

**Submission to the Legislative Council Panel on Public Service****Language Proficiency Requirements****24 May 2010****By Kelley Loper<sup>1</sup>****Introduction**

1. This paper considers Hong Kong's domestic and international legal obligations to ensure equality and non-discrimination on the basis of race and language and aims to provide a reference for discussion of the Language Proficiency Requirements (LPRs) for appointments to the Civil Service. It concludes that LPRs may amount to indirect racial discrimination and must be carefully examined to assess their impact on equal access to employment opportunities for members of minority communities in Hong Kong. It suggests reforming the LPR policy – and other related measures - with the aim of achieving greater diversity and representation of ethnic minorities within government service.

2. When setting LPRs, the Government must ensure that they comply with the right to equality as provided in the Basic Law, the Bill of Rights, the Race Discrimination Ordinance (RDO), and international human rights treaties which apply to Hong Kong. These legal obligations require that the Government prevent, address and remedy *de facto* and *de jure* discrimination on the basis of race and language, among other grounds.

**The Race Discrimination Ordinance – indirect discrimination**

3. The RDO, which applies to the Government, prohibits direct and indirect discrimination in employment on the grounds of race - a broad term which includes race, colour, descent, or national or ethnic origin. Language and race are closely connected and although the RDO does not expressly protect against discrimination on the grounds of language, a language requirement in the employment context could amount to indirect racial discrimination.

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4. Indirect discrimination occurs when a requirement or condition – such as a language requirement - is applied equally to all racial groups but 1) a considerably smaller proportion of members of the claimant’s racial group can comply with it; 2) it cannot be justified; and 3) it is to the detriment of the claimant.<sup>2</sup> A requirement or condition can only be justified when it serves a legitimate objective and bears a rational and proportionate connection to that objective. This justification test is well-established in Hong Kong constitutional law and the Court of Final Appeal has confirmed that any justification for a law or policy which discriminates on the basis of race will be scrutinized with intensity by the courts.<sup>3</sup>

5. When a racial group is disproportionately and negatively affected by a language requirement in employment – such as an LPR - this may amount to indirect discrimination unless it has been carefully tailored and is necessary to achieve a legitimate aim. It is not clear from the paper prepared by the Civil Service Bureau<sup>4</sup> that LPRs as currently formulated can be justified according to the strict standards required by Hong Kong courts.

### **Constitutional Right to Equality**

6. The constitutional right to equality in Hong Kong is based on Articles 1 and 22 of the Bill of Rights (which essentially duplicate Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR)) and Article 25 of the Basic Law. The ICCPR prohibits discrimination on a range of grounds including (but not limited to) race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7. Hong Kong courts have held that these provisions prohibit indirect (or “disguised”) discrimination: measures which seemingly apply equally to everyone but which have a discriminatory effect or impact on members of a particular protected group.<sup>5</sup> They have also referred to materials produced by the UN human rights treaty bodies – the committees which monitor the implementation of obligations under key human rights instruments – to elaborate the content of the right to equality in the Hong Kong context. These bodies recognize that discrimination prohibited under the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) includes discrimination in *effect* as well as purpose.

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<sup>2</sup> RDO (Cap 602), s 4(b).

<sup>3</sup> *Secretary for Justice v Yau Yuk Lung* [2007] HKEC 1278.

<sup>4</sup> LC Paper No. CB(1)1911/09-10(03), May 2010.

### **Substantive Equality**

8. In other words, the right to equality and non-discrimination includes a right to *substantive* as well as formal equality. Substantive equality goes beyond the formal notion that “likes should be treated alike” and requires a careful analysis of context and an assessment of the actual situation of disadvantage faced by particular groups and individuals within those groups. When individuals and groups are competing from unequal starting positions due to past discrimination, lack of language education, etc., then strict equal treatment – in a formal sense – could in fact amount to discrimination.

9. The Committee on the Elimination of Racial Discrimination has confirmed that “The principle of equality underpinned by the [CERD] combines formal equality before the law with equal protection of the law, with substantive or *de facto* equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles”.<sup>6</sup>

10. The Committee on Economic, Social and Cultural Rights has similarly recognized a right to substantive equality under the ICESCR.

“Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2) ... Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination.”<sup>7</sup>

### **Special measures**

11. Both Committees, as well as the Human Rights Committee, have also recognized that the right to equality sometimes requires the implementation of special measures. In addition to ensuring that its policies, including LPRs, do not directly or indirectly discriminate on the basis of race or violate the substantive equality principle in Hong Kong law, the Government

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<sup>5</sup> *Leung v Secretary for Justice* [2006] HKEC 1763. The Court of Appeal held that “where there was an apparent breach of rights based on race, sex or sexual orientation, the court would scrutinize with intensity the reasons said to constitute justification”.

<sup>6</sup> Committee on the Elimination of Racial Discrimination, CERD General Recommendation No. 32, Aug 2009, para. 6.

<sup>7</sup> CESCR General Comment No. 20, E/C.12/GC/20, 10 June 2009, para 8(b).

may also be required to take special measures in order to achieve equality by remedying past discrimination and enhancing the representation of minority communities.

12. The Committee on Economic, Social and Cultural Rights has observed that:

“In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health care facilities”.<sup>8</sup>

13. The CERD also requires “special measures” to address discrimination in effect in certain circumstances.<sup>9</sup> According to the Committee on the Elimination of Racial Discrimination, “[t]he concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms”.<sup>10</sup>

14. The RDO reflects this requirement by allowing an exception for special measures which are reasonably intended to ensure that persons of a particular racial group have equal opportunities with other persons and to meet the special needs of members of a racial group in relation to employment, education, and other areas within the scope of the ordinance.<sup>11</sup>

### **Conclusion**

15. The right to equality and non-discrimination in Hong Kong law requires careful consideration of the possible impact of all laws and policies on particular racial groups to ensure they do not amount to discrimination in either its formal or substantive sense. It is important to keep in mind that policies which appear to conform to a formal equal treatment principle may nevertheless fall foul of the legal right to substantive equality. In addition, in certain circumstances, special measures may be required.

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<sup>8</sup> CESCR General Comment No. 20, E/C.12/GC/20, 10 June 2009, para 9.

<sup>9</sup> See Articles 1(4) and 2(2) of the CERD.

<sup>10</sup> CERD General Recommendation No. 32, Aug 2009, para 11.

<sup>11</sup> RDO s 49.

16. In any event, as a matter of policy, the Government should explore ways to enhance the representation of minority communities in the Civil Service in the context of increasing diversity in Hong Kong society. It is in Hong Kong's long-term social and economic interests to demonstrate a firm commitment to achieving equal opportunities and to take an inclusive approach to difference and diversity.

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