

LEGISLATIVE COUNCIL BRIEF

PROPOSED LEGISLATION AGAINST RACIAL DISCRIMINATION

INTRODUCTION

At the meeting of the Executive Council on 17 June 2003, the Council ADVISED and the Chief Executive ORDERED that –

- (a) the Government agreed in principle to the need for legislation against racial discrimination in Hong Kong; and
- (b) a consultation paper on the legislative proposals for the racial discrimination law should be published for public consultation.

JUSTIFICATION

Legal position

2. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) applies to the Hong Kong Special Administrative Region by extension of China's ratification of this Convention. Article 5 of the ICERD provides 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 (UN) Committee on the Elimination of Racial Discrimination (CERD) has maintained that the ICERD obliges signatories to introduce specific legislation on racial discrimination. Our legal advice supports this assessment.

3. The Hong Kong Bill of Rights Ordinance (BORO) prohibits all forms of discrimination, including racial discrimination, in the public, but not the private, sector. There are also prohibitions against certain aspects of racial discrimination in specific areas. For example, the Broadcasting

Ordinance and the Telecommunications Ordinance respectively prohibit television and radio licensees from broadcasting programmes, advertisements, and so forth that are likely to incite hatred against any group of persons on the grounds of, inter alia, colour, race, sex, religion, nationality or ethnic or national origins. The Film Censorship Ordinance also makes similar provisions in regard to approvals for the exhibition of films.

4. Hong Kong has no legislation that prohibits all forms of racial discrimination on the part of private individuals or organizations. The CERD has called for such legislation. Furthermore, the UN Committee on Economic, Social and Cultural Rights (CESCR) has stated that the absence of such legislation is a breach of our obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). There is a strong case for introducing legislation against racial discrimination. The proposed legislation would be a positive indication of the Government's commitment to human rights. It would also enhance Hong Kong's reputation as an international city.

Ethnic groups: the demographics

5. Hong Kong is a largely homogenous society, with about 95% of its people being ethnic Chinese. The 2001 Census indicated that there were about 344 000 non-Chinese people in Hong Kong or about 5% of the population. Some 52% (180 000) of these were foreign domestic helpers.

6. Hong Kong's principal ethnic minorities are –

<u>Ethnicity of Group</u>	<u>Number</u>
Filipino	142 556
Indonesian	50 494
British	18 909
Indian	18 543
Thai	14 342
Japanese	14 180
Nepalese	12 564
Pakistani	11 017

Not all members of these groups are permanently settled in Hong Kong.

Policy

7. The Government's policy is to encourage the settled ethnic minorities to integrate into our wider society while retaining their cultural identity. Our strategy for achieving that goal comprises two elements, namely to extend practical assistance to ethnic minorities in order to facilitate the settlement and integration process, and to address discriminatory attitudes and actions that may impede the process.

8. The BORO, which incorporated into Hong Kong law the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong, proscribes all forms of discrimination on the part of the Government and public bodies. 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 that entail racial discrimination. In other words, the BORO prohibits discrimination in the public sector. However, section 7 of the BORO restricts the application of the Bill of Rights to the Government and public bodies. We do not yet have specific legislation against racial discrimination which applies to actions between private parties.

Recent developments

9. In 1997, the Government published a consultation paper entitled "Equal Opportunities: A Study of Discrimination on the Ground of Race" to solicit public views. Over 80% of the respondents opposed legislation, particularly the local chambers of commerce. On examining these findings, we decided not to legislate at that stage, but to pursue non-legislative measures and public education instead. We also decided to periodically revisit the question of legislation to ascertain whether changing circumstances warranted a change of policy.

10. We recently revisited the question in 2001-02. The exercise comprised two parts –

(a) **Consultations with the business community**

Some 25 organizations responded to the consultation exercise. Sixteen of the 25 were broadly in favour of legislation. These included nine overseas chambers of commerce and six local trade

associations. The 16 included one local association that, while supportive in principle, considered it inappropriate to legislate at this stage. Of the remaining nine, six were opposed and three had no views.

(b) **Consultations with non-governmental organizations (NGOs) and other interested organizations**

Of the 55 organizations consulted, 44 (80%) submitted comments. All were in favour of legislation.

The principal arguments that respondents adduced for and against legislation are summarized in a table at **Annex A**.

11. The results of our consultations indicate that the business sector is more open to legislation than previously, perhaps because it has had time to adapt to the three existing anti-discrimination laws namely, the Sex Discrimination Ordinance, the Family Status Discrimination Ordinance and the Disabilities Discrimination Ordinance. The organizations that remain opposed – mainly the local Chambers – expressed their opposition in milder terms than they did in 1997.

Experience from implementing existing anti-discrimination laws

12. Between 1996 and 2002, the Equal Opportunities Commission (EOC) received 4 746 complaints under the three anti-discrimination ordinances. About 58% were employment-related. The EOC has taken 24 cases to court. Five were against the Government/public bodies (one being brought by the EOC itself, four by EOC assisted plaintiffs) and 19 were brought by EOC-assisted plaintiffs against the private sector. Furthermore, private citizens have brought 22 cases without legal assistance from the EOC (eight against the Government/public bodies, 14 against private citizens/companies). Thus, there have been on average seven to eight cases a year or about two or three per ordinance per year.

13. On the whole, the Government has experienced little difficulty in complying with the existing anti-discrimination laws. The anti-discrimination laws have generally not adversely affected the general public or the business sector.

Public demand for legislation

14. Public demand for legislation has increased in recent years. The situation is summarized as follows –

(a) Locally

Complaints and enquiries concerning race discrimination have increased. The substance of the complaints has included, among others, refusal to let property to persons of Indian or Pakistani origin, rejection of members of minority groups for job interviews, less favourable treatment in the workplace for members of minority groups, racial slurs, and advertisements restricting services (or special offers) to persons of a particular race.

Complaints and enquiries about racial discrimination are handled by the Race Relations Unit of the Home Affairs Bureau which was set up in June 2002. Where we have been able to investigate, we have found that some complaints arose from misunderstandings of language and/or culture. Others have proved to be quite well founded.

(b) Internationally

Representatives of the CESCRC and the UN Human Rights Committee, in January and February 2001 respectively, made strong calls for legislation in this area. These echoed similar calls made in 1996 and 1999. In February 2000, the then UN High Commissioner for Human Rights repeated the call during her visit to Hong Kong. The CESCRC repeated this in its concluding observations on our current report under the ICESCRC (May 2001), as did the CERD in its concluding observations on our initial report under the ICERD (August 2001).

Legislation: impact assessment

(a) Impact on Government

15. The existing anti-discrimination laws have not significantly affected Government operations. Since the Government is already subject to the anti-discrimination provisions in the BORO, an anti-racial discrimination law applying to the private sector is unlikely to add to our obligations.

(b) Impact on the public

16. Fewer than 5% of respondents to a telephone survey (March 2001) envisaged that legislation would adversely impact on them. Most of those who thought that it would were homemakers, perhaps reflecting the concerns of employers of foreign domestic helpers.

(c) Impact on business

17. As indicated in paragraph 10 above, some respondents –mainly the local chambers – are opposed to legislation, fearing that it would compromise the free market and engender litigation. However, other business respondents, mainly foreign chambers of commerce, consider that legislation would ensure a merit-based level playing field and enhance free market operations.

Legislation in other jurisdictions

18. Many common law jurisdictions have statutory prohibitions against racial discrimination. Examples include Australia, Canada, New Zealand, the United Kingdom and the United States. Other countries such as Austria, Belgium, Denmark, Finland, the Netherlands, Norway, Spain, Sweden and Switzerland also have specific legislation against racial discrimination.

PROPOSAL

19. We propose that the time is now ripe for legislation. In reaching this conclusion, we have taken account of the fact that public and business sector resistance has diminished. This was evident in the views expressed in the recent consultations and at related fora.

20. Our assessment is that –

- (a) business would not face significant new costs beyond those already incurred in conforming to the existing laws. Furthermore, we would formulate exemption provisions that – without compromising the credibility of the proposed law – would address the legitimate concerns of the business community;

- (b) the proposed law would not adversely affect the operation of business and it would be consistent with free market principles;
- (c) the proposed law would not engender a significant level of litigation. The enforcement agency and/or the Director of Legal Aid would screen out vexatious applications as they have done with the existing anti-discrimination laws;
- (d) the possibility of a backlash from the majority population is unlikely; and
- (e) legislation would enhance Hong Kong's international image, and both tourism and other areas would benefit.

21. Legislating against racial discrimination would enhance Hong Kong's image as Asia's world city. We also wish to assure our ethnic minorities that the Government is concerned about their rights and well being.

PROPOSED LEGISLATION

22. The main aim of the proposed Bill would be to make unlawful discrimination on racial grounds and to make provision against racial harassment. We propose that the form and content of the new law should be broadly similar to the existing anti-discrimination laws – with which employers are now familiar – so as to facilitate the adaptation process.

23. We propose to use the definition of racial discrimination as set out in the ICERD. Article 1 of the ICERD defines racial discrimination as follows –

" In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

24. Although new arrivals from the Mainland do sometimes face discrimination by Hong Kong's Chinese majority, they are of the same ethnic group as local Chinese. The discriminatory treatment experienced by new

arrivals from the Mainland is not based on race, colour, descent, or national or ethnic origin. There is no intention to cover the social discrimination against them by the local Chinese in our proposed legislation against racial discrimination. Of course, they would be covered if they are discriminated by members of other ethnic groups or if they discriminate against members of other ethnic groups.

25. The main provisions of the Bill would include prohibition of racial discrimination and harassment in the following areas –

- (a) employment;
- (b) admission to trade unions, employers' organizations, professional/trade organizations, or occupations;
- (c) conferment of professional/trade qualifications;
- (d) admission to educational establishments;
- (e) provision of goods and services;
- (f) admission to pupillage; and
- (g) advertising.

26. We intend to propose some exemptions to the above provisions to address the legitimate concerns of some sectors of the community. However, such exemptions should not compromise the credibility of the proposed Bill.

LEGISLATIVE TIMETABLE

27. We plan to introduce a Bill into the Legislative Council in the 2004-05 session.

IMPLICATIONS OF THE PROPOSAL

28. The proposal to legislate against racial discrimination is in conformity with the Basic Law, including the provisions concerning human rights. It has no civil service, productivity or environmental implications. — **Annex B** addresses its financial, economic and sustainability implications.

PUBLIC CONSULTATION

29. We will consult interested parties in the course of the drafting process, particularly with a view to addressing any residual concerns that the business community may reasonably continue to harbour. A consultation paper setting out the legislative proposals will be issued for public comments.

PUBLICITY

30. A press release will be issued. A spokesman will be available to answer media and public enquiries.

ENQUIRIES

31. For enquiries, please contact Mr. John Dean, Principal Assistant Secretary for Home Affairs, at 2835 1552; or Mr. David Yip, Assistant Secretary for Home Affairs, at 2835 1405.

Home Affairs Bureau
19 June 2003

**The pros and cons of legislation
against racial discrimination in the private sector (respondents' views)**

Against legislation	For legislation
Hong Kong does not need legislation in this area.	The ICERD obliges us to legislate. There have been increasing calls - by local NGOs and UN human rights treaties monitoring bodies - for legislation. Legislation could enhance our international image.
Legislation is punitive and not an effective means to change attitudes. Education is the most effective way of tackling discrimination.	Legislation can help to modify behaviour and change attitudes.
Racial discrimination is not serious in Hong Kong	Complaints about racial discrimination have been increasing, both from the ethnic minorities and from members of the public. Without legislation, victims of acts of racial discrimination by private individuals and organizations have no means of redress.
Many countries that have legislation in this area still suffer from serious and blatant racial discrimination.	Notwithstanding the continued prevalence of discrimination, the overall situation in those countries with anti-racial discrimination legislation has generally improved.
Legislation would be ineffective in the absence of public support.	Opposition to legislation is less strident than in the past. A Legislative Council motion debate in favour of legislation was passed unanimously on 12 March 2003.
There is opposition among the business community and employers groups who see it as unhelpful in the current economic climate.	Supporters of legislation argue that it would be pro-business, would promote meritocracy and would bring about a level playing field.
Legislation could be counter-productive; it could lead to strained relations among ethnic groups and rebound to the detriment of the minorities.	There is no evidence that legislation would be counter-productive.

Against legislation	For legislation
<p>Some 8% of our households include foreign domestic helpers. Employment related complaints would be complicated by allegations of racial discrimination.</p>	<p>Race issues are only likely to arise in unusual cases, such as the use of pejoratives and other race-based abuse on the part of the employer.</p>
<p>Given the large number of households with live-in foreign domestic helpers on an employment relationship, the potential for vexatious litigation cannot be underestimated. Some 57% of EOC complaints under the three existing Ordinances are employment related.</p>	<p>So far, the existing Ordinances have engendered only 42 cases for the courts: an average of eight a year overall, or two to three per year per ordinance. The enforcement agent and the Legal Aid Department would screen out vexatious cases.</p>
<p>The international community is generally satisfied with Hong Kong's human rights situation. UN human rights treaties monitoring bodies are more interested in advocating a human rights commission in Hong Kong than in race discrimination legislation.</p>	<p>This is not the case: both the CESC and the CERD declared that legislation against racial discrimination should be given priority.</p>

IMPLICATIONS OF THE PROPOSAL

Financial implications

It will be necessary to designate a statutory agency to monitor, promote and enforce the eventual Ordinance. We will consider the various options in that regard during the drafting process. There would be recurrent cost for the designated statutory agency.

Economic implications

2. The proposed legislation against racial discrimination, vis-à-vis the existing non-legislative approach, might introduce a certain degree of rigidity to business operations in the economy. Yet the additional compliance cost in overall terms thus entailed, though difficult to quantify, might not be large, given that ethnic minorities constitute only a very small proportion of the local population, and that exemption provisions will be in place to cater for legitimate needs of the business community.

Sustainability implications

3. The proposal will help foster a culture of mutual respect and tolerance in our society, and fulfil our international obligations of protecting the rights of ethnic minorities. It is conducive to the sustainability principle of fostering an equitable and progressive society.