

LEGISLATIVE COUNCIL BRIEF

RACE DISCRIMINATION BILL

INTRODUCTION

A At the meeting of the Executive Council on 21 November 2006, the Council ADVISED and the Acting Chief Executive ORDERED that the Race Discrimination Bill (the Bill), at Annex A, should be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

2. Racial discrimination is not a prevalent or serious problem in Hong Kong. Although over 95% of the population is ethnic Chinese, Hong Kong has always been a cosmopolitan city and Hong Kong people have a long tradition of living in harmony with and respect for persons from diverse cultural background and ethnic origins. While there are occasional complaints and incidents among individuals (e.g. on refusal to let properties and rejection for job interviews), as a community the relationship between the Chinese majority and the ethnic minorities in Hong Kong has generally been peaceful and harmonious. There have also been, from time to time, mild expressions of intolerance (such as over the congregation of Filipino maids in Central), but there are certainly no real antipathy, division or entrenched prejudice and discrimination against any particular groups on account of their race or ethnic origin.

3. That said, the Government firmly upholds the principles of equality and, as policy, recognises protection against racial discrimination to be a fundamental human right for all persons. Over the years, we have also endeavoured to foster understanding and racial harmony through public education and other promotional activities.

4. Policy commitment apart, we are obliged under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to take steps “to prohibit and to eliminate racial discrimination in all its forms”. In this connection, the United Nations (UN) Committee on the Elimination of All Forms of Racial Discrimination, which is the monitoring body of ICERD, has

consistently maintained that specific legislation should be enacted to give effect to the relevant provisions.

5. Under existing legislation, the Hong Kong Bill of Rights Ordinance (Chapter 383) (HKBORO), prohibits the Government and all public authorities, and any person acting on behalf of the Government or a public authority, from engaging in practices which entail discrimination on any grounds, including race and colour. However, HKBORO is not applicable to acts of discrimination committed by private individuals and organisations.

6. The absence of specific legislation in Hong Kong against racial discrimination applicable to the private sector has been the subject of much criticism and concern, both locally and internationally. Over the last ten years, there have been calls from the UN High Commissioner for Human Rights for Hong Kong to enact the necessary legislation. These calls have been repeated in unison by various UN human rights treaty monitoring bodies (including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on Elimination of All Forms of Racial Discrimination) every time the Hong Kong human rights reports are scrutinised and discussed at international hearings. Locally, while there remains a body of opinion which does not consider legislative controls necessary, public demand for legislation against racial discrimination has been increasing in force, not least among human rights advocates and members of the ethnic minorities.

7. In pursuance of the Government's policy commitment and in appreciation of community aspirations, the Government accepted the need to legislate against racial discrimination in both the public and private sectors in 2003. A public consultation exercise was conducted to gauge public opinion on the scope of regulation and the ways in which individual persons should be protected against racial discrimination. The consultation was completed in February 2005. Subsequently, we have announced in public and at UN hearings our plan to introduce the draft legislation within the 2005-06 LegCo Session. However, because of the need to refine the legislative proposal, both for effectiveness and clarity, we were unable to meet this target. We have repeatedly reassured the public of our commitment and have publicly pledged to introduce the Bill into the LegCo before the end of the current calendar year.

THE BILL

8. The main object of the Bill is two-fold:

- (a) to make racial discrimination and harassment in prescribed areas and vilification on the ground of race

unlawful and to prohibit serious vilification on that ground; and

- (b) to extend the jurisdiction of the Equal Opportunities Commission (EOC) to cover racial discrimination.

Where appropriate, exceptions to application of the provisions are spelt out. The Bill is divided into nine parts and the salient features are summarised below.

9. **Part 1** contains definitions of the various terms used in the Bill. By virtue of Clause 3, the Bill, when passed into legislation, will apply 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.

10. **Part 2** specifies the circumstances in which a person would be regarded as discriminating against, or harassing, another person. Racial discrimination may take the form of direct or indirect discrimination. Broadly speaking, “direct discrimination” occurs when a person on the ground of race treats another person less favourably than he would treat others. “Indirect discrimination”, which is a less obvious form of discrimination, occurs when a person imposes a requirement or condition which, although applicable to all, will cause a disproportionate and unjustifiable adverse impact on one particular ethnic group or another. The details of these are spelt out in Clause 4 of the Bill. A requirement or condition is justifiable if it has a rational and proportionate connection with a legitimate aim, or if it is not reasonably practicable not to apply it. The clause also sets out examples of the circumstances relevant for determining whether it is reasonably practicable to disapply a requirement or condition. Clauses 5 and 6 further make it unlawful to discriminate on the basis of the race of a near relative and against a person being involved or likely to be involved in complaints and proceedings for discrimination respectively.

11. Racial harassment is defined in Clause 7 of the Bill. In general, this is when a person offends, humiliates, or intimidates another person because of the latter’s race or the race of his near relative. It also applies to cases when a person acts in such a way as to render the environment of work or study hostile or intimidating for another person, again on the grounds of the latter’s race or the race of his near relative. For the purpose of the Bill, Clause 8 defines the meaning of “race”, “on the ground of race” and “racial groups”. In particular, “race” means race, colour, descent, or national or ethnic origin but does not mean nationality, Hong Kong permanent resident status, length of residence in Hong Kong or indigenous inhabitant status. These definitions are consistent with those internationally adopted under ICERD.

12. Parts 3 and 4 of the Bill prescribe the areas of activity in which racial discrimination and harassment are prohibited under the Bill. They are, specifically,

- (a) employment;
- (b) education;
- (c) goods, facilities, services and premises;
- (d) election and appointment to public bodies;
- (e) pupillage and tenancy by, and instructions to, a barrister;
and
- (f) membership of and access to clubs.

These parts spell out the circumstances which constitute racial discrimination and harassment in the specified areas of activities, which are made unlawful under the Bill.

13. **Part 3** prohibits racial discrimination in employment. 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 and, for the first three years from the enactment of the Ordinance, to employers with five employees or less. Further exceptions to Clause 10 are also provided in Clauses 11 to 13, particularly to allow for differential treatment in circumstances where it is justified by the nature of work as a genuine occupational qualification, and for recruitment/retention of overseas employees on more favourable terms where the consideration does not involve race. Existing employment and the terms of employment are protected and grandfathered under Clause 14 and Schedule 2. Clauses 15 to 22 extend similar controls and protections to other areas of employment and related activities, including engagement of contract worker and commission agent, admission to partnership and professional or trade organisation, professional qualification and vocational training, and provision of services by employment agencies. However, a language proficiency requirement imposed by a qualifying body is excepted if it is reasonable or is one conferred for the purposes of a qualification specified in Schedule 3. Further, it is provided that vocational training bodies are not required to make special arrangements regarding holidays and medium of instruction for particular racial groups. Employment and granting of authorization or qualification for religious purposes are excepted under prescribed circumstances in Clause 23. Clauses 24 and 25 render unlawful racial harassment in the employment field and spell out the circumstances involved.

14. **Part 4** prohibits racial discrimination and harassment in education and other fields. 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. It makes it clear, however, that the educational establishments are not obligated to make special arrangements regarding holidays and medium of instruction for any students of particular racial groups. Clauses 27 to 37 prohibit racial discrimination in the other specified areas, viz.: goods, facilities, services and premises; public bodies; barristers and clubs. Detailed exceptions are provided in the case of premises forming part of small dwellings which are shared by the landlord or the landlord's near relatives, restriction of membership to voluntary bodies or to clubs established specifically for the benefits of particular racial groups, allocation of cemeteries, columbaria and related services, and foster care and similar arrangements. Racial harassment in these areas of activities is prohibited under Clauses 38 and 39.

15. **Part 5** prohibits and sets out the circumstances of other unlawful acts relating to racial discrimination, including discriminatory practices and advertisements, aiding and causing others to discriminate, as well as vilification. Clauses 47 and 48 impose vicarious liability on an employer or principal unless he proved that he had tried to prevent his employee from doing the act or it was outside the agent's authority. It makes serious vilifications an offence punishable by a fine and imprisonment. Knowingly or recklessly making a false or misleading statement as to the discriminatory nature of an act or advertisement to get another to do that act or publish that advertisement is also an offence, punishable by a fine.

16. **Part 6** contains general exception clauses to Parts 3 to 5 of the Bill. These relate particularly to charities and provision of special measures and benefits to meet the special needs of a particular racial group to, for example, give them equal opportunities with others. Clauses 54 and 55 make it clear that the Bill does not affect any law concerning nationality, citizenship, resident status or naturalization or immigration legislation. Acts done pursuant to statutory authority, the operation of the New Territories Ordinance (Chapter 97) and the New Territories Leases (Extension) Ordinance (Chapter 150) are protected. Without affecting the operation of the Official Languages Ordinance (Chapter 5), there is no duty to use, or provide translation into, any language. Further, Clause 59 and Schedule 5 provide for other matters not affected by the Bill, including the Portable Comprehensive Social Security Assistance Scheme.

17. **Part 7** extends the functions and powers of the EOC to cover racial discrimination and other matters under this Bill. These functions and powers are similar to those the EOC currently has under the other existing anti-discrimination ordinances. **Part 8** deals with procedural matters for enforcement and proceedings for remedies, as well as the jurisdiction of the District Court to determine claims. The 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. **Part 9** contains other miscellaneous provisions as well as consequential and related amendments. In particular, Clause 91 amends the Sex Discrimination Ordinance (Chapter 480), to extend unlawful sexual harassment to cover rendering the environment in which a person works, studies or undergoes training sexually hostile or intimidating.

ISSUES OF INTEREST

18. In preparing the Bill, we have been careful to take into account the public views collected from extensive public consultations, as well as the likely impact of the provisions upon implementation. Of particular importance, we aim to arrive at a regulatory regime which not only satisfies our policy objectives and international obligations, but also one which balances the divergent interests of the different parties and is reasonable in its justifications, practicable in implementation and acceptable to the people affected. We have 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.

19. For overall perspective and to facilitate understanding of the Bill, the key issues that have attracted greater interest are highlighted in the paragraphs below.

Overall legal framework: the Basic Law, the Hong Kong Bill of Rights Ordinance and the proposed Bill

20. Article 39 of the Basic Law provides for the application of the International Covenant on Civil and Political Rights (ICCPR) to Hong Kong. This provision has been implemented through the HKBORO. It prohibits the Government from engaging in practices that would entail any form of discrimination, including discrimination on the grounds of race. However, the HKBORO does not bind the private sector.

21. Similar to the other existing anti-discrimination Ordinances, the proposed Bill seeks to proscribe against racial discrimination and to provide for details of the areas of protection, enforcement mechanisms and remedies. When enacted, it will apply to both the Government and the private sector. The Bill also does not absolve the Government and public authorities from obligations under the HKBORO. Hence an act that contravenes the HKBORO (which prohibits all forms of discrimination by Government and public authorities) may be challenged in the Court under the HKBORO, even if it were not specifically covered under the Bill.

Comparison with other existing anti-discrimination Ordinances

22. The Bill is modelled primarily on the existing anti-discrimination laws, namely the Sex Discrimination Ordinance (Chapter 480) (SDO), the Disability Discrimination Ordinance (Chapter 487) (DDO) and the Family Status Discrimination Ordinance (Chapter 527) (FSDO). Thus, most of the principal provisions in the Bill are broadly similar to those in these Ordinances.

23. As a guiding principle, the Bill aims to ensure that people, especially the vulnerable, are protected against less favourable treatment on racial grounds and against any requirement or conditions that, although applicable to all, will have a disproportionate negative impact on a racial group and cannot be justified irrespective of race. While it will still be lawful to bestow benefits to persons of a particular race or ethnic origin for meeting their special needs, we are cautious that we do not impose an obligation for affirmative action. This is also the standard and the approach adopted in the SDO and FSDO. It is unlike the DDO which requires, for example, an employer to take steps to accommodate the special needs of a disabled employee unless to do so will cause “unjustifiable hardship” to the employer. Thus, Clause 4(2)(b) of the Bill states clearly that a person is not obliged to disapply a requirement or condition applicable generally (e.g. an employer requiring a good command of Chinese for applicants for the post of salesperson) even though it will have a disproportionate negative impact on a particular racial group if it is not “reasonably practicable” to disapply the requirement or condition. Further, Clause 4(5) is clear that nothing in this connection requires the person concerned to confer any benefits, provide any services or incur any expenditure which he otherwise does not have to. We believe this approach is reasonable and appropriate.

24. This Bill applies equally to Government in the same way as it applies to the private sector. Specifically, it applies to an act done by or for the purpose of the Government that is of a kind similar to that of a private person. It does not make separate provisions on Government functions.

Provisions for exceptions

25. A key consideration for the proposed legislation is to afford effective safeguards for the rights of individual against racial discrimination, while at the same time maintaining proper respect and protection for the legitimate rights and freedoms of others. In this context, we need to ensure clarity and certainty of the legislative provisions, especially to avoid misunderstanding and unnecessary disputes after enactment of the Bill. Hence, the Bill contains exception clauses which serve to clearly delineate the scope of control and regulation. Most of these mirror those in the other existing anti-discrimination ordinances. We have also taken into account local circumstances as well as international practice and experience of other common law jurisdictions with similar legislations. In particular, these exception clauses have been proposed for the following reasons –

- (a) to ensure that, despite no affirmative action being required in the Bill, special measures which are intended for bestowing benefits on ethnic minorities and promoting equal opportunities for them are not regarded racial discrimination, although these measures are targetted at particular ethnic groups to the exclusion of others;
- (b) to provide for lawful and justified protection for the legitimate rights and freedoms of others, and for other purposes which are justified on policy grounds and considerations; or
- (c) to delineate the scope of the Bill and to provide for clarity and certainty of the law in areas which were not intended to be covered by the Bill.

B

A detailed list of the exception clauses in the Bill with brief explanations of the rationale is at Annex B.

26. Consistent with the principles of rationality and proportionality, which have been widely adopted by international human rights authorities, each of the proposed exception clauses has been critically examined against the following criteria and benchmarks –

- (a) the provision serves a legitimate and needed purpose;
- (b) it is justified on reasonable grounds; and
- (c) the exception is proportional to the objective and to the level of protection required (i.e. it is not excessive).

Language proficiency and use of language

27. This is a matter of common concern among the ethnic minorities, arising especially from their disadvantage in the command of Chinese language which, unlike it is for the majority of the population, is not their mother tongue.

28. In regard to access to services, we appreciate the difficulties which are at times faced by some members of the ethnic minorities who do not use Chinese. However, we equally recognize that 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 will not be unlawful. We have no doubt that those service providers who target their service at specific minority groups will conduct their business in the appropriate language as is reasonably practicable in the circumstances. This is a pragmatic approach which we believe to be in the interest of the community as a whole and should be acceptable to all.

29. The requirement for language proficiency in education has been a matter of concern to the ethnic minorities. In this regard, the Government firmly upholds the right of children to education, irrespective of their race or ethnic origin. All children in Hong Kong have the right to nine years of free and universal basic education. However, as stipulated in Clause 26(2) of the Bill, this does not compel the schools to modify its arrangements regarding holidays or medium of instruction in order to cater for students of any racial group¹.

Differential employment terms for overseas employees

30. During earlier public consultations, questions were raised from the business community over whether the offer of more favourable terms of employment (commonly referred to as “overseas terms”) for employees from overseas would become unlawful under the Bill. Since the race discrimination legislation is not meant to affect such employment practices based on human resource policy considerations that do not relate to race, we consider it justified to provide an exception clause to ensure clarity and certainty. It should be recognised that although the exception clause sets out certain situations where the exception will apply, such as possession of skills not readily available, recruited from a place outside Hong Kong, etc. it

¹ In the Belgian Linguistics Case (1968) 1EHRR 252, the applicants, who were French-speaking residents in the Dutch-speaking part of Belgium, wanted their children to be educated in French. The European Court of Human Rights decided that the right to education did not include a right to be taught in the language of choice of the parents, nor a right of access to a particular school of the choice of the parents.

is not intended to prescribe conditions to be fulfilled before employers may offer overseas terms to their overseas employees. Rather, it seeks to provide a defence for employers in case they were 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 was justified by reasons not related to race.

Application to new arrivals

31. Discrimination against new arrivals from the Mainland has been a matter of concern in the community. There has also been continued pressure from human rights groups and new arrivals organizations for the Bill to make specific provisions against such discrimination.

32. There can be no questions that new arrivals should, as of right, enjoy the same protection against racial discrimination as everybody else in Hong Kong. However, as almost all of the new arrivals are of the same ethnic origin as the local Chinese, they do not constitute a separate racial group under the definition of “race” in Article 1 of the ICERD, which is adopted in the present Bill. More importantly, the discrimination which may at times be experienced by some new arrivals is in essence a form of social, not racial, discrimination. It is wrong in principle to seek to address these issues through legislation on racial discrimination. An extension of the scope of the Bill, as proposed by some advocates, would also have significant adverse implications on established Government policies and practices which are based on the seven-year residency requirement (e.g. the Comprehensive Social Security Assistance Scheme, eligibility to public housing).

LEGISLATIVE TIMETABLE

33. The legislative timetable will be –

Publication in the Gazette	1 December 2006
First Reading and commencement of the Second Reading debate	13 December 2006
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

34. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The Race

C

Discrimination Bill, if enacted, will apply to the Government in accordance with Clause 3 of the Bill whereas the proposed consequential and related amendments to other enactments in the Bill, if enacted, will not affect the current binding effect of such enactments. Annex C addresses the financial, civil service, economic, sustainability and environmental implications of the proposal.

PUBLIC CONSULTATION

35. We issued a consultation paper entitled “Legislating Against Racial Discrimination” for public comments on 16 September 2004. The public consultation ended on 8 February 2005. We received 240 submissions and attended 67 meetings with or briefings for advisory and statutory bodies, business and employers’ associations, non-governmental organizations, representatives of ethnic minorities, human rights groups, the media and District Councils. The majority of our respondents expressed support for our legislative proposal.

PUBLICITY

D

36. Concurrent with the issue of this Legislative Council Brief, we will issue a press release and hold press briefings to introduce the provisions of the Bill on 29 November 2006. In addition, we have prepared a booklet with Q&As to explain, in layman terms, the key provisions of the Bill and their impacts, so as to enhance public understanding of the proposed legislation. A copy of the booklet is at Annex D. We shall also arrange briefings for interested groups, including those from the employment and education sectors, to clarify and to further explain the detailed provisions and the rationale for the proposals.

ENQUIRIES

37. Enquiries on this Brief can be directed to Mr Victor Ng, Principal Assistant Secretary for Home Affairs (4), at 2835 1552.

Home Affairs Bureau
29 November 2006

Content of

Race Discrimination Bill

(Copy at www.hab.gov.hk)

Explanatory note on the exception clauses in the Race Discrimination Bill

Clause No	Subject	Explanatory note
* 8(2) & (3)	Differential treatment on the ground of indigenous villager status, nationality and resident status not to be regarded racial discrimination.	These categories are specifically excluded for the avoidance of doubt. In line with Article 1 of the International Convention on the Elimination of Racial Discrimination (ICERD), the definition of “race” is confined to the “race, colour, descent, or national or ethnic origin” of the person.
10(3) & (8)	Exception for small employers with not more than five employees during the first three years of the enactment of the Bill.	<p>This is a sunset clause to smoothen transition and to minimise hardship for small employers during the initial years of implementation.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
10(4)	Exception for existing provision made in relation to death or retirement of employee	<p>Consistent with the principle of non-retrospectivity of legislation, this preserves the legality of existing arrangements (made before commencement of the relevant provision) in relation to death and retirement benefits for employees.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
10(7)	Exception for employers in regard to the offer of employment to domestic helpers	<p>This recognises the freedom of people to choose who may enter their houses and live with them. It should be noted that, once appointed, the domestic helper will enjoy the same protection against racial discrimination as any other person.</p> <p>Although not appearing in existing Hong Kong anti-discrimination legislation, similar provisions are found in the UK Race Relations Act 1976.</p>
11	Exception for genuine occupational qualification	<p>This is to enable the choice by employers in cases where the race of the employee is a genuine occupational qualification for the job, e.g. for authenticity in a dramatic production or for effective provision of personal services to members of a particular racial group.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
12	Employment for training in skills to be exercised outside Hong Kong	<p>This relates to a person not ordinarily resident in Hong Kong, who is employed for the purpose of being trained in skills to be exercised wholly outside Hong Kong. Insofar as discrimination in employment is concerned, we do not propose to cover these persons as they cannot be regarded as being employed for work locally.</p> <p>Although not appearing in existing Hong Kong anti-discrimination legislation, similar provision can be found in the UK Race Relations Act 1976.</p>
* 13	Overseas terms of employment	<p>It has never been the Government's intention for the Bill to restrict the offer of more favourable overseas terms to employees. There is also case law under the UK Race Relations Act 1976 which indicates that justifiable differential treatment between overseas employees and their locally based counterparts conceived on human resources policy grounds in order to attract employees who possess special skills and experience was not discrimination on the ground of race. However, to provide clarity and reduce potential litigation, and mindful of the concerns expressed by the business community, we have proposed an exception clause covering such "overseas terms" arrangements. It should be noted that this clause and</p>

Clause No	Subject	Explanatory note
		the conditions laid down therein are “defence” available to employers, and not prerequisites for firms to employ staff on overseas terms.
* 14	Existing differential treatment on local and overseas terms of employment	This is a “grandfathering” clause for existing employment made on local and overseas terms.
15(3)	Exception for genuine occupational qualification for contract workers	<p>This is an application of Clause 11 in the context of engagement of contract workers, for the same consideration of enabling choice by employers as stated.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
15(4)	Contract workers under training in skills to be exercised wholly outside Hong Kong	<p>This is an application of Clause 12 in the context of engagement of contract workers (i.e., to allow an act to be done for the benefit of a person not ordinarily resident in Hong Kong, who is engaged as a contract worker for the purpose of being trained in skills to be exercised wholly outside Hong Kong.)</p> <p>Although not appearing in existing Hong Kong anti-discrimination legislation, similar provisions are found in the UK Race Relations Act 1976.</p>
* 15(5)	Differential terms of employment for overseas contract workers	This is an application of Clause 13 in the context of engagement of contract workers.
17(3)	Exception for genuine occupational qualification in a partnership	<p>This is an application of Clause 11 in relation to partners in a partnership.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
17(4)	Exception for existing provision made in relation to death or retirement of partners in a partnership	<p>This is an application of Clause 10(4) in the context of partnerships.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
18(4)	Exception for existing provision made in relation to death or retirement of members of trade unions	<p>This is an application of Clause 10(4) in regard to members of trade unions.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
* 18(5)	Existing trade unions and employer organisations established for the benefit of persons of a particular racial group defined otherwise than by colour	<p>While we respect the freedom of association we do not condone the exclusion of membership on the ground of race for trade unions and employer associations which are established primarily to promote the interest of persons working in the same trade or profession. Existing trade unions and employer associations are nonetheless grandfathered.</p>

Clause No	Subject	Explanatory note
* 19(2)	Exception on requirement for language proficiency in the award of professional qualifications by prescribed qualifying bodies	<p>This allows authorities responsible for the award of job-related qualifications to impose a reasonable requirement for proficiency in Chinese or English, or both, which can be justified by the operational demands of the profession. Apart from the general exception for “reasonable” language requirements, the language requirements for qualifications listed in Schedule 3 are specifically protected for certainty’s sake.</p>
* 20(2)	No mandatory requirement for modification of arrangement for holidays or medium of instruction in vocational training	<p>This is consistent with our principle that while we encourage people to accommodate the needs of racial minorities or persons of a particular race, we do not require affirmative action. In the context of education and vocational training, we consider it is unlikely to be reasonably practicable for education and training institutes to modify their holidays and medium of instruction for particular racial groups. Clause 20(2) makes this clear.</p> <p>This provision is similar to that for educational establishments under Clause 26(2).</p>

Clause No	Subject	Explanatory note
21(3)	Discrimination by employment agency in cases where employer can lawfully refuse employment	<p>In general, it is unlawful for employment agencies to discriminate in the provision of their services. However, it should not be improper for them not to offer service to persons who are not qualified for the job by reason of their race, such as jobs for which race is a genuine occupational qualification as stipulated under Clause 11.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
22(3)	Exception for genuine occupational qualification of workers remunerated on commission	<p>This is an application of Clause 11 in the context of commission agents.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
23	Employment, authorisation and qualification for the purpose of an organised religion in compliance with its religious doctrine or to avoid offending the religious susceptibilities common to its followers	<p>This is to uphold the freedom of religion, especially in cases where the majority of followers belongs to a particular race or group of races.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
* 26(2)	No mandatory requirement for modification of arrangement for holidays or medium of instruction in educational establishments	<p>Government firmly upholds the right of children to education, irrespective of their race or ethnic origin. All children in Hong Kong have the right to nine years of free and universal basic education. However, it is unlikely to be reasonably practicable for the schools to modify their arrangements regarding holidays or medium of instruction in order to cater for students of any racial group. For reference, in a decision of the European Court of Human Rights where French-speaking residents in the Dutch-speaking part of Belgium wanted their children to be educated in French, it was held that the right to education does not include a right to be taught in the language of the parents, nor a right of access to a particular school. Clause 26(2) makes it clear that such modification is not required.</p>
28(3)	Exception on disposal of premises by owner occupiers	<p>This permits a person who owns and wholly occupies the premises to freely choose whom he wants to sell the property to, so long as he does not go through an estate agent or advertise the sale.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
29(2)	Exception on disposal of premises in the context of withholding licence or consent for assignment or sub-letting	<p>In general, the Bill makes unlawful the withholding of licence or consent for assignment or sub-letting on the ground of race. However, in recognition of people's freedom of choice to determine who may enter or live in their homes, this Clause permits a landlord to choose his tenant by reference to race if the landlord or his near relative lives in the flat and will have to share facilities, such as the kitchen and washroom, with the tenant. This does not apply if neither the landlord nor his near relative lives in the flat concerned, or if the premises are normally rented to more than two households or to more than six persons in addition to the landlord's household or that of his near relative.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
30	Exception for letting and assignment of small dwelling	<p>This is an application of Clause 29(2) in the context of letting and assignment of premises. It permits a landlord in similar circumstances to choose his tenant by reference to race.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
31	Exception for voluntary bodies	<p>This is to safeguard the right to freedom of association by people. Hence, we propose that voluntary bodies should be free to determine its membership even if it is done by reference to race.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
* 32	Exception for cemeteries, crematoria and columbaria	<p>This is to recognize existing arrangements in Hong Kong where a cemetery or part of it may be allocated to persons of a particular race or religion.</p>
33	Exception for foster care and similar arrangement	<p>This relates to taking into homes of persons requiring a special degree of care and attention. We believe it reasonable that people should have freedom of choice in deciding whom they want to enter and live in their homes.</p> <p>The UK Race Relations Act 1976 contains similar provisions.</p>
* 34(2)	Exception in respect of nomination, selection, election and appointment to public bodies	<p>The exceptions are confined to public offices whose holders must not have the right of abode in a foreign country and meet other requirements as stipulated in the Basic Law.</p> <p>The UK Race Relations Act 1976 also contains exceptions for certain political offices.</p>

Clause No	Subject	Explanatory note
37	Exception for clubs established for the benefit of particular racial group defined otherwise than by colour	<p>This is to protect the right to freedom of association. Hence, for example, the Jewish Club will not be compelled to accept members of another race.</p> <p>The UK Race Relations Act 1976 contains similar provisions.</p>
45(2)	Exception for fair reports and acts done in good faith in public interest or for other justifiable causes	<p>This Clause clarifies the scope of application for the provision against vilification. Thus, in the interest of fairness and protection of freedom of expression, a fair report on an activity in public, the distribution of a publication which is subject to a defence of absolute privilege in proceedings for defamation or an activity reasonably done in good faith for academic, artistic, scientific or research purposes or other purposes in the public interest will not be inadvertently caught by the provision against vilification on the ground of race.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
49	Exception for special measures	<p>In the context of this provision, special measures refer to those acts and activities which are reasonably intended to promote equal opportunities or for the benefits of persons of particular race groups. It will be obviously against the spirit of the Bill if such activities were made unlawful solely because the benefits are targetted at particular less privileged racial groups to the exclusion of others. This proposal is also in line with Article 1(4) of ICERD.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
50	Exception for charities	<p>This is proposed for similar consideration as that of Clause 49. We believe that charitable benefactors should have freedom to choose where the benefits of their contribution should go to.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
51	Exception for provision of training targetted at minorities	<p>This is proposed for clarity, for similar consideration as that of Clause 49.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>

Clause No	Subject	Explanatory note
52	Exception for provision by employers and trade unions etc of access to training targetted at minorities	<p>This is an application of Clause 51 in the context of access to training provided by employers and trade unions etc.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
* 54	Exception for laws concerning nationality, citizenship, resident status or naturalisation	<p>This is for avoidance of doubt. Article 1(3) of ICERD specifically excludes legal provisions of States Parties concerning nationality, citizenship or naturalisation from the ambit of the Convention.</p>
55	Exception for immigration legislation	<p>This follows the principle in Article 1(2) of ICERD which states 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”.</p> <p>Existing anti-discrimination legislation in Hong Kong and the Hong Kong Bill of Rights contain similar provisions.</p>

Clause No	Subject	Explanatory note
56	Exception for acts done under statutory authority	<p>The Bill is a piece of ordinary legislation and does not purport to interfere with the operation of other statute.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
57	Exception for application to New Territories land under the New Territories Ordinance and the New Territories Leases (Extension) Ordinance	<p>This is to preserve the existing regulatory scheme on New Territories land, taking account of Basic Law provisions on New Territories matters, namely Articles 40 and 122.</p> <p>Existing anti-discrimination legislation in Hong Kong contains similar provisions.</p>
* 58	Exception for use, or failure to use, particular languages in regard to provision of goods, services and facilities, etc	<p>We appreciate the difficulties which are at times faced by some members of the ethnic minorities who do not use Chinese. However, language is not a ground of race. We also recognise that it would not be practicable for service providers to conduct their businesses in all languages or to provide translation into all different languages.</p>

Clause No	Subject	Explanatory note
59 & Schedule 5	Exception for portable comprehensive social security assistance scheme	<p>At present, the portable comprehensive social security assistance scheme permits recipients to take up permanent residence in specific provinces in the Mainland under prescribed conditions. We do not propose to subject such a scheme to the Bill.</p> <p>Existing anti-discrimination legislation in Hong Kong also provides for a mechanism of specifying matters not affected by that law by subsidiary legislation.</p>

* denotes new provisions neither found in existing anti-discrimination laws in Hong Kong nor in other common law jurisdictions.

Home Affairs Bureau
November 2006

IMPLICATIONS OF THE PROPOSAL

Financial and civil service implications

The proposed Bill is intended to apply 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 extra costs to be incurred to ensure compliance with the Bill, if any, are not expected to be significant and will be absorbed by respective bureaux/departments.

2. We intend to designate the Equal Opportunities Commission (the Commission) as the statutory agency to monitor, promote and enforce the eventual Ordinance. We will absorb, from within the operating expenditure envelope of the Secretary for Home Affairs, the resources which the Commission would require for the promotion of racial harmony and for handling complaints against racial discrimination. In addition, the Police may also require additional resources to carry out the investigation and prosecution work relating to criminal offences under the Bill, although this cannot be quantified at this stage. We will seek additional resources for the Police, if necessary, according to the established resource allocation procedure.

Economic implications

3. Unlike the existing non-legislative approach, the proposed legislation against racial discrimination might introduce a certain degree of rigidity to business operations in the economy. However, the additional compliance cost in overall terms thus entailed, though difficult to quantify, is unlikely to be large, given that ethnic minorities constitute only a very small proportion of the local population, and that exception provisions would be in place to cater for the legitimate needs of the business community. During the public consultation, none of our business sector respondents identified specific areas where significant additional costs could reasonably be anticipated.

Sustainability implications

4. The proposal would help foster a culture of mutual respect and tolerance in our society, and fulfil our international obligations of protecting the rights of ethnic minorities. It is conducive to the sustainability principle of fostering an equitable and progressive society.

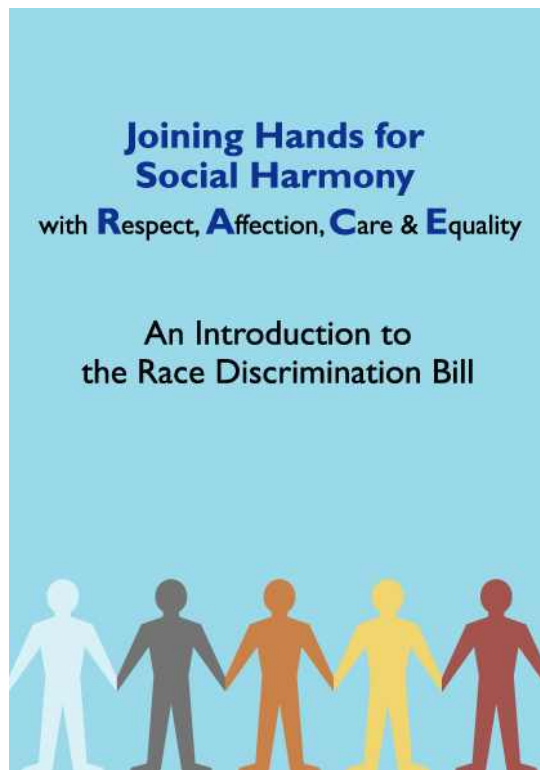
Environmental implications

5. The proposal has no environmental implications.

Home Affairs Bureau

29 November 2006

**”Joining Hands for Social Harmony
with Respect, Affection, Care & Equality
An Introduction to
the Race Discrimination Bill” Booklet:**



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