

Legislative Council Bills Committee on Race Discrimination Bill

Compatibility with Articles 24 and 25 of Basic Law

Purpose

At the meeting held on 29 January 2007, Members expressed concern whether Clause 8(3)(c) of the Race Discrimination Bill might be in breach of Articles 24 and 25 of the Basic Law

2. In our earlier paper referenced LC Paper No. CB(2)963/06-07(03), we have explained the compatibility of the Race Discrimination Bill with Article 25 of the Basic Law. In view of Members' enquiry, this paper further clarifies the matter and reassures Member that the proposed clause is consistent with the Basic Law provisions.

Articles 24 and 25 of the Basic Law

3. Article 25 of the Basic Law provide for the equality of all Hong Kong residents before the law. It states unambiguously that –

“All Hong Kong residents shall be equal before the law.”

Article 24 defines the meaning of Hong Kong residents. It states –

“Residents of the Hong Kong Special Administrative Region (“Hong Kong residents”) shall include permanent residents and non-permanent residents.”

As stated in the same Article, “permanent residents” include –

“(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region.”

4. Read together, these provisions means that all Hong Kong residents, irrespective of their status as permanent residents or non-permanent residents (which include new arrivals), should be equal before the law .

Jurisprudence on equality before the law

5. As observed by Hartmann J in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, para. 84-85, BL25 is reflected in Article 22 of the Hong Kong Bill of Rights (HKBOR), the BOR effectively

bringing the provisions of the International Covenant on Civil and Political Rights (ICCPR) into our domestic law. Article 22 of the HKBOR is in the same terms as Article 26 of the ICCPR which provides:

“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, language, religion, political or other opinion, national or social origin, property, birth or other status.”

6. The jurisprudence regarding Article 26 of the ICCPR shows that the provision guarantees equality in two ways, namely, equality in application and equality in substance.

Equality in application

7. The requirement that “all persons are equal before the law” does not refer to the substance of the law, but to the condition under which the law may be applied (Jayawickrama, N, *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence*, pp.820-821). As noted by Nowak, this requirement “does not give rise to a claim of whatever nature to substantive equality but instead solely to a formal claim that existing laws be applied in the same manner to all those subject to it. The right to equality before the law thus is not directed at legislation but rather exclusively at its enforcement”(Nowak, M, *U.N. Covenant on Civil and Political Rights*, pp. 465-466).

8. “Equality before the law” in this context means that laws should be applied or enforced without arbitrary discrimination. It means that judges and administrative officials must not act arbitrarily in enforcing the law. The right guaranteed under BL25 will be violated where a law is arbitrarily applied and where like fact patterns lead to different legal consequences without objective and reasonable justification.

9. There is no evidence that the Race Discrimination Bill if enacted would be applied or enforced by our courts in an arbitrary manner. The Equal Opportunities Commission (EOC), the agency responsible for the implementation of the Bill, has accumulated valuable experience in the enforcement of the three anti-discrimination ordinances, i.e. the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. No doubt our courts and the EOC would continue to fairly enforce the race discrimination law in the usual reasonable manner without arbitrary discrimination.

Equality in substance

10. “Equal protection of the law” means that the content of the law must be the same for all those who are equally situated. It means that the substance of the law must not contain any arbitrarily discriminatory provisions (Nowak, *supra*, pp. 467-469; Jayawickrama, *supra*, pp. 823-824).

11. The Bill as presently drafted would apply to all in the same manner in matters falling within the scope of the new tort of racial discrimination. It does not seek to exclude any group from its protection. Nor does the Bill contain any arbitrarily discriminatory provisions against any racial or ethnic groups. New arrivals and permanent residents alike, irrespective of their length of residence in Hong Kong, will enjoy the same protection under the Bill, provided the discrimination a person faces in a particular case is within the scope and coverage of the Bill or provided the discrimination a person faces in a particular case is on racial ground and is in an area of activity covered by the Bill.

12. The Bill is not intended to affect the operation of existing statutory requirements (see clause 56). The Bill, as a piece of ordinary legislation if and when enacted, cannot affect or undermine rights guaranteed under the Basic Law (including BL24) and the HKBOR. Persons of any race can continue to claim right of abode in Hong Kong provided that they satisfy the requirements stipulated under BL24. Clause 8(3) of the Bill merely defines the scope and ambit of the new tort. It does not rule out any claims or reduce any rights guaranteed under the Basic Law or the HKBOR.

Conclusion

13. In light of the further explanation and analysis set out above, the Government can reassure Members that the Bill is consistent and in conformity with Articles 24 and 25 of the Basic Law.

14. It may also be reiterated that the Bill does not exclude new arrivals from its ambit. Whether new arrivals can be regarded as an ethnic group is ultimately a matter of facts. It would be determined by the court applying the test advocated by Lord Fraser in *Mandla v Dowell Lee*. The court would look at whether new arrivals have a long shared history and a cultural tradition of their own. Should new arrivals be able to satisfy the test laid down by Lord Fraser, they would be protected as a separate ethnic group under the Bill. The Bill does not pre-empt the court's jurisdiction in this regard.

Presentation

15. This paper is presented for Members' information and for consideration at the Bills Committee meeting to be held on 5 February 2007.

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