

Bills Committee on the Race Discrimination Bill

The Race Discrimination Bill and the Hong Kong Bill of Rights

Purpose

At the meeting held on 8 October 2007, a Member asked whether the Government would use Clause 3 of the Race Discrimination Bill (RDB) as a defence in lawsuits which may be filed against the Government under the Hong Kong Bill of Rights Ordinance (HKBORO). This includes the question of whether Clause 3 of the Bill would restrict application of Article 1 or Article 22 of the Hong Kong Bill of Rights (HKBOR) to acts of the Government, which are of a kind similar to acts done by private persons, particularly in regard to acts of racial discrimination, if any, by the Government.

2. This paper provides the Administration's response and explains the position.

Hierarchy of laws

3. The Basic Law is the constitutional document of the Hong Kong Special Administrative Region (HKSAR). The supremacy of the Basic Law is prescribed by Article 11. Article 11 provides expressly that no law enacted by the legislature of the HKSAR shall contravene the Basic Law and thereby makes the Basic Law superior to local legislation.

4. Fundamental rights and freedoms are protected by the Basic Law. Article 25 of the Basic Law (BL25) provides that –

“All Hong Kong residents shall be equal before the law.”

5. This right is also protected by the HKBOR contained in the HKBORO, which implements, in accordance with Article 39 of the Basic Law (BL39) the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. Article 22 of the HKBOR which corresponds to Article 26 of the ICCPR provides that –

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this

respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

6. In addition, Article 1(1) of the HKBOR provides that the rights recognized in the HKBOR “shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

7. The RDB is not intended to affect the operation of existing enactments. More importantly, the Bill, as a piece of ordinary legislation, if and when enacted, cannot affect or undermine rights which are guaranteed under the Basic Law and protected by the HKBOR. Persons of any race, who suffer racial discrimination in the public sector, can, depending on the circumstances of the case, continue to make a claim against the Government or a public body under Article 1 or Article 22 of the HKBOR. Neither Clause 3 nor any other provision of the Bill can limit the protection provided by the human rights provisions of the Basic Law or absolve a public authority from liability arising under the HKBOR.

8. Further, the RDB was introduced to address concerns over the lack of specific legislation “protecting persons from racial discrimination to which they may be subjected by private persons, groups or organisations¹”. To provide for parity of treatment, we have proposed in Clause 3 that the Bill, when enacted, would apply “to an act done by or for the purpose of the Government that is of a kind similar to an act done by a private person”. Clause 3 of the RDB is not meant to be an exception clause and it does not grant any exemptions to the Government. It is concerned with the scope of Government acts which may constitute a statutory tort under the provisions of the Bill.

Conclusion

9. In summary, the RDB, if and when enacted, cannot override any claims arising under the HKBOR nor can it undermine rights guaranteed under the Basic Law.

¹ Paragraph 17, Concluding Observation of the Committee on the Elimination of All Forms of Racial Discrimination, issued in 2001 after its consideration of the First Report of the HKSAR under the International Convention on the Elimination of All Forms of Racial Discrimination.

10. Clause 3 of the RDB provides for clarity of the law and for parity of treatment between the Government and the private sector. It does not grant any exemptions to the Government for breaches, if any, of the HKBOR.

**Constitutional and Mainland Affairs Bureau
October 2007**