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Bills Committee on Race Discrimination Bill

**Paper prepared by the Legislative Council Secretariat
for the meeting on 31 May 2007**

Discrimination to which the Bill applies

Purpose

This paper summarises the views and concerns of the Bills Committee relating to Clause 4 of the Bill.

Background

2. Direct discrimination on the ground of the race of a person is covered by Clause 4(1)(a) of the Bill. Direct discrimination occurs when a person on the ground of race treats another person less favourably than he would treat others. Under Clause 4(1)(b), indirect discrimination occurs when a person imposes a requirement or condition which, although applicable to all, has a disproportionate adverse impact on people of a particular race and the requirement or condition imposed cannot be justified by reasons not related to race.

3. At the meeting of the Bills Committee on 23 April 2007, members queried the need to include under Clause 4 of the Bill the test of "justification" which was not included in the other three anti-discrimination ordinances. Members also expressed concern that it would be very difficult for the public to assess whether the application of a particular requirement or condition would meet that test or not. In response, the Administration provided a paper entitled "Indirect discrimination and assessment of justifiability" (LC Paper No. CB(2)1823/06-07(01)) for members' discussion at the meeting on 15 May 2007.

Discussion at the meeting on 15 May 2007

Views and concerns of the majority members

4. The majority members were of the view that Clause 4 was far from clear in defining what would constitute racial discrimination, particularly indirect discrimination. They considered that it was not necessary to distinguish arbitrarily two forms of discrimination, i.e. direct and indirect discrimination. Members also queried the rationale for the Administration's decision of modelling Clause 4(1)(b) on section 1(1)(b) of the Race Relations Act 1976 (RRA) of the United Kingdom, instead of the subsections (1A) to (1C) newly added to RRA in 2003. Sections 1(1A) to (1C) of RRA are reproduced in **the Appendix** for members' ease of reference.

5. Members also expressed grave concern that members of the public might not be able to understand the assessment system for determining whether the application of a requirement or condition would be justified or not. As a result, it would cause confusion and uncertainties to the community if the Bill as presently drafted was enacted. They also requested the Administration to confirm whether the following examples would constitute racial discrimination under the Bill -

- (a) ethnic minorities being denied of timely provision of medical services due to language barrier and unavailability of interpretation services at hospitals;
- (b) the implementation of the new Obstetric Package Charge for Non-eligible Persons whose spouses were Hong Kong residents which would have the effect of putting these persons who were predominantly Chinese at a disadvantage as compared with pregnant women of other races whose spouses were also Hong Kong residents; and
- (c) the imposition of the requirement of obtaining a pass for the subject of Chinese Language in the Hong Kong Certificate of Education Examination for university admission on all local students, which had put non-Chinese speaking students of ethnic minorities at a great disadvantage.

The Administration's explanation

6. According to the Administration, Clause 4(1)(b)(i) to (iii) set out the criteria for assessing whether the application of a particular requirement or condition would constitute indirect discrimination. For clarity, Clause 4(2)(a) incorporated the internationally accepted principles of rationality and proportionality for assessing whether the application of a particular requirement or condition could be justified under Clause 4(1)(b)(ii). Clause

4(2)(b) reflected the Government's policy intent of requiring people to be mindful of the special needs of the minorities and, where reasonably practicable, not to apply a requirement or condition that would adversely affect them disproportionately. Whether a requirement or condition was justifiable would be measured by two alternative tests. The first test was whether it served a legitimate purpose and bore a rational and proportionate relationship with the objective sought. The second test was whether or not it was reasonably practicable not to apply the requirement or condition.

7. On the need to distinguish between direct and indirect discrimination, the Administration explained that there was a need to make such distinction because while there was no defence for direct discrimination under Clause 4(1)(a), a defence of "justification" was provided for under Clause 4(1)(b). Many discriminatory acts would be regarded as direct discrimination if these two forms of discrimination were not distinguished from one another and thus would create a lot of uncertainties.

8. On the rationale for adopting the relevant provisions of RRA enacted in 1976, the Administration explained that it was mainly based on the consideration that there were more precedents of the application of these provisions which could serve as a useful reference for the courts and the Equal Opportunities Commission.

9. The Administration further explained that the sets of circumstances described in paragraph 5(a) and (b) above would not constitute racial discrimination under the Bill because the use, or failure to use, a particular language in regard to provision of goods, services and facilities was excepted under Clause 58, and nationality, citizenship, resident status or naturalisation and immigration legislation were excepted under Clause 8(2) and (3). The Administration, however, was unable to give a definite answer as to whether the set of circumstances described in paragraph 5(c) would constitute indirect discrimination under the Bill and undertook to provide a written response.

Advice and observation made by the legal adviser to the Bills Committee

10. The legal adviser to the Bills Committee gave the following advice -

- (a) the scope of Clause 4(1)(b) which defined indirect discrimination was very narrow and only applied if there was a "requirement or condition";
- (b) Clause 4(1)(b) was modelled on section 1(1)(b) of RRA;
- (c) new subsections (1A)-(1C) had been added to the relevant provision of RRA in 2003 to implement EU Council Directive 2000/43/EC which referred to "provision, criterion or practice" and were considered to be broader in scope; and

- (d) new subsections (1A)-(1C) if incorporated into Clause 4 would cover the form of discrimination in the set of circumstances described in paragraph 5(a).

11. The legal adviser to the Bills Committee also observed that Clause 4(2)(a) and (b) as presently drafted had the effect that satisfying either the rationality and proportionality test under Clause 4(2)(a) or the reasonable practicability test under Clause 4(2)(b) would suffice to establish the defence of "justification". In other words, a requirement or condition would be justifiable provided that the discriminator proved that it was not reasonably practicable for him not to apply it, no matter how irrational and disproportionate the requirement or condition was to achieve the legitimate objective.

Policy objectives to be achieved

12. The majority members in general were of the view that the policy consideration to ensure equal opportunities for people of different ethnic groups should come before and above legal consideration. They considered that a result-oriented approach should be adopted in drafting the Bill. Racial discrimination would occur if it was proven that a person had been given differential treatment on the ground of race, irrespective of whether that person was treated less favourably or an unjustified requirement or condition was applied to him. The Bill should apply to any act which resulted in racial discrimination and such act should be prohibited in law.

Options to be considered

13. To achieve the above policy objectives, the majority members suggested that Clause 8 and Clause 58 should be amended to the effect that sets of circumstances similar to those described in paragraph 5 would constitute racial discrimination and be prohibited under the Bill. Members may wish to note that, in order to achieve these policy objectives fully, a new approach will need to be adopted to re-draft the Bill.

14. Apart from adopting a complete reformulation of the Bill, members may also wish to consider revising Clause 4(1)(b) to incorporate the new subsections (1A)-(1C) added to RRA in 2003 in order to expand the scope of indirect discrimination under the Bill.

EXTRACT FROM THE RACE RELATIONS ACT 1976

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[(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—

- (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
- (b) which puts that other at that disadvantage, and
- (c) which he cannot show to be a proportionate means of achieving a legitimate aim.

(1B) The provisions mentioned in subsection (1A) are—

- (a) Part II;
- (b) sections 17 to 18D;
- (c) section 19B, so far as relating to—
 - (i) any form of social security;
 - (ii) health care;
 - (iii) any other form of social protection; and
 - (iv) any form of social advantage;
 which does not fall within section 20;
- (d) sections 20 to 24;
- (e) sections 26A and 26B;
- (f) sections 76 and 76ZA; and
- (g) Part IV, in its application to the provisions referred to in paragraphs (a) to (f).

(1C) Where, by virtue of subsection (1A), a person discriminates against another, subsection (1)(b) does not apply to him.]

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