

立法會

Legislative Council

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Background brief prepared by Legislative Council Secretariat for the Bills Committee on Race Discrimination Bill

Purpose

This paper gives an account of the discussions by the Panel on Home Affairs on the proposed legislation 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 set out in paragraphs 3 to 11 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 Committee on the Elimination of Racial Discrimination (UN Committee) 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 (Cap. 383) 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 the Hong Kong Special Administrative Region (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 Bill of Rights 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.

7. In its Concluding Observations issued on 30 March 2006 after consideration of the second report of HKSAR under ICCPR, the UN Committee urged HKSAR to adopt the necessary legislation in order to ensure full compliance with Article 26 of the Covenant.

The International Covenant on Economic, Social and Cultural Rights

8. 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.

9. 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 Observations that the HKSAR's failure to prohibit racial discrimination in the private sector constituted a breach of its obligations under Article 2 of the Covenant.

10. The second report of HKSAR under the Covenant was submitted to UN as part of China's initial report in June 2003. The UN Committee issued its Concluding Observations on the second report of HKSAR on 13 May 2005. The UN Committee reiterated its concern about the fact that the anti-discrimination legislation in HKSAR did not cover discrimination on the basis of race, sexual orientation and age, and 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 concern that the proposed racial discrimination law would not cover migrants from the Mainland despite the widespread *de jure* and *de facto* discrimination against them on the basis of their origin, and that the existing immigration legislation in HKSAR would not be affected by the proposed law.

The Administration's public consultation exercises on racial discrimination

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 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, it was a wrong approach for the Administration to consider the need to legislate against racial discrimination based merely 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 the elimination of racial discrimination for reference by 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.

Two-phase consultation exercise in 2001- 2002

15. The Administration conducted a two-phase consultation exercise in 2001- 2002 on legislation against racial discrimination. During the first phase, 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.

16. 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. Of the remaining local trade associations, six indicated support, one indicated support but did not consider it appropriate to legislate at that stage, six indicated objection and three had no comments. All the 44 NGOs which responded were in favour of legislation.

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

17. In June 2004, the Government announced its decision to legislate against racial discrimination and its plan to introduce a bill into the Legislative Council (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.

18. According to the Consultation Paper, it was the Government's view that new arrivals from the Mainland did not constitute a racial or ethnic group in Hong Kong. Discrimination against new arrivals from the Mainland by local Chinese was therefore not considered a form of racial discrimination.

Discussions held by the Panel on Home Affairs on the Administration's proposal to legislate against racial discrimination

Meetings held

19. The Panel on Home Affairs received a briefing 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. At its meeting on 8 July 2005, the Administration briefed the Panel on the

results of the public consultation exercise. At the Panel's request, the Administration briefed the Panel on the main provisions of the Race Discrimination Bill on 10 February 2006. The main deliberations at these meetings are summarized in paragraphs 20 to 37 below.

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

20. 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 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. However, in another court case in the United Kingdom, i.e. the case of *Mandla & Another v Lee*, the relevant judgment had spelt out several criteria defining whether a group constituted an ethnic group. An extract from the relevant judgment is in **Appendix I**. Based on the criteria, the Administration considered that the new arrivals from the Mainland could not be regarded as an ethnic minority group. The Administration pointed out that anyone who did not agree could challenge the Government's interpretation in court in future.

21. Some members considered that discrimination against new arrivals from the Mainland was prevalent. As the problem was serious, failure to enact legislation would encourage discriminatory acts against the new arrivals. These members reiterated that the scope of the Bill should be extended to cover such discrimination.

22. The Administration explained that, if it disregarded the definition provided in ICERD and drafted the Bill in such a way as to cover also 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 raise query as to why new arrivals from the Mainland should be given additional protection. The Administration stressed that, given the large number of new arrivals from the Mainland in Hong Kong, inclusion of discrimination against them within the scope of the Bill would have significant implications on social and housing policies and strong views from the business sector, employers' groups and policy bureau were anticipated. The Administration also pointed out that, if a separate legislation to prohibit discrimination against new arrivals from the Mainland was proposed, further public consultation exercise would have to be conducted.

23. The Administration also pointed out that some people had queried the 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.

24. Some Members expressed dissatisfaction in that while the Administration admitted that discrimination against new arrivals from the Mainland by local Chinese was a problem, it refused to address the problem because of technical considerations. These Members remained of the view that, as discrimination against new arrivals from the Mainland was prevalent, the scope of the Bill should be extended to cover such discrimination. They had proposed that the Bill be named as the Racial and Related Discrimination Bill.

Meaning of race

25. In response to members' enquiries about the meaning of race, the Administration explained that the Bill would include race, colour, descent and national or ethnic origin as prohibited grounds. The Chinese, the Japanese, the French and British people were examples of different races; blacks and whites were examples of different colour; and different castes within the caste system in Hinduism were examples of different descent. There were 56 ethnic groups in China, with Han Chinese being the largest one. An example of discrimination on the ground of national origin was a Han Chinese discriminating against a Manchu or a Mongolian, and such discrimination would be regarded as racial discrimination after enactment of the Bill.

26. In response to the query on why the Bill would include colour as one of the prohibited grounds, the Administration explained that there had been a case in an overseas jurisdiction in which some blacks had discriminated against other blacks who had lighter skin colour.

Indirect racial discrimination and problem of language barrier

27. 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 of each case.

28. Some members considered that 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.

29. The Administration pointed out that the Government or a public authority might be regarded as committing indirect discrimination under the proposed legislation 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.

Exception from anti-discriminatory provisions for small companies and employers

30. 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.

31. Some members disagreed with the proposal. They pointed out that after enactment of the new race discrimination law, codes of practice would be issued to provide practical guidance on compliance with the law. They suggested that the proposed “sunset” period should be reduced to one year only.

32. 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.

Exception for immigration legislation

33. Under the proposed legislation, any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation would not be affected.

34. Some members expressed reservations on the proposed exception on the grounds that it would mean allowing the continuation of the two-week rule which had been criticised as a form of discrimination against foreign domestic

workers. They also pointed out that some members of ethnic minorities had complained that they had frequently experienced discriminatory treatment at immigration control points.

35. The Administration explained that the exception for immigration legislation was proposed for effective border control. The Hong Kong Bill of Rights had also provided for exception for immigration legislation and many overseas jurisdictions had provided for the same exception out of similar considerations.

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

36. 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.

37. Some members considered that following the controversies surrounding EOC in the previous year, there were still 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.

Relevant motion and questions moved/raised at Council meetings

38. 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.

39. Details of the relevant questions raised at Council meetings since the first LegCo are in **Appendix II**.

Relevant papers

40. Members are invited to access the LegCo website (<http://www.legco.gov.hk>) to view the minutes of the Panel meetings on 9 November 2004, 11 December 2004, 8 July 2005 and 10 February 2006 for details of the discussions.

Council Business Division 2
Legislative Council Secretariat
15 January 2007

**Extract from the judgment by Lord Fraser of Tullybelton in the case of
Mandla & Another v Lee [1983] IRLR 210, HL**

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For a group to constitute an ethnic group in the sense of the (*Race Relations*) Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

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Appendix II

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 Japser 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.
26 January 2005	Hon WONG Kwok-hing raised a written question on support to and measures to eliminate discrimination against new arrivals from the Mainland