

立法會
Legislative Council

LC Paper No. CB(2)2632/06-07

(These minutes have been
seen by the Administration)

Ref : CB2/BC/2/06

**Bills Committee on
Race Discrimination Bill**

**Minutes of meeting
held on Tuesday, 15 May 2007, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)
Hon Abraham SHEK Lai-him, JP (Deputy Chairman)
Hon LEE Cheuk-yan
Dr Hon LUI Ming-wah, SBS, JP
Hon James TO Kun-sun
Hon CHEUNG Man-kwong
Hon Bernard CHAN, GBS, JP
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Howard YOUNG, SBS, JP
Dr Hon YEUNG Sum
Hon Emily LAU Wai-hing, JP
Hon LI Fung-ying, BBS, JP
Hon Albert CHAN Wai-yip
Hon Audrey EU Yuet-mee, SC, JP
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Alan LEONG Kah-kit, SC
Dr Hon Fernando CHEUNG Chiu-hung
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
Hon TAM Heung-man
- Members absent** : Hon Martin LEE Chu-ming, SC, JP
Hon CHAN Yuen-han, JP
Hon CHOY So-yuk, JP
Hon Daniel LAM Wai-keung, SBS, JP

- Public Officers attending** : Mr Donald TONG
Deputy Secretary for Home Affairs(1)
- Mr Victor NG
Principal Assistant Secretary for Home Affairs (4)
- Ms Roxana CHENG
Senior Assistant Solicitor General
- Miss Betty CHEUNG
Senior Government Counsel
- Miss Shandy LIU
Senior Government Counsel
- Clerk in attendance** : Miss Flora TAI
Chief Council Secretary (2)2
- Staff in attendance** : Mr KAU Kin-wah
Assistant Legal Adviser 6
- Ms Joanne MAK
Senior Council Secretary (2)2
- Miss Kiwi NG
Legislative Assistant (2)2

Action

I. Confirmation of minutes

[LC Paper No. CB(2)1821/06-07]

The minutes of the meeting on 3 March 2007 were confirmed.

II. Meeting with the Administration

[LC Paper No. CB(3)176/06-07 - The Bill

LC Paper No. CB(2)1823/06-07(01) - Paper entitled "Indirect discrimination and assessment of justifiability" provided by the Administration

LC Paper No. LS48/06-07 - Table of comparison of the provisions of the Race Discrimination Bill with those of the Race Relations Act 1976 of the United Kingdom]

Action

2. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Discussion of the Administration's paper on "Indirect discrimination and assessment of justifiability" [LC Paper No. CB(2)1823/06-07(01)]

Admin

3. The Administration undertook to -

- (a) provide information on its publicity and public education work launched to combat discriminatory attitude towards new arrivals from the Mainland, including the amount of resources devoted for such work and, if available, the effect achieved and the evaluation methods used;
- (b) explain the basis of applying the rationality and proportionality test and the practicability test to justify the application of a requirement or condition under Clause 4(1)(b), given that the fundamental right to have equal and effective protection before the law without any discrimination under Article 26 of the International Covenant on Civil and Political Rights was an unqualified one;
- (c) provide the General Comments issued by the United Nations Human Rights Committee relating to the application of the rationality and proportionality principle;
- (d) provide written response to whether the imposition of the requirement of obtaining a pass for the subject of Chinese Language in the Hong Kong Certificate of Education Examination for university admission on all local students, which had put non-Chinese speaking students of ethnic minorities at a great disadvantage, would constitute indirect discrimination under the Bill; and
- (e) confirm whether the implementation of the new Obstetric Package Charge for Non-eligible Persons whose spouses were Hong Kong residents would constitute racial discrimination, given that it would have the effect of putting these persons who were predominantly Chinese at a disadvantage as compared with pregnant women of other races whose spouses were also Hong Kong residents.

4. The Chairman summed up the majority views expressed by members as follows -

Action

- (a) the distinction between "treatment" and "applying a requirement or condition" as prescribed in Clause 4(1)(a) and (b) was blurred;
- (b) any act which resulted in racial discrimination should be prohibited by the Bill and there was no need to distinguish arbitrarily two forms of discrimination, i.e. direct or indirect discrimination; and
- (c) Clause 8 and Clause 58 should be amended so that the following examples which were generally regarded as racial discrimination would be prohibited under the Bill -
 - (i) the imposition of the requirement of obtaining a pass for the subject of Chinese Language in the Hong Kong Certificate of Education Examination for university admission on all local students, which had put non-Chinese speaking students of ethnic minorities at a great disadvantage;
 - (ii) ethnic minorities being denied of timely provision of medical services due to language barrier and unavailability of interpretation services at hospitals; and
 - (iii) the implementation of the new Obstetric Package Charge for Non-eligible Persons whose spouses were Hong Kong residents which would have the effect of putting these persons who were predominantly Chinese at a disadvantage as compared with pregnant women of other races whose spouses were also Hong Kong residents.

Clerk

5. At the suggestion of the Chairman, members agreed that the Clerk should provide a paper reflecting members' views and concerns on the definition of discrimination under Clause 4 to facilitate the discussion at the next meeting to be held on Thursday, 31 May 2007 at 10:45 am.

6. There being no other business, the meeting ended at 10:30 am.

**Proceedings of the meeting of Bills Committee on
Race Discrimination Bill
on Tuesday, 15 May 2007, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000219	Chairman	Confirmation of minutes of meeting	
000220 - 001647	Chairman Admin Dr YEUNG Sum Dr Fernando CHEUNG Ms Emily LAU	<u>Showing of an Announcement of Public Interest (API).</u> Members' comments on the API and request for information on the publicity and public education launched for elimination of discriminatory attitude towards new arrivals from the Mainland.	Admin to provide supplementary information (para. 3(a) of minutes)
001648 - 003909	Chairman Admin Miss TAM Heung-man	<u>Introduction of the Administration's paper by Deputy Secretary for Home Affairs (1)</u> [LC Paper No. CB(2)1823/06-07(01)] Miss TAM Heung-man's questions about progress of preparation work undertaken by the Equal Opportunities Commission (EOC) for implementation of the Bill after its enactment. The Administration's briefing of the current position in this regard.	
003910 - 005058	Chairman Admin Mr Ronny TONG	Mr Ronny TONG's query of the appropriateness of including the rationality and proportionality test under Clause 4 of the Bill, given that the test was normally used to restrict fundamental human rights, and his concern that the concept of "justification" might give rise to implementation difficulties. The Chairman's query of the appropriateness of making reference to the <i>Leung Kwok Hung & Others v HKSAR</i> in the present context (i.e. to justify a discriminatory act), given that the case was related to freedom of speech.	Admin to provide written explanation and relevant General Comments issued by UNHRC (para. 3(b)&(c) of minutes)

Time marker	Speaker	Subject	Action required
		<p>The Administration's explanation that, according to the General Comments issued by the United Nations Human Rights Committee (UNHRC) under Article 26 of the International Covenant on Civil and Political Rights (ICCPR), whether or not a differential treatment constituted unlawful discrimination depended on whether it was a rational and proportional measure to pursue a legitimate purpose. These principles as prescribed in Clause 4(2)(a) had also been adopted in the case of <i>Equal Opportunities Commission v Director of Education</i> [2001].</p> <p>Mr Ronny TONG's reference to Articles 2 and 26 of ICCPR which enshrined that the enjoyment of human rights and the fundamental right to equal protection before the law without any discrimination was an unqualified one.</p>	
005059 - 010411	<p>Dr Fernando CHEUNG Admin ALA6 Mr Ronny TONG</p>	<p>Dr Fernando CHEUNG's question whether non-Chinese speaking (NCS) patients being unable to obtain appropriate and timely medical service at public hospitals due to unavailability of interpretation service would constitute direct or indirect racial discrimination under the Bill.</p> <p>The Administration's response in the negative as Clause 58 provided for an exception for use, or failure to use, particular language in regard to provision of goods, services, facilities, etc.</p> <p>ALA6's view that Dr CHEUNG's example was -</p> <ul style="list-style-type: none"> (a) a form of direct discrimination under Clause 4(1)(a) but exempted because of Clause 58; and (b) not a form of indirect discrimination under the Bill because the scope of Clause 4(1)(b) which defined indirect discrimination was very narrow and only applied if there was a "requirement or condition". 	

Time marker	Speaker	Subject	Action required
		<p>ALA6's advice that -</p> <p>(a) Clause 4(1)(b) was modeled on section 1(1)(b) of the Race Relations Act 1976 (RRA) of the United Kingdom;</p> <p>(b) new subsections (1A)-(1C) had been added to the relevant provision of RRA in 2003 to implement EU Council Directive 2000/43/EC which referred to "provision, criterion or practice"; and</p> <p>(c) these newly added provisions were considered to be broader in scope and would cover the form of discrimination in Dr CHEUNG's example.</p> <p>ALA6's observation that Clause 4(2)(a) and (b) as currently drafted had the effect that satisfying <u>either</u> the rationality and proportionality test under Clause 4(2)(a) <u>or</u> the reasonable practicability test under Clause 4(2)(b) would suffice to establish the defence of "justification". In other words, a requirement or condition would be justifiable provided that the discriminator proved that it was not reasonably practicable for him not to apply it, <u>no matter how irrational and disproportionate</u> the requirement or condition was to achieve the legitimate objective.</p>	
010412 - 010734	Dr YEUNG Sum Admin Chairman	<p>Dr YEUNG Sum's question of whether the imposition of the requirement of obtaining a pass for the Chinese Language subject in the Hong Kong Certificate of Education Examination for university admission on all local students, which had put NCS students of ethnic minorities at a great disadvantage, would constitute indirect discrimination under the Bill.</p> <p>The Administration's undertaking to liaise with the Education and Manpower Bureau to provide a written response.</p>	Admin to provide written response (para. 3(d) of minutes)

Time marker	Speaker	Subject	Action required
010735 - 012118	Mr Ronny TONG Chairman Admin	<p>Mr Ronny TONG's query of the need to distinguish direct and indirect discrimination in the Bill.</p> <p>His suggestion that the definition of racial discrimination in the Bill should be revised in such a way that such discrimination occurred if it was proven that a person had been given differential treatment on the ground of race. He considered that a case of racial discrimination should be established on the basis of the end results, i.e. whether a person had been discriminated on the ground of race.</p> <p>The Administration's responses that -</p> <ul style="list-style-type: none"> (a) there was a need to distinguish between direct and indirect discrimination in the Bill; (b) while there was no defence for direct discrimination under Clauses 4(1)(a), a defence of "justification" was provided for under Clause 4(1)(b); (c) an alternative was to allow both direct and indirect discrimination to be justified; and (d) not allowing for indirect discrimination to be justified would not be acceptable; otherwise any requirement or condition having a disproportionate negative impact on a racial group would become unlawful even with sound justifications (e.g. a tour guide serving tourists from a Chinese province might justifiably be required to speak the dialect.) 	

Time marker	Speaker	Subject	Action required
012119 - 013007	Mr James TO Admin ALA6 Chairman	<p>Mr James TO's views that -</p> <p>(a) there was a need for making explicit provisions to provide for the definitions of "direct discrimination" and "indirect discrimination" respectively; and</p> <p>(b) the Bill should also incorporate the newly added subsections (1A)-(1C) of RRA.</p> <p>His question of whether the example cited by Dr Fernando CHEUNG could be covered by Clause 4(1)(b) as it might be argued that the NCS patient was being imposed "a requirement" that he had to be able to speak Cantonese in order to obtain necessary medical service.</p> <p>The Administration's agreement that Clause 4(1)(b) might arguably apply in Dr CHEUNG's example.</p>	
013008 - 013827	Mr LEE Cheuk-yan Admin Chairman	<p>Mr LEE Cheuk-yan's question of whether the implementation of the new Obstetric Package Charge for Non-eligible Persons would constitute racial discrimination, given that this policy mainly affected Chinese pregnant women but not pregnant women of other races whose husbands were also Hong Kong residents.</p> <p>The Administration's response that the policy did not constitute racial discrimination because Clause 8(2) and (3) made it clear that race did not include nationality, citizenship, resident status.</p>	Admin to revert in writing (para. 3(e) of minutes)
013828 - 014556	Dr Fernando CHEUNG Admin Chairman	Dr Fernando CHEUNG's query of why the Bill did not incorporate the newly added subsections (1A)-(1C) of RRA.	

Time marker	Speaker	Subject	Action required
		<p>The Administration's explanation that adopting the relevant provisions of RRA made in 1976 was mainly based on the consideration that those provisions were well-tested and their effect well-understood as they had been considered and interpreted in various court cases in the UK, which could serve as a useful reference for the courts and EOC.</p>	
014557 - 014907	Mr Ronny TONG Admin	<p>Mr Ronny TONG's view that the definitions of direct and indirect discrimination under Clause 4 were unclear and difficult in application because the distinction between "treatment" and "applying a requirement or condition" was blurred.</p> <p>The Administration's response that the rationale of the fee-charging policy cited by Mr LEE aimed to ensure that local residents were given priority in obtaining public services, given limited public resources available.</p> <p>The Chairman's summing up of the majority views and suggestion of conducting a focused discussion on the definition of racial discrimination at the next meeting.</p>	<p>The Clerk to prepare a paper reflecting members' views and concerns (para. 5 of minutes)</p>
014908 - 015559	Chairman Dr YEUNG Sum	Date of next meeting	