Race Discrimination Bill

Executive Summary

of the Submission of the Hong Kong Bar Association

- The definition of discrimination on the ground of descent in Clause 8(1)(c) of the Bill is unduly restrictive and not in accordance with the inclusive understanding of this aspect of racial discrimination adopted by the UN Committee on the Elimination of Racial Discrimination.

- In not seeking to outlaw at the same time as racial discrimination, discrimination on the ground of immigrant status or former immigrant status, the Bill may have been unduly narrow. The same observation applies to the proposed exclusion in Clause 8(2) and (3)(b), (c) and (d).

- Clause 3 of the Bill, in limiting the scope of application of the legislation to the Government, differs from similar provisions in the existing anti-discrimination legislations in Hong Kong and similar provisions in all the anti-racial discrimination legislation the HKBA has considered when preparing this submission. This clause runs a serious risk of being understood as providing for an exclusion of a substantial portion of Government action

from the purview of the legislation and thus the statutory right to seek redress against racial discrimination perpetrated by Government and may be inconsistent with the International Convention for the Elimination of All Forms of Racial Discrimination. In line with the other anti-discrimination legislation in the HKSAR, it should be re-drafted to state that: "This Ordinance binds the Government".

- Clause 4(1)(b) of the Bill seeks to prescribe in respect of indirect discrimination a test of "disproportionate impact". There is English jurisprudence on the meaning and application of that test, including the limb of "justifiability". However, clause 4(2) to (5) of the Bill seeks to elaborate the limb of "justifiability" by providing for two alternative tests. The second alternative, which turns on the "reasonable practicability" of the alleged discriminator in not applying the impugned requirement or condition, does not appear to be in line with the English jurisprudence. This "reasonable practicability" test runs the serious risk of amounting to a less stringent test than the proportionality test in the first alternative so that an alleged discriminator may successfully justify an impugned requirement or condition by focussing on what is at best an aspect involved in the objective balancing approach of the English jurisprudence before the courts without the courts carrying out the balancing exercise. Clause 4(2) to (5) should be deleted.

- The exception for small companies and employers in clause 10(3) and (8) of the Bill is unwarranted.

- Clause 16 of the Bill, which defines the extent to which the legislation applies to employment in relation to Hong Kong, is less generous in scope than the corresponding provisions in England.

- Clauses 20(2) and 26(2) of the Bill, in seeking to stipulate that the enacted legislation is not to be construed as requiring a person concerned with the provision of vocational training or education to modify for persons of any racial group its arrangements regarding holidays or medium of instruction or to make different arrangements on those matters for persons of any racial group, reveal confused reasoning.

- As one of two criteria, the expression "club" for the purposes of the Bill requires that the association must "sell or supplies liquor for consumption on its premises". The HKBA does not understand the significance of the sale or supply of liquor for consumption on premises to the definition of social, literary, cultural, political, sporting, athletic, or other lawful clubs or associations.

- Clause 55 of the Bill, which stipulates that the legislation will not affect any immigration legislation or its application as regards a person not having the right to enter and remain in Hong Kong, is opposed.

- Clause 56 of the Bill, which seeks to except acts done for the purpose of complying with a requirement of an existing statutory provision from being rendered unlawful by operation of the enacted legislation, is opposed.

- The Administration should explain why the amendments to the Race Relations Act 1975 [Eng] in 2003 pursuant to the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626) to confer greater protection against discrimination on grounds of race or ethnic or national origins are not incorporated in the Bill.

Hong Kong Bar Association

Dated 26th March 2007.

Race Discrimination Bill

Submission of the Hong Kong Bar Association

1. The Hong Kong Bar Association ("HKBA") welcomes the gazettal of the Race Discrimination Bill ("Bill"). Having commented on a consultation paper on this topic in March 2005, the HKBA considers that the Bill is long overdue.

2. The following are HKBA's comments on certain key elements of the Bill. Should the Bills Committee requires further elaboration, the HKBA will be obliged to do so.

General Remark

3. The HKBA notes that the Bill is largely drawn from the Race Relations Act 1976 of the United Kingdom ("RRA"). In understanding and scrutinizing the Bill, the HKBA has referred to not only the RRA, but also the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and human rights legislations of other common law jurisdictions such as Australia, Canada and New Zealand. Without seeking to diminish the

reference value of the other jurisdictions' similar legislations, the HKBA considers that the fundamental yardstick to measure the merits of the Bill to be the CERD, which sets out the international obligations of the HKSAR to eliminate racial discrimination.

Race and Racial Group

4. Clause 2(2) of the Bill provides that references therein to "race", "on the ground of race" and "racial group" are to be construed in accordance with the provisions in clause 8.

5. Clause 8 of the Bill is the principal provision in the Bill determining its scope of protection. The HKBA notes that the definitions of "race" and "on the ground of race" follow Art 1(1) of CERD. The HKBA also notes that the definition of "racial group" follows s 3(1) of the RRA whilst clauses 8(4) and (5) follow s 3(2) and (4) of the RRA respectively.

6. Clause 8(1)(c) seeks to define discrimination on the ground of descent. The HKBA finds this definition to be unduly restrictive and not in accordance with the inclusive understanding of this aspect of racial discrimination adopted by

the Committee on the Elimination of Racial Discrimination, the United Nations treaty body established under the CERD to oversee its implementation by State Parties ("CERD Committee"). See CERD Committee, *General Recommendation XXIX* (Article 1, paragraph 1 (Descent)) (61st session, 2002), preambular paragraph 7 and CERD Committee, *Summary Record of the 1531st Meeting* (9 August 2002) (CERD/C/SR.1531). Accordingly, the HKBA questions the proposal in clause 8(2) and (3)(a) to exclude from the operation of the legislation an act done on the ground that a person is or is not an indigenous inhabitant of the New Territories or is or is not a person who was in 1898 a resident of an established village in Hong Kong or a person descended through the male line from such person. The HKBA considers that contrary to the Administration's assertion, the proposed exclusion is not necessary merely for the avoidance of doubt. The Administration's recitation of the definition of "race" under CERD, Article 1 in the explanatory memorandum to the Bill simply misses this issue.

7. The HKBA, in its comments to the 2005 consultation paper, observed that while discrimination against new arrivals from Mainland China may not qualify as racial discrimination under Art 1 of the CERD, it is of the view that this does not mean that the problem of discrimination of new arrivals from Mainland China is not to be tackled by legislation and calls upon the

Administration to introduce draft legislation outlawing discrimination on the ground of immigrant status or former immigrant status.

8. The HKBA now notes the contents of CERD Committee, *General Recommendation XXX* (Discrimination Against Non-citizens) (1 October 2004). In particular, preambular paragraphs 2 and 3 of the General Recommendation recall the Durban Declaration which recognizes that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and record the Committee's observation that groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory. Further, in the substantive paragraphs, the Committee considers that Art 1(2) of the CERD, which provides for the possibility of differentiating between citizens and non-citizens –

"must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on

Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights";

and that –

"Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory".

The General Recommendation proceeds to recommend that the State Parties to the CERD, as appropriate to their specific circumstances, should adopt, inter alia, measures to –

"7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;

9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;

24. Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment;

25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies,

including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;

27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;

28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;

30. Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party;

31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;

32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;

33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;

34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;

35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;

38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks".

9. The HKBA finds that the Bill does not propose to outlaw at the same time as racial discrimination, discrimination on the ground of immigrant status or former immigrant status. The HKBA observes in this connection that in light of the CERD Committee's General Recommendation XXX quoted above, the Administration's approach towards the HKSAR's international obligations may have been unduly narrow. The same observation applies to the proposed exclusion in Clause 8(2) and (3)(b), (c) and (d).

10. The HKBA further observes that the Racial Discrimination Act 1975 (Cth) of Australia contains in s 5 thereof provisions for the additional operation of that Act extending to discrimination on the ground of immigrant status in the following terms –

'5. Without prejudice to its effect apart from this section, this Act also has, by force of this section, the effect it would have if –

(a) there were added at the end of sections 11 and 13 the words "or by reason that that other person or any relative or associate of that other person is or has been an immigrant";

(b) there were added at the end of subsections 12(1) and 15(1) the words "or by reason that that second person or any relative or associate of that second person is or has been an immigrant";

(c) there were inserted in subsection 14(1), before the words "is invalid", the words "or by reason that that person is or has been an immigrant";

(d) there were added at the end of subsection 14(2) the words "or by reason that that other person is or has been an immigrant";

(e) there were added at the end of subsection 15(2) the words "or by reason that the person so seeking employment or any relative or associate of that person is or has been an immigrant" and

(f) there were inserted in section 18, after the word "person", the words "or by reason that a person is or has been an immigrant".'

Therefore, there appears to be little difficulty in terms of drafting to provide for such protection in the legislation.

Application to the Government

11. Clause 3 of the Bill makes provision for the application of the legislation to the Government. While the HKBA acknowledges that the clause is based upon the RRA s 75, the HKBA finds this clause most unusually drafted, not only because it differs from the similar provisions in the existing anti-discrimination legislation in Hong Kong (namely, the Sex Discrimination Ordinance (Cap 480) ("SDO") s 3, the Disability Discrimination Ordinance (Cap 487) ("DDO") s 5 and the Family Status Discrimination Ordinance (Cap 527) ("FSDO") s 3, which all provide that the respective Ordinance "binds the Government"), but also it differs from similar clauses in all the anti-racial discrimination legislations the HKBA has considered when preparing this submission. For example, the Race Relations Act 1975 (Cth) of Australia provides in s 6 that –

"6. This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of

Norfolk Island, but nothing in this Act renders the Crown liable to be prosecuted for an offence."

The Anti-discrimination Act 1977 of New South Wales provides in s 5 that –

"5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities."

The Canadian Human Rights Act (RS 1985, c H-6) s 66 provides that that Act –

"is binding on Her Majesty in right of Canada, except in matters respecting the Yukon Government or the Government of the Northwest Territories or Nunavut"

(in which separately enacted Human Rights Acts provide the corresponding protection). The Human Rights Code of Ontario, Canada provides in s 47 that it –

"binds the Crown and every agency of the Crown".

The Human Rights Act 1993 of New Zealand provides in s 3 that –

"This Act shall bind the Crown."

12. Clause 3, as presently drafted, runs, in the opinion of the HKBA, a serious risk of being understood as providing for an exclusion of a substantial portion of Government action from the purview of the legislation and thus the statutory right to seek redress against racial discrimination perpetrated by Government. This is because Government action and acts done under statutory powers by the Government are very often acts of a kind which no private person can perform. Typical examples are licensing, taxation, land grants, and correctional services.

13. The HKBA also questions whether it is intended that clause 3, as presently drafted, would exclude the application of the legislation to acts performed by the Judiciary.

14. Without being exhaustive, the HKBA observes that such a formulation is inconsistent with –

(a) Art 2(1)(a) of the CERD (which requires State Parties to undertake to engage in no act or practice of racial discrimination against persons, groups of

persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation);

(b) Art 2(1)(d) of the CERD (which requires State Parties to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization); and

(c) Art 6 of the CERD (which requires State Parties to assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to the CERD, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination).

15. The HKBA is of the view that the Administration cannot possibly justify the present drafting of clause 3 by reference to the RRA s 75. This is because notwithstanding the RRA s 75, governmental and public authorities in the United Kingdom are subject to not only the RRA ss 19B to 19F (which prohibit them, save as to certain exceptions, from doing any act which constitutes racial

discrimination in carrying out any of their functions) but also to an enforceable general statutory duty to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups pursuant to the RRA ss 71 to 71E.

16. Further, the Commission for Racial Equality in the United Kingdom is empowered to ensure compliance of this general statutory duty by the authorities concerned. The Bill regretably does not contain any such provisions. Clause 3, as presently drafted, seems to go the other way to provide for exclusion and consequential immunity, which breeds impunity.

17. Lastly, the HKBA makes the obvious point that the present drafting of clause 3 is materially different from the corresponding provision in legislation *pari materia* with the Bill, namely the SDO, the DDO and the FSDO. The HKBA is not aware of any legal policy reason for such substantive deviation.

18. The HKBA therefore recommends that clause 3 be re-drafted to be in line with the other anti-discrimination legislation in the HKSAR to state that –

"3. This Ordinance binds the Government."

What Amounts to Discrimination

19. In short, clause 4 of the Bill is the principal provision of the Bill defining racial discrimination. Clause 4(1)(a) defines direct discrimination, whereas clause 4(1)(b) (as elaborated in clause 4(2), (3), (4) and (5)) defines indirect discrimination. Together, these provisions seek to outlaw all such "distinction, exclusion, restriction or preference" that has, respectively, the "purpose" and "effect" of unequal treatment in the enjoyment or exercise of human rights by individuals on the ground of "race, colour, descent or national or ethnic origin" pursuant to Arts 1(1) and 2 of the CERD.

Direct Discrimination

20. The HKBA notes that clause 4(1) of the Bill is based upon the RRA s 1(1). The same cannot be said of clause 4(2) to (5), even though they are connected to clause 4(1)(b), which defines indirect discrimination.

Indirect Discrimination

21. Clause 4(1)(b) seeks to prescribe in respect of indirect discrimination a test of

"disproportionate impact"; see Coker & Anor v Lord Chancellor & Anor [2002] IRLR 80, CA (Eng). There is extensive jurisprudence in England on the meaning of each of the three limbs of this test. See *Halsbury's Laws of England* (4th Ed) Vol 13 (2000 Reissue) para 400. In respect of the limb of "justifiability", the House of Lords has approved in Webb v EMO Air Cargo (UK) Ltd [1993] 1 WLR 149 the formulation of Balcombe LJ in Hampson v Department of Education and Science [1989] ICR 179 at 191 in the following terms –

'In my judgment, "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.'

The HKSAR courts administering the enacted legislation will be guided by such jurisprudence. They will also be guided by local jurisprudence under the Hong Kong Bill of Rights on how a departure from identical treatment is to be justified:

"*[The] starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of*

treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and three, that such departure is proportionate to such need" (R v Man Wai Keung (No 2) [1992] 2 HKCLR 207 at 217 (per Bokhary JA)).

22. However, the Administration proposes in clause 4(2) to (5) to elaborate the limb of "justifiability" by providing for two alternative tests. The first alternative prescribes a proportionality test comparable to the objective balancing approach in the English jurisprudence. However, the second alternative, which turns on the "reasonable practicability" of the alleged discriminator in not applying the impugned requirement or condition, does not appear to be in line with the English jurisprudence. Having considered its terms and clause 4(3), (4) and (5) (which specify particular circumstances to take into account in determining whether it is reasonably practicable for the alleged discriminator not to apply the impugned requirement or condition), the HKBA is seriously concerned as to whether this second alternative amounts to a less stringent test than the first alternative so that an alleged discriminator may successfully justify an impugned requirement or condition by focussing on what is at best an aspect involved in the objective balancing approach of the English jurisprudence before the courts without the courts carrying out the balancing exercise. See Allonby v Accrington & Rosendale College [2001]

IRLR 364, CA (Eng) per Sedley LJ at [23]. [24] (indicating that insofar as "reasonable practicability" is to be equated with "reasonable needs" in achieving a legitimate aid, such a consideration would already have been included in the proportionality test to be carried out pursuant to the objective balancing approach). This second alternative thus favours the alleged discriminator. The HKBA wonders whether this is the true intent of the Administration, and if so, what are the justifications (if any).

23. The HKBA appreciates that a "reasonable practicable" test is widely adopted in industrial safety regulations. However, in that context, the test is to operate on the physical practicability of certain means and methods in carrying out a work process in order to ensure safety. It is doubtful whether such an approach is helpful at all in the context of discrimination since it is generally practicable not to apply certain discriminatory criteria.

24. The HKBA therefore recommends that clause 4(2) to (5) be deleted.

Exceptions

25. The Bill contains a number of exceptions, some of which are similar to

provisions in the RRA and some of which appear to be specially drafted and have no similar provision in the RRA or anti-discrimination legislations elsewhere. The HKBA observes that while some exceptions may have been proposed for legal policy reasons or for the avoidance of doubt, it is necessary to scrutinize the terms of and the societal realities associated with each of the exceptions with care so that the enactment of an exception does not in effect deny from judicial examination a related requirement or condition on the question of disproportionate impact against a particular racial group and hence indirect discrimination on the ground of race.

Discrimination by Employers

26. Clause 10(3) and (8) of the Bill together seek to provide for an exception for small companies and employers from engaging in racial discrimination in employment related matters, for the duration of three years after the coming into operation of the provisions of the Bill. The HKBA disagreed with this proposal when it was raised in the 2005 consultation paper and considered that the message against racial discrimination was so well publicized in Hong Kong that an exception for small companies and employers was unwarranted.

27. Without prejudice to the foregoing observations, the HKBA finds that it is unclear whether domestic helpers are to be counted as employees of small employers for the purpose of the temporary exception under clause 10(3) of the Bill. Similar problems have arisen from similar drafting in the SDO and the DDO.

28. The HKBA maintains its disagreement with the proposal now embodied under clause 10(3) of the Bill. The HKBA is further concerned that clause 10(10) creates the impression that the Administration intends that the small employer exception will be prolonged, enlarged or extended so that a mechanism has been built into the Bill. Empowering in clause 10(10)(b) the Chief Executive in Council to substitute another anniversary for the expiry of this exception may allow the prolonged operation of this exception to the detriment of those intended to be protected by the enacted legislation. The HKBA finds clause 10(10) to be highly undesirable.

29. The HKBA notes that the corresponding provisions of clauses 10, 11 and 12 of the Bill in England, namely the RRA ss 4, 5 and 6, were amended in 2003 pursuant to the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626) to confer greater protection against discrimination on grounds of race or ethnic or national origins. The Administration should consider (or

re-consider) and explain why these provisions are not adopted in the Bill.

Meaning of Employment at Establishment in Hong Kong

30. Clause 16 of the Bill defines the extent to which the enacted legislation applies to employment in relation to Hong Kong and excludes employment where the employee does his or her work wholly or mainly outside Hong Kong. The corresponding provision in the RRA is different and more generous. Section 8(1) and (1A) of the RRA (which were introduced by way of amendments in 2003) provides that employment is to be regarded at an establishment in Great Britain for the purposes of the RRA –

"if the employee –

(a) does his work wholly or partly in Great Britain; or

(b) does his work wholly outside Great Britain and subsection (1A) applies.

(1A) This subsection applies if, in a case involving discrimination on grounds of race or ethnic or national origin, or harassment -

(a) the employer has a place of business at an establishment in Great Britain;

(b) the work is done for the purposes of business carried on at that establishment; and

(c) the employee is ordinarily resident in Great Britain –

(i) at the time when he applies for or is offered the employment, or

(ii) at any time during the course of the employment."

The HKBA considers that the Administration should consider (or re-consider) and explain why the latest provisions in the RRA are not adopted in the Bill, bearing in mind the increasing number of HKSAR permanent residents being stationed outside Hong Kong by their employers.

31. Clause 16(2) has no equivalent provision in the RRA. It is also not drafted to make plain in its terms the legislative intent. The HKBA is of the view that it should be re-drafted to indicate whether employment on a Hong Kong registered ship, aircraft or dynamically supported craft is or is not subject to protection of the enacted legislation. By way of example, the protection under the Employees' Compensation Ordinance (Cap 282) is specifically extended to

employees on board a Hong Kong registered ship by virtue of s 29 thereof regardless of where the ship may be. This disparity seems inexplicable.

Discrimination by Partnerships

32. Clause 17(1) of the Bill seeks to outlaw racial discrimination by or in relation to partnerships but limits its protection to a firm consisting of not less than six partners. The HKBA notes that the same limitation was at first enacted in RRA s 10(1) but that was removed in 2003 in relation to discrimination on grounds of race or ethnic or national origins pursuant to the Race Relations Act 1976 (Amendment) Regulations 2003. The HKBA notes that clause 17(7) empowers the Chief Executive in Council to remove this limitation and considers that the Administration should indicate the circumstances in which and the process by which it proposes to exercise this ameliorative power.

Discrimination by Trade Unions etc

33. Clause 18(5) of the Bill seeks to grandfather from the operation of the enacted legislation organizations of workers, organizations of employers and

organizations of both workers and employers established before its enactment and with the main object being to enable the benefits of membership to be enjoyed by persons of a particular racial group defined otherwise than by reference to colour. The Bar notes that this provision, if enacted, will reduce or even remove the effectiveness of clause 18 in respect of a not insignificant portion of organizations the enacted legislation is supposed to regulate. The Administration should explain and justify this proposal bearing in mind its commitment to outlaw racial discrimination.

Discrimination by Employment Agencies

34. Clause 21(4) of the Bill intends to afford a defence to an employment agency which acts in reliance on a statement by the employer to the effect that the employer could lawfully refuse to offer the employment to the person in question. This is predicated upon a correct and reliable understanding of the law on the part of the employer, which is doubtful. Further, the lack of a requirement under clause 21(4)(a) of a statement in writing (or evidenced in writing) is likely to lead to difficulty when it comes to enforcement.

Discrimination by Persons Concerned with Provision of Vocational Training

35. Clause 20(2) of the Bill seeks to stipulate that the enacted legislation is not to be construed as requiring a person concerned with the provision of vocational training to modify for persons of any racial group its arrangements regarding holidays or medium of instruction or to make different arrangements on those matters for persons of any racial group. This provision has no equivalent in the RRA.

36. The HKBA questions whether it is necessary to have this provision to make clear, as the Administration contends, that the enactment of legislation to outlaw racial discrimination does not entail affirmative action for particular racial groups. In addition, insofar as the Administration puts forward as justification the proposition that it is not reasonably practicable for persons concerned with the provisions of training to make the above arrangements, the HKBA expresses its concern that this suggests a very different argument, namely, that the failure to make the arrangements might be discriminatory on racial grounds but that such failure is defensible.

37. If the existing situation is racially discriminatory, then the CERD Art 2(1)(d) mandates a change. If the existing situation stems from governmental policies,

then the CERD Art 2(1)(c) mandates a review. As to whether the failure is defensible, the HKBA expresses its further concern that the argument that it is not reasonably practicable for the arrangements to be made is a less than satisfactory justification and does not meet a properly formulated proportionality test.

Discrimination by Educational Establishments

38. Clause 26(2) of the Bill seeks to stipulate that the enacted legislation is not to be construed as requiring a responsible body for an education establishment to modify for persons of any racial group its arrangements regarding holidays or medium of instruction or to make different arrangements on those matters for persons of any racial group. This provision has no equivalent in the RRA. The HKBA questions whether it is necessary to have this provision to make clear, as the Administration contends, that the enactment of legislation to outlaw racial discrimination does not entail affirmative action for particular racial groups. In addition, insofar as the Administration puts forward as justification the proposition that it is not reasonably practicable for educational establishments to make the above arrangements, the HKBA expresses its concern that this suggests a very different argument, namely that the failure to make the

arrangements might be discriminatory on racial grounds but that such failure is defensible.

39. Again, if the existing situation is racially discriminatory, then the CERD Art 2(1)(d) mandates a change. If the existing situation stems from governmental policies, then the CERD Art 2(1)(c) mandates a review. As to whether the failure is defensible, the HKBA expresses its further concern that the argument that it is not reasonably practicable for the arrangements to be made is a less than satisfactory justification and does not meet a properly formulated proportionality test.

Discrimination in Disposal or Management of Premises

40. Clause 28(3) of the Bill seeks to exclude from the operation of the enacted legislation the disposal or management of premises by their owner-occupier unless the services of an estate agent is used for such purposes or an advertisement is published in connection with the disposal. Its equivalent provision of the RRA, namely s 21, was amended in 2003 to remove the exclusion in relation to discrimination on grounds of race or ethnic or national origins. The HKBA considers that the Administration should explain why the

2003 amendment has not been adopted.

41. Clause 30 of the Bill provides for the exclusion from the operation of enacted legislation the disposal or management of "small dwellings". Its equivalent provision of the RRA, namely s 22, was amended in 2003 to remove the exclusion in relation to discrimination on grounds of race or ethnic or national origins. The HKBA considers that the Administration should explain why the 2003 amendment has not been adopted.

Discrimination by Clubs

42. Clause 2(1) of the Bill, in defining the expression "club" for the purposes of the Bill, requires as one of two criteria that the association must "sell or supplies liquor for consumption on its premises". The HKBA does not understand the significance of the sale or supply of liquor for consumption on premises to the definition of social, literary, cultural, political, sporting, athletic, or other lawful clubs or associations. Such a definition effectively excludes clubs or associations catering for a membership that, for example, share the Muslim faith and cannot, in the HKBA's view, be what is intended.

Charities

43. Clause 50 of the Bill, which makes provision for the exception of certain provisions in charitable instruments from the operation of the enacted legislation, has its equivalent in the RRA s 34. The HKBA notes that the RRA s 34 was amended in 2003 to remove the exception in relation to acts done in order to give effect to a provision in a chartable instrument that discriminates on grounds of race or ethnic or national origins. The Administration should explain why it does not adopt the amendment in the Bill.

Immigration Legislation

44. Clause 55 of the Bill seeks to provide that the enacted legislation will not affect any immigration legislation or its application as regards a person not having the right to enter and remain in Hong Kong. The Administration seeks to support this clause by referring to the CERD Art 1(2), which provides that the CERD does not apply to "distinctions, exclusions, restrictions or preferences made ... between citizens and non-citizens".

45. When it was proposed in the 2005 consultation paper that immigration legislation should not be affected by any future legislation outlawing racial discrimination, the HKBA expressed objection. The HKBA expressed the view that it could not see how such a proposal, which was clearly intended to protect immigration policies and practices from being challenged for their racially discriminatory effect, would be consistent with the Administration's policy statement in the consultation paper, namely (a) To eliminate and combat all forms of racial discrimination; (b) To promote racial equality and communal harmony; and (c) To encourage ethnic minorities settled in Hong Kong to integrate into the wider society, while retaining their cultural identity. The HKBA further expressed the view that it could not see how such a proposal would be consistent with Art 41 of the Basic Law of the HKSAR, which provides that "persons in the [HKSAR] other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter" and Art 31 of the same, namely the right to travel. In so far as it is suggested that this proposal is to provide the "law" to delimit the rights and freedoms that such persons shall enjoy, it must be rejected as unreasonable. The HKBA furthermore reiterated that migrant workers are entitled to protection against racial discrimination by public authorities or private persons as much as other members of the same ethnic group permanently settled in Hong Kong. The HKBA maintains these views.

46. The HKBA makes the following additional observations. Insofar as the Administration seeks to justify the enactment of clause 55 by reference to the CERD Art 1(2), such an argument is, in the opinion of the HKBA, contrary to the CERD Committee's General Recommendation XXX (which is noted above).

Acts Done under Statutory Authority

47. Clause 56 of the Bill seeks to except acts done for the purpose of complying with a requirement of an existing statutory provision from being rendered unlawful by operation of the enacted legislation. Clause 2(5) and (6) elaborates what is to be meant by "an existing statutory provision". When this proposal was put forward in the 2005 consultation paper, the HKBA expressed the view that this proposal was extraordinary and that eliminating the exception cannot possibly give rise to any objection, such as giving the provisions in the Bill prevailing effect over other statutory provisions. The Administration should need no reminder that all legislations adopted or enacted to be laws of the HKSAR must comply with the provisions of the Basic Law of the HKSAR, which provides in Art 25 that all Hong Kong residents shall be equal before the

law. The HKBA maintains these views and adds that the Administration should need no reminder of the CERD Art 2(1)(c), which obliges State Parties to the CERD to eliminate discriminatory laws and not to provide exceptions in anti-discrimination legislation to preserve them.

Concluding Observations

48. The HKBA concludes its commentary on the Bill with an expression of concern. The Bill contains an extensive array of exclusion and exceptions making many governmental and private acts not subject to its operation. Some such exclusion and exceptions may even serve to legitimatize or preserve existing acts, practices and policies that may be racially discriminatory. The Bill, if enacted, might even be inconsistent with or undermine the obligations of the HKSAR under the CERD, Arts 2(1)(a), (b), (c) and (d), 5 and 6. It would be most unfortunate if the first litigation involving the enacted legislation were to be a constitutional challenge on its validity by reference to the equality provisions of the Basic Law and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The HKBA cannot at present rule out this possibility.

49. In the event that the Administration does not review the Bill in light of the above comments and other comments of other NGOs, it may be necessary to explore with the CERD Committee the possibility of invoking its procedures for early warning and/or urgent measures to prevent or limit the anticipated violations of the CERD.

Hong Kong Bar Association

Dated 26th March 2007.