

Bills Committee on Race Discrimination Bill

**Administration's response to questions
raised at the meeting held on 9 April 2008**

Purpose

At the meeting of the Bills Committee on 9 April 2008, Members raised questions on the following issues about the Race Discrimination Bill (the Bill) –

- (a) the need for the exception provisions in Clauses 18(5) (trade unions etc), 31 (voluntary bodies) and 37 (clubs) despite the existence of Clause 4;
- (b) the scope of coverage of organisations providing goods, facilities and services (Clause 27), voluntary bodies (Clause 31), clubs (Clauses 36 - 37) and trade unions etc (Clause 18);
- (c) the meaning of "disregarding any minor exceptions" in Clause 31(1)(a); and
- (d) the application of Clause 27 to government services and the meaning of an "undertaking by or of the Government" in Clause 27(2)(h)(ii).

2. This paper explains the matters.

Clause 4 operating with provisions in Parts 3, 4 and 5

3. Clause 4 defines the concept of racial discrimination (with subclause (1)(a) on direct discrimination, and subclause (1)(b) on indirect discrimination). Clause 4, however, does not operate in vacuum. It is the relevant provisions in Parts 3, 4 and 5 (which provide that **it is unlawful** for a person to discriminate against another person in certain circumstances) that prohibit discrimination as defined in Clause 4 in circumstances relevant to the provisions concerned. Where it is necessary, exceptions to the relevant provisions are provided for in Parts 3, 4 and 5 respectively. Exceptions in Parts 3, 4 and 5 relate to circumstances in which there is justification not to render certain acts unlawful. The exceptions, therefore, serve to make the position clear. Clauses 27, 31, 36 - 37 and 18 are summarized diagrammatically at Annex and are explained in the following paragraphs.

Provision of goods, facilities and services (Clause 27) by organisations involving admission of membership

4. In general, Clause 27(1) prohibits racial discrimination in the provision of goods, facilities and services which are provided (whether for payment or not) to the public or a section of the public. This clause applies to any person who is concerned with the provision of goods, facilities and services, and can cover an organization¹ involving admission

¹ Section 3 of the Interpretation and General Clauses Ordinance says, "person" includes any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.'

of membership. An organization applying a requirement or condition, including admission of membership, when providing goods, facilities and services, must not discriminate within the meaning of Clause 4. This is in line with similar clauses in the three existing anti-discrimination ordinances.

Exceptions for voluntary bodies (Clause 31)

5. Clause 31 provides an exception to Clauses 27(1) (as well as to Clause 28 which prohibits racial discrimination in disposal or management of premises) for voluntary bodies set up to serve a particular racial group. It is not unlawful for a voluntary body to restrict its membership to a particular racial group (disregarding any minor exceptions). It is not unlawful either for a voluntary body to provide benefits, facilities or services to one racial group if the membership is so restricted. This exception only applies to a voluntary body which means a body the activities of which are carried on otherwise than for profit.

6. The phrase “disregarding any minor exceptions” means that minor exceptions to the restriction of membership would not deprive the voluntary body the protection of Clause 31. For example, if on an exceptional basis a voluntary body set up to serve a particular racial group admits an honorary member who is of another race but has actively engaged in the body's cause, it is likely that the voluntary body will still be able to rely on Clause 31. However, once a voluntary body admits persons of different races as members, it must not discriminate between them.

7. Exceptions similar to Clause 31 are also found in section 33 of the Sex Discrimination Ordinance (SDO) (Cap. 480) and overseas legislation².

8. As to the question whether Clause 31 may encourage racist groups like White Supremacy and neo-Nazi groups to be formed in Hong Kong, it should be noted that racist behaviour is outlawed by Clause 45 of the Bill which makes it unlawful to publicly incite hatred towards, serious contempt for, or severe ridicule of, another person on the ground of that person's race. At a more serious level, Clause 46 of the Bill prohibits any activity in public which incites hatred towards, serious contempt for, or severe ridicule, of another person on the ground of that person's race and which includes threatening physical harm to that person or property or premises of that person. Clause 46 makes such serious vilification a criminal offence.

Clubs (Clauses 36 - 37)

9. As defined in Clause 2 (which is modelled on the SDO) of the Bill, "club" means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that –

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and

² s.57 of the Anti-Discrimination Act 1977 of New South Wales, Australia and s. 31 of the Discrimination Act 1991 (Australian Capital Territory)

(b) sells or supplies liquor for consumption on its premises.

10. Clause 36 outlaws racial discrimination by a club against a person in terms of accepting the person's application for membership, or member's access to benefits, services and facilities.

11. Clause 37 provides that Clause 36 does not apply to a club whose main object is to enable the benefits of membership to be enjoyed by a person of particular racial group (defined in a way other than by reference to colour). This is to acknowledge the freedom of persons of the same race who may wish to associate with one another with their common history, traditions and characteristics.

Trade Unions, etc. (Clause 18)

12. Clause 18 applies to an organization of workers, an organization of employers, an organization of both workers and employers, or any other organization whose members carry on a particular profession or trade for the purposes of which the organization exists. Examples of organizations covered are –

- trade unions;
- employers' organisations;
- professional associations (for members carrying on a particular profession); and

- trade associations (for members carrying on a particular trade).

13. Clause 18(2) and (3) outlaws discrimination both in relation to admission to membership and in relation to treatment of existing members. In relation to a person applying for membership, it is unlawful to discriminate:

- in the terms on which the organisation is prepared to admit a person to membership; or
- by refusing or deliberately omitting to accept an application for membership.

In relation to a person who is already a member, it is unlawful to discriminate:

- in the way the organisation affords the person access to benefits, facilities or services or by refusing or deliberately omitting to afford the person access to them;
- by depriving the person of membership or varying the terms on which the person is a member; or
- by subjecting the person to any other detriment.

14. Clause 18(5) provides for an exception for an organisation of workers, an organisation of employers, or an organisation of both workers and employers:

- (a) whose main object is to enable the benefits of membership to be enjoyed by persons of a particular racial group (defined otherwise than by reference to colour); and
- (b) which had been established before the enactment of the proposed legislation.

15. At the meeting on 9 April, a Member cited the example of a trade organisation which comprised exclusively of members of the same race and which promoted the interest of its members in the trade and provided dining facilities for the benefit of its members. The question was whether such an organisation would be regarded an organisation whose members carried on a particular trade (hence governed by Clause 18) or a club (hence governed by Clauses 36, with specified exception under Clause 37).

16. The answer to the question is ultimately a question of fact, having regard to the relevant circumstances and the essential character of the organisation. It will be a trade organisation if its members carry on a particular trade and it is for the purposes of the trade that it exists. If so, Clause 18 applies and prohibits it from racial discrimination. That means, for example, the organisation must not deny a person of eligibility to membership on the ground of the person's race. If the organisation provides the facilities and services mentioned in paragraph 9 above to its members, in doing so the organisation would be regarded as acting in the capacity of a club and, in that context, it may be caught by Clause 36. The

organisation may invoke the exception in Clause 37 if its main object is to enable the benefits of membership to be enjoyed by persons of a particular racial group (defined otherwise than by reference to colour).

Application of Clause 27 to Government services

17. Clause 27(2) gives some examples of the facilities and services referred to in Clause 27(1) which outlaws racial discrimination in the provision of goods, facilities or services to the public or a section of the public. The examples include the services of any department of the Government or of any undertaking by or of the Government.

18. Clause 27 applies to all goods, facilities and services provided (for payment or not) by the Government. In addition, the reference to services of “any undertaking by or of the Government” in Clause 27(2)(h)(ii) will cover the cases where such services are not directly provided by the Government. Undertaking is a broad expression. For example, the various public services offered electronically are formerly offered under the Government’s Electronic Service Delivery Scheme by ESD Services Limited, rather than by a Government department. Such services fall within the services of an undertaking by or of the Government. All in all, Clause 27 applies not only to goods, facilities and services provided by the Government but also to goods, facilities and services provided by any undertaking by or of the Government.

Constitutional and Mainland Affairs Bureau

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Race Discrimination Bill
Clauses 18, 27, 31, 36, 37

Provision which makes discrimination in specified circumstances unlawful

Is the organization concerned with provision (whether for payment or not) of goods, facilities and services to the public or a section of the public? If so, **Clause 27** makes it unlawful for the organization to discriminate in its provision of goods, facilities and services

Is it an organization of workers, an organization of employers, an organization of both workers and employers, or any other organization whose members carry on a particular profession or trade? If so, **Clause 18** makes it unlawful for the organization to discriminate in relation to admission to membership and also in relation to treatment of members.

Is the organization a club as defined in Clause 2? If so, **Clause 36** makes it unlawful for the organization to discriminate in relation to admission of members and also in relation to treatment of members.



Exception

Is it a voluntary body (i.e., does the organization carry on its activities otherwise than for profit)? If so, it can invoke the exception under **Clause 31**. This means that the voluntary body can restrict its membership to persons of a racial group or can provide services and benefits to members of one racial group where the membership is so restricted.

For an organisation of workers, an organisation of employers or an organisation of both workers and employers:

- had the organization been established before the enactment of the Ordinance?
- And, is it the main object of the organization to enable the benefits of membership to be enjoyed by persons of a particular racial group (defined otherwise than by colour)?

If both conditions are met, it can invoke the exception under **Clause 18(5)**

Is it the main object of the organization to enable the benefits of membership to be enjoyed by persons of a particular racial group (defined otherwise than by colour)? If so, it can invoke the exception under **Clause 37**.