

Bills Committee on the Race Discrimination Bill

**The Administration's further response
to the major issues raised by the Bills Committee**

Purpose

This paper provides the Administration's further response to the four major issues of concern raised by Members of the Bills Committee during scrutiny of the Bill. It also addresses the Bills Committee's proposed options for amending the Bill, which are contained in LC Paper No LS 14/07-08 entitled "Discussion Drafts of Committee Stage Amendments for Members' Consideration."

2. The issues raised by Members were related to –
 - (a) Clause 3 regarding the application of the Ordinance to the Government;
 - (b) Clause 4 regarding the definition of race discrimination;
 - (c) Clause 8 regarding the provisions on new arrivals from the Mainland; and
 - (d) Clause 58 regarding the use of languages.

The Administration's response

3. The consideration and views of the Administration had been explained to Members at meetings, in the Legislative Council Brief and in various papers submitted to the Bills Committee, including the letters dated 18 January 2008 and 27 February 2008 to the Chairman of the Committee. In light of Members' views, we have further examined our position in order to address the outstanding concerns.

Application of the Ordinance to Government

4. First of all, we wish to reiterate the Government's commitment to combatting racial discrimination through the application of the Ordinance, if enacted, both to the Government and the private sector. Clause 3 as presently drafted should not be misconstrued as providing a broad exemption to the Government.

5. However, in view of the concerns raised by Members over the wording of this clause, we will introduce a Committee Stage Amendment so as to amend Clause 3 as: "This Ordinance binds the Government".

6. Since the Bill is a piece of local legislation, it should properly reflect and take into account local circumstances. We, therefore, do not consider it appropriate to follow Sections 19B and 76 of the Race Relations Act of the United Kingdom, which would have the effect of expanding the scope of the Bill to cover all government functions.

These sections were added by the UK in 2000 against the background of racial violence and institutional racism in the country. This is very different from the situation in Hong Kong. Moreover, to expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on the Government's ability to make and implement policies: any policy or practice could be challenged in the courts, for example, because of the different demographic profiles of different racial groups. This could render the Government vulnerable to an influx of litigations. It would also mean subjugating policy decisions to the judgment of the courts and, although Government will be able to defend its policies, the efforts required for such litigation would detract resources unnecessarily and affect the effectiveness of government administration.

Definition of racial discrimination

7. Clause 4 of the Bill defines racial discrimination. It incorporates, in Clause 4(2) to 4(4), the criteria for assessing whether a requirement or condition imposed by a person may be justifiable and, hence, does not constitute indirect racial discrimination.

8. We appreciate the concerns raised by Members, especially in regard to the inclusion of the alternative test of "reasonable practicability" in Clause 4(2)(b). We will propose, at Committee Stage, to delete Clause 4(2)(b) as well as Clause 4(3) to 4(5). We consider it appropriate

to retain the “proportionality” principle in Clause 4(2)(a), which is in line with internationally accepted principles of rationality and proportionality.

Application of the Bill to new arrivals from the Mainland

9. We re-affirm that the Bill does not exclude new arrivals from its ambit. Like anyone else in Hong Kong, they are protected under the Bill. Whether or not individual new arrivals may be regarded as belonging to a distinct racial group will be a matter of fact to be determined by the Court. There is well respected jurisprudence on the question of what constitutes a distinct racial group which the Court will certainly take into consideration.

10. The definition of race in the Bill is in line with the definition under the International Convention on the Elimination of All Forms of Race Discrimination. The same definition is widely adopted internationally. Bearing in mind the definition of race, which does not include references to the person’s resident status, length of residency and right of abode etc, Clause 8(3) has been included to provide clarity of the legislation. Removal of these references from the Bill, therefore, cannot be justified. It would create uncertainty as to whether these matters fall within the meaning of race. It would also run against the objective that the Bill should be clear to avoid unnecessary litigations which will be disruptive to society.

11. We appreciate the view of Members that suitable support services should be provided to facilitate integration of new arrivals into the community. In addition to the continuing efforts by Bureaux and Departments, the Family Council will examine initiatives and measures to strengthen support services for new arrivals, with a view to fostering their integration into the community.

Use of language in provision of facilities and services etc

12. Language is not a ground of race. For clarity of the law, Clause 58 of the Bill, therefore, makes it clear that the use of, or failure to use, any languages in circumstances relevant to certain specified provisions (including the provision of services and facilities) is not unlawful. As a matter of fact, it would not be practicable or reasonable for service providers in the private or public sectors to conduct their business in all languages or in the language of their client's choice. It is, therefore, not appropriate to amend or delete Clause 58.

13. We consider that the most effective way of addressing the needs of those members of ethnic minorities who have difficulties using English or Chinese would be through enhanced support in education and through provision of interpretation for access to public services. In his Budget Speech this year, the Financial Secretary has proposed initiatives for granting a recurrent annual allowance to designated primary and secondary schools to help them implement the School-based Support Scheme for non-Chinese speaking students and for setting up, on a trial

basis, four support centres in different districts to provide interpretation services for ethnic minorities and organise Chinese and English language courses and other activities to help them integrate into the community. Detailed information is contained in our letter of 27 February 2008 to the Chairman of the Bills Committee.

Concluding remarks

14. We have taken into account carefully Members' views in drawing up our proposals to amend the Racial Discrimination Bill and in working out plans for strengthening support services for new arrivals and ethnic minorities. These proposals and plans demonstrate the Government's commitment in enacting appropriate legislation and implementing measures to promote racial harmony and to cater for the needs of ethnic minorities and new arrivals.

Constitutional and Mainland Affairs Bureau

March 2008