

Bills Committee on Race Discrimination Bill

Indirect discrimination and assessment of justifiability

Introduction

At the meeting held on 23 April 2007, Members asked the Administration to explain the criteria which should be considered by the public in assessing whether the test of “justifiability” under Clause 4 of the Bill could be met and to provide the relevant guidelines to be issued to the public after enactment of the Bill.

2. This paper provides the information requested.

Proposed provision

3. Clause 4 of the Bill states –

“4. Racial discrimination

- (1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person if –

- (a) on the ground of the race of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons; or

- (b) the discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but –

- (i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;

- (ii) which the discriminator cannot show to be justifiable irrespective of the race of the persons to whom it is applied; and
 - (iii) which is to the detriment of the other person because that person cannot comply with it.
- (2) For the purposes of subsection (1)(b)(ii), a requirement or condition is justifiable either –
- (a) if it serves a legitimate objective and bears a rational and proportionate connection to the objective; or
 - (b) if it is not reasonably practicable for the person who allegedly discriminates against another person not to apply the requirement or condition.
- (3) In determining for the purposes of subsection 2(b) whether it is reasonably practicable for a person who allegedly discriminates against another person not to apply a requirement or condition, any relevant circumstances of the particular case may be taken into account including those referred to in subsection (4).
- (4) The circumstances that may be taken into account include, but are not limited to –
- (a) the nature of the benefit or detriment likely to accrue to or be suffered by, or the likely impact on, all persons concerned;
 - (b) an estimate of the proportion of persons likely to benefit out of all the persons concerned, if the requirement or condition is not applied;
 - (c) whether any activities of the person who allegedly discriminates against another person would be disrupted if the requirement or condition is not applied and, if so, the extent of the disruption; and
 - (d) whether the person who allegedly discriminates against another person will need to provide additional services or facilities or incur additional

expenditure (including recurrent expenditure), if the requirement or condition is not applied.

- (5) Nothing in subsection (3) or (4) is to be construed as requiring the person who allegedly discriminates against another person or any other person concerned to confer any benefit, suffer any detriment, provide any services or facilities or incur any expenditure which the person or that other person (as the case may be) is not otherwise required to confer, suffer, provide or incur.
- (6) It is declared that, for the purpose of this Ordinance, segregating a person from other persons on the ground of the race of that person is treating that person less favourably than the other persons are treated.”

4. Clause 4(1)(a) of the Bill defines direct discrimination on the ground of race. Clause 4(1)(b) defines indirect racial discrimination and sets out in subparagraphs (i) to (iii) the criteria for assessing whether the application of a particular requirement or condition would constitute indirect discrimination. Similar definitions and assessment criteria are found in existing anti-discrimination ordinances, viz. section 5 of the Sex Discrimination Ordinance (Cap 480), section 6 of the Disability Discrimination Ordinance (Cap 487) and section 5 of the Family Status Discrimination Ordinance (Cap 527).

5. For clarity, Clause 4(2)(a) incorporates into the proposed legislation the internationally accepted principles of rationality and proportionality for assessing whether the application of a particular requirement or condition may be justified under clause 4(1)(b)(ii). Clause 4(2)(b) reflects the Government’s policy intent of requiring people to be mindful of the special needs of the minorities and, where reasonably practicable, not to apply a requirement or condition that adversely affect them disproportionately. Clause 4(1)(b) does not impose a mandatory requirement for affirmative action. This is consistent with the standard adopted in the existing Sex Discrimination Ordinance and Family Status Discrimination Ordinance, and one which we consider reasonable and appropriate in the context of race discrimination.

6. Clause 4(3) elaborates on the reference to “reasonably practicable” in Clause 4(2). It emphasizes and aims to put it beyond

doubt that “any (meaning *all*) relevant circumstances of the particular case may be taken into account” in determining whether it would be reasonably practicable for a requirement or condition not to be applied. This is a broad and all encompassing provision. It covers all circumstances which are relevant and which an ordinary person would regard reasonable. For clarity of understanding, Clause 4(4) gives examples of the circumstances which may be taken into account. As stated in Clause 4(4), these examples are not meant to be exhaustive or prescriptive.

7. Consistent with the Government policy of not imposing a mandatory requirement for affirmative action, Clause 4(5) further reiterates that the Bill does not impose a legal obligation for people to go beyond what they are otherwise required to do. In this connection, it should be noted especially that the objective of the Bill is to make it unlawful for people to treat other people of a particular racial group less favourably than they would treat others. It does not, nor do we consider it appropriate to, impose a more onerous duty requiring people to incur additional expenditure or suffer additional detriment in order to accommodate the special needs of persons of any particular racial groups who are not disadvantaged in their physical or mental capabilities.

8. Clause 4(6) simply states that segregating a person from others on the ground of race automatically means subjecting that person to less favourable treatment and, thus, constitutes unlawful racial discrimination.

Concept of discrimination

9. Although both concepts are derived from the principle of equality, the concept of indirect discrimination is much broader and more complicated than that of direct discrimination. Taking the simpler one first, direct discrimination operates from the principle that all people in the same situation should be treated in the same way. Thus, Clause 4(1)(a) provides that people should not be treated less favourably because they are of a particular race. For example, therefore, people should enjoy the same access to and quality of service at a restaurant irrespective of their race; and a shopkeeper should not turn away a customer because he is non-Chinese.

10. The concept of indirect discrimination, on the other hand, means that people who are different should *not* be treated the same. On the other side of the same coin, it also means that in applying a particular requirement or condition the circumstances of people of different race should be taken into account. It goes that one step further towards pursuing equality of outcome by treating as suspicious any requirement or condition that has a disproportionate impact on a racial group. Indirect discrimination is a much less obvious form of discrimination and does not lend itself to a simple and straight-forward yardstick of measurement as in the case of direct discrimination. The way in which the inherent characteristics of people of different races that may affect their ability and capacity to meet a requisite requirement or condition can be broad ranging and, even within the same racial group, there may be some members who are better able to meet a particular requirement or condition than others.

11. Translated into layman's language, Clause 4(1)(b) means that indirect discrimination occurs when a person imposes a requirement or condition which may on its face appear neutral but which, upon implementation, has a disproportionate adverse impact on people of a particular race and that the requirement or condition imposed cannot be justified by reasons not related to race. Examples of this are where a company for no good reasons stipulates that no employees may wear a headgear, and when a company requires applicants for a cleaner job to pass a test in written Chinese when all that the job requires is the ability to understand simple oral instructions in Cantonese. In the former example, it would preclude Sikh men who wear a turban in accordance with their ethnic practice from employment with the company. In the latter, the requirement is unjustified and potential applicants of non-Chinese origin will also find it difficult to comply.

Assessment of justifiability

12. It would be noted that the provision in Clause 4(1)(b) has the potential of opening to challenge any requirement or condition that may have an adverse impact on a particular racial group even if the person applying it has no intention to discriminate. Moreover, Clause 4(1)(b)(ii)

specifically puts the burden of justification on the discriminator to show the requirement or condition imposed “to be justifiable irrespective of the race of the person to whom it is applied”. This places a particular onus on the man-in-the-street who may not be familiar with the concept of indirect discrimination and its implications. Clause 4(2) therefore sets out the fundamental criteria of assessment on the circumstances in which indirect discrimination may be justified. Specifically, whether a requirement or condition is justifiable will be measured by two alternative tests. Following the principles of rationality and proportionality, the first test is whether it serves a legitimate purpose and bears a rational and proportionate relationship with the objective sought. The second test is whether or not it is reasonably practicable not to apply the requirement or condition.

Rationality and proportionality test

13. In gist, the rationality and proportionality test means that a requirement or condition may be justified if it is applied as a “proportionate means of achieving a legitimate aim”, despite it might result in a disproportionate adverse impact on persons of a particular race. The principles involved are well accepted internationally. They are also part of the Hong Kong law in matters concerning human rights. In *Leung Kwok Hung & Others v HKSAR*, the Court of Final Appeal held that the test should be formulated in the following terms:

- (a) the restriction must be rationally connected with one or more of the legitimate purposes; and
- (b) the means used to restrict the right must be no more than is necessary to accomplish the legitimate purpose in question.

Members would note that Clause 4(2)(a) of the present Bill is worded in similar terms.

Reasonable practicability test

14. As earlier explained, the provision relating to reasonable practicability in Clause 4(2)(b) follows the same standard adopted in our

existing Sex Discrimination Ordinance and Family Status Discrimination Ordinance. In essence, it means that a requirement or condition may be justified if, having regard to the relevant circumstances, an ordinary man would consider its application reasonable and necessary. This is by no means a loose stipulation or an open backdoor. Clause 4(3) imposes an obligation on the person concerned to consider all relevant circumstances and to explore alternatives of achieving the same objective without causing undue detriment to other persons on account of their race. Obviously, circumstances of cases may differ widely. For clarity and better understanding, Clause 4(4) provides further guidance and spells out the more common aspects and issues which ought normally be considered. It should be specially highlighted that Clause 4(4) does not limit the court's examination of the relevant circumstances. The use of the words "may", "include" and "not limited to" in the opening sentence is deliberate. It is to state clearly that the provision is not intended to and would not have the legal effect of circumscribing or curtailing the court's power to consider all relevant circumstances of the case, which may include those set out in Clause 4(4)(a) to (d) but are not restricted to them. As explained in paragraph 7 above, Clause 4(5) is included for the purpose of clarity of law - to reflect the Government's policy intent not to impose a mandatory duty for affirmative action.

Guidance to the public

15. Clearly, it is not feasible or practicable for the law to be exhaustive in prescribing all relevant circumstances in different cases, some of which may well be unforeseeable at this stage. Insofar as legislation is concerned, it should be sufficient for the basic principles and criteria for assessment of indirect discrimination to be clearly stipulated in the proposed Bill. This we have done with the detailed and comprehensive provisions in Clause 4.

16 To facilitate public understanding and compliance with the proposed legislation when enacted, we have proposed in Clause 64 that the Equal Opportunities Commission (EOC) should be empowered to issue statutory codes of practice to provide practical guidance for, inter alia, elimination of racial discrimination and promotion of equal opportunity and racial harmony. These codes, when published, will

provide the necessary guidelines for the public both in understanding the legal provisions and in meeting their legal obligations under the new Ordinance. While they will not impose a legal obligation for compliance, these codes shall, as provided for in Clause 64(14), be admissible in evidence in courts and may be taken into account by the courts in proceedings under the Ordinance.

17. The preparation of the codes of practice will be an extensive and laborious exercise. Clause 64(2) of the Bill particularly requires the EOC to consult relevant associations and organisations in the course of preparing any code of practice for eventual publication. This is to ensure that the codes, when published, will meet the needs of the affected parties and sufficiently address their interests and concerns.

18. Given the scale and complexity of the exercise, Members will appreciate that we are not in a position now to provide “the guidelines for the public to be published” as requested. We are also cautious that we do not pre-empt the EOC’s consultation with relevant parties and interfere with its statutory responsibility for preparation of the codes of practice.

19. Nonetheless, in view of the Members’ interest, and to facilitate Members’ consideration of the provisions, we feel obliged to at least make an attempt to spell out some of the questions which a person should consider in assessing whether the application of a particular requirement or condition might be justifiable under the Bill, even if this were done at the risk of repeating what is already stated in Clause 4 of the Bill. We emphasize also that these questions are provided only as illustrations. They are not exhaustive. They do not prejudice the work of the EOC in its future preparation of the code of practice. Above all, they do not purport to be an authoritative statement of the law, which only the courts can provide. That said, they do represent our intention behind the proposed legislation and, particularly, our view on the need for circumspection when a person seeks to apply a requirement or condition which may have a disproportionate adverse impact on other persons of a particular race.

20. With the understanding stated in paragraph 19, we suggest that some of the questions that may be asked would include –

- What is the requirement or condition that I am seeking to impose ?
- Why do I want to impose the requirement or condition ? What is the objective of the requirement or condition ?
- Is the objective a legitimate and reasonable one (for example, health and safety) ?
- Is the objective related to race ? Is it because I want to exclude certain persons of a particular race from the benefits or to treat them less favourably than others ?
- Is the requirement or condition an appropriate, necessary and reasonable means to achieve the objective ?
- When applied, how would a person be affected in comparison to another person in similar circumstances but of a different race ? Will the requirement or condition work to the disadvantage of persons because of their race ?
- Are there alternatives of achieving the same objective which can avoid causing undue detriment to other persons on account of their race ?
- What are the consequences and implications of not applying the requirement or condition ? Are the alternatives reasonably practicable ?

21. The questions suggested above are generic. They are bound to be so because the circumstances in different cases are bound to differ widely. As further illustration, more specific questions could be asked in the context of more defined situations and scenarios -

- Why do we have the minimum height requirement ? If there's no good reason, what are the implications if we remove it ? If there is a good reason, how do I explain it ? Are we indirectly discriminating ?
- If we take out the "ten years experience" requirement, would we get a bigger pool of applicants ? Are we being unreasonable ? What's the downside of this ? Is there any cost involved for us ? What skills are we really looking for ?

Conclusion

22. This paper explains the concept of indirect discrimination and, in that context, the assessment system for determination of whether the application of a requirement or condition may be justified under Clause 4 of the proposed Bill. It also offers pointers and illustrations of the questions which ought normally be asked in considering the issue.

23. This paper has been prepared in response to Members' request at the Bills Committee meeting held on 23 April 2007 and is presented for Members' information and consideration at the meeting to be held on 15 May 2007.

Home Affairs Bureau
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