

22 January 2018

**Submission to the Legislative Council's Panel on Constitutional Affairs on
implementation and review of the
Administrative Guidelines on Promotion of Racial Equality
(23 January 2018)**

1. The Constitutional and Mainland Affairs Bureau (CMAB) issued the Administrative Guidelines on Promotion of Racial Equality (“the Guidelines”) in 2010 to “promot[e] racial equality and ensure equal access to public services in the key areas concerned, and to take this into account in the formulation, implementation and review of relevant policies and measures” [Guidelines, 1.1]. The guidelines apply to a total of twenty-three bureaux, departments and other public authorities who have produced checklists listing specific measures that have been adopted in furtherance of this policy.
2. Although the Guidelines require the integration of an equality-impact perspective in the formulation, development and implementation of policies and measures in the course of their work [1.4], the public authorities to whom the Guidelines have been applied have consistently failed to demonstrate such considerations in their decision-making and implementation of policies and service delivery.
3. Moreover, to the extent that such considerations factoring racial equality are present in the checklists presented by the relevant authorities, they pertain almost singularly to eliminating language barriers by providing access to interpretation services as well as the distribution of information leaflets regarding their services in multiple languages. Whilst this facilitates ‘equal access’ to a very limited degree i.e. that there is an assurance of parity of information assuming that the individuals concerned are literate (but not all of them are, particularly, women from some ethnic minority communities) and they can access services practically by having an interpreter present, these measures do not address the systemic issues which are the predominant inequities which render a system racially discriminatory and fundamentally inaccessible.
4. Equality of access is not just about having the opportunity to be served by public authorities but to be served in a substantively meaningful manner that would address the concerns raised by the predicament of the individuals or groups concerned. To that end, the Guidelines have fallen grossly short of the standards expected by the overarching legal provisions which guarantee equality and non-discrimination in Hong Kong, including, Article 25 of the Hong Kong Basic Law, Articles 1, 22 and 23 of the Bill of Rights Ordinance and the provisions of the Race Discrimination Ordinance (RDO, Cap. 602). Hong Kong is obliged under the International Convention for the Elimination of All Forms of Racial Discrimination, to address pervasive racism at both, the individual and systemic levels.
5. The RDO itself is limited in scope and given the exclusion of ‘government functions and powers’ from the purview of this legislation, it is critical that any other administrative or

policy measures be stringent and astute in constraining the operative prospects of overt or implicit racial discrimination in terms of how policies create impact and eliminate barriers to equal enjoyment of individual rights, particularly on grounds of race. This requires diligence, rigour, and sincerity across the process through which law, policy and practice are developed and executed including a stringent process of review to examine, understand, analyse and address the source of exclusion, marginalization or other disadvantage experienced by racial minorities despite equality guarantees.

6. The guidelines promote the regular review of the policies and their implementation to ensure that policies can be reformed to meet the changing times and needs as they emerge depending on the circumstances of various population groups. However, it is unclear what the Administration's understanding of 'review' is in this regard. The Administration's paper touts that since the implementation of the Guidelines, they have extended their applicability from fourteen to twenty-three bureaus. Other reviews mentioned concern measures taken to document the 'success' of policies and measures. However, mere references to the expansion of the purview of the guidelines to numerically more departments or bureaus is not in and of itself any 'improvement' except to say that 'more areas' of governance and policy implementation are now subject to these Guidelines. Rather, whether these particular Guidelines themselves have any significant **impact on the improvement of the lives and situation of ethnic minorities in Hong Kong or in securing equality and non-discrimination in different spheres is the fundamental question.**
7. To this end, the Administration's paper does not provide any data which could be of assistance to the public in making an informed assessment. The data it does provide pertains to users' 'satisfaction levels' with interpretation services or with training provided. However, achieving substantive change in the elimination of racial discrimination or disadvantage requires more than approval ratings for piecemeal remedial measures which are really responding to a problem created by the system itself. For example, if racial discrimination in the education system, employment, social welfare, law enforcement and in political and social settings could be effectively addressed so as not to systemically disadvantage or discriminate against ethnic minorities, there would not be as significant a reliance on the need for vocational training, employment retraining or alternative educational pathways to facilitate access to education for ethnic minorities in the first place.
8. These are the systemic discriminatory policies, practices and their implementation which reproduce inequalities which perpetuate cycles of disadvantage, detrimentally impacting all ethnic minorities but in particular, the most vulnerable among them, including women, children, and persons with disabilities. *The Status of Ethnic Minorities in Hong Kong 1997-2014* report published by Puja Kapai of the Centre for Comparative and Public Law in September 2015 and the Administration's own *Poverty Situation Report on Ethnic Minorities 2014* published in December 2015 clearly evidence the exclusion, marginalisation and systemic disadvantage experienced by ethnic minorities in Hong Kong on grounds of race.

9. When the data makes abundantly clear that the problem is one of systemic proportions, it is incumbent on the Administration to recognise that the solution is necessarily also required to be systemic. That means that the law itself needs to be rectified to address the gaps which enable the perpetuation of racial discrimination in access to services from government in particular sectors. This is imperative especially when the government is the primary provider of education, health, and welfare services and has the powers of law enforcement and control over immigration policies and how they are enforced. These are the very realms where minorities often experience racial discrimination and where policies have a disproportionately negative impact on their physical liberties but also their most basic human rights.
10. Once the RDO is reformed to include such areas of government functions and powers within its scope, it will serve as an important basis for ensuring that policies which do not comply with racial equality objectives can be challenged for their invalidity on these grounds. This will further help entrench as a matter of practice then, the need to conduct an equality impact assessment in the formulation of law, policies and guidelines so that there can be accountability when these subsidiary forms of policy execution violate the intent and objectives of the RDO. The lack of any accountability for the omission or oversight of the implementation of the Guidelines necessarily limits any positive or remedial impact they may have.
11. There is no mandatory review or evaluation of policies to ensure their compatibility with the RDO or the guidelines nor are there any reporting requirements by bureaus or departments regarding potential racially discriminatory impact of their policies or practices. The CMAB, whilst bearing the overarching responsibility of monitoring the implementation of the Guidelines and reporting to the public any relevant information [1.7], does not itself appear to partake in any review of the implementation, which is left to the individual bureaus and departments themselves.
12. Where racial inequality systemically undermines the life prospects and potential for equal protection and enjoyment of human rights, there is no room for an honour system based on the discretionary benevolence of individual bureaus and departments. It behoves the Administration to explain how the Guidelines incentivise different departments to aspire to higher standards of implementation with respect to our international human rights obligations towards racial minorities, especially in the absence of any systematic monitoring, good practice directives, evaluation or accountability.
13. Without accountability or regular review, evaluation and any consequences or follow up action plan in the event of a finding which recommends that a discriminatory policy be reformed, there is a critical gap in the machinery which underpins cultural and institutional change or facilitates a change in systems at large. Without systemic change, attitudes of individual personnel manning the institutions will also seldom change.
14. The underlying presumption appears to be that since the Basic Law, BORO and RDO guarantee equal protection on grounds of race and discrimination is unlawful, any acts

which fall foul of the provisions can be challenged in court. However, the fact that to date, there has ever only been one case brought to the Hong Kong courts arguing racial discrimination by the police (which failed), only highlights the critical gap between the legislative goals and the practical reality of achieving racial equality in Hong Kong. The reach of the RDO is limited yet the threshold of establishing racial discrimination on grounds of race is extremely high. Even the EOC has failed to investigate the pervasive racial discrimination problems that are manifest in Hong Kong's education system to date. The available data speaks for itself.

15. A lack of cases or complaints against the Administration through the regular channels does not signal the lack of a problem. Rather, it points to a much more invidious challenge – a systemic one where racial discrimination has become institutionalized and redress is prohibitively expensive and far from reach for the groups that need justice the most. Built into this are several challenges, including, the lack of awareness among ethnic minorities of their rights under the law, the competency and access to justice challenge even where they become aware of their rights and seek enforcement, the exclusion from the purview of the legislation certain acts or bodies, the lack of publicly accessible data disaggregated by race and the lack of culturally responsive policy-making. This last issue stems from the lack of training on race-related issues for most frontline personnel engaged in the relevant bureaus and departments but also, the lack of awareness of the RDO and its impact and relevance to various areas of government services, functions and exercise of powers.
16. In view of the failure of the Guidelines to achieve the desired impact and their grossly inadequate nature in terms of continuous benchmarking and evaluation to ensure departments stay on track and in line to improve in their service delivery towards ethnic minorities, the Administration must take immediate steps to remedy the situation to ensure better compliance with Hong Kong's international obligations and the Basic Law, RDO and BORO's equality provisions.

Recommendations

17. The CERD Convention and the RDO anticipate positive duties in the process of ensuring racial equality and the elimination of all forms of racial discrimination. To this end, it is recommended that Recommendation 23 of the EOC's 2016 Discrimination Law Review, which sought to introduce a public-sector equality duty to promote equality and eliminate discrimination in respect of all the protected characteristics under the 4 anti-discrimination ordinances, be implemented.
18. In line with the Concluding Observations of the CERD Committee, the government amend the RDO to include government functions and powers within the purview of the ordinance.
19. Establish a high level commission within the government with a complete mandate and oversight of all issues impacting ethnic minorities so that it may develop a comprehensive understanding of the interconnecting issues which contribute to the disadvantage or discrimination experienced by ethnic minorities in Hong Kong. This body could advise relevant government bureaus and departments as to their compliance with various laws

and guidelines before policies are developed and implemented; conduct impact assessments and assist various units in the development of appropriate policies to achieve targeted change at a systemic level to improve the lives of all ethnic minorities in Hong Kong.

20. Pending the implementation of these recommendations, the Administration ensure that the Guidelines are amended:
- (a) to enhance measures for curating best practices in assessment, development, implementation and review of policies to eliminate discriminatory impact on grounds of race (and other variables as they intersect with racial identities);
 - (b) to monitor and review the checklists developed by each department, bureau or public authority to whom the Guidelines apply;
 - (c) to bring all relevant bureaus, departments and public authorities within the scope of the Guidelines to ensure comprehensive protection and implementation of commitment to equality at all levels and across the spectrum of public services and exercise of functions and powers;
 - (d) to enhance data collection and transparency by facilitating publicly accessible data sets with respect to the performance of individual departments and bureaus to incentivize cultural change and motivation to do better;
 - (e) to regularly review the performance of different units with respect to the policy impact on ethnic minorities to determine need for reform, adjustment or alternative approaches to implementation to ensure equality of access and service in a meaningful manner;
 - (f) to introduce a performance and accountability pledge through benchmarking for all units within the purview of the Guidelines; and
 - (g) to cultivate a culture of respect for all races by modelling for the public the Government's treatment of its minorities so that it can serve as a form of public education.

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