

立法會

Legislative Council

LC Paper No. CB(2)529/09-10(01)

Ref : CB2/PL/CA

Paper for the Panel on Constitutional Affairs

Previous discussions by the Bills Committee on Race Discrimination Bill on the scope of application to the Government under the Race Discrimination Ordinance

At the meeting held on 16 November 2009, the Legal Service Division was asked to provide information on previous discussions by the Bills Committee on Race Discrimination Bill (the Bills Committee) on the scope of application to the Government under the Race Discrimination Ordinance (Cap. 602) (RDO).

2. The Bills Committee was formed in December 2006 to scrutinise the Bill and completed its deliberations in June 2008. The issue on the scope of application to the Government under the Bill was raised and discussed during its deliberations. The relevant discussions are summarized below -

- (a) Members of the Bills Committee noted that the application of the International Covenant on Civil and Political Rights has been implemented in Hong Kong through Hong Kong Bill of Rights Ordinance (Cap. 383) (BORO) which prohibits the Government and public authorities, but not the private sector, from engaging in practices that would entail any form of discrimination, including discrimination on the ground of race (Article 22 of BORO). The Bill was enacted to extend the prohibition of racial discrimination to the private sector so as to meet the obligations under the international human right treaties applicable to Hong Kong and particularly, to address the concern both locally and of the United Nations Committee on the Elimination of Racial Discrimination over the lack of specific legislation to prohibit acts of racial discrimination in the private sector (paragraphs 7 and 8 of LC Paper No. CB(2)963/06-07(03)). Members may wish to note that upon the request of the Bills Committee, the Administration provided an explanation on the compatibility of the Bill with the Basic Law and international human rights treaties (LC paper No. CB(2)963/06-07(03)) (**Appendix I**);
- (b) the majority of the members were dissatisfied with the narrow scope of application to the Government under the Bill. Clause 3 of the Bill provides that RDO, when enacted, applies only to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person. To address the concern, the Administration agreed to introduce a Committee Stage Amendment (CSA) to amend Clause 3

as "This Ordinance binds the Government". The Administration did not consider it appropriate to expand the scope of the Bill to cover all government functions and explained that an act that contravened BORO could be challenged in the courts even if it was not specifically covered under the Bill. Noting the advice given by the legal adviser to the Bills Committee on the legal effect of the CSA proposed by the Administration (LC Paper No. LS64/07-08) (**Appendix II**), the majority of members expressed concern that the scope of application to the Government would still be limited to the specified areas of employment, education and provision of goods, facilities and services, etc. under the Bill. (paragraphs 24 to 28 of the Report of the Bills Committee to the House Committee (LC Paper No. CB(2)2410/07-08));

- (c) Members also noted that a member of the public who has suffered racial discrimination by the Government in performing certain Government functions, e.g. law enforcement, cannot lodge complaints to the Equal Opportunities Commission (EOC), which is empowered under the Bill to conduct conciliation and formal investigation, issue enforcement notices, provide legal assistance to persons suffering discrimination, harassment or vilification and apply for an injunction against persistent discrimination. He would have to seek redress by instituting civil proceedings for judicial review under the Basic Law or BORO and would have the additional financial burden of incurring legal costs (paragraph 23 of the Report of the Bills Committee to the House Committee). In this context, members proposed to expand the remit of EOC so that it can act on complaints lodged under BORO but the Administration did not consider it advisable given the broader ambit of BORO and the availability of existing avenues of redress (paragraph 15 of LC Paper No. CB(2)513/07-08(02)); and
- (d) despite members' request for extending the scope of application to cover all government functions, the Administration maintained its views that such extension would cause uncertain and potential far-reaching adverse implications on the Government's ability to make and implement policies (paragraph 6 of LC Paper No. CB(2)1292/07-08(01)). Instead, the Administration undertook to compile administrative guidelines on promotion of racial equality within the Government for the key Bureaux and Departments to follow in their formulation and implementation of their relevant policies and measures. However, the Administration refused to give an undertaking to legislate for the introduction of a Race Equality Scheme on the ground that there is no specific provision in International Convention on the Elimination of all Forms of Racial Discrimination which requires a State Party to legislate such a scheme (paragraph 19 of LC Paper No. CB(2)2301/07-08(01)).

Legislative Council Bills Committee on Race Discrimination Bill

**Compatibility of the Race Discrimination Bill
with the Basic Law and international human rights treaties**

Introduction

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

- (a) to explain how the Race Discrimination Bill as presently drafted is in conformity with Article 25 of the Basic Law, i.e., “All Hong Kong residents shall be equal before the law”; and
- (b) to explain how the Bill as presently drafted could meet the obligations under various international human right treaties applicable to Hong Kong, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2. This paper sets out the Administration’s explanation on the matters raised.

Conformity with Article 25 of the Basic Law

3. The Bill as presently drafted is consistent and in conformity with Article 25 of the Basic Law.

4. Article 25 of the Basic Law provides that “all Hong Kong residents shall be equal before the law.”

5. The Bill as presently drafted proposes to prohibit racial discrimination in both the public and the private sectors in various specified areas, eg employment, education, provision of goods, services and facilities. It applies equally to all. All Hong Kong residents, including new arrivals, are protected by the Bill in all the activities coming within the scope of the Bill. Indeed, the Bill’s safeguards are available also to tourists whose presence in Hong Kong is only temporary.

Compatibility with international treaties and obligations

6. The relevant treaty provisions are as follows –
- (a) Article 5 of the ICERD - “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”;
 - (b) Article 2 of ICCPR - “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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”;
 - (c) Article 2 of the ICESCR - “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

7. As explained in the Legislative Council Brief circulated to Members on 29 November 2006, the application of the ICCPR has been implemented in Hong Kong through the Hong Kong Bill of Rights Ordinance (HKBORO). It prohibits the Government from engaging in practices that would entail any form of discrimination, including discrimination on the ground of race. However, the HKBORO does not bind the private sector.

8. The absence of specific legislation in Hong Kong against racial discrimination applicable to the private sector has been the concern of the treaty monitoring bodies. Particularly, in its Concluding Observations on HKSAR’s last report, the Committee on the Elimination of Racial Discrimination has raised concern over our lack of legal provisions “protecting persons from racial discrimination to which they may be subjected by private persons, groups or organisations”. Similar calls for the extension of legal protection to the private sector had also been made by the United Nations Human Rights Committee which

oversees the ICCPR, and the Committee on Economic, Social and Cultural Rights which oversees the ICESCR.

9. Against this background, the Race Discrimination Bill as drafted now seeks to extend the prohibition of racial discrimination to the private sector by creating a new tort. Victims who suffer racial discrimination by the Government, public authorities or private individuals or parties in specified areas can have a cause of action in tort against the discriminator under the Bill. We believe that the Bill meets the concerns raised by the treaty monitoring bodies and is compatible with our international obligations under ICCPR, ICESCR and ICERD.

Home Affairs Bureau
January 2007

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Legislative Council

LC Paper No. LS64/07-08

**Paper for the Bills Committee on
Race Discrimination Bill**

**Legal effect of the Administration's proposed amendment
to Clause 3 of the Race Discrimination Bill**

At the Bills Committee meeting held on 12 March 2008, a Member requested that the advice then orally given by the legal adviser to the Bills Committee in respect of the legal effect of the Administration's proposed amendment to clause 3 of the Race Discrimination Bill (the Bill) be reduced to writing. This paper sets out in writing the advice given with the necessary elaboration.

2. The Administration's proposed amendment to clause 3 of the Bill (the amendment) is to delete the existing provision and substitute the following:-

“This Ordinance binds the Government.”

The legal effect of the amendment may be better understood when compared with the legal effect of the existing clause 3.

3. The existing clause 3 is as follows:-

“This Ordinance applies to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person.”

Its effect is that before it may be decided whether the provisions of the Bill would apply to an act done by or for the purposes of the Government, it must first be decided whether that act is similar in kind to an act of a private person. If there is no act of a similar kind of a private person, the Bill would not be applicable to the act of the Government. This operates as a hurdle that must

be surmounted before the other provisions of the Bill would be applicable to an act of the Government. From a legal point of view, the amendment would remove this hurdle.

4. An example of the practical effect of the amendment may be the extension of the application of the Bill to the services provided by the Business Registration Office which would not otherwise be caught since those services may not be similar to any act done by a private person. However, the amendment does not change the fact that the Bill would not be binding on the Government in so far as the performance of its functions or the exercise of its powers does not constitute any act prohibited under the provisions of Part 3 and Part 4 of the Bill. Hence, the example of a police officer's selective ticketing on the ground of race would remain outside the application of the Bill.

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14 March 2008