

LETTERHEAD OF HONG KONG HUMAN RIGHTS MONITOR

**The Need for Legislation on
Racial Discrimination**

**A Submission to the LegCo Panel on Home Affairs
September 1998**

INTRODUCTION

1. Twenty-nine and a half years ago, the United Kingdom extended the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) to Hong Kong. It requires all State Parties to “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all forms and promoting understanding among all races”.
2. Three decades after the extension of CERD, Hong Kong has been for years an advanced metropolitan city in terms of both technology and way of life, but it continues to be lawful for anyone except the Government and public authorities to discriminate against people on grounds of race leaving the victims without any remedies. Moreover, racial discrimination in various forms is still prevalent in Hong Kong. Generally this takes the form of discrimination against Hong Kong’s minority communities although there have also still been recent examples of discrimination by Chinese against Chinese (Chinese-owned bars admitting all white people free but requiring Chinese people to pay an entrance fee) and of discrimination against Japanese tourists (required to pay a special, high, “Japanese” hotel rate).
3. There are at present laws protecting people against sex, disability and family status discrimination in the Special Administrative Region. However, the Government has a bad record of deliberately attempting to ignore the extent of racism that exists and blocking any attempt to provide for racial equality. It may be true that racial discrimination is an built-in element in all colonial system. But with the establishment of the SAR, Hong Kong should have the chance to end this situation. Instead the

Government itself often shows racist attitudes and has been found by the courts to be operating racist policies, in breach of the Bill of Rights, in relation to “localization”.

GOVERNMENT CONSULTATION AND HUMAN RIGHTS MONITOR’S SURVEY

4. Human Rights Monitor considers it a matter of basic principle and an international human rights norm that the law should provide protection against racial discrimination. The Government is withholding such protection on the unacceptable ground that most respondents to a consultation it conducted did not see such a need. This consultation drew no distinction between the majority community and minorities who suffer most discrimination, usually from the majority.
5. It is wrong in principle to base policy on a survey on whether legislation is necessary when the Government is already bound by international obligation to legislate. By doing so, it shows that the Government does not believe in international human rights standards and is happy to breach binding human rights treaties applicable to Hong Kong and entrenched in the Basic Law.
6. Moreover the Government’s consultation has been interpreted to give the answer the Government wants. Other surveys, e.g. by the Movement Against Discrimination, have shown that most Hong Kong people are against discrimination on grounds of race.
7. Human Rights Monitor deplores the Government’s readiness to use the opinions of a predominantly racial majority, satisfied with the status quo, that legislation is not necessary as an excuse for ignoring discrimination suffered by racial minorities. The Government approach is to drown the voices of the minorities with the voice of the majority, some of who may not know the problems faced by the minorities, some of whom could not care less, while others are actually perpetrators or beneficiaries of discrimination.
8. In response to this fundamentally wrong approach, Human Rights Monitor has conducted a pilot survey on the experience, opinion and demands of the racial minorities in Hong Kong.
9. Because of our limited resources, the survey is limited in its methodology. For instance, we did not manage to distribute our questionnaire territorywide, but at spots near the ferry piers or the Immigration Tower. Although it differs little from most questionnaire survey conducted in the street, we do not intend to claim our survey is fully representative of the whole population of the minorities. However we believe it sheds some light on the issue and shows the approach the Government should adopt in future surveys (though the Government will still be handicapped by the lack of demographic information on the minorities until a census which includes questions on ethnic origin is conducted).

10. As the problems of Mainland ethnic Chinese new arrivals in Hong Kong has been revealed by the efforts of many NGOs, our survey concentrates on ethnic minorities who are not ethnic Chinese or only partially ethnic Chinese.
11. Human Rights Monitor distributed copies of questionnaires to members of ethnic minorities in the street in July 1998. We distributed 800 copies and received 123 valid completed questionnaires collected by us or sent to us by fax or by post. The main results of the survey contrast sharply with the Government's consultation result in which 83% of the respondents are said to consider legislation unnecessary or undesirable; and are as follows:
 - Two thirds of the respondents (67%) considered themselves to have personally experienced or witnessed racial discrimination in Hong Kong while 28% of them had not.
 - Four fifths of them (80%) agreed that legislation would be helpful to Hong Kong while 15% of them disagreed.
 - Three quarters of the respondents (76%) supported legislation prohibiting racial discrimination while 18% did not.
 - According to the respondents racial discrimination in Hong Kong had taken place in various types of setting. Among those who considered themselves to have personally experienced or witnessed racial discrimination, the discrimination occurred mostly in employment (45%), admission to facilities (33%), and sales or delivery of goods or services (20%) while it also occurred in government services (16%), home purchase or rental (15%), medical care (12%), access to education (6%), business investment (5%), and other setting like social occasions (12%).
12. The high reporting of racial discrimination suggests that racial discrimination is a serious problem in Hong Kong according to the minorities' own experience and that it takes place in most settings.

THE OBLIGATION TO LEGISLATE UNDER INTERNATIONAL LAW

13. Article 4 of the Basic Law promises "The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law." Unfortunately no law is existent in Hong Kong to safeguard the rights and freedoms of the minorities from racial discrimination.
14. There are a number of international human rights treaties, two of which have been entrenched in the Basic Law, which oblige Hong Kong to legislate.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

15. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was extended to Hong Kong, with certain reservations, by the United Kingdom on 7 March 1969 and entered into force on 6 April 1969.
16. The People's Republic of China is also a party to the Convention. On 10 June 1997 the Chinese Government notified the United Nations Secretary-General that the Convention "will apply to the Hong Kong Special Administrative Region with effect from 1 July 1997" with certain reservations.
17. The Government is bound by CERD to legislate against racial discrimination.
18. Article 2(1)(d) of CERD provides,
"Each State Party shall prohibit and bring to an end, by all appropriate means including legislation as required by circumstances, racial discrimination by any persons, group or organization".
19. "Prohibiting", however, in our common law system can only be done by legislation because there is no common law prohibition to outlaw all racial discrimination.
20. In Hong Kong's common law system, the basic principles of the rule of law dictate that a person, a group or an organization has the right to do anything which is not prohibited by the law while the law enforcement agencies can only prohibit an act if there is a law against it. It is therefore impossible to prohibit any act of racial discrimination until there is such a law forbidding it.
21. The Hong Kong Bill of Rights Ordinance which took effect on 8 June 1991 prohibits all acts of racial discrimination and makes civil remedies available to victims of racial discrimination. However, the Ordinance binds only the Government, all public authorities, and persons acting on their behalf of them. It is clear that this Ordinance does not itself prohibit acts of racial discrimination by private persons which are outside its scope of application. Therefore the Hong Kong Government has yet to legislate to prohibit "racial discrimination by any persons, group or organization".
22. The United Nations Committee on the Elimination of Racial Discrimination, the body set up by CERD responsible for monitoring the implementation of the Convention, has commented in its Concluding Observations on Hong Kong, "It is noted with concern that the adoption of the Bill of Rights Ordinance, while a welcome measure, does not protect persons in Hong Kong from racial discrimination to which they may be subjected by private persons, groups or organizations, as provided for in article 2, paragraph 1(d) of the Convention." (Para 19, 1996)
23. The Committee recommended that "the Bill of Rights Ordinance be amended to extend the prohibition of discrimination to acts committed by private persons, groups or organizations, as provided for in article 2, paragraph 1(d), of the Convention." (Para 35, CERD Concluding observations, 1996)

24. Alternatively, a separate statute outlawing racial discrimination similar to the three existing equal opportunity legislation, or a comprehensive ordinance covering all discriminations, could be enacted to provide for the prohibition.
25. Article 6 of CERD provides,
“State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”
26. In breach of this Article which requires legislation to provide for effective protection and remedies, a victim of an act of racial discrimination committed by a private individual organization has absolutely no remedies in Hong Kong. Neither the Equal Opportunity Commission (which deals with other forms of discrimination), the Government (including the Home Affairs Bureau), nor the Court can provide any redress unless legislation is enacted.
27. By not legislating against racial discrimination, the Government is in breach of its obligation under CERD.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR)

28. Article 39 of the Basic Law provides that the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) as applied to Hong Kong “shall remain in force” and implemented through the laws of Hong Kong.
29. Moreover, on 10 June 1997 the Chinese Government notified the United Nations Secretary-General that the Convention “will apply to the Hong Kong Special Administrative Region with effect from 1 July 1997” with certain reservations.
30. Both Covenants require equal enjoyment of rights without discrimination of any kind as to race, colour, national origin, language, religion, etc. (Articles 2 and 26, ICCPR; Article 2, ICESCR)
31. The ICCPR provides in Article 2(2),
“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

32. Article 2(3)(a) makes it clear that each State Party to the present Covenant undertakes to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”.
33. Article 2(3)(b) makes it clear that each State Party to the present Covenant undertakes to “ensure that any person claiming such a remedy shall have his right thereto determined by competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”.
34. The ICCPR thus requires State Parties to protect against human rights violations by all persons including private persons and to provide remedies for any violations. The Bill of Rights Ordinance which applies the ICCPR in our domestic law fails to protect against violations other than by Government (and public authorities) and is unable to provide the necessary remedies to victims of discrimination by private persons.
35. The United Nations Human Rights Committee, the most authoritative body on the interpretation of the Covenant and responsible for overseeing the implementation of the Covenant by State Parties, expressed with concern in their 1995 Concluding Observations on Hong Kong,
“The Committee notes that Section 7 of the Bill of Rights Ordinance provides that the Ordinance binds only the Government and all public authorities, and any person acting on behalf of the Government or a public authority. The Committee emphasizes in this regard that under the Covenant a State party does not only have an obligation to protect individuals against violations by Government officials but also by private parties. It thus notes with deep concern the absence of legislation providing effective protection against violations of Covenant rights by non-governmental actors.” (para. 10, 1995)
36. It recommended that “comprehensive anti-discrimination legislation aiming at eliminating all remaining discrimination prohibited under the Covenant be adopted.” (para 23, 1995)
37. The United Nations Committee on Economic Social and Cultural Rights, the treaty body responsible for monitoring the implementation of the ICESCR, criticized in its 1994 Concluding Observations,
“The Committee expresses its concern that in spite of recent Government initiatives to introduce legislation concerning non-discrimination in relation to sex and disability, there is an absence of comprehensive legislation providing protection against discrimination on the grounds referred to in article 2 of the Covenant [including race].” (Para 24, 1994)
38. It recommended, “the Government should take immediate steps to introduce a comprehensive anti-discrimination legislation”. (Para.35, 1994)
39. In its 1996 Concluding Observations on Hong Kong, the United Nations Committee on Economic Social and Cultural Rights has already strongly criticized the Government’s refusal of legislation based on the views of the majority community. It

“regret[ed] the ‘step-by-step’ approach according to which legislation for the protection of vulnerable minorities is adopted primarily on the basis of public opinion surveys, that is, based on majority views.” (Para. 16, 1996)

40. The criticisms and recommendations of these treaty bodies have been ignored.
41. By not legislating against racial discrimination, the Government is again in breach of its obligation under ICCPR and the ICESCR.

CONCLUSION

42. There is nothing worse than being insulted, embarrassed and humiliated, or denied equal opportunities solely based on the ground of skin colour, descent, or ethnicity. For those who have been subjected to discrimination on the grounds of their race, the consequences can be psychologically damaging and the bitterness engendered is harmful to society as a whole.
43. Racial discrimination is costly to the community. It denies the society the fullest use of talents, and it also denies Hong Kong of important business opportunities. A recent example was the news report of Japanese tourists being charged higher price, which was another blow to our struggling tourist industry.
44. Human Rights Monitor realises that the law alone cannot prevent racial discrimination. But this is no excuse for allowing acts of gross and overt discrimination which the law can prevent or tackle.
45. Human Rights Monitor urges the Government to honour the promise in the Basic Law and its obligation under the international treaties and Basic Law to legislate to safeguard the rights and freedoms of the minorities against racial discrimination by any persons, groups or organization whether private or public.
46. If the Government does not choose to lead, at the very least it should not block the Legislative Council from taking the lead by way of deliberating and enacting private members’ bills.
47. The Government considers education to promote racial equality and understanding between all races important. We agree with the Government on this point. However, we urge the Government to set more concrete goals and criteria for assessing of the effectiveness of education measures by way of periodic reviews according to an evaluation time table to be published.
48. Moreover, we urge the Government to adopt a more multi-racial attitude and to commit itself to a policy formulation approach sensitive to the needs not only of the majority community but also to those of the minorities. Defending policies found to be discriminatory under the CERD and other United Nations treaty monitoring bodies which are the highest authorities in interpreting the treaties, hardly helps to educate the community to avoid racial discrimination.

49. Human Rights Monitor also urges the Government to cease its offensive and misleading propaganda in support of its “no legislation policy”. It was reported in a Chinese newspaper that the Acting Secretary for Home Affairs commented before the Legislative Council Panel on Home Affairs in July that a responsible government should not just take care of the interest of a small minority (一少撮) a comment which is blatantly discriminatory. It was also reported that he felt that government intervention in acts of discrimination is undesirable in commercial decisions. It is specially disturbing as this statement was made after the Bureau had failed to convince these public houses to give up their discriminatory pricing practices by sending them letters and voluntary Codes of Practice (which bind not even the Government). We call on the official concerned to withdraw his remark.
50. The Government should also adopt measures, to promote equal opportunities e.g. the concept of an equal opportunity employer committed to a policy, practices and perhaps also institutional guarantees to non-discrimination. The Government should take advantage of its position as the sole owner of the MTR, KCR, etc. and holders of quite a substantial portion of shares in companies like the Hong Kong Bank to persuade these corporations to adopt the voluntary Codes of Practices against racial discrimination. The Government should also persuade all schools and universities similarly to commit to become non-discriminatory organizations. Some other possible practical measures may be found in Paragraph 8.12 of the Government’s 1997 consultation paper.
51. Human Rights Monitor has also enclosed our Briefing Paper for the United Nations Committee on the Elimination of Racial Discrimination (Enclosure I) for the Panel’s reference on other issues related to racial discrimination.