REPORT NO. 7 OF THE
SECTION OF INDIVIDUAL RIGHTS
AND RESPONSIBILITIES

RECOMMENDATION*

BE IT RESOLVED, That the American Bar Association recommends that federal fair housing legislation be amended to:

(1) Enhance the ability of the Department of Housing and Urban Development to resolve housing discrimination complaints through conciliation;

(2) Authorize administrative law judges to hear and decide the outcome of housing discrimination complaints, provided that full due process rights and the right to appeal such decisions to a court of appeals are afforded;

(3) Extend the protection of fair housing legislation to the handicapped;

(4) Extend the protection of fair housing legislation to families with children.

REPORT

This Report urges the House of Delegates of the American Bar Association to endorse federal legislation that would, among other things, strengthen the woefully inadequate enforcement mechanisms of Title VIII of the Civil Rights Act of 1968 (the “Fair Housing Act”) and expand a previously-approved policy of the Association in support of equal housing opportunity to include the handicapped and families with children.

The House of Delegates, during its August 1980 Annual Meeting, adopted the following resolution in support of legislation that would bar discrimination in housing:

Be It Resolved, That the American Bar Association continues to support in principle appropriate legislation which prohibits discrimination in the sale and rental of housing on the basis of race, color, creed, sex or national origin.

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*The recommendation was approved. See page 12.
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Congress or in the housing industry questioned the principle of equal housing opportunity. But many opposed vigorously various proposals for attaining that goal through enforcement. Thus, almost seven years later, the Fair Housing Act remains a weak and relatively ineffective law.

Passage of this resolution by the House of Delegates would recognize that eighteen years after the enactment of the Fair Housing Act in 1968, discrimination in the sale, rental and leasing of housing remains a serious national problem that cannot be dealt with adequately under existing enforcement authority.

In 1980, the United States Department of Housing and Urban Development (HUD) estimated that there may occur in the United States as many as two million instances of racial discrimination in housing each year. But due to the lack of remedial legislation such as that endorsed by this resolution, only 5,000 such cases find their way into court or conciliation within HUD or state or local agencies annually. Because of the extremely limited remedies and enforcement powers available under current law, less than 20% of such cases are successfully conciliated outside the courtroom. Legislation endorsed by this resolution would provide for administrative enforcement, temporary restraining orders, injunctive relief, and money damages, unavailable under current law.

The Limitations of the Fair Housing Act

The Fair Housing Act bars discrimination in the sale and rental of real estate and authorizes victims to file complaints with HUD. It also outlaws discrimination in terms and conditions of transactions and brokerage services, blockbusting and interference with a person’s exercise of his or her fair housing rights. The Secretary of HUD is required under the Fair Housing Act to investigate, and if appropriate seek a remedy through conciliation for, each and every housing discrimination complaint HUD receives.
Where HUD determines that states or localities have laws that are substantially equivalent to the federal law, the Secretary is required to refer cases to them for processing. The only power that HUD has with respect to an individual complaint of discrimination is to investigate and attempt to conciliate the matter. The invitation to conciliate is simply an invitation to talk, and its outcome depends entirely upon the good faith of the parties and the skill of the HUD investigators.

Under current law, HUD may not sue an intransigent party but may only refer cases to the Attorney General. Moreover, the Attorney General may sue only if there has been a “pattern or practice” of discrimination—not on behalf of individuals. The result is that just a handful of persistent or affluent victims or those assisted by private fair housing centers take the only available step after an unsuccessful conciliation—engage an attorney to file an action in court. Hence, the United States government takes its place on the sidelines and must depend in essence upon “private attorneys general” to enforce the law. This no doubt poses in potential complainants’ minds the question whether given the prospect of “going it alone” it makes sense to file a complaint. Moreover, the individual who wishes to pursue a remedy is forced to make a sometimes confusing choice of whether or not to go through the administrative procedure before seeking court relief. Whatever the choice, the individual is faced with a relatively short statute of limitations that could further add to his or her confusion. The statistics seem to indicate that most victims of housing discrimination are choosing not to come forward. This is occurring despite HUD’s steadily improving record of conciliating cases.

The chief defect in the existing Fair Housing Act is its lack of an adequate enforcement mechanism. Reliance on individual lawsuits in the field of civil rights does not produce the desired results. Therefore, when Congress passed the historic Civil Rights Act of 1964 and Voting Rights Act of 1965, it included in both laws provisions that make the Federal government the primary enforcer of those laws. Congress failed to do likewise when it passed the Fair Housing Act, instead, limiting the Attorney General to filing pattern or practice suits that raise issues of general public importance. The Attorney General, as a result, has failed to have a great impact on practices in the housing market.

Under the existing law, moreover, the Secretary of HUD is virtually powerless to act against private discriminators. Because the Secretary’s authority is limited to investigating complaints and seeking conciliation between the violator and the complainant, the guilty party is free to persist in breaking the law, knowing, in most instances, that the complainant lacks the funds to file a lawsuit and that the Secretary of HUD is powerless to act even after finding a flagrant violation of the law.

William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, testifying before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on April 7, 1987, said:

There is also general agreement that while the Fair Housing act has achieved much good, its
enforcement provisions must be strengthened if it is to extend the promise of a color-blind society into the housing market.

The overriding goal of fair housing reform must be to increase the access of individuals to remedies guaranteed by the Fair Housing Act, while preserving procedural fairness for both complainants and respondents in fair housing disputes. Under existing law, an individual whose complaint cannot be resolved through conciliation is remitted to filing a private action in federal court. Because the amount of money at stake in fair housing disputes is generally small, an individual may not find it worthwhile to file such an action. This problem is compounded by the current law’s limitation of awards of attorney’s fees to indigent plaintiffs. Thus, we have repeatedly urged Congress to amend the Fair Housing Act to assist individual claimants in pursuing vindication of fair housing claims.

Recognizing the limitations of the present Fair Housing Act, the House of Representatives should support appropriate legislation to strengthen the enforcement provisions of the Act.

Proposed Legislation to Strengthen the Fair Housing Act’s Enforcement Mechanism

During the 96th Congress, the House of Representatives passed a bill that would have strengthened the Fair Housing Act’s enforcement mechanism. It provided for administrative adjudication of simple fair housing cases—those involving a single individual and no novel issues of law—through administrative law judges assigned to the Department of Justice. Under the bill, complaints have been investigated, and where reasonable cause to believe the complaint was found, they would have been prosecuted by the Secretary; the Attorney General could choose to litigate cases involving zoning and land use issues and complex or novel questions of law. A similar measure was reported by the Senate Judiciary Committee and considered on the floor, but it failed to overcome a threatened filibuster and died in the waning days of the session. That measure would have established an administrative procedure and an independent commission of administrative law judges to hear fair housing cases. There were efforts in the Senate to strike the bill’s administrative enforcement provisions and substitute authorization for the Attorney General to take HUD-related complaints to court on behalf of individual complainants. Similar bills were introduced during the 98th Congress to authorize administrative and court enforcement of Title VIII, but no action was taken on these measures.

In the 100th Congress, legislation has been introduced in both houses of Congress to amend the Fair Housing Act. In the Senate, on February 19, 1987, Senator Edward M. Kennedy (D-MA) introduced S. 558, The Fair Housing Amendments Act of 1987. Senate bill No. 558 would strengthen fair housing enforcement by creating administrative remedies and adding protection for the handicapped and families with children, and would make other technical changes in the law. The companion House bill, H.R. 1158, was introduced in the House on the same day by Rep.
Hamilton Fish, Jr. (R-NY). It was referred to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, which has scheduled hearings.

A. Administrative Enforcement

Under the Kennedy bill, the Secretary of HUD is authorized to receive and investigate fair housing complaints and refer those within the jurisdiction of substantially equivalent state or local agencies. If HUD finds that there is no reasonable cause to believe that the complaint is true, the Secretary must dismiss it without further proceedings.

Where reasonable cause is found, the Secretary must bring the parties together and attempt to conciliate the matter. Administrative enforcement comes into play only if conciliation fails. In that case, the Secretary is authorized to bring the matter before an administrative law judge for a hearing or to the Attorney General for litigation (if the case involves zoning, land use, a novel question of law or a complex issue). This assures that only the simplest of cases are—those involving a routine refusal to sell or rent a unit of housing—resolved administratively.

Because most simple refusals to sell or rent require prompt action, the Secretary may ask the Attorney General to seek a temporary restraining order (TRO) or preliminary injunction from the court to prevent the unit from being transferred to another party prior to the outcome of the discrimination case. An administrative law judge is authorized to award such equitable and declaratory relief (including cease and desist orders) and compensatory and punitive damages as deemed necessary. The decision may be appealed to a circuit court of appeals. The legislation does not bar an individual from taking a case to court prior to the commencement of an administrative hearing.

The most important advantage of administrative enforcement is that it will assure that simple cases—the kinds that now either are not filed or cannot be conciliated because of the uncooperativeness of respondents—will not be ignored in favor of class action lawsuits. This will increase the number of victims receiving awards and heighten the effectiveness of the conciliation process. Knowing that if conciliation fails HUD will be able to bring meritorious cases before an administrative court instead of simply dropping out of the matter, violators should be more willing to settle. Even those who espouse giving the Attorney General the authority to represent individual discrimination victims in court acknowledge that such a system would assure that only a handful of individual cases would be brought.

Questions have been raised whether the Seventh Amendment requires a jury trial under the administrative enforcement scheme which the Kennedy bill would establish. However, Congressional hearings have demonstrated the constitutionality of such administrative proceedings, pointing to the U.S. Supreme Court's recent ruling in \textit{Tull v. United States}, 55 U.S. 4571 (U.S. April 28, 1987). In holding that the Seventh Amendment requires jury trials in suits brought by the United States to collect civil penalties in the federal district courts, the Court also made clear its ruling does not apply to administrative proceedings. The Court expressly relied on its ruling...
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### B. The Conciliation Process

With the creation of an effective administrative backup procedure, the conciliation process should become the main focus for the swift and fair disposition of cases. The Kennedy bill would, in addition to creating a procedure for handling failed conciliations administratively, formalize this rather informal procedure.

Among other things, the bill authorizes a respondent and aggrieved party to enter into a conciliation agreement that provides for binding arbitration of the dispute. It also authorizes the Attorney General to file an action in court to enforce the terms of a conciliation agreement. This provision, in effect, authorizes the Attorney General to represent individual fair housing victims in court, but only after a conciliation agreement has been entered into and breached. This is an appropriate point for the Attorney General’s involvement and will assure that the relatively small volume of enforcement proceedings expected to be filed will receive the Justice Department’s attention. Moreover, the public impact of having these proceedings brought successfully by the nation’s chief law enforcement officer should deter both housing discrimination and the breaching of conciliation agreements.

Another key provision that will heighten the impact of conciliation is one that authorizes the making public of conciliation agreements. The impact of a conciliation agreement upon a community’s real estate practices will be nil unless the citizens and those who sell and rent housing are placed on notice that the law is working. This will generate complaints from potential victims and deter future illegal practices. Importantly, the provision is balanced by one which prohibits “individually identifiable information” derived from a conciliation from being made public. It would protect respondents who enter into conciliation agreements in good faith from being placed in a position of public rebuke. In addition, it makes the conciliation process—a private proceeding—even more attractive as a means of settling fair housing cases, as it reduces somewhat the negative connotations associated with being found guilty of housing discrimination in a public forum. Such a connotation could lead to reduced sales or rentals and “pattern or practice” suits, depending upon how serious these matters are taken by the community and the knowledge and resolve of potential victims.

### Protection of the Handicapped

Housing discrimination, although most frequently associated with race, is also a serious problem for handicapped individuals.

Generally, discrimination against the handicapped results from the inaccessibility of housing units and the unwillingness of lessors to permit the removal or alteration of physical barriers and to change rules and regulations that unnecessarily discourage or prevent persons
with disabilities from entering into leases. A handicap is something which affects a person's "major life activities." The House of Delegates should support federal legislation that makes unlawful the refusal to permit a handicapped person to make reasonable modifications of the premises—at his or her own expense—so long as the modifications are necessary to assure accessibility and the handicapped person is prepared upon leaving to return the premises to their original condition, if requested to by the landlord.

Protection of Families with Children

The increasing incidence of refusals to rent to families with children is exacerbating an existing shortage of affordable housing. In some cities, the problem is acute. The House of Delegates should support federal legislation that protects families with children under 18 years of age that are composed of at least one parent, a person with legal custody or a designee of one of those persons.

Discrimination against families with children is often disguised racial discrimination. In *Betsey v. Turtle Creek Assoc.* a new owner of a housing complex began issuing eviction notices to families with children, informing those tenants that the building had been declared an all-adult building. Most of the tenants were white but most of the tenants with children were black, Hispanic or Asian. Appropriate federal legislation to prevent discrimination against families with children can also help abolish this subtle form of racial discrimination.

CONCLUSION

For the above stated reasons, the House of Delegates is urged to endorse the resolution that the American Bar Association recommends that federal legislation be enacted that would:

1. Enhance the ability of the Department of Housing and Urban Development to resolve housing discrimination complaints through conciliation;
2. Authorize administrative law judges to hear and decide the outcome of housing discrimination complaints, provided that full due process rights and the right to appeal such decisions to a court of appeals are afforded;
3. Extend the protection of fair housing legislation to the handicapped;
4. Extend the protection of fair housing legislation to families with children.

Respectfully submitted,

Sara-Ann Detterman  
Chairperson

August, 1987