



ONE STEP FORWARD, TWO STEPS BACK?  
THE DILEMMA OF HONG KONG'S DRAFT RACE  
DISCRIMINATION LEGISLATION

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*After more than a decade of debate, the Hong Kong Special Administrative Region government tabled a race discrimination bill in the Legislative Council in December 2006 which, if passed into law, would prohibit discrimination on the grounds of race, colour, descent, or national or ethnic origin. Although many initially welcomed the commitment to legislate, it soon became clear that the draft legislation contained serious weaknesses which undermined the government's stated objectives to prevent and combat racial discrimination and to comply with Hong Kong's international human rights obligations. This article contends that the bill requires several key amendments to achieve these aims. To date, however, the Hong Kong administration has resisted effective changes to the bill and has therefore created a difficult dilemma for legislators: should they reject the bill or should they adopt a law which could legitimise certain forms of discrimination?*

### Introduction

A small body of equality legislation and case law has developed in Hong Kong since the Sex Discrimination Ordinance (SDO),<sup>1</sup> Disability Discrimination Ordinance (DDO)<sup>2</sup> and Family Status Discrimination Ordinance (FSDO)<sup>3</sup> came into effect in 1996 and 1997.<sup>4</sup> These laws provide statutory protection from discrimination on the grounds of sex, marital status, pregnancy, disability and family status and established an Equal Opportunities Commission (EOC) with the power to investigate and attempt to conciliate individual complaints of discrimination which fall within the scope of the three ordinances. Hong Kong courts have also considered the equality protections in the Basic Law, Hong Kong's mini-constitution, and the Bill

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<sup>1</sup> Sex Discrimination Ordinance (Cap 480), Laws of Hong Kong.

<sup>2</sup> Disability Discrimination Ordinance (Cap 487), Laws of Hong Kong.

<sup>3</sup> Family Status Discrimination Ordinance (Cap 527), Laws of Hong Kong.

<sup>4</sup> See the website of the Hong Kong Equal Opportunities Commission for more information: <http://www.eoc.org.hk>.

of Rights Ordinance (BORO),<sup>5</sup> and have recently ruled that certain provisions in Hong Kong's Crimes Ordinance<sup>6</sup> discriminate on the basis of sexual orientation.<sup>7</sup>

Although the Basic Law ensures equality before the law and the BORO includes protection from discrimination by public bodies on additional grounds not included in the three other statutes,<sup>8</sup> these constitutional documents have had limited impact in practice. Individuals often find it difficult to bring claims of discrimination against the government directly to the courts without the EOC's assistance and the enactment of the BORO in 1991 did not result in an assessment of the impact of government policy on equality.<sup>9</sup> As a result, a number of human rights organisations and other stakeholders have lobbied to introduce new specific anti-discrimination statutes that would extend protection from discrimination falling within the EOC's remit to include the grounds of race, age, and sexual orientation. In the mid-late 1990s some members of the Legislative Council responded to these calls and attempted to introduce private members bills. These initiatives, however, were ultimately unsuccessful in the face of active government opposition.<sup>10</sup>

No further progress was made until September 2004 when the Hong Kong government issued a "Consultation Paper on Legislating against Racial Discrimination" (Consultation Paper) which expressed a commitment to legislate and indicated that the new law would be modelled on the SDO,

<sup>5</sup> Bill of Rights Ordinance (Cap 383), Laws of Hong Kong.

<sup>6</sup> Hong Kong Crimes Ordinance (Cap 200), Laws of Hong Kong.

<sup>7</sup> *Leung v Secretary for Justice* [2006] HKEC 1763 and *Secretary for Justice v Yau Yuk Lung & Another* [2007] HKEC 1278.

<sup>8</sup> The BORO largely copies the 1966 International Covenant on Civil and Political Rights (ICCPR) and both enumerate the following grounds: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (ss 1 and 22 of the BORO and Arts 2 and 26 of the ICCPR).

<sup>9</sup> For a discussion of the limits of the BORO to address public sector discrimination, see generally Carole J. Petersen, "The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong" (2002) 32 HKLJ 103.

<sup>10</sup> For example, former legislator Anna Wu proposed a comprehensive Equal Opportunities Bill in 1994 which would have included race among a number of other grounds of discrimination. Another legislator, Elizabeth Wong, introduced a racial discrimination bill in 1997 based on Anna Wu's draft and Christine Loh attempted to introduce another bill modelled on the existing equal opportunities laws between 1998 and 2000. The Hong Kong government opposed these initiatives maintaining that it would take a "step by step" approach to equal opportunities legislation and argued that the community would not support a race discrimination law. See eg, statements by the Hong Kong Secretary for Home Affairs in the Legislative Council, Hansard, 27 June 1997, pp 1402-1406.

DDO and FSDO.<sup>11</sup> In addition, the Consultation Paper stated that the race discrimination law would aim to:

1. prevent and combat racial discrimination; and
2. fulfil Hong Kong's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention).<sup>12</sup>

More than two years later, in December 2006, the administration introduced draft legislation which, according to its long title, would "render discrimination, harassment and vilification, on the ground of race unlawful." Since January 2007, the Legislative Council Bills Committee, which is tasked with scrutinising the Race Discrimination Bill (RDB), has met more than 20 times and is expected to continue its deliberations until June 2008.<sup>13</sup>

Although many welcomed the government's initial commitment to legislate, the RDB itself failed to meet expectations. In the course of its discussions over the past year, the Bills Committee, as well as academic experts, non-government organisations and others, have identified serious weaknesses in the RDB which undermine the objectives expressed in the original Consultation Paper. The bill contains a number of exemptions and awkward, poorly drafted clauses which appear designed to shield government policies from challenge in several areas. Although the bill has many shortcomings, the Bills Committee has singled out four provisions which are particularly problematic including:

1. the RDB's limited application to the government (clause 3);
2. its definition of discrimination, especially its broad justifiability test (clause 4);
3. its broad exceptions for distinctions based on nationality and immigration status and the bill's apparent failure to address discrimination faced by mainland Chinese immigrants (clause 8); and
4. its broad exemption for the use of or failure to use any language (clause 58).

<sup>11</sup> Home Affairs Bureau of the Hong Kong Special Administrative Region, "Legislating Against Racial Discrimination: A Consultation Paper", September 2004, para 3 (hereinafter "Consultation Paper"). For a detailed analysis of the Consultation Paper, see Carole J. Petersen, "Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong" (2004) 34 *HKLJ* 459.

<sup>12</sup> *Ibid.* (Home Affairs Bureau).

<sup>13</sup> For an overview of the meetings and related papers produced by the administration, the Bills Committee, and other submissions see the website of the Hong Kong Legislative Council: <http://www.legco.gov.hk>.

This article argues that these clauses, as well as other broad exemptions in the bill, could allow unjustifiable racial discrimination and do not comply with the Race Convention. In addition, the bill departs from the Consultation Paper's promise that it would be similar to existing anti-discrimination laws in Hong Kong and in fact the RDB provides less protection from discrimination than the SDO, DDO, and FSDO.<sup>14</sup> The RDB represents a significant step backward in the development of equality law in Hong Kong; it signals a lack of commitment to the principle of equality and non-discrimination, and will require amendment in order to achieve the aims stated in the Consultation Paper. Its regressive nature appears out of sync with recent legal reform efforts in other jurisdictions and theoretical developments which elaborate and promote a more substantive notion of equality.

### Key Areas of Concern

#### *Clause 3 – Application to the Government*

Clause 3 of the bill states that the “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.” This formulation differs from the three existing anti-discrimination laws in Hong Kong which expressly bind the Government and contain provisions clarifying the full extent of the Government's liability.<sup>15</sup> To date, the Government has not provided an explanation for deviating from the existing legal models in this regard.<sup>16</sup>

In a paper published in March 2008, the Constitutional and Mainland Affairs Bureau proposed amending clause 3 to simply state that: “[t]his Ordinance Binds the Government”. Without further amendment, however, this change alone would be insufficient to address concerns. The RDB would still exclude certain government acts – such as law enforcement functions – not falling within the scope of the legislation which includes areas such as employment, education, and the provision of goods and services. The paper does not suggest adding the language in the SDO, DDO, and FSDO which

<sup>14</sup> See generally, Carole J. Petersen, “Hong Kong's Race Discrimination Bill: A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances”, Submission to the Hong Kong Legislative Council's Bills Committee to Study the Race Discrimination Bill, LC Paper No CB(2)2232/06-07(01), June 2007.

<sup>15</sup> See SDO ss 3, 21, and 38; DDO ss 5, 21 and 36; and FSDO ss 3, 17 and 28. See also “Equal Opportunities Commission's Submission to the Meeting of the Bills Committee on Race Discrimination Bill on 10 January 2008”, LC Paper No CB(2)759/07-08(03), paras 3–6, available on the Legislative Council's website at <http://www.legco.gov.hk>.

<sup>16</sup> See Constitutional and Mainland Affairs Bureau, Hong Kong Special Administrative Region, Paper on “Application to Government”, LC Paper No CB(2)173/07-08(01), October 2007.

applies those laws to the exercise of all government functions and powers.<sup>17</sup> Indeed, the Government explained that its substantive position had not in fact changed:

“To expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on the Government’s ability to make and implement policies: and policy or practice could be challenged in the courts for example ... This could render the Government vulnerable to an influx of litigations (sic).”<sup>18</sup>

Therefore claimants bringing cases of race discrimination against some government authorities would not be able to utilise the EOC’s investigation and conciliation services. By comparison, individuals challenging sex, disability, or family status discrimination by any public body and related to any government power or function would be able to access the EOC. The EOC has played a crucial role in uncovering, challenging and ensuring effective remedies for discriminatory government policies. For example, although the BORO came into effect in 1991, sex discrimination in Hong Kong’s public school allocation system (which occurred for two decades), was only discovered and addressed when the EOC first exercised its power of investigation in the late 1990s.<sup>19</sup>

The EOC’s conciliation mechanism also offers a valuable alternative to litigation which could have certain advantages for both claimants and respondents. The EOC’s process is generally faster, less expensive, lower profile and less confrontational than traditional litigation.<sup>20</sup> In fact, as experience with similar enforcement models in other jurisdictions indicates, the Government should find it preferable to open itself up to claims of racial

<sup>17</sup> Constitutional and Mainland Affairs Bureau, “The Administration’s Further Response to the Major Issues Raised by the Bills Committee”, LC Paper No CB(2)1292/07-08(01), March 2008, para 5 (“CMAB Paper”) and n 15 above.

<sup>18</sup> *Ibid.* (CMAB Paper), para 6. The EOC’s submission on 10 January 2008 explains that merely changing clause 3 to read: “this Ordinance binds the Government” would mean the bill still has a narrower scope than the SDO, DDO, and FSDO. See EOC, n 17 above, paras 7–8. See also Patrick Yu, “Submission to the Hong Kong Legislative Council Bills Committee on Race Discrimination Bill, in response to the paper (LC Paper No LS14/07-08) prepared by the Legal Service Division on 12 November 2007”, 7 January 2008, discussion under Part III, Option A.

<sup>19</sup> See eg *EOC v Director of Education* [2001] 2 HKLRD 690; see also Petersen, n 9 above; Petersen, n 14 above at 8; and the EOC, n 15 above at para 12.

<sup>20</sup> Carole J. Petersen, Janice Fong, and Gabrielle Rush, “Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong”, (Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, 2003), generally and at 2–3.

discrimination using the EOC's process rather than encouraging constitutional challenges under the Basic Law and the BORO.<sup>21</sup>

*Clause 4 – Definition of Discrimination*

Clause 4(1) defines direct and indirect discrimination based on corresponding sections of Hong Kong's existing anti-discrimination laws which were originally copied from the UK's Sex Discrimination Act (1975) and Race Relations Act (1976). The UK Acts have since been amended to address weaknesses in the definition and to comply with European law.

Direct discrimination occurs when, on the ground of the race of a person, the discriminator treats that person less favourably than the discriminator treats or would treat other persons (clause 4(1)(a)). Indirect discrimination (clause 4(1)(b)) means that a discriminator applies to another person

“a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but –

- (i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;
- (ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and
- (iii) which is to the detriment of the other person because that person cannot comply with it.”

Decades of experience in the UK revealed considerable limitations when this definition of indirect discrimination was applied in practice. For example, UK courts narrowly interpreted a “requirement or condition” making it difficult for certain discrimination claims to succeed.<sup>22</sup>

<sup>21</sup> This point was made by Malcolm Luey, a New Zealand government lawyer, at “Promoting Racial Equality? Hong Kong's Race Discrimination Bill in Comparative and International Perspective”, a conference organised by the Centre for Comparative and Public Law at the University of Hong Kong, 31 March 2007 (RDB Conference). Papers from this conference are available at the website of the Centre for Comparative and Public Law: <http://www.hku.hk/ccpl/pub/conferences/Confon-HKRaceDiscriminationBill.htm>.

<sup>22</sup> For example, *Perera v Civil Service Commission* [1983] ICR 428. Aileen McColgan emphasised this point at the RDB Conference, *ibid.*, in her paper on “The Race Relations Act 1976: Lessons from the UK” (on file with the author). McColgan wrote that “it is unfortunate ... that the Hong Kong legislation proposes to utilize the old test. It is all the more unfortunate that it has proposed to water down the test of justification”.

Of greater concern, however, is the test for justifiability included in clause 4(2)(b) of the RDB. As noted above, clause 4(1)(b) allows an alleged discriminator to justify imposing a requirement or condition when that requirement or condition has a discriminatory impact on a protected group (eg a racial group). The test for determining justifiability is well-established and Hong Kong courts have accepted the following formulation, based on British authority,<sup>23</sup> when determining whether a discriminatory requirement or condition is justifiable under the DDO:

- whether the objective was legitimate;
- whether the means used to achieve the objective are reasonable; and
- whether the conditions are justified when balanced on the principles of proportionality between the discriminatory effect upon the applicant's racial group and the reasonable needs of those applying the condition.

RDB clause 4(2)(a) specifies a similar test: "if [a requirement or condition] serves a legitimate objective and bears a rational and proportionate connection to the objective" then it can be shown to be justifiable.

RDB clause 4(2)(b), however, adds that it would also be justifiable, in cases brought under the RDB, if it is not "*reasonably practicable* for the person who allegedly discriminates against another person not to apply the requirement or condition." Clauses 4(3) to 4(5) further elaborate on the factors which the courts or the EOC can take into account when determining "reasonable practicability" and seem to allow for a much broader test for justifiability which does not exist in Hong Kong's other equality laws (or to the best of this author's knowledge, discrimination laws from elsewhere).<sup>24</sup> This new test would essentially make it difficult to prove, yet relatively easy to justify, indirect discrimination. In effect it may exempt some racial discrimination which would otherwise be unlawful according to established justifiability standards thus weakening the impact of the bill. Indeed, the ability of an indirect discrimination definition to successfully remove barriers to equal opportunities is largely dependent on the nature of the

<sup>23</sup> *Siu Kai Yuen v Maria College* 2005 WL 11416 (DC), [2005] 2 HKLRD 775, [2005] HKEC 563, citing *Board of Governors of St Matthias Church of England School v Crizzle* [1993] IRLR 472.

<sup>24</sup> Several submissions on the RDB presented to the Bills Committee have raised this point. See eg "Race Discrimination Bill, Submission of the Hong Kong Bar Association", LC Paper No CB(2)1461/06-07(01), March 2007, para 22.

justifiability test which often reflects the extent to which equality is valued over other interests.<sup>25</sup>

In its March 2008 paper, the government proposed deleting clause 4(2)(b) and clauses 4(3) to 4(5) after considering the concerns raised by members of the Bills Committee.<sup>26</sup> If these provisions are ultimately removed, this would improve the definition, but not adequately resolve the problems with the “old” UK definition mentioned above. McColgan notes: “The general view in the UK is that the new approach to indirect discrimination is much to be preferred over the old one, and that 30 years’ of experience of the old test served mainly to underline its inadequacies. It is unfortunate, in this regard, that the Hong Kong legislation proposes to utilise the old test.”<sup>27</sup>

### *Clause 8*

Clause 8(2) and (3) could also have the effect of allowing unjustifiable racial discrimination through its broad exemptions for categories based on nationality, citizenship, immigration and residency status, etc. Subsection (2) provides that “an act done on the ground of any matter specified in subsection (3) does not constitute an act done on the ground of race, colour, descent or national or ethnic origin; and section 4(1)(b) [the definition of indirect discrimination] does not apply to a requirement or condition as to any matter specified in subsection (3).”

The matters specified in subsection (3) include the fact that a person is or is not: an indigenous inhabitant of the New Territories; a Hong Kong permanent resident; subject to any restriction or condition of stay imposed under the Immigration Ordinance; and whether a person has or has not been granted permission to land or remain in Hong Kong under the Immigration Ordinance. Additional matters include a person’s length of residence in Hong Kong, or his / her nationality, citizenship or resident status under the law of any country or place concerning nationality, citizenship, resident status or naturalisation.

Clause 8 would exclude claims of both direct and indirect racial discrimination on the basis of nationality and related grounds thus providing a loophole which could allow discriminators to avoid liability by referring to a person’s nationality rather than one of the enumerated grounds, such as national origin. For example, the RDB apparently would not prohibit a

<sup>25</sup> Sandra Fredman, “The Future of Equality Law in Britain”, Working Paper Series No 5 (UK Equal Opportunities Commission, 2002) at 6.

<sup>26</sup> See n 17 above, paras 7–8.

<sup>27</sup> McColgan, n 22 above.



hotel from charging Japanese passport holders more money for rooms than nationals from other countries.<sup>28</sup>

Clause 8 seems to be an attempt to preserve existing immigration policies and ensure that mainland Chinese immigrants cannot make claims of discrimination based on their immigrant status under the RDB. Reports of discrimination and negative stereotypes against new mainland Chinese arrivals because they come from the mainland have been well-documented.<sup>29</sup> The discrimination they face is, in many ways, analogous to discrimination faced by immigrants coming from other countries (who would likely fall within the ground of “national origin”).<sup>30</sup> Since 1997, the Hong Kong Special Administrative Region (SAR) has been granted a high degree of autonomy under Chinese sovereignty which allows Hong Kong authorities to implement separate immigration laws and policies, and a secure border exists between the SAR and the rest of China. Immigrants from mainland China, as a group, deserve as much protection from discrimination as immigrants coming from elsewhere. The government’s interpretation of “race”, as limited by clause 8, and statements that mainland Chinese immigrants come from the same “racial stock” as the Chinese majority in Hong Kong and should therefore be excluded from the RDB on “principle”, obscure the real problems facing this vulnerable group.<sup>31</sup> This approach reinforces the impression that the government does not intend to address the most serious problems of discrimination facing minority communities in Hong Kong.

In its March 2008 paper, discussed above, the administration maintains its position on clause 8 and states that removing these exemptions would “run against the objective that the Bill should be clear to avoid unnecessary litigations (sic) which will be disruptive to society.”<sup>32</sup>

#### *Clause 58 – Language Exemption*

Language barriers can, in some circumstances, have a negative, disproportionate impact on certain racial groups. Clause 58 of the RDB, however, provides a broad exception for “the use of or the failure to use any language” in educational establishments, vocational training, employment agencies,

<sup>28</sup> For similar examples, see Petersen, n 14 above, at 12.

<sup>29</sup> For example, see the joint submission to the Legislative Council Bills Committee on the Race Discrimination Bill by the Hong Kong Human Rights Commission, Society for Community Organization, New Immigrants Mutual Aid Association, and Voices of the Rights of Asylum Seekers and Refugees, February 2007, LC Paper No CB(2)1168/06-07(01), pp 3–6, available at the website of the Hong Kong Legislative Council: <http://www.legco.gov.hk>.

<sup>30</sup> See discussion in Petersen, n 11 above, at 465–469.

<sup>31</sup> See Home Affairs Bureau, Hong Kong Special Administrative Region, “Legislative Council Brief: Race Discrimination Bill”, HAB/CR/1/19/102, 29 November 2006, para 32 at 10. This point is also discussed by Petersen, n 14 above at 18.

<sup>32</sup> See n 17 above, para 10.

the provision of goods, facilities and services and a number of other areas falling within the scope of the bill. The clause clarifies that the “use of, or failure to use, a language includes a reference to the provision of, or failure to provide, a translation, interpretation or transcription into the language.” This exemption therefore excludes language policy from consideration as a form of indirect discrimination in a number of circumstances and threatens to allow discrimination which may otherwise fail established justifiability tests. It is also unnecessary in light of the possibility to justify indirect discrimination in clause 4(1)(b) of the bill, as discussed above. Despite this justification test, the Government’s March 2008 paper argues that “it is ... not appropriate to amend or delete Clause 58” since “it would not be practicable or reasonable for service providers in the private or public sectors to conduct their business in all languages or in the language of their client’s choice”.<sup>33</sup>

### The Educational Role of the Law

Fredman points out that the “less visible but equally important educational role of [non-discrimination] law should not be ignored”.<sup>34</sup> Since “it is important that the law conveys the right messages”, exemptions from the law for public authorities are problematic since they “give the impression that there is no requirement for these bodies to refrain from discriminating.”<sup>35</sup> Both the exemptions in the RDB and its differences from the three existing ordinances undermine the law’s educational function by signifying that i) the law allows, and therefore seemingly sanctions, discrimination which may be unjustifiable according to well-established tests and ii) victims of racial discrimination deserve less protection than those facing other forms of discrimination. A third, equally counterproductive implication of the bill is that Hong Kong does not intend to comply with its international human rights obligations.

### The Race Convention

The Race Convention has bound Hong Kong since 1969 when the United Kingdom extended the Convention to its dependent territories. The Committee on the Elimination of Racial Discrimination (the Race Committee),

<sup>33</sup> See *ibid.*, para 12.

<sup>34</sup> Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002), p 162.

<sup>35</sup> *Ibid.*

a body of experts which monitors the Convention, has called on Hong Kong authorities to introduce race discrimination legislation. In 2001, the Committee recommended that:

“appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent, or national or ethnic origin, as has been done with regard to discrimination on the grounds of gender and disability.”<sup>36</sup>

In addition to the Race Committee, other human rights treaty bodies have made similar comments. For example, the Committee on Economic, Social and Cultural Rights expressed concern in 2005 that the protection afforded by the proposed race discrimination law, as described in the 2004 Consultation Paper, “will not cover migrants from the Mainland despite the widespread *de jure* and *de facto* 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.”<sup>37</sup>

Since the clauses in the RDB described above may allow and even entrench unjustifiable racial discrimination, they could run counter to several provisions in the Race Convention. For example, Article 2 of the Convention requires “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.” Article 5 stipulates that states “undertake to prohibit and to eliminate racial discrimination in all its forms”. Article 6 provides that

“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.”

And Article 7 demands effective educational measures “with a view to combating prejudices which lead to racial discrimination and to promoting

<sup>36</sup> Committee on the Elimination of Racial Discrimination, “Concluding Observations on China’s Report”, UN Doc A/56/18, 2001, para 247.

<sup>37</sup> Committee on Economic, Social, and Cultural Right, “Concluding Observations of the Committee on Economic Social and Cultural Rights, People’s Republic of China (including Hong Kong and Macau)”, UN Doc E/C.12/1/Add.107, 13 May 2005, para 79.

understanding, tolerance and friendship among nations and racial or ethnical groups”.

In addition to the text of the Convention itself, the Committee has issued several General Recommendations which further clarify the content of state commitments and are helpful as a reference point for evaluating the RDB.<sup>38</sup> For example, clause 3 could run counter to the Committee’s General Recommendation XXXI, which underscores the importance of preventing racial discrimination in the administration and functioning of the criminal justice system.<sup>39</sup>

Clause 4, and other exemptions such as clause 58, may not fully comply with the Committee’s General Recommendation XIV which clarifies that the definition of discrimination in Article 1 includes indirect discrimination (disparate impact). It states that “a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms” and “[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”<sup>40</sup>

Although Article 1(2) provides that the Race Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”, the Committee has interpreted this provision narrowly in its response to state reports and in its General Recommendations. For example, General Recommendation XXX on Discrimination against Non-citizens provides that states must ensure “that the implementation of legislation does not have a discriminatory effect on non-citizens.”<sup>41</sup>

<sup>38</sup> A number of scholars have argued that statements by treaty bodies are significant and should be given adequate weight. For example, the International Law Association notes approvingly that human rights treaty bodies: “have emphasized ... that the legal norms on which the treaty bodies pronounce are binding obligations of the States parties, and therefore the pronouncements of the treaty bodies are more than mere recommendations ...”. See International Law Association, “Final Report on the Impact of the Findings of United Nations Human Rights Treaty Bodies”, Berlin Conference, 2004, at 5. Byrnes observes that General Recommendations “provide detailed content to the generally-worded provisions of the Convention” and Concluding Observations “show the relevance of the Convention’s provisions to the situation in a particular country ... and provide a source of comparative information about how ... States parties ... have gone about implementing the Convention.” See Andrew Byrnes, “Using Gender-Specific Human Rights Instruments in Domestic Legislation: The Convention on the Elimination of All Forms of Discrimination against Women” in Kristine Adams and Andrew Byrnes (eds), *Gender Equality and the Judiciary* (Commonwealth Secretariat, 1999), p 59.

<sup>39</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, 2005, from UN Doc No A/60/18, 98–108.

<sup>40</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XIV: Definition of Discrimination (Art 1(1)), 1993, paras 1 and 3 (contained in UN Doc A/48/18).

<sup>41</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXX: Discrimination Against Non-Citizens, 2004, para 7.

The Committee's Concluding Comments on State Reports also assist when assessing the extent of the RDB's conformity with the Race Convention. For example, in recent years, the Committee has made recommendations to states related to the impact of their language policies, recognising that language can constitute a form of racial discrimination in certain circumstances.<sup>42</sup>

The ICCPR and the General Comments and jurisprudence of the Human Rights Committee (HRC) also shed light on the content of equality and non-discrimination in international human rights law. For example, the HRC has stated that rules which have discriminatory effects even when neutral at face value and without discriminatory intent (indirect discrimination) can result in a violation of Article 26 of the ICCPR.<sup>43</sup> These rules may also be justified if "they are based on objective and reasonable grounds".<sup>44</sup> This test is also a useful benchmark for measuring the "reasonable practicability" standard in clause 4(2)(b).

The Race Committee has, in fact, expressed specific concerns about the RDB's compliance with international human rights standards. In August 2007, the Committee requested detailed information about the RDB and expressed concern that the bill may not fully implement its previous recommendation:

"In particular, it has been brought to the attention of the Committee that the Bill provides for a narrow definition of direct and indirect discrimination differing from the Sex Discrimination and Disability Discrimination Ordinances. Furthermore, Clause 3 of the Bill as presently drafted appears to exclude a substantial portion of Government action from the legislation and thus from the statutory right to seek redress against racial discrimination perpetrated by State authorities."<sup>45</sup>

In its response, the Central Chinese Government did not provide the requested information and instead indicated that its next periodic report

<sup>42</sup> For example, see the Race Committee's Concluding Observations on recent reports submitted by Mongolia (UN Doc No CERD/C/MNG/CO/18, 2006, para 21) and Estonia (UN Doc No CERD/C/EST/CO/7, 2006, paras 15, 16 and 20) among others.

<sup>43</sup> See *Althammer v Austria*, Human Rights Committee, Communication No 998/2001, 22 September 2003, UN Doc No CCPR/C/78/D/998/2001, para 10.2. See also a discussion of these standards in Yu, n 18 above, para 1.3.

<sup>44</sup> *Ibid.*

<sup>45</sup> Letter from Régis de Gouttes, Chairman of the Committee for the Elimination of Racial Discrimination to Sha Zukang, Permanent Representative, Permanent Mission of China to the United Nations at Geneva, 27 August 2007, <http://www2.ohchr.org/english/bodies/cerd/docs/LetterChina-24Aug07.pdf>.

would discuss the bill without specifying when it plans to submit that report.<sup>46</sup>

In its 72nd session from 18 February until 7 March, the Committee considered these issues<sup>47</sup> and sent another letter to the Chinese government dated 7 March 2008.<sup>48</sup> In this second letter, the Committee expressed its regret that China “has not indicated the date on which these overdue reports will be submitted” and “notes with interest that the report will include a detailed section on the Race Discrimination Bill introduced into the Hong Kong Special Administrative Region Legislative Council in December 2006”.<sup>49</sup> It reiterated its concerns about the definition of indirect discrimination and the bill’s limited application to public authorities “including immigration services and detention facilities”.<sup>50</sup> It added that

“[a]ccording to additional information made available to it at its seventy-second session, the Committee is also concerned about the omission from the Bill of provisions on discrimination on the basis of nationality and residency status, which rules out the recognition of discrimination against immigrants newly arrived from the Chinese mainland, and the omission of provisions on indirect discrimination on the basis of language.”<sup>51</sup>

It put some pressure on the Chinese Government by requesting that China submit its overdue reports by 1 July 2008 and “in case of non-receipt ... by the set deadline, the Committee will examine the situation in China ... at its seventy-fourth session, to be held in spring 2009.”<sup>52</sup>

<sup>46</sup> Letter of the Constitutional and Mainland Affairs Bureau to the Clerk of the Bills Committee on the Race Discrimination Bill, 15 January 2008.

<sup>47</sup> The author participated in a briefing for the Committee on the RDB in Geneva on 3 March 2007 and several Committee members expressed concerns about the RDB. NGOs from Hong Kong requested that the Committee assess the RDB’s compliance with Race Convention obligations. (Notes from the briefing are on file with the author.) See Yau Chui-yan and Albert Wong, “Hong Kong at Risk of Attack by UN on Race Bias Law”, *South China Morning Post*, 5 March 2008.

<sup>48</sup> Letter from Fatimata-Binta Victoire Dah, Chairperson of the Committee for the Elimination of Racial Discrimination, to H.E. Mr Li Baodong, Permanent Representative to the Permanent Mission of China to the United Nations at Geneva, 7 March 2008.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

## Conclusions

Despite this international pressure and the bill's limitations, the Hong Kong Government has not indicated that it will support significant amendments.<sup>53</sup> On 11 January 2008, the Chair of the Bills Committee wrote a letter to Stephen Lam, Secretary for Constitutional and Mainland Affairs, the government official responsible for the RDB, expressing frustration with the government's continued resistance to amendment:

"Members [of the Bills Committee] have heard numerous deputations, expressed strong concerns in various areas and taken the trouble to prepare an interim report setting out 4 major areas requiring amendment. Regrettably the Government still appears to be totally intransigent against any modification. At yesterday's meeting, there was a strong feeling among members that the Government is wasting our time."<sup>54</sup>

In response to this letter, Lam suggested that limited concessions may be possible.<sup>55</sup> The March 2008 paper by the Constitutional and Mainland Affairs Bureau elaborated on these concessions, but, as discussed above, the government's proposals are inadequate to address the concerns raised by the Bills Committee and the Race Committee.

In order to align the RDB with the goals of the 2004 Consultation Paper, including compliance with Hong Kong's international human rights obligations, the following amendments are necessary:

1. The RDB should apply to public bodies as well as private actors and reflect relevant provisions in the SDO, DDO, and FSDO.
2. The definition of discrimination should not allow unjustifiable discrimination, and the extra "reasonably practicable" test elaborated in clauses 4(2)(b) and 4(3) to 4(5) should be removed.

<sup>53</sup> Amendments to bills under consideration by Hong Kong's Legislative Council are nearly impossible without government support. As Margaret Ng, Chair of the Bills Committee on the Race Discrimination Bill, points out: "Under the legislative and constitutional arrangements of the Hong Kong SAR, an amendment to a bill the effect of which may be to dispose of or charge any part of the public revenue can only be proposed by the Government or by a member of LegCo with the consent of the Government. The rules of voting are weighted against a member's motion." See Margaret Ng, "Briefing on the Race Discrimination Bill of the Hong Kong SAR for the United Nations Committee on the Elimination of Racial Discrimination, 72nd Session", February 2008, para 4 (on file with the author).

<sup>54</sup> Letter from Margaret Ng, Chair of the Bills Committee on the RDB, to Stephen Lam, Secretary for Constitutional and Mainland Affairs, LC Paper No CB(2)895/07-08(02)11 January 2008.

<sup>55</sup> Letter from Stephen Lam, Secretary for Constitutional and Mainland Affairs of the Hong Kong Special Administrative Region Government, to the Chairman of the Bills Committee on the RDB, LC Paper No CB(2)895/07-08(01), 18 January 2008.

3. Broad exceptions, such as those found in clauses 8 and 58 as well as elsewhere in the bill, should be deleted or narrowly tailored to ensure that the discrimination they exempt is justifiable according to established standards.

Recent case law from a number of countries and developments in theoretical approaches to equality, have led to greater acceptance and adoption of more substantive measures to tackle discrimination and promote equality of opportunity. Grant notes that “[t]he 21st century has seen renewed efforts on the part of both theorists and practitioners to develop new approaches to equality”.<sup>56</sup> Fredman observes that it is “now generally accepted that formal equality should be transcended by principles of substantive equality.”<sup>57</sup> The RDB’s weaknesses as described in this article, however, deviate from these trends and threaten to reverse positive gains which have been achieved in Hong Kong during the past 12 years. The RDB is also inconsistent with the equality principles underpinning the Race Convention and other international human rights instruments.

Unfortunately, the Legislative Council has been faced with a difficult dilemma: would it be better to pass the draft legislation without significant amendment, despite its many flaws, or reject the bill altogether, allowing it to lapse at the end of the current Legislative Council session in July 2008? If the Legislative Council chooses to reject the RDB, then the Hong Kong Government may claim that the decision was beyond their control and may not introduce a new bill at all, or for a long period of time.<sup>58</sup> Activists have lobbied for race discrimination legislation for more than ten years and are reluctant to reject the bill altogether. Current efforts by activists, NGOs, the Hong Kong Bar Association, political parties, and the United Nations Committee on the Elimination of Racial Discrimination may result in a stronger law that complies with the Convention’s obligations. If not, there is a danger that Hong Kong will be left with a counterproductive race discrimination ordinance that would authorise and legitimise racially discriminatory practices.

<sup>56</sup> Evadné Grant, “Dignity and Equality”, (2007) 7 *Human Rights Law Review* 299 at 300.

<sup>57</sup> Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford: Oxford University Press, 2001), p 3.

<sup>58</sup> Margaret Ng made this prediction at a meeting with members of the United Nations Committee on the Elimination of Racial Discrimination in Geneva on 3 March 2008.