

立法會
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**Paper for the House Committee meeting
on 2 June 2000**

**Report of the Bills Committee on
Family Status Discrimination (Amendment) Bill 2000**

Purpose

This paper reports on the deliberations of the Bills Committee on the Family Status Discrimination (Amendment) Bill 2000.

Background

2. The Family Status Discrimination Ordinance (Cap. 527) was enacted on 26 June 1997. It is unlawful under the Ordinance to discriminate against a person on ground of family status in various fields of activity, including employment. Family status is defined as the status of having the responsibility for the care of an immediate family member. An immediate family member is anyone who is related to the person by blood, marriage, adoption or affinity.

3. Apart from their employees, it is a common practice for some employers to extend certain employment fringe benefits to the spouse and children of their employees, even though this is not required by law. According to the Legislative Council Brief on the Bill, it has not been the Administration's intention that the Ordinance will require employers to afford benefits to all immediate family members of their employees if such benefits are granted. Schedule 2 to the Ordinance already provides for some exceptions in relation to housing, education, air-conditioning, passage or baggage benefits or allowances. However, there is a body of legal opinion which considers that according to the wording of the existing provisions of the Ordinance, there is an alternative way of interpreting the Ordinance, that is, it is unlawful for an employer to restrict benefits, if granted, to only some categories of his employees' immediate family members.

The Bill

4. The Bill seeks to amend the Ordinance to clarify that it is not unlawful for a person to afford benefits only to one or more immediate family members of his employees, and without affording the same to all immediate family members of the employees. To put beyond doubt that it has never been the Administration's

intention to require an employer to provide benefits to every immediate family member of his employees, the amendments will be deemed to have come into operation when the Ordinance took effect on 21 November 1997. The Bill also expressly provides that relevant proceedings instituted under the Ordinance before 1 February 2000 are not to be affected.

The Bills Committee

5. At the House Committee meeting on 3 March 2000, members agreed that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Dr Hon YEUNG Sum, the Bills Committee has held three meetings with the Administration to discuss the Bill. The Equal Opportunities Commission (EOC), the Federation of Hong Kong and Kowloon Labour Unions and the Employers' Federation of Hong Kong have made written submissions on the Bill and their representatives gave their views at a meeting of the Bills Committee. The Bills Committee has also received a written submission from the Federation of Hong Kong Industries.

Deliberations of the Bills Committee

7. The main deliberations of the Bills Committee are summarised in the following paragraphs.

Affording benefits to immediate family members of employees

8. The Administration has explained to members that the possibility of an alternative interpretation of the Ordinance that it is unlawful to afford benefits to only some immediate family members of employees has caused concern to both employers and employees. The uncertainty over the interpretation of provisions in the Ordinance carries wide implications for both employers and employees. The Administration has further pointed out that if the uncertainty is allowed to continue, employers may withdraw all the benefits currently offered in order to avoid possible infringement of the Ordinance, in which case the employees' family members will lose the existing benefits.

9. Members in general are in support of the Bill's objective to clarify that it is not unlawful for an employer to afford benefits only to one or more categories of immediate family members of his employees without affording the same to all immediate family members.

10. The Administration has informed the Bills Committee that since the introduction of the Bill, the Administration has received some comments on the Bill. While these comments have raised no objection to the objective of the Bill in principle, there were concerns that -

- a) the wording of the proposed new section 39A might lead to a misunderstanding that discrimination in respect of benefits for employees themselves would also be covered by the proposed exception; and
- b) the proposed exception covering Parts III, IV and V of the Ordinance might be too wide.

11. The Administration agrees that the Bill as presently drafted might lead to a misunderstanding in relation to employees' benefits. The Administration will move Committee Stage amendments (CSAs) to only amend sections 8, 9 and 16 of the Ordinance, instead of granting exceptions covering Parts III, IV and V of the Ordinance. Members express support for the CSAs. Members also note that the Administration will move a consequential amendment to clause 3 of the Bill accordingly.

Retrospective provisions of the Bill

12. Members note that a majority of the EOC members and the Employers' Federation of Hong Kong agree that the Bill should have retrospective effect. Members also note that the Federation of Hong Kong and Kowloon Labour Unions has expressed concern that the retrospective effect of the Bill may result in the reduction or alteration of existing benefits, facilities or services for immediate family members of employees. Some members share a similar concern.

13. The Administration has responded that the Bill will not take away any legislative protection or benefits that are currently enjoyed by the employees themselves. To address the concern, the Administration has proposed to add a new provision to the Bill which expressly provides that the Ordinance shall not affect any term in any agreement or contract entered into before the enactment of the Ordinance under which an employer or a principal undertakes to afford any immediate family member of an employee, contract worker or commission agent access to benefits, facilities or services. Members consider the proposed CSAs acceptable.

14. Several members have expressed concern that the retrospective provisions of the Bill may have adverse implication on the rule of law in Hong Kong. They query whether it is a correct approach of legislation if the Administration seeks to amend the law with retrospective effect whenever it considers that the law has failed to reflect the original legislative intent. A member has further pointed out that she has reservations on the retrospective provisions also because the possible effect of such provisions on the rights of the employers, employees or their immediate family members is unknown.

15. The Administration has responded that as the purpose of the Bill is to put beyond doubt that it has never been the Administration's intention to require an employer to provide benefits to every immediate family member of his employees, the amendments should be deemed to have come into operation when the Ordinance took effect. It is unsatisfactory to introduce amendments without retrospective effect because the uncertainty in respect of former acts will linger on.

16. Another member has indicated support for the Administration's view. The member is concerned that if the amendments are enacted without retrospective effect, the employee or his immediate family members can still initiate proceedings in respect of former acts taken by an employer for affording benefits to only some immediate family members.

17. A member has asked the Administration to consider whether the Bill can provide that no proceedings can be brought in respect of former acts before the enactment of the Bill, instead of having retrospective provisions. The Administration has advised that it had considered such an alternative but concluded a prohibitive provision undesirable because it might be considered to be an interference with the right of access to court.

18. To address the member's concern about the effect of retrospective provisions on the rights of the employers, employees or their immediate family members, the Legal Adviser to the Bills Committee has put forward a proposal of saving existing rights and obligations under an agreement or settlement entered into before the enactment of the Bill. At members' request, the Administration has considered the feasibility of the proposal and has prepared relevant CSAs for the Bills Committee to consider. A majority of members are in support of the CSAs.

Saving of existing proceedings

19. Members note that the proposed saving clause of the Bill aims at preserving the rights of claimants who might have already instituted proceedings before date of the approval of the Executive Council (ExCo) for the introduction of the Bill i.e. 1 February 2000.

20. Several members are of the view that the cut-off date is very arbitrary. The Administration has explained that a line must be drawn somewhere and the date of ExCo's approval is a clear-cut one. The Administration is of the view that a person's right to institute proceedings should be protected before the Administration has made a decision on the way forward to remove the uncertainty in the Ordinance. The Administration has also informed members that according to the Judiciary, no proceedings had been instituted under the Ordinance on or before 10 February 2000.

Committee Stage amendments

21. The CSAs proposed by the Administration are in **Appendix II**. The Bills Committee has not proposed any amendments.

Recommendation

22. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed on 14 June 2000.

Advice sought

23. Members are invited to support the recommendation of the Bills Committee in paragraph 22 above.

Legislative Council Secretariat
31 May 2000

Bills Committee on Family Status Discrimination (Amendment) Bill 2000

Membership List

Dr Hon YEUNG Sum (Chairman)
Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon LEE Kai-ming, SBS, JP
Hon Margaret NG
Hon Ronald ARCULLI, JP
Hon Christine LOH
Hon CHAN Kwok-keung
Hon CHAN Yuen-han
Dr Hon LEONG Che-hung, JP
Hon YEUNG Yiu-chung
Hon CHOY so-yuk
Hon LAW Chi-kwong, JP

Total : 14 members
Date : 10 May 2000