

For information

**Legislative Council
Panel on Administration of Justice and Legal Services**

**Review on Adjudication of Equal Opportunities Claims
by the District Court**

PURPOSE

This paper seeks to inform Members of the Judiciary's plan to improve the procedures and practices in the adjudication of Equal Opportunities ("EO") proceedings in the District Court.

BACKGROUND

EO Claims

2. Anti-discrimination statutes are social legislation with a view to protecting civil rights. At present, anti-discrimination ordinances in Hong Kong include the Sex Discrimination Ordinance (Cap 480), the Disability Discrimination Ordinance (Cap 487), the Family Status Discrimination Ordinance (Cap 527) and the Race Discrimination Ordinance (Cap 602).

3. These ordinances make discrimination unlawful in specified circumstances. Victims of unlawful conduct may bring legal proceedings to the court to claim compensation or other remedies. Some common case types include sex discrimination, sexual harassment, pregnancy discrimination, disability discrimination and disability harassment.

Need for Review

4. In the Decision on Costs of *Sit Ka Yin Priscilla v Equal Opportunities Commission*¹ delivered in October 2010, Judge Lok indicated that EO claims should be adjudicated in a speedy manner and the costs of litigation should be reduced as much as possible. There is room for improvement in the procedural rules of EO proceedings by making them simpler and more flexible.

¹ Unreported, Equal Opportunities Action No. 11 of 1999 (District Court, 27 October 2010).

5. The Judiciary notes that in March 2009, the Equal Opportunities Commission (“EOC”) issued the *Recommendations to the Government on the Establishment of an Equal Opportunities Tribunal in Hong Kong* (“*EOC Recommendations*”). The *EOC Recommendations* highlighted several weaknesses of the then civil justice system in adjudicating EO claims, namely, the procedural rules are too complicated; the court has very little case management powers and the court adopts a passive role in the management of cases; and the adjudication system does not specialize in discrimination and harassment cases. The EOC proposed the establishment of a specialized EO Tribunal to ensure that cases are dealt with as expeditiously and informally as appropriate.

6. In response, the Judiciary has initiated a review on the adjudication of EO claims. It is also part of the Judiciary’s ongoing initiative to review rules and procedures of the court on a regular basis.

The Review

7. The Judiciary has reviewed the institutional, legislative and procedural frameworks, rules and practice of the District Court in the adjudication of EO claims. In September 2011, the Judiciary issued a consultation paper on the recommendations to improve the adjudication system of EO claims. We have put forward seven recommendations to –

- (a) reduce delays commonly found in EO claims;
- (b) improve the cost-effectiveness of the system by reducing the number of unnecessary interlocutory applications; and
- (c) further simplify the procedural rules after the implementation of the Civil Justice Reform (“CJR”) in April 2009.

----- A summary of the recommendations is at **Annex A**².

8. The Judiciary has received written submissions from ten organizations, including those from relevant Government bureaux/departments, the EOC, the legal profession, and non-governmental organizations. The respondents are listed at **Annex B**.

² The full consultation paper is available at the website of the Judiciary : www.judiciary.gov.hk/en/other_info/consult_papers/eoc_consultation_document_eng.pdf.

9. There is general support for the recommendations set out in the consultation paper. There are also suggestions for refinement. After careful consideration of their views, the Judiciary issued a response to the respondents in May 2012.

OUTCOME OF CONSULTATION AND AREAS OF IMPROVEMENT

Dedicated Tribunal

10. In the consultation paper, the Judiciary has indicated objection to the proposed establishment of a specialized tribunal within the Judiciary to adjudicate EO claims. We consider that the active case management introduced under the CJR should enable a more efficient and expeditious handling of EO claims. The recommendations put forward in the consultation paper would also help. Moreover, as EO claims can be complicated in nature, having a specialized tribunal would not necessarily lead to speedy resolution of claims. The small caseload of EO claims does not justify a specialized tribunal either.

11. There is general support for this position, though it is noted that a few respondents took a different view.

12. Some respondents have suggested that the Judiciary review the arrangements say in a year's time or periodically.

13. The Judiciary has been monitoring the progress of the implementation of the CJR, which has so far been smooth and satisfactory on the whole. Improvements to the adjudication system for EO claims will also be made. The Judiciary will continue to monitor the arrangements and introduce further enhancements as necessary.

14. To help justify a specialized tribunal despite the small caseload of EO claims, some respondents have put forward ideas such as inviting the specialized EO tribunal to consider other related claims at the same time (e.g. Labour Tribunal cases or privacy cases), or setting up an independent administrative tribunal under the EOC.

15. The Judiciary's recommendations of simplifying the procedural rules and enhancing active case management for EO claims, when

implemented, should provide a more accessible platform for parties to pursue EO claims in court. This should help address the more fundamental concerns. As regards whether the EOC should be asked to perform the functions of a tribunal as well, this will require careful consideration. It is also a policy matter for the Administration and the Judiciary has referred this to the Administration for its consideration.

Replacement of Technical Pleadings by Informal Forms

16. There is general agreement that technical pleadings should be replaced by more informal claim and response forms under normal circumstances (see Recommendation 1 at **Annex A**). It is also noted that where necessary, the court may, either by parties' application or on its own volition, direct that the informal forms be replaced by formal pleadings.

17. There is a suggestion that, with the agreement of the persons concerned, the District Court may seek relevant information that has been obtained by the EOC during the latter's investigation or conciliation efforts.

18. The Judiciary notes that the existing law allows that relevant information obtained by the EOC during its investigation or conciliation efforts may be released to the court, though consent from the parties concerned may be needed.

19. There is also a proposal that the claim form may be so designed as to include a statement of damages (with a breakdown) so that the defendant may be informed of the quantum of the claim at an early stage.

20. The Judiciary will examine the proposal at paragraph 19 above when considering details of the claim form.

21. Some respondents have proposed that the Judiciary should also simplify the proceedings of the common types of counterclaims that may arise from EO claims. For example, information obtained from the future informal claim forms for EO claims may be allowed to be used for the counterclaims.

22. The Judiciary's experience shows that there are rarely such counterclaims. In any case, the current system allows the court to permit the use of the relevant information in an EO claim for the counterclaim(s), if any, should the court find it just to do so.

Case Management

23. It is generally agreed to fix the first direction hearing within a certain time, say eight weeks, after the filing of an EO claim (see Recommendation 2 at Annex A). Some respondents consider that the proposed eight weeks might be rather tight for certain cases. The defendant might not have sufficient time to get prepared for the hearing which may require record searches etc.

24. The Judiciary agrees to increase flexibility by allowing eight to twelve weeks between claim filing and the first direction hearing.

25. For effective case management, some respondents have proposed that a specialist list be established in the District Court to adjudicate EO cases. They also propose that the judge in charge of that list should preside at all the first direction hearings, remaining case management hearings and pre-trial reviews of all EO cases.

26. The Judiciary notes that there is at present a judge in charge of the EO list. He presides at the first direction hearings and any remaining case management hearings of all EO cases as far as possible. If there is an increase in the caseload for EO claims in future, the Judiciary may consider forming a small panel of judges so that one or more of them would hear the first direction hearings for all EO cases. The same judge would then be in charge of the remaining process for a particular EO case, including any further case management hearing(s), pre-trial review and trial.

Inquisitorial Function

27. There is a proposal that the EO adjudicating body should have some degree of inquisitorial function to duly investigate and enquire into relevant matters.

28. The Judiciary considers that the proposal represents a fundamental change to the long-established adversarial system in the District Court. As legal representation is allowed and in view of the investigating power of the EOC, the proposed fundamental change to the litigation system is not recommended.

Costs Orders, Mediation and Legal Representation

29. There is general support for the Judiciary's recommendations to continue with the present arrangements for the court to (a) make adverse costs orders as necessary; (b) encourage the use of mediation as appropriate; and (c) allow legal representation (see Recommendations 4 to 6 at Annex A).

30. There is a minority view that legal representation should not be allowed for EO cases. It is considered that the unrepresented party would be disadvantaged vis-à-vis the represented party, because of the former's lack of professional training. It is proposed that parties should rely on other support (such as trade unions or support organizations), rather than lawyers. Legal representation should only be allowed for complicated cases, if so agreed by the court.

31. In the view of the Judiciary as explained in the consultation paper, the proposed prohibition on legal representation for EO cases would take away the civil rights of the parties to have their cases argued by lawyers. Whilst the principle of proportionality may justify the exclusion of legal representation for the simple claims in say the Small Claims Tribunal, it may not be justified in respect of EO claims as some of them may be complicated in nature or involve principles of public importance.

32. The Judiciary also notes that under the existing legislation, parties are allowed to be represented by bodies such as registered trade unions etc. Such flexibility will continue.

Assistance for Litigants in Person

33. There is clear support for the various recommendations to provide more assistance to litigants in person, including the continued promotion of pro-bono services and the Judiciary's production of suitable publicity materials to assist court users in EO claims (see Recommendation 7 at Annex A).

34. The Judiciary will follow up on the recommendations concerned.

35. On the recommendation for the Administration to consider extending legal aid to EO litigants as appropriate (such as possibly waiving the means test requirement for EO cases), the Judiciary has received

support from certain respondents. The Administration has however expressed reservation about the recommendation to waive the means test requirement of legal aid applications for EO proceedings as this would undermine the fundamentals of its legal aid policy to maintain equal access to legal aid regardless of the nature of the cases. Nonetheless, the Administration has indicated that it would support the continual provision of legal aid to EO litigants as long as they meet the means and merits tests as required under the Legal Aid Ordinance (Cap 91).

36. Other views, such as inviting the Administration or the EOC to engage lawyers on behalf of the litigants, have also been received. The Judiciary has relayed these views to the Administration for consideration.

Miscellaneous Suggestions

37. The Judiciary has also received other suggestions to improve the logistical and other arrangements during the court process for EO claims.

Identity Protection

38. It is proposed that measures be formulated to better protect the safety and privacy of the EO complainants. For example, in sexual harassment cases, the adjudication process may be allowed to be conducted in chambers (rather than open court) and repetition of the account of events should be minimized.

39. The Judiciary notes that, at present, the court may order anonymity of the identity of the parties and/or restriction on reporting the name of the person who requires identity protection. The court may also order a physical partition blocking public view from a vulnerable witness, or allow such witness to give evidence by live television link in another room. The court may also rely on witness statements during hearings under appropriate circumstances to minimize the need for the witnesses to repeat the account of events.

40. To enhance identity protection, the Judiciary will inform the parties concerned of their rights to apply for identity protection measures before or at the time when they fill in the future informal forms for EO claims.

Assistance for People with Special Needs

41. There are suggestions to facilitate people with special needs during the court process. For example, it is proposed to provide people with hearing impairment with sign language interpretation service, people with visual impairment and developmental disabilities with documents/forms in versions which can be read and understood by them, and people with disabilities with barrier-free access and facilities.

42. The Judiciary recognizes the need to facilitate court users with special needs in general, including those relating to EO claims.

43. The Judiciary provides sign language interpretation service for people with hearing and/or speech impairment in courts. Where appropriate, audio-typing service can be provided for people with hearing impairment and do not understand sign language; and hearing aid devices for those whose hearing is partially impaired.

44. While it is not practicable for the Judiciary to provide all forms and documents in versions which can be read and understood by people with visual impairment or developmental disabilities, the Judiciary always stands ready to provide them with assistance in other practicable ways.

45. The Judiciary strives to provide a barrier-free environment for court users. The Judiciary has been carrying out improvement works for the court premises in the Wanchai Tower (where the District Court is situated), among others, to ensure that they are up to the prevailing relevant standards and requirements in this regard. The latter works are scheduled for completion by end June 2012.

WAY FORWARD

46. Members are invited to note the contents of this paper. The Judiciary will take forward the recommendations, with suitable changes and other enhancements as outlined above, through changes to the legislation and the Practice Direction(s) as necessary. We will continue to discuss with the relevant stakeholders details of the proposed changes. We aim at implementing the changes in 2013.

Judiciary Administration
June 2012

Summary of Judiciary's Recommendations in the Consultation Paper for the Review on Adjudication of Equal Opportunities Claims

Recommendation 1:

- Technical pleadings should be replaced by more informal claim forms and response forms in EO proceedings under normal circumstances. The Judiciary will set up a working group consisting of judges to consider what should be included in the informal forms. After the introduction of the informal forms, a judge may still direct pleadings under exceptional circumstances for case management purposes.

Recommendation 2:

- There should be a Practice Direction providing for a first direction hearing to be fixed within a certain time, say, eight weeks, after the filing of an EO claim.

Recommendation 3:

- Apart from the reforms introduced by the CJR, other reform measures are not necessary at this stage.

Recommendation 4:

- The current rule that each party shall bear its own costs of action and the court may make adverse costs orders should be maintained.

Recommendation 5:

- The court should continue to encourage and promote mediation as an alternative dispute settlement and refer suitable cases to mediation.

Recommendation 6:

- Legal representation should continue to be allowed.

Recommendation 7:

- To tackle the increasing number of LIPs, a multi-faceted approach should continue to be adopted –
 - (a) The legal profession would continue to promote pro-bono services;
 - (b) The Administration may consider extending legal aid and assistance to Equal Opportunities litigants as appropriate. In particular, consideration may be given to the feasibility of waiving the means test requirement for a person involved in proceedings in which a breach of anti-discrimination statutes is an issue; and
 - (c) The Judiciary would consider producing suitable publicity materials to assist court users on EO proceedings.
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List of Respondents
(in alphabetical order)

1. Constitutional and Mainland Affairs Bureau
 2. Department of Justice
 3. Equal Opportunities Commission
 4. Home Affairs Bureau
 5. Hong Kong Bar Association
 6. Hong Kong Human Rights Monitor
 7. Hong Kong Women's Coalition on Equal Opportunities
 8. Law Society of Hong Kong
 9. Legal Aid Department
 10. Rehabilitation Alliance Hong Kong
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