

RACE DISCRIMINATION ORDINANCE

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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 29 OF 2008

A circular stamp containing the letters "L.S." in a serif font.

Donald TSANG
Chief Executive
17 July 2008

An Ordinance to render discrimination, harassment and vilification, on the ground of race, unlawful; to prohibit serious vilification of persons on that ground; to extend the jurisdiction of the Equal Opportunities Commission to include such unlawful acts; to confer on the Commission the function of eliminating such discrimination, harassment and vilification and promoting equality and harmony between people of different races; to amend certain definitions, and the provisions on discrimination against contract workers, in existing anti-discrimination legislation as well as the provision on unlawful sexual harassment by creating a hostile or intimidating environment in the Sex Discrimination Ordinance for alignment with corresponding provisions in this Ordinance; to make other consequential and related amendments to enactments; and for related purposes.

[]

Enacted by the Legislative Council.

PART 1**INTERPRETATION, APPLICATION, ETC.****1. Short title and commencement**

- (1) This Ordinance may be cited as the Race Discrimination Ordinance.
- (2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs by notice published in the Gazette.

2. Interpretation

- (1) In this Ordinance, unless the context otherwise requires—
“access” (獲得、享用) means access as construed in accordance with section 53;
“act” (作為) includes a deliberate omission;

“advertisement” (廣告) includes every form of advertisement, whether to the public or not, and whether—

- (a) in a newspaper or other publication;
- (b) by television or radio;
- (c) by display of notices, signs, labels, showcards or goods;
- (d) by distribution of samples, circulars, catalogues, price lists or other material;
- (e) by exhibition of pictures, models or films; or
- (f) in any other way;

“club” (會社) means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association;

“commencement date” (生效日期), except in section 73, in relation to any provision of this Ordinance, means—

- (a) the date appointed under section 1(2) for that provision to come into operation; or
- (b) if different dates are appointed for the provision to commence for different purposes, the date appointed for that provision to come into operation for the relevant purpose;

“Commission” (平機會) means the Equal Opportunities Commission established under section 63(1) of the Sex Discrimination Ordinance (Cap. 480);

“commission agent” (佣金經紀人) means a commission agent as construed in accordance with section 22;

“committee” (委員會) means a committee established under section 64(2)(a) of the Sex Discrimination Ordinance (Cap. 480);

“committee of management” (管理委員會), in relation to a club, means the group or body of persons (howsoever described) that manages the affairs of the club;

“conciliator” (調解人) means any person engaged by the Commission under section 64(2)(e) of the Sex Discrimination Ordinance (Cap. 480);

“contract worker” (合約工作者) means a contract worker as construed in accordance with section 15;

“discrimination” (歧視) means any discrimination falling within section 4, 5 or 6 and related expressions are to be construed accordingly;

“dispose” (處置), in relation to premises, includes granting a right to occupy the premises, and any reference to acquiring premises are to be construed accordingly;

“dynamically supported craft” (動力承托的航行器) has the same meaning as in the Shipping and Port Control Ordinance (Cap. 313);

“education” (教育) includes any form of training or instruction;

- “educational establishment” (教育機構) means an educational establishment specified in column 2 of Schedule 1;
- “employment” (僱用) means employment under—
- (a) a contract of service or of apprenticeship; or
 - (b) a contract personally to execute any work or labour;
- “employment agency” (職業介紹所) means a person who, for profit or not, provides services for the purpose of—
- (a) finding employment for workers; or
 - (b) supplying employers with workers;
- “enforcement notice” (執行通知) means a notice served under section 71(2);
- “estate agent” (地產代理) has the same meaning as in the Estate Agents Ordinance (Cap. 511);
- “firm” (商號) means a firm within the meaning of the Partnership Ordinance (Cap. 38);
- “formal investigation” (正式調查) means an investigation conducted under section 64;
- “general notice” (一般通告), in relation to a person, means a notice published by the person at a time and in a manner appearing to the person suitable for securing that the notice is seen within a reasonable time by persons likely to be affected by it;
- “genuine occupational qualification” (真正的職業資格) means a genuine occupational qualification as construed in accordance with section 11(2);
- “harass” (騷擾) means to harass within the meaning of section 7(1) or (2);
- “near relative” (近親), in relation to a person, means—
- (a) the person’s spouse;
 - (b) a parent of the person or of the spouse;
 - (c) a child of the person or the spouse of such a child;
 - (d) a brother or sister (whether of full blood or half blood) of the person or of the spouse or the spouse of such a brother or sister;
 - (e) a grandparent of the person or of the spouse; or
 - (f) a grandchild of the person or the spouse of such a grandchild,
- and, in determining the above relationships, children born out of wedlock are to be included, an adopted child is to be regarded as a child of both the natural parents and the adoptive parent or parents and a step child as the child of both the natural parents and any step parent;
- “notice” (通告、通知) means a notice in writing;
- “prescribed” (訂明) means prescribed in rules made under section 82;
- “profession” (專業) includes any vocation or occupation;
- “responsible body” (負責組織), in relation to an educational establishment, means the body specified in column 3 of Schedule 1 opposite to that establishment;

“retirement” (退休) includes retirement (whether voluntary or not) on grounds of age, length of service or incapacity;

“trade” (行業) includes any business;

“training” (訓練) includes any form of education or instruction.

(2) References in this Ordinance to “race”, “on the ground of race” and “racial group” shall be construed in accordance with section 8.

(3) References in this Ordinance to the dismissal of a person from employment or to the expulsion of a person from a position as partner include references—

(a) to the termination of that person’s employment or partnership by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment or partnership is renewed on the same terms;

(b) to the termination of that person’s employment or partnership by any act of that person (including the giving of notice) in circumstances such that that person is entitled to terminate it without notice by reason of the conduct of the employer, or the other partners, as the case may be.

(4) For the purposes of this Ordinance, an enforcement notice or a finding by the District Court becomes final when an appeal against the notice or finding is dismissed, withdrawn or abandoned or when the time for appealing expires without an appeal having been brought; and for this purpose an appeal against an enforcement notice is taken to be dismissed if, notwithstanding that a requirement of the notice is quashed on appeal, a direction is given in respect of it under section 72(3).

(5) Subject to subsection (6), in this Ordinance, “existing statutory provision” (現有法例條文) means a provision of—

(a) an Ordinance enacted before this Ordinance was enacted; or

(b) any subsidiary legislation made—

(i) under an Ordinance enacted before this Ordinance was enacted; and

(ii) before, on or after the enactment of this Ordinance.

(6) Where an Ordinance, enacted after this Ordinance was enacted, re-enacts (with or without modifications) a provision of an Ordinance enacted before this Ordinance was enacted, then that provision as re-enacted is to be treated for the purposes of subsection (5) as if it continued to be contained in an Ordinance enacted before this Ordinance was enacted.

(7) The Secretary for Justice may, by notice published in the Gazette, amend this Ordinance by substituting, for a reference to the commencement date of a provision, the actual calendar date appointed for the commencement of that provision.

3. Application to Government

This Ordinance binds the Government.

PART 2

DISCRIMINATION AND HARASSMENT TO WHICH THIS ORDINANCE APPLIES

4. Racial discrimination

(1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person if—

- (a) on the ground of the race of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons; or
- (b) the discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but—
 - (i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;
 - (ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and
 - (iii) which is to the detriment of the other person because that person cannot comply with it.

(2) For the purposes of subsection (1)(b)(ii), a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective.

(3) It is declared that, for the purposes of this Ordinance, segregating a person from other persons on the ground of the race of that person is treating that person less favourably than the other persons are treated.

5. Discrimination on the ground of race of near relative

In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person (“relevant person”) if, on the ground of the race of a near relative of the relevant person, the discriminator treats the relevant person less favourably than the discriminator treats or would treat another person not having a near relative of the same racial group as the near relative of the relevant person.

6. Discrimination by way of victimization

(1) A person (“the discriminator”) discriminates against another person (“the person victimized”) in any circumstances relevant for the purposes of any provision of this Ordinance if the discriminator treats the person victimized less favourably than in those circumstances the discriminator treats or would treat other persons, and does so—

- (a) by reason that the person victimized or any other person (“the third person”) has—
 - (i) brought proceedings against the discriminator or any other person under this Ordinance;
 - (ii) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Ordinance;
 - (iii) otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person; or
 - (iv) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance; or
- (b) by reason that the discriminator—
 - (i) knows the person victimized or the third person, as the case may be, intends to do any of those things; or
 - (ii) suspects the person victimized or the third person, as the case may be, has done, or intends to do, any of them.

(2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by that person if the allegation was false and not made in good faith.

7. Racial harassment

(1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person harasses another person if, on the ground of the race of that other person or a near relative of that other person, the first-mentioned person engages in unwelcome conduct (which may include an oral or a written statement), in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated by that conduct.

(2) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the first-mentioned person”) harasses another person (“the second-mentioned person”) if, on the ground of the race of the second-mentioned person or his or her near relative, the first-mentioned person, alone or together with other persons, engages in conduct (which may include an oral or a written statement) that creates a hostile or intimidating environment for the second-mentioned person.

8. Meaning of “race”, “on the ground of race”, “racial group” and comparison of cases of persons or different racial groups

(1) In this Ordinance and subject to subsections (2) and (3)—

- (a) “race” (種族), in relation to a person, means the race, colour, descent or national or ethnic origin of the person;
- (b) a reference to an act done on the ground of the race of a person is a reference to an act done on the ground of the race, colour, descent or national or ethnic origin of the person;
- (c) an act constitutes discrimination on the ground of descent only if it constitutes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights; and
- (d) “racial group” (種族群體) means a group of persons defined by reference to race, colour, descent or national or ethnic origin, and references to a person’s racial group refer to any racial group into which the person falls.

(2) An act done on the ground of any matter specified in subsection (3) does not constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person; and section 4(1)(b) does not apply to a requirement or condition as to any matter specified in subsection (3).

(3) The matters specified in this subsection are—

- (a) that the person—

- (i) is or is not an indigenous inhabitant of the New Territories;
or
- (ii) 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;
- (b) that the person—
 - (i) is or is not a Hong Kong permanent resident;
 - (ii) has or has not the right of abode or the right to land in Hong Kong;
 - (iii) is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap. 115); or
 - (iv) has or has not been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap. 115);
- (c) the length of residence in Hong Kong of the person; or
- (d) the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place.

(4) The fact that a racial group comprises 2 or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Ordinance.

(5) A comparison under section 4(1) of the case of a person of a particular racial group with that of a person not of that group must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(6) A comparison under section 5 of the case of a person having a near relative who is of a particular racial group with that of a person not having a near relative who is of that group must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

9. Act done for racial and other reason

If—

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race of a person (whether or not it is the dominant reason or a substantial reason for doing the act),

then, for the purposes of this Ordinance, the act is taken to be done for the reason of the race of the person.

PART 3

DISCRIMINATION AND HARASSMENT IN EMPLOYMENT FIELD

*Discrimination by employers***10. Discrimination against applicants and employees**

(1) It is unlawful for a person (“the employer”), in relation to employment by the employer at an establishment in Hong Kong, to discriminate against another person—

- (a) in the arrangements the employer makes for the purpose of determining who should be offered that employment;
- (b) in the terms on which the employer offers that other person employment; or
- (c) by refusing, or deliberately omitting to offer, the other person that employment.

(2) It is unlawful for an employer, in the case of a person employed by that employer at an establishment in Hong Kong, to discriminate against that employee—

- (a) in the terms of employment which the employer affords that employee;
- (b) in the way the employer affords the employee access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford the employee access to them; or
- (c) by dismissing the employee, or subjecting him or her to any other detriment.

(3) Except in relation to discrimination falling within section 6, subsections (1) and (2) do not apply to employment when the number of persons employed by the employer, added to the number employed by any associated employers of that employer, does not exceed 5. This subsection does not apply to the employment by a person of another person to perform domestic duties on the premises on which the first-mentioned person or his or her near relative resides.

(4) Subject to subsection (5), subsections (1)(b) and (2) do not apply to provision in relation to death or retirement for a person made before the commencement date in so far as any such provision continues for that person on and after that date.

(5) Subsections (1)(b) and (2) apply to provision made in relation to retirement of the kind mentioned in subsection (4) in so far as, in their application to such provision, they render it unlawful for a person (“the employer”) to discriminate against another person—

- (a) in such of the terms on which the employer offers that other person employment as make provision in relation to the way in which the employer will afford that other person access to opportunities for promotion, transfer or training or as provide for that other person’s dismissal or demotion;
- (b) in the way the employer affords that other person opportunities for promotion, transfer or training, or by refusing or deliberately omitting to afford that other person access to any such opportunities; or
- (c) by dismissing that other person or subjecting that other person to any detriment which results in that other person’s dismissal or consists in or involves that other person’s demotion.

(6) Subsection (2) does not apply to benefits, facilities or services of any description if the employer is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public comprising the employee in question, unless—

- (a) that provision differs in a material respect from the provision of the benefits, facilities or services by the employer to his or her employees;
- (b) the provision of the benefits, facilities or services to the employee in question is regulated by the employee’s contract of employment; or
- (c) the benefits, facilities or services relate to training.

(7) Except in relation to discrimination falling within section 5 or 6, nothing in subsection (1)(a) or (c) renders it unlawful for a person to discriminate against another person on the ground of the race of that other person, in connection with employment to perform domestic duties on the premises on which the first-mentioned person or his or her near relative resides.

(8) Subsection (3) expires on the third anniversary of the day on which this Ordinance is enacted.

(9) For the purposes of subsection (3), 2 employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control.

(10) The Chief Executive in Council may, by notice published in the Gazette, do either or both of the following—

- (a) amend subsection (3) by substituting another number for the number appearing after the word “exceed” in that subsection;

- (b) amend subsection (8) by substituting another anniversary for the anniversary appearing in that subsection.

11. Exception for genuine occupational qualification

- (1) In relation to discrimination falling within section 4—
 - (a) section 10(1)(a) and (c) does not apply to any employment where being of a particular racial group is a genuine occupational qualification for the job; and
 - (b) section 10(2)(b) does not apply to opportunities for promotion or transfer to, or training for, such employment.
- (2) Being of a particular racial group is a genuine occupational qualification only where—
 - (a) the job involves participation in a dramatic performance or other entertainment in a capacity for which a person of that racial group is required for reasons of authenticity;
 - (b) the job involves participation as an artist's or photographic model in the production of a work of art, visual images or sequence of visual images for which a person of that racial group is required for reasons of authenticity;
 - (c) the job involves working in a place where food or drink is (for payment or not) provided to and consumed by members of the public or a section of the public in a particular setting for which, in that job, a person of that racial group is required for reasons of authenticity;
 - (d) the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group; or
 - (e) the job involves providing persons of that racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group.

12. Exception for employment intended to provide training in skills to be exercised outside Hong Kong

Without prejudice to section 8(2) and (3), nothing in section 10 renders unlawful any act done by an employer for the benefit of a person not ordinarily resident in Hong Kong in or in connection with employing the

person at an establishment in Hong Kong, where the purpose of that employment is to provide the person with training in skills which the person appears to the employer to intend to exercise wholly outside Hong Kong.

13. Exception for employment of person with special skills, knowledge or experience

(1) Nothing in section 10 renders unlawful any act done by an employer for the benefit of any person in or in connection with employing the person at an establishment in Hong Kong, where—

- (a) the employment requires special skills, knowledge or experience not readily available in Hong Kong;
- (b) the person—
 - (i) possesses those skills, knowledge or experience; and
 - (ii) is recruited or transferred from a place outside Hong Kong; and
- (c) the act is reasonably done for a person so recruited or transferred, having regard to—
 - (i) the prevailing terms of employment offered to persons with those skills, knowledge or experience in places outside Hong Kong; and
 - (ii) any other relevant circumstances (other than the race of the person).

(2) Where in an employment of a person to which subsection (1) or this subsection applies—

- (a) the employment terminates and is immediately followed by renewal or re-engagement (whether or not on the same terms);
- (b) the person is promoted; or
- (c) the person is transferred within the same group of companies, nothing in section 10 renders unlawful any act done, by the employer or the employer upon transfer (as the case may be), for the benefit of the person in or in connection with the renewal, re-engagement, promotion or transfer, or in or in connection with the employment pursuant to it, so long as the act is reasonably done for the person having regard to the matters referred to in subsection (1)(c).

(3) In this section—

- (a) “group of companies” (公司集團) means a group of companies within the meaning of the Companies Ordinance (Cap. 32);
- (b) an employee is transferred within the same group of companies if the termination of the employment of the employee by one employer is immediately followed by the employment of the employee by another employer, both employers being at that time within the same group of companies; and a reference to

transfer of employment within the same group of companies shall be construed accordingly.

(4) Nothing in this section shall prejudice the operation of section 8(2) and (3).

14. Exception for existing employment on local and overseas terms of employment

(1) Nothing in section 10 renders unlawful—

(a) any differential treatment by an employer in or in connection with employing an employee on local terms of employment on the one hand and employing another employee on overseas terms of employment on the other hand in accordance with those two sets of terms respectively; or

(b) any differential treatment by an employer in or in connection with employing on overseas terms of employment an employee who is a national or citizen of a country or place on the one hand and employing also on those terms another employee who is a national or citizen of another country or place on the other hand in accordance with those terms.

(2) Subsection (1) applies only to an employee in an existing employment as specified in Schedule 2.

(3) In this section, “local terms of employment” (本地僱用條款) and “overseas terms of employment” (海外僱用條款) have the meanings assigned to them respectively by section 11 of Schedule 2.

(4) Nothing in this section shall prejudice the operation of section 8(2) and (3).

15. Discrimination against contract workers

(1) This section applies to any work for a person (“the principal”) that is available for doing by individuals (“contract workers”) who are employed not by the principal himself or herself but by a contractor or sub-contractor of the principal.

(2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a contract worker—

(a) in the terms on which the principal allows that contract worker to do that work;

(b) by not allowing the contract worker to do it or continue to do it;

(c) in the way the principal affords the contract worker access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him or her access to them; or

(d) by subjecting the contract worker to any other detriment.

(3) The principal does not contravene subsection (2)(b) by doing any act in relation to a person not of a particular racial group at a time when, if the work were to be done by a person taken into the principal's employment, being of that racial group would be a genuine occupational qualification for the job.

(4) Without prejudice to section 8(2) and (3), nothing in this section renders unlawful any act done by the principal for the benefit of a contract worker not ordinarily resident in Hong Kong in or in connection with allowing the contract worker to do work to which this section applies, where the purpose of the contract worker's being allowed to do that work is to provide him or her with training in skills which he or she appears to the principal to intend to exercise wholly outside Hong Kong.

(5) Without prejudice to section 8(2) and (3), nothing in this section renders unlawful any act done by the principal for the benefit of any contract worker in or in connection with allowing the contract worker to do work to which this section applies, where—

- (a) the work requires special skills, knowledge or experience not readily available in Hong Kong;
- (b) the contract worker—
 - (i) possesses those skills, knowledge or experience; and
 - (ii) comes to do the work from a place outside Hong Kong; and
- (c) the act is reasonably done for a person who comes from that place, having regard to—
 - (i) the prevailing terms of employment offered to persons with those skills, knowledge or experience in places outside Hong Kong; and
 - (ii) any other relevant circumstances (other than the race of the person).

(6) Subsection (2)(c) does not apply to benefits, facilities or services of any description if the principal is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public to which the contract worker in question belongs, unless that provision differs in a material respect from the provision of the benefits, facilities or services by the principal to his or her contract workers.

(7) In this section—

“contractor” (承判商) means a person who undertakes any work for the principal under a contract that is entered into by the person directly with the principal;

“sub-contractor” (次承判商) means a person who enters into a contract with another person (whether or not a contractor of the principal) to undertake all or any part of the work that a contractor of the principal has undertaken.