

**President's ruling on
Committee Stage amendments to
Race Discrimination Bill
proposed by Hon Margaret NG**

Hon Margaret NG has given notice to move Committee Stage amendments (CSAs) to the Race Discrimination Bill (the Bill), if the motion for the Second Reading of the Bill is agreed to at the meeting of the Legislative Council (LegCo) of 9 July 2008. Before making a ruling on the admissibility of these CSAs, I have invited the Secretary for Constitutional and Mainland Affairs (SCMA) to offer his comments on the CSAs, and Ms NG to offer her response. I have also sought the advice of Counsel to the Legislature.

Ms Margaret NG's proposed CSAs

Proposed CSA to clause 4

2. 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. Ms NG's proposed CSA seeks to amend clause 4 to include the application of "a provision, criterion or practice", in addition to the application of "requirement or condition".

Proposed new clause 9A

3. Ms NG's proposed new clause 9A makes it 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.

Proposed new clause 9B and Schedule 6

4. Under new clause 9B proposed by Ms NG, three Government bureaux, four departments and four public authorities as listed in Schedule 6¹ are required to, among other things, assess and consult on the likely impact of their proposed policies on the promotion of racial equality; monitor their policies for any adverse impact on the promotion of racial equality; and publish the result of such assessment, consultation and monitoring.

¹ The Government bureaux/departments and public authorities listed in the proposed Schedule 6 are: Home Affairs Bureau, Home Affairs Department, Food and Health Bureau, Department of Health, Labour Department, Education Bureau, Social Welfare Department, Hospital Authority, Vocational Training Council, Employees Retraining Board and Construction Industry Council.

Proposed CSAs to clause 58

5. Clause 58 of the Bill stipulates that the use of, or failure to use, of any languages for purpose of communication would not be unlawful. Ms NG's proposed amendments to clause 58 seek to exclude the provision of vocational training courses and provision of medical treatment within the meaning of section 2 of Medical Clinics Ordinance (Cap. 343) from the exception provided for under the clause.

Relevant rule in the Rules of Procedure

6. Rule 57(6) of the Rules of Procedure provides that:
- "An amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by –
- (a) the Chief Executive; or
 - (b) a designated public officer; or
 - (c) a Member, if the Chief Executive consents in writing to the proposal."

The Administration's views and Hon Margaret NG's response

7. SCMA submits that Ms NG's proposed CSAs have charging effect on Government expenditure. Ms NG does not agree to SCMA's views. SCMA's comments on Ms NG's proposed CSAs and Ms NG's response are summarized in the **Appendix**.

Advice of Counsel to the Legislature

8. Counsel to the Legislature has given his opinion which is summarized in the following paragraphs.

Proposed CSA to clause 4

9. On additional funding to provide legal aid, Counsel explains that clause 71 of the Bill provides that a claim by any person that another person has committed an act of discrimination against him which is unlawful by virtue of Part 3 or 4 may be made the subject of civil proceedings in like manner as any other claim in tort. Such proceedings are to be brought in the District Court. Under section 5 of and Part I of Schedule 2 to the Legal Aid

Ordinance (Cap. 91), legal aid shall be available in accordance with the Ordinance. Section 27 of the Ordinance requires that the expenses of legal aid shall be met by from moneys provided by LegCo.

10. Counsel considers that the broadening of the scope of indirect discrimination by the proposed CSA will broaden to the same extent the scope of claims that may be made the subject of civil proceedings under clause 71. As a result, the expenditure on the administration of the legal aid system may well increase. However, the proposed CSA being admittedly a broader definition of indirect discrimination should not lead to a new category of claims distinct from the claims of indirect discrimination which has been created under clause 4(1)(b). As such, any possible additional expenditure cannot be new and distinct expenditure not envisaged by the Bill. The claim as to additional funding for the Equal Opportunities Commission (EOC) may also be dismissed on this ground alone. It may thus be said that the proposed CSA has no charging effect.

Proposed new clause 9A

11. Counsel points out that in the Administration's response to the Bills Committee formed to scrutinize the Bill (LC Paper No. CB(2) 2753/06-07(01)), it is reiterated that the Bill does not absolve the Government and public authorities from existing obligations under the Basic Law and the Hong Kong Bill of Rights Ordinance (HKBORO) (Cap. 383). Hence an act that contravenes the HKBORO (which prohibits all forms of discrimination by the Government and public authorities) may be challenged in the Court under the HKBORO, even if it were not specifically covered under the Bill. The Administration therefore considers it unnecessary to further extend the scope of the Bill to cover other government functions.

12. Counsel is of the opinion that the proposed new clause 9A appears to do just what the Administration considers to be unnecessary, i.e. to further extend the scope of the Bill to cover other government functions. In the light of the Administration's assertion in its response to the Bills Committee that the HKBORO already prohibits all forms of discrimination by the Government, there should be no justification in the claim that because of the proposed new clause 9A, the Government will have to devote additional resources for handling the additional complaints and litigation because there should not be any additional complaints and litigation. Accordingly, the proposed new clause should not have charging effect.

Proposed new clause 9B and Schedule 6

13. Counsel points out that proposed new clause 9B(1) requires the Government to have due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. The Administration has made no claim that the

general duty under the proposed subclause (1) will incur additional financial resources. On the face of it, the proposed subclause also does not appear to have financial implications for its implementation. Counsel considers that the proposed new clause should not have charging effect.

14. Counsel further points out that although the Administration in submitting that the discharge of the new duties listed in the proposed subclause (2) has considered those duties as a whole, the specific duties and obligations listed could differ in their financial implications. Counsel is of the opinion that paragraphs (a), (e) and (g) in the proposed subclause do not appear to have any direct bearing on additional expenditure. However, the other paragraphs, whether read in conjunction with the proposed subclause (1) or on their own, could on the face of it incur additional expenditure in view of their nature, namely, the duty to assess and consult (paragraph (b)), duty to monitor (paragraph (c)), duty to publish (paragraph (d)) and duty to provide training (paragraph (f)). As these duties are imposed on quite a number of Government bureaux and departments in respect of the promotion of racial equality that could affect much of the population and related staff training, it is unlikely that the additional expenditure that may be incurred will be of an amount that can be ignored. The paragraphs concerned in the proposed subclause (2) would be likely to have charging effect on their own.

Proposed CSA to clause 58

15. Counsel explains that the effect of the proposed clause 58(1A) is that in relation to a vocational training provider which is providing vocational training courses specifically for persons who speak a particular vernacular, the exclusion in clause 58(1) would not apply. What this means in practical terms is that if a provider provides a vocational training course specifically for persons who speak a particular vernacular and yet fails to use that vernacular in the conduct of the course on grounds of race or under circumstances which constitute indirect discrimination, the provider cannot rely on the exclusion from liability afforded by clause 58.

16. Counsel states that the point that must be made is that the effect of the proposed CSA does not impose any obligation at all on the Government to conduct any vocational training classes for ethnic minorities. Consequently, the proposed CSA should not have any charging effect.

17. Counsel explains that the proposed clause 58(1B) excepts providers of medical treatment from the exclusion in clause 58(1). The effect of the proposed subclause is that a person providing medical treatment would not be excluded from liability for the use of, or failure to use, a language. The removal of the exclusion does not mean that a person in providing medical treatment will therefore be doing anything unlawful if he uses or fails to use a particular language. Whether there will be a contravention depends on whether his conduct constitutes direct or indirect discrimination as defined in clause 4.

18. Counsel further explains that not unlike the proposed CSA to add clause 58(1A), the proposed CSA to add clause 58(1B) does not obligate the Government to provide medical treatment not only in the official languages of English and Chinese but also in the languages of the ethnic minorities receiving such medical treatment. The claim by the Administration as to additional funding to EOC can also be dismissed.

19. Counsel considers that, for the reasons as explained above, the proposed CSA to add subclauses (1A) and (1B) to clause 58 should not have charging effect.

My opinion

Proposed CSA to clause 4

20. SCMA submits that additional funding would be required for EOC to deal with an increase in complaints and to provide legal aid to parties involved in civil litigation for claims and damages. I accept Counsel's advice that indirect discrimination has already been defined under clause 4(1)(b) of the Bill. A broader definition of indirect discrimination will not create a new category of claims, hence any additional expenditure cannot be new and distinct expenditure not envisaged by the Bill. The proposed CSA does not have charging effect.

Proposed new clause 9A

21. Ms NG's proposed new clause 9A makes it unlawful for the Government to discriminate against a person on the ground of the race of that person in the performance of its functions or the exercise of its powers. The Administration's position is that the HKBORO already prohibits all forms of discrimination by the Government and therefore the CSA is unnecessary. Given the Administration's position, I cannot accept SCMA's claim that the CSA will lead to additional complaints and litigation, and that additional resources will therefore be needed. I do not consider that the CSA has a charging effect.

Proposed new clause 9B and Schedule 6

22. Ms NG submits that her proposed CSAs do not impose any obligation on the Government to increase any expenditure. I do not agree. In my past rulings, I ruled that a CSA which would create a new function would have charging effect, unless the public expenditure required for performing that function would be so small that it could be ignored.

23. My opinion is that some of the new duties imposed by subclause (2) of new clause 9B on the three Government bureaux, four departments and four public authorities listed in Schedule 6 are unlikely to result in only negligible expenditure. These new duties in question are:

- (a) to assess and consult on the likely impact of its proposed policies on the promotion of racial equality (paragraph (b) of subclause (2));
- (b) to monitor its policies for any adverse impact on the promotion of racial equality (paragraph (c) of subclause (2));
- (c) to publish the results of such assessment, consultation and monitoring (paragraph (d) of subclause (2)); and
- (d) to provide training in connection with the new duties for its staff (paragraph (f) of subclause (2)).

24. I consider that the paragraphs concerned in the proposed subclause (2) of new clause 9B have charging effect.

Proposed CSAs to clause 58

25. SCMA submits that the CSAs will result in the Government having to devote significant resources to:

- (a) vocational training bodies funded by the Government in the conduct of vocational training classes dedicated to the ethnic minorities; and
- (b) the Hospital Authority and the Department of Health to additionally provide medical treatment in the languages of the ethnic minorities receiving such medical treatment.

26. SCMA also submits that additional funding will also have to be provided to EOC for investigation and conciliation of the related complaints.

27. Ms NG's proposed CSAs merely seek to disapply the general exclusion from liability for the use of, or failure to use, any language in clause 58 of the Bill to the provision of vocational training and medical treatment². Ms NG's CSAs do not impose any obligation on the Government to devote resources for the vocational training classes and medical treatment referred to in paragraph 25 above to be provided. I do not consider that the proposed CSAs have charging effect.

² Medical treatment within the meaning of section 2 of the Medical Clinics Ordinance (Cap. 343)

Ruling

28. Having considered SCMA's comments, Ms NG's response and the advice of Counsel to the Legislature, I rule that Ms NG's CSAs to clauses 4 and 58 and to add new clause 9A are admissible.

29. As for the CSAs to add new clause 9B and Schedule 6, I rule that paragraphs (b), (c), (d) and (f) of subclause (2) of new clause 9B have a charging effect under Rule 57(6) of RoP, and require the written consent of the Chief Executive for them to be admissible. However, if Ms NG wishes to move the CSAs with the above paragraphs deleted, and informs me of her wish by 5:00 pm on 8 July 2008, I am prepared to give direction under Rule 30(3)(b) of RoP that paragraphs (b), (c), (d) and (f) be deleted from subclause (2), and that the CSAs may be moved after the alterations.

(Mrs Rita FAN)
President
Legislative Council

8 July 2008

Race Discrimination Bill

**Summary of Hon Margaret NG's proposed Committee Stage amendments (CSAs),
Secretary for Constitutional and Mainland Affairs' comments on the admissibility of the CSAs
under Rule 57(6) of the Rules of Procedure and Ms NG's response to such comments**

CSAs	Secretary for Constitutional and Mainland Affairs' comments	Hon Margaret NG's response
To amend clause 4	<p>Clause 4(1)(b) of the Race Discrimination Bill defines indirect racial discrimination. Broadly speaking, it refers to the application by a person (the discriminator) of a "requirement or condition" which, although applicable to all, has a disproportionate adverse effect on persons of a particular racial group and cannot be shown to be justifiable irrespective of race.</p> <p>The CSA broadens the definition and brings within the scope of the Bill the informal practices of "provision, criterion or practice", in addition to the application of a "requirement or condition". As a result, the number of complaints and court cases, not only against Government and public authorities but also against individuals and organizations in the private sector, may increase substantially.</p> <p>The Government will have to incur additional public expenditure in dealing with the additional number of complaints and court cases against the Government. The Government will also have to provide significant additional subvention to EOC in order for the latter to discharge its statutory responsibilities for investigation, conciliation, etc., under Part 7 of the Bill, and to deal</p>	<p>Although the CSA would cover "provision, criterion and practice", discrimination would only be established if such provision, criterion and practice cannot be shown to be a proportionate means to achieve a legitimate aim. This is the same as the defence of justification under clause 4(1)(b) and (2).</p> <p>There is no ground to assume that the public, the Government and the public authorities are committing unjustifiable race discrimination on a large scale and will not be able to comply with the provisions. Liability would not result from something beyond the Government's control. That being so, the allegation that there will be substantial increase in complaints and court proceedings are purely speculation without any support of facts.</p> <p>The Bill would add the enforcement of anti-racial discrimination legislation to the existing jurisdiction and duties of EOC. Additional funding will be provided to EOC by the Administration after the Bill is enacted. The Administration's view assumes that the capacities of EOC after receiving the new funding will be fully utilized so that it would not be</p>

CSAs	Secretary for Constitutional and Mainland Affairs' comments	Hon Margaret NG's response
	<p>with the much increased volume of work. Additional funding would also be required to provide legal aid to parties involved in civil litigation for claims and damages.</p>	<p>able to deal with new complaints or proceedings arising from the CSA without further increase in funding. No evidence is adduced to support such assumption. In any event, the provisions do not require the Government to finance EOC.</p> <p>The Administration's view assumes that the courts have no capacity to deal with new cases arising from the proposed CSA without increase in funding. No evidence is adduced in support. In any event, the provisions do not require the Government to increase funding to the courts.</p>
<p>To add a new Part 2A, new clauses 9A and 9B under this Part, and Schedule 6</p>	<p>The existing Bill covers six prescribed areas, i.e. "employment", "education", "goods, facilities, services and premises", "election and appointment to public bodies", "barristers" and "clubs". The proposed clause 9A makes it 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. Hence, it extends the liability of tort on the Government to other areas outside the prescribed areas and renders the Government liable to claims in these other areas. The Government will have to devote additional resources for handling the additional complaints and litigation cases, irrespective of whether the allegations and claims are justified. Additional funding will also have to be provided to EOC for investigation and conciliation of complaints against the Government in these other areas.</p>	<p>The Administration's assertion assumes that the Government is acting in a racial discriminatory way on such a substantial scale that clause 9A will have a significant impact on the Administration's resources devoted to dealing with complaints and litigation arising therefrom. There will not be justified complaints or litigation if the Government complies with the law. Liability would not result from something beyond the Government's control. The provision does not impose any obligation on the Government to expend public funds.</p> <p>On the Administration's views on the impact of clause 9A on EOC, Hon Margaret NG's comments are the same as those on the impact of clause 4 on EOC above.</p>

CSAs	Secretary for Constitutional and Mainland Affairs' comments	Hon Margaret NG's response
	<p>The proposed clause 9B imposes on the Government and the public authorities specified in Schedule 6 specific duties and obligations which are listed in the proposed clause 9B(2). These are new functions which go beyond what is provided in the Bill. The statutory obligation to be imposed by the proposal will incur additional financial resources by the bureaux and departments concerned and by the relevant public authorities which are subvented by the Government, in order for them to discharge the new duties.</p>	<p>Clause 9B does not require more than what the Administration has already promised Members of the Legislative Council to do. Further, clause 9B(2) does not require anything more than what is normally considered by a conscientious policy maker. The clause seeks to ensure that race equality has a place in the policy making process of the relevant Government bureaux and departments and public authorities but does not require any expenditure of public funds. It does not impose any obligation on the Government to increase any expenditure.</p>
To amend clause 58	<p>The CSA limits the exception in clause 58 of the Bill so that, barring the circumstances stated in proposed clause 58(1C), it does not apply to vocational training courses which are specifically provided for persons speaking a particular vernacular (proposed clause 58(1A)) or to the provision of medical treatment within the meaning of section 2 of the Medical Clinics Ordinance (Cap. 343) (proposed clause 58(1B)).</p> <p>The effect of this CSA is that the Administration will be obliged by statute to devote significant Government resources to vocational training bodies funded by the Government in the conduct of vocational training classes which are dedicated to the ethnic minorities; and to the Hospital Authority and the Department of Health in the provision of medical treatment - not only in the</p>	<p>Clause 58(1A) does not require anybody to provide any vocational training course to persons speaking a particular vernacular. It merely disapplies clause 58(1) to such vocational training course. It does not impose an obligation on the Government to finance the Vocational Training Council, which is a body receiving one-line-vote funding.</p> <p>Clause 58(1B) also does not require any medical services provider to provide translation in the language or vernacular spoken by a patient. It merely disapplies clause 58(1) to section 27³ when the service provided is medical treatment. It does not impose any obligation on the Government to finance the Hospital Authority, which is also receiving one-line-vote funding.</p>

³ refers to clause 27 of the Race Discrimination Bill

CSAs	Secretary for Constitutional and Mainland Affairs' comments	Hon Margaret NG's response
	<p>official languages of English and Chinese but, more significantly, in the languages of the ethnic minorities receiving such training or medical treatment.</p> <p>Having regard to the large number of ethnic minorities languages that may be involved, the additional financial implications on the Government would be enormous.</p> <p>Apart from the resources required for providing the services, the Government will have to devote additional resources for handling the additional complaints and litigation cases initiated by people who are not satisfied with the use of particular languages in the provision of the services, irrespective of whether the allegations and claims are justified. Additional funding will also have to be provided to EOC for investigation and conciliation of complaints.</p>	

Abbreviations

CSA Committee Stage amendment
EOC Equal Opportunities Commission