立法會 CB(2)1226/06-07(04)號文件
LC Paper No. CB(2)1226/06-07(04)

Submission to Legislative Council

Bills Committee on Race Discrimination Bill

3 March 2007

Outline of Comments on the Race Discrimination Bill

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Please read the following table with the provisions referred to in the Race Discrimination Bill. Otherwise, you feel difficult to understand.
You may read the Bill, the LegCo Brief and Booklets by visiting HAB's web-page at http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/equal_racebill.htm

Section/Clause of the Bill	Comments/Proposals/Questions	Remarks/References/ Questions
Preamble	Proposal: state clearly the objective of this legislation is to implement the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and shall fully comply with and fulfill in good faith the obligations and commitments HKSAR have assumed under international human rights treaties as applied to HKSAR. (*cf.* article 8 of the 1992 Declaration on the Rights of persons belonging to national or ethnic, religious and linguistic minorities). The Preamble of the Australian Racial Discrimination Act 1975 is a reference: "WHEREAS a Convention entitled the "International Convention on the Elimination of all Forms of Racial Discrimination" (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965: AND WHEREAS the Convention entered into force on 2 January 1969: AND WHEREAS it is desirable, in pursuance of all	**Does this Bill fully comply with the ICERD as applied to HKSAR? If not, which clauses cannot be complied with? Why? If yes, why don't adopt a preamble that clarifies the interpretation of this legislation should be in accordance with the ICERD?** May also consider stating the objective of the legislation is to implement (and/or give effect to) the ICERD and relevant anti-discrimination provisions in the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights

	relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention: BE IT THEREFORE ENACTED by the Queen, the Senate and the House of Representatives of Australia, as follows:"	(ICCPR), and the International Labour Convention (ILC) No. 100 (Equal Remuneration Convention, 1951) and No. 111 (Discrimination (Employment and Occupation) Convention, 1958).
	Part I: Interpretation & Application	
1(2) Appoint a Commencement Day	The Secretary for Home Affairs has the power of appointing a commencement day. In *Leung Kwok Hung, Koo Sze Yiu v CE of HKSAR*, HCAL 107/2005, the judgment stated that "it was open to the Legislative Council to restrict the discretionary duty imposed on the Chief Executive (CE), for example, by providing in s.1(2) that the Ordinance must be brought into operation within a specified period of time. The Legislative Council (LegCo) chose not to do so." (para. 57) and held that it is not a legal duty for CE to appoint a commencement day but there is a legal obligation to keep the matter under review. In the light of such holding, a date being set out in the Bill is more appropriate, such as the practice in the Smoking (Public Health) Amendment Ordinance 2006. At page 8 of the HAB booklet "Joining hands for social harmony with respect, affection, race & equality" in December 2006, it states that the EOC will "draw up code of practice which will provide guideline for people involved in each of the areas of activities covered by the Bill before the relevant legislative provisions are brought into effect." Up to now, there is no Sex Discrimination Ordinance (SDO) Code of Practice on Education but that part of the	**Assuming that the Bill will be passed in July 2008 and no substantial amendment is made to this Bill, what is the expected commencement day? What is the expected time that different parts of this Bill came into effect?**

	SDO on education is operative. Proposal: delete s1(2) and substitute by "This Ordinance shall come into operation on (a specified day, such as) 1 Oct 2008"	
3 Binds the Government	It states "This Ordinance 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." Virtually, all the public policy matters are exempted from this Bill because they are not similar to acts by a private person. Litigations like *EOC v the Director of Education* (HCAL1555/2000) cannot happen pursuant to this Ordinance as the allocation of places in secondary schools is a public policy matter. The Government may respond that the Government will be bound by the HK Bill of Rights Ordinance, Cap. 383, BORO. Indeed, first, the Bill of Rights is very brief, only two articles dealing with racial discrimination. While the ICERD gives more substance to the meaning of race discrimination. The law defines the concrete meaning of race discrimination in detail. Second, BORO basically protects civil and political rights whereas the Bill mainly protects economic, social and cultural rights, such as employment, education and provision of goods, services and facilities. Third, the legislation and does not have an effective implementation mechanism. In the above case, EOC published its Formal Investigation Report before commencing the action. Without EOC, it is very difficult for individual parents to sue the Government. Fourth, more importantly, it is very difficult to get compensation if BORO is violated. Article 2(3) of the ICCPR provides that the State undertakes to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". However, this statement does not appear in BORO. Indeed, s6 of the BORO does provide that "a court may grant such	Paragraph 56 of the Consultation Paper in Sept 2004 ("CP") states that "the Bill should make it unlawful for the Government to discriminate…on the ground of race…" See paragraphs 21, 22, 24 and 34 of the Legislative Council Brief on Race Discrimination Bill dated 29 November 2006 by HAB. Proposal: Delete s3 and replace by "This Ordinance binds the Government" and add a clause similar to s21, SDO: "it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers." This amendment proposal is in line of the exiting anti-discrimination Ordinances. **Why don't follow the example of SDO having such a clause?** **Would you provide overseas examples like s3? What is the justification of not following the examples of the existing three anti-discrimination**

	remedy or relief…as it considers appropriate and just in the circumstances." **Since the enactment of the BORO, how many cases did the victims get the monetary compensation granted by the Court under s6 per se (without relying on other ordinances or common law)? What are the amounts of those compensations and the violation of BORO in question? What are the legal authorities and the Government's position on this (the court may grant monetary compensation by solely relying on s6 of BORO)?** Take recruiting civil servants as an example, is it an act similar to an act done by a private person? The Government may answer in the negative and allege that employment contract with a civil servant is greatly different from other employment contract. They have different legal frameworks governing the disciplinary proceedings and disputes (civil servants cannot claim via Labour Tribunal).	**Ordinances that "this Ordinance binds the Government"? Any discussion on this during the consultation period? Other examples in HK laws and other common law jurisdictions having the provisions of "an act done by …the Government that is of a kind similar to an act done by a private person**"? **If there are, what are the case law defining the concept?** If no, then the vagueness will create an uncertainty in the litigation and the Government will be easier to evade from the legal liability. The EOC may be more reluctant to give legal assistance due to merit of the case.
	Part II: Discrimination & Harassment	
4 Adopt a sensible definition of Indirect Discrimination	UK judges interpreted narrowly on "requirement or condition" in the old definition. In *O'Flynn* case, "it is sufficient to show only that there is "a risk" that conditions may operate to the detriment of a particular racial group." In 1998, the UK Commissioner for Racial Equality, "CRE" recommended this definition: "indirect discrimination occurs where an apparently neutral *provision, criterion, practice or policy* which is applied to persons of all racial groups cannot be as easily satisfied or complied with by persons of a particular racial group or where there is a *risk* that the provision, criterion, practice or	Para 2C of CRE, "Reform of the Race Relations Act 1976", 30/4/1998, pp17-18. *O'Flynn v Adjudication Officer* [1996]All ER (EC) 541 S4(2): a requirement or condition is justifiable either…(b) if it is not reasonably practicable for the discriminator discriminates against another person not to apply the

	policy may operate to the disadvantage of persons of a particular racial group, unless the provision, criterion, practice or policy can be justified by objective factors unrelated to race." Consider s4 of DDO: "For the purposes of this Ordinance, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including- (a) the reasonableness of any accommodation to be made available to a person with a disability; (b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; (c) the effect of the disability of a person concerned; and (d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship." Proposal: Amend s4 according to the above CRE's recommendation. Delete s4(2)(b) as it sets a very unreasonably low standard, i.e. very difficult to prove indirect discrimination. The test should be "failure to consider alternatives". in *Kaur v David Lloyd Leisure Limited Nottingham ET, 2600421/02* the Tribunal held that the dismissal by redundancy of a single mother was really because of her inability to work the shifts of a duty manager. The ET found that the employer gave no or scant consideration to sharing or splitting shifts and did not consult the applicant's colleagues. The requirement to work the shifts (to avoid redundancy) was indirect discrimination. In light of s4(5), do you think the society need not do any measures but the discriminatory practices will be improved? Proposal: Delete s4(2)(b) and s4(5) because it defeats the purpose of this section. There is no such provision in existing discrimination laws.	requirement or condition. S4(5): nothing in s4(3) or (4) is to be construed as requiring the discriminator to confer any benefit, suffer any detriment, provide any services or facilities or incur any expenditure… **What is the justification of not following the examples of the existing three anti-discrimination Ordinances. Are there any overseas examples for this? Any discussion on this during the consultation period?**
2, 5, 8(6) Relative and	The Bill's protection is narrower than that in Consultation Paper: the spouse and relative.	See also Australian Racial Discrimination Act 1975,

Associate replace Near Relative	Proposal: extend the scope of transferred discrimination and applies to "associate" (under ss2, 5 of Disability Discrimination Ordinance, Cap 487, "DDO") instead of the near relative only. Associate in s2(1) of DDO means "(a) a spouse of the person; (b) another person who is living with the person on a genuine domestic basis; (c) a relative of the person; (d) a carer of the person; and (e) another person who is in a business, sporting or recreational relationship with the person". As to the definition of relative, Australian Discrimination Act 1975 is a reference: "*relative*, in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person."	discriminating against a relative or associate of someone of a particular ethnicity or other status is unlawful.
7 Harassment	S7 renders hostile learning environment as unlawful racial harassment shows an improvement when comparing with the CP and the relevant provisions in existing SDO and DDO. These two sections show improvement when compared with present anti-discrimination laws.	Para. 2D of UK CRE, "Reform of the Race Relations Act 1976", 30/4/1998.
8(3) Meaning of Race	During the consultation period in late 2004, the Government's stand is to leave the issue (whether new arrivals should be protected under this Bill) to be decided by the court. All human rights instruments must be regarded as a living instrument, whose interpretation develops over time. By ruling out the possibilities of the Convention offering protection to newly arrivals, this unreasonably restricts the development of human rights laws. In addition, races are not natural forces but social constructs that stemmed from human perception and classification. A racial difference is culturally determined and racial categories change over time. Ethnicity is a social and cultural construction and not unchanging traits.	General Comment No. 8 (2006) CRC, paragraph 20. Cornell, Stephen and Hartmann, Douglas, Ethnicity and Race: *Making identities in a changing world* (California: Pine Forge Press, 1998) p23, 25. Barth, F., "Ethnic Groups and Boundaries (1969)" in May S., Modood, T. and Squires, J. (eds.) *Ethnicity, nationalism and minorities rights* (Cambridge: Cambridge University Press,

	Ethnic groups are situational defined in relationship to their social interactions with other groups. Interpretation of race and ethnicity vary over time, place and context. On 13 May 2005, the United Nations ESCR Rights Committee in its Concluding Observations (paragraph 79) states that "the Committee is concerned that, in the proposed racial discrimination law, the protection afforded by this law will not cover migrants from the Mainland despite the widespread *de jure* (legally) and *de facto* (in reality) discrimination against them on the basis of their origin. The Committee is also concerned that, according to the proposals made by the Hong Kong Home Affairs Bureau, the new law will not affect the existing immigration legislation in HKSAR". **What is the difficulty to protect the new arrivals under the new race law?** Even if new immigrants may not fall within the definition of race under ICERD, it is a good practice encouraged by UN to render protection that is above the minimum standard set out in human rights treaties. In Australia, the "race" was defined in the Racial Discrimination Act 1975 to include race, colour, decent, national or ethnic origin, being an immigrant or being a relative and associate of someone of a particular ethnicity or other status. In U.K. and New Zealand, being discriminated on the grounds of nationality and citizenship is unlawful under the provisions of the race law. The law should also protect those who are not ethnic minorities but perceived as such. Proposal: should extend the protection to new arrivals from the mainland and ethnic minorities by adding the following grounds (in addition to the	2004), p9 *Commission for racial Equality v Dutton* [1989]1 All ER 306 (Court of Appeal, UK); *Ansell-King v police* [1979]2 N.Z.L.R. 531, at 543; *Mandla (Sewa Singh) v Dowell Lee* [1983]2 A.C. 548, at 562. See the website of Australian Human Rights and Equal Opportunities Commission, racial discrimination, available at www.humanrights.gov.au See the website of the Human Rights Commission, Human Rights in New Zealand, available at www.hrc.co.nz **Does the definition of s8 comply with ICERD? If yes, why don't simply incorporate art 1 of ICERD? Does s8(2)(3) comply with article 25 of the Basic Law and article 22 of the BORO?** In DDO, there is a concept of imputed disability. The scope of prohibition in the anti-discrimination laws: **Language**: South Africa, Canada: Quebec **Linguistic background or origin**: Canada: Yukon; **Place of origin**: Canada: Alberta, New Brunswick, Saskatchewan and

	five): language, place of origin outside the HKSAR, nationality, residency (HK resident status), status of being, or having been, an immigrant Proposal: Delete s8(3)(b)(c)(d) and amend 8(1) and bring in the concept of perceived or imputed race. Proposal: "actual or perceived" before the words "race, colour, decent, national or ethnic origin…" (*cf*. New York Senate Bill s1925--2003)	Northwest Territories; **Nationality**: UK, New Zealand, all the six Australian states and the two territories, Canada: Manitoba, Saskatchewan and Northwest Territories; **Citizenship**: UK, New Zealand and Canada: Ontario; **Former and current immigrant status**: Australia: Tasmania. **Perceived race**: Canada: Manitoba and Saskatchewan
	Part III: Discrimination & Harassment in Employment	
10(3)(7)(8) Sunset clause	What is the justification of exempting domestic helper from protection? Any overseas examples having such an exemption? Would s10(7) violate article 25 of the Basic Law and article 22 of the BORO? Proposal: Delete s10(7) and in the sunset clause, the three year should reduce to not more than 1 due to the experience of the implementation of three anti-discrimination ordinances for over 10 years.	
11(2) Genuine Occupational Qualification (GOQ)	Genuine occupational qualification: exemptions on employment should be as few and as narrow as possible. The framework for exemptions should be narrowed to encompass jobs where being of a particular racial group can be shown to be an essential defining feature. The employer must be able to show that the racial group of the job-holder is an essential defining feature. The criterion of authenticity is too wide. A characteristic constitutes genuine and determining occupational requirement provided that the objective is legitimate and the requirement	Para. 4 of UK CRE, "Reform of the Race Relations Act 1976", 30/4/1998 and art 4 of "Establishing a general framework for equal treatment in employment and occupation", the European Union's Council Directive 2000/78/EC of 27/11/2000 Para. 4 of UK CRE, "Reform of the Race Relations Act

	is proportionate. **What is the objectives of the requirements as set out in s11(2)(c)(d)(e)? Are the objectives legitimate? Are the requirements proportionate?** S11(2)(c): "the job involve working in a place where food or drink is (for payment or not) provided… authenticity for consumption in a particular setting". The exception is too wide to be legitimate and proportionate. **Must traditional Chinese food be cooked by a Chinese? Why must waiters, cashiers and those who wash dishes be Chinese? Will the catering industry virtually, or to a large extent, be exempted? How many people may be affected? How to protect the ethnic minorities in HK being dismissed by a western style restaurant on the ground of race**? Exemption of personal service can easily be abused. Social workers, doctors, lawyers and many other service providers render personal services, employers of such industries may escape from legal liability of committing racial discrimination. Sections 4A and 5 of the UK Race Relations Act provides a good reference: Discrimination on racial grounds is allowed in certain limited circumstances, when being from a particular racial group is a 'genuine occupational requirement' (GOR) or a 'genuine occupational qualification' (GOQ). GOR and GOQ exceptions are very restrictively defined Employers are strongly advised to seek legal advice on using a GOR or GOQ exception, before advertising the post. All advertisements indicating an intention to discriminate are unlawful, unless a statutory exception applies. Proposal: Delete s11(2)(c), (d) and (e) unless they are clearly and narrowly defined.	1976", 30/4/1998 and art 4 of "Establishing a general framework for equal treatment in employment and occupation", the European Union's Council Directive 2000/78/EC of 27/11/2000 In Ontario, the Human Rights Code prohibits language discrimination. The Human Rights Commission's Policy on Discrimination and Language suggests that language-proficiency can be established as a *boda fide* occupational requirement if it can be proved that it is a reasonable and legitimate requirement of a job. Fluency in a particular language may also be a BFOR in some employment or service situations. (See www.ohrc.on.ca/english/publications/language-policy.pdf visited on 1 March 2007)
13(1)(c)(i), 15(5)(c)(i)	**Any measures to protect local employees?** It is because the prevailing terms of employment	

Exceptions re work	offered to persons with those skills, knowledge or expertise in places outside HK (not HK's terms) are regarded.	
14 Exception on local and overseas terms of employment	**Does this section violate article 26 of the ICCPR? Does it comply with all the ILO conventions? Who ensure that this Bill complies with all the ILO conventions, in particular those apply to HK?**	Consider article 6 of the Migration for Employment Convention (Revised) 1949
16 Extra-territorial effect	Should clarify the definition is line with overseas jurisdictions in UK and Australia and follow the EOC proposal submitted to the Chief Executive in Feb 1999, "the EOC Proposal", to make it clear that this section has extra-territorial effect and protect against unlawful acts committed outside HK. "Extend the definition of "an establishment in HK" to protect HK residents working wholly or mainly outside HK for businesses or companies registered in HK." Proposal: adopt the UK model: The Race Relations Act 1976 (Amendment) Regulations 2003: Meaning of employment at establishment in Great Britain 11. - (1) In section 8 of the 1976 Act (meaning of employment at establishment in Great Britain), in subsection (1), for the words "unless the employee" to the end, substitute – " if the employee - (a) does his work wholly or partly in Great Britain; or (b) does his work wholly outside Great Britain and subsection (1A) applies". (2) After subsection (1) insert - " (1A) This subsection applies if, in a case involving discrimination on grounds of race or ethnic or national origins, or harassment – (a) the employer has a place of business at an establishment in Great Britain;(b) the work is for the purposes of the business carried on at that establishment; and (c) the employee is ordinarily resident in Great Britain - (i) at the time when he applies for or is offered the employment, or (ii) at any time during the course of the employment."	Refer to para. 1-2 of "Equal Opportunities legislative review proposals for amendment of the SDO and DDO", LegCo Paper No. CB(C)830/00-01(01)
17 Partnership	The Consultation Paper does not set out partnerships of fewer than 6 partners as one of the	Para. 4 of UK CRE, "Reform of the Race Relations Act

	exemptions. However, s17 provides for exemption of a firm with less than 6 partners. As concluded by CRE, there is no justification for restricting application of the new law to partnerships of a particular size. **What is the justification for restricting application to partnerships of fewer than 6?** 2003 UK legal amendment should be taken into account: The Race Relations Act 1976 (Amendment) Regulations 2003: Partnership **12.** In section 10 of the 1976 Act (partnerships) – (a) after subsection (1), insert – "(1A) The limitation of subsection (1) to six or more partners does not apply in relation to discrimination on grounds of race or ethnic or national origins. (1B) It is unlawful for a firm, in relation to a position as a partner in the firm, to subject to harassment a person who holds or has applied for that position."; (b) in subsection (2), for the words "Subsection (1)" substitute "Subsections (1), (1A) and (1B)"; (c) in subsection (3), for the words "being of a particular racial group" to the end substitute "section 4A or 5 would apply to such employment"; and (d) at the end insert - " (6) In subsection (1)(d)(ii) reference to the expulsion of a person from a position as partner includes, where the discrimination is on grounds of race or ethnic or national origins, reference – (a) to the termination of that person's partnership by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the partnership is renewed on the same terms; and (b) to the termination of that person's partnership by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the other partners.". Proposal: delete such an exemption on the number.	1976", 30/4/1998
19 Qualifying bodies	**Is it an over-legislation to include s19(2) and Schedule 3? Please provide overseas example of similar provisions.**	

20 Vocational training	S20(2) states "nothing in subsection (1) is to be construed as requiring a person…(a) to modify…arrangements regarding holidays and medium of instruction; (b) to make different arrangements on those matters for persons of any racial groups." Proposal: Delete s20(2) as this legitmatizes those discriminatory arrangements.	
	Part IV: Discrimination & Harassment other than in Employment	
26 Education, Language	Consider language discrimination as an indirect racial discrimination in light of General Comment No. 13 of CESCR (1999) on "the right to education": "The Committee interprets article 2(2)…in the light of the UNESCO Convention against Discrimination in Education…the ICERD, the CRC…"). In the CERD's Concluding Observations on Mongolia's Report (2006), the Committee "is also concerned about the lack of measures to ensure that children whose mother tongue is a minority language…are provided with adequate opportunities to learn Mongolian as a second language, art.5(e)(v) and (vi)". In its Estonia's Report (2006), "the (CERD) Committee reiterates its previous concern that the scope of the requirement of Estonian language proficiency, including in the private sector, may have a discriminatory effect on the availability of employment to members of this community (art. 5(e)(i))". In *Lau v Nichols* 414 U. S. 563 [1974], the Supreme Court held that the failure of the school system of San Francisco to provide supplemental English language instruction to about 1,800 Chinese students denied from a meaningful opportunity to participate in the public educational program. It was a violation of Title VI of the Civil Rights Act 1964 which prohibited	See website of the UN High Commissioner for Human Rights and the UN Committee on Elimination of Racial Discrimination (CERD) at www.ohchr.org and http://www.ohchr.org/english/bodies/cerd/index.htm respectively

	discrimination based on race, colour, or national origin in any programme or activity receiving Federal financial assistance. **Does s26(2) breach or comply with articles 2 and 26 of the ICCPR (articles 1(1) and 22 of the BORO), article 5(e)(v) of the ICERD, article 2(2) of the ICESCR and the 1960 Convention against Discrimination in Education?** Proposal: Delete s26(2) as this legitimatizes those discriminatory arrangements.	
30 Small dwellings	**What is the rationale of having such an exemption? What is the effect if such an exemption is dropped?**	
34(2) Discrimination in election	**In light of the definition in s8(2)(3) and the Basic Law being the supreme law in the HKSAR, is it an over-legislation to include s34(2)?**	
39(1) Harassment in providing services	Follow the EOC Proposal to extend the protection against racial harassment to service providers instead of service users only. In Nov 2000, the Administration agreed in principle to the EOC Proposal regarding SDO.	
39(3)(4) Harassment in tenancy	It does not protect tenant against another tenant or sub-tenant; or sub-tenant against another sub-tenant. Amend this section to protect tenants and sub-tenants from racial harassment occupying the same premises. The Government agreed in principle to the EOC Proposal regarding SDO and DDO. Proposal: follow the EOC Proposal.	
39(10) Harassment in club	This provision shows an improvement when comparing with s4 of SDO. However, the definition of "club" is very narrow and not in the sense of an ordinary NGO: "club means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and (b) sells or supplies liquor for consumption on its premises". (s2) Proposal: delete the above (b) re definition of club.	

	Part V: Other Unlawful Acts	
41 Discriminatory Practices	**How many proceedings were brought by individuals and EOC under relevant provisions in SDO, DDO and FSDO respectively?**	
45 & 46 Vilification	**Do ss45 and 46 comply with article 20 of the ICCPR in respect of racial hatred?** The words "if his conduct includes threatening *physical harm*…" are too restrictive. Proposal: consider the recommendation of the European Council to extend the scope of criminal law to prohibit racial discrimination. Criminal law should prohibit an intentional acts: (a) public incitement to violence, hatred or discrimination; (b) public insults and defamation; (c) threats on the ground of race, color, language, religion, nationality, or national or ethnic origin; (d) public expression, with a racist aim, of the superiority of a grouping of persons on the ground of race, etc; (e) public denial, trivialization, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war of crimes; (f) public dissemination, distribution with a racist aim of written, pictorial or any materials containing manifestations covered by (a) to (e) above; (g) creation or the leadership of a group which promotes racism. The new law should stipulate that a racially motivated crime should result in increase in sentence. Another reference to incitement is whether the expression amounts to incitement to violence. (*Skokie v National Socialist Party* 373 NE 2d.21 [1978] , *R.A.V. v City if St. Paul* 505 U.S. 377 (1992)) In summer 2004, there was a city forum held by RTHK. A guest speaker was seriously vilified by	For details, see para. 18-23, "ECRI General Policy Recommendation No. 7 on National Legislation to combat racism and racial discrimination", 13/12/2002. UK CRE, "Reform of the Race Relations Act 1976", 30/4/1998, pp6-7 See also UN Office of the High Commissioner for Human Rights, ("OHCHR"), "Model National Legislation for the Guidance of Governments in the enactment of further legislation against racial discrimination" see the UN OHCHR, *Human Rights Standards and Practice for the Police*, January 2004, pp8-9

	an elderly in Victoria Park. The elderly has committed crimes under the DDO but the policemen there did not take action. The Government should raise the anti-discrimination law awareness of the police to enforce the law.	
	Part VI Exemption to Part 3-5	
Exceptions, in particular, 54-58	In Annex B to the LegCo Brief: the explanatory note on the exception clauses in the Race Discrimination Bill, the HAB admits that sections 8(2) & (3), 13, 14, 15(5), 18(5), 19(2), 20(2), 26(2), 32, 34(2), 54, 58 are "new provisions neither found in existing anti-discrimination laws in Hong Kong nor in other common law jurisdictions." This implies that they are probably below the international standards unless being justified on two aspects: (a) why do all other common law jurisdictions' laws function without such exemptions? Or why all others can but we cannot? (b) why the existing anti-discrimination laws can be implemented without the exemptions? The Administration has to justify the special circumstances of (a) HK and (b) race (different from sex, disability and family status). **Do they comply with ICERD? What are the effects of deleting these provisions in light of other provisions (ss8, 11-16 and Part VI) in the Bill?** Paragraph 26 of the LegCo Brief provides: "Consistent with the principles of rationality and proportionality, which have been widely adopted by international human rights authorities, each of the proposed exception clauses has been critically examined against the following criteria and benchmarks—(a) the provision serves a legitimate and needed purpose; (b) it is justified on reasonable grounds; and (c) the exception is proportional to the objective and to the level of protection required (i.e. it is not excessive)." Using the criteria set by	Legislative Council Brief on Race Discrimination Bill dated 29 November 2006, HAB/CR/1/19/102, the "LegCo Brief". The Court of Final Appeal interprets the proportionality test in the context of freedom of assembly as follows: "(a) the restriction must be rationally connected with one or more of the legitimate purposes; and (b) the means used to impair the rights of peaceful assembly must be no more than necessary to accomplish the legitimate purpose in question". [2005]3 HKLRD 166 C-D

	the Government, many of the exceptions in this part must fail the test. **The Administration should justify each and every exception (ss54-58) according to the above standard by showing (a) whether there is legitimate and needed purpose; (b) whether the restriction is rationally connected with one or more of the legitimate purposes; and (c) whether the means used to impair the rights of non-discrimination is no more than necessary to accomplish the legitimate purpose in question.**	
54 Nationality	Delete it as it is too broad and, unnecessary due to s8(3)(d)	
55 Immigration legislation	In the *Aumeeruddy-Cziffra et al. v Mauritius* (35/78), the UN Human Rights Committee opined that the immigration laws of Mauritius discriminated against Mauritian women that violated articles 2(1), 3 and 26 of the ICCPR. . "The reservation (to ICCPR) on immigration matters does not fall into any of the examples set out in paragraph 8 of General Comment no. 24(by the UN Human Rights Committee). In any event, I am not prepared to make any ruling on this issue. The implication of such a ruling on international obligations had not been fully canvassed in this case." The consequence of an unacceptable reservation is that the covenants will be operative for the reserving party without the benefit of the reservation**.** Consider views of UN committees in the relevant UN Concluding observations. Please note that no such declaration or reservation on immigration legislation was made to CERD. **What is the justification of not outlawing the two-week rule in this Bill?**	*Aumeeruddy-Cziffra et al. v Mauritius* (35/78) in Sarah Joseph & ors, *The ICCPR—Cases, Materials, and Commentary*, Oxford University Press, 1995, p540. Unlike CERD, the application of ICCPR to HKSAR, the Govt. "reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the HKSAR". See relevant European Council's Directives and the above Concluding Observations on HK reports.

	Proposal: delete it as it is too broad and it legitimatizes discriminatory stipulations like two-week rule.	
56 Act under statutory authority not affected	**What are the existing statutory provisions referred to in s56? Why don't review the existing statutory duty that may racially discriminatory?** In a school with incorporated management committee ("IMC"), if a manager of an IMC discriminates against a student on the grounds of race, may the student sue the manager after this race law come into force? Consider the possible conflict between s40BI of Education (Amendment) Ordinance 2004 and RDO, HKBORO. Proposal: Delete it in order to mainstream racial equality in the existing laws.	S40BI(2) of Education Ordinance: A manager shall not incur any civil liability in respect of anything done or omitted to be done by him in good faith in the performance or purported performance of any function of his office as the manager.
57 Application to NT land 58 Exemption for languages	**What is the meaning of "in any circumstances relevant for the purposes of the section" as set out in s58(2)?** **Why must these two sections be exempted? What are the rationales of having such an exemption? What are the effects if such exemptions are dropped?** Delete s58 as it legitimatizes discriminatory practice	
	Part VII & VIII: EOC & Enforcement	
60, 79 Powers of EOC	"The EOC is of the views that a voluntary undertaking or agreement would be desirable if it were formally recognized by the legislation and could be enforced in the same manner as enforcement notices." Proposal: follow the EOC Proposal to introduce voluntary and binding undertakings that are legally enforceable. Proposal: the implementation body should have power to give advisory opinions to private and public bodies, review government policy towards	See ss63, 64 of SDO and para. 9 of the above LegCo Paper No. CB(C)830/00-01(01). Refer to UN OHCHR, "Model National Legislation for the Guidance of Govts in the enactment of further legislation against racial discrimination"; CERD General Recommendation No. 17;

	protection against racial discrimination. It shall be established in accordance with a procedure that affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society). Proposal: the implementation body should comply with the Paris Principle (1991) and the General Comment of UN Committee ESCR No. 10. It should be composed of a variety of members from diverse backgrounds, reflect the ethnic diversity of society, gender balance and the range of vulnerable groups in our society. A transparent process of selection and appointment should involve wide consultation and a process for public nomination of candidates. The members should be appointed for a fixed term of 5 years. It should consist of at least 3 leading members who serve on a full-time basis. Proposal: functions and powers of the implementation body: should include power to sue, in particular in case of discriminatory practices. EOC can only take legal action against indirect discrimination after formal investigation. Should follow the EOC Proposal to enable EOC to bring civil proceedings against those who have discriminatory practices without going through the process of formal investigation. The Government agreed in principle to the EOC Proposal regarding SDO and DDO to enable EOC to seek declaratory and injunctive relief in the District Court in respect of discriminatory acts, policies and practices. Before the first reading of the Bill, EOC has the benefit of giving advice to HAB on the draft Bill for about a year. **What are the proposals made by EOC that have not been accepted by the Administration?**	The resolution of Commission on Human Rights 1992/54 of March 1992; para. 35 of the Concluding Observations of UN Committee ESCR on HK report dated 11/5/2001; UN OHCHR, Fact Sheet No. 19, "National Institutions for the Promotion and Protection of Human Rights", April 1993; Para 2.1-2.3, "Commonwealth Secretariat, National Human Rights Institution—Best Practice", 2001. See also s63 of SDO

	Schedules	
Schedule 2 clauses 9, 11	**What is the rationale of having clauses 9 & 11? Is it an over-legislation in light of ss26(2), 58? What is the effect of deleting clauses 9 and 11 of schedule 2 in respect of the Native-speaking English Teacher Scheme?**	
Schedule 5 CSSA Scheme	**What is the rationale of having an exemption as set out in schedule 5? What is the effect of deleting schedule 5?**	
	What should be added to this Bill?	
Positive Duty of the Government	S71 of UK Race Relations Act 1976 ("RRA") imposes a duty on local governments (general duty). May sue or by judicial review if Govt. does not comply with this. "It is incumbent upon every institution to examine their policies and practices to guard against disadvantaging any section of the community". Consider racial profiling and institutional racism, ethnic monitoring, race equality policy, scheme, strategy and impact assessment. Govt. and public authorities should take account of racial equality in the day-to-day work of policy-making, service delivery, employment practice and other functions. After the Stephen Lawrence Inquiry, the Race Relations (Amendment) Act 2000 extended such duty to all public authorities and added the specific duty and employment duty. Proposal: Govt. and public authorities should be under a positive duty to eliminate unlawful racial discrimination, promote equal opportunities and good relations between persons and racial groups (general duty). Specific duty: Secretary for Home Affairs/implementation body has power to set out what a public authority must do to comply with general duty. Employment duty: requires public	Recommendations of the Report of the Stephen Lawrence Inquiry, 1999: See the web-page of UK Commissioner for racial equality ("CRE") at www.cre.gov.uk/duty/index.html Refer to UK CRE, "Race Equality impact assessment: a step-by-step guide" visited the website on 26/9/2004 at www.cre.gov.uk/duty/reia/index.html See para 12 of *SDO Code of*

	authorities to monitor by ethnicity the numbers of employees in post and applicants for employment, training and promotion. Proposal: There should be provisions stipulating "equal pay for equal work" and "equal pay for work of equal value". Whether the proposed legislation would help foster a culture of mutual respect and tolerance should be assessed by continuing survey and research to monitor the situation. Proposal: should introduce race equality impact assessment**.**	*Practice on employment* and para 13 of *DDO Code of Practice on employment* and *UK Equal Pay Act*
Burden of Proof	Proposal: "the rules on the burden of proof must be adapted when there is prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent (alleged perpetrator) when evidence of such discrimination is brought." Proposal: the new law should enable a court to consider a complaint where the discrimination affects a number of people who wish to bring a group complaint, without the need for each person to bring proceedings separately. Where all members of a racial group are discriminated, the court should allow "class action" to relax the rule of bringing proceedings/*loco standi*.	Para. (21) and art 8 of European Union's Council Directive 2000/43/EC of 29 June 2000: "Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin", in *Official Journal of the European Communities*, 19/7/2000. See para 6F of Commission for Racial Equality, "CRE", "Reform of the Race Relations Act 1976", 30/4/1998, p39.
Liability of Educational establishments	At the "Forum on preventing sexual harassment in universities" held by EOC and Women's Commission on 17 August 2004, the then EOC assistant legal adviser stated that the possible amendment to SDO was that "educational establishment to be made liable for unlawful sexual harassment done by students." Proposal: educational establishments should be liable for the racial harassment done by their	United Nations, "World Conference against racism, racial discrimination, xenophobia and related intolerance—declaration and programme of action", Sept 2001, pp73-74. S46 of SDO. See also para. 6.22 of "DDO

	students in the campus or during the schools' activities unless they can prove that they have taken reasonably practicable steps to prevent the students from doing the harassment.	Code of Practice on Education"
Interpretation	Article 31(1) of the Vienna Convention on the Laws of Treaties states that treaties are "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Nowak M added that the followings need to be considered during the interpretation: the entire text of a treaty including its preamble and annexes, the deeds and agreements between the parties relating to the treaty. In cases of doubt as to object and purpose, international monitoring bodies are generally of the opinion that the interpretation should favour the protection of the individual. Proposal: add an interpretation clause like this: 1. This Ordinance shall be construed so as to be consistent with the ICERD as applied to HK. 2. If international human rights treaties as applied to HKSAR provides otherwise than in this Ordinance, the provision of the international human rights treaty prevails. 3. Nothing in the Ordinance may be construed as a. preventing the fulfillment of ; b. permitting any act or omission contrary to the purposes, principles and provisions of; and c. restricting or derogating from any of the human rights and fundamental freedoms recognized or existing pursuant to HK laws, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent. defined in HK laws or in d. affecting any provisions which are more conducive to the realization of the rights of	*Cf.* s4, BORO, article 8 of the 1992 Declaration on the Rights of persons belonging to national or ethnic, religious and linguistic minorities, article 8 of the 1981 Declaration on Elimination of all forms of Intolerance and of Discrimination based on Religion and Belief. and article 4(4) of the 2006 Convention on the Rights of Persons with Disabilities (not yet into force) Article 2.2 of the 2004 Law Against Domestic Violence, Law of Mongolia, states that "If an international treaty of Mongolia provides otherwise than in this law, the provision of the international treaty prevails" Nowak, M, *Introduction to the International Human Rights Regime* (Leideb/Boston: Martinus Nijhoff Publishers, 2003), p65

	ethnic minorities and which may be contained in the HK laws or in-- the Universal Declaration of Human Rights and the international human rights treaties including ICERD, ICESCR, ICCPR, CEDAW, CAT and CRC as applied to HKSAR.	
	Miscellaneous	
Reservation to the ICERD	The anti-racial discrimination law comes late for more than 38 years. **Why don't HKSAR withdraw the reservations to the application of ICERD? What is the action plan and time table to withdraw the reservations?** Proposal: the PRC Government should withdraw the declaration (re art 6) and reservation (re art 22) on ICERD.	Before the handover, UK signed and ratified ICERD for HK on 11/10/1966 and 7/3/1969 respectively with some declarations and reservations.
Resources	According to Annex C to the LegCo Brief, "the extra costs to be incurred to ensure compliance with the Bill, if any, are not expected to be significant…" and the Police may require additional resources to carry out the investigation and prosecution, "although this cannot be quantified at this stage". **What are the additional resources (one-off and recurrent funding respectively) given to EOC for the preparation and implementation for this law?** Proposal: the Government should provide adequate one-off funding and recurrent funding to EOC**,** if it becomes the implementation body, to enable it to fulfill its functions properly.	Annex C "Implications of the Proposal" to the LegCo Brief on the Race Discrimination Bill dated 29 November 2006
Consultation	**Regarding the proposals in this Bill that are not set out in the Consultation Paper, may the Government show any support from the submissions made during the consultation period?**	**Is there a consultation report after the consultation period(from mid Sept 2004 to early Feb in 2005)?**