



For information on 23 Jan 2018

**Submission to the Legislative Council's Panel on Constitutional Affairs on
implementation and review of the
Administrative Guidelines on Promotion of Racial Equality**

1. The Constitutional and Mainland Affairs Bureau (CMAB) issued the Administrative Guidelines on Promotion of Racial Equality (“the Guidelines”) in 2010 with a view to “promot[ing] racial equality and ensure equal access to public services in the key areas concerned, and to take this into account in the formulation, implementation and review of relevant policies and measures” (1.1). Twenty three Bureaux, Departments and other public authorities (collectively referred to as “relevant public authorities” hereafter) are covered by the Guidelines and they have put forward checklists listing measures adopted.
2. Measures listed out by respective public authorities are at best **remedial and piecemeal**. Almost all the relevant public authorities mention providing interpretation services and leaflets in multiple ethnic minority languages, but shy away from acting on the other imperative outlined in the Guidelines – “adopt[ing] the good practice of considering the promotion of racial equality as an integral dimension in the formulation, implementation and review of relevant policies and measures” (1.4). Therefore, equal access to public services is just one of the guiding principles on promoting racial equality. More importantly, relevant public authorities should take steps to eliminate racial discrimination arising from policies and measures.
3. Case in point: the Mother Tongue Policy, implemented in 1998, systematically put ethnic minority students at a disadvantage due to the fact that most of them do not speak Chinese as a mother tongue. The Education Bureau (EDB) has not systematically addressed this issue up to this point and language is a race-related characteristic. Although the EDB implemented the Chinese as a Second Language Learning Framework (“the Framework”) in 2014, the formulation is based on the Chinese Language Curriculum Guide with the perspective for learners with Chinese as mother tongue and the implementation reflects a lack of genuine understanding of the struggles experienced by ethnic minority students under the current education system nor is the EDB responding to stakeholders’ demand for a Chinese Language Curriculum for second language learners; moreover, no systematic measures have been undertaken to address students’ learning in other subjects that also use Chinese as the medium of instruction. Subsequent policies such as “using Putonghua as the medium of instruction for teaching the Chinese Language Subject”, first implemented in the 2008-2009 school year, and the recent move to make Chinese History a compulsory subject for all junior secondary students both betray a lack of concern for the learning needs of ethnic minorities. When one bureau has so colossally overlooked ethnic minorities’ needs in policy formulation and review with no repercussions, and



relevant public authorities have largely limited themselves to piecemeal remedial measures, it does not give one confidence regarding the implementation of the Guidelines.

4. There is **no reporting mechanism** in place under the Guidelines when ethnic minorities receive poorer services from relevant public authorities. A survey shows that under-utilization of interpretation service in several public authorities such as the Social Welfare Department, Department of Health and Housing Department. There were even incidences in which frontline staff members at hospitals or birth registrars are unaware that they are obligated to arrange interpretation service. Ethnic minority service users may register a complaint with the public authority providing the service, but their feedback may get buried or lost within the authority; since any intentional or unintentional non-compliance **does not result in any consequences** such as punishment or reputation lost for the authority, the Guidelines can hardly generate any culture or attitude change in public authorities. As such, consideration for ethnic minorities' needs will remain an afterthought instead of an integral process in the policy-making procedure.
5. One main reason for public authorities's lack of ambition and commitment is that the Guidelines impose **little to no accountability** on them. On the one hand, the CMAB is said to be responsible for "monitoring implementation of the Guidelines, collecting relevant information and publicising such information to the public" (1.7). On the other hand, the CMAB leaves the implementation of the Guidelines and development of measures to the discretion of the individual public authority. The CMAB should be the bureau to implement the Guidelines, ensure compliance, and penalize non-compliance if a public authority under-delivers its measures. No data or review reports can be found on CMAB website or the websites of the relevant public authorities on their performance to promote racial equality or eliminate racial discrimination. The Guidelines essentially function on an honour system and fail to hold any public authorities accountable.
6. A key flaw of the Guidelines is that they rely heavily on the false assumption that the existing legal framework such as the HKBORO, Basic Law and RDO is enough to ensure compliance. The Guidelines claim that since the Basic Law and HKBORO prohibit all forms of discrimination, an act of racial discrimination by a public authority that contravenes the law may be "challenged in court" (3.2). While this may be true in principle, the heavy legal cost implied in seeking judicial review on Government's actions using the HKBORO and/or the Basic Law deters individuals from filing a claim. The Guidelines also rely on the claim that the RDO prohibits discrimination and therefore it will be a force of deterrence against discrimination. However, it is no secret that Government powers and functions are **not** covered under the RDO. Although the RDO provides that it is unlawful to "discriminate on the ground of race in specified areas, including employment, education, provision of goods, facilities, services and premises" (3.3), in the judgement of *Singh Arjun v. the Secretary for Justice* handed down in 2016, the only RDO court case since its enactment in 2009, shows that section 3 of the RDO does not bind Government powers



and functions; and section 27 of the RDO concerning provision of services is not always applicable in terms of Government acts. In other words, whether government acts are covered under the RDO may be debatable and subjected to court decision. Another example is that the *de facto* segregation phenomenon still exists in former “designated schools” which clearly contravenes the RDO, the Basic Law and HKBORO. Parents and students alike voiced out against the adverse effects these schools have on students’ Chinese learning and social integration year after year, yet the EDB has not taken any proactive measures in desegregating these schools. The Government faces no legal or financial repercussions under the current legal framework; and a complaint of such a nature may not even be entertained by the Equal Opportunities Commission (EOC), an organization limited in its powers and even more limited in its vision. The Guidelines are effectively making no promise at all that anything must be accomplished on any authority.

7. The Guidelines being **not legally binding** is the main reason for its ineffectiveness. Since the Government operates under a strong compliance-based culture, **statutory duty** is indispensable in achieving racial equality. Implementing statutory duty will require the amending of the RDO. At the same time, EOC work should be reviewed and EOC power should be stepped up for RDO to be effectively implemented. The CMAB should **amend the RDO immediately to cover government powers and functions in its purviews and include a public sector equality duty**, before abolishing the Guidelines.
8. The EOC has completed the Discrimination Law Review in 2016 and has a recommendation regarding making it a statutory duty for government to actively promote equality and eliminate discrimination when making policies:
 - Recommendation 23: introduce a public sector equality duty to promote equality and eliminate discrimination which applies to all the protected characteristics.¹
9. Equality duties can reinforce and support positive cultures and may instate obligations on public authorities with either passive or active resistance. Change of culture encourages equal treatment and respect for ethnic minorities in the long term within the government bodies, and also in the interaction between the government bodies and the general public. This cannot be achieved with the current compliance-only culture, which sees promoting

¹ The EOC goes on in the report, “A fundamental concern with Hong Kong’s current anti-discrimination legislation is its primary focus on individual redress for discrimination claims, rather than addressing systemic and institutional discrimination or inequalities, such as through a specific duty requiring the Government and public authorities to promote equality and eliminate discrimination in all their work... there is ample evidence of continuing systemic inequality in Hong Kong for multiple groups, including ethnic minorities, persons with disabilities, and women. Further, international human rights obligations require jurisdictions to take proactive steps to achieve substantive equality for disadvantaged groups. In some comparable jurisdictions such as Great Britain, such specific duties to promote equality and eliminate discrimination have been introduced in their anti-discrimination legislation.”



equality as a burden, rather than as a legal right for ethnic minorities. The notion of a public sector equality duty was first put forward in the Legislative Council by the Bills Committee around 2008 during the debate over the Race Discrimination Bill. The Administration was of the view that “drawing up a Race Equality Scheme would involve significant resource and manpower requirements, and the means for achieving this and the implications of the mechanism involved would need to be carefully examined”². As a counter proposal, the Guidelines were drafted. Since the Guidelines has proven to be ineffective, the Government should reconsider the EOC’s recommendation and revisit the need for a public sector equality duty. Hong Kong Government is rich in resources but lack political will and commitment to uphold racial equality. The excuse of significant resources and manpower requirements do not stand until the Government has made and publicised an actual estimation of policy and manpower cost for taking ethnic minority needs into consideration during the formulation of government policies and measures.

10. It is highly suggested that the relevant public authorities compare the cost of making an inclusive policy with the social cost of a racially non-inclusive policy – a policy at the expense of inequality in society and incurs cost of remedial measures. Take education as an example, the social cost of generations of ethnic minorities forced to live in poverty because of language skills and integration issues, and society deprived of the talents and skills of ethnic minority youth because of poor education policies is simply too great. A statutory duty would not have allowed this situation to persist.
11. Ethnic minorities are in need of strong intervention from the Government to combat institutionalized discrimination. The Government has obligations under domestic and international law (e.g. ICERD, ICCPR) to enact statutory duty. Statutory duty is not resource intensive, and will not lead to trifle litigations. This will encourage public authorities to make impact assessment prior to policy decisions to see if there are negative impacts, and detect covert discrimination in the system. In the long run, the public sector equality duty will result in change of culture within public authorities since the legal obligation set up expectation for leaders in government bodies to proactively promote equality, and nurtures a right-centered mindset.

⌘ With research support from our intern Mr. Edward Ye

² LC Paper No. CB(2)2064/08-09(02). <http://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0707cb2-2064-2-e.pdf> (Accessed 16 Jan 2018)