

**BY EMAIL AND  
BY COURIER**

22<sup>nd</sup> February 2008

Ms. Nathalie Prouvez  
Secretary of the Committee on the  
Elimination of Racial Discrimination  
Treaties and Commission Branch  
Office of the High Commissioner for Human Rights  
Palais Wilson – 52, rue de Paquis  
CH-1201  
Geneva  
SWITZERLAND

Attn : Ms. Carolin Schleker

Dear Ms. Prouvez

**Committee on the Elimination of Racial Discrimination  
72<sup>nd</sup> Session (18 February – 7<sup>th</sup> March 2008)  
Submissions on the Race Discrimination Bill of the HKSAR**

I refer to the captioned session of the Committee on the Elimination of Racial Discrimination.

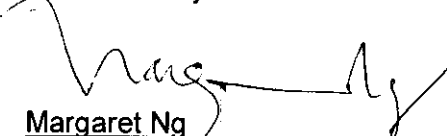
I will attend the briefing with Committee members scheduled to take place on 3 March 2008 on the Race Discrimination Bill of the Hong Kong SAR. I am a member of Civic Party, a Member of the Legislative Council and Chairman of the bills committee on the bill.

Enclosed please find my Submissions for the briefing. I should be grateful if you could distribute the Submissions to members of the Committee at your earliest convenience. 40 printed copies accompany this letter by courier for distribution to members at the briefing for their convenience. I will seek the opportunity to elaborate on the submissions and address any issues members may wish to raise.

If you have any queries or if I can assist in anyway, please feel free to contact me at [margaret@margaretnq.com](mailto:margaret@margaretnq.com) or [margaretnq@civicparty.hk](mailto:margaretnq@civicparty.hk).

Thank you for your kind assistance.

Yours sincerely



Margaret Ng  
Member, Legislative Council of the HKSAR

**Briefing on the Race Discrimination Bill of the Hong Kong SAR for the  
United Nations Committee on the  
Elimination of all Forms of Racial Discrimination  
72<sup>nd</sup> Session February 2008:  
Submission of Margaret Ng,  
Member of the Legislative Council, HKSAR  
and  
Member of the Civic Party<sup>1</sup>**

**Introduction**

1. The Race Discrimination Bill was introduced into the Legislative Council of the Hong Kong SAR ("LegCo") in December 2006. In accordance with the legislative process in Hong Kong, the Bill was committed to a Bills Committee for scrutiny. I am the Chairman of the Bills Committee responsible for the Bill. These submissions are made in my personal capacity as someone with detailed and direct knowledge of the Bill and its progress.
2. I became aware of the letter dated 28 August 2007 from the Chairman of the Committee on the Elimination of All Forms of Racial Discrimination ("the Committee") to the Permanent Representative of the People's Republic of China dated 22 November 2007 requesting for clarification on certain issues of the Bill which does not meet the requirements of the Convention on the Elimination of all Forms of Racial Discrimination ("the Convention"). These issues have been repeatedly discussed within the Bills Committee whose numerous meetings were attended by representatives of the HKSAR Government. The Bills Committee also consulted the views of concerned groups and individuals in two public hearings.
3. As a result of their work in the Bills Committee, members have identified major weaknesses of the Bill and urged the Government to introduce

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<sup>1</sup> Civic Party is a political party in Hong Kong and has 6 members in the Legislative Council. The promotion of equality, justice and democracy is central to the Party's programme.

amendments. Until January 2008, the Government took the position that no amendment was necessary. On 18 January and in response to my letter, the Secretary responsible indicated that the Government may consider changes on two of the issues but without providing the substance, scope or language of the amendment (see paragraphs 10 and 14 below).

4. Under the legislative and constitutional arrangements of the Hong Kong SAR, an amendment to a bill the effect of which may be to dispose of or charge any part of the public revenue can only be proposed by the Government or by a member of LegCo with the consent of the Government. The rules of voting are weighted against a member's motion. Further, the present LegCo term ends on 19 July 2008. Any bill which is not passed by that date will lapse, and it is uncertain how soon a new bill may be introduced by the Government.
5. Thus, unless the Government agrees to make substantial amendments to the Bill, members may be faced with the dilemma of either no legislation to eliminate racial discrimination will be enacted, in breach of our obligation under the Convention, or enacting a defective legislation which not only does not meet Convention requirements but also legalizes certain forms of discrimination because of the large immunities and exemptions provided in the bill. This is also the dilemma faced by the NGOs campaigning for racial equality.
6. In the submissions below, I set out the main concerns and views I share with a majority of the members of the Bills Committee. A progress report of the Bills Committee summarising its observations and concerns, and the exchange of views with the Government (CB(2) 2231/06-07(01)) is available on the website [www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-2501-1-e.pdf](http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-2501-1-e.pdf). I have read the submissions to the Committee for this briefing of the delegation of the Human Rights Monitor and the Hong Kong Bar Association. I broadly agree with them and support them. The brevity of some of my submissions below or omission from them altogether is to avoid extensive repetition.

**1. The Bill does not apply to the Government (Clause 3)**

7. A matter for deep concern is that the Bill "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" (Clause 3) but not otherwise. This is narrower than other discrimination legislations of the Hong Kong SAR. Discriminatory acts done in the exercise and performance of the powers and functions of the Government and public authorities are excluded from the remedy of the Bill.
8. In the context of Hong Kong, discriminatory acts done by law enforcement, correctional services and immigration control agents are, for example, not covered under the bill. Although provision of public medical services and education come within the Clause, major areas within them are carved out and put beyond the scope of the Bill. For example, discrimination by the use of language is expressly and categorically exempted under Clause 58. Any discriminatory exercises of Government powers by officials of the education department such as on allocation of school places will fall outside the scope of the Bill.
9. In this respect, the Bill falls short of the Convention requirement of legislating to provide effective remedy to eliminate all forms of racial discrimination. We are also concerned that the above exclusion of Government acts from the Bill will send a strong message to the Community that certain types of racial discrimination are endorsed or at least tolerated, and different standards apply to public authorities and private bodies. Discriminatory acts, practices and policies of Government agencies currently in existence will be able to continue after the Bill is passed. This will further undermine the educational purpose of the legislation and set a double standard.
10. On this issue, the Government's position to-date as stated in the Secretary's letter of 18 January is that it is prepared to consider the possibility of amending Clause 3, but the ultimate decision and the scope and language of any amendment remain unknown.

## II. "Direct" and "Indirect" Discrimination

11. Racial discrimination is defined in Clause 4 of the Bill, and may be understood as "direct" and "indirect" discrimination. Direct discrimination (Clause 4(1)(a)) occurs when a person on the ground of race treats another person less favourably than he would treat others. Indirect discrimination (Clause 4(1)(b)) occurs when a person imposes a requirement or condition which, although applicable to all, has a disproportionate adverse impact on people of a particular race, and the requirement or condition imposed cannot be justified by reasons not related to race.
12. A requirement or condition is not discriminatory if it is "justifiable". Clause 4(2)(a) and (b) provide two separate tests: a rationality and proportionality test and a "reasonably practicability" test. There is grave concern that the definition is too narrow and too difficult to apply. The legal effect of Clause 4(1)(b) and Clause 4(2) taken together is that a requirement or condition is not discriminatory however irrational or disproportionate for the achievement of any legitimate aim if the alleged discriminator can prove that it is "not reasonably practicable" not to apply the requirement or condition.
13. It is of particular concern that the definition in the Bill is deliberately modeled on section 1(1)(b) of the Race Relations Act ("RRA") of the United Kingdom with all its known defects which led to the amendment of the RRA in 2003. Such an approach reflects a lack of commitment to the Convention's objective of eliminating all forms of racial discrimination.
14. On this issue, the Government's position to-date as stated in the Secretary's letter of 18 January is that it would consider carefully whether there is scope for Clause 4 to be refined, but the ultimate decision and scope and language of any amendment remain unknown.

### III. Exclusions of new arrivals from the Mainland of China and ground of "race"

15. It is undisputed by the Hong Kong SAR Government that new arrivals from the Mainland of China have long been the subjects of serious discrimination and negative stereotyping in Hong Kong. This group of people have looked forward to the enactment of appropriate race discrimination legislation to alleviate the disadvantages and assault on their dignity. Under the Bill, discrimination against them as new arrivals is not recognized as discrimination on the ground of race and provides them no remedy.
16. By the test contained in the Judgment of Lord Fraser of Tullybelton in the case of **Mandla & Another v Lee [1993] IRLR 210** in the House of Lords, the new arrivals from the Mainland of China would constitute an ethnic group in the sense of the Race Relations Act, since they have many of the characteristics specified in the test. However, the Bill's express provisions for exclusion (Clause 8(3)) from its scope discrimination on grounds of years of residence in Hong Kong, Hong Kong permanent resident status, and nationality as not "racial" will preclude this group from seeking remedy under the Bill
17. It is explained to the Bills Committee that the inclusion of new arrivals from the Mainland in the scope of the definition of "race" is inappropriate and also would have adverse implications on established policies and practices which are based on the seven-year residency requirement, and could give rise to significant resources implications. These policies and practices include qualification for welfare benefits and public housing which are themselves discriminatory.
18. Apart from excluding the new arrivals, Clause 8(3) has the effect of categorically exempting certain forms of discrimination which are racial in nature under the labels of residency, resident status and nationality. This exemption will go beyond new arrivals from the mainland of China.

#### **IV. Language exemption**

19. Hong Kong has a predominately Chinese population with a significant minorities population who do not understand the Chinese language or are not proficient in it. Discrimination by use of language is a real issue which can and currently does exclude certain racial groups from essential public services and benefits, including education opportunities and medical treatment. Clause 58 of the Bill expressly excludes the use of language as discrimination on grounds of race. Such an exemption weakens the effect of the Bill.
  
20. There are real situations of racial discrimination in the Hong Kong community. The bills committee has chosen three of them which have attracted wide public interest. Two of them are acknowledged by the Government as excluded from the scope of the Bill and the third is most likely excluded, though so far the Government has not confirmed it. One member of the bills committee voiced the concern in the minds of most: that passed in its current form, this Bill will make little difference to existing discrimination. Not only will the Hong Kong Bill fail to fulfill the obligations under the Convention, its enactment may well become a shield to fend off further initiatives by domestic and international human rights groups to eliminate racial discrimination in the foreseeable future.

#### **V. Conclusion**

21. There is urgency in persuading the Hong Kong SAR Government to make amendments to the Bill to address the areas of concern outlined above. The window for doing so is between now and less than two months before the Bill has to be voted on or lapse. If this opportunity is passed, it is likely to be a very long time before another will come.
  
22. Concrete proposals have been made to:
  - (1) apply the legislation to the Government and public authorities in line with other discrimination legislation in Hong Kong under Clause 3;

- (2) amend the definition of direct and indirect discrimination on the basis of the 2003 U.K. amendment to the RRA and deleting the "practicability" justification under Clause 4;
- (3) include new arrivals of the Mainland of China and amend the express exclusions of discrimination by years of residence, resident status and nationality as not "racial" under Clause 8(3);
- (4) delete the use of language exemption under Clause 58 or narrow down the scope of exemption.

They are consistent with the views of the joint submissions of the delegation of the Human Rights Monitor and the Hong Kong Bar Association. I urge members of the Committee to urge them upon the Hong Kong SAR Government.

Dated the 22<sup>nd</sup> day of February 2008

Margaret Ng  
Member of the Legislative Council HKSAR  
Member of Civic Party, Hong Kong