

**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><b>"The Draft Code only serves as an explanation of the law, not as promoting equality"</b></i></p> <p><i><b>"consider re-writing the respective paragraph to positively reflect the legal status of the Code"</b></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>

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	<p>complied with the law.</p>
<p><b>2 <u>Meaning of Race</u></b></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 <u>Details on good practice and promotion of race</u></b></p>	<p>3.1 Chapter 5 of the Code now provides more detailed recommendations on</p>

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<p><b><u>equality</u></b></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><b><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></b></p> <p><b><i>“The draft code does not aim to promote positive action”</i></b></p> <p><b><i>“should include samples on equal opportunities policy</i></b></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>

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<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>

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	<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><b>4 <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>

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<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><b><i>“employers are not under any obligation to “promote” racial equality or to monitor compliance [with the RDO]”</i></b></p> <p><b><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></b></p> <p><b><i>“It may also be unlawful... to collect race related information given the requirements of [personal data legislation]”</i></b></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>

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	<p>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><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><b><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></b></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>

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<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>



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<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>

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<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>

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<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>

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<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>

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<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>

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<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>

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	<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>

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<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>



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<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>

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	racial equality; formal investigation; and reviewing legislation.