

**PUBLIC CONSULTATION ON
PROPOSED LEGISLATION AGAINST RACIAL
DISCRIMINATION**

INTRODUCTION

This paper introduces the consultation paper entitled “Legislating Against Racial Discrimination – A Consultation Paper” and seek members views on the legislative proposal.

WHY LEGISLATE?

2. The two principal reasons for introducing legislation against racial discrimination are –

- (a) to prevent and combat racial discrimination; and
- (b) to fulfill Hong Kong’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, which is applicable to Hong Kong.

3. All of us are equal before the law and are entitled to equal protection of the law against all forms of racial discrimination and incitement to racial hatred. Discrimination against individuals and groups by other individuals and groups on the grounds of race, colour, descent, and national or ethnic origin is an obstacle to the development of a just and harmonious society.

4. Although communal relations between the local Chinese majority and ethnic minorities in Hong Kong tend, on the whole, to be harmonious and friendly, instances of racial discrimination and intolerance do occur, particularly against persons of South Asian and Southeast Asian origins. We need legislation to prohibit discrimination against people on racial grounds and to prevent and combat all forms of racial discrimination in Hong Kong.

5. Hong Kong has an international obligation to prohibit all forms of racial discrimination. However, there is as yet no comprehensive proscription on racial discrimination in the private sector. There have been calls, both locally and internationally, for legislation to remedy this deficiency.

6. The International Convention on the Elimination of All Forms of Racial Discrimination applies to the Hong Kong Special Administrative Region by extension of China's ratification of this Convention. Article 5 of the Convention states that:

“... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”.

Prohibition necessarily entails legislation. The United Nations Committee on the Elimination of All Forms of Racial Discrimination has maintained that the Convention obliges signatories to introduce specific legislation on racial discrimination.

7. The Hong Kong Bill of Rights Ordinance (Cap 383) incorporates into Hong Kong law the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong. The Hong Kong Bill of Rights proscribes all forms of discrimination (including racial discrimination) in the public, but not the private, sector. Specifically, Article 22 of the Hong Kong Bill of Rights prohibits the Government and all public authorities, and any person acting on behalf of the Government or a public authority, from engaging in practices which entail discrimination on any ground, including race and colour. However, section 7 of the Ordinance restricts the application of the Hong Kong Bill of Rights to the Government and public authorities. We do not yet have specific legislation against racial discrimination which applies to actions between private parties or individuals. There is a need for legislation to prohibit racial discrimination.

PROPOSED LEGISLATION

(a) Principal aims of the Bill

8. The principal aims of the proposed legislation (to be entitled the "Race Discrimination Bill") are to prohibit racial discrimination in certain areas of activity (mainly socio-economic activities) and to make provision against racial harassment and vilification. The objects of the Bill are –

- (i) to render discrimination on the ground of race unlawful in certain areas of activity (i.e., "protected" areas of activity);
- (ii) to make provision against racial harassment and vilification;
- (iii) to provide for remedies for racial discrimination and harassment;
- (iv) to make incitement to violence or hatred against any racial or ethnic group an offence;
- (v) to extend the jurisdiction of the Equal Opportunities Commission to include discrimination on the ground of race;
- (vi) to implement the International Convention on the Elimination of All Forms of Racial Discrimination; and
- (vii) to provide for related and consequential matters.

(b) Approach

9. It is proposed that the Bill should be modelled on the structure and format of the three existing anti-discrimination Ordinances, namely, the Sex Discrimination Ordinance (Cap 480), the Family Status Discrimination Ordinance (Cap 527) and the Disability Discrimination Ordinance (Cap 487).

(c) Implementation body

10. It is proposed that the Equal Opportunities Commission should be the body responsible for implementing the Bill. It should be empowered to handle complaints, conduct formal investigations, provide conciliation service between parties in dispute, and provide assistance to aggrieved persons. It should also be responsible for undertaking research programmes and public education to promote racial equality and communal harmony and for issuing codes of practice to provide practical guidelines for compliance with the Bill.

(d) Types of racial discrimination

11. It is proposed that six types of discrimination should be covered by the Bill –

(i) Direct racial discrimination

A person should be regarded as discriminating against another person if on racial or ethnic grounds he treats that person less favourably than he treats or would treat other persons. “Racial or ethnic grounds” should be defined to mean race, colour, descent, or national or ethnic origin. An example of direct discrimination is that if a Chinese landlord refuses to let his flat to an Indian or Pakistani family on the ground of the race of the members of that family.

(ii) Indirect racial discrimination

A person should be regarded as indirectly discriminating against another person if he applies to that other person a requirement or condition which he applies or would apply to persons not of the same racial or ethnic group as that other person but -

- (1) which is such that the proportion of persons of the same racial or ethnic group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial or ethnic group who can comply with it;
- (2) which he cannot show to be justifiable irrespective of the race, colour, descent, or national or ethnic origin of the person to whom it is applied; and
- (3) which is to the detriment of that other person because he cannot comply with it.

A “racial or ethnic group” should mean a group of persons defined by reference to race, colour, descent, or national or ethnic origin, and references to a person’s racial or ethnic group refer to any racial or ethnic group into which he falls. An example of indirect discrimination is that if a Chinese landlord refuses (without any justifiable cause) to let his flat to anyone who cooks curry in the premises. One effect of this would be that Indian or Pakistani families would be excluded.

(iii) Discrimination on the basis of the race or ethnicity of the spouse or a relative of a person

A person discriminates against another person, if on the basis of the racial or ethnic background of the spouse or a relative of that other person, he treats him less favourably than he treats or would treat a person of a different racial or ethnic background. An example of this type of discrimination is that if a Chinese landlord refuses to let his flat to a Chinese woman because her husband is an Indian.

(iv) Discrimination by way of victimization

A person (the discriminator) discriminates against another person (the person victimized) if he treats the person victimized less favourably than he treats or would treat other persons because the person victimized asserts his rights under the Bill (for example, by complaining to the Equal Opportunities Commission).

(v) Racial harassment

A person (the harasser) harasses another person (the person harassed) if the harasser engages in unwelcome or unwanted conduct (which may include verbal abuse or hate mail) on account of the racial or ethnic background of the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated by that conduct. An example of racial harassment is that if a person frequently makes racist remarks against an Indian colleague at work in order to humiliate or intimidate him.

(vi) Vilification

Racial vilification is an act whereby a person, by any activity in public, incites hatred towards, serious contempt for, or severe ridicule of, another person on the ground of the person's racial or ethnic background.

(c) Protected areas of activity

12. It is proposed that, under the Bill, protection against racial discrimination should cover the following fields –

- (i) employment;
- (ii) education;
- (iii) provision of goods and services and access to and use of facilities and premises;
- (iv) advisory and statutory bodies;
- (v) pupillage and tenancy in barristers' chambers;
- (vi) clubs; and
- (vii) Government.

(f) Exceptions

13. It is proposed that there should be a number of exceptions from the anti-discrimination provisions of the Bill including –

(i) Exception for small companies and employers

An exception from the anti-discrimination provision in the field of employment should be made in the case of an employer who has less than six employees (for example, a company or shop with five or less employees). However, there should be a "sunset" clause under which this exception would expire three years after the Bill comes into effect. The purpose of this exception is to give some time to small companies and employers for them to adjust to the new regulatory regime.

(ii) Genuine occupational qualification

It is proposed that an exception should be provided in the case where being of a particular racial or ethnic group is a

genuine occupational qualification for a job. For example, a producer should be allowed to limit his casting to actors of Indian origin to play the role of an Indian in a film or play.

(iii) Exception for small dwellings

It is proposed that an exception from the provisions of the Bill dealing with the disposal of premises should be made in the case of premises forming part of small dwellings (for example, a flat) which are shared by the landlord and the lodger or tenant.

(iv) Exception for certain voluntary bodies and clubs

An exception from the relevant provisions of the Bill should be made in the case of voluntary bodies which restrict membership to a particular racial or ethnic group. An exception should also be made if the main object of a club is to enable the benefits of membership to be enjoyed by persons of a particular racial or ethnic group.

(v) Special measures

The Bill should provide that any special measures taken in respect of persons of a particular racial or ethnic group to give equal opportunities with other persons should not be rendered unlawful under the Bill. For example, special measures such as "headstart programmes" or "remedial classes" for children of ethnic minorities should be exempted.

(vi) Charities

It is proposed that certain charities which provide benefits to certain groups of people defined by reference to racial or ethnic origins should be protected against provisions of the Bill which might otherwise make the provision of such benefits unlawful.

(vii) Special training

It is proposed that the Bill should make clear that it would not be unlawful to provide special training to only persons of a particular racial or ethnic group to help them find employment.

(viii) Ministers of religion

It is proposed that an exception should be provided in the Bill for an organized religion to limit employment to a person from a certain racial or ethnic group for a job related to that religion, provided that the purpose of such restriction is to comply with the doctrine of that religion or to avoid offending the religious susceptibilities common to its followers.

(ix) Immigration legislation

As regards persons not having the right to enter and remain in Hong Kong, it is proposed that the Bill should not affect any immigration legislation governing their entry into, stay in and departure from Hong Kong, or the application of any such legislation.

IMPLICATIONS OF THE PROPOSAL

14. The proposed legislation against racial discrimination is in conformity with the Basic Law, including the provisions concerning human rights.

COMMENTS SOUGHT

15. Members are invited to comment on the legislative proposal outlined in this paper.

Home Affairs Bureau
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