

Re: Draft Code of Practice on Employment under
the Race Discrimination Ordinance (Cap 602)

Submission of the Hong Kong Bar Association

1. The Equal Opportunities Commission (“EOC”) has invited the Hong Kong Bar Association (“HKBA”) to comment on its draft Code of Practice on Employment (“COP”) under the Race Discrimination Ordinance (Cap 602) (“RDO”).
2. The HKBA notes that the COP has not been drafted in the same format and manner as the codes of practice on employment the EOC has issued under the Sex Discrimination Ordinance (Cap 480), the Disability Discrimination Ordinance (Cap 487) and the Family Status Discrimination (Cap 527). The format of the codes of practice on employment under the other anti-discrimination legislations appears to be geared towards giving employers and employees practical advice on eliminating discrimination in the workplace, thus doing more than informing them of the terms of the legislation. Having considered the COP, the HKBA regrets that it 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 in eliminating racial discrimination in the workplace.
3. Introduction (iv): The description of Section 5 of the COP as providing information on how employers may be “relieved of liability” is unfortunate. The HKBA suggests that a better description is to indicate that employers may be liable for the conduct of their employee(s) towards another employee and there are practicable steps that can be

reasonably taken to ensure that employees behave lawfully towards one another.

4. Paragraph 1.1.2: Good practices should be promoted between employers and employees and also among employees. Therefore, the first sentence may also incorporate as an intent of the COP the introduction and encouragement to employers and employees of good practices to promote racial harmony in the workplace.
5. Paragraph 1.2.3: Bearing in mind that section 63(14) of the RDO only states that the court would take into account a provision of the COP relevant to the question arising in the proceedings, the second sentence should advise that observance of the COP “may” reduce the chance of an adverse decision by the court against the employer. Cf the Code of Practice on Employment under the Disability Discrimination Ordinance (Cap 487) paragraph 4.5.
6. Paragraph 1.3.3: The third sentence can be better phrased with “may not embrace all the relevant facts”.
7. Paragraph 2.1.1: The expressions “European” and “Asian” are capable of denoting only the narrower concept of national or ethnic origin, or even geographical origin. In addition, if the intention of the illustration is to define the concept of “race”, then more needs to be stated than “different bodily features” and “different cultures and ways of life”. Such differences may fairly be applied to describe men and women.
8. Paragraph 2.1.4: The penultimate sentence probably needs redrafting. Groups of different national origins may be called “peoples”. They may retain after many generations their own identity as “nations”. Further it is questionable whether it is a necessary condition for a group of persons to have an “original nation state” in the political or sovereign sense before that group may be described as a “nation”,

bearing in mind that the concept of “nation state” arose as late as the 19th century.

9. Paragraph 2.1.4: Illustration 3 is poorly drafted as the Irish deserve to be described as a “people”.
10. Paragraph 2.2: The first sentence probably needs redrafting to clarify that indirect discrimination refers to “the disadvantage in treatment of persons of one of the specified matter following the equal application of a particular requirement or condition”. The second sentence should either be further clarified or simply deleted as it fails to indicate which of the specified matters is regarded by the EOC as “not generally regarded as race related” and which as “relate to policies which should be free from race discrimination challenges”. The failure to indicate the perceived rationale for exclusion in respect of each of the specified matters serves to mislead and confuse the reader, particularly when it is claimed that differences in treatment on the basis of one such specified matter “would not be racial discrimination” as opposed to “would not be racial discrimination under the [RDO]”. The EOC should consider encouraging employers to adopt good practices in their policies that eliminate use of any of the specified matters as a criterion for making choices or requirements or conditions in decision-making that may result in an unjustifiable disadvantage to persons of any of the specified matters.
11. Paragraph 2.2.1: A person cannot be a descendant from a village. He may descend from an inhabitant of a village. Further the description of “indigenous villages” and “established villages” as “these old villages” is inappropriate bearing in mind that some of them are in fact branched out villages and relocated villages that can trace an association with a village that was in existence in 1898.
12. Paragraph 2.2.4: Nationality, citizenship or resident status of other countries is a distinction that is likely to be abused to camouflage racial

discrimination. The EOC has recognized this in providing for Illustration 9. Therefore, in drafting the first paragraph and Illustration 8, it is desirable to emphasize that differential treatment on the ground of one of these specified matters is not racial discrimination “under the RDO”. It is also desirable to place equal emphasis on the fact that nationality, citizenship or resident status of some countries is largely synonymous with belonging to the same race or membership of a racial group denoted by common national origin.

13. Paragraph 3.5.4: Illustration 17 needs to be redrafted. “South Eastern Asian origin” is more likely a descriptive term of geographical association than national or ethnic origin. Further the notion is very uncertain and the usage adopted by the EOC (suggesting in Illustration 31 that a person with such origin would be called “Ah Cha”) is probably wrong. This error is particularly intriguing as the expression “Indian origin” is used elsewhere in the COP (for example, Illustration 48). A similar comment applies to other Illustrations using this expression. Further, the word “practicing” should be corrected to “practising”.
14. Paragraph 3.5.4: The HKBA suggests that an additional illustration be included relating to a lay client refusing to instruct a barrister because he or she is of a particular national or ethnic origin. This is because the HKBA is aware of at least one real case of this nature.
15. Paragraph 4.1.1: It is inappropriate to describe direct discrimination and indirect discrimination as “meanings” of discrimination. They may be “types” or “situations” of discrimination.
16. Paragraph 4.3.2: The Nazi regime was in power in Germany from 1933 and therefore before 1939, the time regarded by most historians as the outbreak of the Second World War in the European front. Further, as a matter of historical fact, the persecution of Jews by the Nazi regime began well before 1939.

17. Paragraph 4.5.2: Illustration 34 needs to be redrafted. Attempting to justify the Holocaust in itself is likely to constitute unlawful racial vilification.
18. Paragraph 5.4: Putting forward a statutory defence that reasonably practicable steps were taken to prevent employees from engaging in racially discriminatory act should not be described as a means to “escape liability”.
19. Paragraph 5.4.2: Similarly, having in place an equal opportunities policy that is integrated into training and supervisory systems should not be described as a way so that the employer “may have a better chance of defending a claim”.
20. Chapter 6: While it is always useful to indicate using plain language how the court decides a claim of racial discrimination, the true aim of the COP should be to recommend to employers the terms of the equal opportunities policy, the steps of the procedures and the contents of the practical measures they should adopt to promote racial harmony in the workplace.
21. Chapter 8: A comparison with codes of practice on employment issued under other anti-discrimination legislations in Hong Kong suggests that the recommended good practices under the COP are less extensive and probably less than comprehensive. The employee’s role in eliminating racial discrimination in the workplace has not been sufficiently highlighted. All these are regrettable given what the HKBA believes to be the true aim of the COP described above.
22. Paragraph 8.2.6: The suggestion that ability to use a specific language “is not directly or biologically connected to a person’s race characteristics (sic)” is controversial in that it belies a particular view on the statutorily undefined notion of “race”. The HKBA suggests that

the EOC should not bring itself probably inadvertently into the middle of such a controversy. It is more beneficial to give sound advice of good practices to promote racial harmony by indicating the relevance (if any) the ability of a job applicant or employee can speak a particular language and the ability to speak that language fluently (including with or without an accent) to each and every aspect of employment.

23. Paragraph 8.2.8: The last sentence in sub-paragraph (i) is not necessary since its position in the COP indicates sufficiently that a good practice is being promoted.
24. Paragraph 9.3: It is necessary in light of the case of Sunny Tadjudin v Bank of America, National Association (unreported, 28 October 2008, HCA 322/2008), CFI to emphasize that the jurisdiction of the District Court under the RDO is exclusive. Commencing legal proceedings in the wrong court will not only lead to the striking out of the proceedings with adverse costs consequences but also waste valuable time that will be counted as part of the 2 year time limit for taking legal action.
25. Last but not least, the HKBA considers that it is desirable for the EOC to draft and publicize additional codes of practice under the RDO on housing and the provision of goods and services as soon as practicable.

Hong Kong Bar Association

8 January 2009