

Press Statement
The Hong Kong Bar Association

**Re: Delegation to the United Nation's
Committee on the Elimination of Racial Discrimination**

1. Last year, the Hong Kong Bar Association ("HKBA") had submitted a position paper on the Race Discrimination Bill ("Bill") (copy of which can be downloaded from the HKBA's website). Since then, we have been monitoring the progress of this matter.
2. The HKBA is concerned with the legal implications arising from the Bill and how its contents can be improved. It is also anxious to ensure that the Bill, when passed, can adequately protect civil liberties and human rights.
3. The HKBA has recently been asked if its representatives can attend a briefing with the United Nation's Committee on the Elimination of Racial Discrimination ("CERD"). Whilst members of the CERD are eminent experts on matters concerning the International Convention on the Elimination of All Forms of Racial Discrimination, they come from different jurisdictions including those that are not common law jurisdictions. The HKBA believes it is desirable to explain to members of CERD the legal issues concerning the Bill from the common law and international law perspectives as well as to address issues relevant to the Hong Kong context. In the circumstances, both Mr. Rimsky Yuen, S.C. (Chairman of the HKBA) and Mr. P.Y. Lo (the Deputy Chairman of the HKBA's Special Committee on Constitutional Affairs and Human Rights) will attend a briefing with members of CERD on 3 March 2008 at Geneva to present the HKBA's Submissions on the Bill, a copy of which is attached to this Press Statement. The HKBA's focus is twofold, namely, the definition of direct and indirect discrimination and that the Bill to be passed should be fully binding on the Government as well.

Hong Kong Bar Association
22 February 2008

ANNEX

THE HONG KONG BAR ASSOCIATION'S
SUBMISSIONS TO THE UNITED NATION'S
COMMITTEE ON THE ELIMINATION OF RACIAL
DISCRIMINATION

Committee on the Elimination of Racial Discrimination
72nd Session (18 February – 7 March 2008)
SUBMISSIONS BY THE HONG KONG BAR ASSOCIATION
ON THE RACE DISCRIMINATION BILL OF THE HKSAR

Introduction

1. The Hong Kong Bar Association (“HKBA”) appreciates the follow-up action taken by the Committee on the Elimination of Racial Discrimination (“the Committee”) in August 2007 in respect of the Race Discrimination Bill (“the Bill”) currently before the Legislative Council of the Hong Kong Special Administrative Region (“HKSAR”).
2. The HKBA understands that in her reply to the Committee, it was stated the Government of the People’s Republic of China (“PRC”) would soon submit its consolidated 10th to 13th periodic reports on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention”) and that the part of the consolidated reports concerning the HKSAR would deal with the Bill in greater detail.
3. Paragraph 17 of the Committee’s 2001 Concluding Observations (CERD/C/59/Misc.16/Rev.3) recommended that appropriate legislation be adopted to provide appropriate legal remedies and prohibit discrimination based on race, colour, descent or national or ethnic origin.
4. The HKBA takes the view that the Bill falls short of this recommendation. The purposes of these submissions are to set out our key concerns on the Bill and to make suggestions on possible actions the Committee may consider taking in the light of the current situation in the HKSAR.

Application to Government

5. Clause 3 of the Bill states as follows: “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.”
6. The HKBA objects to clause 3. Not only does it differ from similar

clauses on application to the Government in the 3 pieces of legislation already enforced in the HKSAR outlawing sex, disability and family status discrimination, it differs from similar clauses in anti-racial discrimination legislations in other common law jurisdictions including the Australian Commonwealth, New South Wales (Australia), Canada and New Zealand. In its present form, clause 3 appears to permit racial discrimination in cases involving the exercise of bureaucratic powers (e.g. licensing powers) and general policing powers (i.e. police and immigration powers).

7. Without being exhaustive, the HKBA is of the view that clause 3, as presently drafted, is inconsistent with the following Articles in the Convention:

(a) Article 2(1)(a), which requires state parties to undertake 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) Article 2(1)(d), which requires state parties to prohibit and bring to an end, by all appropriate means including legislation, racial discrimination by any persons, group or organization;

(c) Article 6, which requires state parties to 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 the 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.

8. The HKSAR has enacted the Hong Kong Bill of Rights Ordinance (Cap. 383). However, based on our study of the cases that had gone before the courts in the HKSAR, the HKBA has reservations as to whether the Hong Kong Bill of Rights Ordinance provides effective protection and remedies in the event racially discriminatory activities are committed by the Government or public bodies in the HKSAR. One key reason is that the courts cannot grant private law remedies (e.g. monetary compensation) unless a right protected under the Hong Kong Bill of Rights overlaps with an existing private law right (e.g. the right not to be

detained except in accordance with law).

9. Not only should the Bill be drafted to bind the Government, it should contain provisions to outlaw race discrimination by the Government and public authorities: (1) in the carrying out of their functions; and (2) in connection with appointment of posts and offices which are not regarded as employment. Consistent with the concept of the rule of law, the Government should be on the same footing as private bodies when it comes to liability to compensate for acts of unlawful racial discrimination.
10. The HKBA considers that there is a *strong benefit* in having the Bill binding on the Government and specifically prohibiting race discrimination by the Government and public authorities. This lies in the access by aggrieved persons to the expertise and facilities of the Equal Opportunities Commission for investigation and other assistance under a statutory mechanism for redress. The Committee's General Recommendation XVII (1993) refers.

Definition of Race Discrimination

11. Clauses 4(1)(a) and (b) of the Bill respectively set out the tests for direct and indirect discrimination. Clauses 4(2) to (5) elaborates on clause 4(1)(b)(ii) (i.e. a requirement or condition of equal application "which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied") by providing for two alternative tests.
12. The first alternative prescribes a proportionality test comparable to the objective balancing approach in the comparative English jurisprudence.
13. The second alternative deals with the "reasonable practicability" of the alleged discriminator in not applying the impugned requirement or condition. This test, the satisfaction of which would provide a good defence to a claim of race discrimination, is elaborated in clause 4(3) to (5). They specify the matters to be considered in deciding whether it is reasonably practicable for the alleged discriminator not to apply the impugned requirement or condition, such as (a) the nature of the benefit or detriment likely to accrue to or be suffered by, or the likely impact on, all persons concerned; (b) an estimate of the proportion of persons likely to benefit out of all the persons concerned, if the requirement or condition is not applied; (c) whether any activities of the alleged

discriminator will be disrupted if the requirement or condition is not applied and if so, the extent of the disruption; and (d) whether the alleged discriminator will need to provide additional services or facilities or incur additional expenditure if the requirement or condition is not applied.

14. Having considered the comparative English jurisprudence, the HKBA is of the view that clauses 4(2) to (5) should be deleted. The second alternative may amount to a less stringent test than the first alternative so that an alleged discriminator may successfully justify an impugned requirement or condition by focusing on what is at best an aspect involved in the objective balancing exercise required in the comparative English jurisprudence.

Meaning of “Race”

15. Clause 8 of the Bill is important as it determines the scope of protection. While the definitions of “race” and “on the ground of race” in clause 8(1) follow Article 1(1) of the Convention, they are subject to exclusionary provisions in the subsequent sub-clauses.
16. The HKBA takes issue with clause 8(2) and (3)(b), (c) and (d), which together exclude acts done on the ground of a person’s immigration status (not being a permanent resident of the HKSAR), length of residence in the HKSAR, or nationality, citizenship or resident status of another country or place, from constituting acts done on the ground of race, colour, descent or national or ethnic origin of a person. The rationale behind these sub-clauses may not be consistent with the Committee’s General Recommendation XXX (Discrimination Against Non-citizens) (1 October 2004).

Exemptions

17. The HKBA notes that the Bill contains an extensive array of exclusions and exceptions making many governmental and private acts not subject to its operation. Some such exclusions and exceptions may even serve to legitimize or preserve existing acts, practices and policies that may be racially discriminatory.
18. Clauses 55 and 56 of the Bill are of particular concern. Clause 55 stipulates that the legislation will not affect any immigration legislation

or its application as regards a person not having the right to enter and remain in Hong Kong. Clause 56 seeks to except acts done for the purpose of complying with a requirement of an existing statutory provision from being rendered unlawful by operation of the enacted legislation.

Possible Action by the Committee

19. The HKBA calls for prompt action by the Committee, including an assessment of whether the Bill conforms with the Convention and recommendations that the Bill should be appropriately revised so as to ensure compliance with the Convention and the Committee's recommendations.
20. Under the HKSAR's constitutional system, the HKSAR Government has an unfettered power to propose amendments to a bill, whereas individual members of the Legislative Council require the consent of the Chief Executive (the head of the HKSAR Government) before they may propose an amendment to a bill having an effect on public revenue. Proposing a revision of the Bill to cover more acts of the HKSAR Government would have such an effect. Further, there is a possibility that the legislative process may be complete before the next session of the Committee in July 2008. Thus, it is imperative that the Committee makes known its assessment on the Bill soonest possible.
21. The HKBA also requests the Committee to reiterate that the Follow-up Co-ordinator is available to meet the representatives of the HKSAR Government to discuss the implementation of the Committee's observations and recommendations.

Hong Kong Bar Association
15 February 2008