

## **Bills Committee on Race Discrimination Bill**

### **Application to Government**

#### **Purpose**

At the meeting held on 19 April 2007, Members asked the Administration to address, among other issues,

“the concerns raised by Professor Carole Petersen about Clause 3 in her article entitled "How Many Clauses Does it Take to Define Discrimination? A Comparison of the Racial Discrimination Bill with Existing Legislation" delivered at the Conference organised by the Centre for Comparative and Public Law, University of Hong Kong on 31 March 2007”.

2. Professor Petersen later revised her paper. It was subsequently retitled “Hong Kong Race Discrimination Bill: A Critique and Comparison with The Sex Discrimination and Disability Discrimination Ordinances” and submitted to the Bills Committee in June 2007. The paper was distributed to Members and to the Administration on 21 June 2007, under reference of LC Paper No CB(2) 2232/06-07(1).

#### **Scope of Clause 3**

3. Professor Petersen’s paper noted that “the Bill will only apply to governmental acts that are similar in nature to acts by private persons”.

4. We have explained in the Legislative Council Brief, at previous meetings and in LC Paper No CB(2)2753/06-07(01) the background and considerations leading to the introduction of the Bill. We highlighted, in particular, that one of main considerations was to extend the protection against race discrimination to the private sector. Our intention particularly was to address the concern, both locally and of the United Nations Committee on the Elimination of All Forms of Racial Discrimination, over the lack of specific legislation “protecting persons from racial discrimination to which they may be subjected by private

persons, groups or organisations”. In preparing the Bill, we had been mindful of the need to strike a balance among the divergent interests of different parties, taking into account the likely impact of the provisions upon implementation. We had also been careful to ensure that the provisions in the law are clearly defined so as to minimise the risk of potential litigation that would pose unnecessary burden and disruptions to the society.

5. The Bill, including the proposed Clause 3, does not absolve the Government and public authorities from existing obligations under the Basic Law and the Hong Kong Bill of Rights Ordinance (HKBORO). In other words, an act of the Government or any public authority which contravenes the HKBORO may still be challenged in the Court under the law, even if it falls outside the scope of the new tort of race discrimination under the Bill.

### **Remedies under the HKBORO**

6. Professor Petersen’s paper noted that the Equal Opportunities Commission (EOC) “has no authority to enforce the BRO (Bill of Rights Ordinance) and most victims of discrimination simply cannot afford to pursue a complaint without the EOC’s assistance. Moreover, the remedies that can be obtained for a breach of the BRO are less desirable than those that can be obtained under the RDB.” These concerns are in our view unwarranted.

7. The HKBORO has operated in Hong Kong since 1991 and people from all sectors irrespective of their race have been able to use the HKBORO to bring legal proceedings against the Government. It should be noted that section 5AA of the Legal Aid Ordinance, Cap 91, provides specifically that the Director of Legal Aid may waive the limit of financial resources under the “means test” for legal aid, “in proceedings in which a breach of the HKBORO, or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong is an issue”. The provision ensures that no one will be denied access to court for legal redress under the HKBORO due to a lack of means.

8. Section 6(1) of the HKBORO provides that –

“A court or tribunal

- (a) in proceedings within its jurisdiction in an action for breach of this Ordinance;
- (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant;

may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.”

9. This is a broad provision. Orders that may be made include an order of certiorari, mandamus or prohibition. It may also include an order for financial compensation should the court consider it appropriate and just in the circumstances. There can be no grounds for regarding such remedies afforded by the HKBORO to be less adequate than those proposed in the Bill.

### **Hypothetical scenarios**

10. Our comments on the major hypothetical situations cited by Professor Petersen are set out in the following paragraphs.

11. Professor Petersen cited a hypothetical situation under which an ethnic Indian gets a speeding ticket while two other drivers (one white, one Chinese) are allowed to leave. It is not clear whether Professor Petersen meant that a policeman, in issuing a speeding ticket against a particular driver, must make sure not only that particular driver is guilty of speeding but also that other drivers are not speeding. Obviously, it is the duty of the police to enforce the law. If a police officer failed to perform his duty and let an offender go, a complaint may be made. If the complainant considered himself to have been discriminated on the ground of race by the police officer, he may similarly lodge a complaint

through established complaint channels. He is also at liberty to take legal action under existing law.

12. Professor Petersen cited a further hypothetical situation of an Indonesian woman who was refused assistance by a police officer. In *Farah*<sup>1</sup>, the Court of Appeal applying *R (on the application of Amin) v Entry Clearance Officer, Bombay*<sup>2</sup> decided that section 20 of the UK Race Relations Act (RRA) (equivalent to clause 27 of the Bill on provision of goods, services and facilities) applies to the police in giving assistance to the public and protecting the public, as distinct from pursuing and arresting or charging alleged criminals. A member of the public seeking assistance from an officer is quite different from an offender against whom an officer enforces the law. Only the former, but not the latter, is in the nature of service offered to the individual concerned. Therefore, under the Bill, a claim is available to the Indonesian woman concerned who has been refused assistance or, in the course of the event, harassed by a police officer on racial grounds.

13. We must emphasize that the above are general principles and each case must be considered on its own having regard to all relevant circumstances. It would also be wrong for us to jump to conclusions on hypothetical situations and to make assessment on the basis of conjectures and generalisations. Ultimately, whether the situations suggested involved racial discrimination will also be a question of fact for the Court to decide.

14. Professor Petersen made the point that the lack of avenue for complaints to EOC would create “unfairness and inconsistencies” in treatment of such complaints. We should be mindful of the overall system of safeguards for human rights and redress for complaints. With regard to the performance of functions by the Police, there are existing avenues for complaints and the Independent Police Complaints Council also has responsibility to monitor and to review the handling by the Police of complaints by the public.

---

<sup>1</sup> [1997] 2 WLR 824

<sup>2</sup> [1983] 2 AC 818, [1983] 2 All ER 864; in this case, the House of Lords held that the Sex Discrimination Act applies only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person.

## **Presentation**

15. This paper has been prepared for Members' information in response to items I (f) on the "List of issues raised by members of the Bills Committee", LC Paper No CB(2)2753/06-07(05) issued on 2 October 2007.

**Constitutional and Mainland Affairs Bureau**  
**October 2007**