

Bills Committee on the Race Discrimination Bill

**Clauses on employment, especially on offer of
overseas terms and employment by airlines and shipping companies**

Introduction

At the Bills Committee meeting held on 21 January 2008, Members asked for further information on the clauses concerning employment, particularly on the following questions –

- Q1. Is it possible to circumvent the proposed legislation, if enacted, by having different employers for different races?
- Q2. Will the proposed legislation hinder employers in Hong Kong in offering better terms to employees recruited from overseas?
- Q3. Will the proposed legislation adequately protect local employees from being treated less favourably than employees recruited from overseas?
- Q4. How will the proposed legislation apply to employment by airlines or shipping companies?

2. This paper provides the relevant information by –
- (a) explaining the application of Clauses 10(1) & (2) (paragraphs 3 to 6);
 - (b) in response to Q1, clarifying that under Clauses 4(1)(a) and 10(1), it will be unlawful for a company to employ people only from one race unless a specific exception applies (paragraphs 7 to 8);
 - (c) in response to Q2 & Q3, analysing how Clauses 8(5), 4(1)(b) and exceptions under Clauses 12, 13 and 14 apply in a discrimination claim arising from an offer of overseas terms (paragraphs 9 to 22);
 - (d) in response to Q4, explaining how the geographical limitation of “employment in an establishment in Hong Kong” in Clause 10 operates, with specific reference to airlines and shipping companies (paragraphs 23 and 24);

Application of Clauses 10(1) & (2)

3. **Clause 10(1)** provides, among other things, that it is unlawful for an employer in relation to employment by the employer at an establishment in Hong Kong, to discriminate against a job applicant in determining who should be offered employment or in the terms of employment offered. Similarly, **Clause 10(2)** provides, among other things, that it is unlawful for an employer to discriminate against an employee employed by the employer at an establishment in Hong Kong in the terms of employment offered. Although Clause 10 does not specifically refer to comparison with another job applicant

or another person employed by the employer, that comparison is embodied in the reference to “discriminate”, which term is defined in Clause 4.

4. The diagram at Annex A paraphrases clause 4(1) and sets out the essential elements of a discrimination claim. It would be noted in particular that -

(a) discrimination under **Clause 4(1)(a) or (b)** involves, in addition to the circumstances relevant for the purposes of any provision of the Bill, the following **common** elements –

- a single discriminator;
- the victim who is of a particular race, say, race A; and
- for comparison purpose, persons who are not of the same race A.

Under Clauses 4(1)(a) and (b), the concern is with the conduct of the same person in treating others. It does not require different persons to behave in like manners.

(b) For discrimination under **Clause 4(1)(a)**, commonly referred to as “direct discrimination”, **further** elements are –

- less favourable treatment, by **the discriminator**, of the victim compared with others who are of a different race; and

- the ground for less favourable treatment is the race of the victim.

Clause 4(1)(a) does not allow the discriminator to justify his treating people less favourably on the ground of race.

(c) For discrimination under **Clause 4(1)(b)**, commonly referred to as “indirect discrimination”, **further** elements are –

- a requirement or condition applied by **the discriminator**;
- the proportion of **persons of race A** who can comply with the requirement or condition is considerably smaller than the proportion of **persons not of race A** who can comply with it;
- **the discriminator** cannot show the requirement or condition to be justifiable irrespective of the race of the person to whom it is applied; and
- **the victim** cannot comply with the requirement or condition resulting in a **detriment to the victim**.

5. **Clause 8(5)** provides that a comparison under Clause 4(1)(a) or (b) of the case of the victim (who is of race A) with the case of “a person not of race A” must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

6. Therefore, if an employer advertises for a post but specifies that person of race A will not be considered, a person of race A who is otherwise

qualified for the post applies for the post and is not considered will have a claim under Clause 10(1) as construed with Clause 4(1)(a). In this regard, it should be noted that:

- (a) Clause 4(1)(a) does not allow the discriminator to treat another person less favourably on the ground of race than he would treat other persons, unless there is specific exception stipulated in the proposed legislation (for example, Clause 11 provides for an exception of genuine occupational qualification, which enables the choice by employers for reasons of race in specified circumstances, e.g. for authenticity in a dramatic performance or for effective provision of personal services to members of a particular racial group); and
- (b) under Clause 9, if an act is done for two or more reasons and one of the reasons is the race of the person (whether or not it is the dominant reason or a substantial reason), the act is taken to be done for the reason of the race of the person.

Possibility to circumvent the Ordinance by having different employers for different races

7. A question was raised as to **whether it was possible to circumvent the proposed legislation, if enacted, by having different employers for different races**. The factual scenario contemplated was that an employer may recruit people from different races and –

- offer less favourable terms of employment to people of Race A through Company X;

- offer standard terms of employment to people of Race B through a separate Company Y; and
- offer better terms of employment to people of Race C through yet another Company Z.

The concern was that the employees in Company X may not have a claim against the employer because they were employed by a different company from those employing people of Race B and Race C.

8. Such concern is unwarranted. This is because, under Clauses 4(1)(a) and 10(1), it will be unlawful for a company to recruit people only from one race unless it is permitted to do so by a specific exception in the proposed legislation (e.g., genuine occupational qualification as provided for in Clause 11). In other words, a person who belongs to Race A should be allowed to apply for the job in Company Y and Company Z which offer better terms. He may lodge a claim against these companies for the companies' refusal to offer them employment on the ground of race, unless the companies can demonstrate that restriction of offer is based on the ground of a genuine occupation qualification or other exceptions specifically provided for in the proposed legislation. The same applies to job applicants of Race B who may be refused offer of employment on the ground of race by Company Z.¹

¹ As an illustration, the Court of Appeal decision in London Borough of Lambeth v Commission for Racial Equality (1990) held that preferential treatment of the ethnic minorities *constitutes racial discrimination* against other groups unless an exception to the non-discrimination principle applies. There, a local authority advertised in a national newspaper two jobs in their housing benefits department as "confined to Afro-Caribbean or Asian applicants". The advertisement sought to rely on the exception of "genuine occupational qualification" saying that the postholder will provide person services to members of the black community. The Commission for Racial Equality took the view that the posts in question were managerial and administrative, involving minimal contact with the service recipients. The Industrial Tribunal, Employment Appeals Tribunal and the Court of Appeal all found against the local authority.

Offer of Overseas Terms

9. Members asked **if the proposed legislation will hinder employers in Hong Kong in offering better terms to employees recruited from overseas.**

10. The Bill does not seek to restrict the offer of more favourable “overseas terms of employment” as long as the offer was justified by reasons not related to race. We recognise that such overseas terms are normally conceived on human resources policy grounds in order to attract employees who possess special skills and experience which are not readily available in Hong Kong.

11. Under Clause 8(5), a comparison of the case of a person of a particular race with that of a person not of that race must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. If there are genuine reasons which are unrelated to race that differentiate two cases, differential treatment is not prohibited. For example, employees doing different work, or with different experience, qualifications or other material attributes or in different roles within an organization may be treated differently.

12. The issue of expatriate terms is not unique to Hong Kong. For example, the Race Relations Act (UK) has been applied to the issue, with proper regard to legitimate business considerations. In Wakeman and others v Quick Corporation [1999] IRLR 424, a corporation operating in UK, with headquarters in Japan, was found to be acting lawfully even though it treated certain Japanese employees more favourably. The Court of Appeal found that

the employees receiving more favourable treatment had “insight into the (business’s) worldwide operation ability to speak Japanese and liaise more efficiently with other parts of the organization”. The tribunal in Wakeman accepted, “the extent and structure of the pay package is a matter within the province of management discretion ...”.

13. In light of the concerns expressed by the business community during public consultation and in order to ensure clarity of the law to avoid unnecessary potential litigation, we have included a specific exception in **Clause 13** to cover the case of offering overseas terms to a person with special skills, knowledge or experience not readily available who is recruited from a place outside Hong Kong (Clause 13(1)(a) & (b)). At the same time, the exception is limited to differential treatment that is reasonable having regard to prevailing market conditions and any other relevant factors (other than race) (Clause 13(1)(c)). Thus, the exception would not compromise proper protection against racial discrimination.

14. Clause 13 applies whether an employee is recruited before or after the Bill is passed into law. Employees to whom Clause 13 applies can remain on those overseas terms, provided that they are still with the same employer (or with any employer in the same group of companies). This is not affected by renewal or re-engagement after termination, promotion or transfer within the same group of companies (Clause 13(2)).

15. **Clause 12** provides for an exception for employment intended to provide training in skills to be exercised outside Hong Kong. This relates to a person not ordinarily resident in Hong Kong, who is employed for the purpose of being trained in skills to be exercised wholly outside Hong Kong.

16. An exception for employees who are in existing employment on local and overseas terms is provided for under **Clause 14** and Schedule 2. Where an employer employs existing employees on local terms and overseas terms, it is not unlawful for differential treatment of the existing employees in accordance with those two set of terms (Clause 14(1)(a) & (2)). Further, where an employer employs existing employees on overseas terms and treats those employees differently according to their status as a national or citizen of a country or place, such differential treatment is not unlawful (Clause 14(1)(b) & (2)). The relevant definitions are in section 11 of Schedule 2, which reads –

“local terms of employment” (本地僱用條款) and “overseas terms of employment” (海外僱用條款) –

- (a) in relation to any employee (other than a public officer), mean respectively –
 - (i) such conditions or terms of service as apply, from time to time, primarily to the appointment or employment by the employer concerned of a person who is a Hong Kong permanent resident; and
 - (ii) such conditions or terms of service as apply, from time to time, primarily to the appointment or employment by the employer concerned of a person who is not a Hong Kong permanent resident;

- (b) in relation to a judicial officer, an ICAC officer or any other public officer, respectively mean the local conditions or terms of service and overseas conditions or terms of service within the meaning of such regulations, administrative rules, circulars and circular memoranda as apply, from time to time, generally to the appointment or employment of judicial officers, ICAC officers or other public officers (as the case may be);

17. An existing employee (referred to in Clause 14 as “an employee in an existing employment) is one that falls within section 2, 3, 4, 5 or 6 of Schedule 2. These sections are tabulated at Annex B.

18. In brief, Schedule 2 covers –

- judicial officers, ICAC officers and other public officers;
- specified English teachers; and
- employees, other than public officers and specified English teachers.

They add up to employees of all kinds.

19. In every case, the service of the employee with the employer (or, if applicable, with an employer in the relevant group of companies) began pursuant to an offer of employment made before the commencement date on which the proposed legislation shall come into operation and his service has continued without a break. Certain dates earlier than the commencement date

are specified in the case of judicial officers, ICAC officers and other public officers because no new offer of overseas terms has been made after those dates for those officers respectively.

20. As can be seen from column 4 of Annex B, a person's status as an employee in existing employment is not affected by extension, renewal or re-engagement after termination, etc. (Sections 7, 8 and 9 of Schedule 2). In other words, an employee in an existing employment on overseas terms may remain on those terms after the Bill is passed into law, as long as they are still with the same employer (or, if applicable, with an employer in the relevant group of companies). It is immaterial whether or not an employee is or has become a Hong Kong permanent resident (Sections 10 of Schedule 2).

21. It should be noted that Clauses 12, 13 and 14 are not meant to be exhaustive in regard to the different circumstances in which overseas terms may be lawful. Clause 4(1)(b) limits discrimination to the case where a requirement or condition cannot be justified irrespective of race; Clause 8(5) limits comparison under Clause 4(1) to comparison between like cases. An employer can defend the offer of overseas terms if he can provide justification under Clauses 4(1)(b) or can show that the circumstances in the two cases are materially different under Clause 8(5).

Protection of local employees from being treated less favourably

22. Members asked **if the proposed legislation will adequately protect local employees from being treated less favourably than employees recruited from overseas**. The answer is "yes". Clause 10 contains general provisions, in relation to employment at an establishment in Hong Kong, making it unlawful for an employer to discriminate between applicants for jobs

or between employees in respect of the treatment the employer accords to them, including promotion, transfer or training. The exceptions in Clauses 12, 13 and 14 which relate to overseas terms of employment and grandfathering of existing employment under overseas terms are under circumstances specified in those causes.

Employment by Airlines or Shipping Companies

23. Some Members asked how the proposed legislation will apply to **employment by airlines or shipping companies**. The matter concerns the geographical limitation under Clause 16 on the application of Clause 10. **In line with the existing anti-discrimination ordinance**, Clause 10(1) and (2) is limited by the phrase “employment ... at an establishment in Hong Kong”, which expression is defined in **Clause 16** and covers –

- (a) employment on board a ship registered in Hong Kong,
or

- (b) employment on an aircraft or a dynamically supported craft registered in Hong Kong and operated by a person whose principal place of business is in Hong Kong or who is ordinarily resident in Hong Kong,

unless the employee does his or her work wholly outside Hong Kong. (Clause 16(2)); and

- Any other employment unless the employee does his or her work wholly or mainly outside Hong Kong (Clause 16(1)).

24. Therefore, the arrangement is that:
- (a) for employment on board a ship registered in Hong Kong or on an aircraft registered in Hong Kong and operated by a person whose principal place of business is in Hong Kong or who is ordinarily resident in Hong Kong, such employment would be covered by the Ordinance unless the employee does his or her work wholly outside Hong Kong;
 - (b) for employment on board a ship not registered in Hong Kong or on an aircraft not registered in Hong Kong or operated by a person whose principal place of business is not in Hong Kong or who is not ordinarily resident in Hong Kong, such employment would be covered by the Ordinance unless the employee does his or her work wholly or mainly outside Hong Kong.

This follows the same arrangement made under existing anti-discrimination ordinances.

Constitutional and Mainland Affairs Bureau
February 2008

Diagrammatic analysis of Clause 4(1) of the Race Discrimination Bill

The claim involves **circumstances relevant** for the purposes of any provision of this Ordinance (e.g., arrangements made by an employer in determining whom to offer employment are relevant under Clause 10(1)(a))

plus

A person (“**the discriminator**”) discriminates against another person (“**the victim**”) within the meaning of Clause 4(1)(a) or (b)

Clause 4(1)(a)

On the ground of the race of **the victim** (who is of, say, race A), **the discriminator** treats **the victim** less favourably than **the discriminator** treats or would treat **persons not of race A**

Clause 4(1)(b)

The discriminator applies to **the victim** (who is of, say, race A) a requirement or condition which **the discriminator** applies or would apply equally to persons not of race A but –

- (i) which is such that the proportion of persons of race A who can comply with it is considerably smaller than the proportion of **persons not of race A** who can comply with it;
- (ii) which **the discriminator** cannot show to be justifiable irrespective of the race of the person to whom it is applied; and
- (iii) which is to the detriment of **the victim** because **the victim** cannot comply with it.

Tabulated presentation of existing employment covered by Schedule 2

Section No. in Schedule 2 (Column 1)	Category of employee (Column 2)	Offer of employment made before a particular date, and no break of service (Column 3)	Effect of extension, renewal or re-engagement after termination, promotion or any transfer (Column 4)
2	an employee (other than a public officer or specified English teacher)	<p>(a) (i) began his or her employment with the employer pursuant to an <u>offer of employment</u> made to him or her before the commencement date; and</p> <p>(ii) continues to be employed by the employer <u>without a break in service</u> since he or she began service pursuant to the offer; or</p> <p>(b) is employed by the employer following one or more transfers of employment, all being transfers within the same group of companies within the meaning of section 13(3)(b) of this Ordinance, where the employment immediately preceding the first transfer was pursuant to an <u>offer of employment</u> made to him or her before the commencement date and there is <u>no break in the employee's service</u> since he or she began his or her employment pursuant to the offer.</p>	Status as an employee in existing employment not affected by any extension, any renewal or re-engagement after termination or any promotion. (Section 7 of Schedule 2)

3	judicial officer ¹	<p>(a) (i) began serving as a judicial officer pursuant to an <u>offer of employment</u> made to him or her before 27 November 1997; and</p> <p>(ii) continues to serve as such officer <u>without a break in service</u> since he or she began service pursuant to the offer; or</p> <p>(b) (i) began serving as a public officer (other than a judicial officer) pursuant to an <u>offer of employment</u> made to him or her before 1 January 1999;</p> <p>(ii) had continued to serve as a public officer <u>without a break in service</u> since he or she began service pursuant to the offer and until he or she began serving as a judicial officer; and</p> <p>(iii) continues to serve as a judicial officer <u>without a break in service</u> since beginning serving as such.</p>	Status as an employee in existing employment not affected by any extension, any renewal or re-engagement after termination or any promotion. (Section 8 of Schedule 2)
4	an ICAC officer ²	<p>(a) (i) began serving as an ICAC officer pursuant to an <u>offer of employment</u> made to him or her before 1 January 1999; and</p> <p>(ii) continues to serve as such officer <u>without a break in</u></p>	

¹ “judicial officer” (司法人員) means a judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap. 92);

² “ICAC officer” (廉署人員) means a public officer who is an officer within the meaning of section 2 of the Independent Commission Against Corruption Ordinance (Cap. 204);

		<p><u>service</u> since he or she began service pursuant to the offer; or</p> <p>(b) (i) began serving as a public officer (other than an ICAC officer) pursuant to an <u>offer of employment</u> made to him or her before 1 January 1999;</p> <p>(ii) had continued to serve as a public officer <u>without a break in service</u> since he or she began service pursuant to the offer and until he or she began serving as an ICAC officer; and</p> <p>(iii) continues to serve as an ICAC officer <u>without a break in service</u> since beginning serving as such.</p>	
5	a public officer ³ (other than a judicial officer or an ICAC officer)	<p>(a) began serving as such officer pursuant to an <u>offer of employment</u> made to him or her before 1 January 1999; and</p> <p>(b) continues to serve as such officer <u>without a break in service</u> since he or she began service pursuant to the offer.</p>	

³ “public officer” (公職人員) does not include a specified English teacher who is employed –

(a) in a primary or secondary school entirely maintained and controlled by the Government; or

(b) in the Native-speaking English Teacher Section of the Education and Manpower Bureau;

6	a specified English teacher ⁴	<p>(a) began his or her employment as such pursuant to an <u>offer of employment</u> made to him or her before the commencement date; and</p> <p>(b) continues to be employed as such <u>without a break in service</u> since he or she began service pursuant to the offer.</p>	Status as an employee in existing employment not affected by any extension, any renewal or re-engagement after termination or any transfer. (Section 9 of Schedule 2)
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⁴ “specified English teacher” (指明英語教師) means a teacher –

(a) who is a native-speaker of English or possesses native-speaker English competency;

(b) who is normally first recruited from a place outside Hong Kong; and

(c) who –

(i) is employed in a secondary school under the Enhanced Native-speaking English Teacher Scheme administered by the Education and Manpower Bureau;

(ii) is employed in a primary school under the Native-speaking English Teacher Scheme administered by that Bureau; or

(iii) is employed as an Advisory Teacher or a Regional Native-speaking English Teacher Coordinator in the Native-speaking English Teacher Section of that Bureau.