



Submission of the Law Society of Hong Kong on

Legislating against Racial Discrimination: A Consultation Paper

Inclusion of New Arrivals from the Mainland

1. The Administration seeks to implement the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”). The Administration has based its proposals on the definition of “racial discrimination” under Article 1 of the ICERD and suggested new arrivals from the Mainland do not constitute a separate race, as they are of the same ethnic stock as the local Chinese in Hong Kong. Discrimination against new arrivals from the Mainland is rather “social discrimination” and therefore outside the scope of the Bill. The Home Affairs Bureau considers “social discrimination” to be best tackled through education.

2. The Administration should however be aware of the provisions in Article 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, which prohibit discrimination on the grounds of “**national or social origin**” or “**birth or other status**”. The Law Society considers the discrimination suffered by the new arrivals from the Mainland should be addressed by the Government under the terms of the Covenants.

Equal Opportunities Commission (“EOC”)

3. In order to improve implementation of existing anti-discrimination legislation, and facilitate implementation of the future Racial Discrimination Bill, the Law Society considers the following areas of the EOC should be reformed:

Conciliation by the EOC

4. Conciliation should always be encouraged in discrimination complaints, to enable the parties to resolve their disputes without litigation. Under the current legislation the EOC facilitates conciliation for both parties. Where that fails, the

EOC is empowered to provide legal assistance and it has provided such assistance to complainants in some 'test' cases.

5. The current legislation contains provisions to prevent conflict of interest where efforts at conciliation fail. There is no suggestion of any actual failing in these provisions. However, are they adequate to prevent respondents from getting the wrong *impression*? The Law Society has received comments that the dual role of the EOC may result in respondents feeling pressure to agree to settlements.

6. It is suggested that while the principle of encouraging conciliation should remain, consideration should be given to amending the relevant legislation to provide for a panel of independent conciliators or mediators, to enable the process to be seen by both sides to be impartial.

Legal Assistance to Complainants

7. The allocation of government resources to enable complainants to bring claims and the protection against having to pay costs personally has led to the EOC making demands which are unjustified on the employers who will often back down and agree a settlement rather than contest proceedings.

8. A party making a complaint of racial discrimination should be placed in the same position as any other litigant assisted by the Government. Unsuccessful proceedings brought under a legal aid certificate are subject to an order for costs being made on the usual basis. The present protection against usual costs orders in relation to complaints to the EOC cannot be justified.

9. The current arrangements are unsatisfactory, for it gives the public an impression that complainants receive preferential treatment over respondents in discrimination cases and this should be avoided if the EOC is to oversee the racial discrimination legislation.

**The Law Society of Hong Kong
Constitutional Affairs Committee
7 February 2005**

83811