



**Submission to Equal Opportunities Commission on
“Race Discrimination Ordinance Code of Practice on Employment”**

Foreword

The Hong Kong Unison Limited (Hong Kong Unison) is a non-governmental organization serving ethnic minorities in Hong Kong. Our mission is to promote racial equality and harmony in Hong Kong society. While we welcome the issuance of the drafted Race Discrimination Ordinance (RDO) Code of Practice on Employment (the Code) by Equal Opportunities Commission (EOC), we find its content far from satisfactory and could hardly achieve purposes as stated in section 63(1) of the RDO, i.e.,

- the elimination of discrimination;
- the promotion of equality of opportunity and harmony between persons of different racial groups; or
- the elimination of harassment and vilification.

1) **General comments**

1.1 **Inconsistency with similar codes under other anti-discrimination ordinances**

Hong Kong Unison finds that while the provisions in RDO regarding its code of practice is the same as that of other existing anti-discrimination ordinances, the Code of Practice on Employment under RDO adopts a less positive and affirmative approach, which in turns convey to the public a wrong message that RDO and the Code are less significant than other existing ones.

For example, the Code of Practice on Employment under Sex Discrimination Ordinance (SDO) and that under Disability Discrimination Ordinance (DDO) do not provide detailed illustrations on exempted cases. On the contrary, the Code under RDO has in many instances illustrated with unambiguous examples the acts and behaviour exempted by law.





Paragraph 2.2.1 to 2.2.4 highlights the exemptions on the grounds of New Territories indigenous inhabitants, permanent residency, right of abode, right to land, restriction or condition of stay, permission to land and remain, length of residency and nationality, citizenship or resident status of other countries.

Hong Kong Unison strongly believes it is not necessary to include so many detailed illustrations on the exemptions in the Code as it gives the wrong impression to the public that ROD is not important. This would not help in achieving the main purpose of the Code, i.e., promotion of racial equality and harmony.

Suggestion: EOC should delete all the illustrations on exemptions contained in the Code.

In addition, the Code lacks adequate elaborations on good practices for an employer to take to promote racial harmony and equality. Some of the important concepts introduced in the Code of Practice on Employment under SDO and DDO, such as consistent selection criteria, equal pay for equal work, equal pay for work of equal value and workplace policies etc. are all omitted. Besides, useful information like sample policy on equal opportunities and anti-harassment are also missing. Hong Kong Unison considers the above information as necessary for employers to formulate policies and adopt good practice in relation to racial equality and harmony.

Suggestion: EOC should provide practical samples and guidelines to employers with reference to the codes under SDO and DDO. Such measures would facilitate the employers in formulating their race equality plan.

1.2 Mitigation of EOC's role and functions in its implementation of RDO

Hong Kong Unison finds EOC has unnecessarily mitigated its role and functions in its implementation of RDO in the Code, which would undermine the protection provided by RDO and the Code.



Paragraph 9.1 of the Code lists out four general functions of EOC under RDO. It is much narrower when compared to the list contained in the *An Introduction to the Race Discrimination Bill* issued by Home Affairs Bureau in December 2006, in which a total of nine functions were included.

Suggestion: To be consistent with previous publications and to encourage victims to lodge a complaint by highlighting the role of EOC, the following functions and powers should be added to paragraph 9.1 of the Code:

- i. providing assistance in respect of legal proceedings;*
- ii. initiating formal investigation in the public interest;*
- iii. issuing codes of practice;*
- iv. issuing enforcement notices;*
- v. bringing legal proceedings.*

In addition, Paragraph 9.3(i) states that “a person who feels that an unlawful act has been done against him or her has the right to pursue the claim directly through legal proceedings in court without lodging a complaint with EOC or applying for EOC’s legal assistance”. While a person has the right to initiate legal action by his/her own, such statement has toned down the role of EOC and reduce public desire to seek its assistance.

It should be noted that the investigation mechanism under EOC provides a timely and cheaper way for victims to claim their legitimate rights against discrimination. As stated in paragraph 9.1.1(v), “Information provided during the investigation may be admissible in evidence before the Court if legal proceedings were brought at a later stage”. Therefore, it is important to let the public know the benefits from initiating legal action through EOC.

Suggestion: EOC should compare the pros and cons between filing a lawsuit by oneself and doing so with the assistance of EOC in the Code, to facilitate a person to make a rational choice.

Moreover, Paragraph 5.4.1 of the Code provides that “unfounded complaints made in bad faith may be subject to disciplinary action”. Hong Kong Unison considers such statement



would not help in reducing unnecessary claims, but only to deter people suffered from racial discrimination from lodging a complaint.

Suggestion: EOC should delete the part in relation to “unfounded complaint” in the Code, so that it could fall in line with codes of practice under other anti-discrimination ordinances.

In addition, some of the illustrations narrowly interpret RDO and thus limit the legal protection of RDO. For example, Illustration 31 of the Code states “it is likely to be unlawful racial harassment for the co-workers to call a South Eastern Asian worker “Ah Cha” only when the latter finds it disrespectful and offensive and raise objection.” In contrast, s.7 (1) of RDO does not require such objection for unlawful racial harassment.

Suggestion: To provide better protection for the employees, EOC should review and amend those parts in the Code where the interpretation is narrower than RDO.

1.3 Conservative and submissive in elaborating legal status of the Code

The Code has expressed an overtly conservative and submissive attitude regarding the legal status of the Code. Paragraph 1.2.2 of the Code emphasizes that it does not directly impose any legal obligations (repeated twice in Chinese version) or has any binding legal effect and that failure to observe it will not itself lead to any liability.

Hong Kong Unison held that such emphasis on the absence of legal obligation is unnecessary as it only results in public perception that the Code bears neither significance nor consequences and could just be ignored. Besides, it also mitigates the role of the Code as a guidance to protect against racial discrimination.

Suggestions: EOC should delete the phrase “the Code does not have binding legal effect” and replace the sentence that follows by “failure to observe the Code will not in itself directly lead to any liability”. Besides, repeated statement emphasizing that the Code does not directly impose any legal obligation should be deleted as well.



The conservative approach of the Code could also be traced by the fact that it adopts a firm and unambiguous stance on those illustrations where acts and behaviour exempted by RDO (Paragraph 2.2.1 to 2.2.4). On the contrary, those examples to expound on discriminatory acts and harassments are not as clear and assertive. For example, in illustration 1 and 2 (Paragraph 2.1.1 and 2.1.2), it only uses “likely to be unlawful” in relation to legal consequences of the discriminatory behaviour in question.

2) Comment on text and content

2.1 Lack of racial sensitivity

Hong Kong Unison finds EOC do not have racial sensitivity in drafting the Code and also in its consultation exercise.

<The Code itself >

The Code cites “South Eastern Asian” in its various illustrations (illustration 19, 20, 22 27 and 31). However, South East Asian is by no means a single ethnic minority, nor is it a race defined by present law. South East Asians are vastly different ranging from their physical characteristics to their cultural traits. The way the Code puts it only serves to confuse between the concept of geography and ethnicity.

Moreover, in illustration 31, a South East Asian worker is called “Ah Cha”. However, in practice, only South Asians like Indians and Pakistanis are so addressed. South East Asians such as Filipinos are more often called “Bun Chai” for men and “Bun Mui” for women.

Suggestion: EOC should amend all illustrations using “South Eastern Asian”, and to delineate the ethnic groups and address them individually such as Filipinos, Indonesians and Pakistanis.

In addition, the Code fails to quote examples relevant to Hong Kong society. Instead some of the examples are far fetched. For example, to explain the concept of “hostile or intimidating environment”, illustration 32 quotes the example of prominent display of emblem of the Nazi regime in Germany during the Second World War. This is simply out of context.



Suggestion: Examples and illustrations relevant to the Hong Kong context should be used in explaining discrimination. For example, EOC could elaborate whether public labeling of a Pakistani or the whole Pakistani community as “terrorists” amount to “hostile racial harassment”.

Besides far-fetching, those illustrations contained in the Code could hardly be of substantial practical value as many common known situations are not included. Those controversies and difficulties found in workplaces, in which both employers and employees do concern, have not been covered.

Suggestions: EOC should consult companies and enterprises and collect their difficulties in dealing with ethnic minority employees. Such difficulties should be elaborated in the Code accordingly. Besides, Appendix 1 of this submission contains a list of common known situations in need of further clarification from EOC on their legal implications.

<Consultation Exercise>

Initially only Chinese and English version of the Code is available in the Code. Hong Kong Unison considers it as highly unsatisfactory as one of the major users of the Code is ethnic minority people. By failing to provide the Code in their native languages, it is impossible for EOC to engage ethnic minority communities in the consultation process, let alone helping them to better understand their basic rights.

In response to the calls from ethnic minorities and other concern groups, EOC has finally translated the Code into six major ethnic minority languages in Hong Kong, namely, Nepali, Hindi, Urdu, Tagalog, Thai and Indonesians. Hong Kong Unison welcomes the move and recognizes EOC’s commitment in promoting the Code to its main users.

Suggestion: However, we urge that EOC should not stop at this point and should continue to provide six ethnic minority language versions once the Code was finalized and endorsed.



2.2 Absence of illustrations regarding use of language

While the Code provides exemptions on different areas with detailed illustrations; one of the key issues of RDO; i.e., use of language, is entirely omitted. As a result, an employer has no idea on how far he or she has to meet the needs and demands of employees in relation to language issues. On the other hand, an employee is also not clear about where their rights lie.

To put it in context, an employer would like to know under what circumstances he or she must provide employment contracts, internal staff notices and recruitment advertisement in English and ethnic minority languages. Alternatively, he or she may wish to know whether interpretation services must also be provided. Without clear illustrations, neither employers nor employees will be able to understand their duties and rights.

Suggestion: EOC should provide concrete guidelines and explanations regarding the requirement on language, with references to similar code of practice in UK.

2.3 Obscurity in key concepts and overuse of jargons

The Code contains intricate concepts and jargons that perplex rather than clarify. It fails to serve as a practical guidance for employees to learn about their rights or for employers to understand their duties.

Taking the definition of key terms such as “race”, “colour”, “national and ethnic origin” as examples, in its paragraph 2.1(iii) it provides that “There is no elaboration relating to the meaning of ‘race’, ‘colour’, and ‘national or ethnic origin’. In the absence of the case law in Hong Kong, the *general usage* of these terms will be relevant”. Hong Kong Unison considers “*general usage*” is a vague concept and it does not help in interpreting the Code.

Suggestion: In the absence of the meaning of above terms under RDO, they should be defined in consistent with the definition adopted by United Nations Committee on the Elimination of Racial Discrimination (the Committee), and progressive cases established in common law jurisdiction. According to General Recommendations No. 8 of the Convention on the Elimination of All Forms of Racial Discrimination, the Committee is of the opinion



that identification of individuals as being members of a particular racial or ethnic groups or groups should be based on “self-identification by the individual concerned”, if no justification exists to the contrary.

In addition, jargons which are difficult for the public to understand are also found in the Code. One of those examples is “*constructive dismissal*”, found in paragraph 8.2.5(i).

Suggestions: For abstract and technical terms, explanations and footnotes should be provided to facilitate public understanding. Meanwhile, while finalizing the wordings in the Code, EOC should consider appointing experts in Chinese language to proofread and amend the wordings to make it simple and clear.

2.4 Inconsistency between Chinese and English versions

Besides difficult and vague wordings, Hong Kong Unison finds instances of inconsistencies between the Chinese and English version of the Code. In relation to its legal status, paragraph 1.2.2 of the English Code states once that the Code does not directly impose any legal obligations. But for the Chinese version, similar sentence has repeated twice.

In addition, in the same paragraph, the English version provides that “...failure to observe the Code will not in itself lead to any liability...” In contrast, the Chinese version does not include the word “itself” (本身), and add the word “even though” (即使) at the beginning of the sentence. Such drafting has conveyed to the public a wrong message that failure to observe the Code would not lead to any legal consequences, which is inconsistent with RDO (s63(14)), and dilute the significance of the Code.

Hong Kong Unison considers the inconsistency between Chinese and English versions is unacceptable. Not only if it has confused the public and would cause controversy in future, but also the Chinese version has downplayed the significance of the Code.

Suggestion: EOC should carefully examine Chinese and English version of the Code and amendment should be made in cases of inconsistencies. Such amendments should be made in line with RDO and should not downplay significance of RDO and the Code as well.



3) **Other suggestions**

To ensure that the law will be fully implemented to provide members of ethnic minorities with equal protection in the field of employment, we would also like to make the following recommendations:

3.1 Enforcement of RDO and the Code as scheduled

While there are many areas which should be improved in the Code, after collecting all the public opinions during the consultation period, EOC should efficiently adopt necessary and appropriate improvements to the Code, and introduce the revised Code to the LegCo as scheduled (April 2009).

Suggestion: Although the consultation period is extended, Hong Kong Unison insists the enforcement of the RDO should not be delayed.

3.2 Code of Practice on Education and Provision of Goods to be drafted

Hong Kong Unison regrets EOC's refusal to issue codes of practice on education, and on provision of goods, facilities, services and premises.

We consider education as one of the most fundamental rights of human being. Given that ethnic minority students are now facing inferior and unequal position to their Chinese counterparts, a code of practice is necessary not only to safeguard their rights and interests, but will also help to improve their situation. Besides, a code of practice is necessary for teachers and schools as well. It will provide a concrete guideline on how to deal with ethnic minority students, and explain where their duties and obligations lie.

For the code of practice on provision of goods, facilities, services and premises, its issuance is urgently warranted as the business sector is highly worried about the language requirement.

They fear that it is easy for them to do unlawful acts if they fail to communicate with ethnic minorities in certain languages. Hong Kong Unison believes if a clear guideline concerning



duties and obligations was provided, it could help to ease all the unnecessary panic; whereas consumers and service users would also know what they could expect.

Suggestion: EOC should provide a timeline to issue the above Codes of Practice to the public, and the Government should commit adequate resources for EOC to work on these codes.

3.3 Public education on RDO and the Code

The Code could not serve the purpose of promoting racial equality and harmony (s63 (1) of RDO) if its main user, i.e., ethnic minorities, do not aware about its existence or understand its content.

Suggestion: We urge EOC to educate ethnic minorities the scope of protection provided by RDO and the Code. It should adopt a positive attitude and help ethnic minority communities to affirm their rights.

3.4 Setting up of District Offices in Kowloon and New Territories

Currently the EOC office is situated at Tai Koo Shing, which is far away for ethnic minority residents living at Kowloon and Territories. As ethnic minorities are mostly come from low income families, high transportation cost would certainly serve as a barrier for those who want to seek help from EOC.

Suggestion: To satisfy service needs of local communities, we urge the Government to provide funding to EOC so that the latter could set up district offices in central Kowloon, such as Jordan or Tsim Sha Tsui.



Common known situations in relation to racial discrimination in workplaces

Situation 1

A fast-food restaurant forbids its Pakistani male employee from keeping his bread, claiming for the reason of hygiene. According to an overseas case precedent, the employer is discriminatory as his concern could be met by alternative arrangements, such as asking the employee to cover his bread with a mouth mask or handkerchief during the time he works.

Situation 2

A company forbids its Indian employee from bringing curry lunch box to the office, claiming that it would bring a bad smell to the premises or the air-conditioner system.

Situation 3

A Bangladeshi employee with Islamic faith is mocked by his co-workers as he practices his religious rituals (prays facing Mecca) during lunch break.

Situation 4

An employer insists that her Indonesian domestic helper must eat pork, despite she is a Muslim.

Situation 5

A construction site does not allow its Pakistan workers wearing long gown, for the sake of industrial safety. Similar situations have been found in other types of offices, where wearing long gown is considered as affecting corporate image or incompatible with corporate culture.

Situation 6

An Indian worker practicing Sikh religion is fired because he refuses to wear safety helmet in the construction site.





Situation 7

A domestic helper is named “Bun Mui” by her employer or an Indian worker is named “Ah Cha” by his colleagues.

Situation 8 (Hostile Racial Harassment)

During a lunch gathering, a Chinese worker has deliberately put a piece of pork to the lunch box of his Pakistan colleague, who is practicing Islamic faith. There are also cases where Chinese workers have taken advantage of ignorance of Pakistan colleagues on Chinese food, and misled them to eat something that is made of pork or other parts of pig.

Situation 9 (Hostile Racial Harassment)

A Pakistan employee is chanted or branded as “terrorist” by his colleague. Another situation is photos of pigs are deliberately shown to him, or posted in his surroundings.