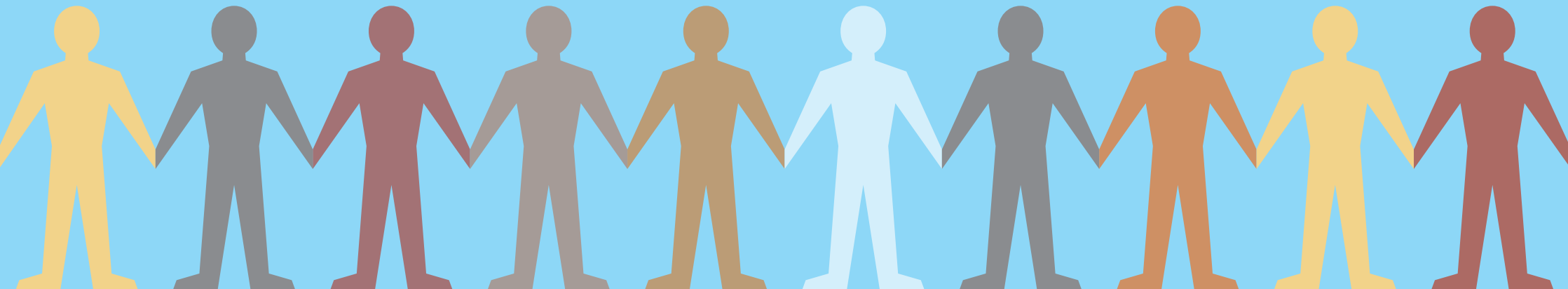


Joining Hands for Social Harmony

with **R**espect, **A**ffection, **C**are & **E**quality

An Introduction to
the Race Discrimination Bill



Introduction

The Government is committed to maintaining a fair and harmonious society in Hong Kong. The Basic Law and the Hong Kong Bill of Rights Ordinance safeguard the rights of individuals, including the right against racial discrimination. We also have obligation, under the International Convention on the Elimination of All Forms of Racial Discrimination, to prohibit and to eliminate racial discrimination.

Against this background, the Secretary for Home Affairs will introduce the Race Discrimination Bill into the Legislative Council on 13 December 2006. This Bill has been modelled, in large part, on the existing anti-discrimination legislations in Hong Kong, viz the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. We have also taken into account the views collected from the public consultation exercise conducted in September 2004 to February 2005. To facilitate public understanding, this booklet outlines the key features of the Bill and the principal considerations behind the proposals. It also provides, in simplified and ordinary layman language, answers to some likely questions which might be raised regarding the Bill.

This booklet is **not** a legal document. It serves only as a brief introduction of the proposed legislation which is subject to scrutiny and changes by the Legislative Council. The full text of the Race Discrimination Bill and the Legislative Council Brief on the Bill are available for download at the Home Affairs Bureau's website at www.hab.gov.hk.

The Government of the Hong Kong Special Administrative Region
Home Affairs Bureau (before 1.7.2007)
Constitutional and Mainland Affairs Bureau (since 1.7.2007)

Main purpose

The Bill seeks to –

- make discrimination, harassment and vilification on the ground of race unlawful;
- prohibit serious vilification of persons on the ground of race; and
- extend the duties and responsibilities of the Equal Opportunities Commission to cover racial discrimination.

Our objective is to ensure that people, especially the vulnerable, are protected against racial discrimination, whether by other persons or by organisations. We aim at a scheme of protection and safeguards which balances the rights and freedoms of the different parties involved and at a piece of legislation which is reasonable in its justifications, practicable in implementation and acceptable to the people affected.

What is racial discrimination ?

In broad terms, racial discrimination occurs when, because of the race of the other person, one treats another person less favourably than he or she would treat others. Racial discrimination may take the form of direct or indirect discrimination. It also includes discrimination on the basis of the race of a near relative, discrimination by way of victimisation, racial harassment and racial vilification. We propose to make these conduct in prescribed circumstances unlawful. The details are further explained in the following paragraphs.

Definition of “race”

In line with the definition adopted under the International Convention on the Elimination of All Forms of Racial Discrimination, “race” is defined in the Bill as meaning the race, colour, descent or national or ethnic origin of a person. Other grounds, such as nationality, citizenship, resident status, length of stay or indigenous villager status of a person are **not** grounds of race under the Bill.

Language is not a ground of race. The Bill therefore imposes no obligation on any person to use any particular language in communication with others. However, there might be situations when the application of a language proficiency requirement could be regarded as indirect racial discrimination. *(See explanation and examples under “Indirect racial discrimination” below.)*

Direct racial discrimination

This occurs when a person treats another person **less favourably** than he or she would treat others of a different race in similar circumstances. An example of this is when a shopkeeper turns away a customer because the customer is non-Chinese, or when an employer rejects an application for job because, despite his eligibility, the applicant is a member of an ethnic minority.

Indirect racial discrimination

This is a less obvious form of discrimination. It occurs when a person imposes a requirement or condition which, although applicable to all and on the face of it has nothing to do with race, will put people of a racial group at a particular **disadvantage** because they cannot or are less likely to be able to meet it, and that the requirement or condition imposed cannot be shown to be justifiable by reasons not related to race. An example of this is where a company for no good reasons stipulates that no employees may wear a headgear, or when a company requires applicants for a cleaner job to pass a test in written Chinese when all that the job requires is the ability to understand simple oral instructions in Cantonese. In the former example, it would exclude Sikh men who wear a turban in accordance with their ethnic practice from employment with the company. In the latter, the requirement is unjustified and potential applicants of non-Chinese origin will also find it difficult to qualify.

Whether a requirement or condition is justifiable will be measured by two alternative tests. Following internationally accepted principles of rationality and proportionality, the first test is whether it serves a legitimate purpose and whether the requirement or condition bears a rational and proportionate relationship with the legitimate objective sought (ie it is not excessive). The second test is whether it is not reasonably practicable not to apply the requirement or condition.

Discrimination on the basis of the race of a near relative

The Bill not only protects people from being discriminated because of their own racial origin, but it also protects them from being discriminated on account of the race of his or her near relatives.

In the Bill, a “near relative” is defined as the wife or husband, a parent or a child, a grandparent or a grandchild, or a brother or sister of a person. Thus, as example, a person should not be denied admission to a business partnership because his wife is of a particular race, whether Chinese or otherwise.

Discrimination by way of victimisation

This occurs when a person is being treated less favourably because he or she has filed, or intends to file, race discrimination complaints and proceedings against another person. The Bill also protects those who give evidence or information in such complaints and proceedings.

Racial harassment

This occurs when a person, on account of another person's race or the race of that other person's near relative, acts in such a way that can reasonably be expected to offend, humiliate or intimidate the other person. Such unwelcome conduct may include any oral or written statement in racially offensive language.

It also applies to cases when a person acts in such a way as to make the environment of work, study or training hostile or intimidating for another person, again on the grounds of the latter's race or the race of his or her near relative. The Bill makes such conduct unlawful in order to ensure that all people, irrespective of their race, can work and study in a harmonious environment.

Racial vilification

This occurs when a person publicly incites hatred towards, serious contempt for, or severe ridicule of, another person on the ground of the person's racial or ethnic background. Under the Bill, this could give rise to a civil claim. At a more serious level, the Bill prohibits racist incitement which threatens physical harm to persons or property or premises of persons and makes serious vilification a criminal offence.

Application of the Bill

The Bill applies to the following specified areas of activities in both the public and private sectors :

- (a) employment;
- (b) education;
- (c) provision of goods, facilities, services and premises;
- (d) election and appointment to public bodies;
- (e) pupillage and tenancy by, and instructions to, barristers; and
- (f) membership of and access to clubs.

■ *Why should the Bill be restricted in its application to the specified areas ?*

□ While we seek to protect the rights of the individual against racial discrimination, we need also to respect the legitimate rights and freedoms of other people. It would not be right or reasonable for the law to demand equal treatment on the ground of race in every aspect of life including, for example, whom a person may want as friends or which restaurants he or she may patronise. The proposed coverage of the Bill is consistent with international practice and with the approach in other existing anti-discrimination ordinances in Hong Kong.

- *Given the variety of circumstances which may or may not constitute racial discrimination, will the passage of the Bill give rise to more accusations of racial discrimination and litigations? How can one be assured of not being inadvertently caught by the law for actions which have nothing to do with racial discrimination?*
- Based on the experience of the other three pieces of anti-discrimination ordinances, ie the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance, we believe that most of the complaints or allegations could be resolved through explanation and mediation. To avoid unnecessary litigations, the Bill has been drafted with special care to ensure both effectiveness and clarity. With that in mind, a number of exception clauses have been included in the Bill specifically for the avoidance of doubts. Moreover, to facilitate compliance, the Equal Opportunities Commission will, in consultation with the professions and parties concerned, draw up codes of practice which will provide guidance for people involved in each of the areas of activities covered by the Bill before the relevant legislative provisions are brought into effect.

Employment

Under the Bill, it is unlawful for employers to discriminate, on the ground of race, between job applicants or between employees in offers of employment, the terms of employment, promotion, transfer, training and dismissal.

Similar restrictions are proposed in the Bill against racial discrimination in employment related matters, including engagement of contract workers and commission agents, partnership arrangements, membership of trade unions or professional or trade organisations, conferment of job-related qualifications, as well as in provision of vocational training and employment agency services.

- *It is not unusual for companies to employ overseas staff on overseas terms which are more favourable than those offered to, for example, local Chinese. Will these be made unlawful under the Bill ?*
- Overseas terms offered to overseas recruits are permitted so long as the differential treatment is justified on grounds unrelated to race. We recognise that such overseas terms are normally conceived on human resources policy grounds in order to attract employees who possess special skills and experience which are not readily available in Hong Kong. Thus, for clarity of the law, an exception is included in the Bill for such arrangements. Existing employments made on overseas terms are also protected under a grandfathering clause.

■ *Does the Bill apply to all employees and workers ?*

- The Bill applies equally to all employees, irrespective of race and irrespective of whether they are on permanent employment, or are part-time or casual workers. It also covers persons engaged on commission and under outsourcing arrangements. Exception is, however, allowed in cases where the race of the employee is a genuine occupational qualification for the job (such as for authenticity in a dramatic production or for effective provision of personal services to members of a particular racial group). To minimise disruptions and hardship, small businesses employing not more than five employees are exempt during the first three years of the enactment of the Bill. Employers also have freedom to choose a domestic helper by reference to race but, once employed, the domestic helper is protected against racial discrimination in the same way as other persons. The Bill also does not affect employment for an organised religion, where the employment is limited to a particular racial group in compliance with its religious doctrines or to avoid offending the religious susceptibilities common to its followers.

■ *Given the large number of ethnic minority persons working in Hong Kong as domestic helpers, how does the Bill protect them against racial discrimination although they are not permanent residents of Hong Kong ?*

□ The Bill protects all persons in Hong Kong against racial discrimination, irrespective of their race or resident status. Hence, it also protects domestic workers in much the same way as it does for other persons working or living in Hong Kong, with only one exception which relates strictly to the choice of the employer at the point of recruitment. Given the nature of domestic work, we recognise the right of the employers to determine whom they may admit to their homes and to live with them. The Bill therefore proposes that employers may have the freedom to choose a domestic helper even if that choice were made, among other criteria, by reference to race. That said, it should be highlighted that, once appointed, a domestic helper will enjoy the same protection against racial discrimination as any other person in Hong Kong, not only in the specific area of employment but also in all the other areas of activities prescribed in the Bill.

■ *Partnerships are, strictly speaking, not a form of employment. How does the Bill apply to such relationships ?*

□ A firm is liable to acts of racial discrimination against its partners or prospective partners. In some professions and companies, persons appointed to senior managerial positions are offered partnerships in the company and not, for example, promoted as senior paid staff. The Bill makes it unlawful to discriminate on the ground of race both in relation to admission of a partner and in the treatment of existing partners. It applies to all partnership firms consisting of not less than six partners.

■ *How are trade unions and workers associations affected ?*

- Trade unions and workers associations should treat all members (and persons seeking membership) equally irrespective of their race. This principle applies to both the terms of membership and, for members, access to benefits (except for existing provision made regarding retirement or death of its members), facilities and services of the union or association. The relevant provisions of the Bill, however, do not apply to those which are established specifically for the benefits of a particular racial group which is not defined by reference to the colour of its members and were established before the enactment of the new legislation.

■ *How are employment agencies affected ?*

- Employment agencies should provide the same access and quality of service to all its clients, irrespective of race. In particular cases where the Bill permits differential treatment, eg as in the employer's choice of a domestic helper of a particular racial group, or in jobs where the race of the employee is a genuine occupational qualification, an employment agency may confine its services to applicants who meets the relevant race criterion.

■ *What is a "genuine occupational qualification" based on race ?*

- A genuine occupational qualification refers to a job specification which restricts the holder to persons of a particular race or races, either for reasons of authenticity (eg in a dramatic/artistic production) or for effective provision of personal services targetted at clients/customers of the racial group concerned (eg in circumstances where familiarity with the language, culture and customs is required). As in existing anti-discrimination ordinances, employers may choose the employees for such jobs based on the genuine occupational qualification (which in the present case concerns the applicant's race).

- *How will the Bill affect employment relating to religion ?*
- We respect the freedom of religion. Hence, specific exception to the Bill is provided for employment, authorisation and qualifications for the purpose of an organised religion. This may be especially necessary for religions of which the majority of followers belong to one or more racial groups.

Education

The Bill proposes to make it unlawful for an educational establishment (a school, institute or university) to discriminate on the ground of race in respect of admissions or the treatment of students.

It is not mandatory, however, for the educational establishment concerned to have to modify its arrangements or make special arrangements regarding holidays or medium of instruction for persons of any race.

- *If schools are not required to make special arrangements on medium of instruction for ethnic minority children, would it not erode the children's opportunity and access to education and thus constitute racial discrimination ?*
- Government firmly upholds the right of children in education, irrespective of their race or ethnic origin. Thus all children in Hong Kong have the right of nine years of free and universal basic education. What the provision in the Bill means is that parents, for example, cannot demand the school which their children attend to teach or provide special classes in their own ethnic languages. In a case of the European Court of Human Rights, where the French-speaking residents in the Dutch-speaking part of Belgium wanted their children to be educated in French, it was held that the right to education does not include a right to be taught in the language of the parents, nor a right of access to a particular school.

- *Does this mean that a school may freely refuse admission of ethnic minority children ?*
- Certainly not. It is unlawful for an educational establishment to discriminate on the ground of race in respect of admissions or the treatment of students. In other words, where a child meets the qualifications required, he or she should be given equal opportunity for admission and, when admitted, should be given the same opportunities and benefits of education as other students in the same school.

Goods, facilities, services and premises

The Bill proposes to make it unlawful to discriminate either directly or indirectly in the provision of goods, facilities and services to the public, as well as in the disposal of premises and in the treatment of occupants.

“Facilities and services” include hotel accommodation; banking or insurance services; facilities for education; facilities for entertainment, recreation or refreshment; facilities for transport or travel; the services of any profession, trade or Government departments etc.

- *Does this mean that a restaurant has to provide its menu in all different languages in order to comply with the non-discrimination principles ?*
- No. Language is not a ground of race. Thus, in general, restaurant owners and operators would not be accused of racial discrimination if the menu in their restaurants are presented only in one language, eg Chinese. We appreciate the difficulties which are at times faced by some members of the ethnic minorities who do not use Chinese. On the other hand, we also recognise that it would not be reasonably practicable for service providers, either in the public or private sectors, to conduct their businesses in all languages, or to provide translations into different languages in their communication with clients/customers. We trust that service providers who target their service at specific ethnic groups will conduct their business in the appropriate language as is necessary and reasonably practicable.

■ *In renting out a flat, can a landlord stipulate that the premises would only be rented to tenants of a specified race or races ?*

□ That will depend on the circumstances. In recognition of people's freedom of choice to determine who may enter or live in their homes, the Bill contains a "small dwelling" exception, in line with the existing anti-discrimination ordinances. This means a landlord may choose his tenant by reference to race if the landlord or his near relative lives in the flat and will have to share facilities, such as the kitchen or washroom, with the tenant. This does not apply if neither the landlord nor his near relative lives in the flat concerned, or if the premises are normally rented to more than two households or to more than six persons in addition to the landlord's household or that of his near relative. In addition, if a landlord wishes to rent out premises that the landlord occupies without engaging any agent and without advertising, such letting by word-of-mouth is not covered by the Bill. The same principles and regulation apply to assignment and sub-letting of premises.

■ *Can a shopkeeper refuse to sell a dress to persons of a particular ethnic group because it would tarnish the company image if the clothes were found worn on these persons ?*

□ No. This is obvious racial discrimination.

■ *Will a voluntary body established with the main object of providing benefits to persons of a particular racial group be rendered unlawful by this Bill on the ground of racial discrimination ?*

□ No, the Bill is not intended to restrict or prohibit the activities of such voluntary organisations. There is specific provision in the Bill clarifying this policy intention and to safeguard the right to freedom of association by people.

Election and appointment to public bodies

The Bill makes it unlawful to discriminate on the ground of race against a person in determining his eligibility to vote in the elections of or to be elected or appointed to a public body, public authority or a public sector advisory and statutory body.

Specific provisions are made in the Basic Law on the eligibility for certain public offices. The Bill does not affect such eligibility criteria.

■ *What are these exempted public offices ?*

- These are specified in the Bill and are limited to the offices of the Chief Executive, Members of the Executive Council, Principal Officials, Members of the Legislative Council, President of the Legislative Council, the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court.

Discrimination by, or in relation to, barristers

The Bill makes it unlawful for a barrister or barrister's clerk to discriminate on the ground of race against a person seeking pupillage or tenancy, or who is a pupil or tenant, in barrister's chambers. It is also unlawful for any person to discriminate against a barrister on the ground of race in relation to the giving of instructions to the barrister and vice versa.

■ *Why are barristers singled out in this Bill ?*

- They are not being singled out. There is no dispute that the non-discrimination principles should apply in the giving or acceptance of instructions to a barrister or in the offer of pupillage or tenancy in barrister's chambers. But the various arrangements relating to the barristers' profession and practices may not strictly speaking come under employment, education or provision of services. Separate provisions will ensure that they are covered.

Discrimination by clubs

The Bill makes it unlawful for any club to discriminate, on the ground of race, in admission of members and access of members to the benefits, services and facilities of the club.

However, this provision does not apply to clubs whose main objectives are to enable the benefits of membership to be enjoyed by persons of a particular racial group or a number of different racial groups. This is to avoid unnecessary interference with other fundamental human rights including the freedom of association.

Other unlawful acts

These include –

- **discriminatory practices** (ie the application of a requirement or condition which constitutes or likely to result in racial discrimination, direct or indirect);
- **publication of discriminatory advertisement;**
- **instructing or pressuring another person to discriminate; and**
- **aiding an unlawful act of racial discrimination.**

Vicarious liability of the employer and principal

In line with the other existing anti-discrimination ordinances, an employer is legally responsible for discriminatory actions of his employees done in the course of employment. This includes doing what the worker is employed to do, such as interviewing a job applicant; or bullying or harassing a fellow worker. The employer has a defence if he can prove that he had taken reasonable practicable steps to prevent that particular discriminatory act or to prevent racial discrimination in general. Steps that may be taken include having a policy against racial discrimination, instructing staff on the policy and having proper complaints and enforcement mechanisms. The Equal Opportunities Commission is expected to issue a code of practice providing such practical guidance.

A principal is responsible for the acts of his agent (eg a person appointed under a power of attorney to sell a flat) when the agent is acting with the principal's authority.

Exceptions for special measures and charities for the benefit of racial minorities, etc

The Bill does not impose a mandatory obligation for special arrangement to be made in favour of any particular racial group other than refraining from applying an indirectly discriminatory requirement or conditions when it is reasonably practicable in the relevant circumstances not to apply it. At the same time, consistent with Government policy objective it encourages people to take measures to promote equal opportunities for people of different races. Hence the Bill provides exceptions for such benevolent measures. In other words, they are not regarded discriminatory although they are targeted at specific racial groups to the exclusion of others.

Specifically, these exceptions relate to -

- **special measures** that are intended to ensure that persons of a particular racial group have equal opportunities with other persons, or to provide persons of a particular racial group goods, benefits or access to services, facilities, programmes or opportunities, to meet their special needs;
- **charities and charitable acts** for the main purpose of providing benefits to specific racial or ethnic groups; and
- **provision of special training** for persons of a particular racial group to prepare them for jobs where there were no persons of the racial group concern doing that work, or number of such persons was comparatively small.

Other matters not affected by the Bill

These include –

- operation of laws concerning nationality, citizenship, resident status or naturalisation and immigration legislation;
- acts done under statutory authority;
- operation of the New Territories Ordinance and New Territories Leases (Extension) Ordinance; and
- the portable Comprehensive Social Security Assistance Scheme.

Legal consequences of contravention

In most cases, contravention of the provisions in the Bill would give rise to civil consequences. A person against whom an unlawful act under the Bill is committed has a civil claim and may bring proceedings in the District Court. Examples of remedies are damages, a declaration or an injunction.

Certain provisions in the Bill do carry criminal consequences. They include:

- the making of false or misleading statements to get another to commit discrimination or suppressing information that the Equal Opportunities Commission requires for the purpose of a formal investigation. This is punishable on conviction by a fine of up to \$25,000; and
- serious vilification, which involves threatening physical harm or inciting others to threaten physical harm toward persons of his target, or the property or premises of those persons, carries a maximum penalty of a fine of \$100,000 and imprisonment for 2 years upon conviction.

Powers and responsibilities of the Equal Opportunities Commission

The Equal Opportunities Commission (EOC) is responsible for implementing the three existing anti-discrimination legislations, namely the Sex Discrimination Ordinance, Disability Discrimination Ordinance and Family Status Discrimination Ordinance. We propose to extend the powers and functions of the EOC to cover race discrimination.

These powers and functions include –

- working towards the elimination of all forms of racial discrimination;
- promoting equality of opportunities between persons of different racial or ethnic backgrounds;
- encouraging settlement between the parties in dispute;
- providing assistance in respect of legal proceedings;
- initiating formal investigation in the public interest;
- issuing codes of practice for elimination of discrimination and promotion of racial harmony; and
- enforcing the Race Discrimination Ordinance, when enacted, by issuing enforcement notices and bringing proceedings in respect of discriminatory practices and certain other unlawful acts.

Conclusion

The prosperity of Hong Kong is founded, among other things, on its cosmopolitan nature and contribution of its people from different background and ethnic origins. Racial harmony is an important cornerstone for harmony in society.

As Government, we are committed to safeguarding the rights of people against racial discrimination. The proposed Race Discrimination Bill is a major stride in our continuous endeavours and commitment in this regard.

We also firmly believe that legislation must go hand in hand with public education and support for better integration. In this connection, the Government has, over the years, launched various initiatives to promote racial harmony and to assist integration of the ethnic minorities in Hong Kong. We have, for example, established in 1997 an Equal Opportunities (Race) Funding Scheme to support community based projects, publications and campaigns to promote racial harmony. The Home Affairs Bureau has a Race Relations Unit which, among its many functions and responsibilities, operates a hotline for ethnic minority public service enquiries and help deal with complaints. It also organises talks and workshops in schools to promote public education on anti-racial discrimination. We maintain continuing dialogue with ethnic minority groups through our regular liaison and the Ethnic Minorities Forum, with invaluable support and advice from members of the Committee on the Promotion of Racial Harmony. We also sponsor local social welfare agencies in providing language classes at district level to facilitate integration of members of the ethnic minorities in our community. Much has been done and more will continue to be done.

As stated in the introduction, this booklet aims to outline the main features of the Race Discrimination Bill for general understanding of the Government's proposal. Readers are requested to refer to the text of the Bill if they are interested in more details.

Electronic copies of the Bill and this booklet are available at www.hab.gov.hk. Additional printed copies of this booklet may also be obtained from local District Offices of the Home Affairs Department.

The Government of the Hong Kong Special Administrative Region
Home Affairs Bureau

December 2006

Constitutional and Mainland Affairs Bureau (since 1.7.2007)

www.cmab.gov.hk