

Legislative Council Panel on Constitutional Affairs

**Complaint-Handling Services and Legal Assistance provided by
Equal Opportunities Commission**

Purpose

This Paper provides information on the complaint-handling services and legal assistance provided by the Equal Opportunities Commission (EOC) under the Sex Discrimination Ordinance (SDO) (Cap 480), the Disability Discrimination Ordinance (DDO) (Cap 487), the Family Status Discrimination Ordinance (FSDO) (Cap 527) and the Race Discrimination Ordinance (RDO) (Cap 602).

Background

2. As set out in the respective anti-discrimination Ordinances (Ordinances), one of the major functions of the EOC is to handle complaints lodged by members of the public in respect of unlawful acts under the Ordinances, by conducting investigation into the complaints, and endeavouring, by conciliation, to effect a settlement of the complaints¹. The Ordinances also provides that after a complaint is lodged with the EOC, and if there is no settlement, any person who may institute legal proceedings in respect of the unlawful act concerned may apply for assistance from the EOC (legal assistance) in respect of those proceedings².

3. Since the operation of the EOC in September 1996 and until the end of 2016, the EOC received 13,787 complaints. The majority of these (8,285) were discontinued before or during the course of investigation owing to a number of reasons, such as early resolution between the parties concerned, no unlawful act found or the complainant had no desire to pursue the complaint further. For the remaining cases, 5,303 cases proceeded to conciliation, with 3,443 cases (65%) successfully conciliated, while 1,860 cases were unsuccessful.

¹ SDO s.84, DDO s.80, FSDO s.62 and RDO s.78

² SDO s.85(1); DDO s.81(1); FSDO s.63(1); and RDO s.79(1)

4. For these unsuccessful cases, the complainants may choose to apply to the EOC for legal assistance. Between September 1996 and end-April 2017, the EOC provided assistance in 352 applications (about 43% of total applications). Out of these 352 assisted cases, 240 (68%) were settled before legal proceedings commenced. For the remaining 112 legally assisted cases in which legal proceedings had commenced, 75 were settled before trial by Court, while legal assistance for 6 cases was withdrawn after legal proceedings had commenced, and 5 legal proceedings are currently ongoing. Altogether 26 trials have been conducted so far, and the EOC won in the majority of them (23 cases).

Handling of Enquiries and Complaints

5. As part of its complaint-handling functions, the EOC handles public enquiries related to the Ordinances and discriminatory acts, the work of the EOC and other subject matters. In 2016, the EOC received a total of 15,629 enquiries from the public. Among these, 9,719 were general enquiries, while 5,910 were specific enquiries. Not all of these specific enquiries were prospective complaints. In fact, only 3,900 out of these 5,910 specific enquiries related to situations, scenarios or incidents of discrimination that might become the subject of complaint. For the remaining 2,010 specific enquiries, they were related to other subject matters, such as the work or activities of the EOC. A breakdown on the enquiries by nature and by Ordinances is set out in Annex A.

6. While the EOC received 3,900 specific enquiries on prospective complaints of discriminatory acts, not all the enquirers would lodge complaints. In 2016, 601 complaints were received. Together with the complaints carried forward from previous years (171 cases) and the EOC self-initiated investigation (46 cases), the EOC handled a total of 818 complaints in 2016. A breakdown on the complaints by Ordinances is set out in Annex B.

7. Upon receiving a complaint, the EOC will assess and review if the complaint falls within the jurisdiction of the EOC. If so, the EOC will conduct investigation into the allegations. Before and during the course of investigation, the EOC may decide not to conduct or discontinue an investigation in accordance with the provisions of the Ordinances, if:

- the EOC is satisfied that the act complained of is not unlawful by virtue of a provision of the legislation;
- the EOC is of the opinion that the person aggrieved by the act does not desire (or in the case of a representative complaint, none of the persons aggrieved by the act desires) that the investigation be conducted or continued;
- a period of more than 12 months has elapsed since the act was done;
- the EOC determines, in the case of a representative complaint, that the complaint should not be a representative complaint (in accordance with the relevant rules dealing with representative complaints); and
- the EOC is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

8. In 2016, 369 complaints were discontinued by the EOC for the reasons explained above, constituting almost half (48%) of the 772 complaints (excluding 46 self-initiated investigations) made to and handled by the EOC during the year. For the remaining 403 complaints, 209 proceeded to conciliation, with 148 successfully settled through conciliation, meaning a successful conciliation rate of 71%.

9. As mentioned above, the EOC is required by the Ordinances to endeavour, by conciliation, to effect settlement of the complaints. As such, the EOC will, where possible, encourage the parties concerned (both complainant and respondent) to settle the complaint by way of conciliation. Submission to conciliation by both parties is entirely voluntary.

Legal Assistance

10. For cases (61 cases in 2016) where conciliation was unsuccessful, the complainants may apply to the EOC for legal assistance. As mentioned above, under the Ordinances, after a complaint is lodged with the EOC, and if there is no settlement, any person who may institute legal proceedings in respect of the unlawful act concerned may apply for assistance from the EOC (legal assistance) in respect of those proceedings. The EOC is obliged under the Ordinances to consider an application for 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.

11. Pursuant to the Ordinances, the EOC has set up a Legal and Complaints Committee (LCC), which is currently composed of the Chairperson of the EOC and four Members of the EOC Board. These Members are all prominent professionals with extensive experiences in issues relating to equality of different sectors. The Members of the LCC are empowered to decide whether to provide legal assistance in respect of each application after considering the following factors:

- (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 and likelihood of success;
- (d) whether the case can set important legal precedent;
- (e) whether litigation can lead to effective remedy for the applicant, and whether the case can be effectively used to enhance public awareness and promote equal opportunities; and
- (f) the attitude and behaviour of the parties (for instance, the EOC is more likely to give assistance if the respondent did not cooperate).

In addition to the above factors, the EOC may consider any other matters which may be relevant on a case-by-case basis, and may also grant legal assistance by reference to the priorities of the EOC's work.

12. In 2016, the EOC received 39 applications for legal assistance. Out of these 39 applications, legal assistance was granted in 16 applications, constituting about 41% of the total number of applications. A table showing the numbers of applications for legal assistance and the cases granted during the period from 2011 to April 2017 is included in Annex C.

13. While these figures may, to a certain extent, reflect the trend for legal assistance through the years, they should not be taken as an indicator of the effectiveness of the legal assistance mechanism and the work of the EOC, given that the grant of legal assistance depends on a number of factors and the merits of the case, which are beyond the control of the EOC. The EOC takes the view that it should provide legal assistance only if there are good prospects of establishing the facts contended. This is in line with the earlier statutory provisions³ and the current legal position and practice in England.

14. In an English case of *Deman v Commission for Equality and Human Rights*⁴, the Court of Appeal (Civil Division) observed that:

“... the Commission had no obligation to help everyone who applied to it. On the contrary, it had a positive duty to discriminate between one application and another in relation to, among other things, their subject matter and the kind of help that might be appropriate. It might well also have to prioritise meritorious cases in order to stay within its budget.”

By way of examples, the former Disability Rights Commission in England supported 47 legal cases in the year 2004/05⁵. The former Commission for Racial Equality in England provided full legal representation in 1 case in 2004 and 3 cases in 2005⁶. The Equality Commission for Northern Ireland received 291 applications for legal assistance in 2015/16 and granted assistance to 71 cases (24.4%)⁷.

Main Roles of Legal Service Division (LSD)

Handling Legal Assistance Applications

³ Under section 66 of the Race Relations Act 1976 (see also section 75 of Sex Discrimination Act 1975), the Commission in England may grant legal assistance if they think fit to do so:

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

⁴ [2010] EWCA Civ 1279; [2011] C.P. Rep.12.

⁵ Disability Rights Commission Annual Report and Accounts 2004-05

⁶ Commission for Racial Equality Annual Report 2005

⁷ Annual Report and Accounts 2015-16, Equality Commission for Northern Ireland

15. At present, the Legal Service Division (LSD) of the EOC is responsible for handling the applications for legal assistance. Whenever an application for legal assistance is received, a lawyer of the LSD will be assigned to deal with the application. He or she will peruse all documents and information in relation to the case, conduct legal research, and prepare a detailed advice to the LCC on whether legal assistance should be granted based on the factual background and the above-mentioned principles.

16. The lawyers of the LSD will attend a meeting with the Members of the LCC, which is convened every two months, to present the information of each application to the Committee, and to advise Members on legal issues with a view to assisting Members in making informed decisions in relation to the applications for legal assistance.

17. If Members of the LCC decide to grant legal assistance to a particular case, the responsible lawyer will take all necessary follow-up actions to assist the applicant, such as providing legal advice to him/her, facilitating settlement of the case, etc. As mentioned above, a majority of the cases were settled before the commencement of legal proceedings.

Legal Proceedings

18. Where legal assistance is granted and the case cannot be settled, the designated lawyer of the LSD will act as the assisted person's legal representative to prepare the necessary legal documentation with a view to issuing legal proceedings for the assisted person. The lawyer of the LSD will appear in Court on behalf of the assisted person in various interlocutory hearings/trial or engage an independent counsel to do so depending on the complexity and magnitude of the case.

19. Where applicable, the LSD may also, on behalf of the EOC, issue legal proceedings in its own name under regulations made under the Ordinances⁸;

⁸ 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; Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation Cap.602C.

apply for judicial review, as it did in the case of *EOC v Director of Education*⁹; and provide *amicus curiae* to the courts, as it did in the cases of *Arjun Singh v Secretary for Justice*¹⁰, *Law Chi Yuen v Secretary for Education*¹¹, *Tong Wai Ting v Secretary for Education & Another*¹², *Secretary for Justice v Chan Wah*¹³, *Tsang Helen v Cathay Pacific Airways Ltd (No 2)*¹⁴ and *Leung T C William Roy v Secretary for Justice*¹⁵.

Discrimination Law Review (DLR)

20. In addition to the above duties, the LSD is also responsible for the work associated with the review of the Ordinances which is one of the statutory functions of the EOC¹⁶. In March 2013, the EOC commenced a large-scale review of the Ordinances. The Discrimination Law Review (DLR) is a cross-divisional project led by the LSD. It aimed to look into areas of the Ordinances that needed to be enhanced and modernised as a response to evolving social expectations and global trends, and make recommendations to the Government on necessary reforms to the Ordinances.

21. Between 8 July and 31 October 2014, the EOC conducted a citywide public consultation exercise to invite views from the public on possible reforms to the laws. More than 125,000 public responses were received, making it the largest number of public responses ever received by the EOC in any single consultation exercise. On 29 March 2016, after months of careful analysis of the responses, the EOC released the *Discrimination Law Review – Submissions to the Government*, which detailed 73 recommendations on possible law reforms in relation to strengthening the anti-discrimination protection (27 recommendations were designated as high priority areas that deserved urgent actions). The Submissions were accompanied by the *Report on Responses*, which consolidated and summarised the responses collected in the public consultation exercise. Following the release of the reports, a number of briefing

⁹ [2001] 2 HKLRD 690

¹⁰ DCEO 9/2011

¹¹ HCAL 91/2011

¹² HCAL 73/2009

¹³ [2000] 3 HKLRD 641

¹⁴ [2001] 4 HKC 585

¹⁵ [2006] 4 HKLRD 211

¹⁶ SDO s.64(e)

sessions were conducted by lawyers of the LSD for the stakeholders and NGOs to explain the rationale behind the recommendations.

Other Legal Work

22. Aside from the above duties, the LSD is also responsible for providing internal legal advice and support to the EOC, such as advising on legal issues arising out of the operations of the EOC, reviewing contracts/agreements, drafting Codes of Practice, and providing legal support to EOC defended cases and on internal corporate governance matters.

Way Forward

Review of the Complaint-Handling and Legal Assistance Functions

23. As a publicly-funded statutory body, the EOC is fully aware of the importance of ensuring proper and effective use of its funding and maximising the efficiency and effectiveness of its work. As part of the EOC's ongoing effort to seek for continuous enhancement to its services and performance, the EOC has commenced a comprehensive review of its complaint-handling and legal assistance functions, taking into account the views and interests of stakeholders, NGOs and the general public. The purpose of the review is to assess whether the current processes are the most efficient and effective in meeting the EOC's objectives and mission within the statutory parameters, and to propose any changes to the system so as to enhance the functions of the EOC.

24. The EOC has set up a steering committee to oversee the review. Comprising the Chairperson and Chief Operations Officer of the EOC, certain Members of the LCC and staff representatives, the steering committee will select and appoint an external consultant to conduct an organisational and operational service review of the EOC's complaint-handling and legal assistance functions. The EOC hopes that the review can be completed in three months' time once it has been commissioned. The recommendations on enhancement measures will be submitted to the EOC Board for consideration and endorsement.

Setting up of Equal Opportunities Tribunal

25. With regard to the proposal of establishing an Equal Opportunities Tribunal (EOT), the EOC put forward the recommendation to the Government in 2009 to address stakeholders' concerns that discrimination claims, as adjudicated by the District Courts, were procedurally complex, time-consuming and expensive. The Government, having consulted the Judiciary, considered that the proactive case management measures introduced after the Civil Justice Reform in April 2009 have enabled the District Courts to handle Equal Opportunities (EO) claims in a more efficient manner. Besides, the Legislative Council passed the District Court Equal Opportunities (Amendment) Rules 2014 in July 2014 so as to streamline the adjudication of EO claims in District Courts and further enhance case management measures. The new measures came into effect in November 2014 and are now operating smoothly. The relevant measures have provided a more accessible platform for parties concerned to pursue EO claims in Court, and also helped expedite the adjudication of EO claims. As such, the Government believes that there is no need to set up the EOT. The EOC will continue to monitor the situation and feedback of stakeholders and discuss the improvements needed with the Government as necessary.

Conclusion

26. The EOC has included in its Strategic Plan 2016-19 delivering better services to the public as one of its major work priorities. Apart from improving the organisation's internal capability including staff expertise to enhance overall productivity, the EOC will streamline policies, procedures and practices, including the case-handling protocols, to achieve greater efficiency and effectiveness of its service provision. In doing so, the EOC recognises the importance of hearing the views of stakeholders, service users and the general public. Indeed, the EOC has been making use of various channels and platforms, such as the EOC Forum and regular stakeholder meetings, to collect feedback, and will continue to seek the views of relevant parties as appropriate.

Equal Opportunities Commission
May 2017

Annex A

Number of Enquiries Handled by the EOC in 2016

	SDO	DDO	FSDO	RDO	Total
General Enquiries	--	--	--	--	9,719
Specific Enquiries (Prospective Complaints)	1,134	2,181	215	370	3,900
Specific Enquiries (others)	--	--	--	--	2,010 <i>(437 – Work of EOC, statutory provisions; 1,573 – outside jurisdiction)</i>
				Total:	15,629

Annex B

Number of Complaints Handled by the EOC in 2016

Ordinance	SDO	DDO	FSDO	RDO	Total
Employment field	233	213	17	9	472
Non-employment field	21	73	2	204	300
<i>Sub-total</i>	<i>254</i>	<i>286</i>	<i>19</i>	<i>213</i>	<i>772</i>
Self-initiated investigations	8	34	0	4	46
Total	262	320	19	217	818

Annex C

Applications for Legal Assistance in 2011-2017

	2011	2012	2013	2014	2015	2016	2017 (As at 30.4.17)
Application for legal assistance	63	32	42	31	29	39	19
<i>Granted</i>	<i>23</i>	<i>13</i>	<i>18</i>	<i>17</i>	<i>22</i>	<i>16</i>	<i>12</i>
<i>Not Granted</i>	<i>39</i>	<i>19</i>	<i>24</i>	<i>14</i>	<i>7</i>	<i>20</i>	<i>7</i>
<i>Withdrawn</i>	<i>1</i>	<i>0</i>	<i>0</i>	<i>0</i>	<i>0</i>	<i>0</i>	<i>0</i>

Note: An application for legal assistance could be granted in a year different from when it was lodged. Overall, about 47% of the applications were granted legal assistance during the above period.