

Position Paper
on
Race Discrimination Bill

Civic Party
10 Jan 2008

1. Introduction

2007 marked the 16th year since the “Anti-Racial Discrimination” law was introduced to Hong Kong by the Bill of Rights Ordinance (Cap. 383). Although during the past 15 years the Government and public authorities have been prohibited from doing anything that was racially discriminatory, little progress had been made regarding the private sector. On 13 December 2006, the Government finally tabled the Race Discrimination Bill (“Bill”) to the Legislative Council.

2. Summary

Civic Party:

- (A) considered an anti-racial discrimination law was needed in Hong Kong;
- (B) was disappointed the Bill fell short of expectations;
- (C) believed the Bill was poorly drafted that it did not provide adequate protection to those intended to be protected; considered much needed protection and safeguards were either missing or watered down; and
- (D) urged the Government to accept our recommendations so as not to legalize and institutionalize existing racial discriminatory practices, which the Bill allows.

3. Suggestions

Our suggestions are simple and straightforward:

- (A) The Race Discrimination Ordinance (“Ordinance”) should bind the Government;
- (B) The Ordinance should contain at least a definition of indirect discrimination no worse than the one in the Disability Discrimination Ordinance (i.e. introduce unjustifiable hardship (section 4 of the Disability Discrimination Ordinance) and remove clauses 4(2)(b) and 4(5) from the Bill);
- (C) The Government and Public Bodies should provide their services in both Chinese and English;
- (D) The Government should provide or continue to provide translation service to the following crucial government services:
 - Court and Tribunal Services;
 - Legal Aid;
 - Education and Vocational Training
 - Medical and Healthcare;
 - Housing;
 - Social Welfare;
 - Immigration; and
 - Labour and employment related services
- (E) The Ordinance should prohibit racial discrimination in the form of language discrimination which goes beyond genuine occupational requirement/qualification;
- (F) Special arrangements should be provided to address the disadvantaged group of students who were unable to have a fair equal chance to learn the official languages in Hong Kong due to racial, social, cultural and historical reasons in the past
- (G) In education and vocational training, due effort should be made to ensure equal opportunities are given to ethnic minorities so that they could equally enjoy their rights to be properly educated unless such effort would lead to undue hardship to those who intend to be protected (i.e. Remove clauses 20(2)(b) and 26(2)(b) from the Bill);
- (H) New Migrants or Visitors from Mainland China should be considered as a separate race or ethnic group; and
- (I) Domestic Migrant Workers should receive equal treatment and not be considered as second class citizens by the Government.

4. Our specific comments on the Race Discrimination Bill

- (A) Comments
 - (i) New Mainland Chinese migrants discrimination

New arrivals from the Mainland suffer from irrational prejudice and discrimination. These new arrivals suffer discriminatory experiences similar in nature to discrimination other immigrants are experiencing. They are discriminated against because of their immigration identity and status, their different skills in local languages, the perceived weaker knowledge of the local society, and differences in appearance and behaviour and other characteristics due to their socialization at their place of origin in the Mainland, quite different from persons socialized in Hong Kong. While immigrants from foreign countries will be protected under the ground of 'national origin,' those from the Mainland are denied such a protection because they are from China and according to the Government because they are of the same ethnic stock as local Hong Kong Chinese.

We believe that it is fundamentally wrong to deny protection to the vulnerable and minority. In our view, there are two ways to outlaw this type of discrimination. It can be done by outlawing on the ground of immigrant status or former immigrant status. Alternatively, the existing term 'national origin' in the Race Discrimination Bill could be defined to include 'origin from any country or territory outside the Hong Kong Special Administrative Region' to incorporate the protection towards the new arrivals from the Mainland. This extended definition would also protect many overseas Chinese who have come or returned to Hong Kong. We have met a number of distinguished Mainland scholars in Hong Kong, most of them felt that they could not fit into Hong Kong even though they work and pay taxes like everyone else. Their demand is simple. They simply want to be treated equally. The Government should protect them and encourage the people in Hong Kong not to discriminate them but respect them. Outlawing discriminatory practice against these Mainlanders will be seen as a good sign and good cooperation between the Mainland and Hong Kong.

(ii) Clause 1

At the moment, the Race Discrimination Bill is written in a way that the Ordinance will only come into effect on a date to be appointed by the Secretary for Home Affairs. We believe that a fixed date needs to be set for effecting the legislation. Otherwise, the Government can simply ignore putting the law into effect even after it has been enacted.

(iii) Clause 2 Definition

(i) Language

It is important to legislate against race discrimination based on languages. We also believe it is important that the Government provides adequate teaching in the two official languages. As a result, we propose that the legislation should define languages as Chinese and English languages.

(ii) Employer

In order to ensure that the Government does not discriminate racially when it comes to employment, we suggest that the definition of employer should be stated clearly to include the Government.

(iv) Clause 3 Government

We believe that it is important that the Government sets a good example not to discriminate another racially. Hence it is felt that a clause in which the Ordinance binds the Government should be included.

(v) Clause 4 Racial Discrimination

In Clause 4(1)(a), we want to point out that there is also race discrimination if the discriminator treats a person more beneficially than another person based on the ground of race or racial group. Even though on the face of it, there is no problem. It simply implies that a person of another race or racial group is being treated less beneficially.

In Clause 4(1)(b), we also want to point out there is race discrimination if the discriminator waives a person fulfilling a requirement or condition based on the ground of race or racial group. This implies there is a person being treated less beneficially because he needs to meet a requirement or condition.

Thus, we believe an amendment is required.

(vi) Clause 5 Discrimination on the ground of race of a near relative

Likewise, there is race discrimination if the discriminator treats a person more beneficially on the ground of having a different ethnic near relative than another person who has no such relative. This clause should also be amended.

(vii) Definition for Indirect Discrimination

The government posited that indirect discrimination would be counted if a person applies to another person a requirement or condition which he applies or would apply to persons not of the same racial group as that other person but which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it.

The phrase 'requirement or condition' is the former UK definition of indirect discrimination. This phrase is being abandoned recently by the UK because of its harsh requirement and condition to have it applicable. To make it work, the party relying it needs to prove to be in 'considerably smaller proportion', statistical data is usually required to substantiate the claim. However, such data is hard to come by and a case can only be brought after actual harm is done. This concept would put the victim at a particular disadvantage and with such harsh conditions, it's not really practical. For all such reasons, we thus believe that the Government should get rid of the phrase and follow the European Union in adopting a wider definition of 'provision, criterion or practices' in its European Commission Race Directive.

(viii) Clause 10 Discrimination against applicants and employees

We do not believe that the benefits stated in Clause 10(5) are restricted to opportunities for promotion, transfer or training only. We believe it goes to other types of benefits like housing benefits, travel allowances, salary increase (but without promotion), pension benefits and right for sabbatical. The current Bill, in our view, is too restrictive and needs amendment.

(ix) Clause 11 Exception for genuine occupational qualification

"Reasons of authenticity" stated in Clause 11 has a wide application. For example, if a French restaurateur says that he wants his restaurant to be 100% French and only recruits French people, he can rely on the "reasons of authenticity" defence to escape from liability. By relying on this defence, the restaurateur can refuse to allow waitresses and cleaners to work there because they are not French. Is that really what we want to see? Do we want French waitresses and cleaners coming to Hong Kong when we may have Chinese people who can speak perfect French and not be given the job as waitresses in that French restaurant? Moreover, is it totally necessary to have cleaners speaking French? We believe this clause should not be used without proper check and balance. We believe in order to strike the balance it is important this clause also sets out the conditions, in which one can rely on it,

(x) Clause 12 Exception for employment intended to provide training in skills to be exercised outside Hong Kong and Clause 51 Discriminatory training by certain bodies

If this is for outside work, it is hard to understand why ordinary residents are not included. We believe training opportunities should be open to all races and racial groups. It should be up to the individual whether he/she wants to participate in it.

(xi) Clause 14 Exception for existing employment on local and overseas terms of employment and Clause 40 Extent of Part 4

We are aware that it is hard for businesses to find suitable candidates for some highly skilled or managerial jobs, and businesses sometimes will recruit people outside of Hong Kong. To attract these people to come to Hong Kong, businesses usually come up with an expatriate package. We accept this is a normal business practice.

(xii) Clause 17 Partnership

It is unclear why the Government chooses partnerships of less than 6 which can be exempted from this legislation. Most of the partnerships are professional partnerships like lawyers, accountants and architects. To allow for different treatments in the same professional field is likely to be unfair and anti-competitive. While the government is considering introducing a general competition law, we have no idea why the Government allows different treatments and anti-competitive practices in professional fields.

(xiii) Clause 19 Qualifying bodies

If this clause becomes law, assuming there is a requirement for Chinese Language, it may prevent a highly qualified professional to qualify in Hong Kong unless he/she speaks perfect Cantonese and writes perfect Chinese. This is unlikely to be the wish of most employers in some professional partnerships like solicitors and accountants. On the other hand, if an overseas professional with the same year of qualification as a local professional, when deciding who should become a partner of a professional firm, it should be unlawful for one to choose a partner based on racial grounds.

(xiv) Language Discrimination and Clause 58 Exception for Languages

We are concerned that discrimination through use of languages is not included in the Bill. Language discrimination means treating someone differently solely because of his or her native language or other characteristics of speech. A language discrimination provision would make it unlawful if ethnic minorities are denied access to government services such as the Labour Department or if they are rejected on the grounds of language in job applications if the job does not require spoken English/Cantonese. In some countries the ethnic minorities have already integrated into society and speak the local language very well. However, this is not the case in Hong Kong. In fact according to government statistics, the difficulty most frequently encountered by ethnic minorities is the language problem, as many of them do not speak Chinese or even English. It is therefore highly necessary to include language in the bill.

(xv) Clause 20 Persons concerned with provision of vocational training

Clause 20(2)(a) virtually seals the fate on many ethnic minorities currently arguing that the Government has not done enough for them as the vocational training courses in which they have undertaken are being taught in a language that they do not understand. Clause 20(2)(a) simply means that it is perfectly fine for an educational institution to carry on ignoring the demands of the ethnic minorities. The needs of the ethnic minorities which we have encountered are simply that the courses are being taught in English rather than in Chinese or the courses taught in Chinese could be supplemented with English assistance. Currently, it is an acceptable practice where Chinese students are having difficulties in learning English to take remedial English classes to improve their English ability. There is no good reason that non-Chinese students who have difficulties in learning Chinese are not allowed to take remedial Chinese classes to improve their Chinese abilities. We believe that Clause 20(2)(a) should be removed in its entirety.

(xvi) Clause 21 Employment agencies

In order to effectively stop discriminatory practice, there should be an active duty placed on employment agencies to report discriminatory employer to the authorities. There should be a sanction against employment agencies that fails to report discriminatory employer as they are simply aiding and abetting the discriminator discriminates against the victims of crime.

We also believe that in order to ensure the Government is not racially discriminate against another, the Labour Department should be named as one of the employment agencies.

(xvii) Employment applications

The Government should consider outlawing the requirement in any job applications that needs to disclose ethnicity and nationality of a job applicant.

(xviii) Clause 23 Employment, etc. for religion

We believe the phrase “organized religion” needs to be defined. Otherwise, there is uncertainty as to the meaning of organized religion. We think it would be helpful if the Government lists out the organized religions that the Government intends to be covered by this clause.

- (xix) Clause 24 Employees, etc.

Our concern is whether university placement, summer jobs and volunteering work will be protected under this Clause.

- (xx) Clause 26 Discrimination by responsible bodies for educational establishments

Similar comments as stated in (xv).

- (xxi) Clause 27 Discrimination in provision of goods, facilities or services

We believe that the application of Clause 27 is too wide and needs to be restricted.

- (xxii) Clause 31 Exceptions for voluntary bodies and Clause 37 Exception from section 36 for certain clubs

We are worried that this Clause will allow exclusive racial groups being formed in Hong Kong. This may also encourage groups like White Supremacy, neo-Nazi groups, or a specific race hatred group forming in Hong Kong. On the other hand, as the definition of a voluntary body is not defined, it is hard to tell who can use this exception. Perhaps, the Government only means societies registered under the Societies Ordinance. We urge the Government to clarify the intended parties who can enjoy this exception.

- (xxiii) Clause 32 Exceptions for cemeteries

We understand that there may be reasons to have partners of same religion to be buried together. We do not believe that people from different races or racial groups but nevertheless of the same faith cannot be buried together. In Hong Kong, mixed marriages are very common, so it is ridiculous to see that the husband of one race cannot be buried together with the wife of a different race.

- (xxiv) Clause 49 Special measures

This is another exception clause allowing the discriminator to escape liability. To avoid misuse, we believe that the phrase “special needs” needs to be defined and an objective test is needed to ensure that the discriminator will not abuse the use of the clause.

- (xxv) Clause 83 Rules

We believe the Rules made by the Commission should also be vetted by the Legislative Council under the 28 days negative vetting practice as the rules may prescribe offences in respect of contraventions of the rules.

- (xxvi) Other comments: Discrimination based on religion

After the September 11 attacks in the US, discrimination against Muslims has increased worldwide. Muslim organisations in England note that hostility, verbal abuse, and unfair media coverage have become more frequent. Furthermore, Muslim organisations in Hong Kong have reported difficulties in getting jobs because some Muslim men wear a beard, which is uncommon among Chinese men. The Government ought to learn from the years of experience gained from overseas, where provisions already exist to make religious discrimination unlawful¹.

The Civic Party
10 January 2008

¹ See the Employment Equality (Religion or Belief) Regulations 2003