

立法會

Legislative Council

LC Paper No. LS96/07-08

Bills Committee on Race Discrimination Bill

**Paper prepared by the Legal Service Division
for the meeting on 14 June 2008**

Discussion Drafts of Committee Stage Amendments for Members' Consideration

At the meeting of the Bills Committee held on 11 June 2008, Members requested that discussion drafts be prepared to facilitate Members' further consideration of the Committee Stage amendments intended to be proposed by the Bills Committee. This paper sets out the draft amendments in marked-up form with the proposed additions underlined—

- (a) in relation to the provisions on Application to Government at Appendix I;
- (b) in relation to the provisions on Racial Discrimination at Appendix II;
- (c) in relation to the provisions on New Arrivals and nationality from the Mainland at Appendix III;
- (d) in relation to the provisions on Exemption from Languages at Appendix IV;
- (e) in relation to the provisions on discrimination against applicants and employees at Appendix V; and

(f) in relation to the provisions on partnerships at Appendix VI.

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12 June 2008

Application to Government

By adding immediately before Part 3—

“PART 2A

GOVERNMENT

9A. Government

It is unlawful for the Government to discriminate against a person on the ground of race of that person in the performance of its functions or the exercise of its powers.”

Note:- This amendment will require consequential amendments be made to the headings and provisions in Part 6 of the Bill by adding “2A,” before “3,” wherever it appears.

Racial discrimination

Clause 4 is amended in the following manner:-

4. Racial discrimination

(1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person if—

- (a) on the ground of the race of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons; or
- (b) the discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but—
 - (i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;
 - (ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and
 - (iii) which is to the detriment of the other person because that person cannot comply with it.

(1A) In any circumstances relevant for the purposes of any provision referred to in subsection (1B), a person (“the discriminator”) also discriminates against another person if the discriminator applies to that other person a provision, criterion or practice which the discriminator applies or would apply equally to persons not of the same racial group as that other person, but—

- (a) which puts or would put persons of the same racial group as that other person at a particular disadvantage when

compared with other persons;

(b) which puts that other person at that disadvantage; and

(c) which the discriminator cannot show to be a proportionate means of achieving a legitimate aim.

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

(a) Part 3, except sections 24 and 25;

(b) sections 26 to 29;

(c) sections 34 to 35; and

(e) Part 5, in its application to the provisions referred to in paragraphs (a) to (c).

(1C) Where, if by virtue of subsection (1A), a person discriminates against another person, subsection (1)(b) does not apply to the first-mentioned person.

(2) For the purposes of subsection (1)(b)(ii), a requirement or condition is justifiable ~~either—~~

~~(a) if it serves a legitimate objective and bears a rational and proportionate connection to the objective; or~~

~~(b) if it is not reasonably practicable for the person who allegedly discriminates against another person not to apply the requirement or condition.~~

~~(3) In determining for the purposes of subsection (2)(b) whether it is reasonably practicable for a person who allegedly discriminates against another person not to apply a requirement or condition, any relevant circumstances of the particular case may be taken into account including those referred to in subsection (4).~~

~~(4) The circumstances that may be taken into account include, but are not limited to—~~

~~(a) the nature of the benefit or detriment likely to accrue to or be suffered by, or the likely impact on, all persons~~

concerned;

~~(b) an estimate of the proportion of persons likely to benefit out of all the persons concerned, if the requirement or condition is not applied;~~

~~(c) whether any activities of the person who allegedly discriminates against another person will be disrupted if the requirement or condition is not applied and, if so, the extent of the disruption; and~~

~~(d) whether the person who allegedly discriminates against another person will need to provide additional services or facilities or incur additional expenditure (including recurrent expenditure), if the requirement or condition is not applied.~~

~~(5) Nothing in subsection (3) or (4) is to be construed as requiring the person who allegedly discriminates against another person or any other person concerned to confer any benefit, suffer any detriment, provide any services or facilities or incur any expenditure which the person or that other person (as the case may be) is not otherwise required to confer, suffer, provide or incur.~~

(6 3) It is declared that, for the purposes of this Ordinance, segregating a person from other persons on the ground of the race of that person is treating that person less favourably than the other persons are treated.

New arrivals from the Mainland and Nationality

Clause 8(3) is amended in the following manner:-

8. Meaning of “race”, “on the ground of race”, “racial group” and comparison of cases of persons or different racial groups

- (1) In this Ordinance and subject to subsections (2) and (3) –
- (a) “race” (種族), in relation to a person, means the race, colour, descent or national or ethnic origin of the person;
 - (b) a reference to an act done on the ground of the race of a person is a reference to an act done on the ground of the race, colour, descent or national or ethnic origin of the person;
 - (c) an act constitutes discrimination on the ground of descent only if it constitutes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights; and
 - (d) “racial group” (種族群體) means a group of persons defined by reference to race, colour, descent or national or ethnic origin, and references to a person’s racial group refer to any racial group into which the person falls.

(2) An act done on the ground of any matter specified in subsection (3) does not constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person; and section 4(1)(b) does not apply to a requirement or condition as to any matter specified in subsection (3).

- (3) The matters specified in this subsection are –
- (a) that the person –
 - (i) is or is not an indigenous inhabitant of the New

Territories; or

(ii) is or is not a person who was in 1898 a resident of an established village in Hong Kong or a person descended through the male line from such person;

(b) that the person –

~~(i) is or is not a Hong Kong permanent resident;~~

(ii) has or has not ~~the right of abode or~~ the right to land in Hong Kong;

(iii) is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap. 115); or

~~(iii)~~ has or has not been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap. 115);

~~(c) the length of residence in Hong Kong of the person; or~~

~~(c)~~ the ~~nationality~~, citizenship or resident status of the person under the law of any country or place concerning ~~nationality~~, citizenship, resident status or naturalization of or in that country or place.

(4) The fact that a racial group comprises 2 or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Ordinance.

(5) A comparison under section 4(1) of the case of a person of a particular racial group with that of a person not of that group must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(6) A comparison under section 5 of the case of a person having a near relative who is of a particular racial group with that of a person not having a near relative who is of that group must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

The language exemption

Clause 58 is amended in the following manner:-

58. Exception for languages

(1) Nothing in section 20, 21, 26, 27, 28, 29, 35 or 36 renders unlawful the use of, or the failure to use, any language in any circumstances relevant for the purposes of the section.

(1A) Subsection (1) does not apply to section 20 when the vocational training course is specifically provided for persons speaking a particular vernacular.

(1B) Subsection (1) does not apply to section 27 when the service provided is medical treatment within the meaning of section 2 of Medical Clinics Ordinance (Cap. 343).

(1C) For the avoidance of doubt, it is declared that nothing in subsection (1B) requires—

- (a) a provider of medical treatment to provide to a patient a verbatim translation in the vernacular of that patient of any written or oral communication or medicinal label; or
- (b) the presence of a translator of a patient's vernacular when the patient is receiving medical treatment.

(1D) Subsections (1A), (1B) and (1C) shall come into operation on the third anniversary of the day on which this Ordinance is enacted.

(1E) The Legislative Council may by resolution amend subsection (1D) by substituting “fourth” for the word “third” appearing immediately before “anniversary” in that subsection.

(2) For the avoidance of doubt, nothing in subsection (1) affects the Official Languages Ordinance (Cap. 5) or provisions on the use of language

contained in any other enactment.

(3) In this section, a reference to the use of, or failure to use, a language includes a reference to the provision of, or failure to provide, a translation, interpretation or transcription into the language and “vernacular” means the language spoken by a person but does not include a dialect.

Discrimination against applicants and employees

Clause 10(8) is amended in the following manner—

10. Discrimination against applicants and employees

(1) 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—

- (a) in the arrangements the employer makes for the purpose of determining who should be offered that employment;
- (b) in the terms on which the employer offers that other person employment; or
- (c) by refusing, or deliberately omitting to offer, the other person that employment.

(2) It is unlawful for an employer, in the case of a person employed by that employer at an establishment in Hong Kong, to discriminate against that employee—

- (a) in the terms of employment which the employer affords that employee;
- (b) in the way the employer affords the employee access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford the employee access to them; or
- (c) by dismissing the employee, or subjecting him or her to any other detriment.

(3) Except in relation to discrimination falling within section 6, subsections (1) and (2) do not apply to employment when the number of persons employed by the employer, added to the number employed by any associated employers of that employer, does not exceed 5. This subsection does not apply to the employment by a person of another person to perform domestic duties on the premises on which the first-mentioned person or his or her near relative resides.

(4) Subject to subsection (5), subsections (1)(b) and (2) do not apply to provision in relation to death or retirement for a person made before the commencement date in so far as any such provision continues for that person on and after that date.

(5) Subsections (1)(b) and (2) apply to provision made in relation to retirement of the kind mentioned in subsection (4) in so far as, in their application to such provision, they render it unlawful for a person (“the employer”) to discriminate against another person—

- (a) in such of the terms on which the employer offers that other person employment as make provision in relation to the way in which the employer will afford that other person access to opportunities for promotion, transfer or training or as provide for that other person’s dismissal or demotion;
- (b) in the way the employer affords that other person opportunities for promotion, transfer or training, or by refusing or deliberately omitting to afford that other person access to any such opportunities; or
- (c) by dismissing that other person or subjecting that other person to any detriment which results in that other person’s dismissal or consists in or involves that other person’s demotion.

(6) Subsection (2) does not apply to benefits, facilities or services of any description if the employer is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public comprising the employee in question, unless—

- (a) that provision differs in a material respect from the provision

of the benefits, facilities or services by the employer to his or her employees;

(b) the provision of the benefits, facilities or services to the employee in question is regulated by the employee's contract of employment; or

(c) the benefits, facilities or services relate to training.

(7) Except in relation to discrimination falling within section 5 or 6, nothing in subsection (1)(a) or (c) renders it unlawful for a person to discriminate against another person on the ground of the race of that other person, in connection with employment to perform domestic duties on the premises on which the first-mentioned person or his or her near relative resides.

(8) Subsection (3) expires on the ~~third~~ first anniversary of the day on which this Ordinance is enacted.

(9) For the purposes of subsection (3), 2 employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control.

(10) The Chief Executive in Council may, by notice published in the Gazette, do either or both of the following—

(a) amend subsection (3) by substituting another number for the number appearing after the word “exceed” in that subsection;

(b) amend subsection (8) by substituting another anniversary for the anniversary appearing in that subsection.

Partnerships

Clause 17 is amended in the following manner:-

17. Partnerships

(1) It is unlawful for a firm ~~consisting of not less than 6 partners,~~ in relation to a position as partner in the firm, to discriminate against a person—

- (a) in the arrangements they make for the purpose of determining who should be offered that position;
- (b) in the terms on which they offer the person that position;
- (c) by refusing, or deliberately omitting to offer, the person that position; or
- (d) in a case where the person already holds that position—
 - (i) in the way they afford the person access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him or her access to them; or
 - (ii) by expelling the person from that position, or subjecting him or her to any other detriment.

(2) Subsection (1) applies in relation to persons proposing to form themselves into a partnership as it applies in relation to a firm.

(3) Subsection (1)(a) and (c) does not apply to a position as partner, where, if it were employment, being of a particular racial group would be a genuine occupational qualification for the job.

(4) Subject to subsection (5), subsection (1)(b) and (d) does not apply to provision in relation to death or retirement for a person made before the commencement date in so far as any such provision continues

for that person on and after that date.

(5) Subsection (1)(*b*) and (*d*) applies to provision made in relation to retirement of the kind mentioned in subsection (4) in so far as, in its application to such provision, it renders it unlawful for a firm to discriminate against a person—

- (*a*) in such of the terms on which the firm offers the person a position as partner as provide for his or her expulsion from that position; or
- (*b*) by expelling the person from a position as partner or subjecting him or her to any detriment which results in his or her expulsion from such a position.

(6) In the case of a limited partnership, references in subsection (1) to a partner shall be construed as references to a general partner within the meaning of section 2(1) of the Limited Partnerships Ordinance (Cap. 37).

~~(7) The Chief Executive in Council may, by notice published in the Gazette, amend subsection (1) by—~~

- ~~(*a*) substituting another number for the number appearing in that subsection; or~~
- ~~(*b*) repealing the words and number appearing after “for a firm” and before “, in relation to”.~~