Subcommittee on Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation

The Administration's Response to Issues Raised by the Assistant Legal Adviser of the Legislative Council Secretariat

Purpose

This note briefs Members on the Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (RD(PEOC)R) and addresses the issues raised by the Assistant Legal Adviser of the Legislative Council Secretariat (ALA) in its report to the House Committee dated 17 March 2009 (LC Paper No. LS50/08-09).

Background

2. The Race Discrimination Ordinance (RDO) was enacted in July 2008. Section 83 of the RDO (extract at **Annex A**), which has commenced operation on 3 October 2008, provides that the Secretary for Constitutional and Mainland Affairs may make regulations to empower the EOC, in case where a victim of racial discrimination, harassment and vilification may bring proceedings under section 70 of the RDO <u>but has not done so</u>, to bring proceedings as if the EOC were that person (extract of section 70 is at **Annex B**).

The Regulation

3. The RD(PEOC)R was made by the SCMA on 11 March 2009. The RD(PEOC)R is modeled on previous regulations made under respective discrimination ordinances i.e. the Sex Discrimination Ordinance (SDO) and Family Status Discrimination Ordinance (FSDO).

Issues raised

4. In LC Paper No. LS50/08-09 (**Annex C**), the ALA noted that some provisions in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation (DD(PEOC)R) are different from those in the regulations made under the RDO, SDO and FSDO. These include :

- (a) there is no requirement for a claim to be "well-founded" provided the EOC has reason to believe that a person committed an act of discrimination, harassment, vilification or which is otherwise unlawful under the DDO;
- (b) there are clear procedures to establish that the aggrieved person will not bring proceedings; and
- (c) there is also a pre-requisite that the EOC has offered assistance to the aggrieved person by way of conciliation but failed to effect a settlement.

5. We responded to issues concerned in our letter of 19 March 2009 to the ALA (**Annex D**). The relevant information and considerations are set out in the following paragraphs.

6. Regarding the issue raised in para. 4(a) above, the circumstances in which the EOC may bring proceedings under the RD(PEOC)R and the regulations under the SDO and FSDO include the circumstance that "it appears to the EOC that the claim is well founded". Although the DD(PEOC)R adopts a more elaborated drafting, i.e. "that the EOC has reasons to believe that an unlawful act under the Disability Discrimination Ordinance was committed", the same purpose is served in the provision "it appears to the EOC that the claim is well founded" in the RD(PEOC)R and the regulations under the SDO and FSDO.

7. As for the issues raised in para. 4 (b) and (c) above, our intent when drafting the RD(PEOC)R is to allow flexibility for the EOC to bring proceedings as provided for in section 83 of the RDO. There is already a requirement under section 83(1)(a) of the RDO that the person who may bring proceedings under section 70 has not done so. It may not be necessary to provide further procedural requirements in the RD(PEOC)R.

Legal assistance

8. Some Members raised concerns at previous Panel meeting about the legal assistance provided by the EOC. Members may wish to note a separate paper provided by the EOC in March 2009 (see **Annex E**) for easy reference. We reiterate that the circumstances under which the RD(PEOC)R will operate are different from those under which legal assistance may be granted by the EOC.

Way forward

9. We aim to bring the Regulation and all the provisions of the RDO into operation in around mid-2009.

Constitutional and Mainland Affairs Bureau March 2009 Cap 602 s 83 Regulations to empower Commission to bring certain proceedings

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Annex A

Individual Section Mode

Previous section of enactment			Next section of S enactment	witch language	Back to the List of Laws
			Contents of Sectio	n	
×					
Chapter:	602	Title:	RACE DISCRIMINA ORDINANCE	TION Gazette Num	nber: L.N. 222 of 2008
Section:	83	Heading:	Regulations to empo Commission to bring certain proceedings		e: 03/10/2008

(1) The Secretary for Constitutional and Mainland Affairs may make regulations-

(a) where any person may bring proceedings under section 70 but has not done so, empowering the Commission, in such circumstances as are specified in the regulations, to bring and maintain those proceedings as if the Commission were that person;(b) specifying which of the remedies referred to in section 70(3) shall be

(b) specifying which of the remedies referred to in section 70(3) shall be obtainable by the Commission in any such proceedings;

(c) for the purposes of enabling the Commission to bring and maintain any such proceedings (including any related purposes), specifying modifications to which any provisions of this Ordinance (including any subsidiary legislation) shall be read.

(2) Any regulations made under this section shall be subject to the approval of the Legislative Council.

(3) This section is without prejudice to the Commission' s power to bring proceedings by way of judicial review, in relation to this Ordinance or any other law, pursuant to its functions under section 59(1).

Previous section of enactment Next section of enactment Switch language

Back to the List of Laws Cap 602 s 70 Claims in respect of discrimination, harassment and vilification



Annex B

Individual Section Mode

Previous section of enactment			Next section of S enactment	witch language	Back to the List of Laws
			Contents of Sectio	n	
*					
Chapter:	602	Title:	RACE DISCRIMINA ORDINANCE	TION Gazette N	umber:
Section:	70	Heading:	Claims in respect of discrimination, hara and vilification		ate:

Remarks: not yet in operation

(1) A claim by or on behalf of any person ("the claimant") that another person ("the respondent")—

(a) has committed an act of discrimination against the claimant which is unlawful by virtue of Part 3 or 4;

(b) has committed an act of harassment against the claimant which is unlawful by virtue of Part 3 or 4;

(c) has committed an act which is unlawful by virtue of section 45; or (d) is to be treated, by virtue of section 47 or 48, as having committed an act of discrimination or harassment referred to in paragraph (a) or (b) against the claimant or an act referred to in paragraph (c),

may be made the subject of civil proceedings in like manner as any other claim in tort.
(2) Subsection (1) does not apply to a claim under section 19(1) of an act in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any enactment.
(3) Proceedings under subsection (1) are to be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection and section 69(1), would be obtainable in the Court of First Instance.

(4) Without limiting the power conferred by subsection (3), the District Court may-

(a) make a declaration that the respondent has engaged in conduct, or committed an act, that is unlawful under this Ordinance and order that the respondent shall not repeat or continue such unlawful conduct or act;

(b) order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant;

(c) order that the respondent shall employ or re-employ the claimant;

(d) order that the respondent shall promote the claimant;

(e) order that the respondent shall pay to the claimant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct or act;

(f) order that the respondent shall pay to the claimant punitive or exemplary damages; or

(g) make an order declaring void in whole or in part and either ab initio or from

such date as may be specified in the order, any contract or agreement made in contravention of this Ordinance.

(5) By virtue of this subsection and notwithstanding any law, the District Court has jurisdiction to hear and determine any proceedings under subsection (1) and has all such powers as are necessary or expedient for it to have in order to provide, grant or make any remedy, injunction or order mentioned in this Ordinance.

(6) In respect of an unlawful act of discrimination falling within section 4(1)(b), no award of damages is to be made if the respondent proves that the requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of the race of the claimant.

(7) For the avoidance of doubt, it is declared that damages in respect of an unlawful act of discrimination or harassment, or an act which is unlawful by virtue of section 45, may include compensation for injury to feelings whether or not they include compensation under any other head.

Previous section of Next section of Switch language Back to the List of enactment enactment Laws

Annex C



LC Paper No. LS50/08-09

Paper for the House Committee Meeting on 20 March 2009

Legal Service Division Report on Proposed Resolution under section 83 of the Race Discrimination Ordinance (Cap. 602)

The Secretary for Constitutional and Mainland Affairs (the Secretary) has given notice to move a motion at the Legislative Council meeting on 1 April 2009. The motion seeks the Legislative Council's approval of the Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (the Regulation) made by the Secretary under section 83 of the Race Discrimination Ordinance (Cap. 602) (the Ordinance), which was passed in July 2008.

2. Section 83 of the Ordinance, which came into operation on 3 October 2008, empowers the Secretary to make regulations to specify-

- (a) the circumstances in which the Equal Opportunities Commission (EOC) may bring and maintain proceedings under section 70 of the Ordinance if a person who is entitled to bring such proceedings has not done so as if the EOC were that person; and
- (b) the remedies which the EOC may seek to obtain in such proceedings.

3. The Regulation, modeled on the Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation (Cap. 480 sub. leg. C) and Family Status Discrimination (Proceedings by Equal Opportunities Commission) Regulation (Cap. 527 sub. leg. C), provides that-

- (a) the EOC may bring proceedings where the case raises a question of principle and it is in the interests of justice to do so and it appears to the EOC that the claim is well-founded; and
- (b) in any such proceedings the EOC may apply for any remedy available to a claimant, including a declaration or an injunction or both.

4. Members may refer to an information paper (LC Paper No. CB(2)829/08-09(07)) issued by the Constitutional and Mainland Affairs Bureau to the Panel on Constitutional Affairs (the Panel) in February 2009.

5. The Panel was briefed on the paper and the proposed Regulation on 16 February 2009. Members had reservations in supporting the proposed Regulation, noting that a claim had to be 'well-founded' for the EOC to bring proceedings in its own name. Members also indicated an intention to propose setting up a subcommittee to study the Regulation when the Council's approval was to be sought.

6. The Regulation, if approved, will come into operation on a day to be appointed by the Secretary by notice published in the Gazette. The Administration aims to bring into operation the Regulation together with the remaining provisions of the Ordinance which are not yet in force by mid-2009.

7. The Legal Service Division is seeking clarification from the Administration on the approach taken in the Regulation, which is different from that of the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation (Cap. 487 sub. leg. C) (Please see attached letter to the Administration).

Encl.

Prepared by TAM Shuk-fong, Clara Assistant Legal Adviser Legislative Council Secretariat 17 March 2009

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中華人民共和國香港特別行政區 Hong Kong Special Administrative Region of the People's Republic of China

立法會秘書處 LEGISLATIVE COUNCIL SECRETARIAT

朱薇薇鉄 YOURREF : 本政術派 CARREF : LS/R/10/08-09 電 訂 TELEPHONE: 2869 9478 蜀文仲阜 FACEMOT : 2877 5029 Ż

URGENT BY FAX Fax No. : 2840 1528

17 March 2009

Mr LAM Sui Lung, Stephen, JP Secretary for Constitutional and Mainland Affairs 3rd Floor, Main and East Wing, Central Government Offices, 11 Ice House Street, Central, Hong Kong

Dear Mr LAM,

Proposed Resolution under section 83 of the Race Discrimination Ordinance

I am scrutinizing the legal and drafting aspects of the Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (the Regulation) made under section 83 of the Race Discrimination Ordinance (RDO).

By virtue of section 83 of the Ordinance, the Regulation empowers the Equal Opportunities Commission (EOC) to bring proceedings under the RDO in its own name where a victim of racial discrimination, harassment and vilification may bring proceedings under section 70 of the RDO but has not done so.

It is noted that the Regulation is closely modeled on regulations made by the Secretary for Constitutional and Mainland Affairs under the Sex Discrimination Ordinance, Cap. 480 (SDO) and Family Status Discrimination Ordinance, Cap. 527 (FSDO).

However, in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation made by the Secretary for Labour and Welfare under the Disability Discrimination Ordinance (DDQ) subsequent to those made under the SDO and the FSDO, different provisions are made, e.g.-

(a) there is no requirement for a claim to be 'well-founded' provided the EOC has reason to believe that a person committed an act of discrimination, harassment, vilification or which is otherwise unlawful under the DDO;

香港中泰段臣還八犹立法舍大楼 LEGISLATIVE COUNCIL BUILDING & JACKSON ROAD CENTRAL HONG KONG.

- 2 -
- (b) there are clear procedures to establish that the aggrieved person will not bring proceedings; and
- (c) there is also a pre-requisite that the EOC has offered assistance to the aggrieved person by way of conciliation but failed to effect a settlement.

I would be grateful for your clarification on the approach taken in the Regulation vis-à-vis the similar regulation made under the DDO to facilitate my reporting to the House Committee on 20 March 2009 (in both Chinese and English and with soft copy to Ms Christine LIU at ylliu@legco.gov.hk).

Yours sincerely,

(Clara TAM) Assistant Legal Adviser

Annex D



CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU GOVERNMENT SECRETARIAT

> LOWER ALBERT ROAD HONG KONG Tel No. : 2810 2368 Fax No. : 2840 1528

OUR REF : CMAB/CR1/34/92 YOUR REF : LS/R/10/08-09

政制及內地事務局

政府總部

香港下亞厘單道

19 March 2009

Ms Clara Tam Assistant Legal Adviser Legislative Council Secretariat Legislative Council Building 8 Jackson Road Central Hong Kong (Fax No.: 2877 5029)

Dear Ms Tam,

Proposed Regulation under Section 83 of the Race Discrimination Ordinance

I refer to your letter dated 17 March 2009 regarding the proposed Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (RD(PEOC)R).

The proposed RD(PEOC)R is modeled on previous regulations made under respective discrimination ordinances to allow the Equal Opportunities Commission (EOC) to bring proceedings under the Race Discrimination Ordinance (RDO) in its own name where a victim of racial discrimination, harassment and vilification may bring proceedings under Section 70 of the RDO but has not done so. The circumstances in which the EOC may bring such proceedings under the RD(PEOC)R are essentially the same as those under the other anti-discrimination ordinances, namely –

- (a) the case raises a question of principle;
- (b) it is in the interests of justice to do so; and
- (c) it appears to the EOC that the claim is well founded.

In particular, although the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation (DD(PEOC)R) adopted a more elaborated drafting (i.e. the EOC has reasons to believe that an unlawful act under the Disability Discrimination Ordinance was committed, as noted in para. 4(a) of your letter), the same purpose is served in (c) above under the RD(PEOC)R and other similar existing regulations.

As we explained during the meeting of the Constitutional Affairs Panel in February, there are some procedural requirements under the DD(PEOC)R (as mentioned in paragraphs 4(b) and (c) of your letter) that are not present in other similar regulations, including the RD(PEOC)R. We consider that, whereas Section 83(1)(a) of the RDO already contains the provision that the person who may bring proceedings under Section 70 has not done so, it may not be necessary to provide further procedural requirements in the case of the RD(PEOC)R.

Yours sincerely,

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(Arthur HO) for Secretary for Constitutional and Mainland Affairs

LC Paper No. CB(2)1093/08-09(01)

CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU

GOVERNMENT SECRETARIAT

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16 March 2009

Ms Flora Tai Clerk to Panel on Constitutional Affairs Legislative Council Building 8 Jackson Road Central Hong Kong

Dear Ms Tai,

Panel on Constitutional Affairs

Legal Assistance provided by Equal Opportunities Commission

At the meeting of the Panel on Constitutional Affairs held on 16 February 2009, Members requested information on the legal assistance provided by the Equal Opportunities Commission (EOC). Attached please find a note prepared by the EOC, entitled "Legal assistance provided by Equal Opportunities Commission", for Members' reference please.

As explained at the meeting and also in the note, the function of the EOC in providing legal assistance to victims of discrimination is distinct from its power to initiate proceedings as if it were the victim under the regulations of respective discrimination ordinances, including the proposed Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation when it comes into operation.

Yours sincerely,

Intil+3,

(Arthur Ho) for Secretary for Constitutional and Mainland Affairs

Encl.

Legislative Council Panel on Constitutional Affairs

Legal Assistance provided by Equal Opportunities Commission

Purpose

Pursuant to Members' enquiries in the meeting held on 16 February 2009, this Paper provides information on legal assistance provided by the Equal Opportunities Commission (EOC) under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance (the Ordinances).

Background

A person may lodge a complaint with the EOC in respect of an 2. unlawful act under the Ordinances, and the EOC will investigate the complaint and will endeavour to effect a settlement between the parties¹.

After a complaint is lodged with the EOC, and if there is no 3. settlement, any person who may take legal proceedings in respect of the unlawful act concerned may apply for assistance from the EOC (legal assistance) in respect of those proceedings².

The EOC's function of providing legal assistance under the 4 Ordinances is distinct from other types of legal proceedings which the EOC may become involved. Where applicable, the EOC may also take proceedings in its own name under regulations made under the Ordinances³. The EOC may apply for judicial review, as it did in the case of EOC v Director of Education [2001] 2 HKLRD 690. The EOC may also provide amicus curiae to the courts, as it did in Secretary for Justice v Chan Wah [2000] 3 HKLRD 641, Tsang Helen v Cathay Pacific Airways Ltd (No 2) [2001] 4 HKC 585 and Leung T C William Roy v Secretary for Justice [2006] 4 HKLRD 211.

¹ SDO s.84, DDO s.80 and FSDO s.62

² SDO s.85(1), DDO s.81(1) and FSDO s.63(1)

³ Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.480C; Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.487C; Family Status Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.527C

Factors considered by EOC

Under the Ordinances⁴, the EOC shall consider an application for 5. legal assistance and may grant it if it thinks fit to do so, in particular where -

- (a) the case raises a question of principle; or
- (b) it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided.

The Ordinances enable the EOC to decide whether to provide 6. assistance in each case as it thinks fit. The EOC may do so by reference to the priorities of its work. This is in line with former commissions in the UK operating under similar legislation before they were merged into a single commission⁵.

Applications for assistance are considered by the EOC's Legal and 7. Complaint Committee. In deciding whether to provide assistance, the factors considered by Committee include:

- (a) Whether the case raises a question of principle;
- (b) Whether it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided;
- (c) The strength of the evidence;

⁴ SDO s.85(2), DDO s.81(2) and FSDO s.63(2)

For example, the former Commission for Racial Equality stated that it was "obliged only to support cases which we consider suitable ... Decisions are usually made on the basis of the strength of the case, but other factors also come into play, such as whether or not the case meets the CRE's priorities: whether the applicant already has, or could have, access to alternative representations... (http://83.137.212.42/sitearchive/cre/legal/assistance.html). In the UK, the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission were merged into the Equality and Human Rights Commission in October 2007.

- (d) The need to establish legal precedents;
- (e) The need to enhance and sustain public awareness;
- (f) The publicity impact on EOC's work in promoting equal opportunity if legal assistance is given;
- (g) Whether the case reinforces a policy issue emphasized by the EOC;
- (h) Whether suitable and effective remedy for the applicant could be obtained through legal proceedings;
- (i) Whether assistance has been granted in another case which will achieve the same purpose;
- (j) Whether the applicant has alternative resources, including legal aid;
- (k) The attitude and behaviour of the parties during the complaint handling process.

General information

8. As at February 2009 (Annex I), there have been 451 applications to the EOC for legal assistance, and the EOC have provided assistance in 190 applications (42%). Out of these 190 applications, 61 applications were settled before legal action was commenced. Legal action was commenced in 69 applications. The same legal action may deal with more than one application. From the 69 applications, there have been 58 legal actions.

9. Out of 58 legal actions, 33 legal actions were settled without a trial. There have been 15 trials; 13 trials have resulted in favour of the EOC assisted party; 2 trials have not resulted in favour of the EOC assisted party.

10. The legal expenses incurred by the EOC in providing assistance have been HK\$6,778,361.25. The settlement sums or damages awarded to EOC assisted party have been HK\$24,645,404.94.

11. While pregnancy discrimination and disability discrimination in employment constitute the majority of applications made to EOC, the EOC currently pays particular attention to applications involving accessibility to buildings and facilities for people with disabilities, sexual harassment, and family status discrimination in employment.

12. With regard to the strength of evidence, the EOC takes the view that it should provide assistance only if there are good prospects of establishing the facts contended. This approach is in line with the former UK commissions⁶.

13. According to the information of the Legal Aid Department (Annex II), from 2005 to 2007, there were 28 applications for legal aid under the Ordinances. There were 24 unsuccessful applications and 3 refusals on means.

14. In the UK, the former Disability Rights Commission supported 47 new legal cases in the year $2004/05^7$. The former Commission for Racial Equality provided full legal representation in 1 case in 2004 and 3 cases in 2005^8 .

Funding

15. At present, under the envelop funding approach, the EOC's legal expenses in relation to giving legal assistance are absorbed in the Recurrent Account. From 2005/06 up to the present, about HK\$1.5 million is set aside each year. Should this amount be insufficient, resort can be had to the General Reserve (except for funds designated for specific purposes). The General Reserve is currently around HK\$17 million.

Equal Opportunities Commission March 2009

⁶ For example the former Disability Rights Commission stated that it "will fund individual need cases where there is exceptional individual need or hardship, such that without DRC support it is likely the disabled person will not be able to access the justice system. However, to warrant DRC support, as with cases involving points of legal principle, the prospects of success of the case must usually exceed 60% (prospects of success will be assessed as they would be with DRC support in place)" (Guide to DRC's Legal Case Selection Priorities, March 2006, paras. 1.6 and 1.7)

⁷ Disability Rights Commission Annual Report and Accounts 2004-05

⁸ Commission for Racial Equality Annual Report 2005

Annex I

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	No. of applications for legal assistance	No. of applications withdrawn	No. of applications under consideration	No. of unsuccessful applications	No. of successful applications [a+b+c+d]	(a) not pursued (withdrawn by assisted person/ terminated by EOC)	(b) settled before proceedings commenced	(c) Proceedings commenced	(d) in progress
Ordinance				93	77	17	27	28	5
SDO	172	0	2					37	8
DDO	261	2	1	155	103	28	30		
FSDO	18	0	1	7	10	2	4	4	0
Total no. of applications	451	2	4	255	190	47	61	69	13

Table 1: Applications to the EOC for legal assistance from 1997 to February 2009

Table 2: Legal actions assisted by the EOC from 1997 to February 2009

LADIC #. LICS		Status of legal actions					
Ordinance	No. of EOC assisted legal actions [a+b+c+d]	(a) Settled out of court	(b) Court ruled in favour of the EOC assisted party	(c) Court ruled in favour of the Defendant	(d) On-going		
SDO	22	13	6	2	1		
DDO	34	18	7	0	9		
FSDO	2	2	0	0	0		
Total no. of legal actions	58	33	13	2	10		

Annex II LC Paper No. CB(2)2187/07-08(01)

法律援助署 Legal Aid Department

卡哥福曼 Our Ref.:	LA/ADM 115/37 (C) II
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Ms. Fl	
Clerk t	o Bills Committee
Legisli	ative Council
Legisl	ative Council Building
8 Jack	son Road
	l, Hong Kong

5 June 2008

Dear Ms. Tai,

Re.: Bills Committee on Race Discrimination Bill

Thank you for your letter of 27.5.2008 enquiring information about applications for legal aid under the three existing anti-discrimination ordinances.

We provide the required information for the past 3 years as follows :-

	2005	2006	2007
DZ Example anti-	5	8	15
No. of applications No. of unsuccessful applications	5	7	12
No. of thisuccession applications	1	2	0
No. of refusal on means	1		

Yours sincerely,

(Ms. Juliana O.Y. Chan) for Director of Legal Aid

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