Feedback on the proposed Maintenance of Racial Harmony Bill

2024

Beyond The Hijab

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Introduction

As a group comprising of minorities, the proposed Maintenance of Racial Harmony Bill ("the Bill") has raised considerable concerns.

Our key concerns with the Bill are:

- Lack of a full draft with the Bill's specific provisions with which the public can submit informed feedback
- Vagueness and overly broad provisions of the Bill and its enforcement mechanisms, which can potentially lead to the disproportionate criminalisation of minorities who raise issues pertaining to race and racism
- The imposition of a Restraining Order which would pre-emptively allow the government to act against content before proving criminal conduct
- Reparative measures that appear to place the burden of reconcialiation on victims rather than seek to address the harm caused
- The Bill sets us back in our obligations as a signatory of ICERD, and does not in fact meaningfully address issues of racial discrimination in the country

Feedback process

The current information provided by the government is insufficient for the public to provide informed feedback on the Maintenance of Racial Harmony Bill ("the Bill"). It is unclear whether the government intends to seek feedback once the Bill is available or if this is the only public feedback session that will be held.

Without specific provisions of the Bill, the public is unable to ascertain if there are procedural issues, due process concerns, and/or flagrantly expansive powers that may have the effect of curtailing constructive speech surrounding race-related issues.

Without being able to address specific provisions in the Bill, there are limitations to the type of feedback that the public can provide.

If the government is serious about taking into account the public's concerns with respect to the Bill, further rounds of public consultation must be held once the draft Bill and its provisions are made available.

Porting over of Penal Code race-related offences

The porting over of section 298 and section 298A of the Penal Code should not be done without revisions to the mens rea element of these offences.

Mens rea refers to the mental state of the accused, e.g. intention, knowledge, dishonesty. Most crimes require *mens rea* to be proven.

Under Section 298, with regard to the mens rea of "deliberate intention", there have been no guidelines, factors, or examples listed in the provision or in case law, as to what constitutes intention. Intention to wound racial feelings should not be so readily and/or constructively imputed on those who engage in constructive conversations surrounding race.

Under Section 298A(a), the mens rea of 'knowledge' ought to be reconstrued or amended.

Currently, the knowledge requirement is proven "If it could be shown that a reasonable person in the Accused's position, having regard to all the facts and circumstances before him, ***would have known that ill-will would be created*** between different racial or religious groups in Singapore, then in order for the Accused to deny actual knowledge, he would have to prove or explain how and why he did not in fact have such knowledge as the reasonable person would have had" (Public Prosecutor v Subhas Govin Prabhakar Nair [2024] SGDC 74 at [29]) [emphasis added].

Based on the legal test above, the mens rea of knowledge does not seem to account for situations where someone raises a race-related issue in good faith, knowing that it may cause ill will between certain racial groups, but raising the matter anyway in the interest of addressing racism or a race-related issue.

Furthermore, the act of "promot[ing]" does not seem to have been analysed sufficiently in the section 298A offence. Knowing "that ill-will would be created" is entirely different from promoting ill-will.

The phrase "disturb or is likely to disturb public tranquility" in Section 298A(b) is also overly broad and vague. Due to the sensitive nature of racial issues in Singapore it is almost inevitable that any race-related discussion will "disturb public tranquility".

In some situations, feelings of ill will within some segments of the community who are less sensitive to race-related issues and are not receptive to criticisms of certain actions or systems in place, may arise when legitimate criticisms or concerns are raised.

While it is always hoped that race-related discussions can be done in a sensitive manner, it may be inevitable that ill will is caused due to the topic of race itself. This situation must be considered and excluded from the scope of section 298A.

Restraining Orders (RO)

Imposing restraining orders on a person or entity, against the production or distribution of content "that prejudices the maintenance of racial harmony in Singapore", is overly broad. It will only further curtail discourse about race, and will put minorities in fear of speaking out, for fear of disrupting the racial harmony.

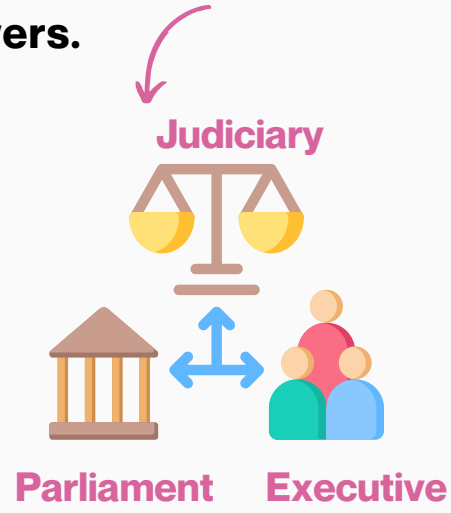
Moreover, the law is not race-neutral, as minority-race persons, who often speak out on racial issues more than Chinese persons, are at greater risk of falling foul of the law. More open conversations surrounding race ought to be the solution in Singapore's path forward, not further criminalization of race-related content.

The purpose of the issuance of ROs is purported to **"enable [the government] to act quickly and pre-emptively against content that threatens racial harmony, without having to establish that the person is engaging in criminal conduct".**

Without first establishing that a person is engaged in criminal conduct, imposing an RO on a person deprives them of due process and limits their freedom of speech without giving the person a chance to first present his or her case.

The ROs are said to be reviewed by a Presidential Council. There are several concerns surrounding the 'safeguards' put in place.

First, it is unclear how appointments on the Presidential Council will be made, and if the Presidential Council will be representative in terms of race, gender, and socio-economic background. It is argued that since the RO is aimed at stopping potentially criminal conduct, a court of law should be the decision-making authority over the issuance and review of ROs. **Designating a presidential council to make decisions about contraventions of criminal law usurps the role of the courts and contravenes the principle of separation of powers.**



(The seperation of powers between the 3 institutions is meant to protect against the centralisation of power and excesses of the government.)

Second, it is unclear how the Presidential Council will be guided in making its decisions since there is not much case law on race-related offences in the first place, and if the Presidential Council will be fit to interpret case law since they are not a judicial body.

Third, it is unclear how the Presidential Council will be undergoing training on intersectionality, privilege, anti-racism, racism, stereotypes, and other race-related concepts.

Fourth, while the person facing an RO is allowed to “make representations” to the Presidential Council, it is unclear whether the person is allowed legal representation and if legal aid under the Criminal Legal Aid Scheme could be provided for those who cannot afford it.

Lastly, it is argued that the Cabinet should not have any decision-making power when it comes to the ROs. An independent court or body should be the only authority making decisions relating to such expansive powers under the RO. Especially in situations where the subject of the RO is content relating to criticism of race-related policies, the Cabinet should not be making its recommendations relating to the RO.

It is also unclear if the Minister for Home Affairs who issues the RO will be making recommendations as part of the Cabinet, as this calls into question if the Cabinet's recommendations may just mirror the initial reasons for the issuance of the RO by the Minister in the first place.

In summary, the RO should not be part of the Bill as it will significantly curtail freedom of speech, may criminalize conversations about race, and lack sufficient safeguards.

Safeguards Against Foreign Influence

It is unclear whether the Bill will only seek disclosure of foreign affiliations and donations or if "foreign influence" will be construed more broadly. Based on what is stated on MHA's website, that MHA will "also be able to impose additional safeguards to counter foreign influence", it seems like a broad approach will be taken.

Absent any further information on how the Bill intends to counter foreign influence, there is a risk that such measures against race-based organizations may curtail the exchange of knowledge and strategies that are used across different social justice movements that address racial inequalities.

Arguably, the adaptation of 'White privilege' to 'Chinese privilege', and the use of Critical Race Theory in Singapore, may be considered concepts that stem from 'foreign influence' and could land race-based organizations in trouble. This will curtail any productive use of concepts that can be meaningfully adapted to the Singapore context.

It is also stated that the safeguards will only apply to certain race-based organizations. The basis of such distinction must be made clear so as to ensure that the Bill does not inadvertently discriminate based on race, gender, religion or any other identity.

The government should also clarify how the Bill is different from what is already addressed through FICA.

Reparative Measures

The lack of specific provisions relating to the types of reparative measures, the guidelines on how eligibility is determined before someone is ordered to make reparative measures instead of facing criminal penalties, and whether and how the aggrieved community's input is taken into account in determining reparations, makes the proposal of reparative measures ring hollow.

If the government is serious about putting in place reparative measures, a whole-of-community approach, through participation and constructive feedback by the community is needed. Working with MCCY and other community partners is insufficient. We have seen how government bodies themselves have produced "culturally-insensitive" content that have harmed certain minority communities (e.g. the government-approved NETS E-pay advertisement in 2019, the People's Association Hari Raya display in 2021, and the MCI and gov.sg Hari Raya advertisement in 2022).

Constructive participation from affected communities does not seem to be a priority based on the approach taken through this feedback exercise alone. Clearer mechanisms must be put in place to ensure that aggrieved communities, especially minorities in Singapore, are part of this process at every step of the way. Regular reviews on the reparative measures are also necessary.

The MHA website also states that the reparative measures will be offered "as an alternative to prosecution".We believe that even in situations where prosecution is pursued, reparative measures are necessary. In cases where prosecution is pursued, it is likely that the harm caused to an individual or to a community is more egregious. This means that there will be a greater need for reparative measures.

Most importantly, it is imperative that a shift in mindset as to the purpose of reparative measures is undertaken. Currently, it is stated on the MHA website that "Such an approach helps the aggrieved community take a more reconciliatory view towards an offender and strengthens understanding between races" and that "the offender is given an opportunity to learn from his mistakes."

However, reparative measures should be meant to address the harm that has been caused to the victim, and whatever reparative measures should be proportional to the harm caused.

Additionally, the burden of being 'reconciliatory' should not be imposed on a particular victim or community.

While it is ideal that various racial communities in Singapore continue to foster racial harmony and learn from one another, the burden of educating and fostering understanding with the offender should be placed on a separate independent body or mechanism.

Those from the aggrieved community who wish to partake in such measures can then choose to do so, without a broad requirement for the particular victim or community to be ‘reconciliatory’.

Singapore's Human Rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)

*The International Convention on the Elimination of all forms of Racial Discrimination (ICERD) was adopted by the United Nations General Assembly on 21 Dec 1965. The Convention requires countries to condemn all forms of racial discrimination, whether based on race, colour, descent, nationality or ethnic origin, and to pursue a policy of eliminating racial discrimination. States Parties to the Convention are expected to fulfil their treaty obligations via legislative, judicial, administrative and institutional measures. ICERD further recognises that affirmative action measures may be necessary to achieve some of these ends.

Singapore signed the ICERD on 19 October 2015 and ratified it on 27 November 2017.

Definition of racial discrimination and legislation

On 2 February 2022, the Committee on Racial Discrimination released its concluding observations on Singapore's initial report on its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). **It is argued that the Bill is not in line with, and/or falls short of, Singapore's obligations under the ICERD.**

In paragraph 7 of the committee's concluding observations, it expressed concern over the lack of "comprehensive anti-discrimination legislation that includes a definition of racial discrimination in line with article 1 of the Convention and ensures adequate protection against and remedies for acts of racial discrimination (arts. 1, 2 and 6)." It is unclear whether the Bill will adopt a definition of racial discrimination that is in line with the ICERD.

We echo the committee's recommendation as follows: "The Committee recommends that the State party adopt comprehensive anti discrimination legislation that: (a) includes a definition of racial discrimination covering all grounds of discrimination, in line with article 1 of the Convention; (b) encompasses direct and indirect discrimination in both the public and the private spheres;

(c) provides for penalties in the case of violation of the legislation and reparation for victims of racial discrimination, bearing in mind the Committee's general recommendation No. 26 (2000) on article 6 of the Convention; and (d) establishes remedies and redress mechanisms.".

Reparations

The Committee's general recommendation No. 26 provides guidance on the issue of reparation. Although general recommendations are not binding, we argue that it provides insight on what is best practice, and should be adhered to by Singapore.

In particular, with regard to the introduction of reparative measures through the Bill, "the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate" (General recommendation No.26, at paragraph 2).

National Human Rights Institution

As expressed by the Committee, councils such as the Presidential Council for Minority Rights do not provide a substitute for the functions of an independent national human rights institution. In this case, the Presidential Council that is proposed under the Bill to review ROs are not a substitute for a national human rights institution that will be able to assess, promote and protect human rights in line with Singapore's obligations under the ICERD.

As such, we echo the committee's recommendation in paragraph 10 of its concluding observations for, "the State party to establish an independent national human rights institution with a broad mandate to promote and protect human rights, in conformity with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)" and "to invest such an institution with a mandate to address individual complaints regarding racial discrimination, as set out in article 14 (2) of the Convention."

We also echo paragraph 18 of the Committee's general recommendation No.35 that, "Independent, impartial and informed judicial bodies are crucial to ensuring that the facts and legal qualifications of individual cases are assessed consistently with international standards of human rights.

Judicial infrastructures should be complemented in this respect by national human rights institutions in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).”

Racist hate speech and hate crimes

With regard to laws in Singapore that address racist hate speech and hate crimes, including Section 298 and 298A, the committee at paragraph 11 of the concluding observations expressed that it was “concerned by reports that amendments to these laws may, in practice, result in intimidation, arrests and prosecution of journalists, human rights defenders or political opponents for exercising their rights to freedom of opinion and expression, including with regard to issues on racial discrimination and racism (art. 4).”

Conditional warnings were given out to Preeti Nair, Subhas Nair, and Raeesah Khan, under Section 298A(a). Subhas Nair was eventually prosecuted under Section 298A for separate offences.

The SPF also held that “the phrase “From the river to the sea” is associated with calls for the destruction of the State of Israel. The use of such phrases can lead to racial tensions in our society, and may be an offence under Section 298A(a) of the Penal Code 1871.” The police is arguably ill-equipped at assessing race-related issues. The police enforcing laws that criminalize satire about harmful stereotypes and racist incidents in Singapore, a gross misunderstanding of a rallying call for solidarity with the Palestinian people who have been the target of an ongoing genocide, only serve to curtail the advancement of Singapore’s

multi-racial society.

We echo the committee's recommendation in paragraph 12 of the concluding observations as follows, "The Committee recalls its general recommendation No. 35 (2013) on combating racist hate speech, according to which the relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero-sum game where the priority given to one necessitates the diminution of the other."

We also refer to paragraph 12 of general recommendation no. 35, which states that, "The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups." We echo the committee's sentiment that other means may be more appropriate in dealing with certain forms of racist expression, to reduce risk of intimidation and silencing of good faith actors and legitimate commentary or criticism about race-related issues.

We also refer to paragraph 13 of general recommendation no. 35 where the Committee states a non-exhaustively list of offences that ought to be punishable by law, which predominantly entail incitement to hatred, contempt or discrimination, and threats or incitement to violence.

We believe that the current offences under Section 298 and 298A(b) falls short of this standard of incitement as they relate to intention of "wounding racial feelings", prejudicing "maintenance of racial harmony" and disturbing of "public tranquility". These acts should not be sanctioned under criminal law and should be addressed by other non-criminal means.

We also refer to paragraph 15 of general recommendation no. 35 which states that "on the qualification of dissemination and incitement as offences punishable by law, the Committee considers that the following contextual factors should be taken into account:"

- The content and form of speech
- The economic, social and political climate
- The position or status of the speaker
- The reach of the speech
- The objectives of the speech

The Bill ought to include these factors in specific provisions that the court has to take into account, and include specific examples relating to these factors in the illustrations section of a provision.

With regard to media representation and stereotypes, specifically bearing in mind the gov.sg Hari Raya advertisement and NETS e-pay advertisement, we refer to paragraph 40 of the Committee's general recommendation No.35, "Media representations of ethnic, indigenous and other groups within the purview of article 1 of the Convention should be based on principles of respect, fairness

and the avoidance of stereotyping. Media should avoid referring unnecessarily to race, ethnicity, religion and other group characteristics in a manner that may promote intolerance."

The Bill ought to ensure that media portrayals such as the ones that have previously stereotyped Malays and Indians, will not be accepted. It is argued that findings by the IMDA, ASAS and other public authorities lacked knowledge of the harm that was caused to minority communities. Both the Internet Code of Practice and Singapore Code of Advertising Practice have not been amended to address prior incidents and prevent future incidents from happening again.

On the issue of freedom of expression, we echo paragraph 29 in the Committee's general recommendation No. 35, "Freedom of expression, indispensable for the articulation of human rights and the dissemination of knowledge regarding the state of enjoyment of civil, political, economic, social and cultural rights, assists vulnerable groups in redressing the balance of power among the components of society, promotes intercultural understanding and tolerance, assists in the deconstruction of racial stereotypes, facilitates the free exchange of ideas, and offers alternative views and counterpoints. States parties should adopt policies empowering all groups within the purview of the Convention to exercise their right to freedom of expression."

Complaints of racial discrimination

It is unclear how the Bill will empower Singaporeans to enforce their rights under the law to make complaints of racial discrimination to court. In its concluding observations, the Committee expressed concern "by the information that national courts have not received a single complaint of racial discrimination to date (art. 6)".

The Committee also highlighted that " a low number of complaints does not signify the absence of racial discrimination in the State party, but may rather signify that barriers exist with regard to invoking the rights under the Convention before the domestic courts, including lack of public awareness of those rights and of the methods available for seeking judicial remedies".

The Bill should be drafted such that the rights and remedies of the people are clearly defined, and processes should be accessible to the public to seek redress. This includes processes to make a claim to court and processes to seek reparations.

We echo the Committee's recommendation "that the State party undertake public education campaigns on the rights under the Convention and on how to file complaints of racial discrimination."

Review of policies and legislation that may have a racially discriminatory effect

It is unclear whether the Bill will address other governmental policies that have a discriminatory impact. One such scheme is the Home Ownership Plus Education (HOPE) scheme, which provides low-income families with housing grants and financial aid on the condition that they do not have more than two children.

As highlighted by the Committee, the HOPE policy "particularly affects Malay women, who usually have a higher fertility rate and are more likely to be in low-income groups than women of other ethnicities (art 5)". Such intersectional discrimination on the basis of gender, race, and socio-economic background, is very alarming as it not only affects Malay women's rights to equality but also their right to reproductive health.

It is argued that the Bill, in its efforts to maintain racial harmony, should also take a proactive step in providing remedies for those who have been disproportionately affected by policies that have had a discriminatory effect. In line with the definition of racial discrimination in Art 1 of the ICERD, 'racial discrimination' encompasses not just purpose, but also the effect of impairing the enjoyment of human rights on an equal footing.

The government must put in place processes to assess policies and legislation, periodically, to ensure they do not have a discriminatory effect on any ethnic groups.

In addition to calling for the Bill to have remedies or reparations for past and/or ongoing discrimination faced by minority women, we echo the Committee's recommendation for the "review [of] policies and legislation including the HOPE scheme, in order to avoid a discriminatory impact on the rights of certain minority groups, including their right to reproductive health.".

Situation of ethnic minorities

It is unclear whether the Bill seeks to address systemic inequalities and historical inequalities faced by racial and religious minorities in Singapore. The Bill in its effort to maintain racial harmony ought to include special measures that promote the equal position of ethnic minorities.

We echo the Committee's recommendation with regard to special measures, "Taking into account its general recommendation No. 32 (2009) on the meaning and scope of special measures in the Convention, the Committee recommends that the State party take effective measures to reduce poverty and inequality that affect members of ethnic minorities, including through the adoption of special measures designed to eliminate structural discrimination against such groups. In doing so, the State party should take into account inequality gaps and the specific needs of members of ethnic minority groups, with a view to achieving meaningful reductions in poverty and inequality."

Migrant workers

It is unclear whether the Bill will have provisions protecting the rights of migrant workers against discrimination. Under the ICERD, Singapore has an obligation to protect migrant workers from racial discrimination.

We refer to the communication (AL SGP 10/2022) by various special rapporteurs, dated 3 October 2022. The Special Rapporteurs highlighted issues of freedom of movement, free choice of employment, right to work, and right to life.

In view of policies such as the exemption under the Road Traffic Act that allows for the transport of migrant workers in the back of lorries, the access to justice issues that affect migrant workers' salary claims,

ithe disproportionate effect of COVID-19 on migrant workers, and issues faced by migrant domestic workers, the Bill must ensure that not only are there adequate protection of the rights of migrant workers against racial discrimination, there must also be a review of current discriminatory policies alongside the passing of this Bill.

Conclusion

In conclusion, we do not support the passing of this Bill based on the aforementioned reasons.

The Government must first ensure that it protects the rights of its citizens, and fulfill its obligations, under the ICERD.

If the Bill is to be passed, the government must provide the full Bill for further rounds of consultations with the public. The government must meaningfully incorporate all the concerns and recommendations that we have raised, and all future feedback by the public. The findings from the rounds of consultations and any feedback received by the government, ought to be made available to everyone to ensure transparency in the process, and so that there is assurance that the government has addressed all the concerns that were raised before the Bill is debated in Parliament.

Racial harmony ought to be fostered through open dialogue and education, rather than the criminalization of race-related expression and conduct.

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