

HK Human Rights Monitor & Hong Kong Unison
Joint Submission
to the LegCo Bills Committee on Race Discrimination Bill
for its Meeting on Friday, 23 May 2008,
on Mainstreaming Racial Equality Through Racial Equality Plan

23 May 2008

General Statutory Duty and Racial Equality Plan

1. One salient feature which is absent in the Race Discrimination Bill but can be found in the UK Race Relations Act as amended in 2000 is the general statutory duty on governmental and public bodies:
 - to eliminate unlawful racial discrimination; and
 - to promote equality of opportunity and good relations between persons of different racial groups.¹
2. Central to such a duty is the cycle of compiling, implementing, monitoring, reviewing and revising a racial equality plan or Race Equality Scheme by governmental and public bodies with a view to mainstreaming racial equality.
3. Other desirable elements in an effective equality plan system include an overseeing body which has the power to request a governmental or public body to submit an equality plan, to consider it and comment on it, and to issue an order of compliance to ensure that proper measures be taken by the offending body to eliminate a discriminatory policy or practice.
4. A set of civil torts to properly outlaw racial discrimination and a proper general statutory duty on the government are useful and mutually complimentary devices in promoting racial equality and in combating racial discrimination. An effective race discrimination law should have both devices in place. The Race Discrimination Bill should be improved to provide for both of them.

The Equality Plan in UK's Race Equality Scheme

5. The UK Government established the Race Relations Act 1976 to prevent discrimination on the ground of race, and the Act was later amended by the Race Relations (Amendment) Act 2000. One of the main amendments in the Act is to impose a general statutory duty under section 71 of the Race Relations Act 1976 on specified or listed governmental or public bodies to carry out their functions with due regard to the need to eliminate racial discrimination and to promote racial harmony and equality. The general statutory duty is usually known as the General Duty.
6. The General Duty applies to all governmental and public bodies listed in Schedule 1A of the Race Relations (Amendment) Act 2000. There are approximately 43,000 bodies bound. They include:

¹ Section 71 of Race Relations Act as amended in 2000:
http://www.opsi.gov.uk/acts/acts2000/ukpga_20000034_en_1#pb1-11g2.

- all ministers and central government departments;
 - local authorities, regional development agencies and enterprise networks;
 - police authorities and police forces;
 - strategic health authorities, health bodies, National Health Service trusts and primary care trusts;
 - governing bodies of maintained schools, colleges and universities;
 - the Housing Corporation, Scottish Homes, housing action trusts;
 - professional bodies;
 - regulatory, audit and inspection bodies;
 - libraries, museums and galleries;
 - non-departmental public bodies.
7. The aim of the General Duty is to “make the promotion of racial equality central to work of the listed [governmental or public bodies]”. It also expects public authorities to “take the lead in promoting equality of opportunity and good race relations, and in preventing unlawful discrimination”.² In doing so, it has the effect of mainstreaming racial equality.
8. The Commission for Equality and Human Rights (hereafter "CEHR")(formerly the Commission for Racial Equality (hereafter "CRE")) issues a code of practice to guide the governmental or public bodies to meet their duty to promote race equality. The code sets out four steps for these bodies to consider in order to meet the general statutory duty:
- “identify which of their functions and policies are relevant to the duty, or in other words, affect most people”;
 - “put the functions and policies in order of priority, based on how relevant they are to race equality”;
 - “assess whether the way these ‘relevant’ functions and policies are being carried out meets three parts of the duty”;
 - “consider whether any changes need to be made to meet the duty, and make those changes.”³
9. For the purpose of ensuring the better performance of the general statutory duty, the Race Relations Act 1976 (Statutory Duties) Order 2001 requires the publishing of a racial equality plan named as Race Equality Scheme, showing how a governmental or public body listed in its Schedule 1 intends to fulfill the general statutory duty and its duties under it.
10. Section 2 of Order 2001 about the Race Equality Scheme states that:
2. - (1) A body or other person specified in Schedule 1 to this Order shall, before 31st May 2002, publish a Race Equality Scheme, that is a scheme showing how it intends to fulfil its duties under section 71(1) of the Race Relations Act and this Order.
- (2) A Race Equality Scheme shall state, in particular -
- (a) those of its functions and policies, or proposed policies, which that person has assessed as relevant to its performance of the duty imposed by section 71(1) of the Race Relations Act; and
 - (b) that person's arrangements for -
 - (i) assessing and consulting on the likely impact of its proposed policies on the promotion of race equality;

² CRE website, <http://83.137.212.42/sitearchive/cre/duty/general.html>

³ Ibid.

- (ii) monitoring its policies for any adverse impact on the promotion of race equality;
- (iii) publishing the results of such assessments and consultation as are mentioned in sub-paragraph (i) and of such monitoring as is mentioned in sub-paragraph (ii);
- (iv) ensuring public access to information and services which it provides; and
- (v) training staff in connection with the duties imposed by section 71(1) of the Race Relations Act and this Order.

(3) Such a person shall, within a period of three years from 31st May 2002, and within each further period of three years, review the assessment referred to in paragraph (2)(a).⁴

11. Orders were issued after the Race Relations Act 1976 (Statutory Duties) Order 2001 to require more public authorities to implement the Scheme. After the replacement of CRE by CEHR, the CEHR continued its functions relating to compliance with the requirement to publish a Race Equality Scheme.
12. If the CEHR are satisfied that a body falling into the Schedule in the Act has failed to comply with the general statutory duty, the CEHR may serve on that body a compliance notice by requiring the person to comply with the duty, or to inform the CEHR of the steps that the person has taken, or is taking to comply with the duty.
13. A governmental or public body is therefore required to increase its cultural sensitivity. It needs to keep an eye proactively on the racial aspects of its policy formulation and implementation, service delivery, etc. It makes it necessary for it to collect and compile statistics and other information to monitor and evaluate the differential impacts of its policies and functions on different racial groups. It has the incentive to review its objectives and operations and to come up with a systematic and comprehensive set of policies and functions to combat discrimination and to promote racial equality. In short, it is required to actively look for improved ways to achieve or promote racial equality.

The HK Race Discrimination Bill and Equality Plan

14. Existing equal opportunities legislation in Hong Kong does not impose a statutory duty on the Government or other public authorities to promote racial equality and harmony and to eliminate racial discrimination. The approach adopted in Hong Kong's existing equal opportunities legislation is mainly complaint and litigation driven. Such a system focuses on complaints and tort actions brought by individuals with or without the assistance of the Equal Opportunities Commission. A key objective of these equal opportunities laws is to provide cause of action to victims of certain forms of prohibited discrimination to bring civil cases (basically as statutory torts) before the courts of law for remedies specified in those laws.
15. Without a statutory obligation, a governmental body in Hong Kong may just passively react to complaints and instances of litigation against it.

⁴ For the details of the Scheme, please refer to the Race Relations Act 1976 (Statutory Duties) Order 2001: <http://www.opsi.gov.uk/si/si2001/20013458.htm>

16. Unfortunately, the Race Discrimination Bill fails to improve beyond the complaint and litigation driven approach of the existing equal opportunities legislation. Instead, there is an important rollback: in the name of preventing rendering the Government "vulnerable to an influx of litigation",⁵ the victims are denied the cause of action to bring litigation against the Government for discrimination in its performance of government functions and its exercise of governmental powers. That is, there will not be any legal recourse for actual and potential victims of racial discrimination against the Government in such cases.
17. There is a very strong case put forward by certain critics that to make up for the lack of legal recourse for governmental racial discrimination under the Bill, a general statutory duty should be imposed under the Bill on governmental and public bodies to continuously promote racial equality. These bodies should be required to discharge their duty under a system of equality plan compiling, implementing, monitoring, reviewing and revising akin to the UK Race Equality Scheme.
18. The EOC should serve its important functions under the system. Power should be given to the EOC to regulate the systematic and periodic publishing of equality plans by various governmental bodies. It could provide guidelines for these bodies to prepare such plans, especially on the conduct of their assessment. After reviewing an equality plans, the EOC may make recommendations on it. Whether the recommendations by the EOC are legally binding would be open for discussion. A strong version is to make the recommendations on certain measures to rectify racial discrimination in the form of a binding enforcement order.
19. Such a system would not make it possible for a victim to bring the government to court under the race discrimination legislation. Therefore, it would likewise not render the government more vulnerable to an influx of legal actions. It would however still provide for the much needed obligation for the government to promote racial equality and to desist from any racial discrimination. The Government is therefore prevented from paving its way for governmental racial discrimination.

Addressing Concerns by Adopting a System of Equality Plan

20. The Government introduced the Race Discrimination Bill in December 2006. The Bill is loaded with problems. The HK Human Rights Monitor, Hong Kong Unison and other Non-Governmental Organisations have brought to the attention of the UN Committee on the Elimination of Racial Discrimination (CERD) the four most serious flaws in the Bill, including its limited application to the Government.
21. The CERD is concerned among other things that the Bill's limited application on the Government. It has initially triggered its Follow-up Procedures in August 2007 and then its Early Warning Measures and Urgent Action Procedures in March 2008 to write to the Central Authority to require the HKSAR to initiate amendments before 19 July 2008 to bring the provisions of the Bill in line with the UN Convention on the Elimination of All Forms of Racial Discrimination.

⁵ Constitutional and Mainland Affairs Bureau: The Administration's further response to the major issues raised by the Bills Committee, LC Paper No. CB(2)1292/07-08(01), March 2008.

22. In spite of the Administration's subsequent agreement to amend Clause 3 of the Bill to be “[t]his Ordinance binds the Government”, it refuses to make the Bill applicable to the Government in its performance of functions or its exercise of power.
23. Such a refusal reinforces the concern among ethnic minority groups and other NGOs that the Government is seeking impunity to defend its existing and future discriminatory policies and practices. It makes the adoption of a general statutory duty imperative.
24. It is important to note that the Government repeatedly expresses its commitment in “enacting appropriate legislation and implementing measures to promote racial harmony and to cater for the needs of ethnic minorities and new arrivals.”⁶
25. If the Government is sincere about this commitment and is not really paving the way for preserving existing discriminatory policies and practices and for legitimizing future ones, at least it has to commit to implement a proper system of race equality plans to assure the public, the LegCo and the United Nations that it is not paving the way to discriminate by claiming immunity in its performance of functions and its exercise of powers. Having such a system in place would partly address the problems created by the failure of the race discrimination legislation to cover government powers and functions.

⁶ The Administration’s further response to the major issues raised by the Bills Committee, March 2008. LC Paper No. CB(2)1292/07-08/(01).