立法會
Legislative Council

LC Paper No. CB(2)2478/07-08

Ref : CB2/BC/2/06

Report of the Bills Committee on Race Discrimination Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Race Discrimination Bill.

Background

International obligation to legislate against racial discrimination

2. Hong Kong has an obligation under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to prohibit and eliminate racial discrimination. Hong Kong also has an obligation under Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race or other status.

3. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The Hong Kong Bill of Rights Ordinance (Cap. 383) (HKBORO) which incorporates into Hong Kong law the provisions of ICCPR as applied to Hong Kong has been taken to proscribe all forms of discrimination, including racial discrimination, in the public sector only.

4. The United Nations (UN) Committee on the Elimination of All Forms of Racial Discrimination (the UN Committee), which is the monitoring body of ICERD, has consistently maintained that specific legislation should be enacted to give effect to the relevant provisions of the Convention. In their concluding observations issued after consideration of the reports submitted by Hong Kong under ICERD, ICCPR and ICESCR, the relevant UN human rights treaty monitoring bodies have repeatedly called for specific legislation against racial discrimination applicable to the private sector.

Public consultation exercises on racial discrimination

5. In February 1997, the Government published a consultation paper entitled "Equal Opportunities: A Study on Discrimination on the Ground of Race" to solicit public views. The Administration had included new arrivals from the Mainland in its study on racial discrimination. According to paragraph 1.7 of the consultation paper, the reason for the Administration's inclusion of new arrivals from the Mainland in its study was that "international bodies concerned with race-related issues consider that 'racial discrimination' includes discrimination against identifiable minorities within a particular culture, even those of the same ethnic stock as the host community". Moreover, in its examination of the United Kingdom's (UK's) thirteenth report under ICERD, the UN Committee considered and commented on the circumstances of the Irish Travellers, who were ethnically Irish people and spoke an Irish dialect. However, their distinct lifestyle set them apart as a discrete minority and as such, the difficulties they experienced were considered a legitimate subject for inquiry by the UN Committee.

6. Of the respondents to the consultation paper in 1997, 83% opposed legislation against racial discrimination. These respondents were of the view that the Administration should eliminate racial discrimination through public education and publicity instead of enacting anti-discrimination legislation in a hasty manner.

7. In 2001-2002, the Administration conducted a two-phase consultation exercise on legislation against racial discrimination. The business sector and non-governmental organizations (NGOs) were consulted during the first and second phases respectively. Twenty-five of the 34 targeted business organizations responded to the proposal of introducing legislation against racial discrimination. Among these 25 business organizations, nine overseas trade associations expressed support for such legislation. Of the remaining local trade associations, six indicated support, one indicated support but did not consider it appropriate to legislate at that stage, six indicated objection and three had no comments. All the 44 NGOs which responded were in favour of legislation.

8. In June 2004, the Government announced its decision to legislate against racial discrimination and its plan to introduce a bill into the Legislative Council (LegCo) in the 2004-2005 legislative session to prohibit racial discrimination. In September 2004, the Government issued a Consultation Paper entitled "Legislating Against Racial Discrimination" to collect public views.

9. According to the Consultation Paper, it was the Government's view that new arrivals from the Mainland did not constitute a racial or ethnic group in Hong Kong. Discrimination against new arrivals from the Mainland because of their status as new arrivals was therefore not considered a form of racial discrimination.

Objects of the Bill

10. The objects of the Bill which was introduced into LegCo on 13 December 2006 are -

(a) to render discrimination, harassment and vilification, on the ground of race, unlawful; and to prohibit serious vilification of persons on that ground;

(b) to extend the jurisdiction of the Equal Opportunities Commission (EOC) to include such unlawful acts; and to confer on EOC the function of eliminating such discrimination, harassment and vilification and promoting equality and harmony between people of different races;

(c) to extend unlawful sexual harassment under the Sex Discrimination Ordinance (Cap. 480) (SDO) to cover rendering the environment in which a person works, studies or undergoes training sexually hostile or intimidating; and

(d) to make other consequential and related amendments to legislation; and for related purposes.

The Bills Committee

11. At the House Committee meeting held on 15 December 2006, members decided that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

12. Under the chairmanship of Hon Margaret NG, the Bills Committee has held a total of 34 meetings with the Administration. The Bills Committee has received views from the public on the Bill and possible options to amend its provisions for the purpose of enhancing the protection afforded by the Bill at two of these meetings. A list of the organizations and individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

13. The deliberations of the Bills Committee are set out in this report under the following subjects -

Subject	Paragraphs
(a) Effectiveness of the enactment of the Bill and its compliance with ICERD	14 - 20

Effectiveness of the enactment of the Bill and its compliance with ICERD

14. The majority of the members are dissatisfied with the approach adopted in the drafting of the Bill because of its narrow scope of application with numerous exemptions. They are of the view that such an approach demonstrates the Administration's lack of commitment in tackling the problem. These members have expressed serious doubt as to how far the Bill as presently drafted would bring about substantive improvements to the problem of racial discrimination in Hong Kong. They consider that, while the Bill may render certain individual discriminatory acts on the ground of race unlawful, it would not have any impact on longstanding discriminatory practices in the public sector arising from the implementation of policies and measures in the Government's performance of its functions or the exercise of its powers. This would result in a double standard in dealing with discriminatory acts on the ground of race. The majority of the members are also concerned that the exemptions provided for in the Bill would have the adverse effect of legitimizing discriminatory acts on the ground of race and defeat the very purpose of protecting vulnerable groups in the community from racial discrimination. They stress that, apart from achieving a deterrent effect, enactment of a piece of legislation would serve an important educational purpose. These members are worried that enacting the Bill as presently drafted would send a very negative message to the community that many discriminatory acts on the ground of race are condoned or acceptable. They also hold the view that, as the clarity of the provisions of the Bill was far from satisfactory, it would cause confusion and uncertainties to the community.

15. Members belonging to the Liberal Party (LP) stress that it is the hope of the business sector that the scope of coverage of the Bill should be made very clear to facilitate compliance with the relevant provisions of the Race Discrimination Ordinance when enacted.

16. Members note that the Chairperson of the UN Committee wrote to the Permanent Representative of China to UN at Geneva on 24 August 2007 and 7 March 2008 respectively expressing concerns over the following issues in relation to the Bill and requesting the Hong Kong Special Administrative Region Government to pay due consideration to the issues and to suitably revise provisions that are not in line with the requirements of ICERD before 19 July 2008 -

(a) limited applicability of the Bill to actions of public authorities and institutions including immigration services and detention facilities;

(b) narrow definition of indirect discrimination;

(c) omission of provisions on discrimination on the basis of nationality and residency status which rules out the recognition of discrimination against new arrivals from the Mainland; and

(d) omission of provisions on indirect discrimination on the basis of language.

17. The Administration stresses that 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 during extensive public consultation in 2004-2005.

18. As regards the scope of the Bill, the Administration has explained that the Bill is modelled on the existing anti-discrimination ordinances in Hong Kong. The scope and the principal provisions are, hence, broadly similar. It is not the policy intent, nor does the Administration consider it right, for the Bill to be extended to cover every aspect of daily life. While the Administration is committed to combating discrimination, it also has the duty 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 employment, education, provision of goods, facilities and services, disposal and management of premises, public bodies, barristers and clubs.

19. With regard to the exception clauses, the Administration has reiterated 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 targeted 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 are not intended to be covered by the Bill.

20. The Administration has also assured the Bills Committee that the exception clauses have been examined critically against the internationally accepted principles of rationality and proportionality in each and every case. Every effort has been made to ensure that the exception clauses would not cause confusion or uncertainties, nor would they result in legitimizing acts of racial discrimination.

Application of the Bill to the Government
(Clause 3)

Members' concerns

21. Members note that, while the three existing anti-discrimination ordinances expressly bind the Government, Clause 3 of the Bill provides that the Race Discrimination Ordinance, when enacted, applies only to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person. The legal adviser to the Bills Committee has given the following advice -

(a) the obligations of the Government not to act discriminatorily as specified under HKBORO do not necessarily cover the day-to-day performance of functions and duties by the Government;

(b) the Race Relations Act (RRA) 1976 of UK has been amended in 2000 to include new provisions, in particular section 19B which extends the application of RRA to the performance of functions and duties by public authorities and section 76 which concerns the making of appointments by government; and

(c) the approach of RRA could be adopted and amendments be made to the effect that the Bill would apply to the Government insofar as the performance of functions and duties by public authorities and the making of appointments by the Government are concerned.

22. The majority of the members have queried the justification for granting a broad exemption for the performance of functions and powers of the Government, given that the three existing anti-discrimination ordinances expressly bind the Government. They have pointed out that discriminatory acts by law enforcement, correctional services and immigration control agents would not be covered under the Bill if Clause 3 remains as presently worded. In this respect, the Bill falls short of the ICERD's requirement of legislating to provide effective remedy to eliminate all forms of racial discrimination. These members have reiterated their concern that Clause 3 would have the legal effect of exempting any act of the Government in the performance of its powers and functions which have contravened provisions of the Bill. The exclusion of Government acts from the Bill would send a strong message to the community that certain types of racial discrimination are endorsed or at least tolerated, and different standards apply to public authorities and private bodies. Moreover, it would be difficult to determine whether an act done by the Government is an act "that is of a kind similar to an act done by a private person". There might be plenty of room for argument causing dispute and uncertainty to the application of the law to the Government.

23. The legal adviser to the Bills Committee has advised that, as HKBORO has incorporated into Hong Kong law the provisions of ICCPR and Article 39 of the Basic Law (BL) guarantees the application of the provisions of ICCPR and ICESCR as applied to Hong Kong, a person can seek legal remedy through judicial review against any Government act which is in breach of any provision of these international human rights treaties. The majority of the members, however, are concerned that the scope of judicial review is rather limited and the exemption status of such act under the Bill

would have a bearing on the Court's decision. They further point out that a member of the public who has suffered racial discrimination by the Government would have the additional financial burden of incurring legal costs if he could only seek redress by instituting civil proceedings for judicial review under HKBORO or BL.

The Administration's response

24. According to the Administration, one of the main considerations which calls for the introduction of the Bill has been that both BL and HKBORO bind only the Government and public authorities. They do not cover acts of racial discrimination in the private sector. This is the cause of concern, both locally and with the UN Committee. It is against this background that the Bill is prepared and subsequently introduced into LegCo, 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, it is proposed in Clause 3 that the Race Discrimination Ordinance, 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 would 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". Clause 27(2)(h) further clarifies the ambit of the proposed legislation to include particularly "the services of any department of the Government or any undertaking by or of the Government". The Administration has assured members that the Bill would cover areas such as provision of public medical services and education, even though law enforcement, correctional service, and immigration control to the extent that they do not fall within any of the specified areas (e.g. provision of services and facilities) are not covered.

25. 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", the Administration has explained that this is a question of fact which ultimately has to be determined by the Court in light of the relevant circumstances of each individual case. The Administration stresses that neither Clause 3 nor any other provision of the Bill could limit the protection provided by the human rights provisions of BL which is a constitutional document of HKSAR or absolve the Government and public authorities from liabilities arising under HKBORO. Hence an act that contravenes HKBORO (which prohibits all forms of discrimination by Government and public authorities) may be challenged in the Court under HKBORO, even if it is not covered specifically under the Bill.

26. Notwithstanding the above explanation, in view of the concerns raised by the majority of the members over the drafting of Clause 3, the Administration has agreed to introduce a Committee Stage amendment (CSA) to amend the provision as: "This Ordinance binds the Government". However, the Administration does not

---

[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 Hong Kong Special Administrative Region under ICERD.

consider it appropriate to follow sections 19B and 76 of RRA of UK as it would have the effect of expanding the scope of the Bill to cover all government functions. The Administration has explained that these sections were added by UK in 2000 against the background of racial violence and institutional racism in the country which is very different from the situation in Hong Kong. Moreover, to expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on the Government's ability to make and implement policies: any policy or practice could be challenged in the Court. According to the Administration, it could render the Government vulnerable to an influx of litigations.

27. The legal adviser to the Bills Committee has advised that the CSA proposed by the Administration would have the legal effect of removing the hurdle of having to decide whether an act done by or for the purposes of the Government is similar in kind to an act of a private person before deciding whether the Bill would apply to such act. However, it does not change the fact that the Bill would not be binding on the Government in so far as the performance of its functions or the exercise of its powers does not constitute any act prohibited under the provisions of Part 3 and Part 4 of the Bill.

28. The majority of the members take the view that, as the CSA proposed by the Administration cannot address fully their concern that the applicability of the Bill will still be limited to the specified functional areas of the Government, an additional provision similar to sections 21 and 38 of SDO, sections 21 and 36 of the Disability Discrimination Ordinance (Cap. 487) (DDO) and sections 17 and 28 of the Family Status Discrimination Ordinance (Cap. 527) (FSDO) should be incorporated into the Bill. The Bills Committee has decided to move CSAs in its name adding a new section 9A under a new Part 2A stating that "It is unlawful for the Government to discriminate against a person on the ground of race of that person in the performance of its functions or the exercise of its powers."

Scope of circumstances constituting indirect discrimination
(Clause 4)

Members' concerns

29. Clause 4(1)(a) of the Bill specifies the circumstances which would constitute direct discrimination on the ground of the race of a person. Direct discrimination occurs when a person on the ground of race treats another person less favourably than he would treat others. Under Clause 4(1)(b), indirect discrimination occurs when a person imposes a requirement or condition which, although applicable to all, has a disproportionate adverse impact on people of a particular race, and the requirement or condition imposed cannot be justified by reasons not related to race.

30. Members have queried the need to include under Clause 4 of the Bill the test of "justification" which is not included in the other three anti-discrimination ordinances. Members are also concerned that it would be very difficult for the public

to assess whether the application of a particular requirement or condition would meet that test or not. The legal adviser to the Bills Committee has advised that -

(a) the scope of Clause 4(1)(b) which specifies the circumstances which would constitute indirect discrimination is very narrow and only applies if there is a "requirement or condition"; and

(b) new subsections (1A)-(1C) which have been added to the relevant provision of RRA in 2003 to implement Directive No. 2000/43/EC of the European Council which refers to "provision, criterion or practice" are considered to be broader in scope.

31. The legal adviser to the Bills Committee has also observed that Clause 4(2)(a) and (b) as presently drafted have the effect that satisfying either the rationality and proportionality test under Clause 4(2)(a) or the reasonable practicability test under Clause 4(2)(b) would suffice to establish the defence of "justification". In other words, a requirement or condition would be justifiable provided that the alleged discriminator can prove that it is not reasonably practicable for him not to apply it, no matter how irrational and disproportionate the requirement or condition is to achieve the legitimate objective.

32. The legal adviser has further observed that Clause 4(1)(a) and Clause 4(1)(b) of the Bill do not define direct discrimination or indirect discrimination as such, but describe conduct which would give rise to tortious liabilities under the Bill. The provisions subsumed respectively under the terms “direct discrimination” and “indirect discrimination” do not have the purpose of making a distinction between “direct” and “indirect” discrimination but are complementary, so that conduct that does not come within Clause 4(1)(a) but has a disparate effect on a particular race or races would be covered by Clause 4(1)(b). The approach and drafting of Clause 4 are in line with the other existing ordinances against discriminatory conduct.

33. The majority of the members are of the view that Clause 4 is far from clear in defining what would constitute racial discrimination, particularly indirect discrimination. They have also queried the rationale for the Administration's decision of modelling Clause 4(1)(b) on section 1(1)(b) of RRA 1976 of UK, instead of the subsections (1A) to (1C) newly added to RRA in 2003. They consider that the legal effect of Clause 4(1)(b) and Clause 4(2) taken together is that a requirement or condition is not discriminatory however irrational or disproportionate for the achievement of any legitimate aim if the alleged discriminator can prove that it is "not reasonably practicable" not to apply the requirement or condition. Members have also expressed grave concern that members of the public might not be able to understand the tests for determining whether a requirement or condition would be justified or not. As a result, it would cause confusion and uncertainties to the community if the Bill as presently drafted is enacted.

The Administration's response

34. The Administration has explained that the distinction between direct and indirect discrimination is a well established concept. As discrimination does not only take the form of treating another person less favourably on the ground of race (which is direct discrimination), it may also take the form of imposing a requirement or condition which, although applied equally to people of different racial groups, would 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 (which is indirect discrimination). The Bill therefore proposes to make racial discrimination unlawful, irrespective of whether it takes the form of direct or indirect discrimination.

35. The Administration has further explained that 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 will be assessed by whether it serves a legitimate purpose and bears a rational and proportionate relationship with the objective sought or whether it is reasonably practicable not to apply the requirement or condition. 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. Recognizing the need for members of the public to understand the proposed statutory provisions which are cast in legal language, the Administration has therefore proposed in the Bill to entrust 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 would include public education to promote awareness and understanding of the law. Moreover, to facilitate compliance, EOC would also draw up codes of practice which would provide guidance for people in each of the areas of activities covered by the Bill before the relevant legislative provisions are brought into effect.

36. Regarding members' question on the feasibility of adopting the definition of indirect discrimination from RRA, the Administration has advised that the new subsections 1(1A) to 1(1C) of RRA were only added recently 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". The definition of indirect discrimination in Article 2(b) of the European Race Directive, which was adopted by 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."

37. The Administration has pointed out that there is a close resemblance of this definition with that proposed in Clause 4(1)(b) of the Bill. The only 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.

38. The Administration is of the view that, while there may be apparent merits in such an approach, careful consideration should be given to the fact that 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. The Administration is also concerned that broadening the definition by including informal practices would widen the gate for accusations of racial discrimination and might encourage unnecessary litigations. It also would 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.

39. The Administration, however, appreciates members' concern regarding the inclusion of the alternative test of "reasonable practicability" in Clause 4(2)(b). The Administration has agreed to move CSAs to delete Clause 4(2)(b) and Clause 4(3) to (5). The Administration considers it appropriate to retain the "proportionality" principle in Clause 4(2)(a), which is in line with internationally accepted principles of rationality and proportionality.

40. While welcoming the CSAs proposed by the Administration, the Bills Committee has decided to move CSAs in its name to amend Clause 4(1) to include the application of "a provision, criteria or practice" for the purpose of enhancing the protection afforded by the Bill.

<u>Exclusion of new arrivals from the Mainland from the scope of the Bill</u>
(Clause 8)

Members' concerns

41. Members note that the definition of "race" in the Bill under Clause 8 as confined to the "race, colour, descent, or national or ethnic origin" of the person is in line with Article 1 of ICERD. Members also note that, although the Bill does not exclude expressly new arrivals from the Mainland from its scope of protection, Clause

8(2) and (3) have specifically excluded different treatment on the ground of permanent residency, right of abode and length of residence from being regarded as racial discrimination, the legal effect of which would make discrimination on the ground of a person's status as a new arrival from the Mainland not unlawful under the Bill.

42. The legal adviser to the Bills Committee has given the following advice -

(a) 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 case of *Mandla v Lee* [1983] 2AC 548 is applicable to cases in Hong Kong. In the light of that test, it seems clear that in considering discrimination relating to the ethnic origin of a person, factors other than "race" could be considered;

(b) "人種" used in the Bill as the translation of "ethnic origin" is too narrow in meaning whereas "族群本源" is a better translation having regard to Lord Fraser's criteria expressed in the case of *Mandla*; and

(c) it is therefore submitted that applying the test in the *Mandla* case, new arrivals from Mainland are likely to be covered by the term "ethnic origin".

43. Many members are of the view that the scope of the Bill should be extended to cover discrimination against new arrivals from the Mainland because these new arrivals constitute a distinct community and the problem of discrimination as well as negative stereotyping against them is prevalent. Excluding these new arrivals from the application of the Bill would allow discrimination against them to continue. These members consider that some people might have a preconception against new arrivals from the Mainland which is formed because of the accent and culture of these new arrivals, irrespective of their length of residence in Hong Kong. Members belonging to the Democratic Party (DP) have suggested that it is not necessary to adhere to the narrow definition of "race" of ICERD and its meaning should be expanded to include specifically new arrivals from the Mainland in order to address the prevalent problem of discrimination encountered by them.

44. Some other members including members belonging to the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB) and members belonging to LP consider that, although new arrivals from the Mainland do encounter differential treatment in education and employment, the Bill should not cover discrimination against these new arrivals as such discrimination is not based on racial grounds. They are of the view that discrimination experienced by some new arrivals from the Mainland is not a form of racial discrimination but is, rather, linked to their social class. These members stress that the Administration should increase allocation of resources to enhance work in eliminating such discrimination and facilitating these new arrivals' integration in Hong Kong. Members belonging to DAB have expressed the view that the issue of discrimination encountered by these new arrivals could be

dealt with in a separate legislative exercise. However, the Administration should give an undertaking during the resumption of the Second Reading debate on the Bill that measures would be implemented to facilitate the early integration of these new arrivals into the local community and protect them from being discriminated.

The Administration's response

45. According to the Administration, given that the purpose of the Bill 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. The definition of "race" in the Bill is in line with the definition under ICERD. The same definition is also widely adopted internationally.

46. The Administration has also explained that, insofar as protection against racial discrimination is concerned, the Bill does not exclude new arrivals from its ambit as some people have alleged. It applies equally to all persons in Hong Kong, including new arrivals, 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* case.

47. The Administration is of the view that to define by statute new arrivals as a distinct racial group 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".

48. The Administration is 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. Many new arrivals have family members or close relatives who are Hong Kong permanent residents. The differences among some in accent, dialect and certain personal habits are not sufficient to justify their classification into a separate racial group. The Administration stresses that 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.

49. The Administration has further advised the Bills Committee that, the overarching aim of the service provided to the new arrivals is to facilitate their integration into the local community. Hence, a variety of social services including

education, employment, welfare, medical and health services are available to them. However, recognizing that new arrivals may experience exceptional difficulties during the initial period of their residence in Hong Kong, the Government also provides a range of timely support services to the new arrivals to enable them to adapt to life in Hong Kong as soon as possible. However, the difficulties which new arrivals encounter are mainly difficulties which people commonly face in adapting to life in a new environment. The discrimination which they encounter is also largely prejudices arising from behavioural 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.

50. Notwithstanding the Administration's explanation, the Bills Committee has decided to move CSAs in its name to delete the reference to different treatment on the ground of permanent residency, right of abode and length of residence from Clause 8(3) to the effect that the Court can apply the existing case law to decide whether any discrimination against new arrivals from the Mainland would constitute racial discrimination under the law.

51. Members also note that Clause 8(2) and (3) expressly state that differential treatment on the ground of indigenous villager status, nationality and resident status is not to be regarded as racial discrimination. Many members express concern that Clause 8(2) and Clause 8(3)(d) would have the effect of exempting any blatant racial discriminatory act claimed to be done on the ground of a person's "nationality". The Bills Committee has further decided to move a CSA in its name to delete the word "nationality" from Clause 8(3)(d).

Resources and measures to strengthen support services for new arrivals from the Mainland

52. While there is a difference of opinion among members as to whether new arrivals from the Mainland should be included within the ambit of the Bill, it is their consensus that the Administration should allocate additional resources and devise new measures targeting these new arrivals in order to strengthen the provision of support services for them and foster their integration into the community.

53. The Administration has assured the Bills Committee that a wide range of public services are available to new arrivals from the Mainland and, in future, it would target resources at the priority districts with more pressing service needs, taking into account the population distribution of these new arrivals and other social factors. The government departments concerned would explore room for further strengthening immediate support services for new arrivals from the Mainland. For example -

(a) the Social Welfare Department (SWD) plans to organize more targeted programmes for new arrivals, including mutual help groups, community education, family life education, etc in the priority districts;

(b) the Labour Department (LD) plans to organize more job fairs in these districts to assist new arrivals in seeking employment; and

(c) the Employees Retraining Board (ERB) would provide more training places for part-time generic skills training courses in these districts.

54. The Administration has advised the Bills Committee that it is not possible to provide a separate breakdown of the government expenditure on all services which new arrivals from the Mainland are entitled to because most of these services are available to all other members of the public as well. The Administration has, however, provided a breakdown of expenditure of services which can be identified separately -

Bureau/department	**Estimated expenditure in 2008-09**	
Home Affairs Department (HAD)	• Service Handbook for New Arrivals from the Mainland	$700,000
	• Allocation to non-governmental organizations	600,000
	• Allocation to 18 District Offices for new arrivals programmes	300,000
	Total:	**$1,600,000**
Education Bureau (EDB)	• Initiation programme	$10,000,000
	• School-based Support Scheme Grant	16,000,000
	• Induction programme	3,500,000
	Total:	**$29,500,000**

55. Members note with concern that the above estimated expenditure is comparable to the expenditure allocated for the provision of services specifically for new arrivals from the Mainland last year and there is no substantial increase in funding. The majority of the members urged the Administration to identify new measures to enhance the provision of services targeted new arrivals from the Mainland and to allocate more resources for such measures.

Exception for languages
(Clause 58)

Members' concerns

56. Some members have expressed strong dissatisfaction with the exemption provided for in Clause 58 for the use, or failure to use, of particular languages in regard to the provision of goods, services and facilities, given that language is a major barrier for ethnic minorities to gain access to essential public services, particularly medical services. They query why it is not practicable for Government departments to use English, which is an official language, in their provision of goods, facilities and services to the public. These members stress that discrimination by use of language is a real issue which can and currently does exclude certain racial groups from

essential public services and benefits, including vocational training opportunities and medical treatment. Such an exemption would weaken the effect of the Bill. Ms CHAN Yuen-han and Ms LI Fung-ying are of the view that a policy decision must be made to ensure that vocational training institutions would have adequate resources to conduct designated programmes and courses to cater for the needs of ethnic minorities including those who know little English. Ms LI particularly points out that, as the Qualifications Framework provided under the Accreditation of Academic and Vocational Qualifications Ordinance (Cap. 592) has commenced full operation on 5 May 2008, ethnic minorities would be in a more difficult position if they cannot receive enhanced support to acquire the necessary qualifications.

57. Concerned organizations and ethnic minority groups submitting views to the Bills Committee stress to members that ethnic minorities face great difficulties in gaining access to vocational training resources and medical services. They have complained in particular that ethnic minorities are unable to obtain appropriate and necessary medical treatment because of the lack of interpretation services at hospitals. Members belonging to DP, members belonging to the Civic Party, Ms Emily LAU and Ms LI Fung-ying have expressed the view that the scope of application of the exception under Clause 58 should be narrowed to facilitate access of the ethnic minorities to public services. The Bills Committee has decided to move CSAs in its name to exclude the provision of vocational training courses and provision of medical treatment within the meaning of section 2 of Medical Clinics Ordinance (Cap. 343) from the exemption provided for under Clause 58. Members note that the proposed new section 58(1C) has expressly lowered the language requirement on the relevant service providers.

The Administration's response

58. The Administration has explained that language is not a ground of race discrimination and the purpose of Clause 58 is for clarifying the law. According to the Administration, while some members of the ethnic minorities who do not use Chinese have faced difficulties at times in regard to access to service, it would not be practicable for service providers, either in the public or private sectors, to conduct their activities and businesses in all languages, or to provide translations into different languages in their communications with clients/customers. Thus, Clause 58 of Bill has been included to stipulate that the use, or failure to use, of any languages for the purpose of communication would not be unlawful. Those service providers who target their service at specific minority groups would, however, conduct their business in the appropriate language as is reasonably practicable in the circumstances. The Administration considers that this is a pragmatic approach which is in the interest of the community as a whole and should be acceptable to all.

59. The Administration's position is that the most effective way of addressing the needs of those members of ethnic minorities who have difficulties using English or Chinese would be through enhanced support in vocational education/training and through provision of interpretation for access to public services. According to the Administration, Vocational Training Council (VTC) has set up an Ethnic Minority Student Support Centre in its Hong Kong Institute of Vocational Education (IVE)

(Haking Wong) Campus in Sham Shui Po District for the provision of dedicated support for non-Chinese speaking (NCS) students. A training annex in IVE (Tuen Mun) is also being built to provide more training places on catering, beauty care and hair-dressing for non-engaged youths in the New Territories North and West districts, including ethnic minority youths. VTC would continue to explore the possibility of spreading out the venues where courses for ethnic minorities are offered, especially in districts where there is a relatively high concentration of ethnic minorities. ERB also plans to work with its training bodies to offer training and employment support services targetting ethnic minorities in these districts. A resource corner catering to the special needs of ethnic minorities would also be set up in the one-stop Training cum Employment Resources Centre to be opened in Sham Shui Po.

60. With regard to assistance to ethnic minorities in overcoming the language barrier in using public services, the Administration has further explained that a two-pronged approach is adopted. Substantial resources has been devoted through the education system to promote the teaching and learning of NCS students and organize language training classes through the Race Relations Unit of the Constitutional and Mainland Affairs Bureau (CMAB) for members of the ethnic minorities to learn the local language. On the other hand, the Administration would arrange interpretation services at various front-line units, including hospitals, job centres and welfare service units as necessary. In the coming year, four regional support service centres would be established for ethnic minorities, especially to provide telephone interpretation services for ethnic minorities (through the employment of their own interpreters) to facilitate their access to public services. The Administration has further informed the Bills Committee of the various measures to be taken by Hospital Authority (HA) to enhance its interpretation support for ethnic minorities in gaining access to medical services. Members note that HA would arrange training on interpretation of medial terms and arrange in-house interpretation service through service contract with an outside body. The latter is being implemented through a pilot project to be rolled out in New Territories West Cluster, Kowloon Central Cluster, Kowloon East Cluster and Kowloon West Cluster in mid-2008. This pilot project involves using part-time interpreters through an outside body to provide on-site interpretation for four common ethnic minority languages viz Urdu, Nepali, Hindi and Punjabi. At members' request, the Administration has agreed to elaborate on the initiatives to enhance the provision of interpretation services at public hospitals/clinics for ethnic minorities during the resumption of the Second Reading debate on the Bill.

Proposed statutory equality plan

61. The majority of the members consider that the supporting services to enable racial minorities to have access to vital public services are still sketchy and sporadic, and fall short of effectively eradicating existing forms of discrimination. They are of the view that the Administration should adopt a programmatic approach toward the goal of eradicating racial discrimination. In this context, members have made reference to the EOC's suggestion and requested the Administration to consider imposing a statutory duty on the Government and specified public authorities to draw up a Race Equality Scheme for the purpose of eliminating racial discrimination and promoting racial harmony.

62. The Administration is of the view that drawing up a Race Equality Scheme would involve significant resource and manpower requirements, and the means for achieving this and the implications of the mechanism involved would need to be carefully examined. The Administration also notes the EOC's advice that racial equality measures are implemented administratively by governments in many other jurisdictions without a statutory duty being imposed. The Administration has undertaken to compile administrative guidelines on promotion of racial equality within the Government for the key Bureaux and Departments to follow in their formulation and implementation of their relevant policies and measures, focusing on the key services including medical, education, vocational training, employment and major community services. At the Bills Committee's request, the Administration has provided further information on its plan on the proposed administrative guidelines, which aims to produce draft in the fourth quarter of 2008 and, subject to progress of consultation with relevant parties, issue the guidelines in the first quarter of 2009. The Administration has undertaken to consult the Panel on Constitutional Affairs on the draft of the proposed administrative guidelines and brief the Panel on the implementation progress.

63. The majority of the members have expressed disappointment at the Administration's plan which, in their view, has demonstrated clearly the lack of the Government's commitment and determination to eliminate racial discrimination. These members are dissatisfied that the Administration has refused to make an undertaking to allocate additional resources for the implementation of measures formulated with reference to the administrative guidelines and set up a separate mechanism to oversee the implementation within the Government as a whole. They consider that, as the implementation of the administrative guidelines would involve various policy areas, it is necessary to set up a high-level monitoring mechanism to be led by the Chief Secretary for Administration (CS) in order to ensure that its implementation would achieve effective results. Mr Howard YOUNG and Mr Abraham SHEK, however, find the Administration's undertaking of drawing up the proposed administrative guidelines acceptable.

64. The Bills Committee has decided to move CSAs in its name to add a new section 9B under new Part 2A imposing a general statutory duty of the Government to draw up a Race Equality Scheme. Under the proposed statutory duty, Home Affairs Bureau (HAB), HAD, Food and Health Bureau, Department of Health, LD, EDB, SWD, HA, VTC, ERB and Construction Industry Council are required, among other things, to assess and consult on the likely impact of its proposed policies on the promotion of racial equality, monitor its policies for any adverse impact on the promotion of racial equality, and publish the results of such assessment, consultation and monitoring.

Discrimination by responsible bodies for educational establishment
(Clause 26)

65. Clause 26 makes it unlawful for an educational establishment to discriminate in the admission of students and in allowing access of the student to benefits, facilities and services. Clause 26(2) makes it clear, however, that the educational establishments are not obligated to make special arrangements regarding holidays and medium of instruction for any students or persons of particular racial groups. Noting that there is no provision in RRA equivalent to Clause 26(2), some members including Ms Margaret NG, Dr YEUNG Sum, Dr Fernando CHEUNG have expressed concern that this provision could be construed as not requiring a responsible body for an educational establishment to modify its existing arrangement to assist students of ethnic minorities and it would send a very negative message to the community. Dr CHEUNG further points out that arrangements regarding holidays are often related to a person's religion which is closely linked with his race as well. Mrs Anson CHAN has expressed the view that the scope of Clause 26(2) is too broad and should be deleted. Ms NG has requested the Administration to review the drafting of the provision for the purpose of improving its clarity regarding the scope of "those matters" referred in Clause 26(2)(b).

66. The Administration has explained that it is well established that the right to education does not carry with it the right to be educated in the language of the student or in the language of the parent's choice. Following the calendar of educational establishments and learning through official languages of Hong Kong are necessary in order to ensure that students of ethnic minorities could genuinely be integrated into the community. Clause 26(2) is provided to avoid unnecessary disputes and challenges. To address Ms NG's concern, the Administration has agreed to amend clause 26(2)(b) to clarify that the words “arrangement on those matters” refer to the “arrangements regarding holidays or medium of instruction” stated in Clause 26(2)(a). Similar amendment will also be made to Clause 20(2)(b) relating to persons concerned with the provision of vocational training.

67. The majority of the members are initially of the view that the Bill should impose an obligation for affirmative action to ensure that ethnic minorities would have equal opportunities to receive education, in particular university education. They consider that imposing the requirement of obtaining a pass in Advanced Supplementary Level in Chinese Language and Culture in the Hong Kong Advanced Level Examination for university admission on all local students has put students of ethnic minorities at a great disadvantage. Mr CHEUNG Man-kwong and Dr YEUNG Sum have suggested that the Administration should consider setting a quota for the admission of NCS students by University Grants Committee (UGC)-funded institutions. They also consider that the Administration should provide an alternative Chinese Language curriculum for NCS students in order to facilitate their learning, design suitable Chinese textbooks and provide training for the relevant Chinese Language teachers. Members belonging to LP and Mr Abraham SHEK have also expressed support for the need to find a solution to resolve the problem of lack of avenue to enable NCS students to attain qualifications in Chinese for admission to

universities.

68. With regard to the Chinese Language requirement for university admission, the Administration has informed the Bills Committee that the UGC-funded institutions have agreed to offer further flexibility in the form of accepting alternative qualification(s) in Chinese Language e.g. the General Certificate of Secondary Education, General Certificate in Education and International General Certificate of Secondary Education, for students pursuing the local curriculum and seeking admission in 2008 to the institutions under the Joint University Programmes Admissions System, upon verification of the following specified circumstances as being applicable to the students concerned –

(a) the student has learned Chinese for less than six years while receiving primary and secondary education; or

(b) the student has learned Chinese Language for six years or more in schools, but have been taught an adapted and simpler curriculum not normally applicable to the majority of students in local schools in Hong Kong.

69. Members in general welcome the proposed new arrangements which seek to allow further flexibility on the application of the Chinese Language requirement for university admission with a view to enhancing the opportunities for ethnic minorities to receive university education.

70. On the Chinese Language curriculum, the Administration has informed the Bills Committee that EDB has developed a draft supplementary curriculum guide for teaching Chinese Language to NCS students. While EDB does not prefer setting a specific, simpler curriculum for application to all ethnic minorities and hence confining them to pre-set lower benchmarks, the supplementary guide should be able to serve the ethnic minority students by recommending different teaching/learning modes with different teaching materials to suit the students' diverse needs.

Discrimination against applicants and employees
(Clause 10)

71. Clause 10 makes it unlawful for an employer to discriminate between job applicants or between employees in offers of employment, the terms of employment, promotion, transfer, training and dismissal. This provision does not apply to employment of domestic helpers. Clause 10(3) and (8) provide for an exception for small employers with not more than five employees during the first three years after the enactment of the Bill. Some members including Mr LEE Cheuk-yan, Miss CHAN Yuen-han and Ms LI Fung-ying have queried the need for the exception. The Administration has explained that the proposed transitional period is needed to allow time for small employers (mostly small and medium enterprises) to make preparation for compliance with the Bill, taking into account the time required for EOC to draw up codes of practice. Mr Howard YOUNG, however, considers the transitional period

appropriate.

72. At Miss CHAN Yuen-han's suggestion, the Bills Committee has decided to move CSAs in its name to reduce the duration of the transitional period to one year. At Mr LEE Cheuk-yan's suggestion, the Bills Committee has further decided to move a CSA in its name to exclude Clause 10(1) relating to employment from the application of the proposed transitional period.

Exception for existing employment on local and overseas terms of employment (Clause 14)

73. Members have requested the Administration to provide justification for the exception for the differential treatment in existing employment on local and overseas terms of employment under Clause 14.

74. According to the Administration, since the Bill is not meant to affect differential employment practices based on human resource policy consideration that does not relate to race, it is considered justified to provide an exception clause to ensure clarity and certainty. The Administration has pointed out that it should be recognized that although the exception clause sets out certain situations to which the exception would apply, such as possession of skills not readily available in Hong Kong, etc. it is not intended to prescribe conditions to be fulfilled before employers offer overseas terms to their overseas employees. Rather, it seeks to provide a defence for employers in case they are challenged for giving overseas terms to individual staff. Basically, the Bill does not seek to restrict the offer of preferential overseas terms as long as the offer is justified by reasons not related to race.

75. Dr Fernando CHEUNG has expressed concern that Clause 14 would permit an employer to treat an overseas employee more favourably than a local one even though they are working in the same position and both have equally met the work requirements. The Administration points out that an employer who offers differential treatment has to meet specified conditions before he could invoke the exception under Clause 13(1)(a), (b) and (c), which provides an exception to cover the case of offering overseas terms to a person with special skills, knowledge or experience not readily available and who is recruited or transferred from a place outside Hong Kong, and the exception is limited to differential treatment that is reasonable having regard to prevailing market conditions and any relevant factors other than race.

Discrimination against contract workers (Clause 15)

76. It is unlawful under Clause 15 for a person (i.e. the principal) who does not employ his or her workers but obtains their services under a contract with a third party to discriminate against the contract workers. Mr Alan LEONG, Dr Fernando CHEUNG and Mr Ronny TONG have expressed concern whether the protection

afforded to contract workers employed under a sub-contract is adequate. They have requested the Administration to examine whether there is any need for clarification regarding the protection for these contract workers if the contract is not made directly with the principal.

77. To address members' concern, the Administration has agreed to move CSAs to amend Clause 15 so as to ensure protection not only for those contract workers who are employed by a contractor of the principal but also those employed by a sub-contractor who does not have a direct contract with the principal.

Partnerships
(Clause 17)

78. Clause 17 makes it unlawful for partnerships consisting of not less than six partners to discriminate against persons seeking partnership or against existing partners. Noting that a similar provision in RRA in UK was deleted in 2003, some members including Ms Margaret NG and Ms LI Fung-ying have queried the basis for exempting partnerships of less than six partners. The Administration has explained that partnership is a close business relationship that results in a partner being exposed to liability and responsibility incurred by other members of the partnership. This is very different from the relationship between an employer and an employee. A small partnership is much more personal and is likely to have less support and resources as compared with a bigger partnership. It is, therefore, necessary to exempt small partnerships from Clause 17 of the Bill.

79. Mr Martin LEE and Mrs Anson CHAN consider the proposed exemption arbitrary and unnecessary. They are also concerned that no date is provided for the expiry of the exemption. The Administration has explained that a line has to be drawn somewhere to define small partnership and the scope of application to partnerships is in line with existing anti-discrimination ordinances. In addition, Clause 17(7) provides for a mechanism to alter or abolish the exemption if it is considered appropriate to do so in the light of the implementation experience after enactment of the Bill.

80. Notwithstanding the Administration's explanation, the Bills Committee has decided to move a CSA in its name to delete the proposed exemption for partnership with less than six partners.

Exception for trade unions, etc
(Clause 18)

81. Clause 18 makes it unlawful for a workers' organization, employers' organization, organization of both workers and employers or professional or trade organization to discriminate in respect of the admission of members or in the treatment accorded to members.

82. Mr WONG Ting-kwong points out that there are many trade organizations which comprise exclusively of members of the same race. He has asked the Administration to clarify whether organizations of this nature would be grandfathered under Clause 18(5). To dispel any query, the Administration has agreed to amend the title of Clause 18 to read "Organizations of workers or employers or professional or trade organizations, etc." so as to reflect fully the coverage of the relevant provisions and to eliminate the misimpression that this Clause only covers trade unions. The Administration has also agreed to revise Clauses 18(5) and (6) so as to clarify the legislative intention and extend their coverage to "any other organization whose members carry on a particular profession or trade for the purposes of which the organization exists", thus ensuring equal treatment with "an organization of workers, an organization of employers, or an organization of both workers and employers".

Discrimination by, or in relation to, barristers
(Clause 35)

83. Clause 35 of the Bill proposes that it should be unlawful for a barrister or barrister's clerk to discriminate against another person on the ground of race in matters relating to the offer, the terms of offer, as well as the benefits and facilities of pupillage and tenancy in a set of barristers' chambers. Mr Ronny TONG has queried why barristers are singled out in the Bill.

84. The Administration has explained that Clause 35 has been proposed in view of the uniqueness of practices and arrangements in the barrister's profession. Despite the close resemblance of purpose, the arrangements in relation to pupillage and tenancies in the barrister's profession technically does not come within the spheres of education, employment and provision of goods, facilities, services and premises which are protected under the Bill. A separate provision as proposed in Clause 35 is therefore required to apply the non-discriminatory principles to persons who seek pupillage or tenancy from, or who are themselves tenants in, the barristers' chambers. The Administration has also informed the Bills Committee that Clause 35 is almost identical to section 26A of RRA 1976 and similar provisions exist in section 36 of SDO, section 33 of DDO and section 26 of FSDO.

Vilification and offence of serious vilification
(Clauses 45 and 46)

85. Clause 45 provides that it is unlawful for a person, by an activity in public, to incite hatred towards, serious contempt for, or severe ridicule of, another person or members of a class of persons on the ground of the race of the person or members of the class or persons. Clause 46, which covers serious vilification, differs from Clause 45 in that any such activity in pubic includes threats of physical harm or inciting others to threaten physical harm on the victims or their premises or property.

Under Clause 46, serious vilification is a criminal offence liable on conviction to a fine at level 6 and to imprisonment for two years.

86. Members have raised queries as to the meaning of the phrases "an activity in public" in the definition of "vilification" and "serious vilification" as well as the scope of the reference to "writing" in Clause 45(3)(a).

87. The Administration has explained that one of the key elements of vilification is that it must be “an activity in public”. This is not confined just to activities undertaken in a “public place”. An activity carried out by a person in a public place would ordinarily be regarded as an activity in public. However, the Bill goes beyond that. Clause 45(3) makes it clear that it is not essential that the person carrying out the activity is in a public place while carrying out the activity. Rather, activity in public under Clauses 45 and 46 includes –

(a) all forms of communication to the public;

(b) all conduct observable by the public; and

(c) all distribution or dissemination of any matter to the public.

88. As regards the reference to “writing”, some members asked whether it covers writing an article in private containing racist views even though the article is not published. The Administration has explained that Clause 45 reflects the policy that vilification covers an activity in public. Writing in private without any act of communication to the public is not an activity in public. Clause 45(3)(a) reads “any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, screening and playing of tapes or other recorded material”. The key is “communication to the public”. A private act not communicated to the public would not be covered.

89. The Administration has also confirmed that the policy intent is that any activity in public with the intention to incite others to threaten physical harm on the victims or their premises or property would constitute an offence under Clause 46 even though no actual person is incited to threaten such harm and the yardstick for determining whether an act constitutes incitement is an objective one. At members' request, the Administration has agreed to amend Clause 46 to reflect the policy intention. In light of members' other views on the drafting of Clauses 45 and 46, the Administration has further agreed -

(a) to amend Clause 45(2)(b) to cover an activity in public that -

(i) is a communication or the distribution or dissemination of any matter; and

(ii) consists of a publication which is subject to a defence of absolute privilege in proceedings for defamation; and

(b) to amend Clause 46(1) which refers to "activity in public ….. which includes threatening…or inciting others to threaten ….." in order to make it clear that the threat or the incitement of threat is a necessary element of the activity in public which would constitute serious vilification.

Special measures for a particular racial group
(Clause 49)

90. Under Clause 49, special measures are not to be rendered unlawful if they are reasonably intended to ensure that persons of a particular racial group have equal opportunities with others or to meet their special needs.

91. Mr LEE Cheuk-yan and Dr Fernando CHEUNG have expressed concern that it would be difficult to ascertain the scope of special measures which would be permitted under Clause 49 of the Bill and that legal problems, similar to those pertaining to the provision of concessionary public transport fares for persons with a disability under DDO, might arise under the Race Discrimination Ordinance when enacted. The Administration has explained that the legal problems pertaining to concessionary public transport fares for persons with a disability under DDO are not expected to arise under Clause 49 in relation to EDB's support measures because they are designed to address a specific need and bear a direct relationship to the objective which is reasonable and justified.

Exception for nationality law and immigration legislation
(Clauses 54 and 55)

92. Clauses 54 and 55 expressly state that the Bill does not affect any law concerning nationality, citizenship, resident status or naturalization or immigration legislation. Some members consider the scope of Clause 54 too broad. They point out that Clause 55 would have the effect of legitimizing existing discriminatory arrangements against foreign domestic helpers. Members have requested the Administration to provide detailed justification for the exception for nationality law and immigration legislation.

93. According to the Administration, Article 1(3) of ICERD states, inter alia, that "nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality". The purpose of Clause 54 is to make it clear that the Bill does not interfere with any domestic legislation governing nationality, citizenship, resident status or naturalization. Similarly, "immigrant status" is not a prohibited ground of discrimination under ICERD. Article 1(2) of ICERD states, inter alia, that "this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".

94. The Administration has further explained that it is common practice internationally that each country or territory has its own immigration legislation under which a visa policy governing entry or stay of visitors may be formulated for effective immigration control. Any visa policy so formulated serves as a useful and effective tool to protect the interests and well being of its people through an immigration control mechanism. Under the existing legislation, any person who is aggrieved by the decision to refuse him/her permission to land in Hong Kong may lodge an objection under section 53 of the Immigration Ordinance (Cap. 115) with CS against the decision. The person may also seek leave from the Court for a judicial review of the relevant decision. Clause 55 of the Bill makes it clear that the Bill does not affect immigration legislation. Without such provision, a person who does not have the right to enter or remain in Hong Kong and has been refused permission to land in Hong Kong may take advantage of the Race Discrimination Ordinance (if enacted) to challenge the refusal decision by lodging a claim with the District Court or making a complaint to EOC, in addition to the existing avenues of complaint and redress. This would increase the risks of vexatious litigation and impose unwarranted additional burden on the Immigration Department and its staff in dealing with the complaints and court cases.

Acts done under statutory authority not affected by Parts 3, 4 and 5
(Clause 56)

95. Clause 56 expressly exempts any act done by a person if it is necessary for that person to do it in order to comply with a requirement of an existing statutory provision. Members have asked the Administration to consider whether relevant provisions should be amended to the effect that the "requirement" in Clause 56 would cover requirements of future legislation as well. The Administration, however, considers it appropriate that, if any future bill contains provisions that require differential treatment of persons on ground of race or may impose a requirement or condition that has a disproportionate negative impact on a racial group, the Government and LegCo should consider how to sort out such provisions on a case-by-case basis.

Functions and powers of EOC and enforcement of the Ordinance when enacted
(Clauses 60 to 81)

96. Clauses 60 to 69 of the Bill extend the functions and powers of EOC to cover racial discrimination and other matters under the Bill. These functions and powers are similar to those EOC currently has under the other existing anti-discrimination ordinances. Clauses 70 to 81 deal with procedural matters for enforcement and proceedings for remedies, as well as the jurisdiction of the District Court to determine claims. EOC is empowered to conduct formal investigation, issue enforcement notices, assist persons suffering discrimination, harassment or vilification, and to apply for an injunction against persistent discrimination,

harassment or vilification. The Bills Committee has considered the observations on these proposed provisions made by EOC on the basis of its experience of implementing the three anti-discrimination ordinances.

97. In response to Mrs Anson CHAN's concern as to whether EOC may conduct formal investigation without any undue influence from the Government, the Administration has agreed to amend Clause 65 to state in one paragraph that EOC may conduct formal investigations if it thinks fit and state in a separate paragraph that EOC shall conduct such investigation if required by CS.

98. At the suggestion of EOC, the Administration has also agreed -

(a) to amend Clause 71(b) so as to clarify that claims under Clause 47 (Liability of employers and principals) or Clause 48 (Aiding unlawful acts) may be made not only against an act of discrimination but also against harassment and vilification;

(b) to correct a typographical error in Clause 72(5) by replacing "Section 67(4)" by "Section 67(5)"; and

(c) in relation to Clause 81(3) (which provides that the 24-month limitation for bringing proceedings to the District Court under Clause 81(1) does not include the time taken by EOC for investigation and conciliation), by replacing "conciliation under section 79 was concluded" by "the complaint was disposed of under section 79(3) or (4)" to cover the case where EOC decides not to conduct, or to discontinue, an investigation.

99. Members note that, arising from the concern over the dual role of EOC as investigator and conciliator which may result in respondents feeling pressurized to agree to settlements, it has been suggested that provisions to provide for setting up a panel of independent conciliators/mediators should be incorporated into the Bill. It is, however, the Administration's position that EOC should be given the same powers and functions as those provided for under the three existing anti-discrimination ordinances to enforce the Race Discrimination Ordinance when enacted.

100. Members also note the observation made by EOC that, as civil litigation procedures are followed in discrimination cases, the formal court procedures and practices which are often associated with procedural complication, lengthy time and substantial costs, make it difficult for people making discrimination claims. According to EOC, it has been looking at the possibility of establishing an Equal Opportunities Tribunal, with informal procedures and active case management functions, so as to make the adjudication process speedy and more accessible.

101. Miss CHAN Yuen-han has expressed the view that the composition of EOC should be reviewed and more representatives of relevant concern groups should be appointed to the Commission. Noting that this issue falls outside the context of the

Bill, the Bills Committee has agreed to refer the following issues to the Panel on Constitutional Affairs for follow-up -

(a) the proposed establishment of an Equal Opportunities Tribunal; and

(b) review of the composition of EOC.

Chinese Temples Ordinance and Chinese Permanent Cemeteries Ordinance
(Clause 89 and Clause 94)

102. Clause 89 amends section 9(1)(b) of the Chinese Temples Ordinance (Cap 153)[2] by repealing the word "Chinese". Clause 94 amends section 7(2) of the Chinese Permanent Cemeteries Ordinance (Cap. 1112) by repealing "persons of the Chinese race in Hong Kong" and substituting "Hong Kong residents". Members have requested the Administration to provide information on the background and rationale for these proposed amendments.

103. The Administration has informed the Bills Committee that the proposed amendment in Clause 89 is made at the request of the Chinese Temples Committee to remove the existing restriction on the disbursement of the General Chinese Charities Fund. Section 7(2) of the Chinese Permanent Cemeteries Ordinance provides that the Board of Management of the Chinese Permanent Cemeteries (BMCPC) "may donate to any charity operating for the benefit of persons of the Chinese race in Hong Kong any moneys vested in it which are or may become surplus to the requirements of the proper management, and administration and maintenance of any Chinese Permanent Cemetery for the time being under the control of the Board". This provision limits the scope of the Board's donations to charities which operate for the benefits of Chinese people in Hong Kong.

104. The Administration has further explained that, although Clause 50 of the Bill specifically permits a provision in a charitable instrument for conferring benefits on persons of a particular race, BMCPC considers the existing limitation on the scope of the Board's donations unnecessary. It has therefore proposed to amend the relevant section by replacing the words "persons of the Chinese race in Hong Kong" by "Hong Kong residents". Clause 94, when enacted, would allow the Board to make charitable donations to benefit Hong Kong residents regardless of their race or ethnic origin. The Administration stresses that these proposals have no implications on other charities which may be established for the benefits of particular racial groups. Clause 50 protects the freedom of people to choose the beneficiaries of their donations.

---

2 Section 9(1)(b) of the Chinese Temples Ordinance provides that the General Chinese Charities Fund shall be held in such manner as the Chinese Temples Committee may direct, and may in the discretion of the Chinese Temples Committee be applied for the purposes of any Chinese charity in Hong Kong.

105. Some members including Ms Margaret NG and Dr YEUNG Sum are of the view that any legislative amendment must be initiated after careful policy consideration. They have expressed reservations about the proposed amendments on the grounds that they are proposed simply upon the request of an individual organization and the Administration has not provided sufficient information including background, objectives and operation of the charities funds for the Bills Committee to assess the implications of the proposed amendments. Moreover, Ms NG does not consider it appropriate to effect the proposed amendments in the form of related amendments as currently proposed. In light of the views expressed, the Administration has agreed to delete amendments affecting the General Chinese Charities Fund and the fund under the management of the Board of Management of the Chinese Permanent Cemeteries.

106. The Bills Committee stresses that it does not object to the proposal of expanding the provision of relevant services to people of non-Chinese race, but considers that any legislative proposal must reflect the relevant policy. At the Bills Committee's request, the Administration has agreed that CMAB would refer the matter to HAB for consideration.

Application of SDO
(Clause 93)

107. Clause 93 amends SDO to extend unlawful sexual harassment to cover rendering the environment in which a person works, studies or undergoes training sexually hostile or intimidating. In line with the amendment to be proposed to Clause 7(2) relating to racial harassment, this provision would be further amended. Members welcome these amendments.

Committee Stage amendments

108. Apart from the CSAs elaborated in paragraphs 26, 39, 66, 77, 82, 89, 97-98 , 105 and 107 above, the Administration will also move CSAs to the following provisions -

(a) Clauses 1(2), 64(3) and 84(1) to substitute "Secretary for Home Affairs" with "Secretary for Constitutional and Mainland Affairs" to reflect the transfer of the policy responsibility on human rights from HAB to CMAB since 1 July 2007;

(b) Clause 2 for the purpose of amending the definition of “club” by deleting “sells or supplies liquor for consumption on its premises” so as to cover also clubs not selling liquor, amending the definition of estate agent" as well as that in SDO for consistency with the same term in the Estate Agents Ordinance (Cap. 511) and amending the definition of “near relative” to include parents-in-law,

children-in-law, brothers-in-law and sisters-in-law and to revise the presentation so as to remove unnecessary stigma against illegitimate children;

(c) Clause 7(2) for the purpose of extending the scope of the provision to cover all the circumstances relevant for the purposes of any provision of the Bill, so that it will also cover other environment, such as those in which a person receives service, instead of only those in which a person works, studies or undergoes training;

(d) Clause 34 for the purpose of deleting subclause (2) which relates to appointment as the Chief Executive, to Executive Council, as a Principal Official, to LegCo or as Chief Justice of the Court of Final Appeal or Chief Judge of the High Court;

(e) Clause 44(1)(b) for the purpose of clarifying its meaning by replacing "threatening" with "threatening to subject"; and

(f) Schedule 1 for replacing "Permanent Secretary for Education and Manpower" with "Permanent Secretary for Education" and paragraphs 9 and 11 of Schedule 2 for replacing "Education and Manpower Bureau" with "Education Bureau".

109. The Administration will move a number of technical amendments and related amendments to the respective provisions of the three anti-discrimination ordinances, where appropriate. The Administration will also amend the long title of the Bill to reflect the impact of the proposed CSAs, including the related amendments to the provisions on discrimination against contract workers in the existing anti-discrimination ordinances as well as the provision on unlawful harassment by creating a hostile or intimidating environment in SDO.

110. The Bills Committee agrees to the CSAs to be moved by the Administration.

111. Hon CHOY So-yuk and Hon WONG Ting-kwong have indicated that Members belonging to DAB do not support the CSAs to be moved by the Chairman on behalf of the Bills Committee. Hon Howard YOUNG has indicated that Members belonging to LP do not support these CSAs. Hon Abraham SHEK has also indicated that he does not support these CSAs.

Date of resumption of Second Reading Debate

112. Subject to the CSAs to be moved by the Administration, the Bills Committee does not object to the resumption of the Second Reading debate on the Bill on 9 July 2008.

Follow-up actions by the Administration

113. The Administration has undertaken to consult the Panel on Constitutional Affairs on the draft administrative guidelines on promotion of racial equality and brief the Panel on the implementation progress.

114. The Administration has undertaken to refer to HAB to consider the matter on amending the relevant provisions of Chinese Temples Ordinance and Chinese Permanent Cemeteries Ordinance.

Referral to the Panel on Constitutional Affairs

115. The Bills Committee has agreed to refer the following issues to the Panel on Constitutional Affairs for follow-up -

(a) the proposed establishment of an Equal Opportunities Tribunal; and

(b) review of the composition of EOC.

Consultation with the House Committee

116. The Bills Committee reported its deliberations to the House Committee on 20 June 2008 and submitted a written report to the House Committee on 27 June 2008.

Council Business Division 2
Legislative Council Secretariat
30 June 2008

Appendix I

Bills Committee on Race Discrimination Bill

Membership list

Chairman	Hon Margaret NG
Deputy Chairman	Hon Abraham SHEK Lai-him, SBS, JP
Members	Hon LEE Cheuk-yan Hon Martin LEE Chu-ming, SC, JP Dr Hon LUI Ming-wah, SBS, JP Hon James TO Kun-sun Hon CHEUNG Man-kwong Hon CHAN Yuen-han, SBS, JP Hon Bernard CHAN, GBS, JP Hon Jasper TSANG Yok-sing, GBS, JP Hon Howard YOUNG, SBS, JP Dr Hon YEUNG Sum, JP Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk, JP Hon LI Fung-ying, BBS, JP Hon Albert CHAN Wai-yip Hon Audrey EU Yuet-mee, SC, JP Hon Daniel LAM Wai-keung, SBS, JP Hon Jeffrey LAM Kin-fung, SBS, JP Hon Alan LEONG Kah-kit, SC Dr Hon Fernando CHEUNG Chiu-hung Hon WONG Ting-kwong, BBS Hon Ronny TONG Ka-wah, SC Hon TAM Heung-man Hon Mrs Anson CHAN, GBM, JP (since 14 December 2007) (Total : 25 Members)
Clerk	Miss Flora TAI
Legal Adviser	Mr KAU Kin-wah
Date	14 December 2007

Appendix II

Bills Committee on Race Discrimination Bill

List or organisations/individuals which/who have submitted views to the Bills Committee

	1.	15 teachers of the Faculty of Education, The University of Hong Kong
	2.	A member of the Committee on the Promotion of Racial Harmony
#	3.	Alliance of Progressive Labor, Hong Kong
#	4.	Alliance of Returning Chinese from Overseas Against Discrimination
#	5.	Association for the Advancement of Feminism
	6.	Association of Hong Kong Chinese Middle Schools
#	7.	Association of Indonesian Migrant Workers in Hong Kong
#	8.	Association of Mainland Overseas Returned Scholars in Hong Kong
#	9.	British Chamber of Commerce in Hong Kong
#	10.	Christian Action
#	11.	Civic Party
	12.	Civil Human Rights Front
#	13.	Coalition for Migrants Rights
#	14.	Colours in Peace
#	15.	Democratic Party
#	16.	Dr Keezhangatte James Joseph, Department of Social Work & Social Administration, The University of Hong Kong
#	17.	Dr Kelley Loper, Faculty of Law, The University of Hong Kong
#	18.	Employers' Federation of Hong Kong
#	19.	Equal Opportunities Commission
	20.	Equal Opportunity Officer, The University of Hong Kong

#	21.	Far East Overseas Nepalese Association
	22.	Federation of Hong Kong and Kowloon Labour Unions
	23.	Federation of Hong Kong Guangdong Community Organizations
	24.	Federation of Hong Kong Industries
#	25.	Filipino Domestic Helpers General Union
	26.	French Chamber of Commerce and Industry
#	27.	HKSKH Lady Maclehose Centre
#	28.	Hong Kong Against Racial Discrimination
	29.	Hong Kong Association of Banks
	30.	Hong Kong Bar Association
	31.	Hong Kong Catholic Commission for Labour Affairs
	32.	Hong Kong Christian Council
#	33.	Hong Kong Christian Institute
#	34.	Hong Kong Christian Service
#	35.	Hong Kong Coalition of Indonesian Migrant Workers Organization
	36.	Hong Kong Council of Social Service*
#	37.	Hong Kong Discrimination Policies Concern Network
	38.	Hong Kong Federation of Insurers
#	39.	Hong Kong General Chamber of Commerce
#	40.	Hong Kong Human Rights Commission
#	41.	Hong Kong Human Rights Monitor
#	42.	Hong Kong Integrated Nepalese Society
	43.	Hong Kong New Territories Commercial and Industrial General Association Tuen Mun Branch
	44.	Hong Kong Subsidized Secondary Schools Council
	45.	Hong Kong Swatow Merchants Association Limited

#	46.	Hong Kong Unison
#	47.	Hong Kong Women Christian Council
#	48.	Indonesian Migrant Workers Union
#	49.	International Social Service - Hong Kong Branch
	50.	Law Society of Hong Kong
#	51.	Luen Woo Chamber of Commerce
	52.	Mr Patrick YU
#	53.	Mr Y K CHONG
#	54.	New Immigrants' Mutual Aid Association
#	55.	New Territories General Chamber of Commerce
#	56.	Pakistan Islamic Welfare Union Inc. (HK) Ltd
	57.	Professor Carole Petersen
#	58.	Professor G G WANG, School of Law, City University of Hong Kong
#	59.	Society for Community Organization
	60.	Tsim Sha Tsui District Kai Fong Welfare Association
#	61.	United Filipinos in Hong Kong
	62.	Vocational Training Council
#	63.	Voices of the Rights of Asylum Seekers and Refugees
	64.	Yau Tsim Mong Committee on Promotion of Hong Kong Economy
#	65.	YMCA of Hong Kong Cheung Sha Wan Centre
	66.	Members of the public

* The submission made by Hong Kong Council of Social Service encloses a joint statement co-signed by 16 non-government organisations, 30 ethnic minority organisations and 10 members of the Committee on Promotion of Racial Harmony.

\# Deputations/individuals which/who have made oral representations to the Bills Committee.