

**Minutes of the Seventy-eighth (Special) Meeting of
The Equal Opportunities Commission
held on 21 April 2009 (Tuesday) at 10:00 a.m. in the
Equal Opportunities Commission's Conference/Training Room**

Present

Mr. Raymond TANG Yee-bong	Chairperson
Ms CHAN Man-ki, Maggie	
Prof. Randy CHIU	
Ms CHOI Wai-kam, Virginia	
Mrs. CHONG WONG Chor-sar, M.H., J.P.	
Dr. LAW Koon-chui, Agnes, J.P.	
Mr. LEE Luen-fai	
Mr. Saeed UDDIN, M.H.	
Mr. YIP Kin-man, Raymond	
Mr. Michael CHAN Yick-man	Secretary [Director, Planning & Administration]

Absent with apologies

Ms CHAN Ka-mun, Carmen, J.P.
Dr. CHENG Kwok-kit, Edwin
Mrs. KOO CHEUNG Man-kok, Christine
Miss LAM Kam-yi
Mr. LIU Luk-por, Desmond
Dr. LO Wing-lok, J.P.
Ms TAM Heung-man, Mandy
Ms WONG Fung-yee, Margaret

In attendance

Mr. Joseph LI Siu-kwai	Director, Operations [D(Ops)]
Mr. Herman POON Lik-hang	Chief Legal Counsel [CLC]
Dr. Ferrick CHU	Head, Policy and Research [HPR]
Ms Shana WONG	Head, Corporate Communications and Training [HCCT]
Miss Gloria YU	Senior Equal Opportunities Officer, Administration & Personnel [SAP]

I. Introduction

1. The Chairperson (C/EOC) welcomed and thanked all Commission Members (Members) to the 78th Meeting which was a Special Meeting convened to discuss the progress on Code of Practice on Employment under the Race Discrimination Ordinance.

2. Apologies for absence were received from Ms CHAN Ka-mun, Carmen, J.P., Dr Edwin CHENG, Mrs. KOO CHEUNG Man-kok, Christine, Miss LAM Kam-yi, Mr. LIU Luk-por, Desmond, Dr LO Wing-lok, Ms TAM Heung-man, Mandy and Ms Margaret WONG due to clash of meetings/out of town/other business engagements.

II. Code of Practice on Employment under the Race Discrimination Ordinance

(EOC Paper No. 8/2009, Agenda Item No. 1)

3. C/EOC informed that EOC Paper No. 8/2009 was to update Members on the progress on issuing the Code of Practice on Employment (Code) under the Race Discrimination Ordinance Cap. 602 (RDO) and to seek Members' approval on the current draft of the Code

at Annex I before publishing it in the gazette and submitting it to the Legislative Council. He said that a total of 88 written submissions were received during the public consultation ending on 19 January 2009. A list of the organizations and individuals making written submissions was at Annex II and a list of the public consultation meetings and briefing sessions was at Annex III. He added that up to the end of the public consultation period, i.e. 19 January 2009, a total of 55 briefing and consultation sessions were held. After the end of the public consultation, briefing sessions were continued and up to 31 March 2009, when the paper was drafted, the total number of sessions held increased to 79 and the total number of participants was more than 6000. He invited CLC to outline the contents of the EOC Paper and provide the latest update to Members.

4. CLC said that the current draft of the Code incorporated various views and inputs received during the public consultation period between 13 October 2008 and 19 January 2009 as well as comments by the Legislative Council's Constitutional Affairs Panel on 17 November 2008. Substantial revision had been made to the first draft of the Code. Wording and expressions in the first draft of the Code had been reviewed to emphasize the spirit of the RDO in promoting racial equality in the workplace. Illustrations and examples had been reviewed to facilitate a better understanding of the application of the RDO. He went on to explain the main difference between the current draft and the first draft, and the details contained in EOC Paper No. 8/2009.

5. On the way forward, CLC informed that in accordance with section 63 of the RDO, before the Code came into operation, it had to be published in the gazette and be laid before the Legislative Council.

Although there had been suggestions for having another round of public consultation, given that a further round of consultation would likely delay the implementation of the RDO, a further round of consultation was not planned. It was expected that the current Code would be published in the gazette in about the first week of May 2009.

6. C/EOC added that the current draft was revised with substantial emphasis placed and details included on how to enhance racial equality in the workplace. The current draft had generally reflected and taken into account the views expressed by stakeholders. Nevertheless, the Legislative Council would have 28 days to consider the Code after it had been submitted and introduce further refinements as appropriate.

7. In response to a question raised by a Member, CLC said that it was hoped that the summary of comments and responses received from the consultation exercise would be ready for publishing around the time when the Code was to be gazetted.

8. Another Member commented that as the EOC Paper did not list out which part of the Code had been revised in response to the views collected from the consultation, it would be difficult to track the changes accordingly. He asked about the major revisions made in accordance with the comments collected from the public consultation. CLC responded that one of the major views collected from the public consultation was that there had been too many examples provided on what was not regarded as an act done on the ground of race under the RDO, and might therefore be perceived as helping employers to avoid their legal responsibilities. In light of this, in the current draft, some previously included examples were deleted and replaced.

9. Another Member opined that the purpose of the Code was to promote racial equality and hence, both the employees and the employers were the target audiences. Listing examples of what were not constituted discrimination under the RDO should also be considered as one of the means to help readers/employers to understand and comply with the law.

10. C/EOC responded that without enforcement experience, it was difficult for the EOC to list all possible situations that could constitute discrimination or not under the RDO. What the EOC could do was to explain the principles with the aid of case laws of other jurisdictions, though their application would depend on the facts of the case.

11. In response to a question concerning “Language” stated in paragraph 5.3.12 (3) in the current draft of the Code raised by the same Member, CLC said that advice from a senior counsel on language requirement under the RDO was obtained and the advice given was that the requirement had to be considered on a case by case basis. Overseas case laws were also checked but only limited assistance could be obtained. In the absence of local case laws and without operational experience, as yet, it was difficult for the EOC to provide very definitive examples. However, in general, it was clear that language requirement in employment was legally acceptable if it was genuinely related to the job. On the other hand, for employees that were not proficient in the language of the workplace, their employers should at least demonstrate that efforts had been made to communicate with them and help them understand important information such as health and safety requirements and other matters relevant to their employment. The drafting of the relevant paragraph in the current draft of the Code had made reference to

similar codes overseas, such as the UK.

12. Another Member expressed her understanding on the difficulty to list out all scenarios of concern without enforcement experience; nevertheless, she hoped the EOC would set aside a corner at the EOC's website to continue provide updated information or advice to stakeholders concerned, in particular for the human resources practitioners so that they could help safeguard the interests of both the employers and the employees.

13. Concerning inclusion of good practices and measures to promote racial equality in the current draft of the Code, CLC added that there was a specific chapter, i.e. Chapter 5, detailing good employment procedures and practices conducive to racial equality. In addition, specific examples drawn from overseas case laws were inserted where applicable throughout the current draft of the Code with their respective sources quoted under the footnote to facilitate understanding.

14. In response to a question raised by a Member, CLC said the Code of Practice was not law, however, as provided under the RDO, it would be admissible in evidence and the court would take into account relevant parts of the Code in determining any question arising from proceedings under the RDO. If an employer had followed the Code's recommendations on taking reasonably practicable steps to prevent discrimination, it would help the employer to show that it had complied with the law. Nevertheless, not following any of those recommendations in the Code would not by itself constitute a violation of the law.

15. Another Member expressed that the public would like to know what views were submitted in the consultation exercise and what had not been adopted into the current draft of the Code and the rationale behind them. He suggested the EOC to publish the views collected and EOC's corresponding responses. He also raised a query on whether Jews and Sikhs should be considered as ethnic groups as stated in paragraph 2.1.4 (3) of the current draft. In response to the query, CLC said that the views in the paragraph were quoted from two decided cases as stated under footnote 16 of the draft.

16. On publishing details of the written submissions received and the respective responses, some other Members shared the same view that the submissions and the responses should be classified or organized in a way to facilitate understanding and released for public consumption. They viewed that this was also a way to increase the public's understanding on the RDO. CLC would endeavour to prepare a report on the consultation exercise summarizing the views and comments on the first draft and the revised draft with responses, as appropriate, and to have the report published as soon as possible.

17. A Member commented that the current draft of the Code was actually very idealistic, in particular Chapter 5. She was concerned that some SMEs might not be able to follow all the good practices recommended and employment opportunities of ethnic minority groups would be affected eventually. She suggested the office to get prepared as early as possible for answering enquiries from SMEs in particular when the RDO was implemented. D(Ops) would follow up with the suggestion.

18. Members endorsed EOC Paper No. 8/2009 and the current draft of the Code for publication in the gazette and laying before the Legislative Council.

III. Any Other Business

Value for Money Audit on EOC

19. C/EOC updated Members that the Value for Money Audit Report on EOC would be made available to EOC the following day at an hour before it was available for the public's consumption. He said that all Members' suggestions as discussed in the last Special Meeting held on 26 March 2009 were submitted to the Audit Commission for their consideration. In addition, a reply from the Audit Commission was provided to the EOC that all the suggestions were incorporated into the report. He thanked Members who had attended the last Special Meeting for their efforts and views regarding the report. A line-to-take in respect of the audit report would be provided to Members for reference.

Vote of Thanks to Members

20. As some Members' term of office would expire on 20 May 2009, C/EOC also took the opportunity to thank all Members for their guidance to himself as well as the office, and their support for EOC's work. He added that all outgoing Members would be alumni of the EOC and their continued support to the work of EOC would be enlisted.

21. There being no other business, the meeting was adjourned at 11:50am.

IV. Date of Next Meeting

22. The next meeting would be a regular meeting to be held on 18 June 2009 (Thursday) at 2:30pm.

Equal Opportunities Commission
May 2009