

Race Discrimination Ordinance  
Code of Practice on Employment

Public Consultation Report

Introduction

1. The Race Discrimination Ordinance Cap. 602 (RDO) provides that the Equal Opportunities Commission (EOC) may issue codes of practice containing practical guidance for the purposes of eliminating of discrimination, harassment and vilification; and of promoting equality of opportunity and harmony between different racial groups<sup>1</sup>.
2. The EOC has drawn up a Code of Practice on Employment (Code) under the RDO and has published it in the gazette on 8 May 2009. Prior to publication in the gazette, the first draft of the Code was published in October 2008 for public consultation. An information note was produced in Chinese and English and six minority languages<sup>2</sup>, advising the reader about the broad areas covered by the Code, how to obtain information on public consultation meetings and copies of the first draft. With the extension of the consultation period originally ending on 8 December 2008 to 19 January 2009, the first draft of the Code itself was translated in the six minority languages.

Consultation process

3. The EOC received 88 written submissions on the first draft of the Code. In addition, a series of ten public consultation meetings were held. Three of these were conducted in Chinese, seven were conducted in English. Simultaneous interpretation was provided in a selection of languages from the six minority languages according to the meeting schedule. Briefing sessions have also been held with various stakeholder organizations. The first draft of the Code was also discussed in the Legislative Council's Constitutional Affairs Panel (Panel) on 17 November 2008.
4. In the light of the views and comments received, the EOC substantially revised the first draft of the Code. The revised draft was discussed by the Panel on 16

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<sup>1</sup> RDO section 63

<sup>2</sup> Hindi, Indonesian, Nepali, Tagalog, Thai and Urdu

March 2009. At the same time, the EOC received further views and comments on the revised draft.

5. Having considered all the views and comments, the Code has been finalized and published it in the gazette on 8 May 2009 (attached as **Annex I**). The Code is now laid before the Legislative Council for consideration. A table setting out the major views and concerns raised in the consultation process, together with the EOC's response, is at **Annex II**. Information on the public consultation meetings is at **Annex III**.

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Equal Opportunities Commission

G.N. 2733

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

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# 1 Introduction

## 1.1 The Race Discrimination Ordinance

1.1.1 The Race Discrimination Ordinance (RDO) was enacted in 2008. Its main objectives include making discrimination, harassment and vilification on the ground of race unlawful; and giving the Equal Opportunities Commission (EOC) the function of eliminating such discrimination, harassment and vilification as well as promoting equality and harmony between people of different races<sup>1</sup>.

1.1.2 Part 3 of the RDO deals with discrimination and harassment on the ground of race in the employment field, which includes employment as well as other occupational relationships and matters<sup>2</sup>, making such discrimination and harassment unlawful. Part 5 of the RDO deals with discriminatory advertisements and other unlawful acts.

## 1.2 Purpose of the Code

1.2.1 This Code of Practice (Code) is issued by the EOC, pursuant to RDO section 63, to give practical guidance on how to prevent discrimination and harassment on the ground of race and other unlawful acts, and to promote racial equality and harmony, in the employment field. The Code is intended to encourage employers, employees and other concerned parties to promote racial equality and harmony in the workplace by adopting good practice, and to help them to understand their respective rights and responsibilities under the RDO so that they will respect, and refrain from infringing, the rights of other people. The Code also helps employees and workers to know what to do if they encounter discrimination and harassment on the ground of race.

1.2.2 The Code should be read in the light of and subject to the RDO. It should be read as a whole and in the spirit of promoting racial equality. It should not be read narrowly or approached in a minimalist way.

## 1.3 Status and application of the Code

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<sup>1</sup> See the long title of the RDO (Cap.602)

<sup>2</sup> See Chapter 3 of the Code (p.11)

1.3.1 The Code is a statutory code that has been laid before the Legislative Council. The Code provides recommendations for good employment procedures and practices. It should be used to promote racial equality and harmony in the workplace. Following good employment procedures and practices will further have the benefit of promoting racial equality and harmony beyond the workplace. For example, where the employment relates to the provision of education or other services and facilities, promotion of racial equality in the workplace will also help to ensure that these services are provided without racial discrimination or harassment. Although the Code is not law, it shall be admissible in evidence and the court shall take into account relevant parts of the Code in determining any question arising from proceedings under the RDO<sup>3</sup>. If, for example, an employer has followed the Code's recommendations on taking reasonably practicable steps to prevent discrimination and harassment, it may help the employer to show that it has complied with the law.

1.3.2 In line with the RDO's application in the employment field, the Code applies to employment relationships in both private and public sectors, unless the employee does his or her work wholly or mainly outside Hong Kong<sup>4</sup>. It also applies to other occupational relationships and work related matters, such as contract workers, commission agents, partnerships, vocational training and the services of employment agencies<sup>5</sup>.

#### 1.4 Recommendations of good practice and use of illustrations

1.4.1 The Code provides recommendations on good employment procedures and practices<sup>6</sup>. Employers and other concerned parties should follow these recommendations by adopting them appropriately to the scale and structure of their organizations and available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices, so long as they follow the spirit of practising and promoting racial equality.

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<sup>3</sup> RDO section 63(14)

<sup>4</sup> RDO section 16 and paragraph 3.3 of the Code (p.11)

<sup>5</sup> See Chapter 3 of the Code (p.11)

<sup>6</sup> See Chapter 5 of the Code (p.21)



- 1.4.2 The Code makes use of simple scenarios to illustrate how principles and concepts of the RDO may be applied in the employment field. The application of discrimination law depends very much on the facts of each particular case. The illustrations used in the Code are intended to facilitate a general understanding of the principles of the RDO. They may not embrace all the relevant facts of, and should be not understood as directly applicable to, any specific situation actually encountered by the reader.
- 1.4.3 At the time of issuing the Code, there are no court decisions in Hong Kong applying the RDO. Case law and other materials under other discrimination laws in Hong Kong or elsewhere (such as international common law jurisprudence) may help in understanding how the RDO operates, and relevant references are given in footnotes where appropriate, though differences between legislative provisions and actual circumstances overseas and those in Hong Kong should be noted.
- 1.4.4 While the Code is intended to explain the general principles of the law, it is not a complete and authoritative statement of the law and it should not be taken as a substitute for taking appropriate legal advice in relation to any specific situation. Readers should refer to the relevant RDO provisions and legal advice for the extent of any legal obligation in relation to specific situations.

## 2 Meaning of Race under the RDO

### 2.1 What is meant by race under the RDO

2.1.1 The RDO provides that race means a person's "race", "colour", "descent", "national" or "ethnic origin"<sup>7</sup>. A racial group is a group of persons defined by reference to these characteristics<sup>8</sup>. In this respect, the RDO is in line with the meaning of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

2.1.2 The RDO further elaborates on the meaning of "descent"<sup>9</sup> by providing that discrimination on the ground of descent means discrimination against members of communities based on forms of social stratification such as a caste system or similar systems of inherited status which nullify or impair their equal enjoyment of human rights.

2.1.3 There is no elaboration in the RDO relating to the meaning of "race", "colour", "national" or "ethnic origin". In applying these terms, the following are useful references:-

(1) ICERD and related documents<sup>10</sup>;

(2) Case law and other materials in other jurisdictions (for example, common law jurisdictions).

2.1.4 The above reference materials indicate that:-

(1) Racism and racial discrimination are the result of social processes that seek to classify people into different groups with the effect of marginalizing some of them in society<sup>11</sup>. In this context, the words "race", "colour", "national" or "ethnic origins" in discrimination laws

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<sup>7</sup> RDO section 8(1)(a)

<sup>8</sup> RDO section 8(1)(d)

<sup>9</sup> RDO section 8(1)(c)

<sup>10</sup> For example, General Recommendation VIII of the Committee on the Elimination of All Forms of Racial Discrimination (a body of independent experts established under the ICERD) states that identification of individuals as being members of particular racial groups should be based on their self-identification if no justification to the contrary exists.

<sup>11</sup> Policy and Guidelines on Racism and Racial Discrimination, paragraph 2.1, Ontario Human Rights Commission, Canada, 2005

have broad popular meanings<sup>12</sup>. They are not mutually exclusive and a person may fall into more than one racial group<sup>13</sup>. For example, identifying people as Asian is an act done on the ground of race. The same is true of identifying people as having Chinese origin. A person living in Hong Kong may be in the Asian racial group as well as in the Chinese origin group.

- (2) National origin includes origin in a nation that no longer exists or a nation that was never a nation state in the modern sense<sup>14</sup>. National origin is not the same thing as nationality. The national origin of a person can be different from his nationality or citizenship. For example, a person living in Hong Kong of Indian origin may have Malaysian nationality.
- (3) A group is an ethnic group (and its members having the ethnic origin of the group) if it is a distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history or presumed common history<sup>15</sup>. On this basis, Jews and Sikhs have been held to be ethnic groups<sup>16</sup>. Other groups in the same nature will also be regarded as ethnic groups.
- (4) Religion in itself is not race. A group of people defined by reference to religion is not a racial group under the RDO<sup>17</sup>. The RDO does not apply to discrimination on the ground of religion<sup>18</sup>. But requirements or conditions relating to religion may indirectly discriminate against certain racial groups, and when this is so the RDO applies<sup>19</sup>.

## 2.2 What is not regarded as an act done on the ground of race under the RDO

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<sup>12</sup> *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] ICR 385

<sup>13</sup> RDO section 8(1)(d) and the UK Code of Practice on Racial Equality in Employment, p.111, Commission For Racial Equality 2005

<sup>14</sup> The UK Code of Practice on Racial Equality in Employment, p.109, Commission For Racial Equality 2005

<sup>15</sup> *King-Ansell v Police* [1979] 2 NZLR 531; see also *Mandla v Dowell Lee* [1983] ICR 385 and *BBC Scotland v Souster* [2001] IRLR 150

<sup>16</sup> *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] ICR 385

<sup>17</sup> *Nyazi v Rymans* (EAT, 10 May 1988, unreported)

<sup>18</sup> *Tower Hamlets London Borough Council v Rabin* [1989] ICR 693

<sup>19</sup> See RDO section 4(b); and paragraph 6.1.1(2) of the Code (p.41)

2.2.1 The RDO provides that acts done on the ground of the matters specified in section 8(3) are not acts done on the ground of race under the RDO. Acts done on the ground of these matters also do not constitute requirements or conditions within the definition of indirect discrimination under the RDO<sup>20</sup>. These matters are:-

- (1) Whether or not a person is an indigenous villager<sup>21</sup>;
- (2) Whether or not a person is a permanent resident, or has the right of abode or right to land, or is subject to any restriction or condition of stay, , or has permission to land and remain in Hong Kong<sup>22</sup>;
- (3) How long is a person's length of residency in Hong Kong<sup>23</sup>;
- (4) Whether or not a person has a particular nationality and citizenship<sup>24</sup>.

2.2.2 Although acts done on the grounds of the above matters would not constitute discrimination under the RDO because they do not come within the meaning of race under the RDO, these matters should not be used as a mask to hide what is in fact race discrimination under RDO. Where there is in fact race discrimination, the person discriminated against may bring legal proceedings in Court or complain to the EOC for investigation and conciliation<sup>25</sup>.

#### **Illustration 1**

*A Hong Kong resident of Pakistani origin applies for a job as a manager with a company. She meets all the requirements of the job, but she is not a permanent resident in Hong Kong. The company declined to consider her application and told her that it only employs people who are permanent residents in Hong Kong. In fact, the company does not only employ people who are permanent residents in Hong Kong and there are managers working in the company who are of various national or ethnic*

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<sup>20</sup> See RDO section 4(b); and paragraph 6.1.1(2) of the Code (p.41)

<sup>21</sup> RDO section 8(3)(a); "Indigenous inhabitant" is a term defined in the Village Representative Election Ordinance Cap.576; "Established village" is a term defined in the Government Rent (Assessment and Collection) Ordinance Cap.515.

<sup>22</sup> RDO section 8(3)(b)

<sup>23</sup> RDO section 8(3)(c)

<sup>24</sup> RDO section 8(3)(d)

<sup>25</sup> See Chapter 7 of the Code (p.52)

*origins and who are not permanent residents in Hong Kong. Although whether or not a person is a permanent resident is not a ground of race under the RDO, on the information above, the court can draw an inference that the real reason for declining to consider the job applicant's application was on the ground of her Pakistani origin, which is a ground of race under the RDO.*

### 3 Scope of Part 3 of the RDO

#### 3.1 Employment Field

Part 3 of the RDO deals with discrimination and harassment in the employment field, which includes employment as well as other occupational relationships and matters.

#### 3.2 Meaning of employment

3.2.1 The RDO defines “employment” as a contract of service or apprenticeship, or a contract to personally do any work<sup>26</sup>. This definition of employment is wider than under the common law or labour legislation. People who are not employees under the common law or labour legislation are protected from discrimination and harassment on the ground of race under the RDO if they fall within the RDO definition of employment.

***Illustration 2:-***

*The RDO applies to a self-employed musician of Filipino origin who contracts with a bar-owner to personally perform in the bar. The bar-owner may not discriminate or harass him or her on the ground of race under the RDO.*

3.2.2 Private employers as well as the Government<sup>27</sup> and other public bodies are all bound by the RDO, and their employees and workers are entitled to work free from discrimination and harassment on the ground of race under the RDO.

#### 3.3 Work wholly or mainly outside Hong Kong

3.3.1 The RDO does not apply to people who work wholly or mainly outside Hong Kong<sup>28</sup>. Reference case law indicates that:-

(1) The RDO applies to all employment situations, unless the employee

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<sup>26</sup> RDO section 2; and a contract within this definition needs not be written.

<sup>27</sup> RDO section 3

<sup>28</sup> RDO section 16(1)

works wholly or mainly outside Hong Kong, or works wholly outside Hong Kong on a Hong Kong registered ship or aircraft<sup>29</sup>

- (2) To determine whether a person work wholly or mainly outside Hong Kong, the whole period of employment should be taken into account<sup>30</sup>.
- (3) A person works mainly outside Hong Kong as long as the person has spent more time working outside Hong Kong in the whole period of employment than in Hong Kong, in which case the RDO does not apply<sup>31</sup>.
- (4) When a person works mainly in Hong Kong, the RDO applies even if the act of discrimination takes place outside Hong Kong. This means that the RDO applies to a person who is discriminated against when he is stationed outside Hong Kong, as long as he has worked more time in Hong Kong than outside Hong Kong in the whole period of his employment<sup>32</sup>.

**Illustration 3:-**

*The RDO applies to a manager of Dutch origin who works in Hong Kong 55% of the time and 45% of the time outside Hong Kong in the whole period of his employment. On the other hand, the RDO does not apply to a factory supervisor of Japanese origin employed by a company to stay and work in a factory in the mainland and does not work in Hong Kong at all.*

**Illustration 4:-**

*An accountant of Chinese origin who has worked for a company in Hong Kong for 5 years has just been transferred to stay and work in the company's factory in the mainland. Even though the accountant no longer has to work in Hong Kong, the RDO applies to him because for the whole period of his employment he has spent the majority of working time in Hong Kong. When he has worked in the mainland for more than 5 years, he would have worked more time outside Hong Kong for the whole period of his employment and the RDO will not apply.*

<sup>29</sup> *Haughton v Olau Line (UK) Ltd* [1986] IRLR 465; RDO section 16(1) and (2)

<sup>30</sup> *Saggar v Ministry of Defence* [2005] IRLR 618

<sup>31</sup> *Carver v Saudi Arabian Airlines* [1999] ICR 991

<sup>32</sup> *Saggar v Ministry of Defence* [2005] IRLR 618

3.3.2 The RDO applies to people who work on:-

- (1) a ship registered in Hong Kong; or
- (2) an aircraft registered in Hong Kong and operated by a person whose principal place of business is in Hong Kong or is ordinarily resident in Hong Kong,

unless they work wholly outside Hong Kong<sup>33</sup>.

**Illustration 5:-**

*The RDO applies to a person who works on a Hong Kong registered ship even if this person only spends 10% of time in Hong Kong waters. The RDO does not apply to a person who works on a Hong Kong registered ship but spends all the time outside Hong Kong waters.*

**3.4 Grace period for small employers**

3.4.1 For the first 3 years after the enactment of the RDO, there is a grace period during which RDO section 10(1) and 10(2) (provisions making discrimination under the RDO in employment unlawful) do not apply to employers who employ no more than 5 employees<sup>34</sup>. If a company is controlled by another company or if 2 companies are controlled by a third person, the employees of both companies are included for the purposes of counting the number of employees<sup>35</sup>.

3.4.2 The grace period does not apply to acts of harassment on the grounds of race or discrimination by way of victimisation<sup>36</sup>. All employers may not at any time harass their employees on the ground of race or discriminate against them by way of victimisation. The grace period also does not apply to the employment of domestic helpers<sup>37</sup>. Employers of domestic helpers may not at any time discriminate against them after recruitment<sup>38</sup>.

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<sup>33</sup> RDO section 16(2)

<sup>34</sup> RDO section 10(3) and (8)

<sup>35</sup> RDO section 10(9)

<sup>36</sup> See RDO section 6 and 10(3); and paragraph 6.1.3 of the Code (p.44)

<sup>37</sup> RDO section 10(3)

<sup>38</sup> See paragraph 3.5 of the Code (p.14)



3.4.3 The grace period will expire on 10 July 2011, by which time the provisions making discrimination under the RDO in employment unlawful will apply to all employers. Even during the grace period, if an employer at any time has more than 5 employees, the RDO will apply in respect of any acts of discrimination on the ground of race done at that time.

### 3.5 Domestic helpers

3.5.1 RDO section 10(1) (a) and (c) make discrimination on grounds of race in recruitment unlawful. But these provisions do not apply to the recruitment of domestic helpers who work in the place where the employer or his or her near relatives live<sup>39</sup>. For example, an employer may choose to recruit a domestic helper of Indonesian origin to work at his or her home and declines to recruit a domestic helper of Thai origin on the ground of the difference in origin.

3.5.2 Once the domestic helper has been employed, however, RDO section 10(2) applies and the employer may not discriminate against the domestic helper on the ground of race.

### 3.6 Religion

Part 3 of the RDO (provisions relating to discrimination under the RDO in employment field) does not apply to employment for the purposes of an organized religion if the employment is limited to persons from particular racial groups in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities common to its followers<sup>40</sup>.

### 3.7 Other occupational relationships

#### 3.7.1 Contract workers

RDO section 15 applies to people who are contract workers. Contract workers are workers who are employed by a contractor or a sub-contractor of a principal to do work for the principal<sup>41</sup>. A contractor is a person who enters into a contract with the principal to

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<sup>39</sup> RDO section 10(7)

<sup>40</sup> RDO section 23(1)

<sup>41</sup> RDO section 15(1)

undertake work for the principal<sup>42</sup>. A sub-contractor is a person who enters into a contract with the contractor or a sub-contractor to undertake all or part of the work<sup>43</sup>. The principal may not discriminate against its contract workers on the ground of race under RDO section 15. If a principal does not itself discriminate against or harass its contract workers, there would be no liability under RDO section 15. However, the principal should take reasonably practicable steps to prevent its employees from discriminating or harassing its contract workers and may not authorize its agents to discriminate the contract workers (see paragraph 4.1 of the Code (p.18)).

**Illustration 6:-**

*A cleaning contractor employs cleaners, and under a contract with a trading firm (the principal), sends the cleaners to the trading firm to clean its office. The cleaners are of different national origins (for example, some are of Chinese origin and others are of Nepalese origin). They are all contract workers of the trading firm and it must not discriminate against any of them on the ground of race.*

**3.7.2 Partners**

RDO section 17 applies to partnership firms having 6 or more partners. These firms may not discriminate against any of its partners or any person who wishes to become a partner on the ground of race.

**3.7.3 Commission agents**

RDO section 22 applies to commission agents, who are people remunerated in whole or in part by commission for work done for their principal. For example, an insurance company as a principal may not discriminate on the ground of race against its insurance agents who are paid commission in whole or in part under RDO section 22.

**3.7.4 Barristers**

RDO section 35(1) and (2) apply to barristers and their clerks, and they may not discriminate on the ground of race against a pupil or a tenant or

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<sup>42</sup> RDO section 15(7)

<sup>43</sup> RDO section 15(7)

against any person in relation to the offer of a pupillage or tenancy<sup>44</sup>. RDO section 35(3) applies to any person giving, withholding or accepting instructions to a barrister, and there may not be discrimination on the ground of race in these matters. For example, a lay client may not refuse to instruct a barrister because the barrister is of Indian origin.

### 3.8 Other matters

#### 3.8.1 Vocational training

- (1) RDO section 20 applies to providers of vocational training. These providers may not discriminate on the ground of race against any person seeking or undergoing training to help fit him or her for employment. For example, a technical college may not refuse to admit a student of Pakistani origin to enrol in a mechanic training course because of his or her origin.
- (2) A vocational training provider is not required to modify its arrangements or make different arrangements regarding holidays or medium of instructions for any persons of any racial group<sup>45</sup>. A provider may set language requirement for courses and may refuse enrolment for people who do not meet the requirement regardless of their race. Such language requirement should be commensurate with the contents of the course.
- (3) Course information and material may be provided only in the language required for the course. However, where practicable it is good practice to design and provide courses, programmes, information and material in ways which enable people from different racial groups have equal opportunities to undergo vocational training, and providers are encouraged to do so.

#### 3.8.2 Employment agencies

- (1) RDO section 21 applies to employment agencies. These agencies may not discriminate on the ground of race against any person who wants to obtain their services.

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<sup>44</sup> Under RDO section 35(4), the terms "pupil", "pupillage", "tenant" and "tenancy" have the meanings commonly associated with their use in the context of a set of barristers' chambers.

<sup>45</sup> RDO section 20(2)

- (2) RDO section 21(4) provides that an employment agency is not subject to any liability under section 21 if it can show that it relied on a statement by an employer that the employer could lawfully refuse employment to a person under the RDO, for example, the employer stating that race is a genuine occupational qualification<sup>46</sup>, providing that it is reasonable to rely on the statement.
- (3) For language requirement of a job and good practice relating to the language of advertisement, see paragraph 5.3.4(3) of the Code (p.26).

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<sup>46</sup> See paragraph 5.3.3 of the Code (p.24)

## 4 Rights and Responsibilities under the RDO

### 4.1 Responsibilities of employers and principals

4.1.1 Employees and workers are entitled to work free from discrimination and harassment on the ground of race under the RDO. Employers may not discriminate or harass their employees and workers on the ground of race. The RDO requires employers to take reasonably practicable steps to prevent discrimination and harassment. Only if an employer has done so, will it have discharged its legal responsibility under the RDO<sup>47</sup>.

4.1.2 RDO section 47(1) provides that anything done by an employee in the course of employment is treated as done by the employer as well under the RDO. This is so even if the employer did not know or did not approve of what the employee has done. If, for example, an employee discriminates or harasses another employee on the ground of race, the employer would be treated as having also discriminated or harassed that other employee on the ground of race, and be legally liable unless the employer has taken reasonably practicable steps to prevent discrimination and harassment from happening.

(1) In order to discharge their responsibility to take reasonably practicable steps to prevent discrimination and harassment on the ground of race, it is recommended that employers adopt and implement the policy of the good employment practice and procedures described in Chapter 5 of the Code (p.21).

(2) Social gatherings involving employees immediately after work and for an organized party were held by a tribunal in the UK on the facts of the case to be within the course of employment even though the events take place outside the workplace or normal work hours<sup>48</sup>.

4.1.3 Similarly, RDO section 47(2) provides that anything done by an agent with the authority of the principal (whether express or implied,

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<sup>47</sup> RDO section 47(3)

<sup>48</sup> *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, a sex discrimination case which has reference value to the application of the RDO.

precedent or subsequent) is treated as done by the principal as well, so that, for example, the principal would be held liable for any discrimination or harassment on the ground of race done by the agent with the authority of the principal. Principals should take reasonably practicable steps to prevent discrimination or harassment by their agents, by adopting and following the good employment practice and procedures described in Chapter 5 of the Code as relevant to their situations. This will help principals to comply with the RDO by ensuring that their agents do not have authority to commit any act of discrimination and harassment on the ground of race.

#### 4.2 Rights of employees and workers and their role

4.2.1 All employees and workers have the right to work free from discrimination or harassment on the ground of race. This right covers access to job opportunities, terms and conditions of employment (including benefits and facilities), opportunities for promotion, transfer or training, and matters of dismissal or redundancy. They are entitled to be treated with respect and dignity and not to be subjected to any unwelcome conduct or hostile environment on the ground of race. They are also entitled not to be instructed or pressurized to discriminate or harass anyone on the ground of race<sup>49</sup>. The rights of employees and workers under the RDO are protected by law. They may seek redress by bringing legal proceedings or lodging complaints to the EOC when they encounter discrimination or harassment<sup>50</sup>. Their right to seek redress is itself protected by law and they are entitled not to be victimized for doing so<sup>51</sup>.

4.2.2 Employees and workers themselves may not discriminate or harass their colleagues in the course of employment and may not aid their employer to do so. RDO section 48(1) makes it unlawful for a person to knowingly aid another person to do an unlawful act under the RDO. RDO section 48(2) provides that, when the employer or principal is liable for the act of an employee or agent, the employee or the agent will be treated as aiding the employer or the principal to do the act. In other words, employees and workers are personally liable if they discriminate on the ground of race or instruct or pressurize another person to do so.

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<sup>49</sup> RDO section 43; and paragraph 6.6 of the Code (p.48)

<sup>50</sup> See Chapter 7 of the Code (p.52)

<sup>51</sup> See paragraph 6.1.3 of the Code (p.44)

Employees and workers are also personally liable for harassment on the ground of race<sup>52</sup>.

4.2.3 Employees and workers have the responsibility to respect the rights of the people they work with. They should not discriminate or harass fellow workers on the ground of race. They are recommended to:-

- (1) Observe the requirement of the RDO and follow the recommendations of the Code;
- (2) Become familiar with and follow the employer's equality policy;
- (3) Respect the racial identity of fellow workers and refrain from infringing their rights to work free of discrimination and harassment on the ground of race;
- (4) Cooperate with measures taken by the management to promote equal opportunities and prevent discrimination and harassment on the ground of race;
- (5) Take part in training related to equal opportunities.

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<sup>52</sup> Paragraph 6.2 and 6.3 of the Code (p.45-48)

## 5 Practising and Promoting Racial Equality

### 5.1 Complying with the RDO

Under Part 3 of the RDO, employers may not discriminate or harass any of their employees and workers on the ground of race and are required to take reasonably practicable steps to prevent such discrimination or harassment. Good employment practice is the key to employers complying with the RDO and meeting their legal responsibilities. Employers are encouraged to adopt the recommendations below as appropriate to the scale and structure of their organizations and available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices so long as they follow the spirit of practising and promoting racial equality.

### 5.2 Drawing up and implementing a policy

5.2.1 A systematic approach is the best way to develop and maintain good employment practice. Employers are encouraged to draw up an equal opportunities policy which includes explicit reference to racial equality. This represents the employer's commitment to racial equality and forms the framework for action in promoting racial equality and putting it into practice.

5.2.2 The policy should explain that, in terms of racial equality, its objective is to ensure that:-

- (1) No job applicant or employee will be treated less favourably than another on the ground of race;
- (2) No job applicant or employee of any racial group will suffer a detriment from requirements or conditions which have a disparately adverse impact on people belonging to his or her racial group than people not belonging to that racial group, unless such requirements or conditions can be justified as serving a legitimate objective and bearing a rational and proportionate connection to that objective;
- (3) Opportunities in the organization for employment, training and career development are equally open to all qualified people regardless of race;



- (4) The racial identity of every job applicant and employee is to be respected and no one is subjected to racial harassment in any way;
- (5) All job applicants and employees understand that the employer is determined to eliminate racial discrimination and harassment; and they know that racial discrimination and harassment is unlawful and they have a proper understanding of the relevant issues;
- (6) The grievance system is properly administered regardless of race for job applicants and employees to raise any concern or complaints internally; and that such matters will be dealt with properly with appropriate remedial action; and no reprisal will be directed against anyone raising concern or complaints; and that all job applicants and employees are aware that they may make use of the grievance system and how to do so.

5.2.3 To be effective, the policy must be implemented through the adoption of good employment procedures and practices which will achieve the above objectives (see paragraph 5.3 of the Code (p.22)). It is recommended that the overall responsibility for implementing the policy rests with senior management, and that employees are engaged in the development and review of the policy, such as through the establishment of a joint committee consisting of management and employee representatives. The details of the policy will depend on the scale and structure of the individual organization and the available resources, but the spirit of practising and promoting racial equality must always be followed. A sample policy is attached at the end of the Code for reference and adoption as appropriate. The policy should be disseminated and made known to all recruits and employees.

### 5.3 Good employment procedures and practices

#### 5.3.1 Recruitment using consistent selection criteria

- (1) Employers should make all recruitment decisions on the basis of consistent selection criteria. Consistent selection criteria should be specific to the job. They may set out, for example:-

- (a) The type of experience the job holder should have, for example,

merchandising experience;

(b) The amount of experience required for the job, for example, five years experience;

(c) The educational qualifications, for example, a diploma in merchandising;

(d) The specific technical and managerial skills, for example, use of certain computer software, proficiency in particular languages (if this is necessary for the satisfactory performance of the job<sup>53</sup>);

(e) The personal qualities required for the job, for example, willingness to travel, willingness to meet people of different backgrounds; and

(f) The physical and other skills required for the job, for example, eye-hand co-ordination for delicate assembly work.

(2) Consistent selection criteria (including language requirements<sup>54</sup>) should reflect job requirements and should be commensurate with the satisfactory performance of the job (and see paragraph 5.3.5 of the Code (p.26) for shortlisting). It is recommended that employers develop consistent selection criteria as one of the first steps in establishing a fair recruitment practice, and from time to time re-examine the criteria to see whether they still apply or need to be modified.

#### 5.3.2 Race must not be a factor

(1) The race of a person does not affect his or her ability to do a job, so long as he or she possesses the relevant qualifications, skills and personal qualities required by the job. Employers must not assume that people belonging to certain racial groups are not suitable for employment.

(2) By making recruitment decisions on the basis of consistent selection

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<sup>53</sup> See paragraph 5.3.12 (p.32) and 6.1.1(2)(v) of the Code (p.43)

<sup>54</sup> See paragraph 5.3.12 (p.32) and 6.1.1(2)(v) of the Code (p.43)

criteria, the employer's interest is served because each individual is assessed according to his or her capabilities to carry out a given job and will not be judged by irrelevant considerations such as race.

- (3) Except where race is a genuine occupational qualification (see paragraph 5.3.3 of the Code (p.24)), employers should ensure that race is not used as a ground for determining who should be offered employment. This applies no matter whether recruiting by advertisement, through employment agencies or through career offices in educational establishments.
- (4) Employers should ensure that employees handling applications and conducting interviews are trained not to assume that people belonging to certain racial groups are not suitable for employment or to use race as a ground for determining who should be offered employment. For example, candidates with names, appearance or accent indicating they are of Pakistani origin should not be refused on the ground of their origin.

#### 5.3.3 Genuine Occupational Qualification (GOQ)

- (1) Except for situations specified under RDO section 11, race may not be a ground for refusing employment and the consistent selection criteria may not make any reference to race. The situations specified in RDO section 11 are:-
  - (a) The job involves participation in a dramatic performance or other entertainment in a capacity for which a person of a particular racial group is required for reason of authenticity;
  - (b) The job involves participation as an artist's or photographic model in the production of a work of art, visual images or sequence of visual images for which a person of a particular racial group is required for reason of authenticity;
  - (c) The job involves working in a place where food or drink is provided to and consumed by the public in a particular setting for which, in that job, a person of that racial group is required for reasons of authenticity;

- (d) The holder of the job provides persons of a particular racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group;
  - (e) The job involves providing persons of a particular racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group.
- (2) Where a particular job falls into the above situations, race is referred to as a genuine occupational qualification (GOQ). If an employer claims that GOQ applies to a job, it is for the employer to show that it is so and the court will examine the claim strictly. For example, the situation in (d) above was held not to apply to managerial and administrative jobs because the job holders did not provide personal services and did not have direct contact with service recipients of particular racial groups<sup>55</sup>.

#### 5.3.4 Advertising vacancies

Employers should ensure that the contents of advertisements are based on consistent selection criteria. Employers are encouraged to:-

- (1) Fill vacancies by open application so that people from all racial groups have the opportunity to apply. Where vacancies are to be filled by promotion or transfer, publish the information to all eligible employees so that there is no restriction on applications from any racial groups.
- (2) Avoid requests for photographs and copies of ID cards at the application stage as this may be perceived as an indication of an intention to discriminate on the ground of race although asking for ID numbers would be acceptable. Requests for photographs and copies of ID card can be made at the interview stage for identification purposes.

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<sup>55</sup> *London Borough of Lambeth v Commission for Racial Equality* [1989] IRLR 379

(3) Advertise vacancies so that job information may reach people from different racial groups. Different channels may be used, such as newspapers, Labour Department's job centres, employment agencies, professional journals and specialist magazines or publications. Where the ability to read and write in a particular language is necessary for the satisfactory performance of a job<sup>56</sup>, advertisement may specify the language requirement and may be published in that language. Given that English and Chinese are the two prevalent languages in Hong Kong, employers are encouraged to advertise in both English and Chinese media where reasonably practicable. Given that there are people who can speak but not read in Chinese, where the job requires only the ability to speak but not read or write Chinese, in addition to advertising in Chinese, employers are encouraged to consider advertising also in English where reasonably practicable. Employment agencies are also encouraged to provide their services in both Chinese and English where reasonably practicable.

(4) Include statements such as "the post is equally open to people from all racial groups" in advertisements, as this will send out a clear message that applicants from all racial groups are welcome.

#### 5.3.5 Shortlisting

It is often necessary to narrow down the field of candidates through a process of shortlisting. Shortlisting may take different stages and may take place with or without interviewing candidates. It is recommended that employers:-

- (1) Ensure that the factors taken into account in shortlisting objectively measure the candidates against the consistent selection criteria;
- (2) Ensure that the marking system is consistently applied to all applicants; the weighting on different factors, for example, command of a language or previous experience, should reflect the requirements of the job and be consistently applied regardless of race;

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<sup>56</sup> See also paragraph 5.3.12 of the Code (p.32)

- (3) Guard against making assumptions in general about the abilities of people from different racial groups which may not be true of the individual;
- (4) Train personnel staff to objectively compare applicants when shortlisting, and not to assume that people belonging to certain racial groups are less suitable for employment or to use race as a ground for determining who should be offered employment.

#### 5.3.6 Race related information

- (1) It is recommended that questions on application forms should not suggest that the employer wishes to take into account any race related factors not relevant to the job which would lead to employment being declined on the ground of race, unless GOQ applies<sup>57</sup>.
- (2) Race related information may be sought for purposes of making any special arrangement, for example, with regard to dates or times coinciding with religious festivals or observance, or dietary needs or cultural norms. The purpose for requesting or using such information should be clearly stated. This information should be detachable from the rest of the application form and should not be made known to members of selection panels before the interview. The information should be treated in strict confidence and should not be used for other purposes. Race related information may also be used for the purpose of monitoring the implementation of racial equality policy (see paragraph 5.3.17 of the Code (p.37)). When collecting and using information, the Personal Data (Privacy) Ordinance should be observed.

#### 5.3.7 Interviewing

It is recommended that employers:-

- (1) Ensure that personnel staff, line managers and all other employees who may be involved in staff recruitment receive training on

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<sup>57</sup> See paragraph 5.3.3 of the Code (p.24)

non-discriminatory practice. It should also be brought to their attention that it is unlawful to instruct or put pressure on others to discriminate<sup>58</sup>;

- (2) Only questions that relate to the requirements of the job are asked at job interviews;
- (3) Keep record of the recruitment process and interviews for 24 months, or if this is not practicable, at least not less than 12 months<sup>59</sup>.

#### 5.3.8 Tests

If tests are to be used for selection purposes, it is recommended that employers:-

- (1) Use selection tests that are specifically related to the job and/or the career requirements and should measure an applicant's actual or potential ability to do or train for the job;
- (2) Give preference to using professionally designed tests wherever practicable. These can contribute important objective information about the applicant, for example, intelligence, aptitude and skills. They have the advantage that they produce numerical scores which do not depend upon opinion or subjective interpretation;
- (3) Review tests regularly to ensure that they remain relevant and free from any bias, either in content or scoring.

#### 5.3.9 Recruitment through employment agencies or employment services

Where recruitment is done through employment agencies, employment services provided by the Labour Department, and educational establishments or non-government organizations, the employer should advise them that they should comply with the RDO and follow the recommendations in the Code as far as practicable, so as to ensure that there would not be any discrimination on the ground of race against any

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<sup>58</sup> RDO section 43 and 44

<sup>59</sup> Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

applicant. Employers should specify that vacancies are open to people from all racial groups, unless GOQ applies (see paragraph 5.3.3 of the Code (p.24)).

#### 5.3.10 Terms and conditions of employment, benefits, facilities and services

- (1) It is recommended that employers make sure their practices, rules and requirements on access to any benefits, facilities or services do not treat any employee less favourably on the ground of his or her race than another employee of a different race (see paragraph 6.1.1(1) of the Code (p.40) for direct discrimination).
- (2) It is also recommended that employers should minimize any disparately adverse impact that their practices, rules and requirements may have on any racial groups (see paragraph 6.1.1(2) of the Code (p.41) for indirect discrimination). When employees' cultural or religious practices, such as those expressed in dress codes, conflict with an employer's policies or workplace requirements, it is recommended that the employer consider whether it is practicable to vary or adapt these requirements. For example, employers may consider flexibility in working arrangements<sup>60</sup>. Employers should consult staff, trade unions and other workplace representatives on practical ways in which they can accommodate workers' needs.
- (3) In respect of pay, hours of work, overtime, bonuses, holiday entitlement, sickness leave, employers should maintain the principle of equal pay for equal work.
- (4) With everything being equal, an employee of one racial group is entitled to equal pay and benefits when he or she is doing "like work" or the same work as another employee of a different racial group. "Like work" means work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of

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<sup>60</sup> See *Ahmad v Inner London Education Authority* [1977] ICR 490 (which is not a case under race discrimination legislation but is illustrative of what employers should do to accommodate employees), where the employer was prepared to allow a devout Muslim employee to work part-time so that he could attend Friday prayers; and *Tower Hamlets London Borough Council v Rabin* [1989] ICR 693, where the employer was prepared to seek a part-time worker to cover for a Jewish job applicant who has to observe Sabbath and cannot work on Saturdays.



employment<sup>61</sup>. Different job titles, job descriptions or contractual obligations do not necessarily imply that the work is different. It is what the job-holders actually do that matters. The question of whether the two jobs are "like work" can be answered by a general consideration of the type of work involved and the skill and knowledge required to do them.

- (5) A related principle to equal pay for equal work is that of equal pay for work of equal value. Where employees of one racial group undertake work as demanding as that of colleagues of another racial group, even though the work is different, they should receive the same pay and benefits. That is, jobs of equal value warrant equal pay.
- (6) Overseas experience suggests that different jobs done by different workers can be compared on the basis of the demands made on a worker in terms of effort, skill, responsibility and working conditions<sup>62</sup>. Employers can set individual pay rates based on market forces and individual performance but should not pay a class of workers less for doing work of equal value on the ground of race.
- (7) Employers should maintain the principle of equal pay for equal work and are encouraged to progressively implement equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory on the ground of race. Large organizations in both the public and private sectors with a structured human resources department could take a lead in this.
- (8) Individual differences in pay are not in themselves discriminatory. Each case should be considered on its own merits. According to overseas experience<sup>63</sup>, the following considerations are relevant in considering differences in pay for equal work or work of equal value:-

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<sup>61</sup> UK Equal Pay Act 1970

<sup>62</sup> Guidelines Respecting the Application of Section 11 of the Canadian Human Rights Act and Prescribing Factors Justifying Different Wages for Work of Equal Value, 1986.

<sup>63</sup> UK Equal Pay Act 1970 and Guidelines Respecting the Application of Section 11 of the Canadian Human Rights Act and Prescribing Factors Justifying Different Wages for Work of Equal Value, 1986.

- (a) Different performance ratings;
- (b) Length of service;
- (c) Re-evaluation and downgrading of a position on objective work-related criteria;
- (d) A temporary training position;
- (e) The existence of internal labour shortage in a particular job classification;
- (f) Re-classification of a position to a lower level, where the person continues to get the former level of pay;
- (g) Regional rates of pay; for example, an employee is rewarded because the work is done in different locations; and
- (h) Economic factors, such as a temporary shortage in a particular type of skilled labour.

#### 5.3.11 Overseas employees

- (1) Circumstances concerning employees coming from overseas to work in Hong Kong may be different from local employees and the differences may not be on the ground of race. For example, overseas employees may require relocation assistance or that they are recruited because they possess skills that are not readily available in Hong Kong.
- (2) It is recommended that, when employers address circumstances concerning employees coming from overseas to work in Hong Kong by providing benefits to them which are not available to local employees, they ensure that the benefits are commensurate with the circumstances of the overseas employees and are not given on the ground of race.
- (3) RDO section 12, 13, 14 and Schedule 2 deal with employees coming from overseas. RDO Schedule 2 defines those employees in existing employment who are on overseas terms of employment; and those

who are on local terms of employment. Situations where differences in treatment are allowed under the RDO between these employees are specified in RDO section 14 (see paragraph 6.7.2 to 6.7.4 of the Code (p.49-51)).

#### 5.3.12 Language

- (1) Employers must ensure that any language requirement (including academic qualification, fluency and accent requirement) for a job is relevant to and should be commensurate with the satisfactory performance of a job (see paragraph 6.1.1(2)(v) of the Code (p.43); and paragraphs 5.3.1 (p.22), 5.3.4 (p.25) and 5.3.5 (p.26) for recruitment criteria , vacancy advertising and shortlisting).
- (2) A person's accent in speaking a language can be related to his race, employers should ensure that employees and workers are not discriminated against or harassed because of their accent<sup>64</sup> (see paragraph 5.3.14 of the Code (p.34) for prevention of harassment). This applies to all aspect of employment including promotion, transfer and training (see paragraph 5.3.13 of the Code (p.32)).
- (3) 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 on health and safety requirements and other matters relevant to their employment; for example, safety signs and notices.

#### 5.3.13 Promotion, transfer and training

It is recommended that employers:-

- (1) Examine the assessment criteria of any appraisal system to ensure that employees are promoted on merit and the criteria adopted (for example, any language requirement) are not discriminatory on the ground of race. Measurable standards for evaluating job performance should be established;

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<sup>64</sup> Policy and Guidelines on Racism and Racial Discrimination, paragraph 3.6, Ontario Human Rights Commission, Canada, 2005

- (2) Organize selection for promotion along the same lines as recruitment. Consistent selection criteria for posts should be compared with the detailed assessment of all candidates' abilities and qualities including their potential. The individual whose profile best fits the job requirements should be selected;
- (3) Where opportunities for promotion, training or transfer arise, specify the conditions for application to all staff who may be interested, and set out related procedures in writing for communication to all employees irrespective of race who are eligible;
- (4) Assess all possible candidates, and if promotion is by nomination, ensure that everyone suitable is considered and that nobody with potential has been overlooked;
- (5) Keep records of notes on promotion, transfer and training for 24 months, or if this is not practicable, at least not less than 12 months<sup>65</sup>;
- (6) Review and change rules which restrict or preclude transfer between certain jobs if they are found to be discriminatory; and
- (7) Examine policies, rules and practices regarding selection for training, day release and personal or career development (for example, any language requirement) to ensure that:-
- (a) No one from any racial group is treated less favourably on the ground of race than another not from that racial group;
  - (b) Any disparately adverse impact on any racial groups is minimized;
  - (c) Where there is found to be an imbalance in training between persons of different racial groups than might be expected, the cause should be identified and, if necessary, remedied to ensure that it is not discriminatory.

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<sup>65</sup> Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

#### 5.3.14 Prevent harassment on the ground of race

Employees and workers of all racial groups are entitled to be free from harassment on the ground of race. Employers must ensure that the working environment is one in which the racial identity of all employees is respected. It is recommended that employers:-

- (1) Make a clear statement in the equal opportunities policy that harassment on the ground of race will not be tolerated;
- (2) Provide a work environment that is safe and free from abuse and insults. Employees and workers should treat each other politely and with respect;
- (3) Explain that harassment<sup>66</sup> on the ground of race is unacceptable; and explain the types of behaviour which can be regarded as harassment on the ground of race, such as:-
  - (a) Racially derogatory remarks or insults; for example, name calling which people of certain racial group may find offensive or impolite should be avoided;
  - (b) Display of graffiti or slogans or other objects offensive to certain racial groups;
  - (c) Racist jokes, banter, ridicule or taunts; for example, laughing at the accent or habits of people belonging to certain racial groups;
  - (d) Using a disparaging or offensive tone when communicating with people on the ground that they belong to certain racial groups;
  - (e) Ostracize people because of their racial group;
  - (f) Imposing excessive workloads or unrealistic performance targets on people on the ground of race;
  - (g) Unnecessarily picking on individuals from particular racial groups;

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<sup>66</sup> See paragraph 6.3.2 and 6.3.3 of the Code (p.47-48)

- (4) Make the above known to all recruits and employees;
- (5) Ensure that grievances and complaints are properly dealt with; in doing so, as an alternative to dealing with a complaint of harassment formally in accordance with the designated internal grievance procedures, employers should consider offering an informal route to resolving a grievance;
- (6) Ensure that no one will be victimized<sup>67</sup> or penalized for coming forward with a complaint or grievance.

#### 5.3.15 Grievance procedures

It is recommended that employers:-

- (1) Ensure that employees who have in good faith taken action under the RDO do not receive less favourable treatment than other employees, for example, by being sidelined for training or promotion, disciplined or dismissed;
- (2) Designate an internal grievance procedure or an officer to deal with complaints concerning discrimination and harassment on the ground of race or victimization<sup>68</sup> within the organization. These procedures should be communicated to all staff and be reviewed from time to time;
- (3) Advise employees to use the internal grievance procedures, where appropriate, but without prejudice to the individual's right to apply to the EOC or the court;
- (4) Deal with all complaints of discrimination and harassment on the ground of race or victimization seriously, effectively and promptly. It should not be assumed that they are made by those who are over-sensitive. Confidentiality should be observed and the rights of both the complainant and respondent respected;
- (5) Handle disciplinary procedures uniformly without reference to race;

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<sup>67</sup> See paragraph 6.1.3 of the Code (p.44)

<sup>68</sup> See paragraph 6.1.3 of the Code (p.44)

- (6) Keep records of notes on grievances and disciplinary matters for 24 months, or if this is not practicable, at least not less than 12 months<sup>69</sup>.

#### 5.3.16 Dismissals, redundancies and unfavourable treatment of employees

It is recommended that employers:-

- (1) Ensure that employee of one racial group is not disciplined or dismissed for performance or behaviour which would be overlooked or condoned in the case of another employee of a different racial group;
- (2) Review redundancy procedures affecting employees of any racial group so as to ensure that there is no discrimination on the ground of race and to remove any unjustifiable and disparately adverse impact on any racial groups;
- (3) Ensure that conditions of access to voluntary redundancy benefits are available on equal terms to employees of all racial groups in the same or similar circumstances
- (4) Ensure that when there is downgrading or short-time working (for example, owing to a change in the nature or volume of an employer's business) the arrangements do not discriminate on the ground of race;
- (5) Keep records of notes on dismissals and redundancies for 24 months, or if this is not practicable, at least not less than 12 months<sup>70</sup>;
- (6) Ensure that a standard of conduct or behaviour is observed to prevent employees of any racial groups from being intimidated, harassed or otherwise subjected to unfavourable treatment<sup>71</sup>.

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<sup>69</sup> Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

<sup>70</sup> Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

<sup>71</sup> See paragraph 5.3.14 of the Code (p.34)

#### 5.3.17 Monitoring

- (1) Employers are encouraged to take reasonably practicable steps to regularly monitor and review the implementation of the equal opportunities policy and the good employment procedures and practices. The objective of monitoring is to gain an appreciation of the situation regarding, for example:-
  - (a) The composition of the workforce by racial group, for comparison with benchmarks such as census data;
  - (b) The distribution of people from different racial groups within the organization, by job type and grade, or by work locations;
  - (c) The pattern of career development (including remuneration and benefits, termination or other disciplinary action) of people from different racial groups.
- (2) Such information will show, for example, whether people from particular racial groups:-
  - (a) Do not apply for employment or promotion, or that fewer apply than might be expected;
  - (b) Are not recruited, promoted or selected for training and development or are appointed or selected in a significantly lower proportion than their rate of application; and
  - (c) Are concentrated in certain jobs, sections or departments.
- (3) In organizations with a simple structure, the situation may be assessed from personal knowledge. In organizations with larger structure, monitoring will require formal processes for collecting, analyzing and evaluating information, for example, through surveys, consultation and feedback. This may be done in stages as operational requirements or resources permit and should be done with prior consultation with employees or their representatives. The purpose of collecting the information must be clearly stated. Information collected should be treated in strict confidence and



should not be used for other purposes. When collecting and using information, the Personal Data (Privacy) Ordinance should be observed; in this connection, employers and other concerned parties may consider collecting and using information in a way which does not identify particular individuals.

- (4) Information obtained through monitoring will help to show whether:-
  - (a) Employees and workers (including job applicants<sup>72</sup>) from any racial group are being treated less favourably than those not from the same racial group;
  - (b) Policies, rules and practices have disparately adverse impact on any racial group.
- (5) If monitoring data shows significant disparities between racial groups, employers should investigate the cause to ensure that race is not a barrier to opportunities. They should examine and review relevant policies, rules and practices to see if they have disparately adverse impact on any racial group; and if so, take steps to minimize such impact.
- (6) Employers are also encouraged to take positive action to address any situation where any racial group might be under-represented in the workforce than might be expected (see paragraph 5.3.18 of the Code (p.38)).

#### 5.3.18 Positive action

- (1) Because of discrimination or other disadvantages in the past, people from particular racial groups may have been deprived of the opportunity to gain the qualification or experience to fully realize their potential.
- (2) Therefore, RDO section 49 allows employers and other concerned parties to provide people from a particular racial group (or groups) goods, access to facilities, services, opportunities, grants, benefits or

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<sup>72</sup> See paragraph 5.3.6 of the Code (p.27) for obtaining race related information from job applicants.

programmes to meet their special needs in relation to employment, when it is reasonably intended to ensure that they have equal opportunities in employment.

- (3) RDO section 51 and 52 allow employers and other concerned parties to provide training for people from a particular racial group (or groups) for particular work, when for the past 12 months in Hong Kong generally (or for an employer, in a particular establishment) no person from that racial group (or groups) has been doing that work or the number of persons from that racial group doing that work has been comparatively small.
- (4) Measures taken under RDO section 49, 51 or 52 are called positive action. Examples of positive action may include encouragement to apply for employment, transfer or promotion, language classes, mentorship schemes, and management skills training or other training courses.
- (5) Positive action under the RDO means providing only training or encouragement, and does not extend to providing employment to individuals from particular racial groups on the ground of their race<sup>73</sup>.

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<sup>73</sup> UK Code of Practice on Racial Equality in Employment, p.40, Commission For Racial Equality 2005

## 6 Unlawful Acts under the RDO

### 6.1 Types of discrimination under the RDO

The RDO defines different types of discrimination. They are:-

#### 6.1.1 Racial discrimination

Racial discrimination occurs in the following situations under the RDO<sup>74</sup>:-

##### (1) Direct discrimination

Direct discrimination occurs when person A treats person B (belonging to one racial group) less favourably than person C (belonging to a different racial group) on the ground of person B's race, when person B and person C are in same or materially similar situation<sup>75</sup>.

##### **Illustration 7:-**

*A person of Pakistani origin who speaks fluent Cantonese and has adopted a Chinese name applies by telephone for the job of a sales person and is invited for an interview. But, because his appearance indicates that he is of Pakistani origin, when he turns up to the interview he is falsely told that someone else has already been hired and the interview is declined. This is less favourable treatment on the ground of race if another job seeker not of Pakistani origin would not have been declined.*

##### **Illustration 8:-**

*A manager of Chinese origin is treated less favourably on the ground of race (directly discriminated against), if a manager of English origin is paid a higher amount of salary than the manager of Chinese origin on the ground of their difference in origin, when they are both in the same or materially similar employment*

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<sup>74</sup> RDO section 4(1)

<sup>75</sup> RDO section 4(1)(a) and section 8(5)

*situation (such as they both do the same job and have similar experience and their performance are both good).*

The following points should be noted:-

- (a) RDO section 9 provides that if an act is done for more than one reason and one of the reasons is the race of a person (whether or not it is the dominant or substantial reason), then it is taken to be done for the reason of the race of the person;
- (b) RDO section 4(3) provides that segregation of a person on the ground of his or her race from other persons is direct discrimination; for example, segregation occurs if employees of non-Chinese origins are required to have their meals in a separate part of the staff canteen from employees of Chinese origin;
- (c) A person's command of a language, including the accent, can be related to his or her race<sup>76</sup>, and employers should ensure that employees and workers are not treated less favourably because of their accent or language.

## (2) Indirect discrimination

Indirect discrimination occurs when a person applies an apparently non-discriminatory requirement or condition to everyone of all racial groups<sup>77</sup>, but:-

- (a) Only a considerably smaller proportion of people from a particular racial group can meet the requirement or condition than the proportion of people not from that racial group;
- (b) The person applying the requirement or condition cannot show the requirement or condition to be justified on non-racial grounds;
- (c) The requirement or condition is to the detriment of a person

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<sup>76</sup> Policy and Guidelines on Racism and Racial Discrimination, paragraph 3.6, Ontario Human Rights Commission, Canada, 2005

<sup>77</sup> RDO section 4(1)(b)

of that particular racial group because he or she cannot meet it.

**Illustration 9:-**

*A blanket ban on beards for health and safety reasons in a food packaging factory is a requirement or condition that indirectly discriminates ethnic groups such as the Sikhs (who by their custom have to keep a beard), when compared to other racial groups, if information shows that the blanket ban is not justifiable, for example, because face masks could be used satisfactorily to meet health and safety standards<sup>78</sup>.*

The following points should be noted:-

- (i) Preferences and factors to be taken into account (as opposed to an absolute requirement or condition for achieving an objective) are not within the meaning of requirement or condition under the RDO<sup>79</sup>.
- (ii) A requirement or condition cannot be met if a person cannot meet it consistently with the customs and cultural conditions of his or her racial group<sup>80</sup>.
- (iii) RDO section 4(2) provides that a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective.
- (iv) Reference case law indicates that requirement or conditions in relation to work times and appearance can lead to claims of indirect discrimination. To determine whether a requirement or condition is justifiable, each case has to be examined on its own merits, considering any discriminatory effects against any significant degree of increased cost, decreased efficiency, or serious safety problem in accommodating individuals from particular racial groups<sup>81</sup>.

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<sup>78</sup> UK Code of Practice on Racial Equality in Employment, p.20, Example B; and *Mandla v Dowell Lee* [1983] ICR 385

<sup>79</sup> *Perera v Civil Service Commission* [1983] IRLR 166

<sup>80</sup> *Mandla v Dowell Lee* [1983] ICR 385

<sup>81</sup> *Osborne v Inco Ltd* [1985] 15 DLR (4th) 723

**Illustration 10:-**

*A blanket ban on beards in a food packaging factory in Illustration 10 above is justifiable if information shows that face masks could not satisfactorily meet health and safety standards<sup>82</sup>.*

**Illustration 11:-**

*An employer who decides not to accommodate Jewish employees (who have to observe Sabbath and cannot work on Saturdays) but requires them to work on Saturdays is able to justify this requirement with information showing that accommodation would lead to a significant degree of increased safety risk, increased cost and decreased efficiency<sup>83</sup>.*

**Illustration 12:-**

*A requirement to wear protective headgear in a repair workshop, even if indirectly discriminatory for Sikhs (who by their custom have to wear a turban), is justifiable given information on the risk of injury, and the possibility of liability on the employers, and that the requirement would be more difficult to enforce if an exception is made for one person<sup>84</sup>.*

- (v) Reference case law also indicates that requirement or condition in relation to academic or language standard can lead to claims of indirect discrimination. Employers must be able to justify any such requirement or condition by showing that it is relevant to and not more demanding than what is required for doing the job.

**Illustration 13:-**

*For a job as a clerical officer or clerical assistant in a government department in the UK, successful applicants would be required to deal with inquiries from the public in person and by telephone. An ability to understand and communicate in English was a prime requirement, and a requirement that candidates must possess an English Language "O" Level or*

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<sup>82</sup> *Panesar v The Nestle Co Ltd* [1980] IRLR 60

<sup>83</sup> *Osborne v Inco Ltd* [1985] 15 DLR (4th) 723

<sup>84</sup> *Singh v British Rail Engineering Ltd* [1986] ICR 22

*equivalent was overall fair and not arbitrary<sup>85</sup>. Such a requirement is justified on grounds unconnected with race because it bears a rational and proportionate connection to the objective of communication in English which is legitimate and required for the job.*

#### 6.1.2 Discrimination on the ground of near relative's race

Discrimination on the ground of the race of a near relative happens when person A treats person B less favourably than other people on the ground of person B's near relative's race<sup>86</sup>. A near relative means a person's spouse, parent or child (including born out of wedlock, adopted or step child), grandparent or grandchild, sibling and in-laws<sup>87</sup>.

##### **Illustration 14:-**

*A manager is discriminated against on the ground of his near relative's race when he applies for promotion to the post of director but is declined because the company considered he and his wife are not suitable for company social functions on the ground that his wife is of Indonesian origin, and another manager whose wife is not of Indonesian origin is appointed.*

#### 6.1.3 Discrimination by way of victimization

Discrimination by way of victimization happens if person A treats person B less favourably than other people by reason that person B or a third person has done or intends to do, or is suspected to have done or to intend to do, the following<sup>88</sup>:-

- (1) Bring proceedings under the RDO;
- (2) Give information or evidence in connection with proceedings under the RDO;
- (3) Otherwise do anything under or by reference to the RDO;

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<sup>85</sup> *Raval v Department of Health and Social Security* [1985] ICR 685

<sup>86</sup> RDO section 5

<sup>87</sup> RDO section 2

<sup>88</sup> RDO section 6

(4) Allege that someone has contravened the RDO.

**Illustration 15:-**

*A manager of Nepalese origin is discriminated against by way of victimization if he complains that he was paid less annual bonus than another manager of Chinese origin on the ground of race, and the company dismisses him by reason that he makes this complaint.*

**6.2 When discrimination is unlawful in employment**

6.2.1 Employers may not discriminate against job applicants in the ways described in paragraph 6.1.1 – 6.1.3 above of the Code (p.40 - 45)<sup>89</sup>:-

- (1) In the arrangement for determining who should be offered employment (for example, an employer may not refuse to interview a job applicant on the ground that the name, appearance or accent of the job applicant indicates that he or she is of Pakistani origin);
- (2) In the terms on which the employment is offered (for example, an employer may not offer a lower starting salary for the same post to applicants of Chinese origin than applicants of Japanese origin, on the ground of the difference in origin);
- (3) By refusing, or deliberately omitting to offer employment (for example, an employer may not refuse to offer employment to a job applicant on the ground that he or she is of Indian origin).

6.2.2 Employers must not discriminate against employees and workers in the ways described above paragraph 6.1.1 – 6.1.3 above of the Code (p.40 - 45)<sup>90</sup>:-

- (1) In the terms of employment (for example, for the same job doing the same work for the same pay, the employer may not on the ground of race require a employee of Nepalese origin to work longer hours than an employee of Chinese origin);
- (2) In the access to opportunities for promotion, transfer or training, or

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<sup>88</sup> RDO section 10(1); and see paragraph 6.7 of the Code (p.49) for acts allowed under the RDO

<sup>90</sup> RDO section 10(2); and see paragraph 6.7 of the Code (p.49) for acts allowed under the RDO



to any other benefits, facilities or services, or refusing or deliberately omitting to afford access to these things (for example, an employer may not give priority for promotion to employees of Chinese origin over employees of other origins on the ground of the difference in origin);

- (3) By dismissing the employee or subjecting him to any other detriment (for example, in a downsizing exercise, an employer may not use race as a factor and select employees of Chinese origin for redundancy first and employees of English origin last);
- (4) In arrangements relating to death or retirement<sup>91</sup>;
- (5) Reference case law indicates that an employee who is forced to resign because he or she is discriminated against on the ground of race by the employer is treated as having been dismissed on the ground of race by the employer<sup>92</sup>;
- (6) Reference case law also indicates that employers may not discriminate against former employees in the ways described in paragraph 6.1.1 – 6.1.3 of the Code (p.40 - 45) in relation to internal appeal process or reference letters after termination<sup>93</sup>.

### 6.3 Unlawful racial harassment

#### 6.3.1 The RDO makes it unlawful for:-

- (1) An employer to harass on the ground of race a job applicant or an employee<sup>94</sup>;
- (2) An employee to harass on the ground of race a job applicant or another employee of his or her employer<sup>95</sup>;
- (3) A principal to harass on the ground of race a contract worker<sup>96</sup>;

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<sup>91</sup> RDO section 10(4) and (5)

<sup>92</sup> *Chang Ying Kwan v Wyeth (HK) Ltd* [2001] HKC 129, a case of pregnancy discrimination resulting in resignation which has reference value to the application of the RDO

<sup>93</sup> *Rhys-Harper v Relaxion Group* [2003] IRLR 484

<sup>94</sup> RDO section 24(1) and (2)

<sup>95</sup> RDO section 24(3)

<sup>96</sup> RDO section 24(4)

- (4) A contract worker to harass on the ground of race another contract worker<sup>97</sup>;
- (5) A partner of a partnership firm to harass on the ground of race another partner or a person applying to be a partner<sup>98</sup>;
- (6) A principal to harass on the ground of race a commission agent<sup>99</sup>;
- (7) A commission agent to harass on the ground of race a fellow commission agent<sup>100</sup>;
- (8) A job applicant or an employee to harass on the ground of race his or her employer<sup>101</sup>;
- (9) Person A to harass person B on the ground of race, if person A lives in a place where person B is employed by a third person to work<sup>102</sup>, for example, a lodger harasses a domestic helper employed by the landlord to work in the place the lodger lives;
- (10) Providers of vocational training to harass on the ground of race people who want to be trained or are being trained<sup>103</sup>;
- (11) Employment agencies or their staff to harass on the ground of race people who want to be provided with their services<sup>104</sup>.

6.3.2 Harassment on the ground of race occurs in the following situations under the RDO:-

(1) Unwelcome conduct harassment

Person A engages in unwelcome conduct (which may include an oral or a written statement) towards person B on the ground of person

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<sup>97</sup> RDO section 24(5)

<sup>98</sup> RDO section 24(6), (7) and (8)

<sup>99</sup> RDO section 24(9)

<sup>100</sup> RDO section 24(10)

<sup>101</sup> RDO section 24(11)

<sup>102</sup> RDO section 24(12)

<sup>103</sup> RDO section 25(3)

<sup>104</sup> RDO section 25(4)

B's race or person B's near relative's race, in circumstances where a reasonable person would have anticipated that person B would be offended, humiliated or intimidated<sup>105</sup>. There is liability for harassment even if there is no intention or motive to offend, humiliate or intimidate.

(2) Hostile environment harassment

Person A engages, on the ground of person B's race or person B's near relative's race, in conduct alone or together with other persons that create a hostile environment for person B<sup>106</sup>.

6.3.3 For types of behaviour which can be regarded as harassment on the ground of race, please see paragraph 5.3.14(3) of the Code (p.34).

6.4 Vilification and the offence of serious vilification

6.4.1 RDO section 45 makes it unlawful for a person by any public activity to incite hatred towards, serious contempt for, or severe ridicule of another person(s) on the ground of race. Such public activity is vilification on the ground of race.

6.4.2 An activity in public includes any form of communication to the public or conduct observable by the public, such as speaking, writing, gestures or wearing of clothing, displaying signs, flag, emblems and insignia<sup>107</sup>.

6.4.3 An act of vilification done with intent and involves threats of physical harm to people of the targeted race or their property is a criminal offence punishable on conviction by fine at a maximum at \$100,000 or imprisonment for a maximum of 2 years<sup>108</sup>. This offence is called serious vilification.

6.5 Discriminatory advertisements

RDO section 42 makes it unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood as indicating,

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<sup>105</sup> RDO section 7(1)

<sup>106</sup> RDO section 7(2)

<sup>107</sup> RDO section 45(4)

<sup>108</sup> RDO section 46

an intention by a person to do an unlawful act under Part 3 of the RDO. For example, it is unlawful to publish an advertisement indicating that only people of Chinese origin would be employed by a company.

#### 6.6 Instructions and pressure to discriminate

RDO section 43 makes it unlawful, if person A has authority over person B, or if person B usually acts on the wishes of person A, for person A to make or try to make person B to do an unlawful act under the RDO (such as to racially discriminate or harass on the ground of race a third person). RDO section 44 makes it unlawful for person A to induce or try to induce person B, by offering some benefit to or by threatening person B, to do an unlawful act under the RDO.

##### ***Illustration 16:-***

*The personnel manager is required to carry out instructions from the managing director. The managing director may not tell the personnel manager to recruit only candidates who are Caucasian to be the general manager.*

#### 6.7 Acts allowed under the RDO

##### 6.7.1 Genuine Occupational Qualification

Where GOQ applies as specified under RDO section 11, employment may be declined on the ground of race (see paragraph 5.3.3 above of the Code (p.24)). If an employer claims that GOQ applies to a job, it is for the employer to show that it is so and the court will examine the claim strictly.

##### 6.7.2 Training for skills to be used outside Hong Kong

RDO section 12 provides that RDO section 10 (provisions making discrimination under the RDO in employment unlawful) does not apply to an act done by an employer for the benefit of a person employed in Hong Kong (but who is not ordinarily resident in Hong Kong) in order to train him or her in skills which are intended to be used wholly outside Hong Kong.

##### 6.7.3 Special skills, knowledge or experience

- (1) RDO section 13 provides that RDO section 10 (provisions making discrimination under the RDO in employment unlawful) does not apply to an act done by an employer for the benefit of a person recruited or transferred from outside Hong Kong to work in Hong Kong where the work requires special skills, knowledge or experience not readily available in Hong Kong. Relevant considerations in determining whether skills, knowledge or experience are readily available in Hong Kong may include the response and time spent for recruitment in Hong Kong, the response and time spent for recruitment of other comparable jobs, information from recruitment agencies and other general information about the labour market.
- (2) The act done must be reasonable having regard to the prevailing terms of employment offered to people with the relevant skills, knowledge or experience in places outside Hong Kong. The act done would be reasonable if it is broadly comparable to such prevailing terms of employment.
- (3) RDO section 13 also applies when this person's employment is renewed, or he or she is promoted or transferred within the same group of companies, so long as the act is reasonable.
- (4) The person must actually possess the skills, knowledge or experience not readily available in Hong Kong.

#### 6.7.4 Existing local and overseas terms of employment

- (1) RDO section 14 provides that, for employees in existing employment as specified in RDO Schedule 2, RDO section 10 (provisions making employment discrimination on the ground of race unlawful) does not apply to different treatment:-
  - (a) Between an employee on local terms of employment and another employee on overseas terms of employment;
  - (b) Between an employee on overseas terms of employment who is a national or citizen of a country or place and another employee on overseas terms of employment who is a national or citizen of

another country or place.

(2) Employees in existing employment as specified in RDO Schedule 2 are employees who fall within RDO Schedule 2 section 1 to 6 (including judicial officers, ICAC officers, other public officers and specified English teachers). For details please refer to the RDO.

(3) RDO Schedule 2 section 11 provides that:-

(a) For judicial officers, ICAC officers and other public officers,

(i) Local terms of employment mean the local conditions or terms of service within the meaning of such regulations, administrative rules, circulars and circular memoranda as apply generally from time to time to the appointment or employment of these officers;

(ii) overseas terms of employment mean the overseas conditions or terms of service within the meaning of such regulations, administrative rules, circulars and circular memoranda as apply generally from time to time to the appointment or employment of these officers.

(b) For any employee other than a public officer,

(i) local terms of employment mean the conditions or terms of service as apply from time to time primarily to the employment of a person who is a Hong Kong permanent resident;

(ii) overseas terms of employment mean the conditions or terms of service as apply from time to time primarily to the employment of a person who is not a Hong Kong permanent resident.

(4) Employees in existing employment as specified in RDO Schedule 2 remain so specified upon their promotion, extension of employment, or renewal or re-engagement after termination.

#### 6.7.5 Positive action

RDO sections 49, 51 and 52 allow for positive action to be taken to assist racial groups who have been disadvantaged in the past (see paragraph 5.3.18 of the Code (p.38)). Examples of positive action may include encouragement to apply for employment, transfer or promotion, language classes, mentorship schemes, and management skills training or other training courses.

## **7 When Discrimination and Harassment is Encountered**

### **7.1 Legal protection under RDO**

- 7.1.1 The right of employees or workers (including job applicants) to be free from discrimination and harassment on the ground of race under the RDO is protected by law. They may bring civil proceedings in the District Court to seek remedies to redress any loss or damage when they have been discriminated against or harassed on the ground of race<sup>109</sup>. Legal proceedings should be brought within 24 months from the time when the discrimination or harassment is done<sup>110</sup>.
- 7.1.2 Employers and employees are encouraged to resolve discrimination and harassment issues internally informally or formally using their grievance procedures before taking legal proceedings. Employees are encouraged to seek legal advice or apply for legal aid from the Legal Aid Department before taking legal proceedings.
- 7.1.3 As an alternative to taking legal proceedings, employees or workers (including job applicants) may lodge a complaint with the EOC for investigation and conciliation<sup>111</sup>. Complaints should be lodged within 12 months from the time when the discrimination or harassment is done.

### **7.2 Complaint handling by EOC**

- 7.2.1 When a complaint is lodged with the EOC, the EOC will investigate into the complaint. The investigation is an exercise to help clarify the issues for the EOC and the parties, so as to facilitate settlement by conciliation.
- 7.2.2 All parties to the complaint (complainant, respondent and witnesses) should provide all relevant and appropriate information during the investigation.
- 7.2.3 RDO section 78(4) provides that, if the EOC takes the view that the complaint is frivolous, vexatious, misconceived or lacking in substance, the EOC may not conduct or may discontinue an investigation. Other

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<sup>109</sup> RDO section 70

<sup>110</sup> RDO section 80

<sup>111</sup> RDO section 78



situations when the EOC may not conduct or may discontinue an investigation include where the complaint is not unlawful under the RDO, or where more than 12 months have passed since the act was done, or where the person aggrieved does not desire the investigation to be conducted or continued.

- 7.2.4 Information provided during the investigation may be admissible in evidence before the Court if legal proceedings are brought at a later stage.
- 7.2.5 The EOC maintains an independent and impartial role during the investigation. If investigation is conducted and is not discontinued, the EOC will help the parties to settle their dispute by conciliation.
- 7.2.6 The primary objective of the complaint-handling process is settlement by conciliation, the EOC may at any stage of the process explore the possibility of settlement between the parties. This may occur at an early stage soon after the complaint is lodged before any investigation into the details. If parties could not at an early stage reach settlement, then investigation into details will continue.
- 7.2.7 If the EOC does not discontinue the investigation, it will proceed formally to the conciliation process. In the conciliation process, it is for the parties to decide if and how they would agree to resolve their dispute. Everything said and done by a party in the course of conciliation is not admissible in subsequent legal proceedings relating to the dispute except with the consent of that party.
- 7.2.8 If parties are able to reach a settlement, a settlement agreement is usually signed and is legally binding between the parties. Subject to parties' agreement, terms of settlement may include monetary compensation, changes in policy and practices, reinstatement or apology.
- 7.2.9 The time spent by the EOC in the complaint handling process does not count towards the 24 months timeline for taking legal proceedings<sup>112</sup>. In other words, that timeline is extended by the period of time spent by the EOC in the complaint handling process.
- 7.2.10 The complaint-handling process by the EOC provides an alternative to

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<sup>112</sup> RDO section 80(3)

legal proceedings in resolving discrimination and harassment issues. Confidentiality is a feature of the process. This alternative can be a less formal, cheaper, faster way of resolving these issues when compared to legal proceedings, but it depends on the co-operation of the parties and will result in a settlement only if both parties agree. Information obtained during the investigation part of the process may be admissible in Court if legal proceedings are brought later and this information may help the parties to assess their positions. For further details on the EOC's complaint handling process, please consult specific publications by the EOC.

### 7.3 Legal Assistance by the EOC

- 7.3.1 When a complaint has been lodged with the EOC, but there has been no settlement of the complaint, the aggrieved person may apply for assistance from the EOC to take legal proceedings.
- 7.3.2 The EOC will consider all applications for legal assistance. In deciding whether to provide assistance in each application, the EOC will take into account a wide range of factors, in particular, whether the case raises a question of principle, the complexity of the case, and also the strength of the evidence, and whether the case reflects a widespread problem or the EOC's strategic concerns.
- 7.3.3 If legal assistance is provided by the EOC, it may include giving legal advice and representation on the case by the EOC's own legal officers or outside lawyers. For further details on legal assistance by the EOC, please consult specific publications by the EOC. If legal assistance is not provided by EOC, claimants may still take legal proceedings in the District Court and they may seek legal advice or apply for legal aid from the Legal Aid Department.

### 7.4 Other functions of the EOC

- 7.4.1 The EOC is a statutory body created by law. Other than the complaint handling and legal assistance functions described above, it has powers and functions under different anti-discrimination laws including the RDO. EOC's other powers and functions under the RDO include:-
  - (1) Working towards the elimination of all forms of racial discrimination, harassment and vilification;

- (2) Promoting equality of opportunities between persons of different racial or ethnic backgrounds;
- (3) Encouraging settlement by conciliation of alleged unlawful act under the RDO;
- (4) Initiating formal investigation in the public interest;
- (5) Issuing codes of practice for elimination of discrimination and promotion of racial harmony;
- (6) Enforcing the RDO by issuing enforcement notices and bringing proceedings in respect of discriminatory practices and certain other unlawful acts;
- (7) Reviewing the working of the RDO and making proposals for amendment.

## Sample policy on racial equality

### 1. Introduction

- 1.1 [Organisation's name] is committed to making full use of the talents, skills, experience, cultural perspectives of different people, and to making sure that it is an organization where they are respected and valued and can achieve their full potential, regardless of race, colour, descent, or national or ethnic origins;
- 1.2 [Organisation's name] will comply with the Race Discrimination Ordinance and will follow the recommendations in the Code of Practice issued by the Equal Opportunities Commission under the Ordinance.

### 2. Objectives

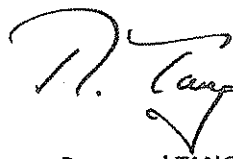
- 2.1 The objectives of this policy are to ensure that:-
  - (1) No one will be treated less favourably on the grounds of race, colour, descent, national or ethnic origins;
  - (2) No one from any racial group will suffer a detriment from any requirements or conditions which cannot be justified on non-racial grounds;
  - (3) Opportunities for employment, training and career development are equally open to all qualified people regardless of race, colour, descent, national or ethnic origins;
  - (4) Everyone is treated with respect and dignity and no one will be subjected to any unwelcome conduct, or to an environment that is hostile or intimidating, on the ground of race, colour, descent, national or ethnic origins;
  - (5) The grievance system is properly administered regardless of race, colour, descent, national or ethnic origins; and there will be no reprisal against anyone raising concerns or complaints or taking action on discrimination or harassment on the grounds of race, colour, descent, national or ethnic origins.

### 3. Implementation

- 3.1 This policy will be a priority for [Organisation's name];
- 3.2 [Position] will have overall responsibility for this policy; and [Position (if different)] will be responsible for the day-to-day operation of this policy;

- 3.3 The policy will be communicated to all workers and job applicants;
- 3.4 Workers will be consulted about the policy and its implementation;
- 3.5 Workers will be trained on the policy and their rights and responsibilities;
- 3.6 Opportunities for employment, promotion, transfer and training will be advertised widely, internally and externally, and all applicants will be welcomed, regardless of race, colour, descent, national or ethnic origins;
- 3.7 Selection criteria and performance appraisals will be entirely related to the job or training opportunity;
- 3.8 The effectiveness of this policy will be monitored regularly. Information on the ethnic and racial backgrounds of workers and applicants for employment, promotion and training will be collected and analysed, to monitor the implementation of this policy. Grievances, disciplinary action, performance assessment and termination of employment will also be monitored by racial group. The information will be held in strictest confidence and will only be used to promote equality and prevent discrimination;
- 3.9 Requirements and conditions will be reviewed in the light of monitoring results;
- 3.10 Harassment on the ground of race
- (1) Every worker will be treated with respect and dignity. All workers have a right to work in an environment that is free from abuse or insults, where individuals treat each other with respect and value politeness.
- (2) Harassment on the ground of race, colours, descent, national or ethnic origins is unacceptable. Workers must not take part in, or encourage, condone or gossip about cases of harassment or bullying. No one should be subjected to any unwelcome conduct, or to an environment that is hostile or intimidating, on the ground of race, colours, descent, national or ethnic origins. Workers should be supportive of fellow workers who are victims of harassment. Examples of unacceptable conduct include:-
- (a) Racially derogatory remarks or insults; for example, name calling which people of certain racial groups may find offensive or impolite should be avoided;

- (b) Display of graffiti or slogans or other objects offensive to certain racial groups;
  - (c) Racist jokes, banter, ridicule or taunts;
  - (d) Using a disparaging or offensive tone when communicating with people on the ground that they belonging to certain racial groups;
  - (e) Ostracize people on the ground that they belong to certain racial groups;
  - (f) Imposing excessive workloads or unrealistic performance targets on people on the ground of their race, colour, descent, national or ethnic origins;
  - (g) Unnecessarily picking on individuals from particular racial groups.
- 3.11 Complaints about discrimination or harassment on the ground of race, colour, descent, national or ethnic origins will be taken seriously and dealt with effectively and promptly and may result in disciplinary sanctions including dismissal.



Raymond TANG  
Chairperson  
Equal Opportunities Commission

24 April 2009

**Race Discrimination Ordinance  
Code of Practice on Employment**

**Major views and concerns raised in the consultation process**

Brief summary of views and concerns with extracts	EOC's response
<p><b>1 <u>The Code's purpose and legal status</u></b></p> <p>The first draft of the Code did not sufficiently emphasize the Code's purpose in promoting racial equality and its legal status.</p> <p><i>"The Draft Code only serves as an explanation of the law, not as promoting equality"</i></p> <p><i>"consider re-writing the respective paragraph to positively reflect the legal status of the Code"</i></p>	<p>1.1 An important purpose of the Code is to encourage employers and employees and other concerned parties to promote racial equality and harmony in the workplace by adopting good practice. This purpose is now clearly stated in paragraph 1.2 of the Code.</p> <p>1.2 In Chapter 5 of the Code, practical and comprehensive recommendations of good practice are now made for the promotion of racial equality and prevention of discrimination. Employers and other concerned parties are encouraged to adopt the recommendations of good practice as appropriate to the scale and structure of their organizations and available resources. This encouragement is reinforced by an explanation of the Code's status.</p> <p>1.3 In paragraph 1.3 of the Code, it is explained that, although the Code is not law, it would be admissible in evidence and the court will take it into account when deciding cases under the RDO. If an employer has followed the Code's recommendations, it may help the employer to show that it has</p>

Brief summary of views and concerns with extracts	EOC's response
	<p>complied with the law.</p>
<p><b>2</b> <u>Meaning of Race</u></p> <p>The first draft of the Code did not adequately refer to relevant international and common law materials in explaining the meaning of "Race" under the RDO.</p> <p><i>"should amend relevant paragraphs to precisely elaborate the meaning of race, colour, descent, national and ethnic origin"</i></p> <p><i>"[refer to] recommendations made by the UN Committee...and progressive case precedents established in other countries"</i></p>	<p>2.1 Making reference to relevant overseas materials, paragraph 2.1 of the Code now explains that racism and racial discrimination are the result of social processes which classify people into different groups with the effect of marginalizing some of them in society.</p> <p>2.2 Making reference to relevant overseas case law and materials, except for "descent" (which has a specific definition in s.8(1)(c) of the RDO), the Code explains that the RDO's meaning of "race" and its different parts (i.e., "race", "colour", "national" or "ethnic origin") are to have broad popular meaning and they are not mutually exclusive. Examples are included in the main text to show how different parts of the RDO's meaning of "race" may be understood and applied.</p> <p>2.3 The Code also explains that international materials such as the International Convention on the Elimination of All Forms of Racial Discrimination and the General Recommendations of the Committee under this Convention are useful reference materials.</p>
<p><b>3</b> <u>Details on good practice and promotion of race</u></p>	<p>3.1 Chapter 5 of the Code now provides more detailed recommendations on</p>



Brief summary of views and concerns with extracts	EOC's response
<p><u>equality</u></p> <p>Compared to codes under other discrimination law, the first draft of the Code did not sufficiently provide guidance on what practical steps should be taken to prevent discrimination and to promote racial equality in the workplace; and that it did not sufficiently explain that positive action is allowed to promote racial equality. There should be a sample policy.</p> <p><i>"[codes under other discrimination law do] more than informing them of the terms of the legislation...[the RDO draft code] reads more like an information leaflet of the RDO than a source of practical advice of the positive roles employers and employees can and should play..."</i></p> <p><i>"The draft code does not aim to promote positive action"</i></p> <p><i>"should include samples on equal opportunities policy"</i></p>	<p>practising and promoting racial equality. Paragraph 5.2 of the Code recommends the adoption of a policy dealing with racial equality and explains the general objectives of such a policy.</p> <p>3.2 A sample policy is provided in the Code for reference and adoption as appropriate.</p> <p>3.3 The Code recommends the implementation of the policy through good practice. Paragraph 5.3 of the Code provides recommendations on good practice. All aspects and stages of employment are covered, including recruitment criteria and advertisement, shortlisting and interview, terms and conditions of employment, language issues in the workplace, promotion, transfer and training, grievance and disciplinary procedures, dismissal and redundancy. Recommendations are also made in relation to prevention of racial harassment, giving examples of the types of behaviour which are not acceptable. The Code recognizes that employers and organizations vary in size and resource, and that less formal practices may be adopted according to the scale and structure of individual entities and available resources.</p> <p>3.4 To ensure that the policy is implemented effectively, paragraph 5.3.17 of the Code recommends monitoring the racial equality situation in the workplace,</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>in employment and non-harassment policy"</i></p> <p><i>"Improvements have been made to promote good practice and references to language are included [in the revised draft]"</i></p> <p><i>"[the revised draft] can better promote racial harmony and equality"</i></p>	<p>such as the composition of the workforce by racial groups and their distribution within different units and their pattern of career development. This will help employers and organizations to review their policies, rules and practices from the perspective racial equality and to promote racial equality and to prevent discrimination. Information gathered from monitoring may be used to plan positive action.</p> <p>3.5 Monitoring involves gathering of race related information. Race related information may also be sought for the purpose of allowing for special arrangement for the cultural needs of different racial groups. Measures to monitor racial equality situation may range from informal assessment through personal knowledge to sophisticated arrangements for survey and consultation. Recommendations on good practice when collecting and using race related information are given in paragraphs 5.3.6 and 5.3.17 of the Code. The Code recognizes that employers and organizations vary in structure and available resources, and encourages them to take reasonably practicable steps to monitor their racial equality situation to prevent discrimination and promote racial equality.</p> <p>3.6 In order to promote racial equality, paragraph 5.3.18 of the Code explains that the RDO allows positive action to be taken to provide facilities and</p>

Brief summary of views and concerns with extracts	EOC's response
	<p>benefits to people from disadvantaged racial groups so that they may have equal opportunities in employment.</p> <p>3.7 Positive action is designed to provide a level playing field by enhancing the opportunities for disadvantaged racial groups to compete, when their opportunities to do so are in substance unequal to others because of discrimination or other disadvantages in the past. Positive action may include encouragement to apply for employment, transfer or promotion; providing language classes, mentorship schemes, management skills training or other training courses; but does not mean reserving or providing employment on the ground of race to any racial group and does not involve favouritism.</p>
<p>4 <b><u>Should not include positive action and monitoring by race related information</u></b></p> <p>Promotion of racial equality is not a legal obligation for employers and the Code should not include recommendations on monitoring the racial equality situation or positive action. Related concerns include the increased burden on employers; whether gathering</p>	<p>4.1 Promotion of racial equality is an important purpose of the Code under the RDO. The Code encourages employers and organizations to promote racial equality, rather than just simply avoid unlawful acts under the RDO.</p> <p>4.2 The Code explains that positive action is allowed under the RDO to provide a level playing field for disadvantaged racial groups to compete. It does not mean reserving or providing employment on the ground of race to any racial group and does not involve favouritism. The promotion of racial equality</p>

Brief summary of views and concerns with extracts	EOC's response
<p>race related information is consistent with racial equality and personal data legislation; whether positive action would involve favouritism towards certain racial groups.</p> <p><i>“employers are not under any obligation to “promote” racial equality or to monitor compliance [with the RDO]”</i></p> <p><i>“race related information is irrelevant and not necessary for the purpose of... appointment, and that the collection of such information... cannot tell whether... appointment policy/practices is in compliance with the RDO”</i></p> <p><i>“It may also be unlawful... to collect race related information given the requirements of [personal data legislation]”</i></p>	<p>through positive action not only does not contravene its underlying spirit of the RDO, but it is in fact one of its objectives, even though it is not enforced as a matter of legal obligation. The EOC takes the view that it is appropriate for the Code to make recommendations on the promotion of racial equality through positive action.</p> <p>4.3 It is important to monitor racial equality situation both for the prevention of discrimination and promotion of racial equality. Useful information which can be gathered from monitoring includes the composition of the workforce by racial groups and their distribution within different units and their pattern of career development. Paragraph 5.3.17 of the Code encourages employers and organizations to analyze and use such information in formulating and reviewing policies, rules and practices. Potential barriers to opportunities or discrimination may then be redressed. This may be done by taking positive action based on information gained from monitoring.</p> <p>4.4 The promotion of racial equality and prevention of discrimination is in the interest of employers and organizations. Measures to monitor racial equality situation may range from informal assessment through personal knowledge to sophisticated arrangements for survey and consultation. The Code recognizes that employers and organizations vary in structure and</p>

Brief summary of views and concerns with extracts	EOC's response
	available resources, and encourages them to take reasonably practicable steps to monitor their racial equality situation to prevent discrimination and promote racial equality.
<p><b>5 <u>Language issues</u></b></p> <p>The first draft of the Code did not adequately deal with language issues. Related concerns include language requirement for jobs; the language(s) for recruitment advertisement; the language(s) for communications with employees; using language ability as shortlisting preference.</p> <p><i>“should include language considerations throughout the code where discrimination based on language can be linked to the prohibited grounds of the RDO...clearly state that language serves relevant indicator of ones’ ethnic or national origin and that employers and employees may be liable under the RDO”</i></p>	<p>5.1 The Code now explains that language issues may give rise to discrimination claims in a variety of contexts.</p> <p>5.2 Paragraph 6.1.1(1) of the Code explains that a person’s command of a language can be related to his or her race. The Code reminds employers to ensure that employees and workers are not treated less favourably because of their command of a language. The Code also reminds employers and employees racist jokes or ridicule on the language and accent can be regarded as racial harassment.</p> <p>5.3 Making reference to relevant case law, paragraph 6.1.1(2)(v) of the Code explains that language requirement for a job may lead to claims of indirect discrimination. At the same time, the Code makes it clear that employers may justify language requirements if they are relevant for and commensurate with the satisfactory performance of the job.</p> <p>5.4 Paragraph 5.3.4 of the Code encourages employers to advertise in a way that</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>"All government departments have to post advertisements in both Chinese and English concerning recruitment of all positions"</i></p> <p><i>"...add a line to this new ordinance "written Chinese must not applied to those who were being recruited before the established of Hong Kong SAR government if he/she did not signed any document of such in his/her agreement""</i></p> <p><i>"requirement of a job incumbent to possess a certain level of language proficiency has nothing to do with racial discrimination"</i></p> <p><i>"we require the majority of our staff to be proficient in both English and Chinese languages...For junior and minor staff, they are required to be able to read and write simple Chinese so that they can carry out their duties and communicate with Chinese-speaking colleagues...and public..."</i></p>	<p>the information would reach different racial groups and to make it clear that vacancies are equally open to people from all racial groups. It explains that recruitment advertisements may specify language requirements so long as they are necessary for the satisfactory performance of the job, and may be published in the language required. In the light of the practical situations of most jobs in Hong Kong, where Chinese and/or English language ability is invariably required, and where some people can speak but not read Chinese, the Code encourages employers to consider advertising in both Chinese and English where reasonably practicable.</p> <p>5.5 The Code recognizes that shortlisting of a large pool of candidates may occur based on factors relevant to the better performance of the job, including language ability. The Code encourages employers to ensure that shortlisting factors, including language ability, objectively reflect the requirements of the job and are applied consistently regardless of race.</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>"Clarification should be provided to the effect that job advertisements do not need to appear in both Chinese and English..."</i></p> <p><i>"it is not uncommon to expect employees to possess higher than minimum language proficiency for best performance output"</i></p> <p><i>"We feel strongly that application of shortlisting criteria on the basis of language skills should not be regarded as discrimination against certain racial groups, as long as it can be justified that applicants with higher language ability may be better able to meet the requirements of that particular job and/or perform better"</i></p>	
<p><b>6 <u>Indirect discrimination justification</u></b></p> <p>The first draft of the Code did not adequately explain the defence of justifying an indirectly discriminatory requirement or condition.</p>	<p>6.1 Paragraph 6.1.1(2) of the Code now explains the elements of indirect discrimination and elaborates on matters that are helpful for a better general understanding of indirect discrimination, including an explanation that an indirectly discriminatory requirement or condition may be justifiable if it serves a legitimate objective and bears a rational and proportionate</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>"should include concrete illustrations to delineate the meaning of the term "justifiable""</i></p> <p><i>"the concept of "indirect discrimination" will give rise to a large number of disputes. This is due to the lack of clarity as to the steps which must be taken by an employer to "justify" certain of its actions which may have a disproportionate impact upon persons of different races"</i></p>	<p>connection to the objective. References are made to relevant overseas case law, a number of illustrations based on case law are given and the type of factors that are relevant are identified (such as significant degree of increased costs, decreased efficiency, or serious safety problem), to facilitate better understanding of how the law may apply.</p> <p>6.2 At the same time, it has to be remembered that the Code is not intended to be a complete and authoritative statement of the law (paragraph 1.4.4 of the Code). Its purpose is to give guidance on promotion of racial equality and prevention of discrimination. Paragraph 5.3.10 of the Code recommends that employers should minimize any disparately adverse impact that their practices, rules and requirements may have on any racial groups; and that they should consider varying requirements which are disadvantageous to particular racial groups and to accommodate their cultural or religious needs. Together with recommendations on monitoring and positive action, these recommendations will help employers and organizations to promote racial equality and prevent discrimination.</p>
<p><b>7 <u>Harassment</u></b></p> <p>The first draft of the Code did not effectively explain</p>	<p>7.1 The first draft of the Code sought to explain what is racial harassment by giving scenario type illustrations. The illustrations were criticized as being inappropriate to Hong Kong or did not accurately described ethnic minorities</p>



Brief summary of views and concerns with extracts	EOC's response
<p>what is unlawful racial harassment and did not give appropriate illustrations.</p> <p><i>"it would be helpful if the definition on "unwelcome conduct" or hostile environment" could be further elaborated"</i></p> <p><i>"the Code fails to quote examples relevant to Hong Kong society"</i></p>	<p>in Hong Kong.</p> <p>7.2 Whether harassment can be established in law depends very much on the facts of each case. An act could be harassment in one scenario but not another. Paragraph 5.3.14 of the Code explains that employees and workers are entitled to be free from harassment and respect for their racial identity. The Code recommends that employees and workers should be treated with respect by their employers and fellow employees and workers. The types of behaviour which would be regarded as an affront to the racial identity of a person are explained. Employers and employees are recommended to ensure that these types of behaviour do not occur in the workplace.</p>
<p><b>8 <u>Employees' rights and responsibilities</u></b></p> <p>The first draft did not sufficiently emphasize the employees' role.</p> <p><i>"does not have a separate chapter about an employee's role in promoting equality or his or her rights and responsibilities"</i></p>	<p>8.1 Chapter 4 of the Code explains the rights and responsibilities under the RDO, stating that employees and workers are entitled to work free from discrimination and harassment.</p> <p>8.2 Paragraph 4.2 of the Code explains that employees and workers themselves may not discriminate or harass their colleagues or aid their employer to do so. Employees and workers are recommended to respect the racial identity of fellow workers and refrain from infringing their rights; to observe the RDO</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>"should also give more guidance to employees / agents including their responsibilities to eliminate racial discrimination and harassment at the workplace"</i></p>	<p>and follow the recommendations of the Code; and to cooperate with measures taken by employers to promote equality and prevent discrimination and harassment.</p> <p>8.3 The Code also explains that the rights of employees are protected by law and that they may seek redress by bringing legal proceedings or lodging complaints to the EOC if they are discriminated against or harassed.</p>
<p><b>9 <u>Employer and principal liability</u></b></p> <p>Making employers liable for employee's acts even if they did not know or approve the acts is too onerous. Related concerns include liability of principals for their contractors or agents; and the obligation of principal not to discriminate against their contract workers.</p> <p><i>"We do not consider that an employer should be liable for what his employee has done especially if the harassment is done behind him"</i></p> <p><i>"whether the principal [would be] liable for the</i></p>	<p>9.1 The RDO makes employers liable for acts of their employees and requires employers to take reasonably practicable steps to prevent discrimination and harassment. The Code explains that employers will have discharged their legal responsibility when they have taken reasonably practicable steps. Implementing a policy of good employment practice will help employers to discharge their obligations of taking reasonably practicable steps. The Code encourages employers to do so by adopting the recommendations on good practice as set out in Chapter 5 of the Code.</p> <p>9.2 Similarly, the RDO makes principals liable for acts done by their agents with their authority. The Code recommends that principals also adopt the recommendations of good employment practice relevantly to their relationship with their agents to ensure that their agents do not have</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>agent's unlawful acts if he can show that he has already taken reasonably practicable steps...to prevent the agent from doing so; or he is ignorant of [the acts]; or [agent] is in fact acting against rules/requirements stipulated by the principal"</i></p>	<p>authority to commit any act of discrimination or harassment.</p> <p>9.3 Apart from the ordinary employment relationship, the RDO also applies to contract workers. The Code explains that a person who engages contract workers may not discriminate against the contract workers.</p>
<p><b>10 <u>Limits and exemptions</u></b></p> <p>The Code should focus on promoting racial equality by good practice and should not give details or illustrations to show how employers could rely on the limits or exemptions of the RDO.</p> <p><i>"should delete all the illustrations on exemptions"</i></p> <p><i>"examples appear to give the effect of how employers can lawfully refuse employment... may be providing employers with excuses from not employing a person of a minority group"</i></p> <p><i>"[the draft] appears to...inform the reader where</i></p>	<p>10.1 An explanation of the law provides the background to the Code and an important reason for following its recommendations. This explanation will not be complete without dealing with the limits and exemptions of the law. It is proper to appropriately mention these matters.</p> <p>10.2 Making reference to the relevant sections of the RDO, paragraph 2.2 of the Code explains that there are acts not regarded as constituting racial discrimination under the RDO, such as acts done on the ground of whether someone is an indigenous villager, someone's resident status, length of residency, and nationality and citizenship.</p> <p>10.3 The Code also explains that there are other limits and exemptions, with reference to the relevant sections of the RDO, such as the grace period for small employers; the recruitment of domestic helpers; employment by organized religion (paragraph 3.4 to 3.6 of the Code); and genuine</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>there are loopholes in the RDO and how these loopholes can be exploited..."</i></p> <p><i>"more [illustrations] are needed... in letting employers and employees know what are lawful or unlawful..."</i></p> <p><i>"Illustrations are a vital part of any employer's or employee's understanding of this complicated piece of legislation...We strongly encourage the EOC to introduce further illustrations, especially in those areas of particular complexity"</i></p>	<p>occupational qualification (paragraph 5.3.3 of the Code).</p> <p>10.4 As the purpose of the Code is to promote racial equality by encouraging good practice, while the Code gives examples, illustrations and references to relevant case law as appropriate, the limits and exemptions are explained in general terms. Adopting good practice will help employers to comply with the law without taking advantage of its limits and exemptions.</p>
<p><b>11 <u>Overseas employees</u></b></p> <p>Provide guidance on exemptions relating to overseas employees.</p> <p><i>"no illustrative assistance in relation to the expatriate exceptions or the grand fathering provisions..."</i></p>	<p>11.1 Paragraph 5.3.11 of the Code makes reference to the relevant sections of the RDO and explains that there are exemptions in relation to employees coming from overseas to work in Hong Kong. Local employees may have different racial backgrounds just as overseas employees. The distinction between local and overseas is not necessarily racial. The RDO does not cover differences in treatment not based on race as defined in the RDO, such as residency status.</p> <p>11.2 The Code recognizes that there are other non-racial differences between</p>

Brief summary of views and concerns with extracts	EOC's response
	<p>overseas employees and local employees, for example, where an employee from overseas has skills which are not readily available in Hong Kong, as relevant to the exemption under RDO s.13. Paragraph 6.7 of the Code explains the considerations which are relevant in determining where a job requires skills not readily available in Hong Kong, such as response and time spent for recruitment, information from recruitment agencies and general information about the labour market.</p> <p>11.3 For prevention of discrimination and promotion of racial equality, the Code recommends that any benefits given to overseas employees which are not available to local employees should not be given on the ground of race.</p>
<p><b>12 <u>Scope of employment protection</u></b></p> <p>Should give quantitative measure of working wholly or mainly in Hong Kong</p> <p><i>“there is no clear definition on “Working mainly outside Hong Kong””</i></p> <p><i>“the legislation actually simply protects employees</i></p>	<p>12.1 Making reference to relevant overseas case law, paragraph 3.3 of the Code explains that working wholly or mainly in Hong Kong is determined by reference to the time a person spend working in Hong Kong for the whole of the period of employment. Illustrations derived from the principles laid down in the relevant case law are given.</p>

Brief summary of views and concerns with extracts	EOC's response
<p><i>who work more than 50% of their working hours in Hong Kong"</i></p>	
<p><b>13 <u>Religion</u></b></p> <p>There should be clarifications on the RDO's application to issues related to religion.</p> <p><i>"The interaction between [race] and the religion of an individual needs to be explained further"</i></p>	<p>13.1 Paragraph 2.1.4(4) of the Code now explains that the RDO does not apply to discrimination on the ground of religion, except where religion related requirements or conditions indirectly discriminate against certain racial groups, in which case the RDO may apply.</p>
<p><b>14 <u>Positive wordings</u></b></p> <p>Words and phrases are used which do not reflect promotion of racial equality</p> <p><i>"escape liability"; "relieved of liability"; "may have a better chance of defending a claim"</i></p>	<p>14.1 Words and phrases have been reviewed to reflect the purpose of the Code to promote racial equality.</p>
<p><b>15 <u>Examples to reflect racial diversity</u></b></p>	<p>15.1 Illustrations and examples have been reviewed to reflect racial diversity in Hong Kong and accurate description of ethnic groups.</p>

Brief summary of views and concerns with extracts	EOC's response
<p>Examples and illustration should be diversified to reflect racial situation in Hong Kong.</p> <p><i>“consider diversifying the racial origin of the persons being used in the illustration”</i></p> <p><i>“should... delineate the ethnic groups and address them individually...”</i></p>	
<p><b>16 <u>EOC's functions and powers</u></b></p> <p>EOC's functions and powers are not fully and effectively set out.</p> <p><i>“EOC...not articulating its role and mandates”</i></p> <p><i>“should compare the pros and cons between filing a lawsuit by oneself and doing so with the assistance of EOC in the Code...”</i></p>	<p>16.1 Chapter 7 of the Code explains that rights of employees or workers to be free from discrimination and harassment and protected by law. Legal proceedings may be brought for unlawful discrimination and harassment. Alternatively, complaints may be lodged with EOC for investigation and conciliation. Where the complaint cannot be settled by conciliation, the complainant may apply for legal assistance from the EOC. Other options open for the complainant are to seek his or her own legal advice or apply for legal aid from the Legal Aid Department. Features relevant to EOC's complaint-handling and legal assistance are explained.</p> <p>16.2 Apart from complaint-handling and providing legal assistance in appropriate cases, the Code also set out other functions of the EOC, such as promoting</p>

Brief summary of views and concerns with extracts	EOC's response
	racial equality; formal investigation; and reviewing legislation.



# Equal Opportunities Commission

Annex III

## Public Consultation Meetings on Code of Practice on Employment under the Race Discrimination Ordinance

Session Number	Date	Venue	Language	Total no of participants	Number of participants of ethnic minority	Participating non-governmental organizations / ethnic minority organizations
1	1/11/2008	YMCA College of Careers	Cantonese	41	-	<ul style="list-style-type: none"> <li>● HK SKH Lady MacLehose Centre</li> <li>● Hong Kong Christian Service</li> <li>● Hong Kong Unison</li> <li>● Hong Kong Human Rights Monitor</li> <li>● Hong Kong Family Welfare Society</li> <li>● Baptist Oi Kwan Social Service</li> <li>● Yang Memorial Methodist Social Service</li> <li>● The Boys' &amp; Girls' Clubs Association of Hong Kong</li> <li>● BGCA Kwai Chung (South) Children and Youth Integrated Services Centre</li> <li>● Caritas Community Centre – Kowloon</li> <li>● World Vision</li> <li>● Caritas – Hong Kong</li> </ul>
2			English	16	5	<ul style="list-style-type: none"> <li>● Amnesty International Hong Kong</li> <li>● Caritas Community Centre – Tsuen Wan</li> <li>● Christian Action</li> <li>● HK SKH Lady MacLehose Centre *</li> <li>● Hong Kong Christian Service *</li> <li>● Yang Memorial Methodist Social Service *</li> <li>● Hong Kong Human Rights Monitor *</li> </ul>
3	8/11/2008	Tuen Mun Town Hall	Cantonese	14	-	<ul style="list-style-type: none"> <li>● Caritas Community Centre – Tsuen Wan *</li> <li>● Yuen Long Town Hall Chomolongma Multicultural Community Centre</li> <li>● Yan Oi Tong</li> </ul>
4			English	3	3	<ul style="list-style-type: none"> <li>● Yuen Long Town Hall Chomolongma Multicultural Community Centre *</li> </ul>
5	15/11/2008	The Boys' & Girls' Clubs Association of Hong Kong	Cantonese	36	-	<ul style="list-style-type: none"> <li>● Asian Human Rights Commission</li> <li>● Ebenezer School &amp; Home for Visually Impaired</li> <li>● Yan Oi Tong *</li> <li>● BGCA Kwai Chung (South) Children and Youth Integrated Services Centre *</li> </ul>

## Equal Opportunities Commission

### Public Consultation Meetings on Code of Practice on Employment under the Race Discrimination Ordinance

Session Number	Date	Venue	Language	Total no of participants	Number of participants of ethnic minority	Participating non-governmental organizations / ethnic minority organizations
						<ul style="list-style-type: none"> <li>⊗ Aberdeen Kai-fong Welfare Association Social Service Centre</li> <li>⊗ Caritas – Hong Kong *</li> <li>⊗ Hong Kong Christian Institute</li> <li>⊗ YMCA of Hong Kong (Cheung Sha Wan Centre)</li> </ul>
6			English	10	9	<ul style="list-style-type: none"> <li>⊗ Amnesty International Hong Kong *</li> <li>⊗ Caritas – Hong Kong *</li> <li>⊗ Caritas Community Centre – Kowloon *</li> <li>⊗ Hong Kong Christian Service *</li> <li>⊗ Asian Human Rights Commission *</li> </ul>
7	29/11/2008	Equal Opportunities Commission	English (with simultaneous interpretation in <i>Hindi, Indonesian and Nepali</i> )	85	71	<ul style="list-style-type: none"> <li>⊗ Christian Action *</li> <li>⊗ Hong Kong Christian Service *</li> <li>⊗ Asian Human Rights Commission *</li> <li>⊗ ISS-HK</li> <li>⊗ HK SKH Lady MacLehose Centre *</li> <li>⊗ Thai Alliance</li> <li>⊗ Hong Kong Unison *</li> <li>⊗ HK Council of Social Services</li> </ul>
8			English (with simultaneous interpretation in <i>Tagalog, Thai and Urdu</i> )	20	5	<ul style="list-style-type: none"> <li>⊗ Hong Kong Christian Service *</li> <li>⊗ Enrich</li> <li>⊗ Hong Kong Family Welfare Society *</li> <li>⊗ Society for Community Organization</li> </ul>
9	10/01/2009	Equal Opportunities Commission	English (with simultaneous interpretation in <i>Cantonese, Indonesian, Nepali and Urdu</i> )	24	13	<ul style="list-style-type: none"> <li>⊗ Sunweb</li> <li>⊗ Catholic Diocesan Pastoral Centre for Workers (Kowloon)</li> <li>⊗ Christian Action *</li> <li>⊗ Hong Kong Family Welfare Society *</li> <li>⊗ SUARA/HK Publications</li> <li>⊗ The Incorporated Trustees of the Islamic Community Fund of Hong Kong</li> <li>⊗ Islamic Union of Hong Kong</li> </ul>

## Equal Opportunities Commission

### Public Consultation Meetings on Code of Practice on Employment under the Race Discrimination Ordinance

Session Number	Date	Venue	Language	Total no of participants	Number of participants of ethnic minority	Participating non-governmental organizations / ethnic minority organizations
						<ul style="list-style-type: none"> <li>⊗ Mission for Migrants</li> <li>⊗ SRACP Project ROSA</li> <li>⊗ Pok Oi Hospital – Social Services</li> </ul>
10			English (with simultaneous interpretation in <i>Hindi, Tagalog and Thai</i> )	12	12	<ul style="list-style-type: none"> <li>⊗ Sunweb *</li> <li>⊗ Filipino Migrant Workers' Union</li> <li>⊗ Hong Kong Refugee Advice Centre Ltd.</li> <li>⊗ Thai Alliance *</li> <li>⊗ TRA Cthai (Thai)</li> <li>⊗ United Filipinos in Hong Kong</li> </ul>
<b>Total:</b>				<b>261</b>	<b>118</b>	<b>37</b>

\* also attended other sessions