Bills Committee on Race Discrimination Bill

The Administration's response to the Legislative Council Secretariat's paper on "Scrutiny progress of the Bill"

Purpose

At their meeting held on 26 June 2007, Members discussed a paper prepared by the Legislative Council Secretariat (LegCo Secretariat) entitled "Scrutiny progress of the Bill" (LC Paper No CB(2)2231/06-07(01)), which summarised the Members' views and concerns over the proposals contained in the Race Discrimination Bill. That paper was subsequently revised in light of Members comments and was issued on 16 July 2007 as LC Paper No CB(2)2501/06-07(1).

2. This paper presents the Administration's clarification and response to the various issues raised.

General issue

3. As stated in paragraph 2 of the LegCo Secretariat's paper, the key concern among Members related to "its narrow scope of application with numerous exceptions". Members had doubts on the effectiveness of the Bill in bringing about "concrete improvement to the problem of discrimination" and "to prohibit longstanding discriminatory practices in the public sector". There were also concerns that the exception clauses "would have the adverse effect of legitimising discriminatory acts on the ground of race" and that "the lack of clarity of the Bill would cause confusion and uncertainties to the community".

4. We note the Members' concerns. However, we are unable to subscribe to any allegation that there had been longstanding discriminatory practices in the public sector. We wish to reassure Members that the Government is committed to the policy of equal

opportunities for all and to the elimination of racial discrimination. The Bill is the outcome of much careful consideration balancing the legitimate rights and interests of different parties affected. It has fully taken into account the community views expressed in extensive public consultation in 2004-05.

5. With regard to the scope of the Bill, we should highlight that the Race Discrimination Bill has been modelled on the existing anti-discrimination ordinances in Hong Kong; the scope and the principal provisions are, hence, broadly similar. It is not our policy intent, nor do we consider it right, for the Bill to be extended to cover every aspect of daily life. While we are committed to combatting discrimination, we have the duty also to safeguard the fundamental rights and freedoms for all including, for example, the freedom of association and the right to protection of private and family life. Thus, like other existing anti-discrimination ordinances in Hong Kong, the scope of the Bill has been confined to the prescribed areas of education, employment and provision of goods and services, etc.

6. With regard to the exception clauses, we have explained that these clauses are intended primarily for clarity of the law and certainty of its application. Specifically, the "exception clauses" have been included for one of the following reasons –

(a) to ensure that, although no affirmative action is required in the Bill, special measures which are intended for bestowing benefits on ethnic minorities and promoting equal opportunities for them are not regarded as racial discrimination, although these measures are targetted at particular ethnic groups to the exclusion of others;

(b) to provide for lawful and justified protection for the legitimate rights and freedoms of others, and for other purposes which are justified on policy grounds and considerations; or

(c) to delineate the scope of the Bill and to provide for clarity and certainty of the law in areas which were not intended to be covered by the Bill.

A detailed analysis with explanation of the individual clauses was provided in the Annex B of the Legislative Council Brief submitted to Members on 29 November 2006. In each and every case, the exception clauses had been critically examined against the internationally accepted principles of rationality and proportionality. Every effort had also been made to ensure that the exception clauses would not cause confusion and uncertainties, nor would they result in legitimising acts of racial discrimination.

Specific concerns

7. Paragraph 4 of the LegCo Secretariat's paper lists the specific issues which Members regard fundamental and need to be resolved "to facilitate the Bills Committee's decision on the way forward for its scrutiny work". These are –

(a) Clause 3 regarding the application of the Bill to the Government;

(b) Clause 4 regarding the distinction between direct and indirect discrimination;

(c) Clause 8 regarding the exclusion of new arrivals from the Mainland from the scope of the Bill; and

(d) Clause 58 regarding the exception for languages.

8. We shall address the concerns raised by Members in the following paragraphs.

Application to Government

9. As stated in paragraph 7 of the LegCo Secretariat's paper, Members' concern was primarily over Clause 3 which they regarded as "granting a broad exemption for the performance of functions and powers of the Government". They perceived difficulties in determining whether an act done by the Government is an act "that is of a kind similar to an act done by a private person" and observed that members of the public would

have "additional financial burden of incurring legal costs" in seeking redress under the Hong Kong Bills of Rights Ordinance, Cap 383 (HKBORO).

10. For perspective, it should be recognised that there are existing constitutional and statutory provisions under the Basic Law and the HKBORO, which guarantee the fundamental rights and freedoms of individuals in Hong Kong, including the right against discrimination. The HKBORO in general prohibits the Government and public authorities from engaging in practices that would entail any form of discrimination, including discrimination on the grounds of race and colour. These provisions are further buttressed by the rule of law in Hong Kong and by an independent and impartial judiciary. In addition, avenues are available to address complaints against public authorities, through e.g. the Ombudsman, the Complaints Against Police Office and complaint channels in bureaux and departments.

11. One of the main considerations which called for the introduction of the Race Discrimination Bill has been that both the Basic Law and the HKBORO bind only the Government and public authorities. They do not cover acts of racial discrimination in the private sector. This was the cause of concern, both locally and with the United Nations Committee on the Elimination of All Forms of Racial Discrimination.

12. It was against this background that the Bill was prepared and subsequently introduced into the Legislative Council, specifically to address concerns over the lack of specific legislation "protecting persons from racial discrimination to which they may be subjected by private persons, groups or organizations." [1] For the sake of parity of treatment, we have proposed in Clause 3 that the Bill, when enacted, would apply "to an act done by or for the purpose of the Government that is of a kind similar to an act done by a private person." In other words, the proposed provisions will apply to both the Government and the private sector. Clause 3 is not meant to be an exception clause and ought not be regarded as "granting a broad exemption".

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[1] Paragraph 17, Concluding Observation of the Committee on the Elimination of All Forms of Racial Discrimination, issued in 2001 after its consideration of the First Report of the HKSAR under the International Convention on the Elimination of All Forms of Racial Discrimination.

13. With regard to the determination of "an act done by the Government that is of a kind similar to an act done by a private person", this is a question of fact which will ultimately have to be determined by the Court in light of the relevant circumstances of each individual case. We should also reiterate the point that the Bill does not absolve the Government and public authorities from existing obligations under the Basic Law and the HKBORO. Hence an act that contravenes the HKBORO (which prohibits all forms of discrimination by Government and public authorities) may be challenged in the Court under the HKBORO, even if it were not specifically covered under the Bill. We therefore consider it unnecessary to further extend the scope of the Bill to cover other government functions. We should also be cautious that such an extension of scope could be abused. The Government might be exposed unjustifiably to litigations whenever a practice or policy is perceived to be less favourable to members of a certain race. This has far-reaching repercussions on the Government's ability to make policy and will seriously hamper efficient administration.

Distinction between direct and indirect discrimination

14. As stated in paragraphs 11 to 13 of the LegCo Secretariat's paper, Members have questioned the need to include the "tests of justification" in Clause 4 of the Bill, which in their view could cause confusions and uncertainties to the community. They also do not consider it necessary to distinguish between direct and indirect discrimination.

15. We should point out, first of all, that the distinction between direct and indirect discrimination is a well established concept. It is not arbitrary. It recognises that discrimination does not only take the form of treating another person less favourably on the ground of race (which is direct discrimination), but that it may also take the form of imposing a requirement or condition which, although applied equally to people of different racial groups, will have a disproportionate negative impact on people of certain particular racial group(s) because they cannot comply with it and the requirement or condition cannot be justified irrespective of the race of the person to whom it is applied (the latter is indirect discrimination). The Bill therefore proposes to make racial

discrimination unlawful, irrespective of whether it takes the form of direct or indirect discrimination.

16. It is also an internationally accepted principle that not all forms of differential treatment are to be regarded as discrimination. Hence, particularly in the context of indirect discrimination, any differential treatment, requirement or condition is justifiable if the criteria for such differentiation are reasonable and objective and if there is a legitimate aim for it.

17. The purpose of Clause 4 is specifically to reflect the legislative intention and to put these definitions and assessment criteria clearly on the statute books, so as to prevent misunderstanding or misinterpretation on their application. We share Members' view over the need for members of the public to understand the proposed statutory provisions which are cast in legal language. We have, therefore, proposed in the Bill to entrust the Equal Opportunities Commission (EOC) with the responsibilities, in addition to enforcement of the legislation, to work towards elimination of discrimination and to promote equal opportunities among different races. These activities will include public education to promote awareness and understanding of the law. Moreover, to facilitate compliance, the EOC will also draw up codes of practice which will provide guidance for people in each of the areas of activities covered by the Bill before the relevant legislative provisions are brought into effect.

18. As reflected in paragraph 12 of the LegCo Secretariat's paper, Members have raised question on feasibility of adopting the definition of indirect discrimination from the UK Race Relations Act (RRA). In this connection, it would be relevant to note for background that the new subsections 1(1A) to 1(1C) of the RRA were only recently added under the UK Race Relations Act 1976 (Amendment) Regulations 2003. The amendment was made specifically to implement Directive No 2000/43/EC of the European Council issued on 29 June 2000, commonly referred to as the "European Race Directive".

19. The definition of indirect discrimination in Article 2(b) of the European Race Directive, which was adopted by the UK in 2003, is as follows –

> "indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

20. Members will note the close resemblance of this definition with that proposed in Clause 4(1)(b) of the Bill. The one significant difference is that the definition under the European Race Directive and the RRA 2003 amendment replaces "condition or requirement" with the phrase "provision, criterion or practice". This therefore broadens the definition to cover not only formal requirements and conditions but also expands it to include informal practices, thereby making it much easier for allegations of racial discrimination to be established.

21. There may be apparent merits in such an approach. However, the matter has to be viewed more carefully in perspective. First, the circumstances in Europe and in Hong Kong are vastly different. The European Race Directive was born out of a response to the rising tide of racist violence in Europe, combined with the impending enlargement of the European Community and the rise of the far right in countries such as Austria. These problems and circumstances do not exist in Hong Kong. Secondly, we are concerned that broadening the definition by including informal practices would widen the gate for accusations of racial discrimination and may encourage unnecessary litigations. It also will not be in the overall interest of the community for ordinary law-abiding citizens to be made vulnerable to risks of being inadvertently caught by the law for actions which have nothing to do with racial discrimination. Moreover, the effect and implications of the new definition have yet to be fully seen and tested. It would not be prudent to adopt it in the present Bill which is an entirely new piece of legislation for Hong Kong, and without the benefits of experience with the proposed statutory provisions.

22. With regard to the Chinese Language requirement for admission to universities[2] (ref. paragraph 13(c) of the LegCo Secretariat's paper), we have explained the relevant background and justifications in LC Paper No. CB(2)2573/06-07(01) entitled "Flexibility in the Application of Chinese Language Requirement for the Admission of Non-Chinese Speaking Students into UGC-funded Institutions" issued on 30 July 2007. Notwithstanding the general language admission requirement, the UGC-funded institutions have built in flexibility in the admission process by providing a number of alternative avenues to admit students (including non-Chinese speaking (NCS) students) without the requisite Chinese Language proficiency. As reported in LC Paper No. CB(2)2573/06-07(01), the Administration and representatives of the UGC-funded institutions have come to the view that in addition to the existing flexibilities, institutions may favourably consider further flexibility in the form of accepting alternative qualification(s) in Chinese for students pursuing the local curriculum and seeking admission to the institutions under the Joint University Programmes Admissions System, upon verification of certain specified circumstances being applicable to the students concerned. Building on the consensus so far, the Education Bureau will be in further discussions with the institutions on implementation arrangements.

Application to New Arrivals

23. Paragraph 21 of the LegCo Secretariat's paper presented the divergent views among Members regarding whether or not new arrivals should be classified as a distinct racial group under the Bill. Members in favour of such a classification have asserted that "new arrivals constitute a distinct community" and that "some people may have a preconception against new arrivals from the Mainland which is formed because of the accent and culture of these new arrivals". Other Members, however, considered that "the Bill should not cover discrimination against these new arrivals as such discrimination is not based on racial grounds".

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2 Members may note please that local students applying for entry to undergraduate programmes funded by the University Grants Committee are generally required to obtain a pass in Advanced Supplementary Level Use of English and Chinese Language and Culture in the Hong Kong Advanced Level Examination (not a pass for the subject of Chinese Language in the Hong Kong Certificate of Education Examination as stated in paragraph 13(c) of LegCo Secretariat's paper) before the institutions would consider their applications.

24. Given the purpose of the Bill which is to render racial discrimination in specified areas of activities unlawful, a clear understanding of the concept and definition of the term "race" is fundamental. As stated at meetings and in LC Paper No CB(2)963/06-07(2) submitted to Members on 29 January 2007, the definition of "race" in the Bill is in line with the definition under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The same definition is also widely adopted internationally.

25. We have also explained that insofar as protection against racial discrimination is concerned, the Bill does not exclude new arrivals from its ambit as some people alleged. It applies equally to all persons in Hong Kong, including even tourists, and safeguards their right against discrimination on the ground of race. Ultimately, whether a person – be him or her a new arrival or otherwise – has suffered discrimination on the ground of race will be a matter of fact for the Court to decide. There is well respected jurisprudence on the question of what constitutes an ethnic group or a distinct racial group, notably in Lord Fraser's judgment in the *Mandla v Lee* [1983] 2AC 548. We have no doubt that our Courts will take the relevant criteria and considerations into account.

26. To define by statute new arrivals as a distinct racial group in our view would be arbitrary and inconsistent with internationally accepted practice and standard. New arrivals are identified by their status as persons who have relocated to Hong Kong permanently from other parts of the Mainland, and who have lived here for less than seven years and therefore have not attained permanent resident status. The difference between this group and other permanent residents in Hong Kong is akin to the difference "between citizens and non-citizens" which is not based on "race".

27. Conceptually, we are also of the view that new arrivals do not, as a group, constitute a distinct ethnic or racial group when measured against the definition of "race" under ICERD and the criteria set out in the Lord Fraser's test. The vast majority of the new arrivals are Han Chinese, ethnically the same as Hong Kong's settled majority and share a

common history and cultural heritage. The differences among some in accent, dialect and certain personal habits are not sufficient to justify their classification into a separate racial group.

28. The point is: the status of a person being a new arrival does not by itself make that person a member of a distinct ethnic group. Being a new arrival in Hong Kong clearly also does not alter a person's ethnicity.

29. Like Members, we are also concerned with the difficulties and discrimination which some new arrivals may at times experience. Hence, the Government has been active in providing support services to new arrival and to facilitate their early integration into community. However, the difficulties which new arrivals encounter are in the main difficulties which people commonly face in adapting to life in a new environment. The discrimination which they encounter is also largely prejudices arising from behavioral difference and from their social and economic positions, and is therefore a form of social discrimination. Since such discrimination does not arise from ethnic or racial considerations, it would not be appropriate to seek to tackle the problem through legislation on racial discrimination.

Use of languages and language proficiency requirements

30. Paragraph 24 of the LegCo Secretariat's paper sets out Members' dissatisfaction over the exemption in Clause 58, particularly on "the use, or failure to use, of particular languages in regard to provision of goods, services and facilities". They were particularly concerned over the language barrier for some members of the racial minorities who, because of their inability to use English and Chinese, are inhibited from access to services. They considered that "differential treatment in access to essential services such as medical services constituted discrimination and should not be exempted."

31. Paragraph 25 of the LegCo Secretariat's paper raised issues concerning Chinese Language proficiency requirements for admission to university education and vocational training. Specifically, there was suggestion from Members for the Bill to "impose an obligation for affirmation action" and for "setting a quota for the admission of NCS

students". Members also suggested that vocational training institutes should be given "sufficient resources to meet the training needs of ethnic minorities". For clarity of understanding, Members may note that Clause 58 deals with the use or failure to use a language in communication and does not concern language requirement for admission to universities.

32. In regard to Clause 58 of the Bill, we should highlight that although the two are often associated, language is not a ground of race. Discrimination on the ground of race and discrimination on the ground of language or the use of it are also separate issues. Thus, we consider that people ought not be penalised under this Bill for discrimination on the ground of race simply because of their use of particular languages or failure to use particular languages in communication.

33. Moreover, as stated in paragraph 26 of the LegCo Secretariat's paper, we are of the view that that it would not be practicable for service providers, either in the public or private sectors, to conduct their activities and business in all languages or in the language of their client/customer's choice. For reference and comparison, Members may note that the UN chooses its official and working languages[3]. We also believe that service providers who target their service at specific ethnic groups will conduct their business in the appropriate language as is necessary and reasonably practicable. We consider this approach to be pragmatic and in the interest of the community as a whole.

34. With regard to government services, we have apprised Members of the various arrangements in courts, hospitals and other front-line departments in providing assistance, where necessary, to members of ethnic minorities who are unable to speak either English or Chinese. We also informed Members of the programmes undertaken to help learning of the Chinese language by ethnic minorities, not only for the purpose of facilitating their access to services in daily life but also, more importantly, to promote their integration into the local community. We consider this

[3] The official languages of the UN are Arabic, Chinese, English, French, Russian and Spanish; the UN Secretariat uses two working languages, English and French. At UN meetings, if a delegation wishes to speak in a language that is not an official language, the delegation is required to supply an interpreter to interpret the statement or translate it into one of the official languages.

approach to be appropriate and will continue to improve and strengthen our support services in the light of experience and needs.

35. Having regard to the principles and practicability, as well as the overriding objective for integration of the community, we do not propose to make the use of particular languages or the failure to use particular languages in communication unlawful under the Bill. However, we do, as we have repeatedly highlighted, appreciate the difficulties faced by those members of the ethnic minorities who are unable to use Chinese or English. We should also, in this connection, reiterate our firm commitment to providing (and to continue to improve) the support measures for the ethnic minorities to improve their language abilities and to facilitate their integration into community.

36. In regard to education and vocational training, we have, in various papers[4] submitted to Members and in discussions at previous meetings, explained in detail Government's policy on education for the ethnic minorities (including the support measures taken to facilitate learning and teaching of NCS students), as well as efforts made to further enhance the flexibility in the application of the Chinese Language requirement for the admissions of NCS students into UGC-funded institutions, in appreciation of the circumstances of those NCS students who may have greater difficulties in learning Chinese than their Chinese-speaking counterparts. Please also refer to paragraph 22 above.

37. Specifically on the question of "affirmative action" and setting of quota for admission to universities, we have, in LC Paper No CB(2)1152/06-07(02) issued on 28 February 2007, explained the development and concept of affirmation action, the problems and complexities involved, as well as the policy and legal considerations for

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[4] LC Paper No. CB(2)884/06-07(02) on "Support measures for non-Chinese speaking students", issued 16 January 2007;
LC Paper No. CB(2)2642/05-06(04) on "Education for children of ethnic minorities" previously issued for discussion at the meeting of the Panel on Education on 10 July 2006, and circulated to the Bills Committee on 16 January 2007;
LC Paper No. CB(2)1019/06-07(01) on "Education for the ethnic minorities", issued 5 February 2007;
LC Paper No. CB(2)1351/06-07(02) entitled "Follow-up information on education for the ethnic minorities", issued 23 March 2007; and
LC Paper No. CB(2)2573/06-07(01)entitled "Flexibility in the Application of Chinese Language Requirement for the Admission of Non-Chinese Speaking Students into UGC-funded Institutions", issued 30 July 2007.

our proposal not to impose such requirement under the Bill. We should reiterate our position that "we are mindful of the need to advance the opportunities of the ethnic minorities while not undermining the rights of other individuals in the community to compete on equal terms. In particular, we are cautious that we should not introduce measures which, while seeking to promote the interest of some, would pose undue hardship on other members of the community or could result in discrimination against those who are not members of the targetted racial group."

38. The same consideration applies in the field of education. We therefore do not propose to impose a mandatory requirement for affirmative action to be taken in regard to admission of ethnic minorities into universities.

39. We would take this opportunity also to address Members' earlier request for information on the number of local NCS students currently studying in local universities. As the Education Bureau (EDB) has confirmed with all UGC-funded institutions, the latter do not collect information about students' ethnicity or NCS background and hence cannot provide the number of local NCS students currently studying at universities. However, beginning from the 2006/07 school year, the EDB has started to collect information on students' ethnicity and spoken language at home from Primary 1 to Secondary 7 through the annual Student Enrolment Survey. With this, the EDB has now sought the assistance of the UGC-funded institutions to trace the articulation of NCS students to further studies in local universities starting from the 2007/08 academic year. We will update Members when the relevant information is available.

40. Notwithstanding the initiatives taken on data collection, Members will understand that there are confounding variables which affect students' articulation to further studies. Hence it will be over-simplified to correlate the results with just the ethnicity/NCS background of the students. For similar reasons, it is not appropriate to draw conclusions on the effectiveness of the Administration's educational support measures for NCS students on the basis of these statistics alone.

41. As regards the vocational training needs of ethnic minorities, efforts have been made by our vocational training institutions, namely the Vocational Training Council (VTC) and the Employees Retraining Board (ERB), to provide subsidised training courses and places for non-Chinese speaking individuals. Specifically, the VTC has offered vocational training courses and trade tests conducted in English for non-Chinese speaking adults and students. The ERB has also launched retraining courses in English for non-Chinese speaking individuals on a pilot basis.

Conclusion

42. This paper sets out the Administration's clarification and response to the various concerns raised by Members in the LegCo Secretariat's paper entitled "Scrutiny progress of the Bill". It also highlights the key considerations involved on the various issues and our views on them. We hope Members will understand, in light of the explanations given, that the Bill as presented is appropriate in combatting racial discrimination in Hong Kong, having regard to local circumstances and the need for balance in the overall interest of the community, and that therefore we are unable to subscribe to the suggestions for amendments as set out in paragraph 30 of the LegCo Secretariat's paper.

43. This paper is presented for Members' consideration at its coming meeting to be held on 8 October 2007.

Constitutional and Mainland Affairs Bureau
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