



香港僱主聯合會
**Employers'
Federation
of Hong Kong**

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29 November 2004

Hon Tommy Cheung Yu-yan, *JP*
Chairman
Panel on Home Affairs
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Hon Cheung,

**Comments of the Employers' Federation of Hong Kong
on the Consultation Paper concerning legislating against racial discrimination**

We refer to your letter of 17 September 2004 inviting views on the Consultation Paper regarding Legislating Against Racial Discrimination.

The Employers' Federation of Hong Kong (the "Federation") is the only employers' organisation in Hong Kong that focuses solely on representing employers' interests on employment issues. Currently, it has about 500 corporate members, ranging from multi-national corporations to small companies, engaging a workforce of about half a million.

The views set out in this Paper follow consultation with the Federation's membership as a whole. In particular each of the Federation's members has been invited to respond to the questions raised in the Consultation Paper.

In the last 10 years a raft of prescriptive employment related legislation has been imposed on Hong Kong employers. In addition to the three anti-discrimination Ordinances (Sex, Disability and Family Status), the Occupational Retirement Schemes Ordinance, the Mandatory Provident Fund Scheme Ordinance and the Personal Data (Privacy) Ordinance have each been passed. Over the same period the Employment Ordinance has been substantially amended in order, for example, to introduce the concept of unreasonable dismissal. Each element of prescriptive legislation is a cost to employers. The Federation's comments on the proposed racial discrimination legislation should, therefore, be considered in the background of this substantial increase in legislation.

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Response on specific questions raised in the Consultation Paper

(a) *Is there a need and urgency for anti-racial discrimination legislation?*

The Federation is of the view that discrimination on the grounds of the race or ethnic origin of an individual is not wide spread amongst employers in Hong Kong. It accepts, however, there will be a very small minority of employers who may discriminate on such grounds and that such action is unacceptable.

Provided that the relevant legislation is introduced with sensitivity and care (and in particular provided that priority is given by the Government in explaining to the public the impact of such legislation) the Federation supports such legislation.

(b) *What would be the impact of anti-racial discrimination legislation?*

The proposed legislation will inevitably result in an increased cost for employers in Hong Kong (as employers will need to train their employees in order to avoid potential vicarious liability and will also need to put in place relevant compliance procedures). This is particularly so for Hong Kong where the workforce is made up of a large number of races and ethnic groups.

Such increased cost will in turn impact the competitiveness and attractiveness of Hong Kong as a place to do business.

If the proposed anti-racial discrimination legislation was to be introduced without detailed explanation and education then it would result in substantial confusion.

The concept of racial discrimination is materially different from that of sex, disability or family status discrimination. Whilst it is a relatively straightforward process to explain to employers and employees the meaning of sex, disability and family status, the concept of “race, colour, descent or national or ethnic origin” is far more vague.

Specifically, certain Members of the Federation have raised concerns as to the impact of the proposed legislation on established practices, including:-

- *corporate culture* - where corporate culture is shaped from social values and beliefs which, to some extent, may be developed from racial backgrounds (for example employing only Jews to work in administration of a Jewish community body),
- *expatriate terms* - the established policy of providing expatriate terms for certain non-local employees (often such terms are also provided even where the employee in question is not relocating from overseas, but is moving from an existing position in Hong Kong). Should the ability to offer expatriate terms to potential employees from overseas become restricted then this will have a

material impact upon the effectiveness of Hong Kong to compete in an increasing competitive global environment,

- *impact on religious beliefs* - the interaction between the anti-racial discrimination legislation and discrimination on the grounds of religious beliefs (compare for example the probably different impacts upon discrimination against Jews, Muslims and Sikhs),
- *english language tests for non native speaking applicants* - will the legislation require an employer to test all applicants for a position requiring fluent English or could an employer only test non-native English speakers (or simply offer the position to the native English speaker without testing the others).

Other Members of the Federation have raised concerns on the “genuine occupational qualification” exemption. In particular certain nationalities and ethnic groups are renowned for specific personal characteristics (eg Gurkha security guards). Entire businesses may have been created on the basis of such reputations. Would the proposed legislation require such businesses to hire other nationalities thereby diluting the entire business model of the entity?

- (c) *Should the anti-racial discrimination legislation cover new arrivals from the Mainland?*

The Federation is of the view that unethical discrimination should not be tolerated. This would include discrimination against individuals from the Mainland simply because they are from the Mainland. In this respect it appears incongruous to permit discrimination against individuals from the Mainland, whilst introducing legislation prohibiting such acts against individuals from, for example, Thailand, the Philippines or Australia.

As an aside, the Federation finds it unusual that the HAB appears to be of the view that Tibetans, for example, are not a particular ethnic group. It follows from this that the other 50 + minority groups in the Mainland could also be “ethnic groups” and therefore covered by the proposed legislation.

- (d) *Comments on the proposed provisions of the legislation*

The Federation is concerned as to the broad scope of the proposed definition of “racial discrimination”. In particular, the meaning of “descent” and “ethnic or national group” need to be explained.

Whilst the Federation will endeavour to assist its Members in understanding this complicated legislation it is imperative that the Government undertake a major education project (which we should include detailed Guidelines with practical examples).

(e) *Views on the proposed exceptions from the racial-discrimination provisions*

The proposed legislation is, as mentioned above, both complicated and subtle. Whilst a grace period of 3 years has been introduced for small employers the Federation would recommend:-

- that sufficient time is given between the passing of the Bill and its coming into force for all employers to understand the concepts and scope of the legislation and explain it to their staff (we envisage this would take at least 12 months), and
- that the exception for smaller employers in its current form is too narrow, in particular it should be extended to include employers with fewer than 50 employees.

(f) *Views on provisions concerning discriminatory advertisements*

The Federation does not have any particular strong views on this particular aspect of the legislation.

(g) *Views on the proposed functions and powers of the Equal Opportunities Commission*

It is the view of the Federation that the Equal Opportunities Commission is currently unduly mechanical and intransigent in its approach to the processing of complaints. In the experience of our Members the EOC is employee bias and is too ready to undertake investigative action and assist complainants in action against large employers. Certain members of the Federation have proposed making any financial assistance by the EOC for a complainant conditional on confirmation from a third part (for example the Department of Justice).

The Federation would encourage greater employer representation on the EOC Board in order that employer's views may be reflected and addressed by the EOC in discharging its duties.

Any investigation by the EOC results in costs to the employer being investigated (sometimes substantial costs). This gives employees a material bargaining tool to use in any dispute with employers.

In addition the EOC is slow to close the file on any complaint. This leaves employers in a situation of "limbo".

Whilst the Federation would suggest that the EOC is the natural body to undertake the regulatory role in relation to anti-racial discrimination legislation, the Federation is of the view that the EOC has certain internal issues which need to be sorted out (in particular a "fast track" mechanism should be put in place in order to enable a speedy resolution of complaints) before it is given increased jurisdiction.

One proposal which has been put forward is the introduction of a small claims tribunal type arrangement for the less major claims of discrimination or harassment.

In addition it is the view of the Federation that the EOC should be given increased resources to focus more on educating the community and promoting racial harmony in society, rather than focusing on litigation as a means to educate and spread the message.

To conclude therefore the Federation would encourage the Government to take this opportunity to undertake a review of the composition and procedures of the EOC with a view to simplifying and streamlining the current complaint, investigation and a conciliation process.

The above summarises the Federation's views on the Consultation Paper. We wish to urge the Government to look fully into the impact of the proposed legislation on employers and the business environment as a whole. Should you have any queries, please feel free to contact me or Mrs Jackie Ma, Executive Director of the Federation at 2528 0033.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'V. Apps', written over a horizontal line.

Victor Apps
Chairman
Employers' Federation of Hong Kong