



## **The Law Society of Hong Kong Comments on the Draft Code of Practice on Employment**

1. The Law Society appreciates the efforts of the Equal Opportunities Commission in drafting the Code. This is a document which is going to be very important in explaining the implications and impact of the Race Discrimination Ordinance ("RDO").
2. We do not have any comments on the main body of the Code which broadly replicates the appropriate operative provisions of the RDO. However, we do have comments on the illustrative examples included within the Code.

### *Lack of certainty in illustrations*

3. We note the vast majority of the illustrations use the phrase "may" or "likely" when describing whether an act is lawful or not (indeed, out of 50 illustrations 35 of them use such words). Whilst recognising the fact the courts are the final arbiter of the law, we suggest the EOC should be able to make definitive statements as to their own opinion in relation to most illustrations, therefore a phrase "may be unlawful" could be changed to "would, in the opinion of the Commission, amount to a breach of the law". Such change in terminology would substantially improve the strength of many of the illustrations.

### *Link between less favourable treatment and race*

4. Many illustrations ignore the fact that direct discrimination only occurs when less favourable treatment occurs *on the grounds of race*. Such illustrations suggest that any less favourable treatment afforded to a person or group of a different race is likely to constitute unlawful discrimination, which is misleading.
5. For example, Illustration 1 states "*Discrimination by way of unequal remuneration between a European person and an Asian person, when their levels of performance are both the same, is likely to be unlawful racial discrimination.*" This could, we suggest, be redrafted to read "Should the [European person] and [Asian person] receive unequal remuneration due in any part to their different race then this will be unlawful discrimination". As an aside, see paragraph 11(a) concerning the phrases "Asian person" and "European person".

6. Certain illustrations include a reference to the people concerned being equally good performers, or the applicant being otherwise the best person or suitable for the job. Such emphasis is unnecessary and potentially misleading. It suggests the complainant may have to prove that he was otherwise suitable or the best person for the job (which is not the case).
7. Those illustrations which do refer to the requirement that the treatment be on the grounds of race do not emphasise clearly enough that an act may be discriminatory even if it is only partially on the grounds of race.

#### *Relationship with religions*

8. The references to Sikhism and Judaism in the illustrations might suggest that "race" includes religions. Whilst it is established law in other jurisdictions that certain religious groups also amount to ethnic groups we would suggest that an alternative example describing a religious group which does *not* amount to an ethnic group (e.g. Catholics or Muslims) be included to illustrate the relationship between the RDO and religions.

#### *The expatriate exemptions*

9. The Code provides no illustrative assistance in relation to the expatriate exception or the grandfathering provision (paragraphs 7.3 and 7.4). These are provisions which are unique for Hong Kong and so it is precisely such type of provision where the view of the EOC would be most useful to employers. Key points where guidance would be useful are:-
  - (a) what steps should be taken by an employer to demonstrate that the relevant "skills, knowledge or experience" is not readily available in Hong Kong?
  - (b) what "circumstances" will be taken into account in determining the reasonableness of the benefits?
  - (c) an explanation of "overseas terms" and "local terms".

#### *Mainland Chinese*

10. Given the publicity this issue has received we would recommend an example in paragraph 2.2.4 dealing with less favourable treatment towards persons from Mainland China, perhaps referring also to the different ethnic groups in the Mainland.

### *Specific illustrations*

11. We have certain comments on specific illustrations as follows:-
  - (a) Illustration 1 - an "Asian person" can be of the same race as a "European person". (For example a person of Chinese extraction born and brought up in Paris is clearly "European", but has Asian features and therefore will also be "Asian").
  - (b) Illustration 8 - the recruitment policy of the "company" is unclear. The illustration should read "A company having business in the United States of America chooses to employ a person of American *nationality because of that person's nationality ...*"
  - (c) Illustration 24 - this is of little use because it does not provide any practical guidance to employers. An employer rarely gives any reason for refusing a job applicant. In practice, a job applicant rarely discloses his or her race in the curriculum vitae. A more practical example could be: whether it is unlawful to have a blank for "race" in a pre-printed job application form.
  - (d) Illustration 26 - Similar to Illustration 24. Employers rarely explain why they refuse to make offers.
  - (e) Illustration 47 - the conclusion should read "this may not apply to a clerical staff doing purely administrative work for the organiser unless the employer can otherwise justify the need for a Thai person to be employed in such position."
  - (f) Illustration 51 - this is unclear. It is certainly justifiable to require a cashier to have *some* level of Chinese! We suggest the comments be expanded.

### *Cost awards*

12. You may wish to consider explaining the rarity of cost awards in court actions involving discrimination claims.

### *Additional illustrations*

13. We would like to see some additional illustrations covering the following aspects of the RDO which are less than clear:
  - (a) Paragraph 4.2.2 - this is an important and risky area for employers. We suggest you provide additional illustrations (e.g. recruitment on Saturdays and Judaism).

- (b) Paragraph 4.3.1 - this is an area in which we anticipate substantial complaints. We suggest you provide additional illustrations.
- (c) Paragraph 4.3.2 - A hostile environment is usually created by more than one person. Whether an employee would be liable for the offence by turning a blind eye to the hostile environment created is unclear. We suggest you provide additional illustrations on whether there is a liability for inactive participation in hostile environment harassment and on the degree of participation which would amount to an offence.
- (d) Paragraph 5.4.1, 5.4.2 and 8.1 - we suggest including a pro forma policy as an attachment to the Code.
- (e) Paragraph 6.1.5 - An illustration would assist in explaining the burden of proof.
- (f) Paragraph 6.2 - The steps an employer needs to take to "justify" a condition or requirement are complex. It would assist if the illustration can be expanded on this point.
- (g) Paragraph 7.1 - each of the bullet points should have an illustration and the illustrations provided could be improved e.g. Illustration 49 is of little use because it is almost commonsense. What if a restaurant specializing in Russian cuisine insists on hiring a Russian chef? What about employees responsible for cleaning toilets hired to "create an authentic atmosphere"? What about other service sectors, e.g. bookstores specializing in Japanese books? Theoretically, a non-ethnic Japanese person who is fluent in Japanese should be qualified, but what about the situation where the employer wants to "create an authentic atmosphere"?
- (h) Paragraph 7.3 and 7.4 - see paragraph 9 above.
- (i) Paragraph 7.5 - insert one or more illustrations.
- (j) Paragraph 8.2.6 - language is likely to be an issue for many employers. We would suggest providing additional illustrations in this area.

*General point*

- 14. The Code should be reviewed on a regular basis as legislative provisions are clarified through case law (either in Hong Kong or overseas).

**The Law Society of Hong Kong**  
**Employment Law Committee**  
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