

**Society for Community Organization**

**Press release 6 November 2008**

**Comments on:  
Draft Code of practice on Employment: Race Discrimination Ordinance  
(November 2008)**

**1. Introduction**

Society for Community Organization (SoCO) welcomes the fact that the Equal Opportunities Commission (EOC) has issued a Draft Code of Practice on Employment under the Race Discrimination Ordinance (the Draft Code).

Written well, such a code could serve to provide practical guidance on how to prevent unlawful racial discrimination and achieve equal opportunities. It could also help employers and employees understand their rights and responsibilities; It could serve as a useful instrument for lawyers to advice clients and it could give good guidance to the courts and make people aware of good practice in the field of employment.

However, this draft code is not such a code. The draft code fails in all these aspects and primarily serves as an instrument to explain to employers how they can avoid liability under the law. It lacks the spirit of promoting equal opportunities and promoting good practices. In the following we have highlighted some of the major flaws of the draft code.

**2. Draft code limited to the employment field**

According to section 63 of the Racial Discrimination Ordinance (RDO) the Equal Opportunities Commission 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.

The draft code only covers the employment field but not other fields that are covered by the RDO. Thus it has not yet published any codes in other fields.

Separate codes relating to other areas should be provided as well, especially in the areas of housing; education; the provision of goods, facilities, services and premises; clubs and other bodies such as employment agencies and other organizations should have a code as well. Essentially the areas covered by sections 26-40 (Part 4 of the RDO) should have separate codes.

## 2.1. Example: Code of Practice on Racial Equality in Housing

In Hong Kong ethnic minorities are often refused housing by landlords, agents, homeless shelters on the ground of their race or ethnicity. They may be refused housing based on stereotypes of the food they cook, about ways of living and culture.

According to our survey on racial discrimination, 28% of the ethnic minority respondents have experienced that the landlord would make bad excuses for not providing accommodation to them<sup>1</sup>.

Sections 28-30 of the RDO provide provisions against racial discrimination in housing, such as prevention against discrimination in terms offered, refusing application for premises.

The draft code, however, only concerns employment. Therefore a separate code relating to housing would be useful in Hong Kong. Public authorities, owners, estate agents and consumers would have practical guidance in all areas of housing to avoid unlawful racial discrimination and promote equal opportunities. A code on housing could also set out examples of good practice and is thus not restricted to what is required by law.

The Commission for Racial Equality in England has published a Statutory Code of Practice on Racial Equality in Housing (England, Wales and Scotland) (September 2006) which includes both a statement of the law, good practice and information on training and monitoring.

This code provides useful examples to illustrate what would be considered racial discrimination. For instance, not providing information about suitable properties to an Asian buyer because the seller has made it clear he does not want to sell to an Asian family would constitute racial discrimination.

The code also sets out advice on good practice in relation to sales and letting, such as ensuring that all information is accessible to people from all racial groups. In Hong Kong ethnic minorities with poor English skills may not have equal access to public housing since they do not know where to obtain such information or because they do not receive information in their own languages. A code could provide practical guidance to people involved in the field of housing.

### **Recommendation I:**

Issue codes of practice in other fields especially relating to housing, education, provision of goods, facilities, services and premises.

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<sup>1</sup> Society for Community Organization: “Hong Kong Racial Discrimination Study Series II: Ethnic Minorities” (2001), p. 35.

### **3. The Draft Code only serves as an explanation of the law, not as promoting equality**

The draft RDO code does not encourage positive action or equality of outcome. Rather it focuses on how employers can escape liability.

#### **3.1. Teaching employers how to escape liability**

The following paragraph illustrates how the draft code seems to be written for the sole purpose of teaching employers what they should do so they can avoid a complaint under the RDO:

“If an employee has done an unlawful act for which the employer would be held liable, the employer *may escape liability* by showing he or she had taken reasonable practicable steps to prevent the employee from doing so.” ( para. 5.4) (emphasis added).

In general the tone of the code is extremely conservative and is not written in the spirit of promoting equality, but rather with the aim ensuring that employers do not break the law.

#### **3.2. Avoiding to promote positive duty**

The draft code does not aim to promote positive action. An example of the wording of the document can illustrate this point:

“Employers may, *if they choose to*, encourage persons from [under-represented groups] to apply for the job...However, *there is no legal obligation to compel employers to do so*”. (para. 8.2.8(i)) (emphasis added).

Rather than encouraging positive action, it states that employers do not have to promote such action.

##### **3.2.1 Comparison with the Code of Practice under the Sex Discrimination Ordinance**

If one compares the codes of the RDO and the Code of Practice on Employment under the Sex Discrimination Ordinance (SDO) two points become apparent:

1. The SDO code puts much more emphasis on good practice
2. The SDO code provides more detailed guidelines to employers

##### *Good practice*

For instance para. 11.5 of the SDO code regarding advertising is much more proactive in its wordings, encouraging employers to actively encourage people of different sexes to apply for jobs, such as placing advertisements in publications likely to reach both sexes.

In contrast the draft RDO code (para. 8.2.2) on advertising for recruitment is strictly legalistic in the sense that it only explains what employers should *not* do, rather than promoting equal opportunities. This problem is apparent throughout the code.

*No detailed guidelines*

The Code of Practice is likely to be the major document that employers and employees will seek guidance from when seeking to implement race equality policies. It is therefore important that the code is as practical as possible. Although chapter 8 concerns good practice, detailed practical guidelines are missing in the code. In contrast the Code of Practice on Employment under the Sex Discrimination Ordinance (SDO) provides very detailed guidelines for employers.

An example is para. 11.5 of the code under the SDO. The code states that employers should:

11.5 Use consistent selection criteria

11.5.1 Advertise to encourage applications from both sexes

11.5.2 Review advertising material to avoid stereotypes based on sex

11.5.3 Avoid requests for photographs

11.5.4 Send clear message that applicants from both sexes are welcome where jobs are traditionally held by persons of one sex

11.5.5 Place advertisements in publications likely to reach both sexes

11.5.6 Publish vacancy information to all eligible employees so there is no restriction on application from either sex.

The tone of the SDO code is definitely proactive and there are many details. In contrast the draft RDO code only provides simple guides:

1. Requirement or criteria for a job should not be unnecessarily high
2. Do not change selection criteria
3. Lists what types of advertisements would be unlawful
4. Avoid photographs
5. Do not refuse to interview a person because of race
6. Do not ask about racial background during interviews.

The above example not only serves to illustrate that the guidelines in the RDO code is not detailed. It also shows that it does not promote good practice. The emphasis is on what the employer should *not* do. The message seems to be that as long as the employer avoids to do certain things then he/she will not be liable under the SDO.

Instead the paragraph on advertisements in the draft RDO code could easily be changed to copy parts of the SDO code:

1. Advertise to encourage application from all races, nationalities, ethnic groups and cultural/religious backgrounds
2. Review advertising material to avoid racial stereotypes
3. Avoid requests for photographs
4. Send a clear message that applicants from all races etc. are welcome where posts are traditionally held by persons of one ethnic group
5. Place advertisements in publications likely to reach more racial groups
6. Publish vacancy information to all eligible employees so there is no restriction on

applications from more races.

### 3.2.2. Special measures not promoted

#### *Comparison with the SDO code*

Section 49 of the RDO concerns special measures. According to the Ordinance such measures are not unlawful as long as they are intended to provide equal opportunities. In the draft RDO code special measures is placed very late in the code, and also it is mentioned as part of the exceptions (chapter 7) thus placing special measures on a very low priority. Rather than promoting special measures such measures have just been hidden away in the last parts of the code.

In contrast chapter 8 of the SDO code actively promotes such special measures under the heading of positive action because the section is placed relatively early in the SDO code. Also instead of placing it under an exemption clause, it is placed under the heading of what implications the SDO has in employment, thus giving it a much higher priority.

#### *Why should special measures be highlighted*

Special measures may also be termed positive discrimination, and require the government or other bodies to provide measures to tackle general inequalities that specific groups may face, such as a higher unemployment rate, or lack of access to vocational training. Such an approach is different from a non-discrimination approach which only prohibits discrimination but does not attempt to provide equality of outcome.

As ethnic minorities represent a very disadvantaged group in HK society, it is important that a positive approach is adopted. The EOC should look into the existing inequality, and aspire to improve the relative position of particular groups. It should emphasize the actual outcome to achieve an equal impact.

Although many organizations have advocated that the Ordinance introduces a duty on public authorities or employers to promote equality, the government has failed to include such a duty. This duty already exists in race legislation abroad. In United Kingdom the Race Relations (Amendment) Act 2000 introduces a duty on public authorities to promote equality of opportunity and good relations between persons of different racial groups. And in Northern Ireland the Fair Employment and Treatment Order 1998 (FETO) imposes on employers certain duties that go beyond non-discrimination. It includes obligations to monitor and periodically review to ascertain if there is fair participation and consideration of suitable affirmative action to address under-representation<sup>2</sup>.

However, although the fact that legislation does not impose such a duty, does not hinder the EOC to proactively promote special measures and good practices. This is however sadly lacking.

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<sup>2</sup> Office of the First Minister and Deputy First Minister 2004: A Single Equality Bill for Northern Ireland. A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, anti-discrimination and equality legislation in Northern Ireland. June 2004, Northern Ireland.

## **Recommendation II:**

The RDO code should actively encourage employers to promote and seek equality of outcome. It should promote best practices and special measures and furthermore provide more detailed guidelines for employers.

### **4. Discrimination based on language**

#### **4.1 Why language is an indicator of national or ethnic origin?**

Although the RDO does not expressly state that language is a prohibited ground of discrimination, practice in other common law jurisdictions (such as USA and Canada) shows that language can be an element of a complaint based on the prohibited grounds of the RDO. This is because there is almost inevitably a link between our mother tongue and our place of origin or ancestry, so language always relates to race, colour, descent, national origin or ethnic origin.

##### **4.1.1 Language as indicator of ethnic origin etc.**

Language often serves as an indicator of national or ethnic origin. A person whose first language is Nepalese may be denied a job on the grounds that she does not speak fluent English and because her first language is Nepalese. However, fluency in English has not been identified as an essential feature of the job. As mother tongue is closely related to ethnic origin, 'ethnic origin' could be cited as a ground in a complaint.

##### **4.1.2 Accent**

A person's accent can often identify a person's national or ethnic origin. If a person is denied employment because of his/her accent without there being a justifiable reason for speaking a certain language without an accent, this may constitute racial discrimination as the underlying ground may in fact be race.

For instance when one hears a Chinese Hong Kong person speak English, the accent often reveals that he or she is from Hong Kong. Thus accent often reveals one's ethnic origin.

Another example is new immigrants from Mainland China may have an accent even though they have stayed long time in Hong Kong. They may be discriminated because of their accent and that may also amount to language discrimination as well as racial discrimination.

Some people may be denied access to housing, employment or services because of their accent. In these situations, it is often because the underlying discrimination is actually based on race, national or ethnic origin.

## 4.2 Language should be mentioned throughout the code

The section on language is only mentioned shortly under the section of **good practice** of the draft RDO code (para 8.2.6). The paragraph concerns indirect discrimination where the ability to use a specific language is used as a requirement before a benefit can be enjoyed. For instance requiring a super market cashier to possess Form 5 level Chinese may be unjustifiable.

Therefore more detailed guidelines in the different chapters of the code would be useful.

### 4.2.1 Types of discrimination where language is relevant

#### *Direct and indirect discrimination*

However, language should be mentioned throughout the code, rather than being reserved to the chapter on good practice. First of all it should be mentioned in relation to the different types of discrimination that are unlawful. For instance it should mention that discrimination on the basis of language or accent can amount to direct discrimination or indirect discrimination if the underlying reason for discriminating is related to the protected grounds (race, colour, descent, national or ethnic origin).

#### *Harassment*

Harassment because of language may be a form of discrimination on the grounds or ethnic origin. For instance if a Chinese manager orders a group of Pakistanis only to speak Chinese or English during their break, denying them to speak Urdu among themselves, this may constitute racial discrimination, unless the manager can demonstrate that speaking English or Chinese is a reasonable requirement in the circumstances.

Another example is for instance where a Pakistani worker is ridiculed for his/her way of using Cantonese or English.

### 4.2.2 Areas in relation to recruitment and in the course of employment

Furthermore the language factor should also be mentioned in relation to the different parts of the section on good practice. It is not enough just to mention that it is good practice not to set too high requirements for language abilities. The code should consider language in relation to recruitment and areas during the course of employment.

#### *Recruitment*

Regarding **recruitment** the code should list out how language can serve as barrier in areas such as job descriptions, job advertisements, application forms.

For instance it could mention that the employer should avoid recruiting solely on the basis of recommendations by existing staff, where the workforce is predominantly from one racial group.

#### *In the course of employment*

Regarding the factors to consider **in the course of employment**, the code should list of relevant areas to consider such as performance assessment, training and development,

promotion etc. For instance an employer may be biased towards an employee who speaks with an accent and therefore make a bad assessment of the person. The code could mention that all assessments should be based on actual performance of specific tasks, measures by impartial and objective standards.

**Recommendation III:**

The code should include language considerations throughout the code where discrimination based on language can be linked to the prohibited grounds of the RDO. It should clearly state that language serves relevant indicator of ones' ethnic or national origin and that employers and employees may be liable under the RDO.

**5. Rights and responsibilities of employees**

The draft code is intended to support employers comply with the Ordinance. Although the draft code states that it also for the employees, it is clear from the language that it is not written from the employees' perspective. It does not emphasize what rights and responsibilities that employees have.

**5.1. Comparison with code under SDO**

The draft RDO code (chapter 5) only mentions employee responsibilities from the employers' perspective, such as emphasizing that the employer will be liable for the employee's acts. It does not have a separate chapter about an employee's role in promoting equality or his or her rights and responsibilities.

In contrast the SDO code has a separate section on the employee's role and it specifically mentions the way that employees can be proactive in helping to eliminate discrimination and encourage their employers to formulate discrimination policies (para. 24.1).

**5.2. Code of Practice in United Kingdom**

The Statutory Code of Practice on Racial Equality in Employment (November 2005) issued by the Commission for Racial Equality in United Kingdom is even more progressive and includes a whole chapter to the rights and responsibilities of workers. For instance it mentions rights in relation to access to job opportunities, not to be subjected to unwanted behaviour and to seek legal advice, to make complaints, types of compensation etc.

**Recommendations IV:**

The RDO code of practice should include a separate chapter for employees about their rights and responsibilities, giving suggestions of what special measures they can promote at the workplace.

## **6. New immigrants**

There is an impression that the RDO does not protect people from discrimination on the basis of new immigrant status. However, the RDO only expressly exempts discrimination on the grounds residence status. It is problematic whether discrimination on the basis on new immigrant status (especially discrimination on the basis of accent) can escape the liability under the RDO.

Therefore the EOC should actively incorporate into the code a chapter concerning new immigrants, especially advice employers and employees that it may be unlawful to discriminate against new immigrants (no matter how long they have resided in Hong Kong) under the RDO.

### **Recommendation V:**

The code should aspire to racial harmony and actively encourage people not to discriminate against new immigrants. The code should also include a chapter on the protection of new immigrants from discrimination.

## **7. Summary of recommendations**

### **Recommendation I:**

Issue codes of practice in other fields especially relating to housing, education, provision of goods, facilities, services and premises.

### **Recommendation II:**

The RDO code to actively encourage employers to promote and seek equality of outcome. It should promote best practices and special measures and furthermore provide more detailed guidelines for employers.

### **Recommendation III:**

The code should include language considerations throughout the code where discrimination based on language can be linked to the prohibited grounds of the RDO. It should clearly state that language serves relevant indicator of ones' ethnic or national origin and that employers and employees may be liable under the RDO.

### **Recommendations IV:**

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### **Recommendation V:**

The code should aspire to racial harmony and actively encourage people not to discriminate against new immigrants. The code should also include a chapter on the protection of new immigrants from discrimination.

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