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Dear Dr. Ho,

**The Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination in Hong Kong**

The Civic Party welcomes the opportunity to express our views on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (the "Convention") in Hong Kong. We now submit our comments as follows:

(a) Part I

Even with the provisions of the International Covenant on Civil and Political Rights (ICCPR) applied to Hong Kong, the Government still lacks the will to enact a law to protect individuals seeking public office.

(b) Part II

2006 marks the 15<sup>th</sup> year in which "Anti-Racial Discrimination" law has been introduced to Hong Kong by the Bill of Rights Ordinance (Cap. 383). Although during the past 15 years the Government and public authorities are prohibited to do anything that is racial discriminatory, little has been progressed towards the private sector. Finally on 13 December 2006, the Government tabled the Race Discrimination Bill (the Bill) to the Legislative Council.

(i) **Article 1 – Definition of racial discrimination**

In the Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.



Although the Bill defines “race”, in relation to a person, means the race, colour, descent or national or ethnic origin of the person which is the same as the Convention, the government says it will not cover discrimination against migrants.

On 12 March 2003, Legislator Hon. Audrey Eu moved a motion urging the Government to expeditiously legislate against racial discrimination to ensure that the new migrants from Mainland China and ethnic minorities in Hong Kong could enjoy equal opportunities in such areas as education, employment and access to social services. The motion was carried without opposition. It is unfortunate that the Government has decided to exclude migrants from the Mainland China in the Bill.

The government acknowledges that new arrivals from the Mainland China are being discriminated against. They are suffering from irrational prejudice and discrimination severely. These new migrants suffer discriminatory experiences similar in nature to discrimination other immigrants are experiencing throughout the World. They are discriminated against because of their immigration identity and status, their inability to speak local languages, the perceived weaker knowledge of the local society, and differences in appearance and behaviour and other characteristics due to their socialization at their place of origin in the Mainland, which are quite different from persons socialized in Hong Kong. While immigrants from foreign countries will be protected under the ground of ‘national origin,’ those from the Mainland are denied such a protection because they are from China. The Government should consider discrimination against new arrivals from the Mainland as a form of racial discrimination although they are of the same ethnic stock as local Chinese.

The Civic Party believes that there are two ways to outlaw this type of discrimination. It can be done by outlawing on the ground of immigrant status or former immigrant status. This will also help to protect many overseas ethnic Chinese who are not born in Hong Kong but are currently living in Hong Kong. Alternatively, the existing term ‘national origin’ in the Race Discrimination can be defined to include ‘origin from any territory outside the Hong Kong Special Administrative Region’ and to incorporate the protection towards the new arrivals from the Mainland. This extended definition will also protect many overseas Chinese who have come or returned to Hong Kong.

(ii) **Article 2 - Policy of eliminating racial discrimination**

It states:

- "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
  - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
  - (b) Each State Party undertakes not to sponsor, defend or support



- (c) racial discrimination by any persons or organizations;
  - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
  - (d) 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;
  - (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Although the International Convention on the Elimination of All Forms of Racial Discrimination (the "ICERD" or the "Convention") was extended to Hong Kong in 1969 by the then British Government and despite the fact that the People's Republic of China has notified the United Nations Secretary-General that the Convention would continue to apply to the Hong Kong with effect from the first day of the establishment of the Hong Kong Special Administrative Region ("HKSAR"), there is no general law currently existing in Hong Kong to prevent racial discrimination. Currently, we only have the Bill of Rights Ordinance (BORO)<sup>1</sup> which prohibits the Government and public authorities from practicing racial discrimination. In particular, Article 22 of the Hong Kong Bill of Rights (Cap. 383) prohibits the Government and public authorities and any persons acting on its behalf from engaging in any racial discriminatory practices (based on race, skin colour, national or ethnic origin). The Bill of Rights itself incorporates the provisions of the International Covenant on Civil and Political Rights ("ICCPR").

As observed by Committee on Economic Social and Cultural Rights to the Economic Council of the United Nations, in paragraph 15 of its report dated 21 May 2001<sup>2</sup>, it stated that:

"[t]he Committee wishe[d] to reiterate in particular its concern on the following issues:

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<sup>1</sup> Cap 383.

<sup>2</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add/58 11 May 2001.



(b) The failure of HKSAR to extend the prohibition of race discrimination to the private sector ...”

This was again observed recently by the Human Rights Committee to the United Nations on 21 April 2006 when it published its report on Hong Kong. Paragraph 19 of the report stated that the United Nations Human Rights Committee was concerned “at the absence of relevant specific legislation” to “combat racial discrimination” and “urge[d] the Government to adopt the necessary legislation in order to ensure full compliance with article 26 of the [ICCPR]<sup>3</sup>”.

To be fair, in 2001, the HKSAR Government conducted consultations with interested parties on the subject. In 2003, the HKSAR Government announced the intention to enact laws against racial discrimination in the 2004-05 legislative session, following public consultations on the detailed legislative proposals. On 13 December 2006, the Government tabled the Race Discrimination Bill (the Bill) to the Legislative Council.

(l) Concerns regarding the Bill

The Civic Party has the following concerns regarding the Bill:

(a) Definition for Indirect Discrimination

The phrase ‘requirement or condition’ is in the former UK definition of indirect discrimination. It is very narrowly interpreted as a requirement or condition has to be absolute and practices, especially informal and/or past ones, may be excluded. To prove to be in ‘considerably smaller proportion’, statistical data usually required is hard to come by and a case can only be brought after actual harm is done. This concept will put the victim at a particular disadvantage as statistical evidence for the purposes of proof is difficult to obtain. The Civic Party thus believes that we should follow the European Union in replacing the phrase ‘requirement or condition’ in its European Commission Race Directive by a wider definition of ‘provision, criterion or practices’.

(b) Language Discrimination

The Civic Party is concerned that discrimination through use of Languages is not included in the Bill. Language discrimination means treating someone differently solely because of his or her native language or other characteristics of speech. A language discrimination provision will make it unlawful if ethnic minorities are denied access to government services such as the Labour Department or if they are rejected on the grounds of language in job applications if the job does not require

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<sup>3</sup> Article 26 of ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”



spoken English/Cantonese. In some countries the ethnic minorities have already integrated into society and speak the local language very well. However, this is not the case in Hong Kong. In fact according to government statistics, the difficulty most frequently encountered by ethnic minorities is the language problem, as many of them do not speak Chinese or even English. It is therefore highly necessary to include language discrimination in the Bill.

Moreover, bearing in mind that the official languages of Hong Kong as stated in the Basic Law are Cantonese and English, it is reasonable for general citizens to fulfill any language requirements for any government purposes as long as they know either Cantonese or English. As a result, it is both unreasonable and unacceptable if the Government fails to legislate against language discrimination.

(c) Discrimination based on religion

After the September 11 attacks in the US, discrimination against Muslims has increased worldwide. Muslim organisations in England note that hostility, verbal abuse, and unfair media coverage have become more frequent. Furthermore, Muslim organisations in Hong Kong have reported difficulties in getting jobs because some Muslim men wear a moustache, which is uncommon among Chinese men. The Government ought to learn from the years of experience gained from overseas, where provisions already exist to make religious discrimination unlawful<sup>4</sup>.

(II) Special Measures

In article 2(2) of the ICERD, it requires governments to take *special measures* to guarantee the equal enjoyment of human rights.

'Special measures' requires the government to provide methods to tackle general inequalities that specific groups may face, such as a higher unemployment rate, or lack of access to vocational training. Such an approach is different from a non-discrimination approach, which only prohibits discrimination but does not attempt to provide equality of outcome.

The Bill does not impose on public authorities a positive duty to promote equality. This duty however, already exists in race legislation abroad. In Northern Ireland the Fair Employment and Treatment Order 1998 (FETO) imposes on employers certain duties that go beyond non-discrimination. It includes obligations to monitor and periodically review to ascertain if there is fair participation and consideration of suitable affirmative action to address under-representation.

A positive duty to promote equality is an important step towards equality for ethnic minorities. A positive approach may take form as a positive

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<sup>4</sup> See the Employment Equality (Religion or Belief) Regulations 2003



duty on a public sector employer or a service provider to promote equality of opportunity, or a requirement to monitor the progress of employing ethnic minorities.

Currently in Clause 49, special measures are being used as an exception to escape liability.

(iii) **Article 3 No racial segregation or apartheid**

It states:

"States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

The Civic Party agrees with the Government remarks that there are no government ghettos and concentration camps in Hong Kong, However, there are in fact some areas in which ethnic minority groups are gathered. For example, the Chung King Mansion houses many asylum seekers and ethnic minorities. These people are being forced to live there due to economic and social reasons.

(iv) **Article 4 - No propaganda or organizations which are based on racial superiority**

It states:

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

The Civic Party worries that the Bill will allow racial hatred groups to be formed in Hong Kong. Clause 31 of the Bill is an exception clause for voluntary bodies. The Civic Party is worried that this Clause will encourage groups like White



Supremacy, neo-Nazi groups, anti-Japanese groups forming in Hong Kong. It is one thing to allow for patriotic voluntary bodies, it is quite another to accept the voluntary bodies wearing the banner of patriotism or nationalism with an ethnic cleansing ideology.

(v) **Article 5 - Guarantees of rights of everyone without distinction as to race, colour, or national or ethnic origin**

It states:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks."



There are numerous exceptions in the Bill allowing the discriminator to continue its discrimination. One common accepted view from the NGOs we met is that the Bill is not trying to prevent discrimination but may in fact legitimize the discrimination.

For example in the exceptions for discrimination in provision of goods, facilities or services, there are reports in UK that a racial group (mainly Africans) has been prevented to foster care for other racial groups children. The Civic Party is concerned that the Bill (Clause 27) will simply permit such racial discrimination to take place. As a result, we believe that the application of Clause 27 is too wide and need to be restricted.

In relation to cultural fields, the Civic Party is concerned that the “reasons of authenticity” exception as stated in Clause 11 is also a loophole since it has such a wide application. For example, if a Chinese director says that he wants his film to be 100% Chinese and only recruit Chinese, he can simply use that “reasons of authenticity” defence to escape liability. This will no doubt prevent a lot of ethnic minority actors and actresses from getting jobs in Hong Kong. The Civic Party believes that the use of “Reasons of authenticity” should be restricted and an objective test should accompany the use in order to avoid its potential abuse.

Another example is the employment agencies. In order to effectively stop discriminatory practice, there should be an active duty placed on employment agencies to report discriminatory employer to the authorities. There should be a sanction against employment agencies that fails to report discriminatory employer as they are simply aiding and abetting the discriminator who discriminates against the victims of crime.

In relation to political rights, the Basic Law prescribes that the Chief Executive must be Chinese. Comparing to Mainland China, non-ethnic Chinese are allowed to be members of the National People’s Congress and they can even hold high government office. In Hong Kong, the Chinese language requirement has also prevented a lot of non-ethnic Chinese taking up government positions namely the administrative officers.

(vi) **Article 6 - Provision of effective protection and remedies against any acts of racial discrimination**

It states:

"States 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."

Currently, no such tribunals or courts exist to deal with such cases as there are no laws and no private rights in Hong Kong. However, with the introduction and the subsequent enactment of the Race Discrimination Bill, we hope this will change.





The Civic Party supports the setting up of a specialised court to deal with discriminatory cases. Currently, the victims will need to wait for a long time to get compensation. This no doubt makes the victims reluctant to seek compensation from the courts. The Equal Opportunities Commissioner has in the past done a good job in resolving the matters. However, discriminatory companies are unlikely to adhere to the conciliations. To stop this practise from growing, the name and shame approach should be considered by the Government to prevent future victims joining such companies.

(vii) **Article 7 - Measures to combat prejudice**

It states:

"States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention."

Clause 20 of the Bill is related to persons concerned with provision of vocational training. Clause 20(2)(a) virtually seals the fate on many ethnic minorities currently arguing that the Government has not done enough for them as the vocational training courses in which they have undertaken are being taught in a language that they do not understand. Clause 20(2)(a) allows the educational institutions to carry on ignoring the demands of the ethnic minorities. We are told by the ethnic minorities that the courses they are interested in are only available in Chinese whereas they prepare English. The Civic Party believes that Clause 20(2)(a) should be removed in its entirety.

In conclusion, Hong Kong is moving towards the right path to combat against racial discrimination. However, much is still needed to ensure full compliance of the Convention. The Civic Party hopes the Government will amend the current Bill so as to comply with the Convention.

Yours sincerely

Civic Party