

Bills Committee on Race Discrimination Bill

Propriety of support measures for ethnic minorities

Purpose

At the last meeting held on 5 February 2007, Members asked the Administration to explain –

“why a defence could be established under Clause 49 for implementing special support measures intending to bestow benefits on ethnic minorities, e.g. the special support measures to help non-Chinese speaking (NCS) student to learn Chinese and inviting the University Grant Committee (UGC)-funded institutions to consider accepting alternative qualifications in Chinese in considering admission of these students, having regard to the argument that provision of concessionary fares to persons with a disability might constitute a contravention of the Disability Discrimination Ordinance and the High Court’s ruling in the case of *Equal Opportunities Commission (EOC) v Director of Education [2001]* that the then Secondary School Places Allocation system was unlawfully sex-discriminatory”.

This paper explains the matter, with particular reference to the special measures for NCS students.

Nature and justifications of the special measures for NCS students

2. As explained in the Bills Committee Paper LC Paper No. CB(2)1019/06-07(01), the Education and Manpower Bureau (EMB) has been putting in place various support measures to cater for the special needs of NCS students who, because they do not use Chinese as their mother-tongue, may have difficulties in learning Chinese when compared to local Chinese-speaking students. These measures include, for example, the Chinese Learning Support Centre and the Summer Bridging Programme which are provided to augment classroom teaching of Chinese for NCS students.

3. Although the benefits of these measures are targetted primarily at NCS students, notably those from ethnic minority groups, these measures will be protected by the proposed Clause 49 of the Race Discrimination Bill, if enacted –

“49 Special measures

Nothing in Part 3, 4 or 5 renders unlawful an act that is reasonably intended to –

- (a) ensure that persons of a particular racial group have equal opportunities with other persons in circumstances in relation to which a provision is made by this Ordinance;
- (b) afford persons of a particular racial group goods or access to services, facilities or opportunities to meet their special needs in relation to –
 - (i) employment, education, welfare or clubs; or
 - (ii) the provision of premises, goods, services or facilities; or
- (c) afford persons of a particular racial group grants, benefits or programmes, whether direct or indirect, to meet their special needs in relation to –
 - (i) employment, education, welfare or clubs; or
 - (ii) the provision of premises, goods, services or facilities.”

4. Clause 49 of the Race Discrimination Bill is also consistent with Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination, which states –

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

5. Members may further note that similar provisions as in Clause 49 regarding special measures are also found in section 48 of the Sex Discrimination Ordinance (Cap 480), section 50 of the Disability

Discrimination Ordinance (Cap 487) and section 36 of the Family Status Discrimination Ordinance (Cap 527).

Concessionary public transport fares for persons with a disability

6. Discrimination against persons with disabilities is unlawful under the Disability Discrimination Ordinance. Under that Ordinance, the definition of “disability” is very broad. It covers total or partial loss of a part of the person’s body or mental functions; the presence in the body of organisms capable of causing disease or illness, and includes not only a disability that presently exists, but allows one which previously existed but no longer exists, or one which may exist in the future. Section 50 of the Ordinance permits special measures which are reasonably intended to meet the special needs of persons with a disability in relation to employment, education, their capacity to live independently etc.

7. On the proposal of concessionary public transport fares for persons with disabilities, while there is no doubt about the philanthropic intention, the main problem has been to identify and to design a scheme which is based on the “needs” of the persons concerned, as required by section 50 of the Ordinance, such that individual persons with disabilities who have the same or similar need are treated equally. The needs of a blind person and the needs of a person with hearing problem may not be the same. A concession scheme which treats all persons with disability in the same manner without regard to their individual needs would not be compatible with the principle of equality as the scheme purports to treat persons with different disability and needs alike.

8. Such difficulties do not necessarily arise in the case of special measures to be covered under Clause 49 of the Bill. Specifically, they should not arise in the case of the EMB’s support measures for NCS students, which are designed to address a specific need and bear a direct relationship to the objective which is reasonable and justified.

The case of *EOC v Director of Education*¹

9. This case concerned the then Secondary School Places Allocation (SSPA) system. The complaint is summarised in paragraph 18 of the Judgment, viz –

¹ HCAL1555/2000

“The complaints were to the effect that the (SSPA) system discriminated against individual students – essentially girls but boys too – on the basis of their sex and was thereby denying those students the opportunity to compete for places in the secondary schools of their choice based solely on their individual abilities, aptitudes and special needs.”

10. In brief, the then SSPA system contained three structural elements –

- (a) a *scaling* mechanism which scaled the scores of primary students in their schools assessment to ensure that they could be fairly compared with scores given by other primary schools and which was then employed on a gender basis;
- (b) a *banding* mechanism which banded all students into broad orders of academic merits and which was then employed on a gender basis; and
- (c) a form of *gender quota* which ensures a fixed ratio of boys and girls in the student body of individual co-educational schools.

These mechanisms were challenged by the EOC on the grounds that they employed “gender” as a criterion in operation and were thus discriminatory. After consideration of the facts and representations, the Court found against the Director of Education and declared that “all three gender-based mechanisms challenged by the Commission as being discriminatory are contrary to the (Sex Discrimination) Ordinance and are unlawful.”

11. In its Judgment, the Court firmly upheld freedom from discrimination as a fundamental right of each individual. It said,

“In my judgment, if there is a central pillar around which the edifice of Hong Kong’s legal system is built, it is respect for the rights and freedom of the individual.”

In this context, it highlighted the need for balancing the rights of different individuals and warned against application of broad assumptions and generalisations which, while seeking to promote the interest of some, could undermine the legitimate rights of others. The Court recognised –

“the enjoyment of equality of treatment free of sex discrimination does not imply that in every instance men and women are entitled to *identical* treatment”

but bemoaned the consequence that –

“For example, a girl who has, through academic merit, warranted a privileged rank in her choice of school can be denied her choice simply because the gender quota in her school has been filled, this despite the fact that boys in her class with lower scores are free to take up places in that same school.”

12. The Court has therefore placed great emphasis on the principles of rationality and proportionality in distinguishing legitimate special measures (which by their nature constitute some form of differential treatment) from unlawful discrimination. It stated that –

first,

“a restriction on the fundamental right of equality of treatment free of sex discrimination might be lawful but only if that restriction was ‘reasonably intended’ to bring about what could be termed equality of opportunity”

and secondly,

“it must be demonstrated that:

- (a) the restriction was demonstrably necessary;
- (b) it was rational in the sense that it was not arbitrary, unfair or based on irrational considerations; and
- (c) it was no more than was necessary to accomplish the legitimate objective, in other words that it was a proportionate response.”

13. The SSPA system at that time was found to have fallen short of these tests.

14. The Court’s ruling has given us useful pointers in establishing the propriety of special measures which seek to meet the special needs of persons of a particular racial group. In this regard, EMB’s support

measures for NCS students are entirely in line with the considerations set out in paragraph 12 above. Unlike the gender quota in the SSPA system, such support measures do not unduly affect the legitimate rights and interests of other students.

15. This paper has been prepared in response to Members' request recorded in paragraph 2(a) of the minutes of the Bills Committee meeting held on 5 February 2007.

**Home Affairs Bureau
February 2007**