

T H E C O U N C I L  
REPORT OF THE LEGAL DIVISION  
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COMMITTEE ON GENERAL WELFARE

PROPOSED INT. NO. 465-A: By Council Member Horwitz (by request of the Mayor) also Council Members Foster and Maloney

TITLE: In relation to the Human Rights Law.

ADMINISTRATIVE CODE: Amends various sections of Chapter 1 and adds new Chapter 4, 5, 6 and 7 to title 8.

PROPOSED INT. NO. 536-A: By Council Member Horwitz (By request of the Mayor) also Council Members Eldridge, Fields and Michels

TITLE: In relation to the Human Rights Law.

ADMINISTRATIVE CODE: Amends various sections of Chapter 1 and adds new Chapters 4, 5, 6 to title 8.

BACKGROUND AND INTENT: During the late 1980's the City of New York (hereafter "NYC" or "the City") was plagued by notorious incidents of racially motivated violence. In the first four months of 1990, the City experienced a 14% increase in bias crimes as compared with the same four month period of 1989.<sup>1</sup> The general

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Coleman, As Bias Crime Seems to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990.

consensus is that conditions have worsened and, according to a June 12, 1990 New York Times/WCBS-TV News Survey, over 70% of the Black and White New Yorkers polled feel that race relations in New York City are generally bad.<sup>2</sup> As was recently stated by Dennis de Leon, Commissioner of the New York City Commission on Human Rights (hereafter "CCHR" or "the commission");

There is a relationship between bias-motivated violence and the deeply entrenched patterns of institutional bigotry that persist in contemporary society. Patterns of segregation in employment, housing, lending, and education all relate in important ways to the "bush fires" of hate crime. For example, many racially-motivated assaults are based upon notions of neighborhood "turf" and intrusion of<sup>3</sup> "outsiders" in segregated neighborhoods.

Proposed Int. No. 465-A and Proposed Int. No. 536-A address the City's race relations problem by attacking entrenched patterns of segregation, discrimination and bigotry. The city's current human rights law covers discrimination in employment, housing, education, training programs, and public accommodations. The bills under consideration install enhanced protection against discrimination in the aforementioned areas plus provide additional protection against systemic discrimination, prohibit discriminatory harassment, and bring the city into conformity with

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<sup>2</sup> Morgan, Many in Poll See Worsening in Race Relations, N.Y. Times, June 27, 1990.

<sup>3</sup> Testimony Given by Commissioner/Chair Dennis de Leon to the General Welfare Committee of the City Council, June 1, 1990, pg. 2.

Local Law 52 of 1989 which included discrimination based on alienage or citizenship as an unlawful activity.

I. DIFFERENCES BETWEEN THE TWO BILLS

Upon introduction, Int. No. 465 (submitted June 22, 1990 by Council Member Horwitz) differed from Int. No. 536 (submitted October 10, 1990 by Council Member Horwitz at the Mayor's request) in several ways. Few of these differences were contentious and were readily addressed in an early amended version of the bills. There, however, are two among the may initial differences that are noteworthy. They are:

- (1) Int. No. 465 empowered both the city commission on human rights and the corporation counsel to appear in state court, whereas under Int. No. 536 only corporation counsel was given this power (the "commission autonomy" issue); and
- (2) Under Int. No. 536, all civil penalties would be paid into the city's general fund, whereas under Int. No. 465 civil penalties levied against a city agency would be paid to the prevailing party (the "disposition of civil penalties" issue).

The current version of Proposed Int. No. 465-A resolves both the commission autonomy and disposition of civil penalties issue. With respect to commission autonomy, section 3(b) of Proposed Int. No. 465-A states:

Within twelve months after the enactment of this local law, the corporation counsel and the chairperson of the city commission on human rights shall issue a report to the council on the operation and results of the procedures implemented by the corporation counsel and such chairperson relating to the effective legal representation of the commission and the enforcement of the city human rights law, and relating to the prevention of any potential conflicts of interest.

With respect to the disposition of civil penalties, §8-127 of Proposed Int. No. 465-A state:

- a. Any civil penalties recovered pursuant to this chapter shall be paid into the general fund of the city.
- b. Notwithstanding the foregoing provision, where an action or proceeding is commenced against a city agency for the enforcement of a final order issue by the commission pursuant to section 8-120 of the code after a finding that such agency has engaged in an unlawful discriminatory practice and in such action or proceeding civil penalties are sought for violation of such order, any civil penalties which are imposed by the court against such agency shall be budgeted in a separate account. Such account shall be used solely to support city agencies' anti-bias education programs, activities sponsored by city agencies that are designed to eradicate discrimination or to fund remedial programs that are necessary to address the city's liability for discriminatory acts or practices. Funds in such account shall not be

used to support or benefit the commission. The disposition of such funds shall be under the direction of the mayor.

By addressing the commission autonomy and disposition of civil penalties issues, Proposed Int. No. 465-A resolves all outstanding differences between early versions of Int. No. 465 and Int. No. 536. In this fashion, Proposed Int. No. 465-A stands as a consolidation of the two bills. Thus, the analysis contained on this report and the annexed section-by-section analysis will refer only to Proposed Int. No. 465-A. A brief summary of the bill's provisions follows below.

## II. SUMMARY OF PROVISIONS

Proposed Int. No. 465-A embodies a complete overhaul of the city's human rights law and a strengthening of the CCHR. A section-by-section analysis which is annexed to this report addresses all of the changes in detail. There are, however, seven key areas addressed by the bill that will be examined in this report. These areas are:

- (1) employment and employer liability;
- (2) housing;
- (3) public accommodations;
- (4) private right of action;
- (5) systemic discrimination;
- (6) discriminatory harassment; and
- (7) penalties and injunctive relief.

An examination of these seven areas, plus an overview of some of the bill's other important provisions follows below.

(1) Employment and Employer Liability

The bill's employer liability standard is designed to provide an incentive to establish a policy against discrimination, hold employers to a high level of liability for employment discrimination, and present employers with a fair opportunity to mitigate the amount of civil damages imposed for discriminatory conduct. Under §8-107(13):

(a) an employer will be liable for an employee's act if:

(i) the employee exercised managerial or supervisory responsibility; or

(ii) the employer knew of the act, acquiesced in the conduct and failed to take immediate and appropriate action; or

(iii) the employer should have known of the act but was not diligent in preventing such conduct.

- (b) an employer may be held immune from civil penalties and punitive damages if she implements an anti-discrimination policy that is approved by the commission and her liability is based solely on the act of an employee or agent; and
  
- (c) if an employer is found liable for an employee's act, she may mitigate damages by showing that no other such incidents had occurred in the past or she had a meaningful anti-discrimination policy or program in place.

This standard of liability would apply to all aspects of employment including hiring and admittance into training programs.

(2) Housing

Proposed Int. No. 465-A limits the existing exemption for owner-occupied two family houses to accommodations for which vacancies are not publicly advertised. §8-107(5)(a)(4)(1). In this manner, the bill does not infringe upon the individual's right of association, but sharply restrict landlords' ability to discriminate.

(3) Public Accommodations

Under Proposed Int. No. 465-A, the commission's power to combat discrimination is expanded through the inclusion of educational institutions within the definition of provider of public accommodations. §8-102(11). This inclusion will not affect educational institutions' pedagogical policies or practices. §8-107(4). Also:

- (a) gender distinctions that are permitted under federal or state law are exempted under §8-107(4); and
- (b) distinctions founded on religious beliefs are protected under §8-107(12).

(4) Private Right of Action

Currently, all claims arising under the city's human rights law may be enforced only by bringing an action before the commission. This limitation denies complainants the right to a jury trial and forecloses the possibility of recovering attorney's fees or punitive damages which could be recovered in state court.

Based on the recommendations contained in the January 1988 report of the Koch Task Force on the New York City



Commission on Human Rights,<sup>4</sup> the bill being considered will empower individuals to enforce the city's human rights law by bringing an action in state court. §8-502. An individual who files such a claim would be able to recover all costs, attorney's fees and punitive damages. Anyone who files a claim with the commission or the state division on human rights will have effectively chosen not to exercise this right and not be able to bring an action in state court.

(5) Systemic Discrimination

As is asserted in Proposed Int. No. 465-A, "the existence of systemic discrimination poses a substantial threat to, and inflicts significant injury upon the city that is economic, social and moral in character, and is distinct from the injury sustained by individuals as an incident of such discrimination." §8-401. Systemic discrimination or a discriminatory pattern or practice is often hard to combat because of the difficulties entailed in accumulating evidence. This type of discrimination is particularly injurious because it is not simply an isolated incident but a repeated act founded upon a discriminatory policy, method of operating, or institutionalized procedure.

There are three aspects of the bill that enhance or clarify the commission's power to combat systemic discrimination.

They are:

- (a) Chapter 4 of Proposed Int. No. 465-A empowers the corporation counsel to investigate and bring a civil action in state court to eliminate unlawful discriminatory practices.
- (b) §8-105(4)(b) and §8-114 detail the commission's investigatory powers. Among these powers is the ability to compel the maintenance of records relevant to determining whether a person is engaging in a discriminatory pattern or practice; and
- (c) §8-107(17) establishes that in a claim alleging that a policy has a discriminatory disparate impact, a person need not specify what specific element of the policy produces the disparate impact. Also, the same subsection allows a person to counter a charge of disparate impact discrimination by showing, "that each such policy or practice bears a significant relationship to a significant business objective or does not contribute to the disparate impact." §8-108(a)(2). This provision assures that recent Supreme Court

decisions that have been viewed by some human rights advocates as imposing an undue burden upon claimants are not incorporated into local law.

(6) Discriminatory Harassment

Chapter 6 of Proposed Int. No. 465-A specifically addresses discriminatory harassment. Under the bill's provisions, the city may bring a civil action against a person who allegedly attempts to threaten or intimidate anyone seeking to exercise a right guaranteed by the human rights law. §8-602. This empowers the city to act vigorously against anyone who attempts to prevent an individual from filing a claim with the commission or in state court.

(7) Penalties and Injunctive Relief

Under current law, the commission is authorized to seek a preliminary injunction only with respect to a housing discrimination claim. Proposed Int. No. 465-A will permit the city to commence a special proceeding before the Supreme Court to seek to enjoin all types of discrimination covered by the law. §8-122.

In addition to its expanding ability to seek injunctive relief, Proposed Int. No. 465-A will empower the commission to seek in state court civil penalties of up to \$250,000 in systemic discrimination cases and \$50,000 cases

alleging discriminatory harassment. §8-404 and §8-604 respectively. Also, in proceedings brought before the commission, it will be able to impose up to \$50,000 as a penalty for engaging in discrimination and a \$100,000 penalty for willful or wanton acts of perjury.

### CONCLUSION

In addition to the seven areas analyzed above, there are two other aspects of Proposed Int. No. 465-A that should be noted. They are:

- (1) discrimination based on perceived characteristics will now be covered as well as acts based on actual traits; and
- (2) the term "handicapped" which is stigmatizing is replaced by "disabled".

It is clear that Proposed Int. No. 465-A will put the city's law at the forefront of human rights laws. Faced with restrictive interpretations of human rights laws on the state and federal levels, it is especially significant that the city has seen fit to strengthen the local human rights law at this time. Particular attention should be given to section 8-130 of Proposed Int. No. 465-A which provides that, "the provisions of this chapter shall be construed liberally for the accomplishment of the

purposes thereof." It is imperative that restrictive interpretations of state or federal liberal construction provisions are not imposed upon city law.

**UPDATE**

Proposed Int. No. 465-A passed by a 7-0 vote. Proposed Int. No. 536-A filed by a 7-0 vote.

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## Section-by-Section Analysis

### Introduction

The City's Human Rights Law (§8-101 et seq. of the Administrative Code of the City of New York) has been in the forefront of civil rights laws, providing protection for all persons from invidious discrimination. As part of a generation of Federal and State discrimination laws which created vital substantive rights and institutions charged with enforcing those rights, the City's law has made a valuable contribution to advancing civil rights in the City. While the law has been amended on numerous occasions to expand its substantive scope, the basic enforcement mechanism of the law has remained virtually unchanged since 1965. The benefits of twenty-five years of experience in enforcing this law, as well as the collective wisdom gained from the enforcement of Federal and State laws, now make it clear that the enforcement mechanisms of the City's law must be strengthened and expanded and that many of the substantive provisions should be expanded, harmonized or clarified. In recognition of the vital role served by the City in protecting civil rights, it is time now to move the City's law into the next generation of civil rights laws. The following is a section-by-section analysis of all of the provisions of the bill.

### §8-101 Policy

This section, which is in current law, expresses the policy reasons for enacting the Human Rights Law. The amendment would update this section by referring to all of the prohibited grounds for discrimination. It would make clear the broad authority conferred

upon the Commission to prevent discrimination from playing any role in actions relating to employment, public accommodations, housing and other real estate. It is intended that the Human Rights Law be liberally construed to recognize the Commission's broad authority to prevent discrimination.

**§8-102 Definitions**  
**"Person" (subd. 1)**

The amendment makes clear that "person" includes natural persons, group associations, organizations and governmental bodies or agencies.

**"Employer" (subd. 5)**

Current law prohibits an "employer" from engaging in all forms of employment discrimination and defines "employer" to exclude employers with fewer than four employees. The amendment would clarify that the definition of "employer" applies only to the employment discrimination provisions. When employer is used in other provisions of the bill, i.e., §8-107(13) (employer's liability for the discriminatory acts of its employees), it is intended to have its ordinary meaning. The amendment would also provide that certain persons employed as independent contractors would be counted as persons employed for purposes of determining whether an employer employs four or more persons and is thus subject to the employment discrimination provisions. It should be noted that employees who are

parents, spouses, or children of the employer will also be counted as persons employed for this purpose. See §8-107(1)(f).

**"Employee" (former subd. 6)**

The purpose of the definition of the term "employee" in the current law is to exclude certain family members and domestic workers from the employment discrimination provisions of the law. Technically the definition did not achieve this purpose since in the current law the term "employee" is not used in these provisions. The inappropriate definition of "employee" is deleted and the employment discrimination provisions are amended to carry out the intended purpose of the deleted definition with respect to the parents, spouse or child of an employer. See §8-107(1)(f). The proposed amendment does not exclude domestic workers from the employment discrimination provisions.

**"Educational Institution" (new subd. 8)**

The bill would add a definition of educational institution.

**"Place or Provider of Public Accommodation"(subd. 9)**

The amendment to this subdivision would change the term "place of public accommodation" to "place or provider of public accommodation." This change is intended to clarify the term "place of public accommodation" to make clear that it is intended to include providers of goods, services, facilities, accommodations or advantages. The amendment would streamline the definition by eliminating the long list of specific types of public accommodations and replace that with a generic definition.



The amendment would also eliminate the current exclusion of public libraries, schools, colleges and other educational institutions. This results in the implicit inclusion of these institutions in the definition of public accommodation, and thereby subjects them to the prohibitions on discrimination by public accommodations. See §8-107(4). The term "place or provider of public accommodation" would now include both public and private educational institutions. Although a variety of other laws including the State Civil Rights Law §40 and the Education Law §§ 313, 3201 and 3201-a cover certain aspects of discrimination in schools and the Board of Education has adopted a nondiscrimination policy and an internal procedure for resolving complaints of discrimination by students, the City has an independent and overriding interest in routing out discrimination from its schools. Extension of the City Human Rights Law in this area would make available to aggrieved persons the administrative remedies provided by the Commission as well as the right to bring a private action and recover attorneys fees.

The amendments to this subdivision also narrow the exclusion for places of accommodation that are distinctly private by providing that only clubs could be considered distinctly private. This would foreclose doctors, dentists and other professionals from arguing that their practices are distinctly private and thus not subject to the prohibitions against discrimination.

"Housing Accommodation" (subd. 10)

The amendment would include publicly-assisted housing accommodations within the definition of "housing accommodation," (except where otherwise expressly provided) thereby reflecting the consolidation of provisions governing public and private housing discrimination effected in a subsequent section. See §8-107(5).

**"Publicly-assisted Housing Accommodations" (subd. 11)**

The only substantial difference which remains in the provisions of the Human Rights Law which cover private housing and those which cover publicly-assisted housing is that the exemptions from the prohibition of housing discrimination for the rental of owner-occupied one and two family homes and for the rental of rooms in owner-occupied apartments do not apply to publicly-assisted housing. See §8-107(5)(a)(4)(1) and (2). Thus, the definition of publicly-assisted housing serves to limit the applicability of these exemptions. The amendment to this subdivision would broaden the definition of publicly-assisted housing to include certain tax-exempt homes or publicly financed homes sold after July 1, 1991 and all homes with mortgages financed, guaranteed or insured at any time by a government agency whether or not the mortgage is still outstanding. By broadening the definition, the bill would thus subject the rental of certain owner-occupied one and two family homes and owner-occupied apartments, which are not covered by the current law, to the housing discrimination provisions.

**"Multiple Dwelling" and "family" (subd. 12)**

The definition of "multiple dwelling" is deleted because the only reference to it is in the definition of publicly-assisted housing

accommodation and that reference is deleted. See §8-102(11)(d). Under current law, "family" is defined for purposes of defining multiple dwellings and for purposes of certain exemptions from the housing discrimination provisions including the rental of owner-occupied one and two family housing. See §8-107(5)(a)(4). With the deletion of the term "multiple dwelling", the amendment makes clear that family is defined only for purposes of those exemptions.

**"Real Estate Salesperson" (subd. 15)**

The amendment makes clear that the term real estate salesperson includes persons who have been appropriately authorized by a licensed real estate broker.

**"Disability" (subd. 16)**

The term "handicap" is changed to "disability", a more modern and less stigmatizing term used in the State Human Rights Law. The definition is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination. The amendments also retain the provision in the existing definition of "otherwise qualified person" (subd. 16(e)) that in the case of alcoholism, drug addiction or other substance abuse, "disability" only applies to a person who is recovering or has recovered and currently is free of the abuse (new paragraph (c)). The amendments also make clear that "disability" does not apply to persons who currently are

illegally using controlled substances when the person subject to the law acts on the basis of such use.

**"Covered Entity" (new subd. 17)**

This term is added to the law for ease of reference to persons who are required to comply with the provisions of §8-107.

**"Reasonable Accommodation" (new subd. 18)**

This definition is added for purposes of a new provision which makes explicit the requirement implicit in the existing law that employers and other persons subject to the City's law make "reasonable accommodation" to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. See §8-107(15)(a). The exception in the definition for accommodations which cause undue hardship represents existing Commission case law. See e.g. Tartaglia v. Jack LaLanne Fitness Centers, NYCCHR Complaint No. 04153182-PA (June 9, 1986) at p. 21 (public accommodations discrimination); New York City Commission on Human Rights v. United Veterans Mutual Housing, Motion Decision NYCCHR Complaint No. EM00936-08/14/87-DE (April 4, 1990) at p. 5. (housing discrimination); see also Doe v. Pleasure Chest Ltd., NYCCHR Complaint No. GA-00167020389-DN (July 19, 1990) at p. 29-30 (employment discrimination).

**"Sexual Orientation" (new subd. 20)**

The bill moves the definition of sexual orientation currently found in §8-108.1 to the definitional section. This amendment is technical in nature and reflects the insertion of this protected category in the lists of protected categories in §8-107.

## §8-105 Powers and Duties

The amendments to this section would expand the powers of the Commission as well as clarify existing powers. Specifically, the Commission would be authorized to require persons or companies under investigation to preserve records in their possession and to continue to make the type of records made by such person or company in the ordinary course of business where the records are relevant to determining whether discrimination has taken place (subd. 6).

The amendment expressly states the Commission's existing power to investigate and file complaints of pattern or practice discrimination, and authorizes the Commission to refer to the Corporation Counsel information on which a civil action (pursuant to Chapter 4) could be based (subd. (4)(b)).

The amendment clarifies the Commission's existing authority, in the course of investigating clubs which are or may be places or providers of public accommodation, to subpoena names of persons when such subpoena would not be inconsistent with applicable statutory and case law (subd. (5)(c)). As under existing law, the Commission's power to investigate clubs would continue to encompass the power to obtain information which is relevant to the determination of whether a club qualifies as a place or provider of public accommodation.

The Commission's authority to delegate its powers, functions and duties to its employees or agents is made explicit with the proviso that certain powers, i.e., rule making, issuing orders

relating to records and making a final determination that a respondent has engaged in discrimination, could be delegated only to Commission members (subd. (8)). The amendment also makes explicit that the Commission's power to appoint employees and assign them duties may be exercised by the Chairperson.

#### **§8-106 Relations With City Departments and Agencies**

The amendments to this section would enable the Commission to require a city agency to furnish information without first consulting the Mayor.

#### **§8-107 Unlawful Discriminatory Practices**

##### **Protected Categories**

The provisions in current law describing unlawful discriminatory practices are amended to make clear that the law prohibits discrimination based on perceived, as well as actual, age, race, creed, color, national origin, disability, marital status, gender, sexual orientation and alienage or citizenship status. The term "gender" is used to replace the term "sex" (with no intent to change the meaning of the term). This section is also amended to include sexual orientation and disability, which are covered in separate sections of the current law, in the list of protected categories so that the law will now provide in one place a list of all the prohibited types of discrimination.

##### **Employment and Apprenticeship Training Programs (subds. 1 and new subd. 2)**

The amendments to these provisions would prohibit employment discrimination based on marital status, and thus would conform the City's law to the State Human Rights Law. Currently,

these subdivisions prohibit employers, employment agencies and labor organizations from engaging in discriminatory employment practices but are silent as to the individual liability of their employees and agents for such practices. The amendment would make explicit such individual liability.

The language which permits advertisements, statements or inquiries to express limitations and discrimination based upon a bona fide occupational qualification is deleted from paragraph (d) of subdivisions one and two. The employment discrimination provisions of the current law have been construed by the courts and the Commission to allow limitations or discrimination which are based upon a "bona fide occupational qualification", although the specific language which sets forth the defense is contained only in the provisions prohibiting discriminatory advertisements or inquiries. See §8-107(1)(d). "Bona fide occupational qualification" is not defined in those provisions and thus the courts and the Commission are left to determine on a case by case basis whether a particular limitation is a bona fide occupational qualification. While the bill deletes the specific language "unless based upon a bona fide occupational qualification" in §8-107(1)(d) and (2)(d), it is not intended to eliminate the defense. The intent is to allow the defense to continue to develop through case law made by courts or the Commission with the expectation that the defense will be upheld only in circumstances where distinctions based on the criteria covered by the law are logical and necessary for the job or occupation.

The amendment would delete language in paragraph (e) of subdivision one which duplicates the general prohibition against retaliation in §8-107(6). New language would be added to paragraph (e) to provide that the age discrimination provisions would not apply to employee benefit plans covered by the federal Employment Retirement Income Security Act of 1974 ("ERISA") where that federal law would be preemptive (subd. (1)(e)(i)). This recognizes the decisional law that has held ERISA to preempt State and local discrimination laws in certain circumstances. See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). Provisions allowing the varying of insurance coverage based on an employee's age and allowing certain retirement policies or systems would also be added to paragraph (e). These provisions are derived from language in the existing subdivision (3-a) of section 8-107 which is being deleted. See §8-107(3-a)(c).

A new paragraph (f) of subdivision one would continue the present exemption for the hiring, firing and terms and conditions of employment of parents, spouses and children but would require those persons to be counted as persons employed for purposes of determining whether the employer is subject to the law with regard to other persons employed.

**Public Accommodations (new subd. 4)**

This subdivision is amended to prohibit places or providers of public accommodation from discriminating on the basis of age (para. (a)). In recognition of the fact that certain distinctions based on age are in the public interest (e.g., senior citizen discounts,



restrictions on viewing adult films and age limits on membership in peer groups), the Commission is given authority to grant exemptions from this prohibition when it is in the public interest to do so (para. (b)). The amendment adding age would not take effect until the Commission promulgates rules setting forth such exemptions. Bill Section 4(1).

Certain exemptions are added permitting educational institutions (public and private) to make gender distinctions permitted under specified state or federal laws (i.e., separate housing, bathroom and locker room facilities, certain physical education classes and certain athletic teams) (para. (c)). Private schools would be allowed to limit admissions to persons of one gender (para. (d)). Educational institutions would not be subject to the prohibitions on discrimination as they relate to matters that are strictly educational or pedagogic in nature (para. (f)). In addition, educational institutions would not be prohibited from using standardized tests which may have a disparate impact on protected groups if the tests are used in the manner and for the purpose prescribed by the test agency which designed the test (para. (e)).

**Subds. 3 and 3-a (deleted)**

Subdivision 3, which currently prohibits discrimination in publicly-assisted housing accommodations, is deleted and incorporated into subdivision 5, which covers all housing accommodations. Subdivision 3-a, which currently prohibits age discrimination by employers and licensing agencies, is deleted and incorporated into subdivision 1 (Employment) and a new subdivision 8 (Licenses and

Permits). In addition, the limitation in subdivision 3-a on age discrimination, providing that individuals older than 65 are not protected thereunder, is removed from the law. This would conform the City's law to the State Human Rights Law and to the Federal Age Discrimination in Employment Act.

**Tax-Exempt Non-sectarian Education Corporations**  
**(former subd. 4 deleted)**

The bill would delete this provision governing private schools as unnecessary in view of the implicit coverage of educational institutions (whether public or private) in the public accommodations provisions (§ 8-102, subd. 9). In bringing private schools within those provisions, the legislation would have the effect of changing current law by adding national origin, gender and marital status to the prohibited grounds for discrimination.

**Housing Accommodations, Land and Commercial Space**  
**(subd. 5)**

**Generally**

The provisions prohibiting discrimination in publicly-assisted housing (former subd. 3) are incorporated into this subdivision except that the provision which permits inquiries relating to children in publicly-assisted housing is deleted. The amendments to this subdivision would make the City's law consistent with the State Human Rights Law by prohibiting age discrimination in the sale, rental or purchase of all housing accommodations, land and commercial space. The amendments would also clarify the applicability of this subdivision to cooperatives and condominiums by prohibiting

discrimination in the "approval of the sale" of housing accommodations "or an interest therein".

Para. (a) Subpara. (4)

Current law exempts from the housing discrimination provisions the rental of housing in one and two family owner-occupied housing. The amendment would allow the exemption only if the available housing has not been publicly advertised or listed or otherwise offered to the general public (Subpara. (4)(1)).

The bill would delete the language creating a general exemption for restricting rooms in a rooming house, dormitory or residence hotel to one sex (Subpara. (4)(3)). This amendment is intended to bring the City's law into conformity with the federal Fair Housing Act, which does not contain such a general exemption.

Para. (c)

A new subparagraph (3) would prohibit real estate brokers from blockbusting, i.e. inducing persons to sell or rent housing, land or commercial space by representations regarding the entry into the neighborhood of any members of a protected group. This provision is derived from the federal Fair Housing Act (42 U.S.C. 3604(e)) but goes further than that law in its application to commercial space and in the number of protected groups.

Para. (d) and (f)

Amendments to paragraph (d) and the new paragraph (f) make clear that the law prohibits discrimination in the appraisal of any housing accommodation, land and commercial space. This

provision is also derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(ix)(B).

Para. (e)

This new provision prohibits the discriminatory denial of access to or membership in a multiple listing service or real estate brokers organization. It is derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(x).

Para. (h)

The amendments to this paragraph are designed to bring the City's law into conformity with the federal Fair Housing Act, which allows owners and operators of housing for older persons (as defined therein) to discriminate in the rental or sale of such housing on the basis of whether children are or would be residing in such housing. See 42 USC 3607(b)(2) and (3).

Para. (i)

This provision would allow restriction of the sale or rental of housing or land exclusively to persons 55 or over. It would clarify that such persons could not be discriminated against on the basis of whether children are, may be, or would be, residing with them, unless such housing qualifies as housing for older persons as defined in the federal Fair Housing Act.

Para. (j)

Although the federal Fair Housing Act on its face prohibits educational institutions from making gender distinctions in dormitory residences, the agency administering that law (the Department for Housing and Urban Development, or "HUD") has construed the law to

permit the gender distinctions allowed under another federal law for separate housing, bathrooms and locker rooms. See 45 CFR §§86.32 and 86.33. This new provision would allow such distinctions to be made under the City's law to the same extent that they are allowed under HUD's interpretation of the federal Fair Housing Act.

Para. (k)

This provision would allow distinctions to be made with regard to gender and children in dormitory-type residences (e.g. shelters for the homeless), to protect personal privacy or the health, safety or welfare of families with children. HUD's interpretation of the federal Fair Housing Act has allowed some distinctions such as these although the Act and its regulations are silent as to these issues.

Para. (l)

This provision restates and clarifies current law.

Para. (m)

This new provision clarifies that the owners of publicly-assisted housing accommodations (such as the Housing Authority) may utilize criteria or qualifications of eligibility for the sale, rental or occupancy of public housing which are required to comply with Federal or State law or are necessary to obtain the benefits of a Federal or State program, and use statements, advertisements, applications and inquiries which state criteria or qualifications necessary to determine eligibility for such housing.

Para. (n)

The provisions relating to housing discrimination on the basis of occupation are moved from §8-102.2 to this paragraph without intent to make any substantive change.

**Retaliation (subd. 7)**

This subdivision prohibits retaliation against persons who file complaints of discrimination. The amendments would broaden this subdivision by also prohibiting retaliation against persons who commence civil actions, assist the Corporation Counsel or the Commission in investigations or provide information pursuant to the terms of a conciliation agreement.

**Licenses and Permits (subd. 9) (new)**

Under the current law, discrimination by licensing agencies is prohibited only where the discrimination is based on age (former subd. 3-a). This new subdivision would broaden current law by prohibiting licensing agencies from discriminating against applicants on the basis of any of the protected categories (paras. (a) and (b)). An exception is provided which allows age or disability to be used as a criterion for determining eligibility for a license or permit where such use is specifically required by another provision of law (para. (c)). Thus, the issuance of special parking permits to disabled persons pursuant to New York City Charter §2903(b)(15), the granting of preferences to disabled or elderly persons in the issuance of newsstand licenses pursuant to Administrative Code §20-230, and the issuance of rifle and shotgun permits only to persons 18 years of age or over pursuant to Ad. Code §10-303(a)(1) would still be allowed.

**Criminal Conviction (subd. 10) (new)**

Article 23-A of the Correction Law prohibits discrimination in employment and licensing on the basis of an applicant's record of criminal convictions except in certain specified circumstances. That article provides for enforcement against private employers by the State Division of Human Rights and concurrently by the Commission. This new subdivision merely incorporates the Article 23-A prohibition into the City's Human Rights Law in the same manner as it is incorporated into the State Human Rights Law. See Executive Law §296(15). The amendment is intended to encompass within the City's law all of the substantive provisions which are already within the Commission's jurisdiction and would effect no substantive change in the Commission's jurisdiction over this type of discrimination.

**Arrest Record (subd. 11) (new)**

The State Human Rights Law, with certain exceptions, prohibits discrimination in connection with licensing, employment and providing of credit on the basis of an applicant's arrest record. See Executive Law §296(16). This new subdivision is identical to the State law provision.

**Employer Liability for Discriminatory Conduct by Employee, Agent and Independent Contractor (subd 13) (new)**

The current City Human Rights Law is silent on the standard to be applied in deciding whether an employer can be held liable for the discriminatory conduct of its employees. The State Human Rights Law, upon which much of the City law is modeled, is also silent on this question. However, the State law provisions prohibiting discrimination in employment and in public accommodations

have been narrowly construed by the courts of this State to impose liability upon an employer for its employee's unlawful conduct only when the employer knew of or condoned the conduct.

The proposed bill would set forth standards which must be satisfied for an employer to be held liable for the unlawful conduct of employees, agents and certain independent contractors. The standards proposed would make the City's law unique among civil rights laws in that the standards are designed not only to deter discriminatory conduct by holding employers accountable but, of equal significance, they are designed to provide employers with an incentive to implement policies and procedures that reduce, and internally resolve, discrimination claims.

Paragraph (a) of this subdivision provides that with respect to all types of discrimination other than employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent. Paragraph (b) provides that with respect to employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent only where the employee or agent who committed the discriminatory act exercised managerial or supervisory responsibility or the employer knew of the conduct and failed to take corrective action or should have known of the conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct. Under paragraph (c), an employer would be held liable for the conduct of certain persons employed as independent contractors only where the employer had actual knowledge of and acquiesced in the conduct.



Employers could mitigate their liability for civil penalties or punitive damages or liability for the act of an employee or agent which they should have known about by proving they had instituted policies, programs, and procedures for the prevention and detection of discrimination, and by showing a record of no, or relatively few, prior incidents of discrimination (para (d) and (e)). Finally, the Commission would be authorized to promulgate rules establishing policies, programs, and procedures for the prevention and detection of discrimination, which if instituted by an employer would insulate him or her from liability for civil penalties which could be imposed by the Commission or punitive damages or civil penalties which could be imposed by a court based on the conduct of an employee, agent or person employed as an independent contractor (para (f)).

Alienage or Citizenship Status (new subd. 14, former subd. 11)

Current law allows distinctions and preferences based upon alienage or citizenship status and inquiries as to a person's alienage or citizenship status in very narrow circumstances ("when... required or when... expressly permitted by any law... and when such law... does not provide that state or local law may be more protective of aliens, §8-107(11)). These circumstances do not cover distinctions or inquiries made by banks and lending institutions who seek to sell mortgages to the Federal Home Mortgage Insurance Corporation ("FHMIC"). A FHMIC directive provides that the "[FHMIC] will purchase mortgages made to aliens who are lawful permanent residents of the United States under the same terms that are available to U.S. citizens... We will purchase mortgages made to non-permanent

resident aliens as long as the borrower occupies the property and the loan-to-value ratio does not exceed 75%." See Fannie Mae, Lending Requirements, §203.02 (emphasis in original).

The proposed amendment to this subdivision is intended to allow banks and lending institutions to make such inquiries or determinations based upon alienage or citizenship status as are necessary to enable them to obtain the benefits of selling their mortgages to FHMIC. It will also allow inquiries and distinctions to be made for other purposes related to federal programs, but only insofar as such actions are necessary to obtain the benefits of such programs.

**Applicability; Persons With Disabilities (new subd.15)**

Paragraph (a) of this new subdivision would make explicit the requirement implicit in existing law that persons subject to the City's Human Rights Law make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. Paragraph (b) establishes an affirmative defense to a claim of discrimination based on disability that the claimant could not, with reasonable accommodation, satisfy those requisites or enjoy those rights. Paragraph (c) makes clear that work place restrictions on the illegal use of drugs and the use of alcohol and drug testing programs are not prohibited.

**Former §8-108 and §8-108.1 subd(1) (deleted)**

These provisions are deleted because the protected categories, disability and sexual orientation, have been inserted in the lists of protected categories in §8-107.

Applicability; Sexual Orientation (subd. 16, formerly paragraphs a through e of subd. 2 of §8-108.1)

Former section 8-108.1, subd. 2, sets forth certain provisions relating to the applicability of the law with respect to discrimination based on sexual orientation. These provisions have been retained and are set forth in the revised law as paragraphs a through e of subdivision 16 of section 8-107.

Disparate Impact (new subd. 17)

Certain discriminatory practices or policies, though not intended to discriminate, may be actionable because they result in a disparate impact to a person who is the member of a group protected by the City's law. Like Title VII of the Civil Rights Act (which prohibits employment discrimination), the City's law has been construed by the Commission to apply to disparate impact cases although it does not explicitly provide as such. In 1989, the U.S. Supreme Court in Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115, 2125-26 (1989) made it significantly more difficult for an aggrieved person to prove a disparate impact case under Title VII. The Court held that when a plaintiff has made out a prima facie case of disparate impact, the defendant has the burden of producing evidence of business justification but the burden of persuasion always remains with the plaintiff. Commentators viewed this holding as a departure from previous decisions which were read to place the burden of proving business necessity upon the defendant. The Commission and the courts are not bound to follow Wards Cove in their interpretation of the burdens of proof in disparate impact cases under the City Human Rights Law. After the Wards Cove decision,

the Commission and the administrative law judges adjudicating disparate impact cases have continued to apply the burdens of proof (as set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971)) that most courts applied in Title VII cases decided prior to Wards Cove. See Fitzgibbons v. New York City Police Department, NYCCHR Complaint No. 12141485-EG (April 26, 1990) at p. 4.

The proposed provisions are intended to clearly set out the burdens of proof in disparate impact cases brought under the City Human Rights Law so that it will not be necessary for the courts or the Commission to seek guidance in federal case law to interpret the City law in this area. The provisions make clear that the respondent or defendant has the burden to affirmatively plead and prove that a policy or practice bears a significant relationship to a significant business objective (business necessity) or does not contribute to the disparate impact (para. (a)(2)). The legislation also provides that a policy or practice shown to have a disparate impact will be found unlawful where the Commission or a plaintiff produces substantial evidence that an alternative policy or practice with less disparate impact is available and the respondent or defendant fails to prove that it would not serve them as well (id.).

**Unlawful Boycott or Blacklist (new subd. 18)**

This new subdivision incorporates the provisions of the State Human Rights Law which prohibits boycotts and blacklists based on discriminatory animus. However, it goes further than State law by adding disability, age, marital status, sexual orientation and alienage or citizenship status to the protected categories. The

subdivision is also different from the State law in that it specifies that it does not apply to any form of expression that is protected by the First Amendment of the U.S. Constitution.

**Interference with Protected Rights (new subd. 19)**

This new subdivision prohibits threats, harassment, coercion, intimidation and interference with a person's exercise or enjoyment of any rights granted or protected under §8-107 or attempts to engage in those acts. It is derived, in part, from a similar provision of the federal Fair Housing Act.

**Relationship or Association (new subd. 20)**

This subdivision makes clear that the City's Human Rights Law prohibits discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom such person has a known relationship or association. It would also codify the Commission's interpretation of the existing law. This provision is similar to provisions in the Federal Fair Housing Act (42 USC §3604(f)) and the Americans with Disabilities Act (§102(b)(4) and §202(b)(1)(E)).

**Former §8-109 Procedure (deleted)**

This section, which prescribes the current procedures for filing and processing complaints of discrimination with the Commission, is deleted and replaced by new sections 8-109 through 8-122.

**§8-109 Complaint (new)**

This section describes in detail the requirements and procedure for filing a complaint of discrimination with the Commission.

It includes the content of the complaint and a requirement that the Commission acknowledge the filing of the complaint (subd. a), a requirement that the Commission serve a copy of the complaint on the respondent and advise the respondent of his or her procedural rights and obligations under the law (subd. d), the time limit for filing a complaint (subd. e), and amendment of the complaint (subd. h). This section would preclude the Commission from adjudicating a complaint if prior to filing such a complaint the complainant had initiated a civil action alleging the same act of discrimination, if a complaint involving the same grievance is pending before an administrative agency, or if the State Division of Human Rights issued a final determination on such complaint (subd. f). With regard to complaints filed on or after September 1, 1991, this section would require the Commission to commence proceedings, investigate and make a final disposition promptly and within the time periods prescribed by rule of the Commission or explain the reasons for not doing so (subd. g).

**§8-111 Answer (new)**

This section requires a respondent to file an answer within 30 days after the complaint is served (subd. a). Under current law, there is no requirement that a respondent answer a complaint of discrimination until he or she appears at a hearing. Respondents have no incentive to answer prior to such time. This requirement would assist the Commission in the timely processing of complaints. The failure to file an answer would result in a default and the hearing would proceed without the respondent. See §8-119(e). The

administrative law judge could open the default and allow the respondent to present an answer only upon a finding that there was good cause for the failure to file a timely answer. This section also prescribes the contents of the answer (subds. b, c and d) and provides for extension of the 30-day period for good cause (subd. e). Allegations not specifically denied or explained in the answer are deemed admitted (subd. c).

#### **§8-112 Withdrawal of Complaints (new)**

This section provides that a complaint may be withdrawn at any time prior to service of a notice that it has been referred to an administrative law judge (subd. a) or after service of such notice, at the discretion of the Commission (subd. b). Unless the complaint is withdrawn pursuant to a conciliation agreement, withdrawal is without prejudice to further prosecution of the alleged discriminatory acts by the Commission or the Corporation Counsel (subd. c).

#### **§8-113 Dismissal of Complaint (new)**

This section prescribes the circumstances under which the Commission may dismiss a complaint for administrative convenience (subds. a and b). Dismissal for administrative convenience includes a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated (subd. (a)(6)), as well as dismissal prior to the filing of an answer where no investigation or conciliation had taken place (subd. b). The section also provides for dismissal upon a finding of no probable cause (subd. d) or lack of jurisdiction (subd. c), and for appeal of any dismissal to the chairperson (subd. f).

#### **§8-114 Investigations and Investigative Recordkeeping (new)**

This section provides that where the Commission has conducted an investigation it could demand that the person or entity under investigation preserve records in its possession or continue to make the type of records previously made where the records are relevant to a determination of whether discrimination has taken place (subd. b). A person or entity upon whom a demand is made may file objections with the Commission and get a determination in 30 days (subd. c). During the 30-day period, the person or entity upon whom a demand is made would be required to maintain the status quo, i.e., preserve existing records and continue to make records (subd. c). A proceeding may be brought in court to enforce an order relating to records (subd. e) or the Commission may impose administrative sanctions for non-compliance (see §8-118).

#### **§8-115 Mediation and Conciliation (new)**

This section makes explicit the Commission's authority to engage the parties in mediation or conciliation at any time after the filing of a complaint (subd. a). It also provides that a conciliation agreement may be embodied in a consent decree (subd. b). All conciliation agreements shall be embodied in orders and violation of such orders would be subject to a civil penalty (subd. d). Efforts at mediation and conciliation shall not be publicly disclosed (subd. c) but all conciliation agreements shall be made public unless the complainant, respondent and the Commission agree otherwise (subd. d).

#### **§8-116 Determination of Probable Cause (new)**



This provision sets out the procedure to be followed after a finding of probable cause, including notice (subds. a and b) and referral to an administrative law judge (subd. c). It also provides that Commission-initiated complaints shall not require a determination of probable cause.

**§8-117 Rules of Procedure (new)**

This section requires the Commission to adopt rules for hearing and prehearing procedure, including rules for discovery. The rules shall require that the Commission be a party to any proceeding and that the complainant shall be a party only if he or she has formally intervened.

**§8-118 Noncompliance with Discovery Order or Order Relating to Records (new)**

To discourage persons under investigation from resisting the Commission's discovery requests, this provision would make express the Commission's authority to impose administrative sanctions upon the resisting party. The section would also authorize the Commission to impose administrative sanctions upon parties who fail to comply with Commission orders to preserve records and/or to continue to make records. After affording the resisting party an opportunity to make objections to an order compelling discovery or relating to records and upon non-compliance with the order, the Commission could sanction that party by drawing adverse inferences, precluding the introduction of evidence or testimony and striking out pleadings.

**§8-119 Hearing (new)**

This section describes the essential elements of the hearing process. It is similar to the current law except that it allows an administrative law judge to enter a default if the respondent has failed to file a timely answer without good cause (subd. c). If a default is entered, only the evidence in support of the complaint may be presented at the hearing (id.).

**§8-120 Decision and Order (new)**

This section gives the Commission the same broad authority as the existing law to grant injunctive relief and compensatory damages if it finds that a respondent has engaged in any unlawful discriminatory practice. The section gives examples of certain types of remedies but is not designed to be all inclusive. It makes clear the Commission's authority to order front pay, as well as back pay, to compensate victims of employment discrimination. Like back pay, front pay is a "make whole" remedy. Where back pay covers the time between the injury and the date of judgment, front pay offers prospective relief, providing compensation until the victim obtains the position he or she would have earned but for the discrimination. Without the remedy of front pay, the injuries of past discrimination might continue. This can occur, for example, in a situation where rightful promotion cannot take place immediately upon a favorable judgment. Thus, federal courts have found front pay useful under Title VII where reinstatement at the proper level is inappropriate because "the hostility between the parties precludes the possibility of a satisfactory employment relationship." Shore v. Federal Express Corp., 777 F.2d 1115 (6th Cir. 1985). In such cases, front pay can

be ordered until the plaintiff obtains the appropriate level with his or her new employer. Courts have also used the front pay remedy where the position has already been filled, and promoting the plaintiff would, therefore, require "bumping" an incumbent. Here, front pay can enable the victim of discrimination to draw a rightful wage while awaiting the availability of his or her rightful place. Edwards v. Occidental Chemical Corp., 892 F.2d 1442 (9th Cir. 1990) (ordering front pay from the date of the judgment until the date of promotion).

#### §8-121 Reopening of Proceeding by Commission (new)

This provision authorizes the Commission to reopen its proceedings or vacate or modify its orders in the interest of justice.

#### §8-122 Injunction and Temporary Restraining Order

Under the City's current law, after a complaint of housing discrimination has been filed, the Commission is authorized to seek a preliminary injunction to enjoin the respondent from engaging in acts which would render ineffectual a final order of the Commission (e.g. renting the subject housing to another person). The Commission is not similarly authorized with regard to complaints involving other forms of discrimination, and thus, pending the adjudication of such complaints and during the lengthy court review process, respondents will often engage in acts which make meaningless the relief imposed in Commission final orders. This section would broaden the Commission's authority to seek preliminary injunctive relief to include all types of discrimination covered by the City Human Rights Law. It allows the Commission to seek such relief where it is necessary to restrain the respondent or persons acting in concert with the respondent from

committing acts tending to render ineffectual a remedy that the Commission might impose in a final order.

**§8-123 Judicial Review**

**§8-124 Civil Penalties for Violating Commission Orders (new)**

**§8-125 Enforcement (new)**

Under current law, the provisions relating to judicial review of Commission orders and enforcement of Commission orders are combined in one section. As a consequence, courts have construed these provisions to permit a respondent in an enforcement proceeding to question the evidentiary basis for the issuance of the order which the Commission is seeking to enforce even where he or she had failed to commence a timely proceeding for judicial review of that order. Also, under current law there are no civil penalties for non-compliance with Commission orders. Thus, a respondent who has been found guilty of a violation of the Human Rights Law has no incentive to seek judicial review of, or to comply with, a Commission-ordered remedy until the Commission commences an enforcement proceeding.

The proposed new sections separate the procedures for judicial review (§8-123) and the procedures for enforcement of Commission orders (§8-125), and make clear that unless the respondent commences a timely proceeding for judicial review of a Commission order, he or she may not challenge the evidentiary basis for the issuance of the order when the Commission seeks to enforce that order (§8-125 (b)). In addition, civil penalties could be imposed in amounts up to \$50,000 and \$100 per day for non-compliance with Commission orders (§8-124).

**§8-126 Civil Penalties Imposed by Commission for Unlawful Discriminatory Practices (new)**

In addition to its existing authority upon a finding of discrimination to order equitable relief and award compensatory damages to a complainant, this section would give the Commission the power to impose civil penalties to vindicate the public interest. The penalties could be in amounts up to \$50,000, and for willful and wanton conduct, up to \$100,000.

**§8-127 Disposition of Civil Penalties (new)**

Civil penalties would be paid into the general fund, except that civil penalties assessed by a court against a city agency for violation of a final order issued by the Commission pursuant to section 8-120 after a finding that the agency has engaged in an unlawful discriminatory practice would be budgeted in a separate account. Monies from the account could be used only for anti-bias education programs or programs to redress discrimination by city agencies.

**§8-128 Institution of Actions and Proceedings (new)**

This section specifies that actions or proceedings on behalf of the Commission may be instituted by the Corporation Counsel or Commission attorneys designated by the Corporation Counsel or other attorneys designated by the Corporation Counsel.

**§8-129 Criminal Penalties**

This section is amended to increase the criminal fine for willful violation of final Commission orders from \$500 to \$10,000.

**§8-130 Construction**

This section expresses the legislative intent that the Human Rights Law be liberally construed for the accomplishment of its purposes. The amendment deletes unnecessary and duplicative language.

**Chapter 4 Civil Action to Eliminate Unlawful Discriminatory Practices (new)**

**§8-401 Legislative Declaration**

This provision contains an express recognition of the economic, social and moral harm imposed upon the City and its inhabitants by the existence of systemic discrimination.

**§8-402 Civil Action**

This provision expressly authorizes the Corporation Counsel to bring a civil action on behalf of the Commission or the City to eliminate particular instances of systemic discrimination. The relief which may be sought in such action includes injunctive relief and damages (including punitive damages) as well as civil penalties.

**§8-403 Investigation**

This section authorizes the Corporation Counsel to make any investigation necessary for the commencement of the civil action provided for above, and would also allow the issuance of subpoenas to compel the attendance of witnesses or the production of documents.

**§8-404 Civil Penalty**

This provision would authorize a court in addition to ordering a defendant found to have engaged in systemic discrimination to pay damages and provide other relief to the City, to impose upon the defendant civil penalties (recoverable by the City) of up to \$250,000.

**Chapter 5 Civil Action By Persons Aggrieved By Unlawful Discriminatory Practices §8-502 (new)**

Under the City's Human Rights Law, claims of discrimination are currently adjudicated through the administrative procedure available at the Commission. An aggrieved person may resort to court only to seek review of the Commission's final decision in the matter. Where the type of discrimination alleged is also prohibited under the State Human Rights Law, an aggrieved person may bring a civil action in State court under that law. The State law, however, does not authorize a court to award costs and attorney's fees to a prevailing party.

In consideration of the policy inherent in the State Human Rights Law that a judicial forum is an appropriate alternative forum for the enforcement of discrimination laws, this chapter would permit aggrieved persons to bring a civil action in court for violation of the City law. Alternatively, aggrieved persons could file a complaint with the Commission, and having chosen one avenue of relief over another, would be deemed to have elected their remedy. §8-502(a). The bill provides generally that the filing of a complaint with the Commission or the State Division of Human Rights would preclude a person from going to court except if the complaint had been dismissed for administrative convenience. §8-502(b). Dismissal by the Commission for administrative convenience could include a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated, as well as dismissal prior to the filing of an answer where no investigation or

conciliation attempts had taken place. See §8-113(a)(6) and §8-113(b).

In the civil action proposed by the bill, an aggrieved person could seek equitable relief and any appropriate damages including punitive damages. §8-502(a). In addition, the proposed bill provides for a court, in its discretion, to award costs and reasonable attorney's fees to a prevailing party. §8-502(f).

#### Chapter 6 Discriminatory Harassment (new)

Sometimes discrimination takes the form of threats, harassment or intimidation by persons who are not employers, owners of housing accommodations or persons who operate public accommodations and thus in circumstances not covered by the current City Human Rights Law, which although broad in its scope, prohibits discrimination by certain persons in certain defined contexts, e.g., employment, public accommodations, housing, etc. While harassment based upon discriminatory animus can theoretically be addressed by either criminal prosecution or by a civil action commenced by the victim, these methods are often ineffective.

This new chapter would add provisions derived from similar laws in Massachusetts and California. The chapter would authorize the Corporation Counsel to seek a court order enjoining a person from interfering by threats, intimidation or coercion with an individual's rights secured by any Federal, State and City laws. §8-602(a). A violation of the court order would constitute contempt and be subject to the imposition of civil penalties of up to \$10,000 per day. §8-602(c). Harassment involving force or a threat of force or the



damaging of property could result in the imposition of civil penalties of up to \$50,000. §8-603.

### Chapter 7 Discriminatory boycotts

This new chapter would require the Commission to begin investigation of a complaint alleging a discriminatory boycott or blacklist within 24 hours after the filing of the complaint and to make reports to the mayor and the council relating to the actions taken to resolve the dispute. If disclosure of any information in such reports would compromise the investigation or mediation or conciliation efforts, such information may be excluded from the report.

### Bill Section 3

This section calls for the Commission to hold a hearing within 180 days of enactment, and to submit recommendations, if any, to the Mayor and the Council, on whether the City's Human Rights Law should be amended to authorize the Commission to impose reasonable requirements involving generation of records upon persons or classes of persons subject to the law.

The section also requires the Corporation Counsel and the Chairperson of the City Commission on Human Rights to issue a report to the Council within 12 months after the bill's enactment on the operation and results of procedures for effective legal representation of the Commission and enforcement of the City Human Rights Law and prevention of potential conflicts of interest.

### Bill Section 4 - Effective Date

The bill would take effect 90 days after its enactment except that the provisions which prohibit discrimination on the basis

of age in public accommodations will take effect on the effective date of rules to be promulgated by the Commission which set forth exemptions to such provisions based on considerations of public policy. In addition, no action may be commenced in court for violation of the City Human Rights Law until 270 days after the effective date. The bill also specifies which of its provisions apply to complaints filed with the Commission prior to the effective date.