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RESPONSE TO THE GOVERNMENT'S CONSULTATION DOCUMENT ON RACE DISCRIMINATION LEGISLATION

1. General points

Human Rights Monitor strongly welcomes the Government's commitment to legislate in this important area.

It is an anomaly that Hong Kong does not yet have legislation of this kind. Hong Kong became committed to enacting such legislation as long ago as 1969 when the Convention on the Elimination of Racial Discrimination was extended to Hong Kong. Discrimination by the HKSAR Government or public sector organisations has been outlawed since the enactment of the Bill of Rights in 1991. It is illogical in an aspiring world city such as Hong Kong to permit race discrimination to continue in the private sector.

We agree that it is sensible to model the proposed legislation closely on the existing Sex Discrimination and Disability Discrimination Ordinances, as we have done in our draft Bill presented to the Government earlier this year.

A table setting out our criticisms on the consultation paper and our recommendations is attached for your consideration. We just address some of the issues below.

2. Specific points

(1) Foreign domestic helpers (Consultation Paper, paragraph 9, or CP9 in short)

We are not sure why foreign domestic helpers are singled out as a separate category from other ethnic minorities in Hong Kong. It is just as unacceptable to discriminate against a foreign domestic helper on grounds of race as against any one else.

(2) New arrivals from Mainland China (CP24 and 25)

Mainland immigrants to Hong Kong are the subject of much irrational prejudice and discrimination. This is a serious social problem. It is important that provision is made in the legislation to deal with this.

There are two obvious methods of dealing with this issue. One is the Australian approach, which is simply to outlaw discrimination against a person because they are an immigrant. This is simple and clear, but would outlaw discrimination not just against Mainland immigrants but against immigrants from anywhere.

The alternative approach is that proposed in our draft bill, which is to amend the definition of "national origin" to include "any jurisdiction of the People's Republic of China". This is simple in terms of drafting. It also has the advantage that it is reciprocal. It not only outlaws discrimination against Mainlanders but also outlaws discrimination in favour of Mainlanders. In view of the large number of Mainland immigrants this could become a real issue. It would be unfair for one Hong Kong company to be penalised for refusing to employ an otherwise qualified person because he was a Mainlander, yet be lawful for another company to give preference to a person because he was a Mainlander. A reciprocal provision outlawing discrimination in either direction is in line with the aim of providing a level playing field and should therefore be generally acceptable to the community.

(3) Implementation (CP29-31)

We agree that it is appropriate and necessary for the EOC to be given the enforcement role in relation to the Bill, as in relation to the aforementioned Ordinances. It is important that the EOC has the same range of enforcement powers in relation to the new legislation as in relation to those Ordinances, as these powers are the minimum required for effective enforcement.

There is no mention in the discussion of the EOC's enforcement powers of the power to give legal assistance. Assistance with litigation is essential of the EOC is not be a toothless tiger and the legislation a failure. Many people will comply with the law readily or as a result of conciliation and/or education but there will always be a hard core who will break the law unless forced to obey it. Most victims of discrimination will not have the resources to litigate without assistance from the EOC. Assistance similar to that provided by the EOC in relation to the Sex, Disability and Marital Status Discrimination Ordinances is therefore vital.

(4) Indirect discrimination (CP36)

The proposed definition of indirect discrimination is the former UK definition, which the UK has amended because it did not comply with the European Union Directive on Race Discrimination. The older definition has been widely criticised and is out of date. There is no reason why it should be retained and we recommend that the legislation should use the improved UK definition.

(5) Exception for small companies (CP60)

We do not believe that this exception is necessary. We believe Hong Kong society is already sufficiently familiar with the idea of racial discrimination being wrong that such a transitional provision is not needed.

(6) Ministers of religion (CP68)

We are concerned that this exemption may be abused. It should be made clear that the religious susceptibilities of the congregation are something different from their racial prejudices, and that this exemption will not cover, say, a predominantly Caucasian church refusing to appoint a minister because he is not a Caucasian.

Attachment

HONG KONG HUMAN RIGHTS MONITOR

ATTACHMENT TO
RESPONSE TO THE GOVERNMENT'S CONSULTATION DOCUMENT
ON RACE DISCRIMINATION LEGISLATION

Keys: CP25 = Page 25 of the Consultation Paper
ICERD = International Convention against All Forms of Racial Discrimination
CERD = United Nations Committee against All Forms of Racial Discrimination
SDO = Sex Discrimination Ordinance
DDO = Disability Discrimination Ordinance
FSDO = Family Status Discrimination Ordinance
EOC = Equal Opportunities Commission
RRA = Race Relations Act as amended

Issues	**Comments**
Definition of terms	
The position of Mainland Chinese - Most new arrivals from the Mainland will not be protected. In the Government view, new arrivals from the Mainland are of the same ethnic stock as local Chinese and therefore do not constitute a racial or ethnic group in HK according to ICERD (CP24-25).	- ICERD provides the minimum standards for protection. Even if it is true that new arrivals from the Mainland do not fall within the definition of ICERD there is no reason to prevent the protection offered by a racial discrimination law to go beyond the ICERD. Wider protection can be found in the Race Relations Act in UK which protects discrimination based on "nationality". The Australian Racial Discrimination Act also prohibits discrimination against immigrants and ex-immigrants. - It is reasonable to protect new arrivals from the Mainland since they face similar problems as ethnic minorities, e.g. in the need to adapt to the life in Hong Kong. Moreover, similar social and other services have been and are still being offered to the ethnic minorities and the new arrivals. - The definition of "national origin" can be slightly expanded to include "any jurisdiction of the People's Republic of China" to cover the new arrivals. To provide for protect new arrivals from places other than from China, the law should also prohibit discrimination on the grounds of a person's current or past status as an immigrant.

Weak and outdated definition of indirect discrimination (CP36) - "requirement or condition": The term is very narrowly interpreted: (a) A requirement or condition has to be absolute and (b) practices, especially informal and/or past ones, may be excluded.	- "provision, criterion or practices", a wider definition in the European Commission Race Directive, should be adopted to cover more circumstances.
- "considerably smaller proportion": Statistical data usually required are hard to come by and a case can only be brought after actual harm done.	- The concept "would put [the victim] at a particular disadvantage" in the Race Directive does not require statistical evidence for purposes of proof. Policies or practices can be challenged based on the associated risk at an early stage before any harm is done.
- "justified": include justified by any pre-existing Ordinances and subsidiary legislation (see CP58 on pre-existing statutory provisions as well as CP57 and 68 on immigration law).	- Pre-existing Ordinances and subsidiary legislation can only be used as justification if these statutory provisions are justified themselves. Otherwise institutional discrimination will be entrenched.
- The Government uses consistency with the other 3 equal opportunities legislation as an excuse to refuse to adopt the European Commission Race Directive will make the law in indirect discrimination	- At the very least, there should be provisions to make it clear that: The term "requirement or condition" does not need to be absolute; It includes “all kinds of practices, including informal ones”; and in assessing discriminatory impacts, past practices can be taken into consideration.
Multiple discrimination - CP silent on this issue.	- It should be made clear that multiple discrimination involving racial and other discrimination will be included in the definition of racial discrimination (c.f. SDO, s.4)
Imputed discrimination - CP silent on this issue.	- It should be made clear that racial discrimination on racial and ethnic grounds cover those cases involving mistaken belief as to the race, colour, descent, or national or ethnic origin of the relevant person or persons.
"Transferred discrimination" (CP37) - Only applicable to "the spouse or a relative" of a person. This is inconsistent with Article 1(1) of ICERD which is intended to protect all persons against all forms of racial discrimination. It is also inconsistent to the Government's stated policy "to eliminate and combat all forms	- Should be widened to include any person connected to him or not, or at least to include those related by blood, marriage, adoption or affinity (s. 2, FSDO) and "associate", which consists of any relatives or carers of the person; [any person cared by the person;] any person who is living with the person on a genuine

of racial discrimination" (CP22(a)). - The proposal will not offer protection to persons like: A waiter harassed for having served an unrelated Indian contrary to an instruction of his racist supervisor not to serve any non-white customers; or persons who were harassed for standing up to defend an ethnic minority from being discriminated against.	domestic basis; [any person who defend or work for the interest of the person]; and another person who is in a business, [education, training,] sporting or recreational relationship with the person. (c.f. ss.2 & 5, DDO)
Racial harassment (CP39)	
Unclear definition - The definition in CP is unclear. A single humiliating act on the ground of a person's race may sufficient to amount to racial harassment, but the example in CP seems to suggest that repeated acts of humiliation may be necessary.	- The law should provide for a two-pronged definition. One prong should be able to catch a single humiliating, offending or intimidating act. The other should be able to catch acts or omissions which taken together amount to racial harassment although each may not be sufficient to sustain such a claim individually. The conjunction between the two arms should be "or", not "and" (c.f. SDO and DDO).
- Unsure if the component of "transferred racial harassment", i.e. discrimination of a person (the victim) not because of his race but the race of another person who in a way is connected to the victim. An example would be the carer of a Pakistani might be humiliated by a racist because the carer cares for him. A limited type of "transferred racial harassments" are found in DDO based on the concept of "associate".	- "Transferred harassment" should be provided for and the concept of "associate" should be expanded (see the part on "Transferred discrimination" above).
- Racial harassment is restricted to all protected areas of activity only (CP39-41). But there were gaps in the three existing discrimination ordinances (See "Equal Opportunities Legislative Review" by the EOC in 1999).	- Lessons should be drawn from the unjustified gaps in the protected areas of activity in the existing legislation. Gaps should be filled and the widest protection should be offered.
Vilification	
Inadequate definitions (CP42-43) - In serious vilification involving premises or property, the threat of physical harm (or incitement of the same) has to be towards premises or property "of that person". It may therefore exclude circumstances in which the person may be merely in	- The definition should be clear enough to offer protection to those cases without ownership.

possession of the property or he is a tenant, licensee or even a visitor to the premises. It is particular unfair to foreign domestic workers who may need to defend their employers' property and/or premises which are not theirs. Persons like tourists should also be protected.	
- No "transferred vilification" is provided for (e.g. incitement of hatred toward a teacher of an ethnic minority child on the ground of the race of the student is not covered by the current definitions of vilification and serious vilification).	- Corresponding expansion of definitions needed. ICERD envisage that all persons, not only those with very close relations should be protected all persons against forms of racial discrimination.
Issues concerning the protected areas of activities	
Employment (CP45-50) - The proposed law protects employees from racial discrimination in the work place but only against discrimination by the employers or their agents, but probably not say discrimination by the customers or other persons (e.g. visitors and family members of the employers or other employees) in the work place. Foreign domestic workers who interact closely with family members and friends of the employer may be seriously affected by this lack of protection.	- More comprehensive protection is needed.
Services (CP44, 52, 39 and 41) - In SDO, harassment by service providers to their actual or possible customers is outlawed but not the other way round (SDO, s.40(1)).	- The law should fill all the gaps in the protected areas of activity, including possible gaps similar to those already identified in the "Equal Opportunities Legislative Review" by the EOC in 1999.
Housing - Housing has not been explicitly spelt out but inferred from CP44(c) and 52. - There is no protection for a sub-tenant being racially discriminated by a tenant.	- Housing should form a separate area of protected activity with sufficient details specified. - The ground to exempt racial discrimination in housing is unjustified and too wide. No exclusion should be allowed here (see below).
School' liability in protecting students (CP51) - There is no clear protection of students against racial harassment by other students or their parents or even strangers. The provision of vicarious liability does not	- Such protection such be clearly provided for and not only against the students or even their parents and even strangers like racists (whether in the neighbourhood or not) (c.f. the case of

help in this situation. Unless the word "engages" in CP39 is given wider meaning to include adoption of the conduct of the discriminator students (however, such an interpretation may be inconsistent with the Chinese version of CP)	anti-Japanese slogans on the wall of the Japanese international school). The school should also be held responsible for not being diligent enough in permitting this happening and not preventing a racially hostile environment from developing (c.f. SDO, ss.39 and 40). Omission of this nature should be considered treatment for the purpose of discrimination.
Issues concerning the general exceptions	
Pre-existing legislation (CP58) - Instead of reviewing the laws with a view to repealing those statutory provisions which authorize or require the Government to do racially discriminatory acts, the consultation paper proposes to uphold the laws and validate and legalise such discriminatory acts. This approach will result in institutionalization of racial discrimination rather than combating it. - This approach is a breach of the duty under Article 2(1)(d) of ICERD.	- The Government should faithfully implement Article 2(1)(d) of ICERD which requires all Governments "to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". - The Government should release a list of legislation, which require the Government to do racially discriminatory acts in performance of its duty.
Immigration legislation (CP68-69) (See also "Pre-existing legislation" above") - The proposed law is not intended to override the existing immigration legislation. That means any case involving immigration issues would follow the existing immigration legislations but not the new race law (see also the criticisms of CP58). For example, the two-week rule, though severely criticised by UN treaty bodies, will be preserved. - There were no reservations made by the Chinese Government on behalf of Hong Kong (see CP page 41) to enable the Hong Kong Government to rely on to include such an exception on immigration law. (The reservation on Immigration laws made to ICCPR cannot be relied on to justify the breach of obligations under ICERD to which the Chinese Government as voluntarily entered into on behalf of Hong Kong.) Under Article 1(2) of ICERD, differential treatments are possible on the ground of citizenship but not race. In any event all differential treatments allowed under Article 1(2)	- The whole exception should be abolished. All immigration law and practices should be reviewed in the light of ICERD, including the new General Recommendation by CERD on the treatment of non-citizen. - The two-week rule targets only foreign domestic workers. It requires them to leave HK within 14 days after the termination of their contract even if they have found another employer to employ them. It is indirect discrimination against ethnic minorities from South and South East Asia. The rule should be abolished in the light of the new legislation. - Treatment for non-citizens should not be racially discriminatory. For example, there should not be discrimination on the grounds of race between a non-citizen British and a non-citizen Filipino.

should not be racial discriminatory.	
Small companies and employers (CP60) - Exempted from the legislation for the first three years so as to adapt to any changes make to the company due to the legislation. Most foreign domestic workers and a lot of security guards employed by Owners Committee will be left unprotected during the grace period. It is particularly unjustifiable for domestic households employing domestic workers as their personnel matters are much simpler to adjust.	- The period of 3 years should be cancelled or substantially shortened because small employers should have learned a lot from the existing three discrimination ordinances and the voluntary code of practice on employment. - In any case, the application of the exception to households employing domestic workers are unjustified as they do not need any major adjustments.
Genuine occupational qualification (CP61) - Genuine occupational qualification based on authenticity is too wide.	- The exception in respect of a job, not a type of job, can only be justified by a characteristic based on "the nature of the occupational activities and the context in which they are carried out and only when such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate" (Article 4, Race Directive)
Small dwellings (CP62) - Exceptions are provided for when dealing with the disposal of the premises where the landlord, tenant or lodger shares a small premise.	- The UK has repealed this kind of exception. There are also a number of problems in the corresponding exclusions found in the old UK RRA and the existing HK SDO like excluding tenants from discriminating against subtenants.
Clubs and Charities (CP63 & 65) - Club and charities are given exemption in seeking for service targets, in case the clubs and charities are serving particular target groups.	- No discrimination purely on the grounds of colour is accepted in the UK law in relation to charities. It may also be desirable to set clearer criteria to indicate which kinds of clubs and charitable bodies are able to serve specific target groups in order to eliminate any possible discrimination in benefits allocation.
Ministers of religion (CP67) - This exemption may be abused.	- It should be made clear that the religious susceptibilities of the congregation are something different from their racial prejudices, and that this exemption will not cover, say, a predominantly Caucasian church refusing to appoint a minister because he is not a Caucasian.

Special measures (CP64) and statutory positive duty	
- It is unclear whether the definition of special measures would include examples to promote understanding; and to allay fears. For example, the Education and Manpower Bureau has reservations about justified special measures, probably out of fear of being criticized for discriminatory.	- Examples should be included in the legislation while more should be included in the Code of Practice (c.f. SDO, s.28(2).
- The usefulness of the provision on special measures will be substantially reduced if it is not accompanied by a statutory positive duty on public authorities, subsidized or subvented bodies, and contractors (c.f. CP22-23)	- A provision of a statutory positive duty on public authorities, subsidized or subvented bodies, and on contractors binding their contracts should be included (c.f. UK RRA, s.71) (See the last page for more information.
Burden of proof (CP84)	
Tort	
- Unclear what kind of burden will be required in claims under the new legislation. Apparently it is for the victims to bear the burden.	- Once the victim has proved the facts on which a prima facie case can be inferred, the court should find that a racial discrimination has been committed unless the defendant can prove otherwise (disprove it). (c.f. Burden of Proof Directive and Race Directive of the European Commission)
Issues concerning the implementation	
Nature of key enforcement body	
- The Equal Opportunities Commission (the EOC) will probably undertake the responsibilities in relation to the new racial discrimination law.	- It is important that an independent statutory human rights commission formed and operates in line with the Paris Principles should be set up to enforce such kinds of laws. Entrusting to the EOC should only be a temporary arrangement. It is important for the Government to refrain from undermining the independence and credibility of the EOC whether by way of appointment or otherwise.
Resources of the EOC	
- The EOC will probably undertake the responsibilities in relation to the new racial discrimination law but they may not be given adequate resource necessary to perform the tasks, e.g. it has no particular funds for conduct litigation.	- After the enactment of the new law, the EOC needs to pick up a number of new responsibilities besides handling cases and will need a large increase in its professional and support staff. A firm commitment as to enough funding must be given by the Government.
Members of the EOC	
- To bring it more in line with the Paris	- The composition and operation of the EOC must

Principles and to ensure that it operates more effectively, the EOC needs to change in composition, and needs additional members of staff and professional assistance in order to reflect the new responsibilities effectively.	be reformed to make them in line with the Paris Principles. The EOC needs to have members to reflect its new responsibilities, including members of ethnic minorities, and of non-Government organizations genuinely experienced in and genuinely working with and for the ethnic minorities. - The appointment mechanism of the EOC members should be more open and transparent.
Powers of the EOC - CP does not mention the EOC's power to litigate in its own name but its power to give "legal advice". Nothing is said on whether the EOC will be able to provide "legal assistance".	- It is important for the EOC to have litigation-based enforcement powers. Otherwise, many discriminators will simply refuse to resolve their cases and the law will be powerless since most complainants cannot afford their own lawyer.
Weak protection mechanism	
- The protection offered by the court, except in serious vilification (which is a criminal offence), is by way of civil litigation, making it difficult for a weak victim to protect his rights. - Without action by the EOC, the deterrent effect of the law will be limited, because of lack of public education about equality rights, lack of legal assistance from the EOC and Legal Aid Dept, and complicated procedures.	- It is important that the EOC will not simply react to events such as complaints which are made to it, but adopts a pro-active strategy, speaking out about issues and problems, and so educating the public and maintaining pressure to change discriminatory attitudes. This will be critical to its success or failure as the body charged with eradicating race discrimination.
Government's statutory positive duty	
- The objectives stated in the paper for legislation does not include the duty of the Government to promote race equality and harmony. The responsibility solely falls to the EOC.	- The Government and public authorities should be under a positive duty to combat discrimination, to promote racial equality and racial harmony. - The Government should therefore closely monitor the situation by keeping of statistics and conducting surveys, detecting and preventing racial profiling, performing impact assessment exercises, working for race mainstreaming, and formulating and implementing plans of actions for racial equality.
Jurisdiction	
- It is unclear whether Central Government bodies and persons working or acting, or	- It is important that they are bound.

purporting to work or act, for them in Hong Kong will be bound by the new law.	
- The law should have extraterritorial effects to protect Hong Kong residents working outside Hong Kong or persons working for "undertakings" registered in Hong Kong (and their subsidiaries outside Hong Kong) as many of them work outside Hong Kong.	- Such extraterritorial effects should be provided for.