

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

Administration's Response to issues raised by Members

Purpose

At the meeting held on 15 May 2009, Members asked the Administration -

- (a) to confirm, in consultation with the Department of Justice (DoJ) and the Equal Opportunities Commission (EOC), whether EOC is adequately empowered under section 79 of the Race Discrimination to provide legal assistance to an aggrieved person under the following circumstances -
 - i) the aggrieved person has an arguable case that he has suffered racial discrimination, harassment or vilification;
 - ii) the aggrieved person has suffered substantive damage spiritually as a result of the unlawful act even though his monetary loss is minimal; and
 - iii) the aggrieved person is financially unable to initiate legal proceedings on his own in respect of the case which is of high complexity;and whether the proposed Race Discrimination (Proceedings by the Equal Opportunities Commission) Regulation ("the proposed RD(PEOC)R") as presently worded will affect such assistance to be provided by EOC and narrow the functions and powers of EOC under section 59; and
- (b) to explain, in consultation with DoJ, how the proposed RD(PEOC)R as presently worded can achieve the policy objective of giving more flexibility for EOC to bring proceedings in its own name.

2. This paper sets out the response of the Administration.

Sections 79 and 83 of the RDO

3. Under section 79(1) of the RDO, if a complaint has been lodged with EOC and settlement has not been effected, then a person who may institute proceedings in respect of the subject of the complaint may apply to the EOC for assistance in respect of those proceedings. Under section 79(2) of the RDO, EOC may grant an application for assistance “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”.

4. Section 79 of the RDO and the proposed RD(PEOC)R operate in different contexts.

5. The proposed RD(PEOC)R was made under section 83 of the RDO. Section 83(1)(a) sets the context in which the regulation is to operate, namely, where a person may bring proceedings (“the alleged victim”) but has not done so. The effect of the regulation made under section 83 (i.e., RD(PEOC)R) is to empower the EOC to bring proceedings as if the EOC were the alleged victim.

6. Under section 2 of the proposed RD(PEOC)R, EOC may bring proceedings if the following conditions are met –

- (a) the case raises a question of principle; and
- (b) it is in the interest of justice to do so;

and it appears to the EOC that the claim of the person is well-founded. However, these conditions will apply only when the alleged victim does not bring proceedings.

7. Unlike section 83 of the RDO, section 79 of the RDO does not refer to any regulation-making power to further govern the granting of assistance under section 79. Moreover, the conditions under the proposed RD(PEOC)R as mentioned in paragraph 6 above do not apply to the granting of assistance under section 79. **Legal assistance that could be provided by EOC under section 79 of the RDO would not be narrowed down by the proposed RD(PEOC)R.**

8. As mentioned at the meeting on 15 May 2009, **the EOC is adequately empowered under section 79 of the RDO to provide legal assistance to an aggrieved person under the circumstances raised at the meeting (as in paragraph 1(a) (i) to (iii) above).** It should also be noted that the EOC would take into account a range of factors in deciding whether to provide legal assistance for individual cases, as elaborated in a note prepared by the EOC for the Constitutional Affairs Panel entitled “Legal assistance provided by the Equal Opportunities Commission” (LC Paper No. CB(2)1093/08-09(01)). The same position applies to the assistance provided by the EOC under equivalent sections in the three existing anti-discrimination ordinances (namely, section 85 of the Sex Discrimination Ordinance (Cap. 480), section 81 of the Disability Discrimination Ordinance (Cap. 487) and section 63 of the Family Status Discrimination Ordinance (Cap. 527)). Assistance by EOC to a complainant under section 79 of the RDO will be similar to assistance given to a complainant under the equivalent provisions under the existing anti-discrimination ordinances.

Section 59 of the RDO

9. Section 59 of the RDO provides for the functions and powers of the EOC, including (among others) working towards the elimination of discrimination, harassment and vilification, in the case of any act alleged to be unlawful by virtue of the RDO, encouraging persons who are concerned with the matter to which act relates to effect a settlement of the matter by conciliation, whether under section 78 or otherwise, and performing such other functions as are imposed on it under the Ordinance or any other enactment¹. The EOC may also do all such things that are necessary for, or incidental or conducive to, the better performance of its functions.

¹ Section 59 of the RDO has equivalents in the 3 existing anti-discrimination ordinances (section 64 of the Sex Discrimination Ordinance (Cap. 480), section 62 of the Disability Discrimination Ordinance (Cap. 487) and section 44 of the Family Status Discrimination Ordinance (Cap. 527)).

10. **Such functions and powers of the EOC, including those of bringing proceeding, would not be narrowed down by the proposed RD(PEOC)R made under section 83 of the RDO.** To avoid doubt, section 83(3) of the RDO explicitly provides that “this section (section 83) is without prejudice to the Commission’s power to bring proceedings by way of judicial review, in relation to this Ordinance (the RDO) or any other law, pursuant to its functions under section 59(1)” (of the RDO).

How the proposed RD(PEOC)R can give more flexibility to EOC

11. Section 2 of the proposed RD(PEOC)R follows the wording of the Sex Discrimination (Proceedings by the Equal Opportunities Commission) Regulation (“SD(PEOC)R”) instead of those in the Disability Discrimination (Proceedings by the Equal Opportunities Commission) Regulation (“DD(PEOC)R”) as shown below –

- (a) the DD(PEOC)R” provides that “the Commission has reason to believe that a person has committed an act of discrimination...”;
- (b) the SD(PEOC)R provides that “it appears to the Commission that the claim of the person is well founded”.

12. The DD(PEOC)R formula gives an objective connotation with the word “reason” and a threshold with the expression “reason to believe”–

- (a) the expression “reason to believe” in the Matrimonial Causes Act 1950 (c.25), s.16(2) was held to mean what a reasonable man would believe and not what each individual petitioner would believe (Thompson v. Thompson [1956] P. 414);
- (b) the word “believe” means feel sure of the truth of (Concise Oxford Dictionary).

13. The SD(PEOC)R formula gives a subjective flavour with the word “appear” but the EOC has to assess whether the claim is “well-founded” on an objective basis in the light of facts and circumstances known to him or established to his satisfaction –

- (a) in referring to a state of things shall “appear” to a local authority, it was the opinion of the local authority, and not the actual fact, which was predicated (per Channell J., *Robinson v Sunderland* [1899] 1 Q.B. 751);
- (b) whether a fear of being persecuted is “well-founded” has to be assessed by the Secretary of State on an objective basis in the light of facts and circumstances known to him or established to his satisfaction (*R. v. Secretary of State for the Home Department, ex p. Sivakumaran* [1988] 2 W.L.R. 92; *R v Secretary of State for the Home Department, ex p. H., The Times*, June 20, 1988).

14. It is submitted that **there is no material difference between the two formulae.**

15. It is noted that in its submission to the subcommittee, the Hong Kong Bar Association “considers that there should, in substance, be no material difference between” the two formulae. Similarly, Professor Carole J. Petersen does not think that “the difference in this particular language...has had any practical impact”.

16. As regards procedures, the DD(PEOC)R provides for detailed procedural requirements under section 1(c) to (e) as follows -

- the EOC has offered assistance to the person aggrieved by way of conciliation under section 80 of the DDO but failed to effect a settlement (section 1(c));
- the EOC has in accordance with section 2 served on the person aggrieved a written notice-
 - (i) informing him of its intention to bring proceedings as if the EOC were that person; and
 - (ii) requesting the person aggrieved to reply in writing to the EOC within 21 days of the date of the notice as to whether he intends to bring proceedings in his own name, otherwise he shall be deemed to have indicated that he does not wish to

bring proceedings in his own name (section 1(d)); and

- the EOC has established that the person aggrieved does not wish to bring proceedings in his own name, and he shall be deemed to have indicated that he does not wish to bring proceedings in his own name if he failed to reply under paragraph (d) of the DD(PEOC)R (section 1(e)).

17. **There are no such detailed procedural requirements under the SD(PEOC)R**, although section 89(1)(a) of the SDO stipulates that the EOC is empowered to bring proceedings where the person who may bring proceedings has not done so.

18. Having regard to the considerations in paragraphs 11 to 17 above, we are of the view that the RD(PEOC)R, which is modelled after the SD(PEOC)R, provides greater flexibility for the EOC to bring proceedings in its own name.

Constitutional and Mainland Affairs Bureau
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