

Briefing on Hong Kong's Race Discrimination Bill
Prepared for the United Nations Committee on the Elimination of all Forms of Racial
Discrimination

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Overview

1. This paper provides information on the Race Discrimination Bill (RDB) currently under consideration in the Hong Kong Special Administrative Region. The RDB does not conform with Hong Kong's obligations under the Convention on the Elimination of all Forms of Racial Discrimination (the Convention) and fails to fully implement the 2001 recommendation of the Committee on the Elimination of all forms of Racial Discrimination (the Committee) which called on Hong Kong to:

review the existing unsatisfactory situation thoroughly and that appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent, or national or ethnic origin, as has been done with regard to discrimination on the grounds of gender and disability.

2. We appreciate the Committee's subsequent follow-up action taken in August 2007 and request that the Committee take further action to ensure that the RDB complies with the Convention.
3. After a decade of debate over the need for a specific race discrimination law, the Hong Kong SAR government issued a "Consultation Paper on Legislating against Racial Discrimination" in September 2004. The paper expressed a commitment to legislate and indicated that the new law would be modeled on Hong Kong's existing sex, disability and family status discrimination ordinances. In addition, the paper stated that the race discrimination law would aim to:
 - 3.1. prevent and combat racial discrimination; and
 - 3.2. fulfill Hong Kong's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination

4. More than two years later, in December 2006, the administration finally introduced draft legislation which, according to its long title, would “render discrimination, harassment and vilification, on the ground of race unlawful.” Since then, the Legislative Council Bills Committee which is tasked with scrutinizing the Race Discrimination Bill (RDB) has met approximately twenty times and is expected to continue its deliberations until June 2008.
5. In the course of its discussions, the Bills Committee, as well as academic experts, NGOs and others, have identified serious weaknesses in the RDB which undermine the objectives expressed in the original Consultation Paper. Although the bill has many shortcomings, four provisions have been singled out as particularly problematic including the bill’s:
 - 5.1. limited application to the government (clause 3)
 - 5.2. definition of discrimination, especially its broad justifiability test (clause 4)
 - 5.3. broad exceptions for distinctions based on nationality and immigration status and the bill’s apparent failure to address discrimination faced by mainland Chinese immigrants (clause 8) and
 - 5.4. a broad exemption for the use of or failure to use any language (clause 58)
6. Collectively, these provisions create a weak, ineffective, and counterproductive bill which threatens to sanction and entrench unjustifiable racial discrimination. The bill signals the government’s lack of commitment to the principle of equality and non-discrimination as well as its unwillingness to fulfill its international human rights obligations.
7. The RDB also departs from the Consultation Paper’s promise that the bill would be similar to existing anti-discrimination laws in Hong Kong. The RDB is in fact much weaker, and provides much less protection from discrimination, than legislation prohibiting sex, disability and family status discrimination. In this sense, the RDB is itself racially discriminatory and represents a significant step backward in the development of anti-discrimination law in Hong Kong. It also undermines the law’s educational function by sending a message that victims of racial discrimination deserve less protection than those facing other forms of discrimination. There have been recent incidents in which personnel in the Hospital Authority, Legal Aid Department, Labour Department and even government schools have cited the Bill’s exemption clauses as an excuse for denying interpretation and translation services which they had previously provided before the Bill was published.

8. Despite these problems, the government has not indicated that it would support significant amendments to the bill. Only recently, and only after members of the Bills Committee questioned the need to resume meeting if the government continued to resist changes to the bill, a senior official wrote to the Bills Committee suggesting that limited concessions may be possible. The letter did not indicate, however, whether the government will propose or support amendments that would strengthen the bill and ensure compliance with the Convention. Under Hong Kong's constitutional system, the government may freely propose amendments to bills tabled in the Legislative Council but individual Council members require the consent of the Chief Executive before proposing amendments if the bill would have an effect on public revenue.¹
9. We understand that the government has failed to provide information on the RDB as requested in August 2007 by the Committee and has instead indicated that it will discuss the bill in its next periodic report without specifying when that report will be submitted. Since the bill will lapse unless it is enacted before the end of July this year, it is essential that meaningful amendments to the RDB are drafted and adopted before the Committee's next session in late July 2008. We therefore ask the Committee to take further action in its current session to assess the compatibility of the Bill to the Convention and to urge the Hong Kong SAR government to amend the bill to ensure compliance with the Convention and the Committee's recommendation.
10. In particular we request that the Committee urge the Hong Kong SAR government to ensure that the RDB would not allow unreasonable, unjustifiable discrimination and provide at least the same level of protection that is currently provided against sex, disability and family status discrimination:
- The RDB should apply to public bodies as well as private actors.
 - The definition of discrimination should not allow unjustifiable discrimination, and the extra "reasonably practicable" test should be removed.
 - Broad exceptions, such as those found in clauses 8 and 58 as well as elsewhere in the bill, should be deleted or narrowly tailored to ensure that the discrimination they exempt is justifiable according to established standards.

¹ The RDB would have an effect of public revenue since the Equal Opportunities Commission, a publicly funded body, would have jurisdiction to consider complaints of race discrimination under a new race discrimination law.

Key areas of concern

Clause 3 - Application to the government

11. Clause 3 of the bill states that the “ordinance applies to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person.” This formulation differs from all three existing anti-discrimination laws in Hong Kong which expressly bind the government and contain provisions clarifying the full extent of the government’s liability.
12. Although the administration claims that the 1991 Bill of Rights Ordinance (BORO)² already covers acts of discrimination by public bodies, the BORO has proven ineffective in providing remedies for racial discrimination by government actors and is therefore inadequate to fulfill the requirements of Article 6 of the Convention.
13. The Equal Opportunities Commission (EOC), which was established by the Sex Discrimination Ordinance in the mid-1990s, has jurisdiction over Hong Kong’s three specific anti-discrimination laws but not over the non-discrimination provisions in the BORO. The EOC has played a crucial role in uncovering, challenging and ensuring effective remedies for discriminatory government policies. For example, although the BORO came into effect in 1991, sex discrimination in Hong Kong’s public school allocation system (which occurred for nearly two decades), only came to light when the EOC first exercised its power of investigation in the late 1990s.
14. Questions also remain about the extent to which the Bill of Rights applies to discriminatory acts committed by individual government officials as well as the availability of monetary remedies for individual claimants. These issues have not been fully tested by Hong Kong courts. On the other hand, the EOC’s powers and the remedies which would be available under the RDB are clearly defined and have been applied under the other anti-discrimination laws for more than ten years.

² The BORO largely copies the provisions of the International Covenant on Civil and Political Rights, including its equality guarantees.

15. The Committee has underscored the importance of preventing racial discrimination in the administration and functioning of the criminal justice system in its General Recommendation XXXI. If clause 3 remains, however, the new race law would allow, and certainly would not effectively prevent, such discrimination in Hong Kong.

Clause 4 - Definition of discrimination

16. Clause 4(1) defines direct and indirect discrimination based on Hong Kong's existing anti-discrimination laws (originally copied from the UK's Sex Discrimination Act (1975) and Race Relations Act (1976). The UK Acts have since been amended to address the definition's weaknesses and to comply with European law).
17. Direct discrimination occurs when, on the ground of the race of a person, the discriminator treats that person less favourably than the discriminator treats or would treat other persons (clause 4(1)(a)).
18. Indirect discrimination occurs when "the discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but –
 - 18.1. which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;
 - 18.2. which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and
 - 18.3. which is to the detriment of the other person because that person cannot comply with it."
19. Despite this definition's limits (as evidenced by more than 2 decades of experience in the UK) the Hong Kong government insists on adhering to an outdated provision which has not effectively achieved racial equality in another jurisdiction. The government's unwillingness to consider recent trends to reform and strengthen anti-discrimination laws in other countries is symptomatic of their generally regressive approach to the RDB.

20. Of even greater concern, however, is the additional language in clause 4(2)(b) which has been added to the definition of indirect discrimination and does not exist in Hong Kong's other anti-discrimination laws. This provision states that "it is justifiable if it is not *reasonably practicable* for the person who allegedly discriminates against another person not to apply the requirement or condition."
21. Clauses 4(3)-4(5) further elaborate on the factors which can be taken into account when determining "reasonable practicability" and seem to allow for a much broader test for justifiability which does not exist in Hong Kong's other equality laws (or to the best of our knowledge, any equality laws from elsewhere). This new test would essentially make it difficult to prove, yet relatively easy to justify, indirect discrimination. The ability of indirect discrimination provisions to remove barriers to equal opportunities is highly dependent on the nature of the justifiability test and the extent to which equality is valued over other interests.
22. This extra language could allow unjustifiable, unreasonable indirect racial discrimination which would normally be caught by the narrower, well-established tests in domestic and international human rights law.
23. The RDB's definition of discrimination, therefore, does not comply with the Convention's obligation to prohibit discriminatory effects. The Committee has clarified that the definition of discrimination in Article 1 includes indirect discrimination (disparate impact). Its General Recommendation XIV states that "a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms" and "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."

Clause 8

24. Clause 8, subsections (2) and (3) could also have the effect of allowing unjustifiable racial discrimination through its broad exemptions for categories based on nationality, citizenship, immigration and residency status, etc.

25. Clause 8(2) provides that “an act done on the ground of any matter specified in subsection (3) does not constitute an act done on the ground of race, colour, descent or national or ethnic origin; and section 4(1)(b) [the definition of indirect discrimination] does not apply to a requirement or condition as to any matter specified in subsection (3).”
26. The matters specified in subsection (3) include the fact that a person is or is not: an indigenous inhabitant of the New Territories; a Hong Kong permanent resident; subject to any restriction or condition of stay imposed under the Immigration Ordinance; and whether a person has or has not been granted permission to land or remain in Hong Kong under the Immigration Ordinance. Additional matters include a person’s length of residence in Hong Kong, or his/her nationality, citizenship or resident status under the law of any country or place concerning nationality, citizenship, resident status or naturalization.
27. Not only does clause 8 exclude claims of direct racial discrimination on the basis of nationality, it would not even allow challenges based on *indirect* discrimination. This provides a significant loophole which could allow discriminators to avoid liability by referring to nationality rather than one of the prohibited grounds included in the Convention, such as national origin. For example, a policy by a hotel or an airline which charges Japanese passport holders more money for rooms or tickets would apparently be lawful.
28. Clause 8 also seems to be an attempt to ensure that mainland Chinese immigrants cannot make claims of discrimination based on their immigrant status under the RDB. Reports of discrimination and negative stereotypes against mainland Chinese immigrants based on the fact that they come from the mainland have been well-documented. The discrimination they face is, in many ways, analogous to discrimination faced by immigrants coming from other countries (who would likely fall within the ground of “national origin”). Immigrants from mainland China, as a group, deserve as much protection from discrimination as immigrants coming from elsewhere. The government’s interpretation of “race”, as limited by clause 8, and statements that mainland Chinese immigrants come from the same “racial stock” as the Chinese majority in Hong Kong and should therefore be excluded from the RDB on “principle”, obscure the real problems facing this vulnerable group. This approach reinforces the impression that the government does not intend to address the most serious problems of discrimination facing minority communities in Hong Kong.

29. Clause 8 does not conform to the Committee's General Recommendation XXX on Discrimination against Non-citizens.

Clause 58 - language exemption

30. Language barriers can, in some circumstances, have a negative, disproportionate impact on certain racial groups and could potentially violate Convention obligations. Clause 58 of the RDB, however, provides a broad exception for "the use of or the failure to use any language" in educational establishments, vocational training, employment agencies, the provision of goods, facilities and services and a number of other areas falling within the scope of the bill. The clause clarifies that the "use of, or failure to use, a language includes a reference to the provision of, or failure to provide, a translation, interpretation or transcription into the language."
31. This exemption therefore excludes language policy from consideration as a form of indirect discrimination in a number of circumstances and threatens to allow discrimination which may otherwise fail established justifiability tests. It is also unnecessary in light of the possibility to justify indirect discrimination in clause 4(1)(b)(ii) of the bill.
32. Anecdotal evidence suggests that this provision is already having a counterproductive effect and could undermine efforts to better integrate minority communities into Hong Kong society and secure their basic human rights, such as the rights to health and education. For example, some authorities have reportedly referred to clause 58 to support contentions that they do not need to provide interpretation services in hospitals or extra language instruction for non-Chinese speaking students in Chinese medium schools.

Conclusion

33. The bill's weaknesses are not confined to the four clauses described above, but these exemplify the drafter's generally defensive, negative approach to implementing Hong Kong's international obligations to prohibit racial discrimination. The long delay in tabling the RDB (even after the commitment to legislate in 2004) resulted from concerns within government bureaux and departments that the new law may impact certain policies. It appears, however, that instead of reviewing and modifying potentially discriminatory policies to ensure compliance with a race discrimination ordinance, some government departments have lobbied for far-reaching exemptions which would effectively shield them from scrutiny.
34. It is necessary to amend the bill in order to ensure compliance with the Convention. In its recent letter to the Legislative Council Bills Committee, the Hong Kong government indicated that it may consider changes to clauses 3 and 4 – without specifying whether or what sort of amendments would be proposed - but maintains its position to preserve clauses 8 and 58.
35. We request that the Committee publish an assessment of the Bill's compliance with the Convention and urge the Hong Kong government to propose amendments to all provisions in the bill which could perpetuate racial discrimination and undermine the object and purpose of the Convention.