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The Hon Margaret Ng Ngoi Yee
Chairman, Bills Committee on Race Discrimination Bill
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Ms Ng

Race Discrimination Bill

We write to give the comments of the Hong Kong Association of Banks for the consideration of the Bills Committee which is reviewing the Race Discrimination Bill.

A. Scope of exceptions needs to be widened to allow established banking practices

1. Prevention of money laundering and terrorist financing

Banks play an important role in preventing money laundering and terrorist financing through the financial system. In this regard, the standards that banks in Hong Kong follow reflect the initiatives undertaken by international bodies and the requirements contained in laws, regulations and guidelines issued by the regulatory bodies in Hong Kong. Examples of the local guidelines would be the Guideline on Prevention of Money Laundering issued by the Hong Kong Monetary Authority (HKMA) under section 7(3) of the Banking Ordinance and the Supplement to the HKMA Guidelines (together "HKMA Guidelines"). Similar guidelines have also been issued by the Securities and Futures Commission and the Office of the Insurance Authority.

Among the provisions in the HKMA Guidelines are the requirement for banks to develop customer acceptance policies and procedures that aim to identify the types of customer that are likely to pose a higher than average risk of money

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laundering. In determining the risk profile of a particular customer or type of customer, a bank should take into account factors such as the origin of the customer (e.g. residency), the place where the customer's business is established, the location of the counterparties with which the customer conducts transactions and does business, and whether the customer is otherwise connected with certain jurisdictions known to the bank to lack proper standards in the prevention of money laundering or customer due diligence process.

In addition to the above, the Hong Kong offices of international banks are required to observe sanctions against designated countries or individuals issued by competent overseas regulatory authorities. There are criminal and civil penalties for violating the sanctions. By way of example, the Foreign Assets Control Regulations against North Korea issued by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") apply equally to all branches, subsidiaries and controlled affiliates of U.S. organisations throughout the world. The OFAC has also issued sanctions programmes involving Cuba, Iran, Myanmar (Burma), various other countries and designated terrorists and international narcotics traffickers, foreign terrorist organisations and designated foreign persons who have engaged in activities relating to the proliferation of weapons of mass destruction.

Clause 56 of the Bill states that nothing in Parts 3, 4 or 5 renders unlawful any act done by a person if it was necessary for that person to do it in order to comply with the requirement of an existing statutory provision. We trust an "existing statutory provision" means any law enacted in Hong Kong prior to the Race Discrimination Ordinance coming into operation. If so, compliance with non-statutory requirements such as the HKMA Guidelines and sanctions issued by competent overseas regulatory authorities would be outside the protection of Clause 56 of the Bill.

Further, we note that whereas Clause 56 of the Bill only applies to an existing statutory provision, Section 41 of the U.K. Race Relations Act applies to existing and future legislation. This means that in the Hong Kong situation, the protection would not apply to any new ordinance enacted after the Race Discrimination Ordinance becomes law.

In view of the importance of keeping Hong Kong clean of money laundering and terrorist financing, we suggest that the scope of Clause 56 should be suitably widened to ensure that the protection applies to compliance with existing and future legislation as well as non-statutory requirements with which banks are expected to comply in the prevention of money laundering and terrorist financing activities.



2. Not making available financial/investment services to certain nationals

Sometimes certain financial/investment services, such as offering of Initial Public Offers ("IPOs") of shares, distribution of unit trusts, mutual funds and structured products, may not be available to certain nationals by reason of the laws/regulations pertaining to their home country. For example, in the case of some Initial Public Offers of shares, the distribution of the prospectus and the offering and sale of the offer shares in certain jurisdictions are subject to restrictions and may not be made except as permitted under the applicable securities laws of such jurisdictions pursuant to registration with or authorisation by the relevant securities regulatory authorities or an exemption therefrom. As such, the IPOs may not be made available to nationals of those jurisdictions. The practice is mainly based on the following considerations without any discriminatory intent: that if such practice is not permitted under the new law, banks will incur additional expenditure and resources (including recurrent ones) in order to comply with the restrictions or exceptions as permitted under the applicable securities laws of such jurisdictions, and more importantly, banks will be concerned of facilitating a breach of the laws/regulations by the nationals in their home country. Appropriate exceptions, such as expanding Section 4(4)(d) of the Bill, will need to be incorporated into the Bill to maintain Hong Kong's attractiveness and competitiveness as a capital formation and international financial centre.

3. The above two points are applicable to the provisions of the Bill insofar as they apply both to direct and indirect discrimination.

B. Comments on specific clauses

1. Discrimination on ground of race of a "near relative" of a person – "Near relative" in the Bill is defined widely to include the wife or husband of a person, a parent or child, grandparent or grandchild, brother or sister including stepchildren and illegitimate children. It may be difficult for a person to know whether he is inadvertently discriminating, as he would not necessarily know the racial background of all of the persons who come within the definition.
2. Clause 4(2) – This relates to defining whether a condition applied to all persons in circumstances where the proportion of persons in a particular group are less likely to be able to comply with it was justifiable. Clause 4(2) defines 'justifiable' in a very restrictive manner so that either (i) the condition serves a legitimate objective and bears a rational and proportionate connection to the



objective or (ii) it is not reasonably practicable for the person who allegedly discriminates not to apply the restriction or condition. In practice, this would create doubt in any given factual matrix whether a requirement or condition is or is not justifiable. It appears to us that this requirement is not contained in the other anti-discrimination legislation in Hong Kong.

3. Clause 8(1) – The definition of ‘race’ in paragraph (a) is extremely wide, covering not only race and colour but also descent or national or ethnic origin. In paragraph (c) discrimination on the ground of descent arises if it is against members of communities based on social stratification such as a caste or analogous system of inherited status. It is a matter for discussion as to whether these should be the subject of protection in legislation of this type. It might in practice prove to be difficult to determine the descent of a particular person. A subsidiary issue not dealt with in the definition of “race” is how persons of mixed blood or origin are dealt with.
4. Clause 13 – This only allows preferential terms to be offered to persons who possess those skills, knowledge or experience if they are recruited or transferred from a place outside Hong Kong. We query why there is a need to justify the person’s transfer from a place outside Hong Kong if it is established that he has skills that are not readily available in Hong Kong. Furthermore, “relevant skills, knowledge or experience” can be extremely broad and at times subjective and difficult to justify. A clear definition of the term or the issue of guidelines or code would assist employers in compliance.

Under clause 13(1)(c)(i), the terms of employment of the person concerned must have regard to the prevailing terms of employment offered to persons with the relevant skills, knowledge or experience outside Hong Kong. This would seem to restrict the total value of the package, which may be offered to persons by reference to places outside Hong Kong. This appears to be inappropriate because in point of fact salaries in Hong Kong are normally higher than those paid outside in many places abroad because of the cost of living here and also they may need to be higher to induce a person to move to Hong Kong.

Similar issues also arise under Clause 15(5) which contains parallel provisions in relation to contract workers.

5. Clause 33(2) and Schedule 4 – Paragraph 19 of the Explanatory Memorandum to the Bill states “It should also be noted that Clauses 27(1) and 28 do not extend to discrimination covered by the employment or education provisions of the Bill (Clause 33(2) as read with Schedule 4)”. Clause 27(1) relates to discrimination in provision of goods, facilities or services and clause 28 relates to discrimination in disposal or management of premises. The connection between the employment or education provisions of the Bill and clauses 27(1) and 28 as mentioned in the Explanatory Memorandum is not entirely clear. We would

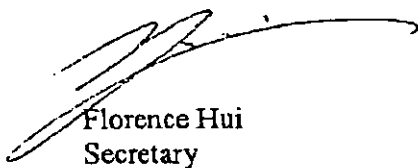


also like to seek clarification on how the specific provisions of clause 33(2) and Schedule 4 should be read in the context of the Explanatory Memorandum.

6. Clause 58(1) – This is the provision which excludes from illegality the use of or a failure to use any language. We suggest that this should also cover clause 10 and other provisions relating to employment.
7. Schedule 2, paragraph 2 – This is the Schedule which defines an existing employee for the purpose of clause 14 which grandfathers the terms offered to all existing employees. This requires there to be no break in the service of the employee. If there is a break then the existing employment will cease to be grandfathered. We query whether there should not be some flexibility here, for example, a break not exceeding 6 months to cover sabbatical leave arrangements and other special arrangements for leave.

We hope that the Bills Committee would find the above comments helpful and we would be happy to provide further comments upon the request of the Bills Committee.

Yours sincerely



Florence Hui
Secretary

c.c. Hong Kong Monetary Authority