

**Submission to the UN Committee on the Elimination of Racial Discrimination**  
**75<sup>th</sup> Session, August 2009**  
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Introduction

- The Hong Kong Race Discrimination Ordinance (RDO) came into effect on 10 July 2009 - six years after the Hong Kong Government had initially announced its intention to legislate. Further delays occurred during the legislative process when members of the Legislative Council (LegCo), NGOs, lawyers and legal scholars identified serious flaws in the draft legislation.
- Despite the problems with the original Race Discrimination Bill, the Government failed to propose or support any significant amendments. Because of restrictive voting procedures in LegCo and the lack of democracy in Hong Kong, it is generally difficult to amend draft legislation without government support. As a result, the RDO retains many of the problems which were raised by Hong Kong NGOs in briefings to members of the Committee on the Elimination of Racial Discrimination in 2007 and 2008 - including most of those identified by the Committee in its letter to the Chinese representative to the Permanent Mission of China to the United Nations in Geneva on 7 March 2008.
- One significant positive change - the deletion of a broad exemption for the use of (or failure to use) any language – was initiated by LegCo and occurred despite strong government opposition. Problematic language exemptions in the areas of education and vocational training, however, have been retained in the RDO.
- Some of the key remaining problems are outlined below. This submission contends that exceptions in the RDO, insufficient policy measures, and an overall lack of commitment on the part of the Government (demonstrated in particular by its approach to the legislative process) allow discriminatory policies and practices to continue unchallenged. As a result, the RDO is unlikely to be effective in addressing the most serious problems of racial discrimination in Hong Kong. The RDO protects government policies, including language and immigration policies, which cut off access to equal opportunities for members of ethnic minority communities. In addition, the Hong Kong Government has not provided sufficient measures to ensure the full and effective participation and enjoyment of the fundamental rights of members of these groups. It has therefore failed to fulfill its obligations under the Convention despite the enactment of the RDO.

Government functions and powers

- Despite minor amendments, the RDO still does not prohibit discrimination by the government in the performance and exercise of *all* of its functions and powers. In this

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respect, the RDO is weaker than Hong Kong's three other anti-discrimination laws (which cover discrimination on the grounds of sex, marital status, pregnancy, family status, and disability).

- A minor amendment to the text of the original draft provision does not resolve this problem. Indeed, when the Government proposed the amendment, it also clarified its intention to exclude certain governmental functions from the scope of the RDO. It stated that "...to expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on the Government's ability to make and implement policies."<sup>2</sup>
- This omission in the RDO undermines Hong Kong's ability to fully implement the full range of its obligations under the Convention and the law should be amended to include all government functions and powers within its scope. This would provide more effective protection from discrimination by public bodies including the police and correctional services.

#### Language policy and education

- As described in other submissions made to your Committee by Hong Kong NGOs, members of ethnic minority communities in Hong Kong face considerable difficulties accessing educational, training and employment opportunities due to language barriers. Teacher training, school curricula and assessment mechanisms have not been adequately developed to ensure that ethnic minority students can obtain the Chinese language skills necessary for pursuing further education and employment.
- The RDO explicitly provides that nothing in the Ordinance would require educational establishments or vocational training providers to modify arrangements regarding the language of instruction (RDO sections 26(2) and 20(2)). These exemptions appear designed to preclude challenges under the RDO to language policies in the fields of education and vocational training and essentially protect policies which may amount to unjustifiable racial discrimination.
- Although the Government has recently agreed to allocate resources to enhance Chinese-language learning for minority students, these efforts have been limited and piecemeal in nature. Further special and concrete measures are required to ensure that individuals belonging to ethnic minority groups in Hong Kong can enjoy their fundamental human rights, including education, training and employment, without discrimination.
- Article 2(2) of the Convention requires that states parties take special and concrete measures when the circumstances so warrant and Article 5 requires states to prohibit and to eliminate racial discrimination in all its forms and to guarantee the enjoyment of human rights without discrimination, including the right to education and training (Article 5(e)(v)). Inadequate

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<sup>2</sup> Constitutional and Mainland Affairs Bureau, Hong Kong SAR Government, "The Administration's Further Response to the major issues raised by the Bills Committee", March 2008, LC Paper No. CB(2)1292/07-08(01), para 6.

language policies along with the language exemptions in sections 20 and 26 of the RDO undermine the Hong Kong Government's implementation of these obligations.

### Migrant workers, refugees and new mainland immigrants

- Hong Kong has a number of policies – described in other NGO submissions to the Committee - which discriminate against non-permanent residents, including migrant workers, asylum seekers, and new immigrants from mainland China. Some of these measures, especially those targeted at foreign domestic workers and new immigrants from mainland China, discriminate on the basis of both race and gender. In addition, Hong Kong has yet to develop comprehensive refugee law and policy which ensure full protection of refugee rights.
- The RDO, however, explicitly limits the definition of race by excluding categorizations based on nationality, immigration status and other similar groupings (RDO s 8(3)). Sec 8(2) disallows claims of direct or indirect discrimination on these grounds. Section 55 exempts immigration legislation governing entry into, stay in and departure from Hong Kong.
- These exceptions are overly broad and protect potentially unjustifiable racial discrimination from challenge and fail to comply with the Government's obligations under the Convention. They should be amended either through deletion from the law altogether or by narrowly tailoring them only to exclude policies which are designed to achieve legitimate objectives using proportionate means. A proportionality test would be consistent with international standards and Hong Kong's human rights jurisprudence.

### Lack of commitment and negative messages

- Article 7 of the Convention requires that states adopt immediate and effective measures with a view to combating prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups.
- The Hong Kong Government's insistence on retaining exemptions which protect potentially unjustifiable discrimination coupled with its generally defensive approach to legislating against racial discrimination has undermined implementation of this obligation. The Government's position before, during, and after the legislative process has sent negative messages to the Hong Kong community and demonstrates a lack of commitment.

### Conclusion

- The Government has generally downplayed the problem of racial discrimination in Hong Kong and has sought to avoid the policy and legislative reforms necessary to address the most serious problems of racial discrimination facing immigrant and minority communities. In order to fully comply with its obligations under the Convention, the Hong Kong Government should propose or support amendments to the RDO which eliminate exemptions protecting racially discriminatory acts and policies. It should also take special measures, especially in the area of language and education, in order to ensure the full enjoyment of fundamental human rights without racial discrimination.