

**Refined recommendations to the Government
on the Establishment of
an Equal Opportunities Tribunal in Hong Kong**

Response of the Constitutional and Mainland Affairs Bureau

I. Introduction

The Equal Opportunities Commission (EOC) submitted in 2009 its recommendations to the Government to address relevant stakeholders' concerns that discrimination claims, as adjudicated in the District Court (DC), were procedurally complex, time-consuming and expensive. In order to provide a user-friendly, informal adjudication system and enable the parties to deal with their own cases promptly and effectively, the EOC recommended the establishment of an Equal Opportunities Tribunal (EOT), together with relevant measures to simplify the procedures involved.

2. After its submission in 2009, the EOC has engaged stakeholders (including the legal professional associations, unions and employers' group, professional bodies and other non-government organisations) to brief them on the 2009 recommendations and listen to their views. After the consultation, refinements were made to the 2009 recommendations. The EOC submitted its refined recommendations to the Administration in August 2011 (hereafter referred to as "the Recommendations")

3. This note sets out the response of the Constitutional and Mainland Affairs Bureau on the Recommendations and relevant matters.

II. The Judiciary's Review on the Adjudication of Equal Opportunities Claims

4. On 1 September 2011, the Judiciary published a paper ("Judiciary's Review Paper") which seeks to review the institutional, legislative and procedural frameworks, rules and practice of the DC in the adjudication of Equal Opportunities (EO) claims and, on the basis of the issues identified, makes recommendation to provide a more accessible

platform for parties to pursue EO claims in court. The Judiciary has invited views from interested parties and organisations on the review and recommendations before deciding on the way forward.

5. As stated in the Judiciary's Review Paper, after the EOC's submission of its recommendations in 2009, the Judiciary has implemented the Civil Justice Reform (CJR) in that year. It has subsequently conducted an internal review of the institutional, legislative and procedural frameworks of the DC in the adjudication of EO claims. In conducting the review, the Judiciary has taken on board the concerns and observations in the EOC's 2009 recommendations.

6. Both the Recommendations and the Judiciary's Review Paper deal with the institutional, legislative and procedural arrangements for the adjudication of EO cases. While the Judiciary's Review Paper were made on the basis that EO cases will continue to be adjudicated in the DC, it has a similar aim of providing a more accessible platform for parties to pursue EO claims.

III. General Comments

7. The Recommendations have examined the procedures, practice and challenges of the current system of adjudicating EO claims, and proposed to establish an EOT with corresponding procedural framework, rules and practices to address the issues. We note that the Judiciary's Review Paper has identified similar challenges and proposed measures to address them in the context of the DC. In particular, the Judiciary's Review Paper notes that the CJR has improved the case management of EO claims, but there is room to further simplify the rules and procedures involved given the complicated nature of many EO claims.

8. We support the objective of lessening delays commonly found in EO claims, improving the cost-effectiveness of the system and simplifying the procedural rules. We consider that this is important in order to improve the access of the public to the adjudication process for EO claims and enhance the promotion of equal opportunities in general.

IV. Proposed establishment of an EOT

9. The EOC recommended the establishment of a specialised EOT to deal with anti-discrimination claims. The Recommendations set out the challenges of the current adjudication system which, in EOC's view, support the establishment of the EOT. They include:

- (a) proceedings for discrimination claims are governed by formal rules and procedures which are complex and technical. These include highly technical rules and procedures for the issue and service of writs, for pleadings and for documentary and other evidence for use in the trial. They also include pre-trial procedures which are formal and technical in nature;
- (b) claimants are usually unable to understand and follow the rules and procedures. They would require professional legal advice and representation. However, many claimants cannot afford such advice and representation; and
- (c) due to the complex and technical rules and procedures, proceedings tend to be lengthy which in turn increases legal costs.

The EOC also refers to jurisdictions such as the UK, Australia, Canada and New Zealand in which discrimination claims are adjudicated in a separate forum or under procedures separate from and less formal than normal litigation.

10. The Judiciary's Review Paper does not support the proposed establishment of the EOT and sets out the considerations in its paragraphs 3.51 to 3.67.

11. We have considered carefully the EOC's views and the Judiciary's position in the Review paper. We note that:

- (a) the EOC is concerned about the complex and technical rules and procedures, undue delay in processing EO claims by the DC, and the little and passive case management powers of the court.

Such concerns will have been largely addressed by the implementation of the CJR and the recommendations in the Judiciary's Review. These include the greater case management powers of the court, the adoption of a more pro-active approach in case management, the proposed adoption of simplified claim forms and response forms and the proposal to fix a first hearing to facilitate the court to identify the relevant issues at an early stage;

- (b) if a specialised tribunal is established to replace the DC in adjudication of EO cases, the issue of availability of legal aid (as presently available to DC cases) would also need to be addressed, as legal aid is not available to cases in tribunals in general; and
- (c) as pointed out in the Judiciary's Review Paper, a specialised tribunal will provide no guarantee of speedy resolution of the EO claims, due to the complicated nature of EO claims, principles of some public importance that may be involved, developing jurisprudence in the area of EO law, and the wide range of remedies that may need to be considered.

12. In addition, we also note the following considerations:

- (a) as a matter of principle, the Judiciary does not support a proliferation of tribunals. Specialised tribunals should only be established under very special circumstances, e.g. the case type should be highly specialised and complex, the rules and practices to be applied should be distinct from the normal rules and practices of the Court and the caseload should justify the establishment of the tribunals;
- (b) on average, there were only 10 EO claims filed with the court per year for the past five years. The Judiciary's Review Paper considers that the small caseload does not justify the establishment of a specialised tribunal as this would not be conducive to the efficient deployment of the Judiciary's resources; and

- (c) at present, there is an Equal Opportunities List in the DC. A judge is in charge of the List to manage the cases effectively. The system has worked well.

13. Overall speaking, the setting up a specialised tribunal could provide a user-friendly and more informal adjudication system. The Judiciary has now implemented the CJR and proposed measures which are in the same direction and which could be implemented more expeditiously as they would not involve major institutional changes. The Judiciary's other considerations regarding the establishment of a specialised tribunal are also relevant. In the circumstances, we consider that the priority at this stage is to implement the improvement measures proposed by the Judiciary as quickly as possible. The need for a specialised tribunal as proposed in the Recommendations can be further reviewed in the light of the changing circumstances after the proposed measures have been implemented.

V. Other Related Issues

14. The EOC has made a number of recommendations concerning the rules and procedures of the proposed EOT. Some of the recommendations are relevant to the adjudication of EO cases in general regardless of the institutional setup, including -

- (a) commencement of proceedings by the use of specific forms, which will guide the parties to set out their case and define the issues in an appropriate manner; (*Recommendation 1.2.2*)
- (b) wide general case management powers to manage proceedings (both informally through telephone or case conferences, and by formal hearings), with examples of usual and permissible orders or directions, and also power to investigate and inquire into claims; (*Recommendation 1.2.3*)
- (c) having the function of attempting to help the parties to settle amicably and the discretion to refer cases to the EOC for complaint-handling (i.e. investigation and conciliation); (*Recommendation 1.2.4*)

- (d) power to call for and have proper regard to a summary of the complaint from the EOC, setting out the complaint, the response and the outcome of the handling process; (*Recommendation 1.2.5*)
- (e) making unreasonable refusal to resolve disputes through conciliation or mediation a permissible factor for adverse costs orders; (*Recommendation 1.2.8*)
- (f) apart from the rules themselves, provision of suitable information guides for the public on how to conduct discrimination cases; (*Recommendation 1.2.9*) and
- (g) legal representation in the proposed EOT to be permissible. Provisions for right of audience in the proposed EOT should be consistent with the current provisions for right of audience in relation to proceedings in the District Court under the anti-discrimination ordinances. (*Recommendation 1.4*)

15. We note that the Judiciary's Review Paper has made recommendations related to the above issues in the context of the adjudication of EO cases in the DC. We have taken into account the EOC's recommendations above, as well as views from stakeholders during the EOC's consultation, in considering these issues. We believe that the implementation of the improvement measures by the Judiciary would help address the relevant issues.

16. Separately, in respect of the interface between the EOC and the EOT, the Recommendations proposed that the EOC's power to terminate a complaint case should be widened to include -

- (a) when it is clear at the outset that conciliation is unlikely to be fruitful, so that proceedings could be started promptly, or
- (b) when matters of principle are involved and it would be desirable for there to be an authoritative ruling rather than private resolution through conciliation settlement.

17. Regarding ground (a) in paragraph 16 above, under section 84 of the Sex Discrimination Ordinance as well as corresponding provisions in other anti-discrimination ordinances, the EOC may decide to discontinue an investigation if -

- (a) it is satisfied that the act is not unlawful by reason of a provision of the Ordinance;
- (b) it is of the opinion that the person aggrieved by the act does not desire that the investigation be conducted or continued;
- (c) a period of more than 12 months has elapsed beginning when the act was done;
- (d) it determines in accordance with relevant rules that the complaint should not be a representative complaint (if it was lodged as a representative complaint under those rules); or
- (e) it is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

18. The above should have covered a wide variety of circumstances, which may include circumstances in which the conciliation is unlikely to be fruitful. For other circumstances, continued conciliation may be useful since the EOC may be able to uncover more information by proceeding with the investigation, which may either aid the parties (which originally may be unwilling to settle) to come to settlement as the case for the complainant becomes stronger; or enable the EOC to determine that no unlawful acts have occurred and thus terminate the investigation of the case at that juncture. Ground (a) may have the undesirable effect of terminating conciliation prematurely.

19. On ground (b) above, terminating conciliation in settling disputes for the purpose of encouraging a judicial ruling may be against the interests of both parties due to the additional time and expenditure that would be involved, and may not be in line with the trend of encouraging mediation and conciliation to settle disputes.

20. For the above considerations, we have reservation on the proposal.

Constitutional and Mainland Affairs Bureau
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