

Bills Committee on the Race Discrimination Bill

Administration's response to further issues related to employment and partnership

Purpose

At the Bills Committee meeting held on 13 February 2008, Members asked for further information on clauses concerning employment in the Race Discrimination Bill (“the Bill”), namely the scope of employment being covered, local and overseas terms of employment, contract workers, and the exemption provided for small partnership.

2. This paper provides the Administration's views and response.

Scope of employment being covered

3. Clause 10 of the Bill provides that it is unlawful for a person (“the employer”), in relation to employment by the employer at an establishment in Hong Kong, to discriminate against another person on matters related to employment. Clause 16 provides that employment is to be regarded as being at an establishment in Hong Kong unless the employee does his or her work wholly or mainly outside Hong Kong¹.

¹ The principle is slightly different for employment on a Hong Kong registered ship or aircraft (See Clause 16(2) of the Bill) as explained in Paper CB(2)1046/07-08(01).

4. As regards the information requested by Members concerning employment legislation in Hong Kong, the Employment Ordinance (Cap. 57) does not have an express provision regarding an employee working outside Hong Kong. On the other hand, section 30B(2) of the Employees' Compensation Ordinance (Cap. 282) stipulates that the Ordinance "applies where personal injury by accident arising out of and in the course of employment is caused to an employee outside Hong Kong where the employee's contract of employment is entered into in Hong Kong with an employer who is a person carrying on business in Hong Kong".

5. As a result of Clause 16 of the Race Discrimination Bill, the relevant provisions of the Bill apply to employment of an employee unless the employee works wholly or mainly outside Hong Kong. Unlike the Employees' Compensation Ordinance, the Bill does not require the contract of employment to be entered into in Hong Kong or the employer to be a person carrying on business in Hong Kong before the relevant provisions can be applicable to the employment concerned.

6. Clause 16 of the Bill is also in line with the provision in the existing anti-discrimination ordinances (namely, the Sex Discrimination Ordinance (Cap 480), the Disability Discrimination Ordinance (Cap 487) and the Family Status Discrimination Ordinance (Cap 527)), which have been in operation for years. Clause 16 of the Bill, if enacted, would ensure consistency among the anti-discrimination ordinances and would

be familiar to members of the public who have experience with the existing anti-discrimination ordinances.

Local and Overseas terms of employment

7. Under Section 10 of Schedule 2 of the Bill, the provisions of the Schedule apply irrespective of whether or not an employee is or has become a Hong Kong permanent resident. Section 11 of Schedule 2 makes reference to “local terms of employment” or “overseas terms of employment” as 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 or who is not a Hong Kong permanent resident respectively. This provision does not confine the application of overseas terms of employment to people who are not Hong Kong permanent residents. An employee in an existing employment as specified in Schedule 2, who is employed on overseas terms of employment and who is a Hong Kong permanent resident, is also subject to the provisions in Clause 14 of the Bill.

Contract Worker

8. The Bill is to prohibit discrimination against employees on the ground of race, including contract workers. Clause 10 covers discrimination by the direct employer and Clause 15 covers discrimination by a person (“the principal”) against a contract worker

who is employed not by the principal but by another person who supplies the contract worker under a contract made with the principal.

9. There are two other provisions in the Bill, which may be relevant depending on the circumstances of the case:

(a) under Clause 43, it is unlawful for a person –

(i) who has authority over another person; or

(ii) in accordance with whose wishes that other person is accustomed to act,

to instruct that other person to do any act which is unlawful by virtue of Part 3 or 4 (of the Bill), or procure or attempt to procure the doing by him or her of any such act; and

(b) under Clause 44(1), it is unlawful to induce, or attempt to induce, a person to do any act which contravenes Part 3 or 4 (of the Bill) by –

(i) providing or offering to provide the person with any benefit; or

(ii) subjecting or threatening the person to any detriment.

Clauses 43 and 44(1) would apply to a principal who instructs or exerts pressure on a contractor or subcontractor to discriminate against a contract worker.

10. The provisions in Clauses 15, 43 and 44(1) are in line with those in the existing anti-discrimination ordinances, which have been in operation for years. At the same time, we appreciate the concern raised regarding protection for contract workers who work under a sub-contract which is not made directly with the principal. We would examine this further and consider, if necessary, the need for clarification.

Partnership

11. Partnership is a close business relationship that results in a partner being exposed to liability and responsibilities incurred by other members of the partnership. It involves a high level of trust and confidence in the partnership relationship. Small partnership is much more personal and is likely to have less support and resources as compared with bigger partnership. It is, therefore, necessary to exempt small partnerships from Clause 17 of the Bill. The same exemption was in the Race Relations Act 1976 of the United Kingdom (UK) until 2003 after the community had gathered years of experience with the application of the legislation.

12. The small partnership exemption is also provided under the existing anti-discrimination ordinances which have been in force for years.

13. Under Clause 17(7) of the Bill, the Chief Executive in Council may alter the exemption (by stipulating another number of partners) or abolish the exemption. This clause provides for a mechanism to alter or abolish the exemption if it is considered appropriate to do so in the light of the implementation experience after the enactment of the Bill.

**Constitutional and Mainland Affairs Bureau
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