses, courses on industrial relations and courses designed to improve negotiation skills. Effective communication, and the ability to be flexible and accommodating about the different ways in which people may need to balance the conflicting demands of their personal life, cultural background and work, lie at the heart of good relations at work.*" (Highlights in bold added).

It is quite clear from the highlight that the EOC's revised draft code only has incorporated a few sentences from the UK code.

The UK Code emphasizes:

1. The personal liability of the individual employee (para. 6.6)
2. The different acts by an employee that are unlawful (para. 6.8), such as:
 - a. Discriminating on racial grounds (para. 6.8.a)
 - b. Harassing someone at work because of their racial group (para.6.8.b)
 - c. Attempting to induce, pressurise or persuade other workers to discriminate (para. 6.8.c)
 - d. Helping someone to plan or carry out an act of unlawful racial discrimination or harassment (para. 6.8.d)
 - e. Victimising a worker who has complained in good faith (para. 6.8.e)
3. Includes a number of recommendations for the employee (para. 6.9-6.10)
4. Includes a number of examples for easy understanding.

It is highly recommended that the Code incorporates the parts from the UK Code to provide guidance not only to employers but also the employees.

Questions:

e. Will the Code include more details on rights of employees, especially informing about the right to seek redress and seeking legal advice?

f. Will the Code include more details on the responsibilities of the employees and also provide recommendations to the employees?

7. Sample policies and guidelines

The revised draft code includes a “Sample policy on racial equality”, which draws heavily on the “Sample policy on equal opportunities in employment” from the UK code.

However, some parts of the UK code have been left out. It is recommended that the EOC includes the following sentences in the sample policy:

- *“Grievances, disciplinary action, performance assessment, and terminations of employment, for whatever reason, will also be monitored by racial group”*
- *“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.”*

(Extracted from different parts of Appendix 2: *Sample policy on racial equality* from the UK code)

Furthermore, commitment to the policy can be strengthened by including:

*“This policy has been endorsed by ____ [an appropriate senior person] and has the full support of the management/board.
The policy was approved on ____ [insert date], following consultation with senior managers, workers, workers’ representatives and trade unions.
Overall responsibility for the effectiveness of this policy lies with ____ [an appropriate senior person].
All staff are responsible for familiarising themselves with this policy. Managers must also make sure their workers know about, and follow, the policy.
For further information, please contact [insert name and details].”*

(Extracted from Appendix 2: “Sample policy on racial equality” from the UK code)

The revised draft code also includes a section on harassment. The section is obviously based on the UK codes “Sample on anti-harassment policy” (Appendix 3 in the UK code), but has again left out some parts. The important parts that were left out are:

“All workers have a right to work in an environment that:

- *is free from abuse or insults;*
- *is safe;*
- *promotes dignity at work;*
- *encourages individuals to treat each other with respect;*
- *values politeness;*
- *is open and fair; and*
- *encourages individuals to support each other.*

All workers should:

- *encourage a person who says they have been bullied or harassed to seek help, and be sensitive to their feelings; and*
- *refrain from taking part in, or encouraging or condoning, gossip about cases of alleged or actual harassment or bullying.”*

(Extracted from Appendix 3: “Sample on anti-harassment policy” from the UK code).

Lastly, the UK code also includes guidelines on job application forms (Appendix 4 in UK code). This has not been included in the EOC revised draft code. It is recommended that such a guideline is included.

Questions:

g. Will the Code include more sections in the “Sample policy on racial equality”, especially in relation to monitoring; informing customers and clients of the policy; rights of workers in relation to harassment; and a guideline on job application forms?

8. Recommendations:

- 1. Provide a time frame for drawing up codes and guidelines in relation to housing, education and provision of good, facilities and services.**
- 2. Include more examples in the Code, especially by including examples of cases from other jurisdictions.**
- 3. Refer to language and accent issues in relation to direct discrimination and other areas such as training and promotion.**
- 4. Include more details on rights of employees, especially informing about the right to seek redress and seeking legal advice.**
- 5. Include more details on the rights and responsibilities of the employees from an employee’s perspective.**

- 6. The “Sample policy on racial equality” should include reference to monitoring; informing customers and clients of the policy; rights of workers in relation to harassment; and a guideline on job application forms.**
- 7. Publish the Code in different ethnic minority languages.**