Submissions by the Law Society of Hong Kong on The Race Discrimination Bill

The Law Society's Committees on Constitutional Law and Employment Law have reviewed the Race Discrimination Bill ("the Bill") and have the following submissions:

1. Section 4: "*Racial Discrimination*"

1.1. "*Justifiable*"
Section 4(2) attempts to set parameters for when an action is "*justifiable*":

> *(a) If it serves a legitimate objective and bears a rational and proportionate connection to the objective; or*
>
> *(b) If it is not reasonably practicable for the person who allegedly discriminates against another person not to apply the requirement or condition.*

We note this is a material deviation from the drafting in the other discrimination ordinances.

2. Section 5: "*Discrimination on the ground of race of near relative*"

2.1. In Section 5 of the Bill, it is unlawful to treat any person less favourably by reason of the race of a "near relative" of that person, as defined in Section 2, namely:

> "the wife or husband, a parent or child, a grandparent or grandchild, or a brother or sister of the person (whether of full blood or half-blood or by affinity)
>
> ['child' includes an illegitimate child and the wife or husband of an illegitimate child".]

2.2. Under section 2(1) of the Disability Discrimination Ordinance ("DDO"), it is

unlawful to treat any person less favourably by reason of the disability of an "*associate*" of that person which covers the following:

- a disabled spouse of the person discriminated against
- a disabled person who is living, on a genuine domestic basis, with the person who is discriminated against
- a disabled relative of the person
- a disabled carer of the person
- a disabled person who is in a business, sporting or recreational relationship with the person

2.3. The concept of "*associate*" in the DDO is wider than the concept of "*near relative*" in the Bill but there are subtle differences. We note the adoption of "*near relative*" may not cover the following situations:

2.3.1. A landlord refusing to rent a roommate to a person because of the race of his roommate (if the roommate is not a relative of that person)

2.3.2. A person refusing to provide services to a person because of the race of his business partner

2.4. Unless there is a rational justification to adopt a different definition we recommend the definition of "*associate*" in the DDO should be adopted in the Bill.

3. Section 8: *"Meaning of "race", "on the ground of race" etc."*

3.1. The Administration has adopted the definition of "race" from the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") in section 8 (1) (a) namely:

> *"…the race, colour, descent or national or ethnic origin of the person"*

3.2. *Education campaign*

Whilst it is appreciated the definition has been lifted from ICERD, it is nonetheless complex and unclear. It will be especially difficult for employers to explain to employees the legal meaning of different ethnic groups or persons of different national origin.

3.2.1. The Law Society wishes to highlight the need for very clear *guidance notes* to be distributed to all persons to whom the new Ordinance will apply and would encourage the Government to undertake a thorough education process *before* the Bill becomes law.

4. Section 13: *"Exception for employment of person with special skills, knowledge or experience"*

4.1. Section *13(1)(c)(ii)*
This exception is an attempt to deal with the issue of appointing individuals on "expatriate terms". However, as drafted, the requirements in section 13(1)(c)(ii) are sufficiently unclear as to make it impossible for any employer to be able to rely on this exception until a material body of case law has been laid down by the courts on the meaning of this sub section.

4.1.2. The exemption: *"any other relevant circumstances (other than the race of the person)"* is problematic as it is too wide. The Administration must explain the legislative intent of this clause. If there are circumstances which should be exempted, it should provide examples in the Bill by adopting the standard drafting format of "*including … but not limited to …*", or failing which to indicate determination will be made by the court or appropriate tribunal.

4.2. We recommend the words "*as the court may consider appropriate*" should be inserted immediately after *"….race of the person*)".

5. Section 14: *"Exception for existing employment on local and overseas terms of employment"*

5.1. The phrases "*local terms of employment*" and "*overseas terms of employment*" are defined by reference to the Conditions of Service which apply "primarily to the appointment or employment by the employer concerned of a person who is a Hong Kong permanent resident", (or not, as the case may be).

The reality, as we understand it, is that many employers determine an individual's entitlement to expatriate or local terms by reference to a number of different factors. These may include, for example, where the individual is resident immediately prior to commencing employment, nationality, as well as whether or not the individual had expatriate terms of employment immediately prior to being employed by the current

employer. None of these are dependent upon the permanent residency status of the individual.

5.1.2. We would, therefore, recommend the relevant definitions in section 11 of Schedule 2 in the Bill be deleted in their entirety and replaced by:-

> ""local terms of employment" (本地僱用條款) and "overseas terms of employment" (海外僱用條款) -
>
> *(a) in relation to any employee (other than a public officer), means respectively* -
>
> *(i) such conditions or terms of service as are not "overseas terms of employment",*
>
> *(ii) such conditions or terms of service as are generally known as "expatriate terms" due to their being related in whole or in part to the residency or nationality status of the employee...."*

6. Part 7 - Commission

6.1. The Equal Opportunities Commission ("EOC")

Existing legislation already prohibits unlawful discrimination on the grounds of sex, disability or family status and it is the EOC which administers compliance with such legislation, and considers complaints made under this legislation. It is proposed the race discrimination legislation will also be administered by the EOC and procedures will be put in place by the EOC to hear complaints of alleged race discrimination.

6.2. Conciliation by the EOC

6.2.1. The Law Society accepts that, in order to assist the parties to resolve their disputes without resorting to litigation, conciliation should always be encouraged in discrimination complaints. Under the existing legislation on discrimination, the EOC facilitates conciliation for both parties. When the conciliation fails, the EOC is empowered to provide legal assistance and has provided assistance to complainants in some "test" cases.

6.2.2. Current legislation contains provisions to prevent *conflict of interest* where efforts at conciliation fail. We do not suggest there is any actual failing in these provisions, but are they adequate to prevent respondents from getting the wrong *impression*? The Law Society has received comments that the dual role of the EOC as ***investigator and conciliator*** may result in respondents feeling pressure to agree to settlements.

6.2.3. We recommend the principle of encouraging conciliation should remain, but consideration should be given to amending the legislation to provide for a panel of ***independent conciliators or mediators***, to enable the process to be seen by both sides to be impartial.

6.3. Legal Assistance to Complainants

6.3.1. 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 many employers consider to be unjustified. In particular, complainants can proceed to trial in the knowledge that, unless their complaint is held to be frivolous or vexatious, they will never be responsible for the costs and expense of the defendant, even if they lose the case; thus many defendants facing complaints of unlawful discrimination will settle without proceeding to court, even if they feel they have done nothing wrong.

6.3.2. We are aware the EOC considers the statistics concerning the high number of cases settled out of court as being a “success”. In our view whilst it is of course appropriate for an attempt to be made to settle cases before they reach the courts, the statistics themselves can be viewed as evidence of the current inequity between claimant and defendant in the current procedures.

6.3.3. 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.

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

legislation.

7. Section 26: Discrimination by responsible bodies for educational establishments

7.1. Section 26(2)
Schools under this clause will not be required to make special arrangements on the medium of instruction for "any racial group". Many NGOs have stated the fact that many ethnic minority students face an impediment to their education because of lack of linguistic skills. Clause 26(2) provides a blanket shield for the Administration and other educational bodies. The Bill fails to impose any requirement that reasonable arrangements should be put in place in order to provide adequate support for ethnic minority students.

7.1.2. The Administration should review s.24(4) in the DDO, which provides an exemption for an educational establishment if its provision of services, or facilities for students with a disability "*would impose unjustifiable hardship*" on the educational establishment.

7.2. Clause 58
This clause provides a wide exemption by covering services in the public and private sector that the use of – or failure to use – any language would not be considered racial discrimination.

7.2.1. The Law Society accepts that it is unrealistic to expect all businesses in Hong Kong to display notices in a plethora of minority languages. However the provision of bilingual information in English, in addition to Chinese, can assist ethnic minorities. The Administration should consider amending the Bill by adopting wording similar to that in S.26(2) DDO, namely it "*would impose unjustifiable hardship*" on that person, or business.

7.2.2. Consideration should be given to expanding the use of English on all government websites and publications; S.58 as drafted has the effect of "sanctioning" existing Government's current policy which is unacceptable.

7.2.3. The Government should provide adequate resources to provide language support to the ethnic minorities and the new arrivals from the Mainland to enable them to acquire linguistic skills in Cantonese and English to enable them to integrate

into local society. The budget of HK$17 million is not generous and should be increased.

8. Section 57: "Application to New Territories Land"

8.1. The rights of the New Territories inhabitants are protected by Article 40 of the Basic Law: *"the lawful traditional rights and interest of the "indigenous inhabitants of the New Territories" shall be protected by the HKSAR"*. It is unclear why there should be an exemption to cover whether a person is an indigenous inhabitant of the New Territories in the Bill.

8.2. The indigenous inhabitants of the New Territories should not be granted exemption from racial discrimination under this legislation as it widens their "rights".

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