

Legislative Council Bills Committee on Race Discrimination Bill

Discrimination by, or in relation to, barristers

Purpose

At the meeting held on 16 January 2007, Members asked the Administration –

- (a) to provide detailed justification for singling out barristers in the Bill in relation to discrimination on the ground of race against a person seeking pupillage or tenancy, or who is a pupil or tenant, in barrister's chambers; and
- (b) to consider the alternative of covering a field of non-employment pupillage instead of singling out a profession.

2. This paper explains the unique practice of the barrister's profession in relation to pupillage and tenancies, which gives rise to the need for separate provision under Clause 35 of the Bill.

Proposal in Clause 35

3. In gist, Clause 35 of the Bill, particularly Clause 35(1) and (2), proposes that it should be unlawful for a barrister or barrister's clerk

to discriminate against another person on the ground of race in matters relating to the offer, the terms of offer, as well as the benefits and facilities of pupillage and tenancy in a set of barristers' chambers. As will be explained in the following paragraphs, the need for this provision arises solely from the uniqueness of the arrangements for training and practice in the barrister's profession. It is not to "single out barristers". It certainly should not be misconstrued as alleging any particular problems of racial discrimination in that learned profession.

4. Clause 35 is almost identical to section 26A of the Race Relations Act 1976 (at Annex). Explanation in the notes to paragraph 415 of the *Halsbury's Laws of England (Vol. 13)* on section 26A is informative and extracted below –

- As to section 26A(1) (equivalent to Clause 35(1) of the Bill), note 4 says, “,,,The provision is unusually drafted, in an attempt to take account of the unique (and often undefined) organisation of barristers' chambers....”.
- Explaining section 26A(1)(a) (equivalent to Clause 35(1)(a) of the Bill), note 5 says, “The scope of this provision is presumably similar to that of [s 4(1)(a) of the RRA] (discrimination in arrangements made for the purpose of determining who should be offered employment: ...). In the context of barristers' chambers, indirect discrimination by reliance upon word of mouth recommendations or social or family contacts for the recruitment of pupils may be

particularly relevant; as may discrimination by the concentration on certain universities as sources of recruitment.”

- Explaining the reference to “gaining experience” in section 26A(2)(b) (equivalent to Clause 35(2)(b) of the Bill), note 12 says, “This provision would presumably cover discrimination by a barrister's clerk in the allocation of work to tenants or pupils.”
- Explaining section 26A(3) (equivalent to Clause 35(3) of the Bill), note 17 says, “This provision would cover discrimination by a solicitor, or anyone instructing a barrister and discrimination by a barrister's clerk, either against a barrister, or against the solicitor or lay client. It would cover, for example the withholding of certain work from a barrister on racial grounds, or the refusal to accept a set of instructions on racial grounds.”

Training and practice of barristers

5. In Hong Kong, a person with the prescribed qualifications (usually a Bachelor of Law (LLB) degree and the Postgraduate Certificate in Laws (PCLL)) may proceed to pupillage, which is the final stage of training, in order to get qualified as a barrister. Pupillage takes a year to complete, with the year divided into two six-month periods or “sixes”. Each six is spent in a set of chambers under a Pupil Master who is an experienced barrister. During the first six, the pupil will observe and assist his Pupil Master who would enable his pupil to see the work done

by junior members of chambers and may also arrange for the pupil to accompany other barristers to courts. This involves, among other things, being in court, attending conferences, preparing drafts, researching and reading up on case laws. During the second six, the pupil will be a practising barrister, handling his own cases and representing his own clients in court, subject to guidance and supervision of his Pupil Master.

6. On satisfactory completion of pupillage, the pupil will be given a certificate under section 10(4)(a) of the Barristers (Qualification for Admission and Pupillage) Rules "(Cap. 159 sub. leg. AC)" and thereafter may commence independent practice as a barrister.

7. Unlike solicitors who may practise together in partnership, barristers must practise singly. While barristers usually practise in a set of chambers, the legal, financial and professional duties of each barrister are separate and distinct from those of the other barristers sharing those chambers. Barristers working within a set of chambers are self-employed and known as tenants. They work for themselves under the umbrella of chambers, but with an experienced barrister as the head and usually a clerk to manage administrative matters and the flow of work. Tenants are expected to pay towards the cost of running the chambers and in some cases may have to buy into a company that, for instance, owns the chambers building or premises.

Need for Clause 35

8. Members would note that while there is much similarity between pupillage and apprenticeship, there is no employer-employee relationship between the Pupil Master and the pupil, nor can the pupil be regarded a contract worker or a commissioned agent for the Pupil Master.

9. In regard to tenancies in barristers' chambers, Member will also note that the arrangement is unique to the barrister's profession. The organisation of the barristers' chambers is often undefined. Barristers practising in the same set of chambers are not in partnership, nor are they employees of the senior barrister who is the head of the chambers. The admission of a barrister into a set of chambers does not turn the chambers concerned into a provider of services, facilities and premises for the purposes of the barrister's practice either.

10. Hence, despite the close resemblance of purpose, the arrangements in relation to pupillage and tenancies in the barrister's profession technically does not come within the spheres of education, employment and provision of goods, facilities, services and premises which are protected under the Bill. A separate provision as proposed in Clause 35 is therefore required to apply the non-discriminatory principles to persons who seek pupillage or tenancy from, or who are themselves tenants in, the barristers' chambers.

11. It would be appreciated, too, that the giving of instructions to a barrister is not regarded, strictly speaking, as a form of employment. Clause 35(3) therefore makes it unlawful for any person to discriminate on the ground of race in the giving of instructions to, or acceptance of instructions by, barristers.

12. Members will see that Clause 35 has been proposed in view of the uniqueness of practices and arrangements in the barrister's profession. Similar provisions exist in section 36 of the Sex Discrimination Ordinance (Cap. 480), section 33 of the Disability Discrimination Ordinance (Cap. 487) and section 26 of the Family Status Discrimination Ordinance (Cap. 527).

Presentation

13. This paper has been prepared in response to items (1) and (2) under section VI, "Discrimination by, or in relation to, barristers" of the "List of issues raised by members" (LC Paper No. CB(2)2576/06-07(01)). It is presented for Members' information and for consideration at the Bills Committee meeting to be held on 8 October 2007.

Constitutional and Mainland Affairs Bureau

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Race Relations Act 1976, Ch. 74 S.26A

[26A . . . Barristers]

- [(1) It is unlawful for a barrister or barrister's clerk, in relation to any offer of a pupillage or tenancy, to discriminate against a person--
- (a) in the arrangements which are made for the purpose of determining to whom it should be offered;
 - (b) in respect of any terms on which it is offered; or
 - (c) by refusing, or deliberately omitting, to offer it to him.
- (2) It is unlawful for a barrister or barrister's clerk, in relation to a pupil or tenant in the chambers in question, to discriminate against him--
- (a) in respect of any terms applicable to him as a pupil or tenant;
 - (b) in the opportunities for training, or gaining experience which are afforded or denied to him;
 - (c) in the benefits, facilities or services which are afforded or denied to him; or
 - (d) by terminating his pupillage or by subjecting him to any pressure to leave the chambers or other detriment.
- (3) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to a barrister, to discriminate against any person [or to subject any person to harassment].
- [(3A) It is unlawful for a barrister or barrister's clerk, in relation to a pupillage or tenancy in the set of chambers in question, to subject to harassment a person who is, or has applied to be, a pupil or tenant.]
- (4) In this section--
- "barrister's clerk" includes any person carrying out any of the functions of a barrister's clerk; and
- "pupil", "pupillage", "tenancy" and "tenant" have the meanings commonly associated with their use in the context of a set of barristers' chambers.
- (5) This section does not apply to Scotland.]