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Paper for the Bills Committee on
Race Discrimination Bill

The meaning of "Race"
in Race Discrimination Legislation
of certain relevant Overseas Jurisdictions

At the meeting of the Bills Committee on the Race Discrimination Bill (the Bill) on 16 January 2007, the Chairman has, at the request of members, asked the legal adviser to the Committee to comment on the question whether the definition of "race' in other relevant overseas legislation is restricted to race only or other considerations are also included. This paper seeks to address the question.

Overseas Legislation Considered

2. Since the Bill under scrutiny is modelled on the English Race Relations Act 1976, the relevant overseas legislation come within consideration must be those of the Commonwealth countries. In view of the limited time available, only the English Race Relations Act 1976 (RRA), the Australian Racial Discrimination Act 1975 (RDA) and the New Zealand Human Rights Act 1993 (HRA) are considered. (All the Acts include amendments subsequent to the date of enactment.) They are collectively referred to as "the Acts".

3. Of the Acts, only RRA has provided some form of definition of "race" in its section 3(1), which defines "racial grounds" and "racial group". They have been substantially reproduced in clause 8(1)(b) and (d) of the Bill. For RRA, "racial" effectively means "colour, race, nationality, ethnic or national origin". The Bill expressly stipulates in clause 8(1)(a) that "race" means in relation to a person, "the race, colour , decent or national or ethnic origin of the person". RDA sets out in each relevant section a reference to "race, colour or national or ethnic origin". HRA lists in its section 21 as prohibited grounds of discrimination: "race", "colour", and "ethnic or national origins, which includes nationality or citizenship". Hence, the terminologies used in the Acts are largely the same. By themselves, the provisions of the Acts do not provide further disclosure of the meaning of "race". It is therefore necessary to look at the relevant judicial interpretation of the term.

Judicial Interpretation

4. It has been held in the New Zealand Court of Appeal Case *King-Ansell v Police*[1] in the context of the then Race Relations Act 1971 that the words "race" and "national or ethnic origins" should be treated as "used in a wide popular sense but at the same time as associated with one another in such a way that each word gives colour to the meaning of others"[2]. The Court then construed the expression "ethnic origins" in terms of dictionary meaning. It also rejected an interpretation of "race" in strictly biological terms. The House of Lords in *Mandla v Dowell Lee*[3] approved the approach and Lord Fraser of Tullybelton expressed the view that:

> "… an ethnic group in the sense of the 1976 Act … must … regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of the neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or dominant group within a larger community, for example a conquered people … and their conquerors might both be ethnic groups."[4]

5. Lord Fraser's criteria have been applied in England in subsequent cases, e.g. *Crown Suppliers v Dawkins*[5] and *Commission for Racial Equality v Dutton*[6]. They have also been applied in the local High Court case of *Lau Wong Fat v Attorney General*[7], in which the issue of whether indigenous inhabitants of the New Territories were ethnic minorities was being considered. Cheung J, as he then was, expressed

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1 [1979] 2 NZLR 531.
2 At 533.
3 [1983] 1 All ER 1062.
4 At 1066-67.
5 [1993] ICR 517.
6 [1989] QB 783, CA.
7 [1996] 7 HKPLR 148.

the *obiter* view that there was an arguable case.

Concluding observation

6. In the absence of direct judicial definition of "race"[8], it is submitted that the existing case law suggests that "race" is not to be understood only in its biological meaning and Lord Fraser's test for "ethnic origin" in the *Mandla* case is applicable in Hong Kong. In the light of that test, it seems clear that in considering discrimination relating to the ethnic origin of a person, considerations other than "race' could be included.

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[8] Michael Connolly, *Discrimination Law*, 2006, at paragraph 3-003.