

Submission by the Equal Opportunities Commission
to the LegCo Panel on Education, Special Meeting on 19 July 2001

Background

1. On 14 July 2000 the Equal Opportunities Commission (“EOC”) applied for leave to judicially review the decision of the Director of Education (“the Director”) to maintain the Secondary School Places Allocation System (“SSPA”). The events which gave rise to this course of action by the EOC may be summarized as follows:

- (i) The EOC undertook a formal investigation into the SSPA in 1998, after it had received complaints from parents that their children were allocated to a lower band than their classmates of the opposite sex who did not do as well as they did in school.
- (ii) During the course of the investigation, the EOC found that the SSPA, which had been in place for more than 20 years in Hong Kong, was discriminatory on the ground of sex in three aspects:
 - (a) boys and girls in the same school were treated separately in the scaling process, where gender curves were used to produce the final scores in the placement process;
 - (b) boys and girls were put into two separate rank orders in the banding process, resulting in different band cutting scores for each sex; and
 - (c) co-educational schools were required to admit a fixed proportion of boys and girls.
- (iii) The EOC published its Formal Investigation Report in August 1999, together with its findings, including that the SSPA discriminated on the basis of sex, and resulted in **protecting the top 30% of boys to the disadvantage of the higher achieving 30% of girls and the poorer performing 70% of boys, by ensuring that the top 30% of boys were allocated to the better schools.**

- (iv) The EOC recommended that the Government, the Education Commission and the Director should review the SSPA to fulfill their own responsibilities under the laws of Hong Kong and to remove the discriminatory elements to ensure that boys and girls were placed into secondary schools in a manner that did not discriminate against either boys or girls.
- (v) On 19 April 2000 the Director gave a formal reply to the EOC, to the effect that the existing SSPA (including the three elements the EOC had found discriminatory) would be maintained.
- (vi) In view of the decision of the Director to maintain the SSPA, and in view of the wide impact this decision had on a large section of the public, the EOC applied for judicial review.
- (vii) Leave was granted by the High Court and the hearing of the matter commenced on 14 May 2001. It concluded on 24 May 2001.

Relief Sought in Judicial Review

2. As part of the relief sought from the court, the EOC originally sought a declaration that the SSPA was unlawful as well as orders quashing the unlawful discriminatory elements and requiring the Director to remove all discriminatory elements from the SSPA immediately. However, in view of the Director's insistence that the new system could not be implemented in time for the current allocation exercise, by the end of the hearing the EOC sought only the declaration, and did not insist on the other forms of relief.

3. Relying on the public statement made by the Director at the outset of the hearing, that the Education Department "had made preparations to meet all outcomes of the judicial review", the EOC acknowledged that a declaration alone might be sufficient, **as long as the Director was prepared to admit that sex discrimination would be eliminated from the SSPA within a reasonable time scale and that in the meantime an effective and user friendly mechanism was put in place to deal with and to remedy complaints of sex discrimination by individual parents on behalf of their children.**

4. This was accepted by the court and referred to later in its judgment.

5. The EOC also pointed out that it could not be involved in any mechanism put in place by the Director, as the EOC was statutorily bound to administer its own complaint handling mechanism and would be required to deal with such complaints and any applications for legal assistance in the normal course.

Court Ruling

6. On 22 June 2001 the Court delivered its judgment. It found the SSPA to be unlawfully discriminatory in respect of the three elements identified by the EOC and ruled that all three gender-based mechanisms are contrary to the Sex Discrimination Ordinance, Cap. 480 (“SDO”). The Court granted a declaration to that effect, with liberty for both parties to apply for further relief.

7. In so ruling, the Court held that the central pillar around which the edifice of Hong Kong’s legal system is built is respect for the rights and freedoms of the individual, which are manifest in the Bill of Rights, the Basic Law and in the various international conventions and treaties which apply to Hong Kong. The Court also held that administrative difficulty could not be accepted as a reason for entrenchment of a discriminatory system.

8. The Court referred to the fact that the EOC had not sought to dismantle the SSPA at a stroke and that reliance was placed on the Director taking such steps as were necessary to honour the findings of the Court. Based on this expectation, the Court did not consider it necessary to make orders for further relief at the present time.

Current Status

9. On 8 July 2001, the Director announced that the Education Department would introduce its own grievance handling procedure for

cases where students had not been allocated to their school of choice and who believed they had been discriminated against.

10. The EOC welcomes any measures by the Director and the Education Department to redress the grievances of parents whose children have been discriminated against in the current allocation exercise, and hopes that this willingness to remedy unlawfulness extends to participation and co-operation with the EOC in respect of complaints made by parents to the EOC.

11. The EOC also confirms what it has already advised the Director and the Court, that **it is not appropriate for the EOC, or any servant or agent of the EOC, to participate in any of the interim measures introduced by the Director to redress discrimination complaints, as the EOC administers its own statutory complaint handling mechanism, and has certain statutory obligations which would bring it into conflict if it were to adopt a role as insisted by the Director.**

12. The Director also announced that he hoped that a new allocation system, which is both fair and free from discriminatory elements, would be devised as soon as possible. The EOC welcomes the acceptance and recognition of the Director of the court's ruling. However, it is not clear what time frame the Director has in mind for devising a new system, nor whether a new, non-discriminatory system will be in place in time for the next year's allocation exercise.

13. The EOC notes that a special task force has been set up to draw up proposals for a longer-term allocation exercise. The EOC is concerned that, despite the indication by the Director that contingency plans were in place in May 2001, there is still no concrete plan of what is to be done, nor when it is to be done by. This is unacceptable, as the system will continue to adversely affect students who will be awaiting allocation to secondary schools.

14. Whilst the EOC itself cannot assist the Director or the task force in designing a replacement system, the EOC is prepared to recommend suitable local or overseas experts who are in a position to

advise on a new system and to assist the Director in designing a system which is lawful and non-discriminatory as soon as possible. Once a proposal for the new system has been prepared, the EOC is also prepared to advise whether it conforms with anti-discrimination laws.

15. The Court's ruling has provided clarity in terms of the SSPA being unlawful. The EOC now asks that the Government abide by the decision of the court and provide concrete proposals as soon as possible and a timetable for change in time for the next allocation exercise. It is particularly important for the Director of Education to indicate whether a new, lawful system will be in place before the allocation exercise for next year.

Equal Opportunities Commission

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