

Submission to the LegCo Bills Committee on the Race Discrimination Bill for the meeting on 10 Jan 2008

**By Hong Kong Discrimination policies concern network
(關注香港歧視政策網絡)**

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Our network is very concerned about the development of the Race Discrimination Bill (RDB), and in this submission we would like to state our concerns and to respond to some of the options put forward in the “Paper prepared by the Legal Service Division for the meeting on 21 November 2007”.

We believe that an effective piece of race-discrimination legislation should aim to promote equality by ensuring equal opportunities and rights and preventing discrimination based on race, whether due to direct or indirect discrimination. We have noticed, however, quite a number of weaknesses within the current RDB that go against the promotion of racial equality, and hence are inconsistent with the equality provisions in the Basic Law and the Hong Kong Bill of Rights Ordinance (BORO). In this submission, we would like to highlight two areas with which we are most concerned.

1. The unfairness implied by Clause 3 – a sweeping exemption for governmental acts
According to Clause 3 of RDB, “[t]his Ordinance applies to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person”, this gives the government a sweeping exemption for virtually every action a governmental agent performs because there is always some dissimilarity between a governmental act and an act done by a private person.¹ As such, the RDB fails to protect an individual from race discrimination when a discriminatory action is performed by a governmental agent.

We think it is against the principle of racial equality for the government to have such a sweeping exemption, not to mention that a government should be the one to set an example of good practice for the private sector to follow and to serve as a good model for public education.

Although the government argues that the BORO, Cap. 383 has already prohibited racial discrimination in the public sector, it is no more than paying lip service for two reasons. First, the Equal Opportunities Commission (EOC) has no power to enforce the BORO or to investigate complaints based on the BORO. Given the expensive nature of our litigation system, most victims of discrimination would not be able to afford to pursue a legal proceeding without the assistance of the EOC. Moreover, the beauty of the EOC is not only confined to its legal assistance, but the investigation of the case as well as conciliation if it decides to do so to resolve the conflicts, and this may result in the victims obtaining a wide range of remedies, such as apologies and/or

¹ Even in the case of employment, the government can argue that government employment is dissimilar to the employment in the private sector because of its specific way of recruitment, training, and pension scheme etc. Even if it is explicitly stated that RDB will apply when the government is an employer, the government is still exempted from many other responsibilities that are not provided by the private sector, such as policing, correctional services, taxation etc.

money damages. In other words, by taking out the sweeping exemption stated in Clause 3, the EOC can deploy the RDB in most of the disputes with the government and help maintain our racial harmony in a more effective way than asking a victim of racial discrimination to rely on the BORO alone. Secondly, unlike the three existing anti-discrimination ordinances (cf. Clause 76 of SDO and DDO), the BORO does not indicate any money damages as the remedy for its violation (cf. Section 6 of the BORO). Having effective remedies, as in the case of those three anti-discrimination ordinances, not only help compensate for the damages inflicted upon a victim, but also helps deter others from breaching the legislations. It is therefore insufficient and ineffective to rely solely on the BORO to prohibit racial discrimination in the public sector.

In response to the “Paper prepared by the Legal Service Division for the meeting on 21 November 2007”, we opt for Option A of Appendix I because by having a binding power upon the government, the legislation would be better equipped in promoting racial equality and would be consistent with the international human rights standards (e.g. ICERD), the three existing anti-discrimination ordinances, and the BORO.

2. The call for special measures

We find Clause 4(5) very problematic as it implies that employers and other potential defendants should not have to incur any additional expenditure or provide any additional services. The same problem persists in subsection (5) of Option A in Appendix II of the “Paper prepared by the Legal Service Division for the meeting on 21 November 2007”.

We think Clause 4(5) is problematic because the definition of discrimination provided by the RDB is backward and fails to promote racial equality. Clause 4(5) is merely an example of the government’s lack of commitment to promote special measures for the less privileged racial minorities due to, for example, the language barriers.

We can easily imagine hypothetical (yet realistic) cases such as a non-Chinese speaking racial minority visiting a hospital and the medical staff, sanctioned by the RDB, refuses to find an interpreter simply because that would incur additional expenditure/service, and it is conceivable to imagine that some of these cases may lead to deadly consequences when the patients cannot communicate with the medical staff.

Other hypothetical (and equally realistic) cases include the lack of special measure for racial minority children to learn Chinese as a second language. Due to the lack of exposure of the Chinese language in their home environment and lack of familial resources for extra tutorials or to go to International schools, racial minority children would usually have a very hard time coping with a Chinese language curriculum, and hence they are more likely to do poorly at school and perpetuate the poverty cycle.

In order to demolish this kind of institutional/structural discrimination, we think the government has the duty to amend the relevant clauses within the RDB² as well as implementing relevant special measures in their policies, such as additional tutorials

² For example, they should amend Clause 4(5) of RDB regarding expenditure/services until unjustifiable hardship as that stated in the DDO.

and curriculum for Chinese as a second language in schools, interpretation service in hospitals and clinics, and job descriptions in English advertised in the labour department.

Conclusion

Apart from the two areas discussed above, there are still many clauses in the RDB that are problematic and fall below the international human rights standards. We urge the government to take the lead in promoting social justice, racial equality and harmony by making relevant amendments to the RDB and implementing special measures to assist those racial minorities who have been the victims of institutional/structural discrimination in Hong Kong.