

**Hong Kong's Race Discrimination Bill
A Critique and Comparison with
The Sex Discrimination and Disability Discrimination Ordinances**

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Submission to the Hong Kong Legislative Council's
Bills Committee to study the Race Discrimination Bill¹
June 2007

I. Introduction and Executive Summary

In 2004 the Hong Kong government agreed to legislate against racial discrimination and distributed a Consultation Paper² describing the approach that it would take in drafting the Race Discrimination Bill (RDB). This was an important development because the government had previously opposed individual legislators' efforts to introduce such a bill.³ The government had argued that a "step-by-step" approach should be taken to this field and that Hong Kong needed to acquire experience with the Sex Discrimination Ordinance (SDO) and Disability Discrimination Ordinance (DDO) (enacted in 1995)⁴, and with the Family Status Discrimination Ordinance (FSDO) (enacted in 1997).⁵

A decade later, the government purports to have taken the next step, by

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¹ This is a revised and expanded version of a paper entitled "How Many Clauses Does it Take to Define Racial Discrimination?", presented by the author at the Conference on Hong Kong's Race Discrimination Bill, Centre for Comparative and Public Law, University of Hong Kong, 31 March 2007.

² Home Affairs Bureau, Government of the Hong Kong Special Administrative Region, *Legislating Against Racial Discrimination: A Consultation Paper*, September 2004 (hereinafter, the "Consultation Paper").

³ Although racial discrimination in the public sector has been prohibited by the Bill of Rights Ordinance (BRO) since 1991, it is an ineffective tool since the Equal Opportunities Commission (EOC) has no power to enforce the BRO or to investigate complaints based upon the BRO.

⁴ Cap 480 and Cap 487 respectively, *Laws of Hong Kong*.

⁵ Cap 527, *Laws of Hong Kong*. The FSDO is very similar in structure and approach to

introducing the RDB. However, a “step-by-step” approach implies that progress is being made. One might, therefore, have expected the RDB to incorporate recent reforms to UK and Australian laws, which have often served as models for Hong Kong.⁶ Unfortunately, the RDB does not do so. At a minimum, the RDB should be as strong as the SDO, DDO, and FSDO, which have now been in force for more than a decade in Hong Kong and which the government acknowledges have *not* adversely affected either the government, the general public, or the business sector.⁷

Indeed, the 2004 Consultation Paper appeared to make a commitment that the RDB would be as strong as the existing anti-discrimination ordinances. For example, the Consultation Paper stated that the RDB would be “modelled on the structure and format” of the three existing anti-discrimination Ordinances.⁸ The government also stated that it would use the existing definitions of direct and indirect discrimination and did not indicate any intention to narrow these definitions in the RDB.⁹ The Consultation Paper further stated that the RDB “should make it unlawful for the government to discriminate against a person or group of persons on the ground of race in the performance of its functions or the exercise of its powers.”¹⁰ Nowhere in the Consultation Paper did the government indicate any intention to insert a *general* exemption for governmental acts and policies.

Yet by the time the RDB was introduced into the Legislative Council the government had completely changed its position, albeit without any explicit explanation as to why it has done so. The RDB is much weaker than the SDO and the DDO. This is largely because the government has severely limited the extent to which the bill applies to governmental functions and thus the extent to which the Equal Opportunities Commission (EOC) can assist victims of racial discrimination by government departments. The government has also added lengthy clauses that limit the definition of discrimination, thus

the SDO and will not be discussed in detail in this paper.

⁶ The SDO was largely based upon the UK’s Sex Discrimination Act 1967, but also drew upon Australian law (for example, in the provisions on sexual harassment). The Hong Kong DDO was based upon the Australian Disability Discrimination Act 1992.

⁷ See Consultation Paper, note 2 above, at para 15.

⁸ *Ibid*, para 26.

⁹ *Ibid*, paras 34-5.

¹⁰ *Ibid*, paras 56.

excluding acts that many of us would think of as classic examples of racial discrimination. For the most part, these clauses were not contained in the 2004 Consultation Paper and they are unduly complex, making it difficult for a layperson to understand the bill. Once one works through these clauses, it is clear that ethnic minorities have been targeted for less favourable treatment than victims of gender and disability discrimination – arguably making the RDB itself an example of official discrimination and a violation of the government’s obligations under the Basic Law and the International Covenant on the Elimination of Racial Discrimination (ICERD). The weaknesses in the RDB will also create significant problems for the Hong Kong EOC, which will frequently have to explain to victims of racial discrimination why the EOC has no power to assist them, although people with comparable complaints of sex and disability discrimination would be entitled to file complaints with the EOC and receive free investigation and conciliation services.

Part II of this paper discusses Clause 3 of the RDB, which provides for very limited application of the bill to governmental acts and policies (far more limited than provided in the SDO and DDO). As drafted, the RDB will only apply to government acts that are similar in nature to acts by private persons – such as when the government is an employer. The RDB will not bind the government in its truly “governmental” responsibilities – such as policing, correctional services, taxation, licensing, and most regulatory responsibilities. The government’s response to this point (that the Bill of Rights Ordinance (BRO) already covers governmental discrimination) does not solve this problem because the Hong Kong EOC has no authority to enforce the BRO and most victims of discrimination simply cannot afford to pursue a complaint without the EOC’s assistance. Moreover, the remedies that can be obtained for a breach of the BRO are less desirable than those that can be obtained under the RDB. Part II of the paper provides some hypothetical situations to illustrate the unfairness and inefficiencies that Clause 3 will create, when compared with the wider scope of the SDO and DDO.

Part III of the paper discusses the definition of discrimination in the RDB, which is narrower than the corresponding definitions in the SDO (Section 5) and the DDO (Section 6). The government has added several clauses to the RDB, which have no equivalents in the SDO or DDO. The two main examples of this are Clause 8 (which appears to limit the

definitions of both direct and indirect discrimination) and Clause 4 (which provides a long list of “qualifications” to the definition of indirect discrimination). Some hypothetical advertisements are analyzed here, to demonstrate how this definition could “legalize” what most of us would think of as rather clear examples of racial discrimination. (The hypothetical situations in this paper represent my best attempt to sort through the long and vague clauses in the RDB. I hope that members of the Bills Committee will ask the government whether I am correct in my conclusion that these situations would not be actionable under the RDB. I would be delighted to learn that I am wrong, but would then argue that the RDB needs to be drafted in clearer language.)

Part IV of the paper discusses the grounds of discrimination and argues that the bill needs to be broadened, to prohibit discrimination on the grounds of religion and immigrant status. These grounds are comparable to the grounds of pregnancy and marital status, which have been included in Hong Kong’s SDO because legislators recognized their close relationship to sex discrimination. Indeed, the Hong Kong EOC receives more complaints of pregnancy discrimination than sex discrimination and it would be impossible to effectively address gender inequality in Hong Kong if pregnancy discrimination were not actionable.¹¹ Similarly, in the circumstances of Hong Kong, one cannot effectively address racial and ethnic discrimination without also prohibiting discrimination on the grounds of religion and immigrant status. I also argue that the RDB should prohibit discrimination on the ground of the race or ethnicity of one’s *associate* (similar to Section 6(c) of the DDO).

II. Clause 3: The Non-Application of the RDB to Governmental Acts

Section 3 of the SDO and Section 5 of the DDO state that “This Ordinance binds the government.” Additional provisions also make it clear that the SDO and DDO apply

¹¹See the statistics on complaints received by the Hong Kong EOC (available at www.eoc.org.hk); see also Carole J. Petersen, Janice Fong, and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (CCPL 2003), which analyzed a database of 451 complaints filed under the three existing anti-discrimination ordinances.

to governmental acts. For example, Sections 21 and 38 of the SDO state, in relevant part:

(1) Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers.

Almost identical language appears in Sections 21 and 36 of the DDO. It should be noted that a significant percentage of the complaints filed with the EOC are directed at government departments. A study of complaint files (representing all complaints completed in a six month period) found that complaints filed against government departments represented 18.2% of the disability-related complaints and 10.2% of the gender-related complaints.¹²

As noted above, the 2004 Consultation Paper indicated that the RDB would bind the government generally. It is arguably a “bait and switch” for the government to conduct public consultation on that basis and then change this fundamental point when it comes time to draft the bill. Normally, a fundamental change like this would only be made in response to a request by the majority of submissions responding to the Consultation Paper. In this case, the government has not pointed to any evidence of public demand for this change and it is highly unlikely that members of the public argued for a sweeping exemption for governmental acts. Thus it was probably government departments themselves who argued that they should be left out of the bill. If that is the case then it raises serious questions about the extent to which these departments are abiding by the equality provisions in the Basic Law and the Bill of Rights Ordinance. In any event, Clause 3 of the RDB now provides:

This 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.

Thus, whenever the government does things that private persons *do not* do – such as make arrests, issue traffic tickets, detain people, allocate students to government schools, regulate businesses, or issue licenses – the RDB simply will not apply. The following hypothetical

situations demonstrate the unfairness and inconsistencies that will be created if Clause 3 is not amended:

Situation 1: A woman believes that a police officer committed sexual harassment against her in the course of giving her a speeding ticket. The woman can go to the EOC, file a complaint and receive free investigation and conciliation assistance. If the case fails to conciliate she can apply for assistance to litigate her case. If her case is successfully litigated she can obtain money damages, pursuant to Section 76 of the SDO.

Situation 2: A man with a hearing disability believes that the Correctional Services Department has committed disability discrimination because it refuses to allow him to use his hearing aid in prison. The victim can file a complaint with the EOC and receive free investigation and conciliation assistance. If the case fails to conciliate he can apply for assistance to litigate the case and obtain a court order compelling the Correctional Services Department to allow him access to his hearing aid, as well as an award of money damages.

Situation 3: A resident of Hong Kong who is ethnically Indian receives a speeding ticket. He believes that the police committed racial discrimination because he observed that the police stopped three cars going about the same speed and let the other two drivers (one white and one Chinese) leave the scene with just a verbal warning. If this man goes to the EOC to file a complaint then the EOC will have to reject it as outside its jurisdiction. This is because giving out a speeding ticket is not an act “of a kind similar to an act done by a private person”. It is outside the scope of Clause 3 and not affected by the RDB. If the victim points to the equality provisions in the BRO the EOC officer will have to inform the complainant that the EOC has no power to enforce any part of the BRO and send him away.

Situation 4: An Indonesian woman, employed in Hong Kong as a live-in domestic worker, goes to the police to file a complaint against her employer, who has taken her passport and other personal belongings without her permission.¹³ The police officer is rude to the Indonesian woman and makes several derogatory remarks about her skin colour. He also declines to record her complaint, telling her to “learn how to get along

¹²See Petersen, Fong, and Rush, note 11 above, p. 14.

¹³Interviews with 22 foreign domestic workers and four resource persons who assist domestic workers indicate that employers and employment agencies often confiscate domestic workers’ passports, perhaps as a way to ensure that the workers pay the illegal “placement fees” that are frequently imposed upon them. See Peggy W.Y. Lee and Carole J. Petersen, *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*, CCPL Occasional Paper No. 16 (May 2006), (available at www.hku.hk/ccpl).

with your employer or go back to your home country”. If the Indonesian woman goes to the EOC it will have to reject her complaint as outside its jurisdiction. Although the police officer appears to have committed racial discrimination, the acts are part of “police work” and not “similar to an act done by a private person”. The acts thus fall outside the scope of Clause 3 and would not be covered by the RDB.

Situation 5: Same as *Situation 4* except that the police officer also commits sexual harassment against the Indonesian woman. The EOC will investigate the woman’s complaint of sexual harassment because the SDO provides for general application to the government. However, the EOC will have to her reject complaint of racial discrimination and probably would not even include her allegations of racial discrimination in the statement of complaint. Even if the Indonesian woman manages to obtain legal aid to pursue her claim of racial discrimination separately from her claim of sexual harassment, the process of investigation and litigation is likely to be far less efficient and effective than if the EOC had been empowered to investigate both claims together. Indeed, this situation appears to be a case of intersectional discrimination, involving inseparable allegations of gender and racial prejudice, which should be investigated as one consolidated complaint.

We can imagine how the South Asian man and the Indonesian woman would feel in these situations. They would justifiably ask: why does the EOC help victims of sex and disability discrimination to pursue similar complaints against government departments but not us? The answer that the EOC will have to give is: (1) the RDB is simply not as good as the SDO and the DDO when it comes to providing remedies for official discrimination; and (2) the EOC’s powers are tied to the scope of the RDB. Without EOC support, most victims of racial discrimination or harassment will simply abandon their complaints. Legal services are very expensive in Hong Kong and it is not easy to obtain legal aid for non-criminal matters, even for claims under the BRO. The EOC enforcement process also offers a wider range of remedies than litigation under the BRO. For example, apologies are frequently requested by complainants and obtained in EOC conciliations.¹⁴ Money damages can also be obtained, either through conciliation or through litigation supported by the EOC.

In contrast, Section 6 of the BRO does not expressly mention money damages and I am not aware of any case in which money damages have been ordered as the remedy for a violation of the BRO. (Compare Section 6 of the BRO to Clause 76 of the SDO and DDO, and to Clause 71(4)(e) of the RDB, which all expressly provide for money damages.) It

¹⁴See Petersen, Fong, and Rush, note 11 above, especially the tables of remedies requested

appears that the effect (and perhaps the intent?) of Clause 3 in the RDB is to ensure that the government never has to pay money damages for truly “governmental” acts of racial discrimination or racial harassment.

Equally important, the EOC has no power to conduct formal investigations of conduct that may violate the BRO. Thus, if the language of Clause 3 is not amended we cannot expect the EOC to conduct any formal investigations of alleged racial discrimination in truly “governmental” policies. The EOC also would not be able to initiate an action for judicial review of a governmental policy unless it relates to a function that falls within Clause 3. The importance of the EOC’s enforcement powers was demonstrated by the case of *EOC v. Director of Education*,¹⁵ which ultimately led to a declaration by the Court of First Instance that the government’s system of allocating students to secondary schools (known as the “SSPA”) violated the SDO. The SSPA actually became unlawful in 1991, when the BRO came into force. However, the BRO had no practical effect upon the SSPA. It was not until the SDO came into force – bringing with it the formal investigation powers of the EOC – that the nature and extent of gender discrimination in the SSPA was revealed to the public. When the government still refused to reform the SSPA the EOC initiated an action for judicial review, which was successful on all counts. Without this EOC involvement, the SSPA almost certainly would not have been reformed because individual complainants lack the power to conduct a formal investigation and lack the resources to challenge the government in court.

This raises an interesting question: if the government’s Education Department develops a system of allocating students to government schools that discriminates against certain ethnic groups, would that system fall within the scope of Clause 3? Private institutions educate students but they do not allocate students to government schools. Thus, it appears that a racially discriminatory allocation system would fall outside Clause 3. It would be covered by the BRO but this would not help the victims much because the EOC could not investigate their claims or support them in litigation. Indeed, EOC support is arguably even more important for

and obtained through the EOC complaints resolution process.

¹⁵ [2001] 2 HKLRD 690. For a discussion of the EOC formal investigation and the events that led to the action for judicial review, see Carole J. Petersen, “The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong” (2002) 32 *Hong Kong Law Journal* 103-34, especially 117-31.

governmental discrimination than it is for discrimination by private actors. Private actors have an incentive to settle a case if they feel that they are likely to lose in court. However, the government has virtually unlimited financial resources to defend itself in court and certain government departments have demonstrated that they are reluctant to settle even very strong claims of unlawful discrimination.¹⁶

In short, Clause 3 is a huge weakness in the RDB and the government has not offered any convincing justification for it. It is not sufficient for the government to keep repeating that it is already bound by the BRO because that law is far more difficult for individuals to enforce and offers fewer remedies than the RDB. The legislature needs to ask *why* the government is seeking to make it impossible for the EOC to enforce racial equality in *all* governmental actions and policies? Perhaps the government is afraid that an EOC investigation will uncover policies that have been unlawful for many years under the BRO (like the policies in *EOC v. Director of Education* and in *K, Y, and W v. Secretary for Justice*), but which have not yet been reformed due to weak enforcement of the BRO in civil matters.

If Clause 3 is not amended then the EOC should at least be given the power to enforce the equality provisions of the BRO and the Basic Law. If the government is truly confident that its policies comply with the BRO then it should not be afraid to give this power to the EOC.

If the RDB is enacted without amendment then there is no question that Hong Kong's ethnic minorities will have received a weaker law than Hong Kong's victims of sex and disability discrimination. If I were the CEO of a multinational company and considering opening an office in Hong Kong then I would view that as a negative factor. If I were a member of the UN Committee on the Elimination of Racial Discrimination (CERD) I would

¹⁶See Petersen, note 15 above, which discusses two cases in which the government refused to conciliate and instead chose to litigate, although it must have been clear to the government lawyers that the government's legal position was weak. Indeed, in *K, Y, and W v Secretary for Justice*, the District Court judge implicitly criticized the government for refusing to conciliate the three cases consolidated in that action. The judge noted that the government's own internal task force had advised it that the policy in question should be changed to comply with the DDO. The judge ordered the government to pay the EOC's litigation costs. *Ibid*, pp. 115-6. This only occurs in DDO litigation in the District Court if special circumstances justify an order of costs. See District Court Ordinance (Cap 336), section 73(C)(3).

view the RDB as an example of unfavourable legislative treatment of Hong Kong's ethnic minorities and as a violation of ICERD.

It should also be noted that Clause 3 appears to contradict certain other clauses, which were apparently drafted before the government decided to add Clause 3. For example, Clause 34 prohibits discrimination in eligibility to stand for election and in appointments to public bodies. This is an important provision, based on Section 35 of the SDO. But how would it be enforced in light of Clause 3, which seems to imply that the RDB only binds the government when it performs acts that a private person could perform? This is an example of how the RDB has become internally inconsistent as a result of the addition of clauses that seek to narrow the scope of the bill.

III. Defining (Away?) Racial Discrimination

The government's 2004 Consultation Paper stated that it would follow the UK model and prohibit both direct and indirect discrimination. In English law, direct discrimination has been traditionally defined as treating a person a person less favourably on one of the prohibited grounds (e.g. race, colour, ethnicity, or national origin). Indirect discrimination is supposed to address practices that appear to be neutral but have a disproportionate and detrimental effect when applied to certain groups. However, in the UK it was difficult for plaintiffs to establish indirect discrimination under the Race Relations Act 1976, because the courts have interpreted the "condition or requirement" language as requiring a plaintiff to identify some policy that acted as an "absolute bar" to her hiring, promotion, or other benefit.¹⁷ Thus, when the Hong Kong government released its Consultation Paper, many commentators suggested that the government should incorporate the Race Relations Act 1976 (Amendment) Regulations 2003, which were adopted to comply with the European Union Directive on equal treatment between persons, irrespective of racial or ethnic origins.¹⁸

¹⁷ See, for example, *Perera v. Civil Service Commission and Department of Customs & Excise* [1983] IRLR 428; and *Meer v. London of Tower Hamlets* [1988] IRLR 399.

¹⁸ See, for example, Carole J. Petersen, "Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong", 34 *Hong Kong Law Journal*

Unfortunately, the Hong Kong government has done quite the opposite. It has taken the “old” definition of discrimination and then added additional qualifying language that will make it even harder to prove discrimination. Thus, the definition of discrimination proposed in the RDB is weaker than the 1976 version of the Race Relations Act and much weaker than the current version of UK law.

Clause 4(1)(a) of the RDB starts out as follows:

- (1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person if
- (a) on the ground of the race of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons; or
 - (b) 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 –
 - (i) 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;
 - (ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and
 - (iii) which is to the detriment of the other person because that person cannot comply with it.

So far, the language is similar to Section 5 of the SDO. However, in order to understand how this definition would work in practice one must read it in conjunction with Clause 8, which is entitled: *Meaning of “race”, “on the ground of race”, “racial group” and comparison of cases of persons or different racial groups* and has no equivalent in the SDO or the DDO. I have included, below, just a few excerpts from this very long clause, which appear to qualify the definitions of *both* direct and indirect discrimination. Clause 8 states, in relevant part:

- (2) An act done on the ground of any matter specified in subsection (3) does not

459-480, especially pp 470-1 (discussing recent amendments to UK law that could have been incorporated into the Hong Kong bill).

constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person; and section 4(1)(b) does not apply to a requirement or condition as to any matter specified in subsection (3).

(3) The matters specified in this subsection are –

.....

(b) that the person –

(i) is or is not a Hong Kong permanent resident;

(ii) has or has not the right of abode or the right to land in Hong Kong;

(iii) is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap. 115); or

(iv) has or has not been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap. 115);

(c) the length of residence in Hong Kong of the person; or

(d) the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place.

If I understand this provision correctly, it means that the following hypothetical advertisements would *not* be prohibited by the RDB:

“Wanted, hairdresser: No person with French nationality may apply.”

“Wanted, accountant: Must have lived in Hong Kong for at least 20 years.”

“This school does not admit children with South African citizenship.”

“No person with Nepalese citizenship may enter this restaurant.”

“Citizens of the Philippines may not stay in this hotel.”

“People with Indian citizenship may not enter this shop.”

“Only persons with Japanese passports may enter this jewellery shop.”

“Only persons with American passports may enter this bar.”

Most of us would consider advertisements like these to be discriminatory and highly offensive, and we would want them to be prohibited in a bill that purports to prohibit discrimination on the grounds of race, ethnicity, and national origin. We would want the ECO to have the power to investigate complaints arising from such advertisements. Had the government used the definition of racial discrimination that it said it would use (in the 2004 Consultation Document) then these advertisements would almost certainly constitute

at least *indirect* discrimination on the ground of race, ethnicity, or national origin.

The government's RDB, however, seems to preclude a claim in all of these situations. Clause 42 apparently only prohibits advertisements that indicate an intention to commit unlawful discrimination, as defined in the RDB. The RDB's definition of *direct* discrimination does not apply here because the RDB expressly states (in Clause 8(2)-(3)) that acts done on the ground of nationality, citizenship, or the length of residence in Hong Kong do "not constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person". The RDB also seems to preclude a claim of *indirect* discrimination, because Clause 8(2) states that the definition of indirect discrimination in "section 4(1)(b) does not apply to a requirement or condition as to any matter specified in subsection (3)." Thus, if a person were excluded by one of these hypothetical advertisements and filed a complaint with the EOC the complaint would probably be rejected for failure to state an unlawful act. Although the field (provision of goods and services) falls within the scope of the RDB, the advertisements do not appear to constitute unlawful acts under the RDB. Assuming that my interpretation is correct, I would hope that the government and legislators would see the injustice (and the lack of logic) in this approach and make substantial amendments to Clause 8.

Why would the government want to insulate advertisements like these? It may be that the government drafters did not fully appreciate the implications of Clause 8. The government's brief on the RDB to the Legislative Council implies that the reason it defined discrimination so as to exclude differential treatment on the basis of nationality or length of residence in Hong Kong is that the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) does not *require* a state party to prohibit nationality discrimination.¹⁹ It is correct that ICERD permits some differential treatment on the ground of nationality (with respect to voting, for example).²⁰ But this does not mean that a domestic anti-discrimination law implementing ICERD can give a *blanket* endorsement

¹⁹ The government informed the legislature that: "These definitions are consistent with those internationally adopted under ICERD." See Home Affairs Bureau, Government of the Hong Kong Special Administrative Region, *Legislative Council Brief: Race Discrimination Bill*, 29 November 2006 (File Ref: HAB/CR/1/19/102), at para 11.

²⁰ See ICERD, article 1.

to differential treatment on the ground of nationality and length of residence, as these grounds could often be used to accomplish racial discrimination. Indeed, the CERD Committee has often condemned policies and practices that discriminate against non-nationals.²¹ The CERD Committee and other United Nations human rights monitoring bodies would likely view a domestic law with Clause 8 as wholly inconsistent with Hong Kong's obligations under ICERD and other human rights treaties that apply to Hong Kong. Ironically, the government has stated that the need to respond to previous criticisms by these bodies is one of its chief reasons for introducing the RDB.²² It makes little sense to enact a law that will attract additional criticism from the treaty monitoring bodies. Moreover, if allowed to stand, Clause 8 could also do severe damage to Hong Kong's reputation as an international and multicultural city. Who would want to travel or work in a city that has enacted a law that allows advertisements like the hypotheticals set forth above?

There is no equivalent to Clause 8 in either the SDO or the DDO. But one could draft a hypothetical equivalent to Clause 8 for the DDO, which might read as follows:

An act done on the ground that a person owns a guide dog shall not constitute an act done on the ground of disability for the purposes of the DDO and a rule against guide dogs shall not constitute a "requirement or condition" for the purposes of a claim of indirect disability discrimination.

We can imagine how the disability community would feel if such a clause were suddenly added to Section 6 of the DDO.

Moreover, Clause 8 is not the only limitation that the government has added to the RDB's definition of discrimination. Clauses 4(2)-(5) add a seemingly endless list of qualifications to the definition of indirect discrimination, with language that has no equivalent in either the SDO or the DDO. For example, Clause 4 provides:

(2) For the purposes of subsection (1)(b)(ii), a requirement or condition is

²¹ See, for example, the CERD Committee's General Recommendation XXX (Discrimination Against Non-Citizens) (2004).

²² See, for example, the Home Affairs Bureau's *Legislative Council Brief: Race Discrimination Bill* (note 19 above), at para 6.

justifiable either –

(a) if it serves a legitimate objective and bears a rational and proportionate connection to the objective; or

(b) if it is not reasonably practicable for the person who allegedly discriminates against another person not to apply the requirement or condition.

(3) In determining for the purposes of subsection (2)(b) whether it is reasonably practicable for a person who allegedly discriminates against another person not to apply a requirement or condition, any relevant circumstances of the particular case may be taken into account including those referred to in subsection (4).

(4) The circumstances that may be taken into account include, but are not limited to –

(a) the nature of the benefit or detriment likely to accrue to or be suffered by, or the likely impact on, all persons concerned;

(b) an estimate of the proportion of persons likely to benefit out of all the persons concerned, if the requirement or condition is not applied;

(c) whether any activities of the person who allegedly discriminates against another person will be disrupted if the requirement or condition is not applied and, if so, the extent of the disruption; and

(d) whether the person who allegedly discriminates against another person will need to provide additional services or facilities or incur additional expenditure (including recurrent expenditure), if the requirement or condition is not applied.

(5) Nothing in subsection (3) or (4) is to be construed as requiring the person who allegedly discriminates against another person or any other person concerned to confer any benefit, suffer any detriment, provide any services or facilities or incur any expenditure which the person or that other person (as the case may be) is not otherwise required to confer, suffer, provide or incur.

This extensive additional language makes it almost impossible for a layperson to sort out what constitutes indirect discrimination. The combined effect of all these qualifications and “relevant circumstances” (which the judge would be asked to consider when determining if it was “reasonably practicable” for the defendant not to apply the requirement or condition) also may make it impossible for a plaintiff to establish a case of indirect racial discrimination. It should be noted that a defendant could defeat a claim of indirect discrimination by satisfying *either* the “rational and proportionate” test in Clause 4(2)(a) *or* the “not reasonably practicable” test in Clause 4(2)(b). Thus, it appears that a defendant could justify a requirement or condition simply by showing that it was not reasonably practicable for him not to apply it, *regardless* of how irrational and

disproportionate the requirement or condition was in relation to the “legitimate objective”.

Consider, for example, the following hypothetical situation:

A private training centre that offers extensive courses in English as a second language posts the following advertisement:

“Wanted: Qualified English teachers to teach English as a second language. All applicants must: (1) be graduates of and provide transcripts from an accredited university in Hong Kong; and (2) provide at least three reference letters from university teachers who are currently residents of Hong Kong.”

A woman is interested in this job. She grew up in Hong Kong and is a Hong Kong permanent resident, but she is not Chinese and she graduated from a university in the United Kingdom. When she telephones to ask if the prospective employer would waive these two requirements she is told that this not possible because it is too burdensome for the employer’s staff to check on the authenticity of overseas transcripts and reference letters.

Under most racial discrimination laws, this policy would probably constitute a *prima facie* case of indirect racial discrimination. The two requirements are applied to all applicants, regardless of their race or ethnicity. However, in practice, non-Chinese applicants will have a more difficult time complying with the two requirements because they are less likely than Hong Kong Chinese to be graduates of local universities. If the RDB’s definition of indirect discrimination simply tracked the language of the SDO then the burden of proof would now shift to the prospective employer to show that these two requirements were “justifiable irrespective of the race of the person to whom it is applied.” It would be difficult for an employer to demonstrate that these two requirements are justifiable for this job.

However, with the extensive “extra” language that has been added in Clause 4(2)-(5) of the RDB, the employer may have an easier time justifying the requirements. The employer will argue that it takes extra time and effort to process an application from an applicant with overseas transcripts and references. The employer’s staff may have to make long-distance telephone calls to check on the authenticity of the references and it is always a little more difficult to evaluate an overseas transcript than a transcript from one’s own jurisdiction. The employer will argue that the judge should take this into account when

considering whether it was “reasonably practicable” for the employer to have given up the two requirements stated in the job advertisement. The employer will also seek to rely upon Clause 4(5), which is poorly worded but seems to imply that employers and other potential defendants should not have to incur *any* additional expenditure or provide *any* additional services as a result of this new law.

This is just one example. I am sure that we could think of many more hypotheticals that demonstrate how difficult it would be to prove indirect racial discrimination – unless legislators insist that the “extra” language in Clause 4 be deleted. It is ironic that commentators initially hoped that the government would depart from the model in the SDO and adopt the more progressive model now applied in the UK. Instead, the Hong Kong government has taken a step backward and proposed that Hong Kong’s ethnic minorities should be content with a far weaker definition of discrimination than the definition enacted in 1995 in the SDO and the DDO. Victims of racial discrimination clearly would have been better off if the Equal Opportunities Bill 1994 (EOB), which was introduced by former legislator Anna Wu, had been enacted. That bill took a uniform approach and gave victims of different forms of discrimination similar protection. This uniform approach is particularly important for small minority groups, who lack political power. In contrast, the “step-by-step” approach, which the government insisted upon when it successfully opposed the EOB, has turned out to be nothing more than an excuse to provide a weaker law – this constitutes delayed, separate, and unequal protection for ethnic minorities.

IV. The Prohibited Grounds

The government has proposed that the bill should prohibit discrimination on the grounds of “race, colour, descent, or national or ethnic origin.” These grounds track the language of Article 1 of ICERD, which defines “racial discrimination” to mean “any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin.” However, the UN’s CERD Committee has often observed that every jurisdiction should closely examine its own circumstances and develop legislation and policies to address the problems that exist there. For Hong Kong, one of the most controversial issues is how to address the well-documented discrimination suffered by new

immigrants from Mainland China. I have previously argued that the government should prohibit discrimination on the ground that a person is an immigrant.²³ I will not repeat those arguments here except to explain why the government's reasons for not including this as a prohibited ground of discrimination are not persuasive.

The government has argued that the discrimination suffered by new immigrants from Mainland China is a form of "social" rather than racial discrimination and that it would be "wrong in principle" to address that type of discrimination in a bill on racial discrimination.²⁴ I cannot think of any "principle" that would be violated by including immigrant status as a prohibited ground, especially as this is closely related to national origin (there is a strictly controlled border between Hong Kong and China, which makes the analysis of national origin somewhat different here than it would be in countries without internal immigration control). There is also growing evidence that Hong Kong Chinese and Mainland Chinese have distinct ethnic identities. Indeed, the Hong Kong government itself took this position when it included information on new arrivals from China in its 2000 submission to the CERD Committee.²⁵ The only other explanation that the government has given for not including immigrant status now is that a law prohibiting discrimination against new migrants from Mainland China would have "adverse implications" for government rules on eligibility for certain public benefits, which require seven years of eligibility.²⁶ If these rules are desirable the government could easily draft a precisely worded exemption for them.

I have also previously argued that the bill should expressly prohibit discrimination on the ground of religious affiliation.²⁷ Otherwise, the courts are likely to hold that some religious groups constitute an ethnic group while others do not. For example, Jews were held to be an ethnic group under the UK's Racial Relations Act 1976. However, religious groups with a wider and more culturally diverse membership, such as Muslims, have had

²³ See Petersen, note 18 above.

²⁴ See the Home Affairs Bureau's *Legislative Council Brief: Race Discrimination Bill* (note 19 above), at para 32.

²⁵ *Ibid.*

²⁶ See, for example, the Home Affairs Bureau's *Legislative Council Brief: Race Discrimination Bill* (note 19 above), at para 6.

²⁷ See Petersen, note 18 above.

difficulty establishing that they constitute a distinct ethnic group. Rather than leaving this issue open for judicial interpretation, the law should expressly include “religious affiliation or belief” as a prohibited ground of discrimination. Then a religious group would not need to argue that it is also an “ethnic group” in order to secure protection from discrimination.

There is, in fact, no logical reason why discrimination on the grounds of religion and immigrant status should not also be prohibited in a diverse community like Hong Kong. The SDO prohibits marital status and pregnancy discrimination because the legislature and the government recognized that the SDO could not tackle gender discrimination without addressing these related forms of discrimination. (Interestingly, the Hong Kong EOC receives more complaints of pregnancy discrimination than of sex discrimination.) Similarly, religion and immigrant status are often related to ethnic discrimination and it makes sense to address them both in this piece of legislation.

The government has proposed, in Clause 5 of the RDB, to prohibit discrimination on the grounds of the race or ethnicity of the *spouse or relative* of a person. Thus, if a landlord refuses to rent to a prospective tenant because his wife is South Asian, the prospective tenant could bring an action for discrimination in his own name. This is a useful provision but it should be amended so as to prohibit discrimination (as well as harassment and vilification) on the grounds of the race, ethnicity, colour, descent, or national origin of an *associate* of a person. The following hypothetical example illustrates the advantages of this suggested amendment:

A student at the University of Hong Kong wishes to rent an apartment but the landlord refuses to rent to her because her roommate is Nepalese. The Nepalese roommate is reluctant to file the complaint, fearing that it will generate more hostility against her. Since the Nepalese roommate is not the student’s spouse or relative (as required by Clause 5 of the RDB), the student would not be able to file a complaint of racial discrimination in her own name.

If, however, the language of Clause 5 is amended to include “associates”, as well as spouses and relatives, then the student could file a complaint in her own name. Similarly, if a group of friends is denied admission to a bar (or charged a higher admission fee) on the ground of the ethnicity of one member of the group, then all members of that group should be able to file complaints.

There is precedent for this broader approach as the Hong Kong DDO prohibits discrimination on the ground of the disability of an associate and this provision has proven valuable in redressing actual cases of discrimination. For example, in the case of the Kowloon Bay Health Centre (which settled before it was litigated), patients and staff at a health centre in Hong Kong suffered discrimination and harassment from people living in the area, on the ground of the disabilities of the patients. Privacy concerns and fear of reprisals understandably make patients reluctant to file complaints with the EOC. Fortunately, certain employees of the centre were willing to file complaints and could do so because they had suffered discrimination on the ground of the disabilities of their associates.²⁸ There is no reason why the law should not provide similar protection to people who suffer discrimination on the ground of the race or ethnicity of their associates.

V. Conclusion

As a the consequence of the government's insistence on a "step-by-step" approach, ethnic minorities have waited more than a decade longer than victims of gender and disability discrimination for a law protecting their rights. It would be shameful if the RDB now turns out to be a significantly weaker law than the SDO and the DDO. If the government is not willing to incorporate the progressive amendments that have been made to UK law in recent years, it should at least be willing to enact a law that is as strong (and as wide in scope) as Hong Kong's existing anti-discrimination ordinances. A law that is clearly less effective may well violate the Basic Law, as well as Hong Kong's obligations under ICERD and other international human rights treaties.

If the Hong Kong government refuses to agree to amendments to strengthen the RDB then legislators and the public have a right to ask: what is the government afraid of? If government departments are already complying with the equality provisions of the Basic Law

²⁸ See Hong Kong Equal Opportunities Commission, *Report on Case Study of Kowloon Bay Health Centre* (1999). See also *K, Y, and W v Secretary for Justice* [2000] 3 HKLRD 777, in which the District Court held unlawful a government policy of rejecting an applicant for jobs in the disciplined services if the applicant had a close relative who suffered from mental illness. The Court found that this policy constituted unlawful discrimination on the ground of the disability of the applicant's associate.

and the Bill of Rights Ordinance then they should not be not be afraid of an RDB that is just as strong as the SDO and DDO. The government also should not hesitate to give the EOC the power to investigate claims of racial discrimination in governmental functions.