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Panel on Home Affairs

**Background brief prepared by Legislative Council Secretariat
for the meeting on 8 July 2005**

Legislating against racial discrimination

Purpose

This paper gives an account of the discussion of Members of the Legislative Council (LegCo) on racial discrimination and legislating against racial discrimination.

Background

2. Hong Kong has an international obligation to prohibit all forms of racial discrimination. A number of international human rights treaties oblige Hong Kong to introduce specific legislation to deal with racial discrimination, as discussed in paragraphs 3 to 10 below.

The International Convention on the Elimination of All Forms of Racial Discrimination

3. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was extended to Hong Kong in March 1969. Article 5 of the Convention states that the States Parties have obligations to prohibit and 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. Prior to 1 July 1997, the United Nations (UN) Committee on the Elimination of Racial Discrimination had expressed concern, in its Concluding Observations issued after consideration of the 14th periodic report of the United Kingdom on Hong Kong, about the absence of a provision in the Hong Kong Bill of Rights Ordinance protecting persons from racial discrimination to which they might be subjected by private persons, groups or organisations.

4. The UN Committee issued its Concluding Observations on the first report of HKSAR under ICERD on 9 August 2001. The UN Committee reiterated its concern about the continuous absence in HKSAR of legal provisions protecting persons from racial discrimination to which they might be subjected by private persons, groups or organisations. The UN Committee recommended that appropriate legislation be introduced in HKSAR to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent or national or ethnic origin.

The International Covenant on Civil and Political Rights

5. The International Covenant on Civil and Political Rights (ICCPR) was extended to Hong Kong in May 1976. The States Parties have obligations under Article 26 of the Covenant to enact law to prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, such as race or other status. The Hong Kong Bills of Right Ordinance, which incorporates into Hong Kong law the provisions of ICCPR as applied to Hong Kong, proscribes all forms of discrimination on the part of the Government and public bodies.

6. The UN Committee issued its Concluding Observations on the first report of HKSAR under ICCPR on 15 November 1999. The UN Committee expressed concern that no legislative remedies were available to individuals in respect of discrimination on the ground of race.

The International Covenant on Economic, Social and Cultural Rights

7. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was extended to Hong Kong in May 1976. The States Parties have obligations under Article 2 of the Covenant to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race or other status.

8. The UN Committee issued its Concluding Observations on the first report of HKSAR under ICESCR on 11 May 2001. The UN Committee stated in its Concluding Observation that HKSAR's failure to prohibit racial discrimination in the private sector constituted a breach of its obligations under Article 2 of the Covenant.

9. The second report of HKSAR under the Covenant was submitted to UN as part of China's initial report in June 2003. The Government informed the UN Committee in its second report that views had been sought from interested parties in 2000 and early 2001 on the issue of legislating against racial discrimination in the private sector. At the time of finalising the report, the Government had completed an analysis of the responses received and was examining the balance of consideration.

10. The UN Committee issued its Concluding Observations [LC Paper No. CB(2)1634/04-05(01) dated 20 May 2005] on the second report of HKSAR on 13 May 2005. In its Concluding Observations, the UN Committee reiterated its concern about the fact that the present anti-discrimination legislation in HKSAR did not cover discrimination on the basis of race, sexual orientation and age, as well as the lack of effective protection from discrimination and abuse in practice, of foreign domestic helpers, affected by the “two-week rule”, upon expiration of their contracts.

11. In paragraph 79 of its Concluding Observations, the UN Committee expressed disagreement with the Government’s latest position that the protection afforded by the proposed racial discrimination law would not cover migrants from the Mainland and the new law would not affect the existing immigration legislation in HKSAR.

Discussion of the Panel on Home Affairs

Public consultation exercise in 1997

12. The Government published a consultation paper entitled “Equal Opportunities: A Study on Discrimination on the Ground of Race” in February 1997 to solicit public views. The Administration had included new arrivals from the Mainland in its study on racial discrimination. According to paragraph 1.7 of the consultation paper, the reason for the Administration’s inclusion of new arrivals from the Mainland in its study was that “international bodies concerned with race-related issues consider that ‘racial discrimination’ includes discrimination against identifiable minorities within a particular culture, even those of the same ethnic stock as the host community”. Moreover, in its examination of the United Kingdom’s 13th report under ICERD, the UN Committee on the Elimination of Racial Discrimination considered and commented on the circumstances of the Irish Travellers, who were ethnically Irish people and spoke an Irish dialect. However, their distinct lifestyle set them apart as a discrete minority and as such, the difficulties they experienced were considered a legitimate subject for inquiry by the UN Committee.

13. Of the respondents to the consultation paper in 1997, 83% opposed legislation against racial discrimination. These respondents were of the view that the Administration should eliminate racial discrimination through public education and publicity instead of enacting anti-discrimination legislation in a hasty manner.

14. The Administration briefed the Panel on Home Affairs on the outcome of the consultation exercise on racial discrimination at its meeting on 20 June

1997. Some members pointed out that since the people being subjected to racial discrimination were the minority group, this was a wrong approach for the Administration to consider the need to legislate against racial discrimination merely based on a quantified assessment of the opinions received in the consultation exercise. These members considered it necessary for the Administration to take more proactive steps in the promotion of equal opportunities and issue a code of practice or guidelines on elimination of racial discrimination for reference of the general public. The Administration responded that it would consider drawing up such a code of practice or guidelines to promote self-discipline among the general public.

HKSAR's initial report under ICESCR

15. When the Panel on Home Affairs held a special meeting on 26 February 2001 to discuss the first report of HKSAR under ICESCR with concern organisations and the Administration, some members expressed the view that the need for legislation against racial discrimination should not be determined on the basis of public opinion surveys, i.e. the majority view, and that the minorities affected should be consulted. The Secretary for Home Affairs (SHA) responded that the need to legislate against racial discrimination was not determined simply based on the results of opinion surveys. The Administration had proactively approached ethnic minorities for a better understanding of their relevant experience.

Two-phase consultation exercise in 2001-02

16. The Administration conducted a two-phase consultation exercise on legislation against racial discrimination in 2001-02. In the first phase (June – September 2001), the Administration consulted the business sector as to whether they agreed in principle to the Government introducing legislation against racial discrimination in the private sector, their concern about such legislation, and issues to which the Administration should pay particular attention in drafting the legislation. In the second phase, the Administration consulted non-governmental organisations (NGOs) on the same issues and sought their views on the comments made by the business community.

17. Twenty-five of the 34 targeted business organisations responded to the proposal of introducing legislation against racial discrimination. Among these 25 business organisations, nine overseas trade associations expressed support for such legislation. Among the remaining local trade associations, six indicated support, one indicated support but it did not consider it appropriate to legislate at the present stage, six indicated objection and three had no comments. All the 44 NGOs which responded to the consultation exercise were in favour of legislation.

HKSAR's second report under ICERD and the outcome of the two-phase consultation exercise

18. The Panel on Home Affairs discussed the preparation of the second report of HKSAR under ICERD and of other reports under human rights treaties for submission to UN at its meeting on 13 December 2002. Some Panel members were of the view that the Government should fulfil its international obligations under international conventions by legislating against racial discrimination, as they noted from the outcome of the two-phase consultation exercise that the business community had indicated its support and there seemed no strong objection from the society. The Administration responded that the Government had not yet taken a decision on the issue and required more time to study it.

Government's announcement of its intention to legislate against racial discrimination and public consultation exercise in 2004

19. In June 2004, the Government announced its decision to legislate against racial discrimination and its plan to introduce a bill into LegCo, in the 2004-05 legislative session, to prohibit racial discrimination. In September 2004, the Government issued a Consultation Paper entitled "Legislating Against Racial Discrimination" to collect public views.

20. According to the Consultation Paper, it is the Government's view that new arrivals from the Mainland do not constitute a racial or ethnic group in Hong Kong. Discrimination against new arrivals from the Mainland by local Chinese is therefore not considered a form of racial discrimination. The closing date of the public consultation exercise, originally scheduled for 31 December 2004, was subsequently extended to 8 February 2005.

21. The Panel on Home Affairs received a briefing given by the Administration on the legislative proposals set out in the Consultation Paper at its meeting on 9 November 2004. The Panel also held a special meeting on 11 December 2004 to further discuss the proposals and receive views from 22 deputations.

Exclusion of discrimination experienced by new arrivals from the Mainland from the scope of the Bill

22. The Administration proposed that racial discrimination should be defined as discrimination based on "race, colour, descent, or national or ethnic origin" as set out in Article 1 of ICERD. The Administration was of the view that discrimination against new arrivals from the Mainland by local Chinese was not based on race, because almost all of the new arrivals from the Mainland were of the same ethnic stock as local Chinese, i.e. Han Chinese. The Administration considered that discrimination against new arrivals from

the Mainland by local Chinese was not a form of racial discrimination but, rather, a form of social discrimination. The Administration explained that the Government had previously considered that discrimination faced by new arrivals from the Mainland was racial discrimination based on an international discrimination case concerning the Irish Travellers. After further study of the case of the Irish Travellers as well as other cases, the Administration, however, found that there were marked differences between the case of Irish Travellers and the background of new arrivals from the Mainland. As such, the Administration came to the view that new arrivals from the Mainland should not be covered by the Bill.

23. Some members considered that discrimination against new arrivals from the Mainland was prevalent and supported that the scope of the Bill should be extended to cover such discrimination. In this connection, they proposed that the Bill be named as the Racial Discrimination and Discrimination on the Ground of Culture Bill, or the Racial and Related Discrimination Bill.

24. The Administration explained that if it disregarded the definition provided in ICERD and drafted the Bill in such a way that it also covered discrimination against new arrivals from the Mainland, the Bill so drafted would violate the original legislative intent of prohibiting racial discrimination in Hong Kong, as it would be queried why new arrivals from the Mainland should be given additional protection. The Administration pointed out that if a separate legislation to prohibit discrimination against new arrivals from the Mainland was proposed to be introduced, further public consultation exercise would have to be conducted to collect public views on such a proposal.

25. The Administration also pointed out that some people had queried whether there was really an urgent need to legislate against discrimination encountered by new arrivals from the Mainland. These people considered that since new arrivals were ethnic Chinese and Chinese-speaking, in time they would be able to adapt to the Hong Kong society and assimilate. They were concerned that introducing legislation to provide special protection to the new arrivals would only affect their assimilation into the Hong Kong society.

Exception from anti-discriminatory provisions for small companies and employers

26. In order to allow small companies and employers sufficient time to adapt to the proposed new regulatory regime, the Administration proposed that an exception from the anti-discriminatory provision in the field of employment should be made in the case of an employer who had less than six employees. However, there would be a “sunset” clause under which this exception would expire three years after the Bill was enacted into law and became operative.

27. Some members disagreed to the proposal and they pointed out that after enactment of the new race discrimination law, anyway there would be codes of practice issued to provide practical guidance on compliance with the law. They also suggested that the proposed “sunset” period should be reduced to be one year only. A representative of the Employers’ Federation of Hong Kong, however, pointed out at the special meeting on 11 December 2004 that some members of the Federation had suggested that “small companies and employers” in the Bill should be defined as those employing less than 50 people.

28. The Administration explained that while transnational corporations and large companies probably had already put in place anti-discriminatory measures/practices in employment-related matters, small enterprises had expressed concern about possible increases in operating costs entailed by the enactment of the proposed legislation. Nevertheless, the Administration was still in the course of consulting the public and the business sector on the appropriate length of transitional period to be proposed in the Bill.

Indirect racial discrimination and problem of language barrier

29. The Administration pointed out that an employer might be regarded as indirectly discriminating against members of ethnic minorities if the employer imposed certain requirements on job applicants and his purpose of so doing was only to exclude members of ethnic minorities from being eligible for the job. Such requirements might include requirements in respect of languages, religion, dressing, outlook (e.g. job applicants not allowed to have beards), etc. These examples would not be spelt out in the provisions of the Bill. It was intended that the Court would rule over disputes alleging indirect racial discrimination based on the circumstances in each case.

30. Some members considered that the language barrier was the main cause giving rise to indirect racial discrimination. They urged the Administration to allocate more resources to resolve the problem of language barrier encountered by members of ethnic minorities to ensure equal opportunities for them in gaining access to all kinds of public services. These members further suggested that the Bill should provide that no local resident should be denied equal opportunities, on the ground of race or language, in gaining access to any public services.

31. The Administration pointed out that under the proposed legislation, the Government or a public authority might be regarded as committing indirect discrimination if it had denied, without reasonable justifications, a member of the ethnic minorities access to any public services due to its refusal to provide the necessary interpretation service.

Appropriateness of the Equal Opportunities Commission to be appointed as the implementation body

32. The Administration proposed that the Equal Opportunities Commission (EOC) should be the body responsible for implementing the provisions of the Bill or, alternatively, a dedicated “Commission for Racial Equality” be set up to implement the provisions of the Bill. At the special meeting on 11 December 2004, the Administration informed the Panel that the responses received so far in the public consultation exercise indicated that there was general support for the former.

33. Some members considered that following the controversies surrounding EOC over the previous year, there still seemed to be many voices in the community questioning the credibility of EOC. They urged the Administration to take measures to restore EOC’s credibility and enhance the transparency in the process of appointment of the EOC Chairperson. Some deputations suggested that if EOC was to be appointed as the implementation body, consideration should be given to appointing members of ethnic minorities to EOC and ensuring that adequate resources were provided to EOC to ensure smooth implementation of the proposed legislation.

34. A chronological account of past discussions on racial discrimination and legislating against racial discrimination at meetings of the Panel on Home Affairs is set out in the **Appendix I** for members’ easy reference.

Relevant motion and questions moved/raised at Council meetings

35. At the Council meeting on 12 March 2003, Hon Audrey EU moved a motion urging the Government to adopt the recommendations of the relevant UN Committees and expeditiously legislate against racial discrimination to ensure that new arrivals from the Mainland and ethnic minorities in Hong Kong could enjoy equal opportunities in such areas as education, employment and access to social services. The motion was carried.

36. Details of the questions relating to racial discrimination and legislating against racial discrimination raised at Council meetings since the first term of LegCo are in **Appendix II**.

Recent development

37. The Administration has completed analysis of the results of the public consultation exercise and will provide a paper for discussion at the meeting of the Panel on Home Affairs on 8 July 2005.

Council Business Division 2
Legislative Council Secretariat
5 July 2005

Chronological account of past discussions

A chronological account of past discussions on the issue of racial discrimination at meetings of the Panel on Home Affairs is set out below for members' easy reference.

1998-1999 legislative session

Meeting of the Panel on Home Affairs on 27 July 1998

2. The Panel discussed the reports to be submitted by the Hong Kong Special Administrative Region (HKSAR) under the international human rights treaties. At the meeting, the Administration reported the developments on the issue of racial discrimination since it had last briefed the Panel on the outcome of a consultation exercise on the same subject on 20 June 1997. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr98-99/english/panels/ha/minutes/ha270798.htm>".

Meeting of the Panel on Home Affairs on 22 September 1998

3. The Panel discussed the issued of racial discrimination with the Administration and concern organisations. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr98-99/english/panels/ha/minutes/ha220998.htm>".

1999-2000 legislative session

Meeting of the Panel on Home Affairs on 10 January 2000

4. The Panel discussed the outline of topics to be included in the first report of the HKSAR under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) with concern organisations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr99-00/english/panels/ha/minutes/ha100100.pdf>".

2000-2001 legislative session

Meeting of the Panel on Home Affairs on 17 October 2000

5. The Secretary for Home Affairs (SHA) briefed the Panel on the 2000 Policy Address at this meeting during which he explained the Government's position on the issue of legislating against racial discrimination. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr00-01/english/panels/ha/minutes/ha171000.pdf>".

Meeting of the Panel on Home Affairs on 13 February 2001

6. The Panel discussed the findings of a sample survey of ethnic minorities commissioned by the Government with concern organisations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr00-01/english/panels/ha/minutes/ha130201.pdf>".

Meeting of the Panel on Home Affairs on 26 February 2001

7. The Panel discussed the first report of HKSAR under the International Covenant on Economic, Social and Cultural Rights (ICESCR) with concern organisations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr00-01/english/panels/ha/minutes/ha260201.pdf>".

Meeting of the Panel on Home Affairs on 10 July 2001

8. The Panel discussed the first report of HKSAR under ICERD. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr00-01/english/panels/ha/minutes/ha100701.pdf>".

2001-2002 legislative session

Meeting of the Panel on Home Affairs on 9 November 2001

9. The Panel received a briefing by SHA on the Chief Executive's Policy Address 2001 at this meeting during which the issue of legislating against racial discrimination was discussed. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr01-02/english/panels/ha/minutes/ha011109.pdf>".

Meeting of the Panel on Home Affairs on 23 May 2002

10. The need to legislate against racial discrimination was raised during discussion of promotion of equal opportunities on racial issues at this meeting. The minutes of the meeting are available at "<http://www.legco.gov.hk/>

[yr01-02/english/panels/ha/minutes/ha020523.pdf](http://www.legco.gov.hk/yr01-02/english/panels/ha/minutes/ha020523.pdf)".

2002-2003 legislative session

Meeting of the Panel on Home Affairs on 13 December 2002

11. The Panel discussed the second report of HKSAR under ICERD and preparation of other reports under human rights treaties for submission to the UN with concern organisations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr02-03/english/panels/ha/minutes/ha021213.pdf>".

Special meeting of the Panel on Home Affairs on 7 February 2003

12. The Panel discussed the second report to be prepared by HKSAR under ICESCR with concern organisations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr02-03/english/panels/ha/minutes/ha030207.pdf>".

2003-2004 legislative session

Meeting of the Panel on Home Affairs on 9 January 2004

13. The Panel received a briefing by SHA on the Chief Executive's Policy Address 2004 during which he informed the Panel that a bill to legislate against racial discrimination would be introduced into the Legislative Council. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr03-04/english/panels/ha/minutes/ha040109.pdf>".

Meeting of the Panel on Home Affairs on 11 June 2004

14. The Panel discussed the second report of HKSAR under ICESCR and the implementation of international human rights treaties in HKSAR with concern organisations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr03-04/english/panels/ha/minutes/ha040611.pdf>".

2004-2005 legislative session

Meeting of the Panel on Home Affairs on 9 November 2004

15. The Panel discussed the Consultation Paper entitled "Legislating Against Racial Discrimination". The minutes of the meeting are available at "<http://www.legco.gov.hk/yr04-05/english/panels/ha/minutes/ha041109.pdf>".

Special meeting of the Panel on Home Affairs on 11 December 2004

16. The Panel discussed the Consultation Paper entitled "Legislating Against Racial Discrimination" with 22 deputations and the Administration. The minutes of the meeting are available at "<http://www.legco.gov.hk/yr04-05/english/panels/ha/minutes/ha041211.pdf>".

Note

The above minutes of meetings are also available on the Research and Library Services Information System.

Council Business Division 2
Legislative Council Secretariat
5 July 2005

Questions moved by Members at Council meetings

Meeting Date	Question
22 July 1998	Hon Emily LAU raised an oral question concerning bars and clubs charging non-white customers with higher rates. Two supplementary questions were raised about conducting another survey to consult the ethnic minorities on the need to legislate against racial discrimination.
25 April 2001	Hon Margaret NG raised an oral question on the Government's plan to introduce legislation against racial discrimination.
13 June 2001	Hon James TO raised an oral question on the implementation of the recommendation made by the United Nations (UN) Committee on Economic, Social and Cultural Rights on prohibition of discrimination in its Concluding Observations.
10 April 2002	Hon Cyd HO raised a written question on legislation against racial discrimination in the private sector and among individuals.
19 June 2002	Hon Emily LAU raised an oral question on legislation against acts of racial discrimination in private sector.
12 February 2003	Hon Jasper TSANG raised an oral question on ethnic minorities. Hon James TO also raised a supplementary question about education and employments problems encountered by ethnic minorities.
2 June 2004	Hon Audrey EU raised an oral question about the legislative proposals for racial discrimination law.
27 October 2004	Hon CHOY So-yuk raised an oral question concerning an expatriate teacher of an aided school reportedly insulting a local Chinese by making racially discriminatory remarks.