Antidiscrimination Protections for Mainland Chinese Migrants in Hong Kong: An Overseas Legal Perspective
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1. Foreword

There are discussions on the discrimination against migrants and travelers from Mainland China in Hong Kong over the past several years. While the United Nations recommended the Hong Kong Government to take steps to eliminate all forms of discrimination, the Government’s position is that the Race Discrimination Ordinance (RDO) does not apply to Mainland migrants and travelers, related discrimination, if any, is social rather than racial in nature. Some commentators have challenged this position on whether discrimination against Mainland migrants and travelers is prohibited under the existing RDO, but no court cases have definitively resolved this interpretive question.

Hong Kong has taken big steps towards a progressive society, various policy measures are in place to eradicate discrimination in community, schools and workplace; yet, it is difficult, if not at all impossible, to build consensus among diverse views of stakeholders, including Hongkongers and the Government. International observers comment that racial discrimination is still prevalent in Hong Kong and challenge how much progress to fight discrimination has truly been made. The article adopts a comparative law approach to analyse existing antidiscrimination protections in Hong Kong and discusses in parallel what could be drawn to the legal treatments of subnational / regional discrimination in other jurisdictions, including, among others, Canada, the United Kingdom, the United States, South Korea, and the European Union. We are very grateful to have the writer of this article, currently studying at Harvard Law School, to have served as one of the Centre's interns. As with other Occasional Papers produced by our interns, the views and opinions expressed here are those of the Author.

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2. Introduction

Discrimination against migrants from Mainland China (Mainland migrants) is a well-documented phenomenon\(^1\) in Hong Kong — one that may be rooted in historical political developments in Mainland China and Hong Kong, cultural and socioeconomic differences between Mainland migrants and Hong Kong locals, periods of significant Mainland Chinese migration, and competition for Hong Kong’s public benefits.\(^2\) Whatever the cause, discrimination against Mainland migrants persists, and the United Nations has urged Hong Kong to rectify the situation or risk violating its international human rights obligations.\(^3\) This paper employs a comparative law approach — taking guidance from laws and judicial decisions in overseas jurisdictions — to analyze existing antidiscrimination protections in Hong Kong and to suggest ways in which such protections can be interpreted or amended to address discrimination against Mainland migrants.

Hong Kong’s racial discrimination law, the Race Discrimination Ordinance (RDO), does not expressly prohibit discrimination against Mainland migrants.\(^4\) Even though the Hong Kong government’s (the Government’s) concerns regarding anti-Mainland discrimination played a key role in the genesis of the RDO, the Government has since taken the position that the RDO’s protections do not apply to Mainland migrants.\(^5\) The Equal Opportunities Commission (EOC), the agency charged with enforcing the RDO, recently undertook a comprehensive review of Hong Kong’s antidiscrimination laws and recommended that the Government introduce protections from discrimination on grounds of residency status in the RDO which would include migrants from Mainland China.\(^6\) Furthermore, the EOC has contended that some forms of anti-Mainland discrimination may already be prohibited by the RDO.\(^7\) Despite the public positions articulated by the Government and the EOC, Hong Kong courts have yet to hear any cases regarding the RDO’s applicability to Mainland migrants.

International precedent, which favors a flexible and context-sensitive interpretation of “race” and other prohibited grounds of discrimination, supports the proposition that the RDO’s existing provisions can be read to protect individuals from Mainland China.\(^8\) However, a comparative analysis of overseas laws suggests that the RDO should be amended to include a prohibited ground — such as region of origin (i.e., place of birth within the People’s Republic of China (PRC)), residency, or language — that specifically targets discrimination against Mainland migrants. Such an amendment would align with the approach taken by a number of jurisdictions that tailor the prohibited grounds covered by their antidiscrimination laws to address the unique forms of discrimination.

\(^1\) See infra Part 2.1
\(^2\) See id.
\(^3\) See infra notes 65–67 and accompanying text.
\(^5\) See infra notes 46–52.
\(^6\) See infra Part 2.4.
\(^7\) See id.
\(^8\) See infra Part 3.1.3.
discrimination resulting from their historical legacies. Furthermore, any public concerns regarding the impact of express protections for Mainland migrants on freedom of expression, access to public benefits, and business practices of the tourism industry can largely be addressed by existing exceptions in the RDO and the justification doctrine applicable to discriminatory government conduct. In the absence of legislative action, Hong Kong courts should defer to the EOC’s broad interpretation of the RDO’s provisions if and when a racial discrimination claim is brought by a Mainland migrant.

This paper proceeds in five Parts: Part 2 provides a historical overview of discrimination against Mainland migrants, and the enactment and impact of antidiscrimination legislation in Hong Kong. Part 2 also summarizes the EOC’s recent review of Hong Kong’s antidiscrimination laws. Part 3 uses a comparative law approach to determine whether the RDO’s current provisions can be interpreted to protect Mainland migrants, and suggests a number of potential amendments to the statute to expressly prohibit discrimination against Mainland migrants and to broaden the scope of conduct covered by the statute. Part 4 addresses the most prevalent public concerns regarding the inclusion of express protections for Mainland migrants in the RDO, including the resultant impact on freedom of speech, access to public benefits, and the business practices of the tourism industry. Part 5 analyzes the role of the EOC and courts in enforcing the RDO’s protections. Part 6 concludes.

3. Historical Overview

3.1 Discrimination against Individuals of Mainland Chinese Origin in Hong Kong

Scholars have traced the emergence of “a uniquely localized Hong Kong culture and identity” to the self-isolation of Mainland China during the Cultural Revolution in the 1960–70s and the coincident coming of age of Hong Kong’s homegrown generation — a generation that was influenced by both traditional Chinese values and Western political philosophy from British colonial rule. Discrimination against Mainland migrants first became a significant issue in the 1980s, when a “new social ethos” developed that centered on discrimination toward the significant number of mostly illegal Mainland Chinese immigrants who found their way into Hong Kong when the PRC briefly relaxed its border controls. The newly arrived Mainland migrants were

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9 See infra Part 3.2.1.
10 For the purposes of this paper, Mainland China means the territory of the People’s Republic of China, excluding the special administrative regions of Hong Kong and Macau.
12 Siu, supra note 11.
seen as poor, rural outsiders with a different “cultural orientation” and “social status” than Hong Kong locals.13

Discrimination against individuals of Mainland origin in Hong Kong was exacerbated in the 1990s by the growth of the Mainland migrant population and the increased number of Mainland visitors. The handover of Hong Kong from the United Kingdom to the PRC caused a second wave of immigration from the Mainland and a dramatic increase in the number of Mainland Chinese people arriving in Hong Kong for tourism and education.14 A report to the United Nations by the Hong Kong Human Rights Commission (HKHRC) in 199715 indicated that new Mainland migrants faced discrimination by the Government in access to public goods such as education,16 housing,17 and social security.18 Surveys in the late 1990s also revealed widespread discrimination against Mainland migrants by Hong Kong locals, some of whom perceived Mainland migrants to be “impolite, filthy and under-educated,” and characterized them as “impoverished spongers coming [to Hong Kong] primarily for welfare handouts.”19 New Mainland arrivals reported being denied services by store owners, suffering from harassment by the police, receiving lower wages than Hong Kong locals for similar work, and facing rejection from employment opportunities because of their Mainland origin.20

Discrimination against Mainland migrants continues to be an issue in Hong Kong. A 2013 Government-sponsored study surveying 13,400 recent arrivals from the Mainland revealed that over half of adult respondents reported experiencing discrimination in their daily lives.21 The discrimination reportedly came not just from Hong Kong locals, but also from Mainland immigrants who had migrated to Hong Kong earlier.22 The study highlighted the particularly serious nature of employment discrimination: Mainland migrants often found their “educational qualifications, skills, and experience” discounted by employers because of their Mainland origin.23

13 Id.
16 See id. (noting that Mainland immigrant children were rejected from local schools despite vacancies).
17 See id. (noting that poor Mainland immigrant families were excluded from public housing because of a 7-year residency requirement).
18 See id. (noting that Mainland immigrants in need of financial assistance could not receive social security payments because of a one-year residency requirement).
20 Id.
22 Id.
23 Id. at 59.
The study concluded that the discrimination experienced by new Mainland migrants has had a “profound negative impact on [their] educational, political, and cultural integration.”

Discrimination has also alienated students from Mainland China. A focus group–based study of Mainland university students studying in Hong Kong noted that such students were “highly aware of the discriminatory attitudes towards Mainland Chinese held by Hongkongers before their arrival.” These attitudes have exacerbated the social isolation of Mainland students from local Hong Kong students in campuses across Hong Kong, in some cases making Hong Kong feel “more foreign than a foreign country” to Mainland students. While Mainland students generally did not report overt discrimination taking place on campus, they did report experiencing such discrimination “when they needed to interact with Hongkongers, such as salespersons and small traders.”

More recently, discrimination against individuals from Mainland China may have been linked to Hong Kong locals’ discontent over Hong Kong’s political relationship with the PRC government. In particular, anti-Mainland sentiment may have been stoked in 2014 by the “Umbrella” or “Occupy Central” protest movement, which featured organized protests in which tens of thousands of demonstrators occupied the primary business district of Hong Kong and demanded that the PRC and Hong Kong governments allow universal suffrage for the 2017 Chief Executive elections. Tensions rose again in October 2016, when two successful pro-independence candidates for Hong Kong’s Legislative Council covered themselves in a banner proclaiming “Hong Kong is NOT

24 Id. at 97.
25 Yu & Zhang, supra note 14, at 308. The prevalence of discrimination perceived by Mainland migrants and visitors may have been amplified by prominent local media coverage of confrontations between Hong Kong locals and individuals from Mainland China. See, e.g., Kahon Chan, HK Faces Hurdles to Outlaw ‘Locust’ Bias, CHINA DAILY (Mar. 31, 2014) (describing a “netizen-organized gathering” of local Hong Kong residents to drive Mainland tourists — who were “verbally abused” and called “locusts” — out of a major shopping area in Tsim Sha Tsui); Lau Nai-keung, The Racism We Pretend Does Not Exist in Hong Kong, CHINA DAILY (June 9, 2015), http://www.chinadailyasia.com/opinion/2015-06/09/content_15274181.html (reporting that a group of Hong Kong locals stormed a primary school that offered admission to a Mainland boy who immigrated illegally to Hong Kong, plastering posters with the words “traitors” and “my classmate is an illegal immigrant” on school doors); Song Sio-Chong, EOC Recommendations Will Benefit Everyone in HK, CHINA DAILY (Oct. 21, 2014) (recounting a protest by “1,000 furious Hong Kong residents” after luxury retailer Dolce & Gabbana “permitted mainlanders, but not Hong Kong people to take photographs outside its store in Harbour City”).
26 Yu & Zhang, supra note 14, at 310–11.
27 Id. at 308.
China” and used a negative slur to refer to the PRC during their swearing-in ceremony.\textsuperscript{31} In both cases, commentators have linked the political backlash against the PRC government to “xenophobia and bigotry against mainlanders” in Hong Kong.\textsuperscript{32}

Regardless of whether anti-Mainland sentiment has social, cultural, or political origins, there is ample evidence that Mainland migrants and visitors continue to face various manifestations of discrimination in Hong Kong. This is a pressing concern, because Hong Kong has an international obligation to eliminate all forms of discrimination occurring within its borders, and the United Nations has repeatedly urged Hong Kong to rectify its failure to fulfill this obligation in the context of Mainland migrants.\textsuperscript{33} A resolution is made even more urgent by the projected increase in Mainland migration to Hong Kong: arrivals from Mainland China through Hong Kong’s One Way Permit system currently make up approximately 12% of Hong Kong’s population and will be the primary source of population growth in Hong Kong for the next several decades.\textsuperscript{34} Considering no resolution of the issues associated with Hong Kong’s political relationship with the PRC is on the horizon, the ebb and flow of anti-Mainland sentiment may exacerbate the discrimination faced by Hong Kong’s growing Mainland migrant population going forward.\textsuperscript{35}

3.2 Antidiscrimination Legislation in Hong Kong and the Birth of the Equal Opportunities Commission

Hong Kong ratified the International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{36} (ICERD) in 1969 via the British Government.\textsuperscript{37} However, it took over twenty years after the ICERD’s ratification for the Government to propose domestic antidiscrimination

\textsuperscript{32} E.g., Zhang, supra note 29.
\textsuperscript{34} LEGISLATIVE COUNCIL HOUSE COMM., PROGRESS ON IMPLEMENTATION OF THE RECOMMENDATIONS OF THE SUBCOMMITTEE TO STUDY ISSUES RELATING TO MAINLAND-HKSAR FAMILIES FORMED UNDER THE HOUSE COMMITTEE OF THE FOURTH LEGISLATIVE COUNCIL 1–2 (2015).
\textsuperscript{35} Furthermore, any amendment discussed in this paper that is designed to protect Mainland migrants from discrimination by Hong Kong locals would likely also protect Hong Kong locals from discrimination by Mainland migrants — a situation that may become salient as Mainland migrants comprise an increasingly larger proportion of the Hong Kong population. For example, discriminating against a Hong Kong local because of her inability to speak Mandarin, her status as a permanent Hong Kong resident (rather than a recent Mainland migrant), or her Hong Kong origin (rather than PRC origin) would be proscribed by an amendment to the RDO that prohibits discrimination on the grounds of language, residency, or region of origin, respectively.

\textsuperscript{37} H.K. HUMAN RTS. MONITOR, BACKGROUND ON ENACTING A RACIAL DISCRIMINATION LEGISLATION FOR HONG KONG 10 n.10 (2006).
In the face of mounting public support for the women’s movement and for the protection of the disabled, the Government introduced the Sex Discrimination Bill in October 1994 and the Disability Discrimination Bill in 1995. The non-employment provisions of the two laws came into force in September 1996; the employment provisions became effective in December 1996. The SDO also established the EOC, an agency charged with promoting equal opportunities and enforcing Hong Kong’s antidiscrimination laws, with a range of powers including providing legal assistance to victims and conciliating complaints of discrimination. Subsequently in 1997, the Government enacted the Family Status Discrimination Ordinance (FDSO), which prohibited discrimination on the basis of family responsibilities (for example, refusing to hire a mother of young children) and mirrored the structure and language of the Sex Discrimination Ordinance (SDO). Together, the SDO, the Disability Discrimination Ordinance (DDO), and the FDSO provided protections against discrimination on the basis of sex, marital status, pregnancy, disability, and family status.

While legal protections against racial discrimination were proposed during legislative debates regarding the SDO and DDO, amendments introducing such protections were ultimately defeated as legislators were convinced by the Government’s argument that Hong Kong should gain experience with the SDO and DDO before enacting other antidiscrimination protections. In early 1997, the Government published its first consultation paper on racial discrimination. The paper highlighted the difficulties faced by new Mainland migrants in Hong Kong and noted that “international bodies concerned with race-related issues consider that ‘racial discrimination’ includes discrimination against identifiable minorities with a particular culture, even those of the same ethnic stock as the host community.” However, a majority of the respondents to the 1997 consultation opposed racial discrimination legislation, and the Government thus decided to address racial discrimination “through civic education and publicity” rather than lawmaking.

The “civic education and publicity” approach taken by the Government following its 1997 consultation failed to sufficiently curb racial discrimination. In 2002, the Government surveyed a number of business associations and nongovernmental organizations, asking whether such groups

39 Id. at 331.
40 Id. at 333.
41 Id. at 331.
42 Id.
43 Id. at 334.
44 Id. at 332.
45 See PANEL ON HOME AFFAIRS, BACKGROUND BRIEF PREPARED BY LEGISLATIVE COUNCIL SECRETARIAT ON LEGISLATING AGAINST RACIAL DISCRIMINATION (2004) [hereinafter 2004 LEGCo BRIEF].
46 Id. at 3-4 (2004) (emphasis added); see also Albert Wong, A Good Step Forward but Still Much to Be Done, Say Lawmakers, S. CHINA MORNING POST (July 11, 2008).
47 2004 LEGCo BRIEF, supra note 45, at 4.
supported the enactment of race discrimination laws.48 Sixteen of the twenty-five business associations were broadly in favor of such laws, and all fifty-five of the nongovernmental organizations were in favor. 49 After public opinion decidedly shifted in favor of racial discrimination legislation, 50 the Government finally acknowledged the need for a race discrimination bill in a consultation paper published in 2004. 51 However, by the time the 2004 consultation paper was published, the Government had taken a new stance on Mainland migrants:

Although new arrivals (and others) from the Mainland do sometimes face discrimination by Hong Kong’s Chinese majority, almost all of them are of the same ethnic stock as local Chinese (i.e., Han Chinese). The discrimination experienced by new arrivals from the Mainland is not based on race. Rather, it is a form of social discrimination and therefore outside the intended scope of the Bill. 52

In late 2006, the Government introduced the Race Discrimination Bill to the Legislative Council. 53 The Bill was modelled on Hong Kong’s then-existing antidiscrimination laws — the SDO, the DDO, and the FDSO — as well as antidiscrimination laws from other common law jurisdictions, including the U.K. and Australia. 54 Various stakeholders objected to the bill. Many interested parties expressed concern regarding the bill’s narrow definition of “race” and exclusion of acts done on the grounds of residency and immigrant status from the Bill’s protections — features that (perhaps intentionally) prevented the law from protecting Mainland migrants. 55 There appears to have been a partisan divide in the Legislative Council on the issue of extending racial discrimination protections to Mainland migrants: the Democratic Party and the Civic Party advocated for the expansion of the definition of “race” to include new Mainland arrivals, whereas the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB) and the Liberal Party opposed the extension of the Bill’s protections to new Mainland arrivals. 56

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49 Id.

50 See id. at 5–6. The government’s summary of local demand for race discrimination legislation focused on the increased number of complaints by ethnic minorities and — unlike the 1997 consultation paper — did not mention the discrimination against Mainland migrants as a factor supporting the need for such legislation. Compare text accompanying note 46, with 2004 Consultation Paper, supra note 48, at 5–6.

51 2004 Consultation Paper, supra note 48, at 8.

52 Id. (emphasis added); see also Wong, supra note 46.

53 Wong, supra note 46.

54 Id.; H.K. Bar Assoc., Race Discrimination Bill: Submission of the Hong Kong Bar Association 1 (2007) [hereinafter HKBA Submission]; Interview with Alfred Chan, Chairperson, Equal Opportunities Comm’n & Peter Charles Reading, Legal Counsel, Equal Opportunities Comm’n [hereinafter EOC Interview] (Jan. 11, 2017).


Another prominent concern — particularly among nongovernmental organizations — was the Bill’s inapplicability to government acts that were not “of a kind similar to an act done by a private person.” Ultimately, the Bill was amended to include a clause providing that “[the] ordinance binds the Government.” However, critics of the Bill noted that many government functions, such as immigration and law enforcement, would nonetheless be exempt from the bill.

Stakeholders also objected to the Bill’s language exception, which excluded from the law’s prohibitions “the use of or the failure to use any language” in education, employment, the provision of goods and services, and other areas. Commentators noted that language barriers can have a “disproportionate impact on certain racial groups,” and that the Bill’s language exemption thus threatened to allow some forms of unjustifiable discrimination.

The RDO was enacted in October 2008 and became effective on July 10, 2009. The RDO did not incorporate the suggested amendments to explicitly extend protections to Mainland migrants and only partially removed the language exceptions. In June 2009, four nongovernmental organizations submitted comments to the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee) regarding Hong Kong’s compliance with ICERD. The comments reiterated concerns regarding the RDO’s exclusion of Mainland migrants and the RDO’s failure to cover government acts outside of education, employment, and the provision of goods and services.

In a report issued in September 2009, the CERD Committee concluded that the RDO’s definition of racial discrimination was “not . . . consistent with article 1 of the Convention” because, inter alia, it did not “include immigration status and nationality among the prohibited grounds of discrimination.” The CERD Committee urged the Government to rectify its failure to comply with ICERD by including the aforementioned prohibited grounds in the RDO.

In 2014, another UN body, the Committee on Economic Social and Cultural Rights (ICESCR Committee), squarely addressed the issue of Mainland migrants, urging Hong Kong “to eliminate the widespread

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57 See, e.g., LOPER, supra note 55, at 4–5; Albert Wong, Last-Ditch Bid on Anti-Racism Bill, S. CHINA MORNING POST (June 30, 2008).
59 See Wong, supra note 58.
60 See, e.g., LOPER, supra note 55, at 9–10; CIVIC PARTY, supra note 55, at 3.
61 LOPER, supra note 55, at 9.
63 H.K. HUMAN RTS, COMM’N ET AL., COMMENTS ON THE HONG KONG SPECIAL ADMINISTRATIVE REGION REPORT UNDER THE INTERNATIONAL CONVENTION ON ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2009)
64 See id. at 3–9.
66 Id.
discriminatory practices against migrants and internal migrants from other parts of China.” To date, the Government has not taken any steps to implement either of the UN’s recommendations.

3.3 The Legal Impact of the Race Discrimination Ordinance

Actions arising under the discrimination ordinances are brought in the District Court of Hong Kong. Since 1998, there have been fifty-one claims in the District Court concerning the four antidiscrimination ordinances. However, there is a noticeable scarcity of race discrimination cases: there have only been three judgments (including rulings on motions to dismiss) related to racial discrimination, and only a single decision on the merits.

The sole District Court merits decision concerning racial discrimination, Singh v. Secretary for Justice, involved allegations of discriminatory conduct on the part of Hong Kong police officers, who arrested the plaintiff — an eleven year-old Indian boy — after he was involved in an altercation with a Chinese woman outside the Wanchai MTR station. The plaintiff alleged that the police violated section 27 of the RDO, which prohibits racial discrimination in the “provision of goods, facilities or services,” by engaging in racial profiling, arresting the plaintiff because of his race, failing to assist the plaintiff after he reported the altercation, and forcing the plaintiff to make his police statement in Punjabi when he spoke English. The District Court ruled against the plaintiff, rejecting the plaintiff’s allegation of racial profiling and holding that the police officer’s arrest and detention of the plaintiff were not “services” under section 27 of the RDO. The EOC participated as amicus curiae, making independent submissions on the scope of protections under the RDO relating to services.

There have not been any reported cases analyzing the definition of “race” under the RDO, nor any cases filed by Mainland migrants alleging racial discrimination.

3.4 The Discrimination Law Review

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67 Comm. on Econ., Soc. & Cultural Rights, supra note 33, at 2.
70 Id.
72 Id. at 5–6. Both the plaintiff and the Chinese woman reported the altercation to the police. Id. at 6.
75 Id. at 175, 178. However, the court deemed the police’s investigation of the altercation to be a “service” under section 267 the RDO because it was “helpful and beneficial” to the plaintiff — a victim of a crime — for the police to investigate his complaint. Id. at 178–79. But the court found insufficient evidence that the police refused to provide such services to the plaintiff in violation of section 27. Id. at 185–86.
Recognizing the “gaps” in Hong Kong’s current antidiscrimination laws and the United Nations’ calls for Hong Kong to fill these gaps, the EOC launched the Discrimination Law Review (DLR) — the first comprehensive review of all four antidiscrimination ordinances — in March 2013. After preliminary meetings with stakeholders, the EOC announced a three-month long public consultation on the DLR in July 2014. Then—Chief Legal Counsel of the EOC, Herman Poon, noted that, as part of the DLR:

[The EOC] would like to know whether members of the public think the law should protect people from discrimination because of nationality, citizenship, Hong Kong residency or related status, which the existing Race Discrimination Ordinance does not cover. This new proposal could hopefully provide better legal protection to new immigrants and tourists against discrimination.

The consultation period concluded in November 2014. The EOC noted that it had received over 100,000 submissions and would “carefully analyze the opinions received with a view to submitting a detailed report with recommendations to the Government, by the second half of 2015.” However, because of the volume of responses, it ultimately took the EOC until March 2016 to finish drafting its report with recommendations to the Government.

The EOC’s March 2016 submission to the Government detailed seventy-three recommendations regarding reforms to Hong Kong’s antidiscrimination laws. The EOC also published a report summarizing the responses it received during its public consultation. The EOC noted that the topic of protections from discrimination on the grounds of nationality, citizenship, and residency

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81 Id.
82 Id. at 91–129.
83 EQUAL OPPORTUNITIES COMM’N, DISCRIMINATION LAW REVIEW: SUBMISSIONS TO THE GOVERNMENT [hereinafter SUBMISSIONS TO THE GOVERNMENT] (2016); see also id.
84 EQUAL OPPORTUNITIES COMM’N, DISCRIMINATION LAW REVIEW: REPORT ON RESPONSES TO THE PUBLIC CONSULTATION [hereinafter REPORT ON RESPONSES] (2016).
status “received some of the highest numbers of consultation responses, as well as media attention,” particularly relating to the impact of such protections on Mainland Chinese people.\(^85\) In fact, many of the respondents to consultation questions related to the introduction of protections for Mainland Chinese people “also responded to other questions they perceived were linked to mainland Chinese, even if that was not the intended focus of the question.”\(^86\) The EOC’s data showed that 58% of the seventy-three organizations surveyed (including NGOs, religious groups, employer groups, and other organizations) favored the introduction of racial-discrimination protections based on nationality, citizenship, residency, or related status, whereas 97% of the 59,704 individual respondents opposed such protections.\(^87\)

The EOC’s report also noted that some instances of discrimination against Mainland migrants may already be prohibited by the RDO — in particular, cases of “intraracial discrimination,” whereby “a person treats someone of their own race less favorably than a person of another race.”\(^88\) Nevertheless, recognizing the evidence of discrimination against Mainland migrants in Hong Kong and the fact that residency status was not a protected characteristic, the EOC also recommended that the RDO be amended to expressly prohibit discrimination on grounds of residency status.\(^89\) However, because of the significant public focus on the extension of protections to Mainland migrants, and the divergence of stakeholder views surrounding the subject, the EOC ultimately recommended that:

the Government conduct a public consultation and then introduce protection from discrimination on grounds of residency status in Hong Kong under the Race Discrimination Ordinance. The consultation should consider all relevant issues including the possible scope of protections, whether existing exceptions regarding residency status should be repealed or amended, and whether any other specific exceptions may be appropriate.\(^90\)

As of March 2017, the Government indicated to the Legislative Council that it intended to implement 9 of the recommendations made by the EOC. However, none of those relate to the recommendations on providing protection from discrimination on grounds of nationality, citizenship or residency status.\(^91\)

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\(^85\) Submission to the Government, supra note 83, at 92.
\(^86\) Id. at 13 (noting, for example, that two-thirds of responses to a question regarding racial-discrimination protection from the exercise of government functions and powers “expressed the view that if the discrimination law applied to all public authorities, it would mean mainland immigrants and persons from Hong Kong would have to be treated equally, that new immigrants from the mainland would have the same civil rights as Hong Kong permanent residents, and would be able to become civil servants”).
\(^87\) Report on Responses, supra note 84, at 46–48.
\(^88\) Submission to the Government, supra note 83, at 105; see infra Part 3.1.4.
\(^89\) Submission to the Government, supra note 83, at 111.
\(^90\) Id.
4. Comparative Analysis of Hong Kong’s Race Discrimination Laws

In its DLR submission to the Government, the EOC concluded that the RDO may already protect Mainland migrants from some forms of discrimination, but also that, notwithstanding this potential interpretation, the Government should amend the RDO to include an explicit prohibition against discrimination on grounds of residency status. Drawing from antidiscrimination case law and statutes in other jurisdictions, this Part evaluates both of the EOC’s conclusions. In particular, it traces the history of the statutory provisions defining “race” and other protective grounds in the RDO, and concludes that the existing prohibited grounds may be interpreted flexibly and in context to encompass discrimination against Mainland migrants. However, because alternate interpretations are possible, particularly in light of the Government’s stated position that the RDO does not apply to Mainland migrants, this Part contends that the Government should amend the RDO to include a new prohibited ground that expressly covers discrimination against Mainland migrants. Finally, this Part argues that the scope of conduct covered by the RDO should be expanded to match that of Hong Kong’s other antidiscrimination ordinances, including the SDO.

4.1 Race as a Protected Ground

4.1.1 Race Discrimination Ordinance Definition of Race
Section 4 of the RDO prohibits discrimination “on the ground of race.” “Race” is defined in section 8 as the “race, colour, descent or national or ethnic origin of the person” — a definition that mirrors the language from the ICERD. However, section 8 also contains express exclusions from the definition of “race”: race does not include, inter alia, Hong Kong permanent resident status, right of abode, length of residence, or “the nationality, citizenship or resident status of [a] person . . . under the law of any country or place.” Commentators have speculated that the exclusions in section 8 were meant to “ensure that mainland Chinese immigrants cannot make claims of discrimination based on their immigration status.”


92 SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 105.
94 Id. § 8(1)(a).
95 ICERD, supra note 36.
96 Race Discrimination Ordinance § 8(3)(b)(i).
97 Id. § 8(3)(b)(ii).
98 Id. § 8(3)(c).
99 Id. § 8(3)(d).
100 LOPER supra note 55, at 8 (suggesting that clause 8 of the Bill — which exempts acts done on the ground of nationality, citizenship, and immigration and residency status from the law’s prohibitions — may have been an attempt by the government to “ensure that mainland Chinese immigrants cannot make claims of discrimination based on their immigration status”).
The Government itself has taken the position that new arrivals from Mainland China are of the same “ethnic stock” as Hong Kong locals, and any discrimination against new arrivals is social rather than racial in nature. It appears that this view of discrimination against new Mainland arrivals can be traced to the deliberations of the Legislative Council Bills Committee charged with scrutinizing the RDO’s provisions in 2008. Then, Democratic Party legislators argued that it was “not necessary to adhere to the narrow definition of ‘race’ of ICERD and its meaning should be expanded to include specifically new arrivals from the Mainland in order to address the prevalent problem of discrimination encountered by them.” However, members of DAB and the Liberal Party expressed the view that discrimination experienced by “new arrivals from the Mainland is not a form of racial discrimination but is, rather, linked to their social class.” Instead of dealing with discrimination against new Mainland arrivals through legislative means, DAB and Liberal Party legislators advocated for the “increase[d] allocation of resources to enhance work in eliminating such discrimination and facilitating these new arrivals’ integration in Hong Kong.”

The Government shared the view of the DAB and Liberal Party, arguing that “new arrivals do not, as a group, constitute a distinct ethnic or racial group when measured against the definition of ‘race’ under ICERD and the criteria set out in the Lord Fraser’s test.” However, the Government noted that “whether a person — be him or her a new arrival or otherwise — has suffered discrimination on the ground of race will be a matter of fact for the Court to decide.” The Bills Committee eventually moved to amend the RDO to remove the exclusions in section 8 for residency and right of abode, thereby allowing courts to “apply the existing case law to decide whether any discrimination against new arrivals from the Mainland would constitute racial discrimination under the law.” However, the Bills Committee’s amendments failed and the RDO was enacted with the section 8 exclusions intact.

4.1.2 Exclusions from the Definition of Race

It is widely recognized that race and ethnicity are “largely socially-constructed creations” that are “at most only stereotypically associated with particular phenotypical characteristics, which are themselves mutable and . . . of no more intrinsic moral value than the color of one’s eye.” Not surprisingly, there are multiple approaches to racial classification. Racial identities can be “self-reported,” meaning that they can be assigned by individuals to themselves based on the group that

101 2004 CONSULTATION PAPER, supra note 48, at 8.
103 Id. at 13.
104 Id.
105 Id.
106 Id. at 15.
107 Id.
108 Id.
such individuals most closely identify with or otherwise feel a part of. Racial identities can also be “other-ascribed,” meaning that a “designated decision-making third party” can assign individuals into a particular group according to either (a) the determinations by other members of that group whether the individual belongs to the group, or (b) determinations by nonmembers of that group. Because the definition and boundaries of “race” can be blurry, scholars have argued that legal protections based on race should be interpreted broadly.

The fact that the RDO defines “race” as race plus a number of other categories implies an acknowledgment of the fluid nature of the term. Yet, the RDO is unusual in its attempt to narrow the definition of race through express exclusions. No negative definitions of race can be found in the antidiscrimination statutes of many other Commonwealth jurisdictions, including the U.K., Australia, New Zealand, and Canada. Aside from the motive of expressly excluding Mainland migrants from the RDO’s protections, another potential explanation for the unusual exclusions in the RDO may lie in the fact that section 4(2) of the RDO includes a justification defense — a defense that immunizes from liability a “requirement or condition” that “serves a legitimate objective and bears a rational and proportionate connection to the objective” — for indirect discrimination (i.e., conduct that is facially neutral but has a discriminatory impact) but not for direct discrimination (i.e., facially discriminatory conduct).

Regardless of their underlying purpose, a consequence of the broad exclusions in the RDO is that they may exempt conduct that functionally amounts to the type of discrimination that the RDO is meant to proscribe. For example, a shopkeeper refusing to serve holders of Pakistani passports may technically be discriminating on the ground of nationality, which is exempt from the RDO’s proscriptions under section 8, but such conduct arguably uses nationality as a proxy for the prohibited grounds of race or ethnicity. Furthermore, the broad exclusions in the RDO are also redundant when it comes to immunizing bona fide conduct with incidental discriminatory impact because the justification exception already serves to exempt such conduct from liability.

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110 Id. at 1239.
111 Id.
114 Racial Discrimination Act 1975 (Cth) (Austl.).
115 Human Rights Act 1933, s 21 (N.Z.).
118 Interview with Kelley Loper, Associate Professor, Univ. of H.K. Faculty of Law (Jan. 13, 2017).
119 Id.
120 See Loper, supra note 112, at 28; text accompanying note 117.
Conversely, the exclusions do not prevent a court from reading “race” to apply to Mainland migrants in a way that eschews any nexus to residency, nationality, or citizenship. Therefore, the redundant and overbroad exclusions from the definition of race in section 8 should be repealed.

4.1.3 Standalone Judicial Interpretation of Race and Other Grounds Covered by the Race Discrimination Ordinance

Since the enactment of the RDO, the Government has consistently asserted its position that intraracial discrimination between Hong Kong Chinese and Mainland Chinese is not racial discrimination. However, no courts have had the opportunity to interpret the RDO to test the Government’s position. There are a number of reasons why courts may disagree with the Government, should an appropriate case arise. First, international precedent counsels against a narrow construal of “race” and “national origin” and instead supports a flexible approach to interpreting these terms. In the U.K. case *BBC Scotland v. Souster*, a Scottish court determined that an English broadcaster could maintain an action against a Scottish television station who allegedly fired the broadcaster because he was English. The court found that English origin qualified as “national origin,” which was expressly included in the definition of “racial grounds.” Notably, the court held that:

The real test [for national origin] is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.

The court in *Souster* thus adopted a flexible definition of national origin, focusing on both the self-reported and other-ascribed racial identity of the alleged victim. The facts of *Souster* can be distinguished from the facts relating to anti-Mainland discrimination in Hong Kong because in *Souster* the Scottish court’s interpretation of “national origin” depended on the fact that England and Scotland were once separate nations. Nonetheless, the court’s broad and flexible approach to interpretation — an approach that considered the historical context of the relationship between Scottish and English people as well as their self-reported racial identities — may be instructive to Hong Kong courts.

Similarly, in the U.K. case *Mandla v. Dowell-Lee*, Lord Fraser interpreted “ethnic group” under the 1976 Race Relations Act to mean a group that “regard[s] itself, and [is] regarded by others, as

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121 See infra Part 3.1.3.
122 Cf. SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 105 (noting that “the extent to which the RDO applies to situation of intra-race discrimination is a matter for the courts to determine, and to date there has not been a definitive determination on the issue”).
124 Id. at 458.
125 Id. at 464 (quoting King-Ansell v. Police [1979] 2 NZLR 531, 542) (emphasis added).
126 Id. at 462.
a distinct community by virtue of certain characteristics.” 128 Lord Fraser listed the two characteristics that he deemed essential to an ethnic group: “(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;” and “(2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.” 129 Lord Fraser also considered five other characteristics “relevant” to determining whether an ethnic group exists:

(3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups. 130

In formulating his test, Lord Fraser eschewed rigid formalities — such as “distinctive biological characteristics” — in favor of a “relatively wide[]” interpretation of the term “ethnic,” taking into account cultural and historical factors. 131 In the context of Hong Kong, Mainland migrants arguably share a common history as former residents of Mainland China, maintain unique “cultural traditions,” 132 have the same geographical origin (Mainland China); speak a common language (generally Mandarin); and represent a distinct minority group within Hong Kong. 133 Therefore, it is certainly plausible that a court applying the Mandla factors could reach the conclusion that “ethnic origin” — which is included in the definition of race in the RDO — encompasses Mainland migrants. 134

Other jurisdictions have also erred on the side of inclusivity when defining race, ethnic origin, and national origin. Like the U.K. court in Mandla, New Zealand courts have broadly interpreted “ethnic origin” to encompass groups “marked off from the generality of [its] society by shared

128 Id. at 562.
129 Id.
130 Id.
131 Id.
133 See Qiong Li & Ying-Yi Hong, Intergroup Perceptual Accuracy Predicts Real-Life Intergroup Interactions, 4 GROUP PROCESSES & INTERGROUP REL. 341, 344 (2001) (labelling Mainland Chinese recent arrivals as a minority group in Hong Kong).
134 Cf. Barry Sautman, Hong Kong as a Semi-Ethnocracy: “Race,” Migration and Citizenship in a Globalized Region, in AGNES S. KU & NGAI PUN, REMAKING CITIZENSHIP IN HONG KONG 103, 112 (2004) (noting that many Hong Kong locals view new Mainland migrants as “a notch lower on the [Hong Kong] ethnic hierarchy” (emphasis added)).
beliefs, customs and attitudes.”  

Antidiscrimination legislation in Northern Ireland defines “racial group” to include the Irish Traveller community, even though there is considerable debate as to whether Irish Travellers constitute a distinct race — under the conventional definition of that term — within Northern Ireland. The Northern Ireland statute also features a broad, flexible definition of Irish Traveller status, defining Travellers as a “community of people commonly . . . called [Irish Travellers] who are identified (both by themselves and by others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.” While “racial or ethnic origin” is not expressly defined in the European Union’s Race Directive, commentators have noted that the term should be interpreted broadly and that a “purposive interpretation which explores the social and historical context of racism” in each member state is favored over a “literal approach.” Finally, in the U.S., courts have adopted broader readings of the term “national origin” in Title VII of the Civil Rights Act of 1964, allowing discrimination claims based on national origin “[s]o long as plaintiffs can trace their origin to some subnational group that has been subject to discrimination,” including groups based on origin countries that are not sovereign nations.

In a similar vein, Hong Kong courts should also employ a flexible, context-sensitive approach to interpreting the terms race and national/ethnic origin. By doing so, they should find that Mainland migrants are a racial or national/ethnic-origin group based on their shared cultural characteristics, common history, and historical discrimination in Hong Kong, notwithstanding Hong Kong’s lack of sovereignty and the Government’s position that Mainland migrants are of the same “ethnic stock” as Hong Kong locals.

4.1.4 Intraracial Discrimination

Even if Hong Kong courts deem Hong Kong locals and Mainland migrants to be of the same race, they may nonetheless read the RDO’s provisions to protect Mainland migrants under the EOC’s theory of intraracial discrimination. Claims based on intraracial discrimination are cognizable in

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136 Race Relations (Northern Ireland) Order 1997 § 5.2(a).
142 Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 673 (9th Cir. 1988) (citing Roach v. Dresser Indus. Valve & Instrument Div., 494 F. Supp. 215, 218 (W.D. La. 1980)). Note, however, that U.S. courts have so far refused to extend Title VII’s protections to cover regional discrimination within the U.S. (for example, groups such as Appalachians or Southerners), thus “treating the United States as a homogenous place of origin.” Diaz, supra note 142, at 672; see also Bronson v. Bd. of Educ. of the City Sch. Dist. of Cincinnati, 550 F. Supp. 941, 959 (S.D. Ohio 1982) (refusing to extend protection from discrimination based on national origin to Appalachians).
the United States (U.S.). In *Saint Francis College v. Al-Khazraji*, the U.S. Supreme Court acknowledged that “racial classifications are for the most part sociopolitical, rather than biological in nature” and that “differences between individuals of the same race are often greater than the differences between the ‘average’ individuals of different races.” Citing *Saint Francis College*, the U.S. District Court for the Northern District of Indiana held in *Hansborough v. City of Elkhart Parks & Recreation Department* that claims based on intraracial discrimination are actionable under Title VII. In *Hansborough*, a black male employee sued his employer, claiming that his supervisors, who were also black, discriminated against him on the basis of his race when they fired him. Similarly, the EOC considers valid a racial discrimination claim under the RDO against “a shop . . . run by a Hong Kong Chinese person [that] refused to serve mainland Chinese people who were carrying suitcases, but did serve persons of other races who also carried suitcases.”

One issue that arises is the role of a comparator, and who is the appropriate comparator. Claims of direct discrimination generally require the identification of a comparator. For example, this may be “a person in the same or nearly the same circumstances as the claimant but of [a] different [race].” The court in *Hansborough* dismissed plaintiffs’ claims due to insufficient evidence of discriminatory conduct, and thus did not elaborate on who the alleged comparator was. It is therefore unclear whether the plaintiff would have been required to show that members of other races would have been treated more favorably by the plaintiff’s employer.

The RDO provisions on direct discrimination could arguably be interpreted as permitting comparisons not only of how a person was treated with persons of another race, but also the same race. Direct discrimination is as defined as:

“on the ground of the race of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons…”

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145. *Id.* at 610 n.4.
147. *Id.* at 201.
148. *Id.* at 200.
149. SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 105.
151. Section 4(1)(a) RDO.
There is no requirement for a comparison with persons of another race, in contrast to the indirect discrimination provisions. In other words, this could apply to situations where a Hong Kong shopkeeper served other Hong Kong locals, but not Mainland Chinese customers.

4.2 Introducing a New Protected Ground

If Hong Kong courts determine that Mainland migrants are not protected under the prohibited grounds currently included in the RDO, international precedent supports amending the RDO to include distinct grounds that would proscribe discrimination against Mainland migrants. There are several grounds — including region of origin, residency, and language — that would serve as potentially effective proxies for Mainland migrant status. Because none of the potential grounds are perfectly inclusive, the Government should carefully weigh the costs and benefits of each ground before selecting one for inclusion in the RDO.

4.2.1 International Approach to Protected Grounds

Generally, the prohibited grounds of discrimination in a particular jurisdiction are tailored based on the unique history of discrimination in that jurisdiction. For example, India’s constitution expressly prohibits discrimination based on caste — an attempt to remedy the socioeconomic effects of historical caste-based discrimination in Hindu society.\(^\text{152}\) India’s federal and state governments have also developed a system of remedial group preferences for “Scheduled Classes” (i.e., “untouchables”) — preferences based on the understanding that the formal equality guaranteed by the Indian constitution is not by itself sufficient to combat the legacy of caste-based discrimination.\(^\text{153}\) Also recognizing the need to address historical sources of discrimination, Quebec — a Canadian province with a unique history of English-French bilingualism\(^\text{154}\) — enacted antidiscrimination legislation that prohibits discrimination on the basis of language.\(^\text{155}\) And because of the immense historical impact of HIV/AIDS on the South African population and economy, South Africa’s Employment Equity Act prohibits discrimination based on HIV status.\(^\text{156}\)

European Union antidiscrimination directives contain a fixed and fairly narrow list of protected grounds (sex, sexual orientation, disability, age, religion or belief, and racial or ethnic origin), and

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\(^\text{152}\) India Const. art. XV; see also SANDRA FREDMAN, EUROPEAN COMM’N, COMPARATIVE STUDY OF ANTI-DISCRIMINATION AND EQUALITY LAWS OF THE US, CANADA, SOUTH AFRICA AND INDIA 19 (2012) [hereinafter COMPARATIVE STUDY].

\(^\text{153}\) See Ford, supra note 109, at 1267–68.


\(^\text{155}\) Quebec Charter of Human Rights and Freedoms, C-12, art. 10.

do not expressly define race or ethnic origin. However, the prohibited grounds in the national laws of individual European Union members often go beyond the minimum prescribed by European Union directives, and are generally tailored to address historically salient forms of discrimination in each member country. For example, Hungary’s antidiscrimination statute includes unique grounds such as “belonging to a national minority,” “mother tongue,” and “social origin,” as well as a catch-all ground that covers any “other situation, attribution or condition . . . of a person or group.” Bulgaria prohibits discrimination on the grounds of, inter alia, “nationality, origin, education, convictions, political allegiance, personal or public status, family status and property status and ‘any other grounds established by law, or international treaty the Republic of Bulgaria is party to.’” And, because of the historical marginalization of the Irish Traveller community throughout Ireland, the Republic of Ireland’s antidiscrimination law includes membership in the Traveller community as a prohibited ground of discrimination.

Following the same approach as the above-mentioned jurisdictions, any prohibited ground that is to be added to the RDO must account for Hong Kong’s unique political and social context, as well as the history of discrimination in Hong Kong society.

4.2.2 Region of Origin and the South Korean Analogy
South Korea’s antidiscrimination laws are an interesting example of how a jurisdiction can seek to curb subnational discrimination through legislation. South Korea’s National Human Rights Commission Act expressly includes “region of origin (referring to a place of birth, permanent domicile, principal area of residence before the full adult age, etc.)” and “state of origin” as prohibited grounds of discrimination. The express inclusion of region and state of origin as prohibited grounds may be explained by the history of “intense regional fractionalism” in Korea — a phenomenon that can be traced to the early 1960s, when President Chung-Hee Park’s rule marked the beginning of a thirty-six year “reign of [presidents] from the Gyung-sang Provinces.

157 See Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (EC); COMPARATIVE STUDY, supra note 152, at 78; see also supra note 140 and accompanying text.
159 Id. at 14 (citing Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities (Hung.)).
160 Id. at 16 n. 20 (citing Protection Against Discrimination Act (2004)).
162 Act No. 12500, Mar. 18, 2014 (S. Kor.).
163 Id. art. 2(3).
who favored their native southeastern regions at the expense of others, especially the [Jeolla] Provinces."  

Korean regionalism and discrimination faced by Mainland migrants in Hong Kong are analogous in several respects. First, because Hong Kong is part of the PRC, "there is no Hong Kong nationality or citizenship." Therefore, like the discrimination against Koreans from the Jeolla provinces by Koreans from the Gyung-sang provinces, discrimination against Mainland migrants by Hong Kong locals is also a form of "regionalism" in the sense that the conflicting group identities are subnational. Accordingly, the subnational nature of both forms of discrimination makes it difficult to categorize them as conventional types of "racial" discrimination — rather, there is an argument that they are both forms of what the Government terms "social discrimination." Second, historical discrimination in both South Korea and Hong Kong has involved both the Government and the private sector. Third, regional biases in South Korea and biases against Mainland migrants in Hong Kong have both been associated with stereotypical notions of social class, political opinion, and behavior. Fourth, the inherent social conflict that arises in the competition for scarce state resources may influence subnational discrimination in both South Korea and Hong Kong. Because of these striking similarities, there is a strong argument that the Government should consider following Korea’s example and including some variation of a “region of origin” prohibited ground in the RDO.

There are some important limitations to the comparability of Korea’s protections against regional discrimination to the Hong Kong context. Most importantly, the political relationship between

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165 Id. at 66.
166 Id.
167 SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 93.
168 See sources cited supra note 52.
169 See, e.g., Lee, supra note 164, at 66 (noting discrimination in politics and civil service); supra notes 16–18 and accompanying text.
173 See Kim Wang-Bae, Regionalism: Its Origins and Substance with Competition and Exclusion, KOREA J., Summer 2003, at 18 (noting the “popular belief that people from the Jeolla area are dangerous, unreliable, rude and immoral”); supra note 19 and accompanying text.
174 See Kim, supra note 173, at 26 (positing that Korean regional discrimination may be traced to “the conflicts that arise among specific groups competing for resources created by South Korea’s traumatic social and regional dislocation during rapid industrialization”); supra notes 9 and 183 and accompanying text.
Hong Kong and the PRC is arguably more complex than the historical tension between Korean provinces because of the PRC’s “one country, two systems” approach, which creates two functional governments and regions but one true sovereign. A copy-and-paste approach that inserts Korea’s “region of origin” statutory language into the RDO may thus have unintended consequences — for example, doing so may allow regional discrimination claims to be brought by individuals from different districts within Hong Kong. Carefully tailoring the prohibited ground language may resolve this issue — for example, defining the ground as “region of origin within the People’s Republic of China, excluding Hong Kong” instead of simply “region of origin.”

4.2.3 Residency

Many Commonwealth jurisdictions have distinct prohibitions against citizenship-based discrimination, perhaps as a result of the historical magnitude of net migration into such jurisdictions. As mentioned, the U.K.’s Equality Act defines race to include “nationality.” Similarly, New Zealand’s Human Rights Act 1993 includes “nationality or citizenship” in the definition of “ethnic or national origins.” And while the original prohibited grounds language in Australia’s Race Discrimination Act 1975 covered only race, color, descent, and national or ethnic origin, a later amendment introduced “immigrant” status as a prohibited ground.

While there is no Hong Kong nationality or citizenship, permanent residency is an analogous concept in Hong Kong because permanent-resident status comes with a set democratic rights that are traditionally associated with citizenship: the right to vote and the right to stand for election. Under Hong Kong’s Immigration Ordinance, a Mainland Chinese citizen born outside of Hong Kong can become a permanent resident of Hong Kong if she “ordinarily reside[s] in Hong Kong for a continuous period of not less than 7 years.”

Residency may capture several aspects of perceived Mainland Chinese identity that have historically influenced discrimination against Mainland migrants in Hong Kong. Some of the discrimination against Mainland migrants stems from the perception that their relocation to Hong

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175 EOC Interview, supra note 54.
177 Equality Act 2010, c. 15, pt. 2, ch. 1, § 9 (Eng.).
178 Human Rights Act 1993 s 21(1)(g) (N.Z.).
179 Racial Discrimination Act 1975 (Cth) s 5 (Austl.).
182 Id. sch. 1, § 2(b).
Kong has been motivated primarily by access to public welfare benefits. Permanent resident status may serve as a proxy for the closeness of a migrant’s ties to Hong Kong, and the strength of such ties may correspondingly determine whether Hong Kong locals view the migrant as having earned the right to welfare. Furthermore, Hong Kong locals may view Mainland migrants without permanent residency status as more closely affiliated with the Mainland government. Finally, residency status protections have the added benefit of covering other minority groups that face discrimination because of their foreignness, such as ethnic minorities without permanent residency status. Perhaps for some of these reasons, residency status has been favored by the EOC as an appropriate category of protection.

However, one significant drawback associated with residency as a protected ground is its potential inability to account for discrimination based on Mainland migrants’ cultural and linguistic characteristics. A former Mainland migrant (and current permanent resident of Hong Kong) who does not fully assimilate into Hong Kong culture — for instance, by failing to learn Cantonese — might still be perceived by Hong Kong locals to be in the same cultural class as new Mainland arrivals and may thus face the same forms of discrimination as the new arrivals. Moreover, residency status may not protect Mainland migrants from discrimination based on their spoken language or accent. Finally, including residency as a prohibited ground may create interpretive issues regarding whether businesses in Hong Kong will be prohibited from offering exclusive benefits to tourists.

4.2.4 Language
Mainland migrants who report experiencing discrimination often indicate that such discrimination occurs when they speak in Mandarin, the official language of Mainland China, or when they display an inability to speak fluent Cantonese. Language is “closely tied to culture and ethnic

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183 See supra note 19 and accompanying text.
185 Cf. Zhang, supra note 29 (linking political backlash against the Chinese government after the 2014 Occupy Central movement and 2016 oath-taking controversy to anti-Mainland sentiment in Hong Kong).
186 See SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 100–11.
187 See infra Part 3.2.4.
188 See infra Part 4.3.
189 Putonghua (Mandarin), YALE-CHINA CHINESE LANGUAGE CTR., http://www.ycclc.cuhk.edu.hk/contentViewer.aspx?YRoGETace=MzM5MTQfGxpbmtnYWluTHZsHiHw2MzYzMDE3NgExMzN4MDY=---aSN0ItACifITNEDi=NjI2MjAxNzYxMTM5MTQ1ODt2fHx8OHx8MzMTQ= (last visited Feb. 11, 2017).
190 See, e.g., SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 102 (describing an instance of alleged discrimination where a recent Mainland migrant who applied for a cleaning position that “did not require much
background,”¹⁹¹ and may thus serve as a proxy for other aspects of Mainland Chinese identity that form the basis for the discrimination experienced by Mainland migrants. In addition, a language-based ground would extend protection from language discrimination to ethnic minorities who are unable to speak either Mandarin or Cantonese.¹⁹² Because of the prevalence of language-based discrimination in multilingual societies,¹⁹³ there are a number of overseas jurisdictions that include language as a prohibited ground in their antidiscrimination statutes.¹⁹⁴

However, there are several issues with using language as a proxy for Mainland Chinese status. First, there is unresolved ambiguity over whether Cantonese is a distinct language from Mandarin, or whether both are dialects of the same Chinese language.¹⁹⁵ Any amendment to the RDO that introduces “language”-based protections will thus generate significant interpretive issues when applied to discrimination against Mainland migrants, and courts may not be an appropriate venue to answer a complex policy question that linguists themselves have been unable to solve.¹⁹⁶ Second, there is evidence that a significant proportion of new arrivals from Mainland China are unable to speak either Mandarin or Cantonese.¹⁹⁷ And while discrimination against Cantonese-fluent Mainland migrants has been reported to exist when such migrants speak Cantonese with a non-“Hong Kong” accent,¹⁹⁸ similar interpretive complications arise with regard to whether accent-based discrimination qualifies as language discrimination. Thus, language-based protections against discrimination may be underinclusive in some respects, and in other respects risk generating difficult interpretive questions.

4.2.5 Conclusion

¹⁹³ See ADRIAN BLACKLEDGE, DISCOURSE AND POWER IN A MULTILINGUAL WORLD, at vii (2005).
¹⁹⁴ See, e.g., Quebec Charter of Human Rights and Freedoms, C-12, art. 10; Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, § 1 (S. Afr.).
¹⁹⁵ See generally SHUANG LIANG, LANGUAGE ATTITUDES AND IDENTITIES IN MULTILINGUAL CHINA: A LINGUISTIC ETHNOGRAPHY (2014).
¹⁹⁶ See id. at 12 (noting that “[i]f there is any consensus among linguists on the distinction between “language” and “dialect”, it would be that a clear-cut distinction is largely unattainable”).
¹⁹⁷ See, e.g., CENT. POLICY UNIT, supra note 21, at 55 (showing that almost 80% of new Mainland arrivals surveyed said that they could speak fluent Cantonese); Shirley Zhao, Mainland Chinese Immigrants to Hong Kong Risk Living ‘in Own Little Worlds’, Researcher Says, S. CHINA MORNING POST (June 3, 2015, 3:36AM), http://www.scmp.com/news/hong-kong/education-community/article/1814822/mainland-chinese-immigrants-hong-kong-risk-living (describing a study showing a similar statistic).
¹⁹⁸ See Shelby Chan & Gilbert Fong, Hongkong-Speak: Cantonese and Rupert Chan’s Translated Theater, in THE OXFORD HANDBOOK OF MODERN CHINESE LITERATURES 172, 184 (Carlos Rojas & Andrea Bachner eds., 2016) (noting that, in Hong Kong, “[e]ven if one is able to speak Cantonese, if it is not the particular Hong Kong variety with its unique accent, syntax, and vocabulary, one is almost immediately identified as a non-Hongkonger”).
The Government should introduce either region of origin, residency, or language as a new prohibited ground under the RDO. In deciding among the three potential grounds, the Government should consider the potential scope of coverage of each ground and any interpretive issues that may arise with its inclusion in the RDO.

While it is possible to include the new prohibited ground in the definition of “race” in section 8(1)(a) of the RDO, it would likely trigger less confusion, generate less controversy, and be more faithful to the spirit of the amendment to avoid conflating “race” with the new prohibited ground. Specifically, the Government should introduce the new ground as a distinct term in section 4 of the RDO. For example, the Government could amend section 4(1)(a) of RDO so that it reads:

In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person if . . . (a) on the ground of the race [or region of origin/residency status/spoken language] of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons.

If this approach is taken, other conduct-prohibiting provisions of the RDO that expressly apply only to race will also need to be amended to include the new prohibited ground.

4.3 Scope of Prohibited Conduct

During the drafting process for the RDO, commentators were especially concerned about the Basic Law’s applicability to government functions. Ultimately, drafters inserted section 3 of the RDO, which states that the RDO “binds the Government,” to address these concerns. However, as critics have noted, the RDO’s proscriptions still leave out a wide range of government functions. In particular, the RDO only covers government functions that involve employment; education; the provision of goods, facilities, or services; the disposal or management of premises.

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199 To the extent that institutional resistance to including protections for Mainland migrants in the RDO can be attributed to an aversion to labelling Mainland Chinese people as members of a different “race” or “ethnicity,” keeping such protections distinct from the definition of race is likely to more palatable. In a similar vein, the Hong Kong government may consider changing the name of the RDO to something more neutral (for example, the Race and [Origin/Residency/Language] Discrimination Ordinance) to avoid implying that all of the law’s proscriptions speak to “race” in the conventional sense of the word.


201 See supra text accompanying notes 57–59.

202 See supra note 59 and accompanying text.

203 See supra text accompanying notes 57–59.

204 Race Discrimination Ordinance pt. 3.

205 Id. § 26.

206 Id. § 27.

207 Id. § 28.
consent for assignment or subletting;208 and the determination of eligibility to stand for election.209 Furthermore, the RDO’s provisions are expressly inapplicable to “any law concerning nationality, citizenship, resident status or naturalization”;210 immigration legislation;211 and any act done in order to comply with a requirement of an existing statutory provision.212

The holes in the RDO’s applicability to the Government are anomalous. They are inconsistent with other Hong Kong antidiscrimination laws (on which the RDO is partially based) under the SDO, DDO and FSDO. For example, under the SDO there is a prohibition on all sex-based discrimination “in the performance of [government] functions or the exercise of its power.”213 The only exceptions to the SDO’s applicability to the Government include acts “done under any immigration legislation governing entry into, stay in and departure from Hong Kong”214 and acts “done in relation to a woman if it was necessary for that act to be done in order to comply with a requirement of an existing statutory provision.”215 The RDO’s gaps in applicability to the Government are also anomalous when compared to international antidiscrimination laws, which are “generally designed to bind private as well as public bodies.”216

The Government has argued that the RDO’s protections should not reach all government functions because other laws already impose similar obligations on the Government, and subjecting the Government to further obligations under the RDO would “pose unnecessary burden and disruptions to the society.”217 The government is, of course, correct in the sense that it “has always been prohibited from engaging in any discriminatory practice or activity”218 by article 22 of the Hong Kong Bill of Rights Ordinance (BRO),219 which provides that:

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,

208 Id. § 29.
209 Id. § 34.
210 Id. § 54.
211 Id. § 55.
212 Id. § 56.
214 Id. § 21(2)(a).
215 Id. § 21(2)(b).
216 COMPARATIVE STUDY, supra note 152, at 47; see also id. (highlighting various antidiscrimination laws in the U.S., Canada, South Africa, and India that apply to government entities).
language, religion, political or other opinion, national or social origin, property, birth or other status.  

Unlike the antidiscrimination ordinances, the BRO binds only “the Government and all public authorities” and “(b) any person acting on behalf of the Government or a public authority.” As will be discussed in Part 4.2, the BRO has been used successfully to challenge government policies that have had a discriminatory effect on Mainland migrants.

While it is true that a victim of government discrimination can seek recourse under the BRO without relying on the RDO, extending the RDO’s protections to all government functions (or at least those covered by the SDO) would be useful for a couple reasons: First, doing so would provide complainants with access to the EOC’s conciliation services, which represent a low-cost dispute-resolution alternative to filing a lawsuit seeking judicial review against the Government. Second, the more specific prohibitions of the RDO — and the absence of a justification exemption for direct discrimination — will likely provide victims of government discrimination with a stronger claim than simply asserting a breach of the broadly-worded, justification-qualified “equal and effective protection” guarantee in the BRO. In addition to these benefits, it appears that the Government’s concern regarding excessive litigation may have been exaggerated, considering the paucity of cases filed under the RDO.

Given the clear benefits of filling the gaps in the RDO’s applicability to government functions, and the likely exaggeration of the Government’s initial concerns, the RDO should be amended to, at a minimum, apply to the Government in the same manner as the SDO, DDO and FSDO.

5. Addressing Concerns with Expanded Antidiscrimination Protection

The EOC’s submission to the Government drew attention to a number of public concerns regarding the extension of the RDO’s protective scope to Mainland migrant — concerns that are particularly salient if residency is included as a new prohibited ground in the RDO. The most significant of these concerns include the impact of such protections on freedom of expression, public benefit entitlements, and the practices of businesses in the tourism industry. The EOC recommended that, before protections for Mainland migrants are introduced into the RDO, the Government undergo a public consultation to consider whether these concerns necessitate the introduction of additional statutory exceptions. As will be discussed in this Part, no specific exceptions need to be added to

220 Id. § 8, art. 22 (emphasis added). The Basic Law also provides that “[a]ll Hong Kong residents shall be equal before the law.” XIANGGANG JIBEN FA art. 25 (H.K.).  
221 Bill of Rights Ordinance § 7.  
222 See Race Discrimination Ordinance, (2013) Cap. 602, 32, § 78 (H.K.) (allowing persons to seek conciliation by the EOC if she alleges a violation of the RDO’s provisions).  
224 See supra Part 2.3.
the RDO to respond to concerns regarding freedom of speech and public benefit entitlements — the existing statutory language and the judicial justification test sufficiently address these issues. Furthermore, there are ways in which businesses serving tourists can structure their offerings to avoid violating any protective provision that is introduced into the RDO. Should the Government find the impact on tourism businesses to be a matter of great concern, however, an ad hoc exception should be inserted into the RDO to address the issue.

5.1 Freedom of Expression

The EOC noted that “many of the individual consultation responses expressed concerns that the EOC’s proposals would inhibit legitimate freedom of expression, for example about bad behaviour by mainland Chinese people in Hong Kong.”

Freedom of expression is a right guaranteed under article 16 of the BRO. However, the right may be restricted “for respect of the rights or reputations of others” or “for the protection of national security or of public order . . . , or of public health or morals.” As the EOC noted, the public’s freedom of expression concern relates primarily to the RDO’s prohibition against racial vilification, which makes it unlawful for someone to publicly “incite hatred towards, serious contempt for, or severe ridicule of, another person” on the grounds of their race, because this prohibition would presumably be extended to any new protected ground that is inserted into the RDO.

Racial vilification laws are highly controversial internationally because of the restrictions they impose on the right to freedom of speech. Nonetheless, such laws exist in virtually all comparable common law jurisdictions. To balance racial vilification protections with freedom of expression, legislators generally exclude certain types of communications from the proscriptions of racial vilification laws. For example, racial vilification laws in Australia and Canada exclude statements made for any purpose in the public interest (among other specific exclusions). Similarly, Hong Kong’s RDO does not render unlawful “an activity in public done...
reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussions about and expositions of any matter.233

Noting that Hong Kong courts have not adjudicated any racial vilification cases and only three disability vilification cases (of which only one was successful), the EOC has persuasively argued that the RDO’s threshold for unlawful racial vilification is already high enough to obviate any concerns regarding a material trespass on freedom of expression.234 Moreover, individuals who wish to comment on “the bad behavior” of Mainland migrants will not be per se prohibited from doing so. Rather, they will have to prove that their communication does not incite hatred towards, serious contempt for, or severe ridicule of Mainland Chinese people. Given the strong adjectives used in section 45 of the RDO, judges will likely have significant discretion to excuse communications that fall below the threshold of severity contemplated by the statutory language. Even if a communication is deemed to be racial vilification, the communication is immunized if the speaker can assert a viable “public interest,” such as stimulating debate about the Government’s policies regarding public welfare benefits, immigration, or tourism. Finally — unlike the racial vilification laws in several other jurisdictions, including Canada235 and the U.K.236 — section 45 of the RDO only imposes civil penalties on the vast majority of racial-vilification violations.237 Under the RDO, criminal penalties are only imposed on individuals who commit the offense of “serious vilification,” which requires both intent and the threat of physical harm.238 The lack of criminal punishment for a substantial proportion of section 45 violations reduces the deterrent effect of the provision, thus mitigating its chilling effect on free expression.

The public’s anxiety regarding limits on freedom of expression is likely misplaced. The strong adjectives and public-interest exception embedded in the RDO’s racial vilification language, along with the safeguards of judicial discretion and the counterweight of the BRO, make it unlikely that freedom of expression will be materially limited by the inclusion of express protections for Mainland migrants. The lack of criminal sanctions for all but the most serious cases of racial vilification further lessens the likely chilling impact of Mainland migrant–protecting amendments on free expression.

5.2 Public Benefit Entitlements

Another common concern expressed by individual respondents to the DLR’s consultation was that including residency as a prohibited ground would entitle Mainland migrants to the same public benefits, services, and civil rights as permanent residents, including the right to social housing and

233 Race Discrimination Ordinance § 45(3)(c).
234 SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 107.
235 Criminal Code, s 319.
236 Public Order Act 1986, c. 64, § 27(3)(a) (UK).
237 Race Discrimination Ordinance § 45(1).
238 Id. § 46.
the right to vote.\textsuperscript{239} This concern is misguided. Section 56 of the RDO exempts from the ordinance’s proscriptions “any act done by a person if it was necessary for that person to do it in order to comply with a requirement of an existing statutory provision.”\textsuperscript{240} Therefore, any act that is authorized by legislation — including by statutes that impose a residency requirement — is currently immune from the RDO’s restrictions.\textsuperscript{241} The government’s decision to restrict access to public benefits and voting eligibility to permanent residents would therefore unlikely to be unlawful discrimination under the RDO, even if residency status were introduced as a prohibited ground.\textsuperscript{242}

Regardless of whether new prohibited grounds — including residency, region of origin, or language — are introduced into the RDO, the Government’s actions are (and will continue to be) subject to the BRO’s broader prohibition against discrimination.\textsuperscript{243} Importantly, article 22 of the BRO prohibits discrimination on “any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\textsuperscript{244} Because of the BRO’s broad, inclusive language, the Hong Kong Court of Final Appeal has deemed Mainland migrants to fall within the BRO’s protective scope,\textsuperscript{245} and has adjudicated two notable BRO-based challenges to government policies that were alleged to discriminate against Mainland migrants. In both of these challenges, the Court applied a proportionality test to determine whether the Government’s policies, though discriminatory, were nonetheless justified.

In \textit{Fok Chun Wa}, Mainland-resident women who were married to Hong Kong residents challenged the Government’s policy of charging higher fees for obstetric services in public hospitals to nonresident women compared to Hong Kong residents.\textsuperscript{246} The Court acknowledged that the Government’s policy was discriminatory\textsuperscript{247} but held that the discriminatory treatment could be justified if:

\begin{quote}
The difference in treatment . . . pursue[s] a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established[;] [t]he difference in treatment must be rationally connected to the legitimate aim[;]
\end{quote}

\begin{enumerate}
\item \textit{Id.} at 106.
\item Race Discrimination Ordinance § 56.
\item See SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 106–7.
\item See \textit{id.} at 107. Even ignoring section 56, the government’s acts must still fall under the domain of the RDO’s protections, see \textit{supra} notes 204–212 and accompanying text, which might be the case for the provision public welfare benefits if such handouts are deemed “services” under section 27 of the RDO. \textit{See Race Discrimination Ordinance} § 27.
\item See \textit{supra} notes 217–221 and accompanying text.
\item \textit{Bill of Rights Ordinance} (1997) Cap. 383, § 8, art. 22 (emphasis added).
\item \textit{Id.} at 417.
\item \textit{Id.} at 444.
\end{enumerate}
and [t]he difference in treatment must be no more than is necessary to accomplish the legitimate aim.248

The Court noted that, when evaluating socioeconomic government policies, “the constraining role of the courts, absent a florid violation by government of established legal principles, is . . . modest,”249 and that the Court “will only interfere where the option chosen is clearly beyond the spectrum of reasonable options . . . .”250 Applying this test, the Court found that the Government’s obstetric-services policy satisfied all three prongs of the justification test because “due regard had to be given to the need for long-term sustainability of Hong Kong’s social services in the context of limited public resources;” Mainland women constituted a substantial proportion of obstetric-service users; and their “dangerous behavior” of seeking admission to public hospitals shortly after midnight and discharging themselves shortly after giving birth adversely affected Hong Kong resident mothers.251

In Kong Yunming v. Director of Social Welfare,252 a Mainland-resident woman challenged the Government’s policy of imposing a seven-year residency requirement on access to Hong Kong social security assistance.253 Applying the same justification test as in Fok Chun Wa, the Court found that while the Government had the legitimate aim of reducing costs to preserve the sustainability of the social security system,254 the seven-year residency requirement was not rationally connected to this aim because there was no evidence that the requirement generated any material savings, and the requirement conflicted with two other important government policies (the family reunion policy for holders of One-Way Permits and the policy of rejuvenating Hong Kong’s aging population by encouraging the entry of young immigrants).255 Furthermore, the court held that even “[i]f there was any rational connection, the restriction was wholly disproportionate and manifestly without reasonable foundation, given its contradictory policy consequences and socially insubstantial benefits.”256 The Court therefore struck down the seven-year residency requirement as unconstitutional.

*Kong Yunming* can be distinguished from *Fok Chun Wa* because, in addition to the BRO nondiscrimination right, *Kong Yunming* implicated the right to social welfare enshrined in article 36 of the Basic Law.257 However, the Court’s justification test was applied in the same manner in both cases, and both decisions featured judicial scrutiny of the Government’s proffered reasons for

248 *Id.* at 432.
249 *Id.* at 438.
250 *Id.* at 439.
251 *Id.* at 411.
253 *Id.* at 960–61.
254 *Id.* at 986.
255 *Id.* at 998.
256 *Id.*
257 XIANGGANG JIBEN FA art. 36 (H.K.).
the decision to differentiate between residents and nonresidents. Where the Government’s reasons seemed pretextual or irrational, they were grounds for invalidation.

In the context of public housing and voting, the Government has persuasive arguments for applying a residency requirement. With regard to public housing, the Government has a legitimate aim of providing such housing to individuals who need it the most. Given the significant shortage of public housing in Hong Kong, restricting access to permanent residents is rationally connected to this aim because permanent residents are likely to have stronger connections to Hong Kong (both personally and professionally) and are more likely to stay in Hong Kong for the long term. The residency exception is arguably “necessary” to accomplish the Government’s goal of equitably providing housing access because there are simply not enough public housing units for needy residents: there were nearly 150,000 applications for housing as of December 2016 and a 4.7-year average waiting time for such housing. Allowing nonresidents to receive public housing would significantly exacerbate this shortage and deprive many residents of near-term access.

Because voting rights are reserved for citizens in many jurisdictions around the world, the Government has solid support from international precedent for imposing a residency requirement on voting. If such a requirement is challenged in court, the Government can articulate a number of legitimate interests in restricting the classes of people who are eligible to vote. For example, it may be sensible for a government to give a “voice in the shaping of . . . institutions and laws . . . under which [members of society] are to live” only to those who are likely to live in the society for the long term, those who sufficiently demonstrate “their commitment or loyalty” to the society, and/or those who are most likely to understand how the society’s political processes function. Residency is rationally related to these goals because it is a proxy for an individual’s civic commitment to Hong Kong, her intention to stay in Hong Kong, and her likely knowledge of Hong Kong’s political dynamics. Furthermore, a residency requirement may be considered “necessary” to achieving the aforementioned goals based on the lack of administrable alternatives for determining voter eligibility.

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258 SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 106 & n. 196.
260 See sources cited supra note 180.
261 Lardy, supra note 180, at 92.
262 See id. at 93.
263 Of course, residency is not a perfect proxy for intent to remain in Hong Kong. For example, it may be argued that holders of One Way Permits who come to Hong Kong for family reunification purposes also generally intend to stay for the long term. However, the government’s burden is only to show that imposing a residency requirement is rationally related to its goals; not that it perfectly achieves such goals.
264 Cf. Lardy, supra note 180, at 100. Of course, the seven-year period for permanent residency may itself be challenged. However, given the inherent policy implications of choosing a threshold residency period, a court may
The concern that public rights traditionally reserved for permanent residents will suddenly be allocated to Mainland migrants if residency-based protections are extended to them is misguided. The RDO does not currently apply to acts sanctioned by legislative authority. Furthermore, discriminatory governmental policies (regardless of prohibited ground) are already subject to challenge by Mainland migrants under the BRO’s broad antidiscrimination provision. Policies that are unjustifiably discriminatory, like the seven-year residency requirement in Kong Yunming, will continue to be at risk of invalidation, regardless of what changes are made to the RDO. On the other hand, narrowly tailored policies that are rationally related to legitimate government aims — such as residency requirements for public housing and voter eligibility — may be saved by the judicial justification test even if they are found to discriminate against Mainland migrants.

5.3 Impact on Specific Businesses

In its submission to the Government, the EOC also brought attention to the potential impact of residency-based antidiscrimination protections on the tourism industry. Groups representing the tourism industry were concerned that “their practices of providing discounts or other benefits to tourists visiting Hong Kong would become unlawful.” Examples of such benefits include “setting up [a] special channel for tourists” for a large-scale event; “[r]eserv[ing] tickets for tourists . . . to participate in . . . activities;” offering exclusive discounts for tourists; and organizing “lucky draws” for tourists. Recognizing these concerns, the EOC recommended that the Government consult “all key stakeholders” on whether there should be an exemption to prohibitions against residency-based discrimination for the tourism-related practices highlighted.

Section 27 of the RDO prohibits discrimination against an individual who “seeks to obtain or use . . . goods, facilities or services” by refusing to provide the individual with such goods, facilities, or services, or refusing to provide the individual with goods, facilities or services of “like quality, in the like manner and on the like terms as are normal . . . in relation to other members of the public.” The term “facilities and services” is defined broadly, and covers functions such as hotel accommodations, entertainment and recreation, and any undertaking by the Government.

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265 The tourism industry’s concerns may also apply to the introduction of region of origin as a prohibited ground. For example, a plaintiff may argue that discounts offered only to tourists from Mainland China discriminate against individuals of Hong Kong regional origin. However, careful statutory drafting may resolve this issue: Hong Kong locals likely have no claim if region of origin is defined to exclude Hong Kong. See supra section 3.2.2.

266 Id. at 110.

267 Id. § 28(2).

268 SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 109.

269 Race Discrimination Ordinance § 28(1).

Section 27’s broad scope would likely encompass many of the activities that the tourism industry highlighted.

However, many of the “benefits” identified by the tourism industry could be structured in ways that would not directly discriminate based on residency or region of origin. For example, prizes, tickets, or discounts that are aimed at tourists who are only in Hong Kong for a short period of time could be structured so that only individuals who provide trip itineraries showing a length of stay under a certain threshold are eligible to receive them. Providing a discount to travelers who are in Hong Kong for a certain period (for example, a month or less), as evidenced by a trip itinerary, would not be direct discrimination based on residency status because even Hong Kong permanent residents who supply such itineraries would be eligible.

Of course, the above-mentioned practice could be challenged as indirect discrimination under section 4 of the RDO. A plaintiff could argue that individuals with a particular residency status (here, Hong Kong permanent residents) are disproportionately excluded from tourism-related benefits even though the itinerary requirement is not facially discriminatory. However, indirect discrimination claims are subject to a justification defense. Providers of tourist discounts can therefore defend their practice by arguing that the travel-itinerary requirement serves a legitimate objective (promotion of sales to tourists or increasing tourist engagement) and that the requirement “bears a rational and proportionate connection to the objective.”

If (1) residency is introduced as a protected ground, (2) members of the tourism industry are unwilling to bear any risk that their practices may be deemed to be in violation of the RDO, and (3) the Government considers the protection of the tourism industry to be a substantial interest, an ad hoc exception for tourism-related businesses could be introduced to the RDO. Such an approach would not be unprecedented — the RDO currently contains a variety of ad hoc exceptions to its prohibition on discrimination in the provision of goods and services. These exceptions include provisions dealing with, inter alia, small dwellings, voluntary bodies, cemeteries, and children or elderly persons requiring special care.

5.4 Conclusion

The primary public concerns regarding expanded antidiscrimination protections are, for the most part, misguided. First, two of the three major concerns expressed in the DLR — the impact of

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271 See id. § 4(1)(b).
272 Id. § 4(1)(b)(ii); (2).
273 Id. § 4(2).
274 See SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 110.
275 Race Discrimination Ordinance § 30.
276 Id. § 31.
277 Id. § 32.
278 Id. § 33.
enhanced protections on public benefits and the tourism industry — are salient only if residency is chosen as the new prohibited ground. Furthermore, the legality of government efforts to restrict access to public benefits based on residency would not be materially affected by the introduction of protections for Mainland migrants in the RDO, given existing statutory exceptions, the fact that discriminatory government policies are already proscribed by the BRO, and the availability of the justification defense in cases brought under the BRO. On the other hand, the business practices of the tourism industry can be structured to avoid the RDO’s reach, but ad hoc exceptions could be introduced to the RDO to ease the industry’s concerns with minimal disruption. Finally, concerns relating to the chilling of free speech, while generally applicable to any newly introduced prohibited ground, are likely exaggerated because of the high threshold for illegal speech and the public-interest exception, both of which are embedded in the RDO’s existing racial vilification language.

6. The Enforcement Role of Courts and the Equal Opportunities Commission

As discussed previously, courts have had a limited impact on enforcing the RDO’s protections against racial discrimination.\(^{279}\) One potential explanation for the paucity in antidiscrimination cases in general is the EOC’s “conciliation-first” model, under which the EOC is required to use conciliation to seek a settlement of any matter that is brought to it before providing legal assistance to the complainant.\(^{280}\) While conciliation has many benefits,\(^{281}\) scholars have argued that the EOC’s mandatory conciliation mandate “has essentially undermined the impact of anti-discrimination laws in Hong Kong due to the lack of visibility” of the conciliation process, under which no judgment, facts, or findings are made public.\(^{282}\) A 2004 study of the then-existing discrimination ordinances (i.e., the SDO, DDO, and FSDO) found that in a nine-month period, 45% of the 451 complaints received by the EOC were discontinued by the EOC, 35% were conciliated, 4% were resolved outside of the EOC’s complaints process, and 16% were classified as unsuccessfully conciliated.\(^{283}\) Of the 71 complaints that were unsuccessfully conciliated, complainants in 32 cases applied for legal assistance from the EOC, which rejected 15 cases and provided legal assistance in only 17 cases.\(^{284}\) Furthermore, in those 17 cases in which the EOC provided legal assistance, the EOC only represented the complainant in litigation in two cases.\(^{285}\)

\(^{279}\) See supra section 2.3.

\(^{280}\) See Race Discrimination Ordinance §§ 78–79.

\(^{281}\) As previously mentioned, conciliation by the EOC may be a low-cost alternative to filing a lawsuit. Conciliation may also result in a quicker resolution of the issue and allow complainants to keep their disputes out of the public eye. See What is Conciliation, EQUAL OPPORTUNITIES COMM’N (2013), http://www.eoc.org.hk/eoc/GraphicsFolder/showcontent.aspx?content=about%20conciliation (last visited Feb. 11, 2017).


\(^{284}\) Id.

\(^{285}\) Id.
These statistics support the claim that forced conciliation has minimized the judicial role in enforcing Hong Kong’s antidiscrimination laws. Making conciliation optional rather than mandatory may thus increase the number of discrimination cases that reach Hong Kong courts.

However, within the domain of discrimination cases filed with Hong Kong courts, there is a particular dearth of cases involving the RDO. With respect to ethnic minorities, some commentators attribute the lack of racial discrimination litigation to their “fear of victimisation and backlash as well as fear of authority in general.” For example, ethnic minorities, “who already have a hard time securing a job,” may be unwilling to file a lawsuit against an employer for fear that doing so would render them unemployable elsewhere “as they would be seen as troublemakers.” And ethnic minorities who are asylum seekers or refugees — and thus treated as illegal immigrants by Hong Kong authorities — are understandably unwilling to complain to public authorities because doing so may lead to their arrest or detainment.

The lack of cases under the RDO filed by Mainland migrants may have an even more straightforward explanation: both the Government and interests groups who represent Mainland migrants — notably the Society for Community Organization (SoCO) — have publicly taken the position that discrimination based on Mainland origin is not covered by the RDO’s existing language. In fact, according to SoCO, the EOC has refused to conciliate claims brought by Mainland migrants because of the Government’s position that the RDO’s protections do not apply to such migrants. While the EOC has more recently taken the view that some readings of the RDO may allow Mainland migrants to bring claims under the theory of intraracial discrimination, organizations interested in protecting the Mainland migrant community — such as SoCO — may not even be aware of this view.

Insofar as miscommunication between interested constituents explains the lack of coordinated efforts to bring discrimination claims on behalf of Mainland migrants in the District Court, the current paucity of such suits will likely be temporary.

286 See supra section 2.3.
288 Id. at 19.
289 Id.
290 SoCO has been an influential participant in litigation focused on vindicating Mainland migrant rights, and was involved in the Kong Yunning Court of Final appeal decisions. See SOC’Y FOR CMTY. ORG., INCREASED DISCRIMINATION AGAINST NEW IMMIGRANTS AND PEOPLE FROM MAINLAND CHINA FOLLOWING ABOLITION OF 7-YEAR RESIDENCE REQUIREMENT FOR WELFARE APPLICANTS (2014).
291 See supra notes 51–52 and accompanying text; Interview with Sze Lai Shan, Soc’y for Comty. Org. (January 17, 2017); SOC’Y FOR CMTY. ORG., supra note 290.
292 Interview with Sze Lai Shan, supra note 291.
293 See supra Part 3.1.4.
294 See Interview with Sze Lai Shan, supra note 291.
295 See EOC Interview, supra note 54.
such as SoCO should, as soon as possible, confer and reach a shared understanding of the applicability of the RDO’s protections to Mainland migrants. Given the continued complaints of racial discrimination that SoCO has received from Mainland migrants, and the EOC’s recent position that the RDO covers some forms of Mainland discrimination, a test case involving a Mainland migrant who has been the victim of racial discrimination should be brought to a Hong Kong District Court with the support of interested policy groups and the EOC under section 79 of the RDO. Furthermore, if it has not yet done so already, the EOC should begin to accept conciliation requests from Mainland migrants who have suffered from discrimination, and notify all interested stakeholders of this policy.

If antidiscrimination claims by Mainland migrants do reach the District Court, judges should defer — or at a minimum give persuasive weight to — the EOC’s latest interpretation of the RDO, as expressed in its 2016 report to the Government following the DLR. Judicial deference to reasonable agency interpretations of ambiguous statutory provisions is a well-established tenet of U.S. administrative law under *Chevron v. Natural Resources Defense Council, Inc.* and its progeny. Commentators have posited that such deference can be in part justified by the recognition that executive agencies have “greater competence and experience” in interpreting the statutes they are in charge of implementing, as well as access to “broader investigations and information” than nonexpert judges. The *extent* of deference that U.S. courts afford to agency interpretations varies depending on whether the agency is empowered to makes rules with the “force of law,” which may be indicated by an agency’s authority to engage in formal procedures such as adjudication or notice-and-comment rulemaking. If the agency can make rules carrying the force of law, a judge’s deference to the agency’s interpretation is near absolute as long as the statute is ambiguous and the agency’s interpretation is reasonable. If the agency cannot “speak with the force of law” — for example, if it is only able to issue interpretive documents with no legally binding effect — the agency may nonetheless receive “some deference” by the court. The latter, less binding form of deference is known as *Skidmore* deference, and is premised on the rationale that, even in the absence of lawmaking power, agencies bring specialized experience to

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296 Interview with Sze Lai Shan, *supra* note 291.
301 *See id.; Chevron*, 467 U.S. at 865–66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”); *see also* Note, *supra* note 299 (examining the role that relative expertise plays in judicial deference to executive agencies by the U.S. Supreme Court and federal courts of appeal).
303 *Id.* at 229 (citing *Chevron*, 467 U.S. at 842–846).
304 *Id.* at 233.
305 *Id.* at 234 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).
bear on legal interpretive questions.\textsuperscript{306} Employing a similar approach, Hong Kong courts may recognize the EOC’s relative expertise at administering the RDO in light of the agency’s exposure to the everyday realities of discrimination in Hong Kong and thereby defer — or at least give persuasive weigh to — the EOC’s interpretations of the statute. Such an approach would entail a greater degree of deference than the District Court provided to the EOC’s interpretation of the RDO in \textit{Singh}.\textsuperscript{307}

There is another source of support for judicial deference to the EOC on matters of interpretation: the RDO and other antidiscrimination ordinances give the EOC the express power to “issue codes of practice containing such practical guidance as it thinks fit for the purpose[] of . . . the elimination of discrimination.”\textsuperscript{308} These codes of practice are amendable by the Legislative Council\textsuperscript{309} and are not by themselves legally binding.\textsuperscript{310} However, once the codes of practice are promulgated, they are admissible as evidence in court and must be “taken into account” by the court in determining relevant legal questions.\textsuperscript{311} By requiring a court to “take into account” the EOC’s codes of practice on matters of law, the RDO effectively codifies a form of \textit{Skidmore} deference to the EOC’s interpretation of the statute. As a result, when answering an interpretive question regarding the RDO, such as the definition of “race,” a Hong Kong court is required to give persuasive weight to the legal positions that the EOC has taken in codes of practice.

The EOC has so far promulgated a single code of practice pertaining to the RDO.\textsuperscript{312} That code of practice, released in 2009 to provide clarity around how the RDO should apply in the employment context, contains a section that discusses the meaning of race under RDO section 8.\textsuperscript{313} In particular, the 2009 code of practice states that ICERD and “case law . . . in other jurisdictions (for example common law jurisdictions)” are “useful references” for determining the meaning of race, color, national origin, and ethnic origin in the RDO.\textsuperscript{314} The code of practice goes further to say that the aforementioned terms have “broad popular meanings”\textsuperscript{315} and clarifies the meaning of two of the terms: Informed by the U.K. Code of Practice on Racial Equality in Employment, the EOC provides that national origin “includes origin in a nation that no longer exists or a nation that was

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\textsuperscript{306} Id. at 235; see also Note, \textit{supra} note 299, at 1570–71 (noting that “by creating a place for \textit{Skidmore} deference in \textit{Chevron}, the Court [in \textit{Mead}] reintroduced a consideration of expertise into the doctrine”).
\textsuperscript{307} Singh v. Sec’y for Justice, DCEO 9/2011, at 124 (D.C. May. 30, 2016) (Legal Reference System) (H.K.) (rejecting the EOC’s interpretation of the RDO and noting that “[t]here is only so much statutory interpretation can achieve and it is pre-eminently the responsibility of the LegCo to strike a balance between different interests of the community”).
\textsuperscript{308} See id. § 63(5).
\textsuperscript{309} Id. § 63(14).
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} \textit{EQUAL OPPORTUNITIES COMM’N, CODE OF PRACTICE ON EMPLOYMENT UNDER THE RACE DISCRIMINATION ORDINANCE} (2009).
\textsuperscript{313} Id. at 7.
\textsuperscript{314} Id.
\textsuperscript{315} Id. at 8.
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never a nation state in the modern sense.” Citing King-Ansell, Mandla, and BBC Scotland, the EOC further clarifies that an “ethnic group” includes “a distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history or presumed common history.”

The 2009 code of practice’s reliance on international precedent and endorsement of a broad, contextual reading of the RDO’s prohibited grounds aligns with the approach articulated in Part 3.1.3 of this paper — an approach that militates in favor of interpreting the RDO’s existing provisions to apply to Mainland migrants. Because a court interpreting the RDO is required to take the code of practice into account under section 63 of the RDO, a court has ample justification for holding that the RDO’s protections extend to Mainland migrants. Furthermore, to increase the chance that a court will adopt such a reading, the EOC can promulgate a new code of practice that incorporates either its recent understanding that the RDO applies to Mainland migrants under the theory of intraracial discrimination, or a new interpretation of race, national or ethnic origin that includes Mainland migrants. However, any interpretation that the Legislative Council deems outside the scope of reasonableness may be subject to reversal or amendment under section 63 of the RDO.

The structure of the RDO and its express delegation of interpretive authority — albeit nonbinding authority — to the EOC provides a useful framing for the role of Hong Kong courts in enforcing the RDO’s protections. In particular, the role of Hong Kong courts should mirror that of U.S. courts applying judicial deference to agency interpretations under Chevron and Mead. Because the EOC is an expert agency that is charged with implementing the RDO’s mandate to eliminate discrimination, and has significant on-the-ground knowledge of the frequency, magnitude, and characteristics of discrimination occurring in Hong Kong, Hong Kong courts should defer to the EOC’s judgments on the protective scope of the RDO’s provisions.

Moreover, as the organ of the Hong Kong government structure vested with “independent judicial power, including that of final adjudication,” it is arguably the province of the Hong Kong judiciary to vindicate the rights of Mainland migrants, who — as a minority group without voting rights — are unable to secure their own protection through Hong Kong’s political processes.

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316 Id.
317 Id.
319 See supra section 3.1.4.
320 Race Discrimination Ordinance § 63(5).
321 See id. § 59(1).
322 See generally SUBMISSIONS TO THE GOVERNMENT, supra note 83.
323 XIANGGANG JIBEN FA art. 19 (H.K.).
324 Cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that where “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, . . . a correspondingly more searching judicial inquiry” may be justified); see also Daryl J. Levinson, Confronting Power in Public Law, 130 HARV. L. REV. 31,
Whether through deference to EOC interpretations of the RDO or reliance on international precedents — which support a broad, inclusive, and context-sensitive reading of legal protections against racial discrimination — Hong Kong courts should read the RDO to apply to Mainland migrants, even in the absence of clarifying legislation that introduces a new ground that expressly protects Mainland migrants. Inaction by the Government or the Legislative Council should not excuse Mainland migrants’ inability to obtain recourse for the discrimination that they face in Hong Kong.

7. Conclusion

As the UN has noted, discrimination against Mainland migrants in Hong Kong is a serious, continuing issue in need of resolution. An analysis of judicial decisions in overseas jurisdictions supports the view that the RDO’s existing protections should be given an expansive reading. Furthermore, an analysis of overseas antidiscrimination statutes indicates that countries often include tailored prohibited grounds that address the unique history and character of discrimination occurring within their borders. This trend suggests that Hong Kong should amend the RDO to include a specific ground targeted at Mainland migrants.

There is reason for optimism: at the conclusion of the DLR, the EOC urged the Government to amend the RDO to introduce express protections for Mainland migrants. However, the EOC’s recommendation was qualified by its comment that any new protections should only be introduced after the Government conducts another round of consultations — this time focusing on the “possible scope of protections, whether existing exceptions regarding residency status should be repealed or amended, and whether any other specific exceptions may be appropriate.” It is unclear what another round of public consultations would achieve. The DLR included a number of targeted questions regarding the introduction of express protections for Mainland migrants, and the overwhelming volume of responses to the DLR received by the EOC seems to indicate that the public’s view on the issue has already been comprehensively canvassed. Furthermore, many of the major concerns that the EOC highlighted in its submission to the Government can be addressed by existing exceptions in the RDO and the justification test employed by courts when evaluating government actions. Therefore, the Government should consider immediately introducing a new prohibited ground — whether it be region of origin, residency, or language — to the RDO.

129 (2016) (describing the Carolene Products theory, “which calls for judicial enforcement of rights to protect ‘politically powerless’ groups,” potentially by “replicating the policy outcomes that would have resulted from an idealized process in which all groups exercised their fair share of power”).
325 See supra notes 65–67 and accompanying text.
326 SUBMISSIONS TO THE GOVERNMENT, supra note 83, at 110.
327 Furthermore, it is unclear whether there is utility in undergoing a public consultation that is likely to be dominated by majoritarian perspectives when minority rights are at stake. Cf. sources cited supra note 324; see also supra notes 83–87 and accompanying text (noting that the individual responses to the EOC’s DLR public consultation were overwhelmingly opposed to increased protections for Mainland migrants).
In the absence of legislative action to amend the RDO, the EOC should clarify its position regarding the applicability of current RDO provisions to anti-Mainland discrimination, for example by promulgating a code of practice or issuing a press release articulating its position. The EOC should also communicate to all interested stakeholders that it is willing to accept requests for conciliation and legal assistance from Mainland migrants who have suffered from discrimination. Additionally, if a Mainland migrant brings a claim under the RDO to a Hong Kong District Court, the court should give persuasive weight to the EOC’s interpretation of the RDO’s protective scope, including the interpretive clarifications in the 2009 code of practice (and any subsequent codes of practice).

As the UN and other stakeholders have noted, Hong Kong’s international human rights obligations require it to take immediate action to protect its residents of Mainland origin from continuing discrimination. The urgency of the situation is augmented by the fact that political tensions between Hong Kong and Mainland China are unlikely to subside anytime soon, thus increasing the risk of further discriminatory activity targeted at Mainland migrants and visitors in the near term. Whether the first step toward introducing such protections ultimately comes from the Government, courts, or the EOC, one thing is for certain: if Hong Kong is to be “Asia’s World City” — a city that attracts talented students, professionals, and other workers from around the world — it must embrace all forms of diversity and ensure that all of its residents “are entitled to equal protection of the law against any discrimination.”

328 In parallel with these efforts, the EOC should continue to step up its educational efforts to emphasize the importance of maintaining a pluralistic and inclusive society free of discrimination. As part of these efforts, it should continue to work closely with all sectors of the community to communicate its position on Mainland-migrant discrimination and the availability of its conciliation services for Mainland migrants.

329 Courts will, of course, retain their discretion to decide on the reasonableness of the EOC’s legal judgments. However, if the EOC provides reasonably compelling support for its positions — for example by referring to the broad, flexible interpretations of race that courts provide in comparable jurisdictions, see Part 3.1.3, and/or by supplying evidence regarding the severity of discrimination faced by Mainland migrants in Hong Kong — courts should feel comfortable giving persuasive weight to the EOC’s interpretations.


331 ICERD, supra note 36, pmbl (emphasis added).