Report on Review of the Equal Opportunities Commission Governance, Management Structure and Complaint Handling Process

平 等 機 會 委 員 會
EQUAL OPPORTUNITIES COMMISSION

Table of Contents

Foreword by the Chairperson ii
Prelude vii
Acknowledgement ix
Glossary x
Executive Summary 1
  Chapter 1 – Background 7
Part 1 – Governance Review 17
  Chapter 2 – The EOC/Overall Governance 17
Part 2 – Management Structure 21
  Chapter 3 – The Chairperson/COO 21
  Chapter 4 – The Four Governing Committees 26
Part 3 – Complaint Handling Process 29
  Chapter 5 – Legal and Complaints Committee 29
  Chapter 6 – Recommendations and Practical Implementation 34
  Chapter 7 – The Independent Report 38
Part 4 – Conclusions 46
  Chapter 8 – Overview/Recommendations 46
Appendices 52
  Appendix 1 – Review of Governance, Management Structure and Complaint Handling Process 52
  Appendix 2 – Professor REYES's Appointment Letter 53
  Appendix 3 – Summary of recommendations in the EOC's Discrimination Law Review submissions prioritised by the Government 56
  Appendix 4 – List of Chairperson of EOC 58
  Appendix 5 – List of Current EOC Members 59
  Appendix 6 – EOC Member Attendance Records 62
  Appendix 7 – Independent Report 63
  Appendix 8 – Key Performance Indicator of Complaint Services Division and Legal Service Division in 2008 – 2018 113

Foreword by the Chairperson

Between 2017 and 2019, the Equal Opportunities Commission (EOC) conducted a process review to examine its governance and management structure, as well as complaint-handling process, for service improvement purposes.

The process review was conducted by a Review Panel consisted of three EOC Members, namely Mr Mohan DATWANI, Dr Maggie KOONG and Dr Trisha LEAHY (Dr Koong and Dr Leahy have retired from the EOC Board since May 2018 and May 2019 respectively). In parallel, Professor Anselmo REYES, a retired High Court Judge, also conducted an independent review concerning the EOC's complaint-handling process on a pro bono basis upon the invitation of the EOC.

To assist the Review Panel, Mr John LEUNG Chi-fai, a retired senior civil servant, was engaged by the EOC as the Chief Project Manager. His duties included carrying out the ground work, such as interviewing various EOC staff members concerned and examining all relevant records and documents, and reporting his findings to the Review Panel.

The Review Panel eventually produced the final Process Review Report with the benefit of considering the work of Mr Leung and the report prepared by Professor Reyes.

In gist, the Process Review Report covers the following issues:

(A) Victim-centric Approach (VCA)

The Process Review Report recommended that a VCA be adopted by the EOC in processing all complaints. In brief, the VCA embraces the following features:

(1) It operates within the principles of fairness and impartiality;

(2) It recognises, and pays special attention to, the needs of the victims, in particular their welfare and dignity, as well as their rights of being heard;

(3) The EOC must make genuine attempts to help the victims seek justice, and that regardless of the ultimate outcome of their complaint cases, they

are entitled to know the rationale behind the outcome; and

(4) Throughout the complaint-handling process, the victims' expectations must be competently managed, and that their sentiments be properly and constructively taken care of.

(B) Complaint-handling Process

The Process Review Report has listed a number of observations, comments and recommendations as to how the complaint-handling process could be streamlined for the purpose of enhancing effectiveness and efficiency. It is of particular importance that the Process Review Report sets out that complaint investigation should not be only for the purpose of conciliation. In order for a case to succeed, be it in conciliation or legal proceedings, it would be critical for sufficient facts and evidence be obtained by the EOC so that the case could further proceed meaningfully. Needless to say, the VCA should be adopted throughout the whole process.

(C) Governance & Management Structure

The Process Review Report in general supported the prevailing governance and management structure of the EOC. In particular, the Chairperson should be in the overall commanding role, underpinned by Members in strategy setting and steering on the one hand, and by the full-time employed management team in discharging the EOC's statutory functions and day-to-day operation on the other.

Having read through all the relevant reference materials and papers, I am pleased to report that the Process Review Report is a very high-quality product as a result of meticulous research and distinctive insight into the EOC work. I readily agree with the recommendations of the Process Review Report, including, in particular, that (a) the VCA is a prudent approach for the EOC to adopt in handling complaints; (b) the handling of complaints must be in a holistic manner insofar as collection of facts and evidence is concerned; and (c) the Chairperson is in the overall commanding role, to be ably assisted by EOC Board Members and the professional management team.

All in all, I am of the view that the Process Review, though protracted in its course,

has successfully achieved its purpose of resolving most challenges faced by the EOC. The Process Review Report also provides me with excellent insights and forms a solid foundation for me to consider the way forward in further revising the EOC management structure so as to ensure EOC's continuous and sustainable improvement in tackling new challenges.

I would, therefore, like to take this opportunity to congratulate and thank Professor Anselmo Reyes, Mr Mohan Datwani, Dr Maggie Koong, Dr Trisha Leahy, Mr John Leung, and all other former and serving EOC Members, including my predecessor Professor Alfred CHAN, as well as all the EOC staff members who have been involved, together with those stakeholders who had generously offered their views to the EOC, for their contributions to the success of this exercise. I firmly believe that, with all the invaluable recommendations provided in the Process Review Report, the EOC would be able to serve the citizens of Hong Kong as a whole even more effectively and efficiently in building up a just, pluralistic and inclusive society.

Ricky CHU Man-kin, IDS
Chairperson
Equal Opportunities Commission
December 2019

Note: The Process Review Report was endorsed by the then EOC Members in February 2019.

Equal Opportunities Commission

Review of the Equal Opportunities Commission (EOC) Governance, Management Structure & Complaint Handling Process by Review Panel Members

---

Review Panel Members:

Mr Mohan DATWANI **Dr Maggie KOONG** **Dr Trisha LEAHY**

There must be some yardstick or belief to build something that is substantial, sustainable and of value to society, and hence we have adopted a victim-centric approach in the context of the use of EOC's finite resources and anti-discrimination focus…

Review Panel Members

Prelude

The Review Panel Members are first and foremost grateful to the dedicated staff of the Equal Opportunities Commission (EOC), led by the Chairperson, Professor Alfred CHAN. They all contributed to the Review Panel Members' review (Review) and appeared aligned with the adoption of a victim-centric approach.

But what is the 'victim-centric' approach? The Review Panel Members recognize that the EOC has finite resources in dealing with anti-discrimination cases and related policy messaging. In the context, the purpose of the Review must be to try to seek for better outcomes for the EOC. The question then is who should be the central focus of the outcomes? Based on widespread discussions with stakeholders, including victims and non-governmental organisations (NGOs) representing them, it became evident that EOC should try to improve its processes to help victims and potential victims of discrimination (which equates with minority protection).

In the context of a discrimination case, a victim-centric approach is one which, while focused on operating within principles of fairness and impartiality to both parties in a complaint activated under the Anti-Discrimination Ordinances, nevertheless recognises and pays special attention to the needs of victims at all stages of the complaint handling process. An important, but related observation is that the victim could be the complainant, the respondent, or some other third party. Accordingly, for a complaint that alleges an act which is not unlawful and/or is otherwise frivolous, vexatious, misconceived and/or lacking in substance[1] the EOC will seek to dismiss it, and to direct resources to the pursuit of appropriate cases for the victims as complainants.

The EOC recognises the inherently disempowering impact of discrimination, the nature of power differentiated structures in society, the difficulties some victims experience in recounting their experiences of discrimination, and the particular cultural and social barriers to reporting particular forms of discrimination.

But pausing here, the reality is that not every victim of discrimination will prevail against the persons subjecting them to discrimination. This is the

[1] See e.g. Section 84(4) SDO

nature of our legal system which requires evidentiary thresholds and legal standards to be met before a case is established at law as part of the rule of law. What is important to the Review Panel Members is that victims should feel that they have been heard, and that the EOC has made a genuine attempt to help them. As such, the EOC, using a victim-centric approach, commits to operating its processes, using its powers, and managing victim expectations in a manner that empowers the victim regardless of the ultimate outcome.

Implementing this victim-centric approach requires the EOC to have proper *governance, management structure and complaint handling processes* which are the three matters mandated under the scope of the Review. In fact, because of the Review process, enhancements to the work of the EOC have already taken place, for example the strengthened sharing of information between different departments, along with more frequent use of statutory powers in the complaint handling process. These bode well for victims in the pursuit of their legitimate anti-discrimination rights as important aspects of human rights.

The Review Panel Members themselves are passionate in discharging their duties to deliver public good to the victims of discrimination and to clarifying related policy messaging. Two of the three Review Panel Members are current EOC Members and the convenor and deputy convenor of the Legal and Complaints Committee (LCC) respectively. Another Review Panel Member is a retired EOC Member with deep experiences on anti-discrimination matters for the other Review Panel Members to draw upon.

The Review Panel Members are grateful to those persons and organisations set out in the next page for their contributions to the Review process and would especially like to express gratitude to Professor Anselmo REYES for his independent report (Independent Report) appended to this Report to provide independent perspectives.

The Review Panel Members would like to thank the EOC Members for the trust and confidence placed upon us to lead this Review under the Terms of Reference (TOR) (summarised in Appendix 1).

Review Panel Members:

Mr Mohan DATWANI **Dr Maggie KOONG** **Dr Trisha LEAHY**

Acknowledgement

During the period from the second quarter of 2017 to date, the following persons/organisations contributed views, which were taken into account in shaping this Report:

Coalition of Equal Action comprising:

Hong Kong Unison
Network for Women in Politics
Hong Kong Women's Coalition on Equal Opportunities
New Arrival Women League
Hong Kong Women Workers' Association
Association Concerning Sexual Violence Against Women
Hong Kong Women Christian Council
Hong Kong Confederation of Trade Unions Women's Affairs Committee
Hong Kong Association of Women Social Workers
Rainbow Action
Out and Vote 同志公民
Retail, Commerce and Clothing Industries General Union
Office of Dr Hon Fernando CHEUNG Chiu Hung
Civic Human Right Front

The Hong Kong Federation of Trade Unions

Hon CHEUNG, Chiu Hung Fernando (Legislator)
Hon KWOK, Wing Hang Dennis (Legislator)
Ms LAM, Eleanor (Network for Women in Politics)
Mr LEE, Cheuk Yan (Hong Kong Confederation of Trade Union)
Mr NASIR, Amirali (Former EOC Member)
Ms NG, Margaret
Professor REYES, Anselmo
Dr TSANG, Sandra (Former EOC Member)
Ms WONG, Linda (Association Concerning Sexual Violence)

EOC Members and staff consulted

Glossary

Abbreviations	Meanings
A&FC	Administration and Finance Committee
Anti-Discrimination Ordinances	SDO, DDO, FSDO and RDO
CEO	Chief Executive Officer
CIC	Complaint for Investigation and Conciliation
CMAB	Constitutional and Mainland Affairs Bureau
COO	Chief Operations Officer
CPM	Chief Project Manager
CPPC	Community Participation and Publicity Committee
CSD	Complaint Services Division
DDO	Disability Discrimination Ordinance
Department	A department of the EOC as set out in Diagram 1
EOC or Commission	Equal Opportunities Commission
FSDO	Family Status Discrimination Ordinance
Government	Government of HKSAR
HKSAR	Hong Kong Special Administrative Region
IFAC	The International Federation of Accountants
Independent Report	The report of Professor Anselmo REYES set out in Appendix 7 of this Report
IOP	Internal Operating Procedures Manual
KPIs	Key Performance Indicators
LCC	Legal and Complaints Committee
LegCo	Legislative Council
LSD	Legal Service Division
NGOs	Non-governmental organisations
Process Review	The process review as to the investigation and legal assistance functions of the EOC performed by the CSD and the LSD (overseen by the LCC)
RDO	Race Discrimination Ordinance
SDO	Sex Discrimination Ordinance
SII	Complaint for Self-Initiated Investigation
TOR	Terms of Reference

Executive Summary

In the third quarter of 2017, the EOC commissioned a Review exercise of certain of the core functions of the EOC. The Review reflects the EOC's commitment to cross-sectoral stakeholder coalitions in fulfilling its statutory functions and was a response to feedback received from service users, stakeholder groups representing victims and from the Legislative Council (LegCo). The Review Panel consisting of three Members of the EOC was formed to conduct the Review *pro bono*. The scope of the Review included assessing the effectiveness of the governance of the EOC; a senior management structure implemented in 2015; and the complaint handling processes of the EOC. An external expert Professor Anselmo REYES (a former High Court judge) was also commissioned on a *pro bono* basis to conduct a parallel independent external review of the complaint handling process portion to add value to the entire Review.

Unlike previous wide-ranging reviews conducted at various junctures in the EOC's history, the current Review exercise is grounded in a practical governance approach within the existing framework, the Sex Discrimination Ordinance (SDO); the Disability Discrimination Ordinance (DDO); the Family Status Discrimination Ordinance (FSDO); and the Race Discrimination Ordinance (RDO) (collectively the Anti-Discrimination Ordinances). The purpose is to identify and adopt best-practices to optimise a victim-centric approach to the work of the EOC in conducting its core functions, in line with its vision and mission to work towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race.

The EOC is committed to ensuring that regardless of the outcome of any particular complaint all persons involved are treated with understanding, dignity and respect, are appropriately informed of the progress of the case and their expectations are sensitively managed. The EOC, in the furtherance of its victim-centric approach, considers that continued cross-sectoral stakeholder engagement is central to ensuring that its activities assist victims and potential victims of discrimination, and that it regularly reflects on and reviews its institutional capacity and processes.

Conducive to the victim-centric approach, human dignity and rights, and respect therefor, the following summary of key conclusions and recommendations are presented to the EOC for consideration:

Governance and Management Structure

1. The EOC should adopt the victim-centric approach as an integral part of its culture. This is in line with widespread discussions with stakeholders, including victims and non-governmental organisations (NGOs) representing them. That is, EOC should try to improve its processes to help victims and potential victims of discrimination (which equates with minority protection). In the context of an anti-discrimination case, a victim-centric approach is one which, while focused on operating within principles of fairness and impartiality to both parties in a complaint activated under the Anti-Discrimination Ordinances, nevertheless recognises and pays special attention to the needs of victims at all stages of the complaint handling process.

2. There needs to be alignment of the thought processes in the EOC and by EOC Members that the Members constitute are and represent the EOC. This approach heightens the responsibilities of EOC Members and the oversight functions of the EOC Members in meeting as the EOC. Consistent with this observation, there should be strengthened reporting by the Chairperson as to the overall operational matters and issues to the EOC under more regular updates pending quarterly EOC meetings.

3. As to the composition of the Chairperson and the EOC Members, these are entirely under the discretion of the Chief Executive of the HKSAR. The only constraint is that EOC Members should not be appointed for more than 5 years per appointment. Likewise, the remuneration of the Chairperson, which is statutorily stipulated as a full-time role is for the Chief Executive to determine.

4. By-and-large, the Review Panel Members have no issue with the current diversity mix of EOC Members and believe that the Chief Executive makes a conscious attempt to enhance the diversity of the EOC Members. This has been recently recognised by the Hong Kong Institute of Directors which gave EOC both a Directors of the Year Award as a Board and an additional award for Excellence in Board Diversity, at its 2018 Awards Ceremony.

5. As the EOC is Hong Kong's lead anti-discriminatory body, the Review Panel would recommend that written Chinese language skills should not be required of candidates for the appointment as Chairperson of the EOC, and for that matter affect, any other posts not dictated by operational needs. This would not detract from the situation where there are two equally meritorious candidates,

the candidate with the ability to speak and/or write Chinese, as conducive to operational needs, should weigh in the selection process. By dropping the strict written Chinese language requirements, the Government would lead the anti-discrimination drive by example and widen the selection pool and the inclusion of ethnic minorities in accordance with policy objectives. This matter is however entirely at the discretion of the Chief Executive.

6. From a governance perspective for a public body, while a two-tier non-executive Chairperson and executive Chief Executive Officer (CEO) with contributions by independent members could be adopted, this is not the only viable alternative. There could be other structures. The Government has made it clear that the EOC carries important functions and should be led by the Chairperson. The introduction of the Chief Operations Officer (COO) is a mechanism by the Government to seek to enhance governance and accountability at the EOC.

7. The overall measure for the EOC is whether it is effective in carrying out its functions. While there is no issue with the governance structure with a Chairperson being the executive lead, it is the effectiveness of the implementation of the EOC's operation, that is, outcomes, which is the true measure of the effectiveness of governance for a statutory body. For the EOC, the Review Panel recommends that this should be considered in the context of the delivery of the functions and responsibilities of the EOC to relevant stakeholders based on a victim-centric approach.

Complaint Handling Process

From the Process Review, recommendations involving practical steps have already been implemented relating to: the accurate classification of cases as complaints not enquiries; the use of statutory powers for documents and investigations; internal operational changes such as the previous practice of case officer reassignment when an enquiry is reclassified as a complaint which has now been done away with; and options being provided to parties for early conciliation.

The Review Panel Members further recommend that:

8. In terms of case management, the Complaint Services Division (CSD) should make it clear to a victim complainant that in order to succeed in

conciliation and/or follow-up legal assistance, the facts and evidence are critical, and a case should not be reduced to one of the victim's words against the respondent's words as that carries with it the risk of failure for the victim. Therefore, there is a requirement on the victim to provide credible evidence or leads for investigations so that the case can be taken on by the EOC. Otherwise, the EOC will necessarily have to dismiss the complaint. The CSD needs to be focused on credible cases for investigation.

9. As to the investigation processes undertaken by CSD, it is wrong in principle, in the view of the Review Panel Members, for the CSD to investigate a case only for the purpose of conciliation. The Anti-Discrimination Ordinances state where a complaint is lodged the EOC shall conduct an investigation into the act, and endeavour by conciliation to effect a settlement.[2] The Review Panel Members cannot equate this to a leap of logic that the investigation should be for the purposes of conciliation. This is because there is the need to have a holistic view of a case prior to attempts at conciliation. This is part of the art of case management.

In fact, under the existing EOC Internal Operating Procedures Manual (IOP) (i.e. clause 4.1) the objectives of complaint investigation are (i) to collect and examine the factual information in respect of the complaint; (ii) to decide whether or not to conduct, or to discontinue, an investigation; (iii) to provide a basis on which conciliation can be endeavoured and (iv) to provide a basis upon which to determine what action, if any, should be taken in the event conciliation is not successful (i.e. whether legal assistance should be granted by EOC). As such, the EOC needs to adjust CSD's Key Performance Indicators (KPIs), which are currently focused on conciliation rate, to allow CSD to effectively fulfil its case management function in compliance with the IOP which has set out the applicable policy and procedures.

10. On the issue of preservation of the victims' privilege which attaches to conciliation only, CSD should explain upfront that the victim should seriously consider agreeing to release anything said and done by the victim where conciliation fails, otherwise the case would not be on firm ground for legal assistance.

---

[2] See e.g. Section 84(3) of SDO

11. On the other hand, the CSD should limit investigations over respondents and potential respondents which attract privilege for conciliation. The CSD has powers of investigation under applicable rules and regulations under the Anti-Discrimination Ordinances. These allow for it to obtain information and evidence generally from the respondent, potential respondents and/or third parties. The CSD should be ready to use its powers as a regulator for effectiveness in discharging its regulatory objectives.

12. The EOC should seek to allocate resources, including using technology, like videos or interactive programme on its website accessible by the public. This is to provide a ready interactive tool for a general overview of the different types of discrimination cases, the processes involved and to manage the general expectations of victims under a victim-centric approach by addressing the issues raised above.

13. The victims of discrimination should be given the opportunity, following an unsuccessful conciliation, to meet a legal professional from the LSD team. This would be after LSD's review of the facts and evidence up to the stage of conciliation which are not subject to privilege. The purpose of the meeting is for the LSD to provide the victim with an analysis of what the gaps in the case are and in relation to which the LSD would need further information and/or would need to investigate for the purpose of providing an impartial legal analysis to the LCC to assist the LCC to determine whether to grant legal assistance, and the extent of such, (limited or full assistance) depending on the legal and policy considerations of the LCC. The Review Panel Members believe that this aspect is important to the victim-centric approach and EOC should seek to reorganise its resources and/or seek Government funding to achieve this objective. The Chairperson is recommended to make this a priority item at the A&FC for effective resourcing.

14. There are some 25 recommendations made under the Independent Report. In fact, under the existing practice, and matters already being implemented and/or under consideration by the EOC, the desired outcomes for the great majority of these are already covered. For the rest of the contents and recommendations under the Independent Report these could be considered under future law reform, as and when appropriate, should the Process Review and practical implementations recommended herein not improve the overall investigation/legal assistance functions of the EOC based on a victim-centric approach. At this juncture, the

Review Panel recommends that the immediate focus should be on the practical governance focus and related implementation measures as detailed in this Report.

Chief Project Manager

15. The Review Panel was supported by a Chief Project Manager (CPM). The CPM had prepared a working draft report for the consideration of the Panel. Members of the Review Panel had drawn certain relevant materials from the CPM's working draft when writing up the Review Panel Report.

Chapter 1 – Background

1.1 The EOC is an independent statutory body set up in 1996 to implement the Anti-Discrimination Ordinances. The EOC works towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race. Specifically:

(a) Sex Discrimination Ordinance (Cap. 480) (SDO)

It is unlawful under the SDO to discriminate against a person on the grounds of sex, marital status or pregnancy in prescribed areas of activities, including:

- employment;
- education;
- provision of goods, services and/or facilities;
- disposal and/or management of premises;
- eligibility to vote for and to be elected or appointed to advisory bodies;
- participation in clubs; and activities of the Government.

The SDO also protects a person from sexual harassment and victimisation in prescribed areas of activities, including employment, education, provision of goods, services and/or facilities, disposal and/or management of premises.

(b) Disability Discrimination Ordinance (Cap. 487) (DDO)

The DDO renders unlawful certain acts which discriminate against a person on the grounds of disability when committed in prescribed areas of activities, including:

- employment;
- education;
- provision of goods, services and/or facilities;
- access to premises; disposal and/or management of premises;
- participation in clubs and sporting activities; and activities of the Government.

Protection is also extended in respect of discrimination on the grounds of the disability of an associate, or where the discrimination arises because a person is accompanied by an interpreter, a reader, an assistant or a carer, who provides services because of the person's disability. Harassment on the ground of disability, victimisation and vilification are also unlawful when committed in the areas of activities prescribed in the DDO.

(c) Family Status Discrimination Ordinance (Cap. 527) (FSDO)

Under the FSDO, it is unlawful to discriminate a person on the ground of family status. "Family status" means the status of having a responsibility for the care of an immediate family member, and "immediate family member", in turn, means a person who is related to someone by blood, marriage, adoption or affinity. The areas of activities for which a person may lodge a complaint under the FSDO are the same as those under the SDO, which include:

- employment;
- education;
- provision of goods, services and/or facilities;
- disposal and/or management of premises;
- eligibility to vote for and to be elected or appointed to advisory bodies;
- participation in clubs; and activities of the Government.

(d) Race Discrimination Ordinance (Cap. 602) (RDO)

The RDO protects people against discrimination, harassment and vilification on the ground of their race. "Race" means the race, colour, descent, national or ethnic origin of a person. Under the RDO, it is unlawful to discriminate, harass or vilify a person on the ground of his/her race in prescribed areas of activities, including:

- employment;
- education;
- provision of goods, services and/or facilities;

- disposal and/or management of premises;
- eligibility to vote for and to stand for election to public bodies, and participation in clubs.

Protection is also extended in respect of discrimination on the grounds of the race of a near relative (the Government is proposing to change the protection from near relative to associate) of a person. A person's "near relative" includes (without limitation to) the person's spouse, parents, children, siblings, grandparents and grandchildren.

1.2 It follows that under these legislations, the main functions and powers of the EOC are to:

- work towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race;
- promote equality of opportunities between men and women, between persons with a disability and persons without a disability, irrespective of family status and race;
- work towards the elimination of sexual harassment, and harassment and vilification on the grounds of disability and race;
- conduct investigation into complaints lodged under the Anti-Discrimination Ordinances and encourage conciliation between the parties in dispute;
- undertake self-initiated investigation into situations and issues giving rise to discrimination concerns under the Anti-Discrimination Ordinances;
- develop and issue codes of practice under the Anti-Discrimination Ordinances;
- keep under review the workings of the Anti-Discrimination Ordinances and when necessary, draw up proposals for amendments; and
- conduct research on issues relevant to discrimination and equal opportunities.

1.3 Consistent with these functions and powers, EOC has adopted the vision to create a pluralistic and inclusive society free of discrimination where there is

no barrier to equal opportunities. To do so, the EOC's expressed mission is to seek to establish partnerships with all sectors in the community; promoting awareness, understanding and acceptance of diversity and equal opportunities and providing education to prevent discrimination; enforcing compliance with provisions in the anti-discrimination legislation; and providing access to redress for discrimination.

1.4 Moving from the high-level perspectives, in its day-to-day operations, the EOC has four external operational objectives and an internal one. These are:

(a) Operational Objective 1 - Public Enquiry & Complaint Handling. EOC will maintain an effective and efficient public enquiry and complaint handling system.

The major tasks are to:

- implement a set of user-friendly procedures for service users;
- maintain a complaints database and management system to facilitate the collection, analysis and benchmarking of data about enquiries and complaints;
- maintain an up-to-date and comprehensive complaint procedures manual for complaint handling staff;
- provide thorough orientation training for complaint handling staff within three months of commencing employment in the use of the complaint procedures manual, understanding of anti-discrimination legislation and complaints database;
- provide continuous training for complaint handling staff to enhance their skills in complaints handling with an emphasis on conciliation skills;
- maintain constructive relationships with other agencies dealing with individual rights in Hong Kong and with anti-discrimination agencies in the region for exchanges and sharing;
- achieve high levels of customer satisfaction through monitoring and investigation into service complaints and compliments received.

(b) Operational Objective 2 - Promotion, Education & Publicity. The Commission will provide effective communication and education for all sectors in the community about equal opportunities.

The major tasks are to:

- develop a close relationship with the media to positively promote EOC's image;
- develop effective communication channels, such as a user-friendly website and enquiry and complaint lodgement procedures, to inform the business sector, Government and the community about the functions and policies of the Commission and for the promotion of equal opportunities;
- continue to develop online equal opportunities education modules for use by different stakeholders; establish close links with schools, teachers and educational institutions;
- develop and publish a range of information materials and newsletters for the community, media, public and private sectors;
- provide general and customised training and consultancy services on the subject of equal opportunities and anti-discrimination to the community;
- partner with business to develop EO employment policies and good practices;
- promote the creation of the post of an Equal Opportunities Officer for implementing EO policies in both public and private organisations; and
- undertake evaluation and other surveys to measure the effectiveness of EOC's promotional and education programmes.

(c) Operational Objective 3 - Policy and Research. The Commission will engage in robust review, research and policy work to combat systemic discrimination and to facilitate mainstreaming of equal opportunities in the society.

The major tasks are to:

- review patterns and trends in enquiry and complaint cases with a view to identifying discriminatory practices in both the employment and non-employment fields and make recommendations to combat such practices;
- recommend actions relating to formal investigation for the purposes of dealing with systemic discrimination;
- conduct or commission research studies on possible areas of systemic discrimination and to promote specific areas of equal opportunities policies and practices;
- keep abreast of public policy issues impacting on equal opportunities, examine these issues and recommend solutions or ways forward;
- maintain effective relationships with relevant stakeholders on policy and research issues;
- build and strengthen relationships with overseas organisations and bodies advocating human rights; and
- conduct surveys on baseline indicators of equal opportunities and monitor change in perception, attitudes and understanding of members of the public.

(d) Operational Objective 4 - Legal Services. The Commission will provide efficient and effective legal services.

The major tasks are to:

- tender internal advice on interpretation of the provisions of the Anti-Discrimination Ordinances;
- provide legal assistance to aggrieved persons, which includes appearance in court as required;

- review the criteria for granting legal assistance to clients to facilitate assistance and to maximise impact;
- collaborate closely with the complaint handling division to implement necessary improvements to ensure a quality and efficient service for clients in respect of lodging complaints and subsequent application for legal assistance;
- facilitate the development of jurisprudence on discrimination legislation by participating in proceedings as intervener or amicus curiae;
- keep under review the working of the Anti-Discrimination Ordinances and draw up proposals for legislative amendments if necessary; and
- prepare for the implementation of new anti-discrimination legislation including the issue of Codes of Practice and Guidelines.

(e) Operational Objective 5 - Corporate Support. The Commission will manage its work, staff and resources effectively and will maintain efficient corporate support processes and systems.

The major tasks are to:

- uphold the values of EOC and Code of Conduct applicable to the staff of the Commission through orientation and refresher training;
- facilitate the planning and implementation of the Commission's overall priorities and strategies and monitor and review performance pledges for adherence and improvement;
- manage an efficient secretariat for the Commission and effectively liaise with EOC Members on matters related to the performance and operations of the Commission;
- maintain an Information Technology System and assess available communication and other technologies to improve public access to the Commission;
- enhance internal communication by making available a variety of open communications channels;

- recruit, retain and develop quality staff to support the Commission's objectives;
- develop, implement and where necessary improve the human resources, administrative and procurement policies and practices paying due regard to best practices in the public and private sectors;
- maintain a performance management system to sustain and enhance staff's productivity and development;
- exercise prudent financial management in utilising the Commission's funds and develop and maintain monthly finance reporting and forecasting on an accrual basis;
- assess use of rental accommodation and enter into new lease agreement on the best possible terms for the Commission; and
- make continuous improvements by implementing the recommendations of management or organisational reviews undertaken from time to time.

The Review

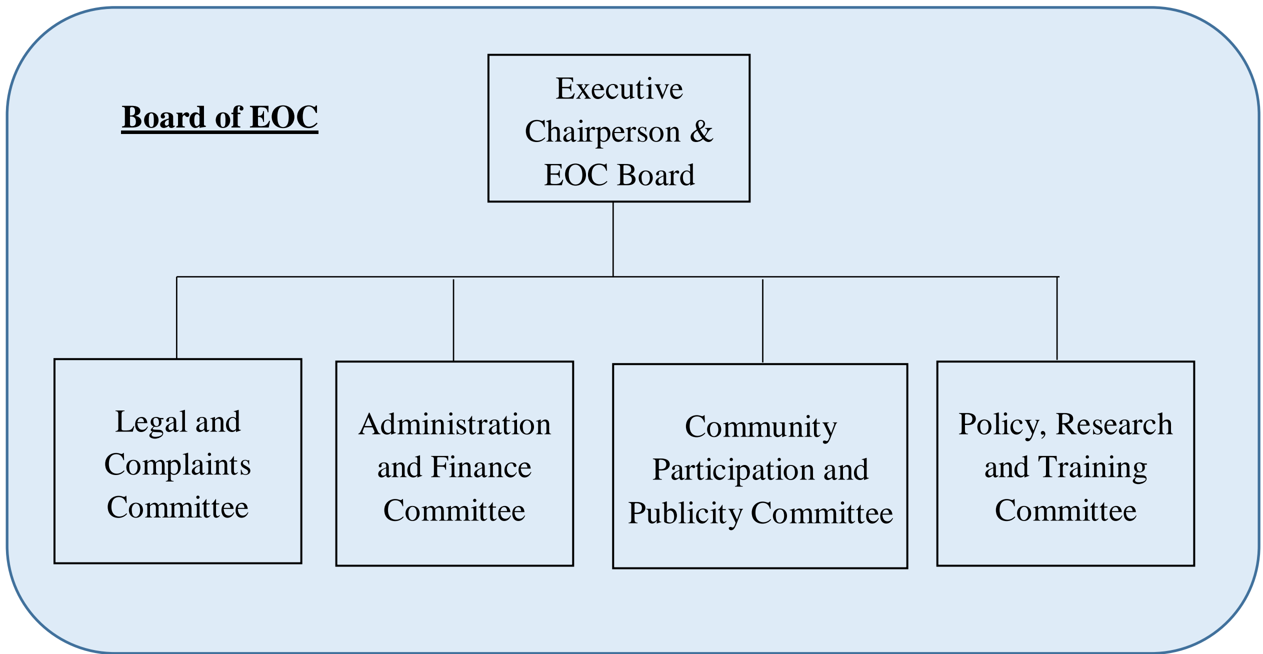
1.5 In the third quarter of 2017, the EOC commissioned the Review exercise reflecting the EOC's commitment to cross-sectoral stakeholder coalitions in fulfilling its statutory functions. The Review stemmed from and was a response to feedback received from service users, stakeholder groups representing victims and from the LegCo. The Review Panel consisting of three Members of the EOC was formed to conduct the Review on a *pro bono* basis. The scope of the Review included assessing the effectiveness of the governance of the EOC; a senior management structure implemented in 2015; and the complaint handling process under the agreed scope (Appendix 1). An external expert and former Judge of the High Court Professor Anselmo REYES was also commissioned on a *pro bono* basis to conduct an independent external review of the complaint handling process portion to add value to the entire Review (Appendix 2 - Invitation Letter to Prof REYES).

1.6 Unlike previous wider-ranging reviews conducted at various junctures in the EOC's history, the current Review exercise is grounded in a practical governance approach within the existing framework and Anti-Discrimination Ordinances. The purpose is to identify and adopt best-practices to optimise a

victim-centric approach to the work of the EOC in conducting its core functions in line with its vision and mission to work towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race. The Review Panel Members would therefore like to point out that the discussions are decidedly practical with the aim of helping the Government and EOC to consider the way forward to better use EOC's finite resources for the benefit of relevant stakeholders, especially victims of discrimination and for related policy messaging.

1.7 The Review itself reflects a multi-method approach including documentary reviews, detailed interviews with relevant staff and discussions with stakeholders. A temporary Chief Project Manager (CPM) was employed by the EOC to conduct the ground work and provide the relevant data for the Review Panel's consideration. This provided the opportunity for the CPM to be seconded for a period within the Complaint Services Division, providing a live, embedded research methodology adding robustness to the whole Review through practical in-depth experience of the complaint handling process.

Based on the regulatory framework and the operational objectives described in this Chapter, the Review Panel Members recognise that the current organisational structure of the EOC set out below is conducive to implementation of the operational objectives. But then, that is a separate issue from that of whether from the governance point of view the *governance, management structure and complaint handling process* could be enhanced. These are the topics covered in the following Chapters.



Management Structure of EOC

Executive Chairperson

Chief Operations Officer

Corporate Planning and Services Division

Complaint Services Division

Legal Service Division

Ethnic Minorities Unit

Policy, Research and Training Division

Corporate Communications Division

Diagram 1 - EOC Organisation Chart

Part 1 – Governance Review

Chapter 2 – The EOC/Overall Governance

2.1 As would be seen in the organisation chart presented in Diagram 1 (Chapter 1) the 'Board' of the EOC serves to provide oversight to the operations of the EOC. This includes the overall governance performed by the Chairperson; LCC; A&FC; Community Participation and Publicity Committee; and Policy, Research and Training Committee. A review of the Anti-Discrimination Ordinances would show that nowhere is there a reference to a 'Board' of the EOC. In fact, under the Anti-Discrimination Ordinances it is stated that '*the [M]embers of the Commission shall form its governing body with authority, in the name of the Commission, to perform the functions and exercise the powers of the Commission.*'

2.2 It follows that when EOC Members meet to discharge their statutory functions under the Anti-Discrimination Ordinances, they do so not as a board of the EOC but as the EOC itself under the Anti-Discrimination Ordinances. The role of the management is to support EOC Members in the discharge of the important functions of the EOC as set out in Chapter 1. The ultimate ownership of the governance is with the EOC Members sitting as the EOC. As such, it is timely to reconsider if the organisation chart of the EOC should also be amended to refer to the EOC instead of the EOC Board along with related external communications. For example, what is the advantage of saying that the EOC Board has resolved an issue compared with saying that the EOC has resolved an issue? Therefore, while not critical, at some stage the reference to EOC Members sitting as EOC or as the EOC Board which was resolved in favour of the latter by the EOC (in 2014) out of convenience, could be re-examined. This is however not a priority issue.

2.3 From a governance perspective, in the Review Panel Members' views, the existing practice for the EOC Members to be actively involved in shaping the overall strategy of the EOC, and to liaise with the Constitutional and Mainland Affairs Bureau (CMAB) and other policy bureaus for resources allocation is appropriate as they have oversight as to the strategy and implementation of the EOC's vision and mission. The further observation by the Review Panel Members is that CMAB does consider EOC Members' views and has made it plain that where EOC's strategic priorities accord with those of the Government's they make for priority uptake. For example, eight discrimination law review

recommendations made by the EOC would, subject to the legislative process, be adopted as priority matters (as set out in Appendix 3).

The CMAB has made it clear that where appropriate it would assist the EOC to liaise with the necessary policy bureaus as to overall policy and implementation issues but EOC itself needs to prioritise and synchronise requests with Government policies which relate to the overall good of the Hong Kong community, to optimise effectiveness. The Review Panel Members recommend that the EOC should continue its work to realistically push for desired outcomes, but this should not detract from matters of principle which the EOC should continue to strive for. An example is anti-sexual harassment work which EOC has actively promoted for a number of years, which because of the recent #MeToo campaign has become even more of a priority issue.

2.4 Aside from strategy and implementation, EOC Members fundamentally shape the EOC's governance. In terms of membership of the EOC, under the Anti-Discrimination Ordinances, the Chief Executive of the HKSAR should appoint a full-time Chairperson who is not allowed to hold any other office of profit nor outside occupation for reward without the Chief Executive's approval. The remuneration and terms and conditions of the appointment are entirely within the prerogative of the Chief Executive, who no doubt considers all relevant factors relating thereto, including feedback as to the performance of the Chairperson from relevant sources and the importance of the governance role that the Chairperson in leadership of the EOC performs. Since the inception of the EOC in 1996, the duration of the appointment of the Chairperson has varied from several months to five years. The detailed list is at Appendix 4.

2.5 In addition to the Chairperson, under the Anti-Discrimination Ordinances there are also to be not less than 4 or more than 16 other EOC Members appointed by the Chief Executive. The only fetter as to these appointments is that the appointment should not be more than 5-year term (per single appointment) under the Anti-Discrimination Ordinance. There appears to be nothing under the Anti-Discrimination Ordinances that restricts the reappointment of any Members. Likewise, the EOC Members shape the governance of the EOC as part of the EOC with the Chairperson. While the Government has an announced policy of no more than one person being on six boards for six years, ultimately, this does not fetter the discretion of the Chief Executive to consider relevant matters in the case of EOC Member appointments, subject to the statutory provisions of the Anti-Discrimination Ordinances.

2.6 As a governance issue, the Review Panel Members note that the EOC Members should be appointed with a diversity mix to avoid group thinking. In this connection, Appendix 5 illustrates the current EOC Member-mix. The Chief Executive has obviously appointed EOC Members with a balance of background and expertise, including men, women, persons with disabilities, ethnic minorities, employment group experts, social services, legal, and accounting sector professionals, academics and education experts, and other persons from the community at large. The Review Panel Members speaking from personal experiences know that Members of EOC are passionately committed to the exercise of proper governance by the Chairperson and the EOC, to ensure that the anti-discrimination functions of the EOC are carried out to safeguard victims, provide access to justice, and promote related policy messaging.

2.7 The Anti-Discrimination Ordinances set out strict compliance requirements that if the Chief Executive is satisfied that a Member of the Commission (a) has been absent from 3 consecutive meetings of the Commission without the permission of the Commission; (b) has become bankrupt or made an arrangement with his creditors; (c) is incapacitated by physical or mental illness; or (d) is otherwise unable or unfit to discharge the functions of a Member, the Chief Executive may declare his office as a member of the Commission to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office shall become vacant. There are therefore strict attendance requirements upon EOC Members. The attendance records of EOC Members are set out in Appendix 6 and there are generally no governance concerns.

2.8 As with the appointment of the Chairperson, it is entirely within the unfettered discretion of the Chief Executive as to what constitutes the right diversity mix of EOC Members, and the Review Panel Members have no doubt that this issue is appropriately considered by the Chief Executive. In fact, in periodic announcements relating to appointment and reappointments, the diversity mix of the membership of the EOC is expressly summarised therein. There is nothing that the Review Panel Members see as of concern or as contrary to the victim-centric approach in the diversity mix relating to the EOC Member appointments. This has been recently recognised by the Hong Kong Institute of Directors that gave EOC both the Director of the Year Award as a Board and an award for Excellence in Board Diversity at its 2018 Awards Ceremony.

2.9 As the EOC is Hong Kong's lead anti-discriminatory body, the Review Panel would recommend that written Chinese language skills should not be required of candidates for the appointment as Chairperson of the EOC, and for that matter affect, any other posts not dictated by operational needs. This would not detract from the situation where there are two equally meritorious candidates, the candidate with the ability to speak and/or write Chinese, as conducive to operational needs, should weigh in the selection process. By dropping the strict written Chinese language requirements, the Government would lead the anti-discrimination drive by example and widen the selection pool and the inclusion of ethnic minorities in accordance with policy objectives. This matter is however entirely at the discretion of the Chief Executive.

Part 2 – Management Structure

Chapter 3 – The Chairperson/COO

3.1 The common focus of governance discussions relating to the management structure of the EOC is whether the EOC should have a CEO (which it previously did) for separation of powers, and whether the current management reporting structure with some functional units reporting to the COO and other units to the Chairperson as set out in the organisation chart reflects best practice governance. Before going into detailed discussions, the Review Panel Members feel it necessary to put it into context what good governance for a public body means in the international arena.

3.2 The International Federation of Accountants (IFAC) publication 'International Framework: Good Governance in the Public Sector' July 2014 (Framework) is referred to by the Review Panel Members as the starting point for analysis. The IFAC Framework makes it clear that '[t]here is no universally agreed-on definition for the term "public sector governance." What is understood by the term appears to vary considerably among jurisdictions (*p 8*).' The publication further refers to the following notions of governance for public bodies: 'Every public sector entity needs one or more individuals who are explicitly responsible for providing strategic direction and oversight while being accountable to its stakeholders' (*p 9*). For the EOC, this is collectively the EOC Members with the Chairperson in the leadership position.

3.3 The IFAC Framework further notes that the governing bodies (like the EOC) 'can be made up of independent and non-independent members. They may have various subcommittees, such as audit or finance, which have specific delegated powers and processes but are accountable to the governing body. In some entities, the governing body may include executive members. In others, the governing and management functions may be separated, with a non-executive governing body overseeing an executive management group. This is sometimes described as a two-tier structure. The non-executive role commonly comprises: contributing to strategy by bringing a range of perspectives to strategy development and decision making; making sure that effective management structures and processes are in place, and that there is an effective team at the top level of the entity; and holding the executive to account for performance in fulfilling the responsibilities delegated to it by the governing

body, including thorough purposeful challenge and scrutiny' (*p 9*). The IFAC Framework then goes on to state that 'whichever structure is adopted, the governing body has a crucial leadership role with respect to implementing, evaluating, and improving an entity's governance' (*p 9*).

3.4 What this means is that there is no universal model of management structure from the governance perspective that Hong Kong must adopt for the EOC. The important matter is that whatever management structure is adopted, this should be conducive to the discharge of the anti-discrimination functions and related policy messaging as set forth under Chapter 1. That would be the true measure of practical governance of the EOC. Further, the current Review by the Review Panel Members concerns performance of the governing body of its crucial leadership role with respect to implementation, evaluation, and improvement of the EOC's governance.

3.5 For the EOC, Hong Kong has chosen under the Anti-Discrimination Ordinances for the Chairperson to be in an executive full-time office. In view of the time commitment, the Chief Executive of the HKSAR has remunerated the position, and accordingly, the Chairperson carries a high degree of responsibility over the affairs of the EOC, including as to its governance and strategy which the Review Panel Members believe should be based on a victim-centric approach with related policy messaging. There is no scope for the Chairperson to be a non-executive as with the prevalent two-tier structure of Government boards which would in any event require legislative amendments under the Anti-Discrimination Ordinances. The Review Panel Members do not see any compelling arguments for legislative changes from the governance point of view.

3.6 As to the genesis of the current organisational structure with a COO, the following is a brief technical summary:

(a) The CEO position

When the EOC came into operation in 1996, there was a Chairperson and a CEO. In 2000, the CEO post was removed to streamline the EOC's operation. Between 2004 and 2006, following certain governance reviews, there were calls for the reinstatement of the CEO post. In January 2006, the Home Affairs Bureau ─ the then policy bureau of the EOC) consulted the Home Affairs Panel

of the Legislative Council (LegCo), and some LegCo Members raised reservations as to this proposal. In view of this, the then Administration did not take forward the proposal. In its March 2009 Report No. 52, the Audit Commission noted that there had been a lack of progress after the Home Affairs Panel meeting and recommended that action be expedited to bring the matter to a satisfactory conclusion.

(b) The COO position

On 15 June 2009, CMAB (the current policy bureau) consulted the LegCo Panel on Constitutional Affairs on the matter of separation of the EOC Chairperson and CEO. It was noted that the EOC is a very important human rights institution and that it should have the appropriate structure to facilitate the performance of its statutory functions and that any changes should not undermine the perception of the EOC's independence. Due to this unique nature, the then Administration opined that rather than just comparing its structure with that of other public bodies, the EOC structure should reflect its important functions.

Considering the views of LegCo and EOC Members, the CMAB as at 2009 took the position that it would be important for the EOC to continue to have a full-time Chairperson who has the executive authority to lead the organisation. CMAB at that time expressed that it was mindful that any changes to the structure of the EOC should not undermine public perception of its independence. Accordingly, it agreed to reinstate and fund a pre-2000 post at D3 level (titled 'Chief Operations Officer' (COO)) to oversee the administrative and operational matters and to strengthen the governance of the EOC. The then Administration expressed that it was open to any future review and again would consider the EOC and other community views. Eventually, in 2015, a revised structure, with the addition of a COO post among other changes was implemented by the EOC as it took time for the EOC to organise its resources to fund the position.

3.7 The Review Panel Members, mindful of the IFAC Framework, and the detailed considerations of the Government have no issue with the EOC having a Chairperson with the executive authority to lead the EOC (as required under the Anti-Discrimination Ordinances), and a COO to oversee the administrative and operational matters, and to strengthen the governance of the EOC. In this connection, the Review Panel Members recommend that the A&FC of the EOC, as part of its function of oversight of the EOC's human resources, consider whether the direct reporting lines of the Corporate Communication Division and the Policy, Research and Training Division should instead be made to the COO to further enhance the governance role of the COO, and to make relevant recommendations to the EOC on the appropriate organisational structure. The aim should always be to enhance the transparency, accountability and impartiality of the implementation and execution of the EOC strategic objectives, but at the same time to balance the operational efficiencies from direct dealing of the external related matters by the Chairperson. The views of the Chairperson, COO and functional divisional heads would be relevant for A&FC's consideration. While ultimate oversight of the Chairperson is through the collective decision-making power of the EOC and its relevant Committees, the Review Panel Members believe that the COO post, would assist in adding to this system of checks and balances, as well as the implementation of the long-term strategic objectives of the EOC.

3.8 Therefore the COO should be a senior position at the current grading subject to the necessary funding from the Government. The attributes of the candidate are of great importance to the successful implementation of the COO functions. It is preferable that the candidate has substantial commercial and organisational experiences to allow for the setting of strategy and implementation, internal day-to-day management and to liaise with diverse stakeholders and the Government. The ability to deal with volume legal case management and crisis management are definite assets to the position. In short, substantial and demonstrable leadership position in the private, NGO and/or government sectors is a prerequisite. The soft skills of the candidate should include expert people management, team formation and motivation to bring out the best in staff to deliver upon the common purposes of the EOC as set forth under Chapter 1.

3.9 The ultimate requirements of the candidate for the COO position and the specific scope of the position should be a matter left to the A&FC to

determine. In view of the expected contribution from the right candidate, and for best practice executive management of the organisation, the COO position should not be integrated into any of the operational Divisions, but rather sit in a supervisory capacity to these divisions. This would free up the Chairperson to be fully functional in the crucial externally facing role and would avoid any perception of inherent bias in the internal executive management of the operational Divisions.

3.10 In the view of a Review Panel Member, Dr Maggie KOONG, the apparent overlap of the current functions of the Director of Corporate Planning and Services (DCPS) with the COO, needs to be clarified and rationalised by the A&FC. Consequently, there is need to review the current grading of the DCPS post should it be deemed appropriate to transfer some of the roles and responsibilities of the Corporate Planning & Services Division (CPSD) to the COO office. Until that takes place, the other Review Panel Members have no issue with the current management structure in terms of the staff grading of the DCPS (who has substantial responsibilities and staff supervision role) as confirmed by the EOC in its 108th Meeting in December 2014. As and when the A&FC deems it appropriate to review the issue, the comments in paragraph 3.7 of this Report, and all relevant historical archives relating to the creation and current staff grading of the head of CPSD would be relevant for consideration. Pending any A&FC Review the majority view of the Review Panel Members is that no change is required on this specific issue and that it is a simple matter of clarifying the articulation of the job scopes in the job descriptions.

EOC's Oversight

3.11 On the issue of the management structure, the Review Panel Members emphasise that the ultimate oversight of the EOC is with the EOC Members collectively. As expected, major policies and decisions of the EOC are not made by the Chairperson alone but discussed and approved by the EOC Members sitting as EOC. For example, following the audit review in 2009, enhanced control measures by the EOC through the A&FC oversight have been introduced regarding overseas duty visits and official entertainment. This provides an effective system of checks and balance within the EOC which could be further strengthened with enhanced reporting by the Chairperson and enhanced engagement of EOC Members in the affairs of the EOC as set out in paragraph 2.3 above.

Chapter 4 – The Four Governing Committees

4.1 In terms of overall governance oversight, this would not be complete without a discussion of the Legal and Complaints Committee (LCC); the Administration and Finance Committee (A&FC); the Community Participation and Publicity Committee (CPPC); and Policy, Research and Training Committee (PRTC). EOC Members form the membership of these Committees. This is an arrangement to apportion the governance and strategy of the EOC into manageable parts without diluting the overall governance functions of the EOC. All functional committees have a convenor and a deputy convenor and include the Chairperson. Committees are delegated certain EOC functions but subject to periodic reporting at EOC meeting and its ultimate oversight.

4.2 The mandates of the committees are set out as follows and can be found on the EOC website:

(a) Legal and Complaints Committee

This committee is to: recommend to the EOC rules to be made under the Anti-Discrimination Ordinances; receive reports relating to conciliation, investigation, and settlements; determine the granting of legal assistance and scope thereof, along with monitoring of case progress; and deal with formal investigations according to established procedures. It is the workings of the Complaint Services Division (CSD) and the Legal Service Division (LSD) under the Legal and Complaints Committee (LCC) that is the subject of the Process Review as there are governance issues which need to be considered under the victim-centric approach and related policy messaging.

(b) Policy, Research and Training Committee

This committee is to advise on measures to be taken in conducting policy analysis/advocacy and related follow-up actions; consider and approve the undertaking of commissioned research and related follow-up actions in accordance with section 65(1) of the SDO; consider and approve assistance (financially or otherwise) of the undertaking by other persons of any research activities in accordance with section 65(1) of the SDO; advise on measures to

be taken in conducting training programmes and activities and providing consultancy services; consider and approve training modules of the Commission within the framework of policy analysis/advocacy and research; receive reports from the EOC office on commissioning of projects in relation to policy and research matters; and to receive progress reports on policy and research undertaken or commissioned by the Commission.

(c) Community Participation and Publicity Committee

This committee is to advise on measures to strengthen publicity, public education and media relations of the Commission; advise on measures to foster community participation in promoting equal opportunities and eliminating discrimination; advise on measures for liaison with government bodies and non-government organisations including employment establishments and concern groups; receive reports on actions taken by the EOC office in pursuance of the aforesaid; consider and approve assistance (financial or otherwise) of the undertaking by other persons of any educational (non-research related) activities in accordance with section 65(1) of the SDO; and to monitor community response to the Commission's work and make recommendations to the Commission on the way forward.

(d) Administration and Finance Committee

This committee serves to: review the draft Annual Estimates of Expenditure of the Commission, consider and approve donations to the Commission; draft statements of accounts of the Commission and the auditor's reports; draft annual report on the activities of the Commission; review the Memorandum of Administrative Arrangements (between EOC and CMAB) and any proposed amendments thereof; set up tender boards in relation to matters connected with the work of the Commission and to approve such recommendations as are made by these boards; set up recruitment boards in relation to staff employed on Directorate Pay Scale and Directorate (Legal) Pay Scale and to approve such recommendations as are made by these boards; decide on matters related to further employment or termination of service in relation

to staff employed on Directorate Pay Scale and Directorate (Legal) Pay Scale; approve reports for quarterly reviews under the Memorandum of Administrative Arrangements; make recommendations to the Commission in respect of the appointment of an auditor; keep the staffing and administrative policies of the Commission under review; and to advise and to approve recommendations in relation to the leasing, renewal or acquisition of the Commission's office accommodation.

4.3 For completeness, the Review Panel Members have no governance concerns as to the membership and mandates of the LCC, A&FC, PRTC and CPPC.

The EOC and the Review Panel Members however do have concerns relating to the complaint handling procedures under the LCC. This is not a structural issue but relates to governance issues from the implementation of the EOC's functions on the important areas of investigations and legal assistance to victims, directly relevant to the victim-centric approach and related policy messaging at the core of the EOC's functions and responsibilities.

Part 3 – Complaint Handling Process

Chapter 5 – Legal and Complaints Committee

5.1 At the outset, it needs to be said that the Review Panel Members have high regard for the passion, commitment and professional expertise of the staff of the EOC. The following discussions relating to the Process Review as to the investigation and legal assistance functions of the EOC performed by the CSD and the LSD (overseen by the LCC) are intended to enhance the use of the EOC's finite resources within a victim-centric approach. Such an approach, while focused on operating within principles of fairness and impartiality to both parties in a complaint activated under the anti-discrimination Ordinances, nevertheless recognises and pays special attention to the needs of victims at all stages of the complaint handling process. The Review Panel Members will describe problematic issues, identify the root causes and provide recommendations thereon.

5.2 The Review Panel Members are also grateful to the independent review conducted in parallel by Prof Anselmo REYES (a retired High Court Judge) which is appended hereto (in Appendix 7). There are some 25 recommendations made under the Independent Report. In fact, under existing practice, and matters already being implemented and/or under consideration by the EOC, the desired outcomes for the great majority of these are already covered. For the rest of the contents and recommendations under the Independent Report, these could be considered under future law reform, as and when appropriate, should the Process Review and practical implementations recommended herein not improve the overall investigation/legal assistance functions of the EOC based on a victim-centric approach.

5.3 The Review Panel Members are pleased that the EOC has made itself accessible to NGOs representing victims and to meet them, which is a much-needed milestone of openness and transparency, and a cornerstone of establishing meaningful cross-sectoral stakeholder coalitions which can add value to the EOC. In a July 2017 meeting with the Coalition of Equal Action (an umbrella body consisting of a number of NGO representatives) the key message was that there was dissatisfaction by the victims of discrimination on the following grounds:

(a) Victims experienced the investigation process as taking a long time with repetitive requests for documents and information. Files appeared to be passed from officer to officer due to a perceived high

turnover rate at EOC (or other reasons) and the victims had to re-provide information more than once. The overall experience of the victims was far from being satisfactory and was very frustrating at times.

(b) Concerns were raised that there are many cases in which victims have not physically seen a solicitor or legal professional to clearly explain what the law is; the strength and weaknesses of the case; how are they to be represented; what they could expect; and what the major steps, processes and timelines might be. This was perceived as particularly troubling in the context of the level of the EOC's public funding with seemingly only a small number of cases being taken by the EOC to Court.

(c) The Coalition also pointed out the power disparity between individual complainants and corporate respondents, who while being in a better position to provide evidence, may delay or withhold responding to the EOC's requests for information. Even when conciliation is eventually commenced, this power disparity remains. During conciliation the respondent (accused of the discrimination practices) may be intransigent, and the whole case appears to victims to be reduced to one of 'your words against mine'.

(d) Dr Trisha LEAHY expressed that there should be a victim-centric approach to EOC's processes which reflects an understanding of, and sensitivity to the nature of victimisation and its psychological impact. A victim-centric approach would ensure that attention is paid to the needs of the victim at all stages of the complaint process such that the entire process is empowering regardless of outcome.

Mr Mohan DATWANI noted that to be fair, by-and-large many cases have been effectively settled by conciliation (around 67% of cases which go to conciliation are settled). As to the cases that the Coalition of Equal Action discussed, these were obviously not settled. Mr DATWANI pointed out that setting and managing victim expectations through clear information and knowledge sharing is an important part of a victim-centric approach. While not every case will prevail, the victims are right to feel frustrated if they go into a process not knowing what to expect. They should have

the law and procedures explained to them, including that they could win or lose their case, and what is necessary for them to help themselves on the case.

5.4 The Review Panel Members emphasise that in their view, the opportunity should be provided to victims, following an unsuccessful conciliation, to meet a legal professional from the LSD team. This would be after LSD's review of the facts and evidence up to the stage of conciliation which are not subject to privilege. The purpose of the meeting is for the LSD to provide the victim with an analysis of the gaps of the case for which the LSD would need further information, and/or to investigate for the purpose of providing an impartial legal analysis to the LCC to assist the LCC to determine whether to grant legal assistance, and the extent such, (limited or full assistance) depending on the legal and policy considerations of the LCC. The Review Panel Members believe that this aspect is important to the victim-centric approach and EOC should seek to reorganise its resources and/or seek Government funding to achieve this objective. The Chairperson is recommended to make this a priority agenda item at the A&FC for effective resourcing.

5.5 EOC is aware that while a significant number of cases which go to conciliation are settled (around 67% as mentioned above), there are incidences where key performance indicators for CSD and LSD set out in Appendix 8 are not met, and/or could further be enhanced. Therefore, while the EOC does not accept a broad-brush critique that it is not effective, as it does close matters for many victims, there is scope for it to improve the processes between the CSD and LSD under the LCC. Practical and visible improvements will form the basis of improved public trust and confidence in the EOC.

5.6 As part of the Review, Panel Members and the CPM met with the heads and staff of the CSD and LSD on multiple occasions. What became evident was there appeared to be a lack of synergy between them and they were not acting as a coherent whole even though under the governance structure of the LCC their functions should comprise a coherent whole. Tensions especially surface due to different understandings of investigation for which CSD assumed a focus for conciliation and not for the purpose of assessing the case for the grant of legal assistance (if conciliation fails, and the complainant files a legal assistance application, the LSD team will carry out an investigation for this assessment of the case merits for the consideration of the LCC). The then head of the CSD explained that the operation of the CSD was premised on the following

understanding:

(a) The CSD was concerned to preserve the statutory privilege[3] that attaches to 'anything said or done by any person in the course of conciliation (including anything said or done at any conference held for the purpose of such conciliation)'. This means that what was said and done by the victim (and the respondent) for the purposes of conciliation cannot be admissible on evidence under any proceedings under the Anti-Discrimination Ordinances. For the avoidance of doubt, this statutory privilege does not extend to the victim's complaint to the EOC, any pre-existing documents and information from any persons, nor after settlement of the complaint has taken place.

The aim of the statutory privilege is to facilitate conciliation. In this connection, victims would psychologically be more likely to be open and trust the process, where the victim knows that information provided to an EOC officer would not be revealed at subsequent proceedings. This is especially true where there are situations which the victim may find potentially embarrassing if revealed in open Court.

(b) The CSD has its own KPIs to conciliate cases within a timeline of around 6 months. Therefore, the CSD's main focus is to get in documents and information for the purposes of conciliation. It does not investigate for the purposes of further legal assistance when the case fails conciliation as this would require more resources and time leading to failure to comply with the KPIs. Further, as a large majority of cases (around 67%) were settled, it would be wasteful of EOC's resources to perform extensive investigation on each case when only a minority of cases proceed to legal assistance.

5.7 The head of LSD noted that while it is understandable why the CSD

[3] Note: At the risk of over-simplification, communications between a solicitor or a barrister with a client would not be discoverable (that is, disclosable) to an adversary in litigation. The privilege belongs to the client. Under the Anti-Discrimination Ordinances, there is a similar statutory privilege despite certain EOC officers not being solicitors and barristers for the purposes of conciliation.

adopts the approach it does, this creates issues for the victim and for the efficient progress of the case. For the purposes of considering legal assistance, the LSD may require further background information, documents and evidence from the victim over and above those provided for conciliation. The LSD therefore has no choice but to again seek further documents, information and evidence from the victim, following the failure of conciliation and after grant of limited assistance, so as to be able to make appropriate recommendations to the LCC as to whether there is any case for further limited legal assistance to attempt to settle the case and/or full legal assistance to pursue a claim.

5.8 Mr Mohan DATWANI, an EOC Member with a legal background, noted during the discussions with the heads of the CSD and LSD and the Chairperson that:

(a) CSD and LSD would be able to work in a more coordinated manner through adjustment of CSD's KPIs to reflect the inherent challenges for realistic outcomes. This would result in CSD being able to be in a position to obtain certain basic documents and information for the purpose of assisting the victim in case conciliation fails.

(b) CSD could communicate, upfront with the victim and explain that it is up to the victim to agree to release anything said and done for the purposes of conciliation to the CSD as the Anti-Discrimination Ordinances allow for this approach. As long as the victim knows that the victim is in control, the victim would feel enfranchised.

(c) The EOC has powers of investigation under applicable rules and regulations over the respondent, potential respondents and/or third parties. The EOC should communicate up front with respondents, potential respondents and/or third parties that should they not provide the necessary assistance to EOC that these powers would be used.

These recommendations and other practical implementation steps have already been or are to be worked into the EOC processes which would be considered in further details in Chapter 6.

Chapter 6 – Recommendations and Practical Implementation

6.1 In corporate governance, an important concept is conduct risk, referring to any action by individuals in an organisation that may result in detriment to the service user/client. An important conduct issue that has emerged through the Review process is the relatively common mis-categorisation of victim complaints as mere enquiries. For example, a race discrimination complaint was filed on the following terms by the representative of an aggrieved person: *"I am making this complaint on behalf of the aggrieved person. The respondent cannot accept a person of different race and colour, and has been employing all kinds of tactics to push the aggrieved person to resign . . ."*

Notwithstanding the clear terms, the complaint was classified as an "enquiry" and allocated to an Equal Opportunities Officer. Six months later, because of staff turnover, it was reallocated to a Senior Equal Opportunities Officer (without documentary explanation) who spent a further six months processing it as an "enquiry". The enquiry was reclassified as a complaint for investigation and conciliation 12 months after the first contact with the EOC. During this time, the aggrieved person's representative had been repeatedly asked to substantiate the complaint, while no clarification was sought from the respondent. When the respondent provided its comments on the complaint, there was a seven-week time lag before the referral of the same to the aggrieved person's representative for rebuttal. This was because the case officer and designated relief officer were both on leave. As a result, it took 26 months to process the complaint to the conclusion of the (unsuccessful) conciliation stage prior to preparing the case for presentation to the LCC for consideration of legal assistance.

6.2 A further conduct issue that was noted during the Review concerned the reassignment of case officers once an enquiry was established as a complaint. In the example quoted above, there was a reassignment of case officers when the case was still at the assessment stage. This resulted in the victim having to answer repeated and further questions, unnecessarily extending the time for processing, and causing additional distress and anxiety to the victim.

6.3 To practically deal with the above conduct issues the following enhancements have already taken place under the leadership of the Chairperson and COO as operational implementations of the matters arising during the Review:

(a) **Case Classification.** The Internal Operating Procedures Manual of the EOC provides that all incoming correspondence should be assessed to determine whether or not it is in the nature of a complaint. The threshold test is: (a) the complaint must be in writing; (b) the person must be a 'person aggrieved' (unless the complaint is a representative complaint made on behalf of an aggrieved person); and (c) the complaint must allege that a person has done an unlawful act under the relevant Anti-Discrimination Ordinances.

The current practice following the Process Review is that where the correspondence is not clear the EOC would now err on the side of it being a complaint and classify it accordingly. This has the effect of making applicable the EOC pledge of concluding 75% of complaint cases within six months. This also restricts staff ability to close a complaint without appropriate authorisation as complaint closure (as opposed to enquiry closure) is subject to a stricter set of procedures. All these are conducive to a victim-centric approach and will provide more accurate statistical information as to the operations of the EOC.

(b) **Reassignment of Case Officers.** Another change following the Process Review is that the practice of reassigning a case from an enquiry officer to a complaints officer once the complaint has been established has been stopped, providing a more streamlined and efficient victim-centric process.

(c) **Contacting Respondents / Third Parties.** In addition to interviewing complainants, CSD investigating officers now contact respondents/third parties as appropriate in the case assessment stage, with more frequent use of the statutory powers under the Anti-Discrimination Ordinances to call on third parties for documents and information to assist the EOC in its investigation.

(d) **Options for Early Conciliation or Investigation.** In the EOC's first letter to respondents the EOC now offers them option (1) to participate in early conciliation or (2) to provide information for our investigation.

(e) **Seeking Expert Opinions and Contacting Witnesses.** Prior to the Process Review, CSD staff had operated under the assumption that they had no authority nor financial resources to seek expert opinions. The EOC has now clarified that expert opinions may be sought, where appropriate.

(f) **Conciliation during Investigation Stage.** The Process Review has also resulted in the EOC clarifying to the CSD that it could initiate conciliation during the investigation stage. With the change of practice, officers are encouraged to look for opportunities to settle cases through conciliation.

(g) **Panels of Advisers.** The CSD has now established a panel of advisers in selected fields which would no doubt be of assistance to victims under the victim-centric approach.

6.4 The Review Panel recommends that EOC allocate resources, including through the use of technology, such as videos or interactive programme, on its website accessible by the public. This is to provide a ready interactive tool for a general overview of the different types of discrimination cases, the processes involved and the expectations of victims under a victim-centric approach.

6.5 The Review Panel also recommends giving victims of discrimination the opportunity early on in the complaint process to be able to meet a legal professional to provide an overall picture of the case which could be much more focused on the specifics of the case instead of a general overview. The Review Panel believes this aspect is important and EOC should seek to reorganise its resources and/or seek Government funding to achieve this objective. The Chairperson is recommended to make this a priority agenda item at the A&FC.

6.6 As to the workings of the LSD and CSD, these are largely in order, but the CSD and LSD should seek to use the statutory powers under the Anti-Discrimination Ordinances to obtain documents and information from third parties to corroborate or assist investigation of the victim’s allegations, which would provide stronger merits to assess cases. The use of standard protocols to inform respondents, potential respondents and/or third parties that powers where satisfactory replies within certain dates are not provided will be useful approaches

that the Review Panel Members recommend being adopted by the relevant EOC departments.

Chapter 7 – The Independent Report

7.1 The Review Panel Members are grateful to Professor REYES who compiled the Independent Report on a *pro bono* basis. There is alignment of thinking between this Report and the Independent Report on a number of issues. In this chapter we cover a few key points where there may be some divergence or to add further background detail. In addition, there have been a large number of practical implementation steps already effected because of the Process Review, as the Review Panel Members, EOC and the current staff are aligned on a victim-centric approach.

7.2 The Review Panel Members are pleased to report to the public that following discussions with all heads of the functional Departments of the EOC in mid-November 2018, the consistent message is that the working relationship of CSD and LSD and across the whole of the EOC is much improved following the Process Review. Their collective comments are that the problems detailed by the Independent Report as a 'turf war' are largely a thing of the past, and not worth the focus of current staff members, nor do they desire to make any specific comments. However, the Independent Report does serve as a reminder that the EOC should always strive to find common purpose within its operational divisions. Divisional heads welcome this being based on a victim-centric approach as detailed under this Report to which they have always been aligned. There was consensus that in some cases the identified victim may be the respondent or some other third party. Accordingly, for a complaint that alleges an act that is not unlawful and/or is otherwise frivolous, vexatious, misconceived and/or lacking in substance,[4] the EOC should seek to dismiss it, and to direct resources to the pursuit of appropriate cases for the victims as complainants.

7.3 The Review Panel Members agree with Professor REYES's observations that '*in any event it takes too long for the EOC to investigate a complaint, attempt conciliation of the same, and (where conciliation is abortive) determine whether to grant legal assistance to an aggrieved person for the purpose of pursuing a wrongdoer in court.*' Mr Mohan DATWANI, a Solicitor and Chartered Governance Professional, has identified that one of the main issues contributing to this is a conduct risk under previous CSD practice whereby incoming communications were not appropriately classified as complaints but rather as enquiries. The effect of this is that the processing of the complaint first through

[4] See e.g. Section 84(4) SDO

the enquiry stage and then through a complaint stage with different officers unnecessarily extended the time required. This has now changed at the EOC with its current staff complement and full adherence to the IOP. The practical implementation matters based on a victim-centric approach are detailed in Chapter 6, and the snapshot provided by Professor REYES has already changed.

7.4 If there were no issues with the EOC, the Review Panel Members would not have volunteered their time, as no doubt would Professor REYES. The aim is to do public good in dealing with victims of discrimination and related policy messaging. In this connection, there is need to prioritise. Cases that are significant with policy messaging would be afforded priority to be brought to Court (i.e. strategic litigation), and the focus is to settle the rest of the cases by conciliation. But as yet, the LCC has not turned away assistance on any cases that, on the merits, deserve some form of legal assistance, from exploring settlement, further advice, to Court action. Approximately 67% of the cases going to conciliation are currently settled, and with proper dealing with the conduct issue of appropriately classifying enquiries as complaints (and closing those that concern acts which are not unlawful, and/or complaints which are frivolous, vexatious, misconceived and/or lacking in substance as referred under the Anti-Discrimination Ordinances), the true workload of the CSD and the dedication of its current staff would be reflected.

7.5 The Independent Report proposes that following receipt of a complaint, the EOC should be focused on conciliating the case during the initial two to three months, and thereafter on granting some form of legal assistance for most of the complaints except those excluded by s84(4) of the SDO and its equivalent in the other Ordinances. This would include cases where no unlawful act appears to have been committed, the complainant does not wish to proceed further, the 12-month time bar has lapsed or the complaint is frivolous, vexatious, misconceived and/or lacking in substance.

In this connection, the Review Panel Members refer to the Anti-Discrimination Ordinances where it is stipulated that after complaint is lodged with the EOC, the EOC shall '*conduct an investigation into the act subject of the complaint ... and endeavour, by conciliation, to effect a settlement*'.[5] In the course of the Review, Panel Members observed that current statistics indicate that, following the proper classification of enquiries to complaints, around 50% of complaints received are

[5] See for e.g. Section 84(3) of SDO

in the category of not concerning unlawful acts, of being frivolous, vexatious, misconceived and/or lacking in substance. In certain cases, therefore the identified victim is the respondent (albeit there may not be discrimination of the proper victim). For example, in an actual case, a professional alleged that an institution was discriminating the professional in relation to certain matters, when in fact, the professional had committed multiple breaches of confidentiality under the guise of seeking to find the truth, which went way beyond common decency or acceptable behaviour. There were also other legal redress options available to the professional which were being pursued. The application was rejected on the basis that it was misconceived, as with a number of other complaints.

If this particular proposal as mentioned above was broadly adopted, there is a risk, and we are referring to a risk only, in the minds of a fair-minded individual, and maybe even within the CSD that conciliation should be attempted in all cases. The Review Panel Members therefore recommend the CSD to continue to apply the current investigation procedures under the Anti-Discrimination Ordinances and IOP.

7.6 In addition, and more importantly, from the legal perspective, Review Panel Members note that during this suggested initial conciliation period of two to three months suggested under the recommendations, '*evidence of anything said or done by any person in the course of conciliation under this section (including anything said or done at any conference held for the purposes of such conciliation) is not admissible in evidence in any proceedings under this Ordinance except with the consent of that person'*[6] (privilege). If Professor REYES's recommendations were adopted, then after two to three months and a very initial investigation, where conciliation fails, there would be a real risk that the LSD would inherit a case with no evidence from the respondent as everything said and done would have been for conciliation. There would therefore be significant duplication of efforts required and funding requirements to investigate to obtain the evidence again. This would again create a double burden for the victim having to start from the beginning, would prolong the time of processing and the respondent could well come up with a different version of facts. There was consensus between Review Panel Members and EOC key staff that that this proposal would likely be difficult to work in practice.

[6] For e.g. Section 84(6) of SDO

7.7 The Independent report also proposes that legal advice sought by EOC on any case could be disclosed to the Complainant on request. The LCC had previously discussed this and viewed that the danger of revealing internal legal advice to the EOC to the complainant, which is based on a neutral and impartial assessment of the facts, would in fact amount to a waiver of privilege, and open up all files to the respondent institution which is being sued. This may have unintended consequences, and the matter is best left for consideration on a case-by-case basis.

7.8 There are some 25 recommendations made under the Independent Report. The Review Panel Members have set out the responses to the recommendations collated from staff members and also from the Review Panel itself in the table below. In fact, under existing practice, and matters already being implemented and/or under consideration by the EOC, the desired outcomes for the great majority of these are already covered. For the rest of the contents and recommendations under the Independent Report these could be considered under future law reform, as and when appropriate, should the Process Review and practical implementations recommended herein not improve the overall investigation/legal assistance functions of the EOC based on a victim-centric approach. At this juncture, the Review Panel recommends that the immediate focus should be on the practical governance focus and related implementation measures as detailed in this Report. The table below lists the recommendations of the Independent Report and the Review Panel's Responses which are also collated from staff members.

Review Panel Members' Responses to the Key Recommendations of the Independent Report

No.	Independent Report Recommendation	Review Panel Response
1	The EOC requires all complainants to attempt what is now called "early conciliation," and such process should normally be completed within 2 to 3 months of the making of the complaint. Where this "early conciliation" fails, the EOC should straightaway proceed to considering whether and (if so) in what form, it should grant legal assistance to a complainant. To facilitate this change in operating procedure, it is suggested that what is now known as "early conciliation" should simply be renamed as "conciliation".	This has been addressed in the discussions in paragraphs 7.5 – 7.6.
2	Routine use should be made of Rule 5 (as found in the subsidiary legislation to the anti-discrimination statutes) during the conciliation process.	This was also recommended by the Review Panel Members and has already been implemented (Chapter 5).
3	Following the failure of conciliation (formerly early conciliation), save in cases that plainly are outside of the EOC's remit or are frivolous, vexatious, misconceived or lacking in substance, limited legal assistance should normally be granted to a complainant to enable the EOC to perform one or more of these functions: (a) providing initial advice to an aggrieved person on the strengths and weaknesses of a complaint; (b) developing a plan in conjunction with an aggrieved person for bringing a complaint to court (including the degree of investigation required, the evidence to be gathered through such investigation, and the timetable to be followed); and, (c) in light of the results of the detailed investigation to be carried out, assessing in conjunction with the aggrieved person the legal merits, the strength of the evidence, and the likely outcome of any court proceedings.	This has been addressed in the discussions in paragraphs 7.5 – 7.6.
4	Conciliation (including preliminary investigation) should be undertaken by a CSD officer.	This is the current practice.
5	If conciliation fails, the initial limited legal assistance to be provided (that is, giving preliminary advice on a complaint, carrying out detailed investigation and evidence-gathering, and assessing in light of investigation results whether there is a case for going to trial) could be undertaken by a team of officers drawn from CSD and LSD. In simple cases, a single person can perform all the functions of this initial legal assistance. Otherwise, it is suggested (albeit not as an inflexible rule) that there be 2 officers in a team, one drawn from CSD, the other from LSD.	The EOC will study this recommendation.
6	The EOC will need to ensure that Chinese walls are in place to prevent a CSD officer who has acted as conciliator on a complaint from later having anything to do with the detailed investigation and legal assessment of that same complaint. One way to achieve this is to implement a rule that, where an officer from one CSD sub-division has acted in a conciliation, only a CSD officer from the other subdivision can be part of a team tasked with the detailed investigation and legal assessment of the relevant complaint.	The EOC will study this recommendation.
7	In most cases, the EOC should target making a decision on whether or not to grant full legal assistance for the purposes of bringing a case to court within 6 months from the failure of conciliation.	The LCC determines the issue, and there are currently strict timelines in place. This suggestion will be considered.

No.	Independent Report Recommendation	Review Panel Response
8	EOC officers should regularly take part in capacity-building workshops and seminars, covering matters such as sensitivity to the subtle psychological dynamics that may be in play where there are power or other imbalances between the parties to a conciliation; techniques for dealing with difficult complainants; advising lay persons; the conduct of investigations; working as a team; etc.	The Review Panel agrees and views this as inherent in a victim-centric approach.
9	The EOC should seriously consider the possibility of LSD officers providing specific legal advice to complainants even during the conciliation stage.	The Review Panel agrees with the general principle that complainants should have earlier access to one of the EOC's legal team. The form and purpose of this access has been dealt with in Chapter 5.
10	The EOC should bear in mind that a sizeable number of cases are unlikely to be clear-cut. Thus, the LCC should be cautious about refusing legal assistance for court proceedings merely because a case has less than a 50% chance of success. A case with significantly less than a 50% chance of success may nonetheless enable the court to give guidelines, even if *obiter*, on substantive areas of discrimination law or on best practices for institutions to follow in order to eliminate discrimination.	The Review Panel agrees and notes that it is already the practice that the LCC considers legal and policy perspectives in arriving at its decisions.
11	It should be a normal expectation that the LCC decides whether to grant full assistance within 9 to 12 months of a complaint being made or of a specific enquiry being classified as a complaint.	This EOC will study this recommendation.
12	The LCC should continue its practice of giving reasons for any refusal of full legal assistance. It will not normally be enough merely to issue a terse statement that a complaint lacks legal or evidentiary merit and no principle of importance is involved. Reasons can be succinct, but they should convey the gist of the considerations that the LCC has taken into account.	This would amount to waiver of LCC's privilege and the whole file, adverse to the victim may open up to a respondent should the victim pursue legal actions using other avenues. This may have unintended consequences, and the matter is best left for consideration on a case-by-case basis (already dealt with above).
13	The EOC should have a formal system of review whereby a complainant (say) puts in a request for reconsideration (with supporting materials) within 2 weeks of a refusal of legal assistance and the LCC reconsiders its decision within 2 weeks thereafter. There should not be a protracted series of reviews by the LCC of a decision to refuse legal assistance, merely because a complainant with little merit in her or his complaint does not accept the same.	This is the current position.
14	The EOC should have a transparent procedure for the appointment of lawyers from whom legal opinions are sought to assist in the decision whether to grant or refuse legal assistance. Transparency might include maintaining a public roster of solicitors and barristers qualified to advise on anti-discrimination law. There might be a requirement that lawyers on the roster undergo a specified number of capacity-building activity-hours (continuing professional development) annually to keep abreast of the latest thinking and developments in anti-discrimination law and practice. Appointments to advise should normally be in accordance with the roster, save in special instances where deviations from the roster may be warranted. Fees for advising on EOC cases might be at a standard hourly rate with the number of hours capped to a pre-agreed maximum.	Unlike the Legal Aid Department, the overall caseload of the EOC does not call for a large scale briefing-out system requiring significant administration or under statutory framework. There is an internal panel. This could be considered to be made public with consent of the persons involved. The LCC considers individual appointments on a case-by-case basis.

No.	Independent Report Recommendation	Review Panel Response
15	As a matter of principle, where legal assistance is refused on the basis of external legal advice, complainants should be entitled to sight of instructions to counsel and counsel's opinion.	This has been dealt with above. For the benefit of complainants, EOC always provides sufficient reason for its decisions in line with what is required under the law.
16	Decisions on whether or not to grant legal assistance should continue to be the responsibility of the LCC, rather than being delegated to the chairperson. However, depending on the volume of cases in which legal assistance is being considered, the LCC should be prepared to meet more frequently, even weekly or fortnightly, in order to ensure that decisions on legal assistance are made in timely and efficient manner.	The EOC has delegated the LCC with the relevant powers. The EOC Chairperson is not the decision maker. Papers are circulated when necessary to meet KPI deadlines and the LCC also meets as necessary and in general every two months.
17	The EOC should adopt an internal guideline of fully responding to an enquiry, either disposing of the matter or elevating it into a complaint, within 4 weeks. In exceptional circumstances where, for one reason or another, it is not possible to resolve an enquiry within a standard of 4 weeks, the enquiry should be carefully monitored by the COO, ideally on a weekly basis, to ensure that it does not drag on longer than necessary. As much as possible, all information needed to classify an enquiry as a complaint should be requested from the enquirer within the 4-week period.	The Review Panel notes that the IOP guidelines are now strictly adhered to and monitored.
18	The information required for the purposes of deciding whether to upgrade a matter from an enquiry to a complaint, should be kept to a minimum in the first instance. The information requested might perhaps be little more than the following: by whom a wrong was allegedly done; when and where the wrong is said to have been perpetrated; how the wrong is said to have been committed; and what relief is being sought.	The Review Panel notes that this is the position, and relevant enhancements have been made as outlined in Chapter 5.
19	The EOC should monitor whether it would or would not be appropriate for a CSD officer handling an enquiry also to act as conciliator.	The Review Panel agrees that this can be considered.
20	The government should consider increasing the head count at the EOC by one or two junior officers above present full strength level, with a view (among others) to alleviating the workload on existing staff and enabling more SIIs to take place.	This will be considered by the EOC following the conclusion of the Process Review.
21	A CSD officer who has conducted an abortive conciliation should refrain from communicating anything about the conciliation (apart from the fact that it failed) to anyone else.	The Review Panel agrees and notes that the matter is privileged and the EOC works under a confidential environment.
22	Greater use be made of Rule 7, including the payment by the EOC of taxi fares, to enable complainants and respondents to attend at the EOC's premises for face-to-face conferences at mutually convenient times.	The Review Panel agrees this matter can be considered.
23	There should be greater transparency and rigour in the appointment of the chairperson, board members, and the members of the LCC. To make the job of chairperson more attractive to the exceptional persons being sought for that post, a chairperson's tenure should be increased from 3 to 6 years.	The Review Panel has dealt with the issue of the Chairperson's appointment under Chapter 2. The Review Panel Members observe that appointments to the EOC, including the appointment of the Chairperson, are entirely the prerogative of the Chief Executive of HKSAR, which should not be fettered in any respect, as otherwise, that would be

No.	Independent Report Recommendation	Review Panel Response
		inconsistent with the exercise of discretion.
24	The EOC's CMS should be upgraded and made more user-friendly.	The Review Panel agrees that this matter could be considered.
25	In deciding whether to grant full legal assistance, the LCC should also bear in mind the financial situation of the respondent (especially if the respondent is an individual or an MSME) and the potential for moral hazard. Nor should the EOC lose sight of the need to adhere to due process in any dealings with respondents.	The Review Panel agrees and notes that the EOC considers the merits and policy considerations of each case through the LCC which has been delegated with the decision-making authority. A victim-centric approach considers the legal rights of both the Complainant and Respondent.

Part 4 – Conclusions

Chapter 8 – Overview/Recommendations

8.1 The Review Panel Members recognise that the EOC has finite resources in dealing with discrimination cases and related policy messaging. In this context, the purpose of the Review was to try to identify and adopt best-practices to optimise a victim-centric approach to the work of the EOC in conducting its core functions, in line with its vision and mission to work towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status, and race.

8.2 In the context of a discrimination case, a victim-centric approach is one which, while focused on operating within principles of fairness and impartiality to both parties in a complaint activated under the Anti- Discrimination Ordinances, nevertheless recognises and pays special attention to the needs of victims at all stages of the complaint handling process. The EOC recognises the inherently disempowering impact of discrimination, the nature of power differentiated structures in society, and the difficulties some victims experience in recounting their experiences of discrimination and the particular cultural and social barriers to reporting particular forms of discrimination.

8.3 The effective implementation of a victim-centric approach requires proper governance, management structure and complaint handling processes. In reviewing these three aspects of its operation, the Review Panel commends the EOC under the leadership of the Chairperson, Professor Alfred CHAN for its commitment to cross-sectoral stakeholder engagement, and its openness to critical evaluation. In particular the Review Panel acknowledges the passion and expertise of the Management and staff of the EOC.

8.4 To conclude, the Review Panel Members provide the following views and recommendations:

Governance and Management Structure

(i) The EOC should adopt the victim-centric approach as an integral part of its culture. This is in line with widespread discussions with stakeholders, including victims and NGOs representing them. That is, EOC should try to improve its processes to help victims and

potential victims of discrimination which equates with minority protection. In the context of a discrimination case, a victim-centric approach is one which, while focused on operating within principles of fairness and impartiality to both parties in a complaint activated under the Anti-Discrimination Ordinances, nevertheless recognises and pays special attention to the needs of victims at all stages of the complaint handling process.

(ii) There needs to be alignment of the thought processes in the EOC and by EOC Members that the Members are and represent the EOC. This approach heightens the responsibilities of EOC Members and the oversight functions of the EOC Members in meeting as the EOC. Consistent with the above observation, there should be strengthened reporting by the Chairperson as to the overall operational matters and issues to the EOC under more regular update pending quarterly EOC meetings.

(iii) As to the composition of the Chairperson and the EOC Members, these are entirely under the discretion of the Chief Executive of the HKSAR. The only constraint is that EOC Members should not be appointed for more than 5 years per appointment. Likewise, the remuneration of the Chairperson, which is statutorily stipulated as a full-time role is for the Chief Executive to determine.

(iv) By-and-large, the Review Panel Members have no issue with the current diversity mix of EOC Members and believe that the Chief Executive makes a conscious attempt to enhance the diversity of the EOC Members. This has been recently recognised by the Hong Kong Institute of Directors which gave EOC both a Directors of the Year Award as a Board and an additional award for Excellence in Board Diversity, at its 2018 Awards Ceremony.

(v) As the EOC is Hong Kong's lead anti-discriminatory body, the Review Panel would recommend that written Chinese language skills should not be required of candidates for the appointment as Chairperson of the EOC, and for that matter affect, any other posts not dictated by operational needs. This would not detract from the situation where there are two equally meritorious candidates, the candidate with the ability to speak and/or write Chinese, as

conducive to operational needs, should weigh in the selection process. By dropping the strict written Chinese language requirements, the Government would lead the anti-discrimination drive by example and widen the selection pool and the inclusion of ethnic minorities in accordance with policy objectives. This matter is however entirely in the discretion of the Chief Executive.

(vi) From a governance perspective for a public body, while a two-tier non-executive Chairperson and executive CEO with contributions by independent members could be adopted, this is not the only viable alternative. There could be other structures. The Government has made it clear that the EOC carries important functions and should be led by the Chairperson. The introduction of the COO is a mechanism by the Government to seek to enhance governance and accountability at the EOC.

(vii) The overall measure for the EOC is whether it is effective in carrying out its functions. While there is no issue with the governance structure with a Chairperson being the executive lead, it is the effectiveness of the implementation of the EOC's operation, that is, outcomes, which is the true measure of the effectiveness of governance for a statutory body. For the EOC, the Review Panel recommends that this should be considered in the context of the delivery of the functions and responsibilities of the EOC to relevant stakeholders based on a victim-centric approach.

Complaint Handling Process

From the Process Review, recommendations involving practical steps have already been implemented relating to: the accurate classification of cases as complaints not enquiries; the use of statutory powers for documents and investigations; internal operational changes, such as the previous practice of case officer reassignment when an enquiry is reclassified as a complaint, which has now been done away with; and options being provided to parties for early conciliation.

The Review Panel Members further recommend that:

(viii) In terms of case management, the CSD should make it clear to a victim complainant that in order to succeed in conciliation and/or follow-up legal assistance, the facts and evidence are critical, and a case should not be reduced to one of the victim's words against the respondent's words, as that carries with it the risk of failure for the victim. Therefore, there is a requirement on the victim to provide credible evidence or leads for investigations so that the case can be taken on by the EOC. Otherwise, the EOC will necessarily have to dismiss the complaint. The CSD needs to be focused on credible cases for investigation.

(ix) As to the investigation processes undertaken by CSD, it is wrong in principle for the CSD to investigate a case only for the purpose of conciliation. The Anti-Discrimination Ordinances state where a complaint is lodged the EOC shall conduct an investigation into the act, and endeavour by conciliation to effect a settlement.[7] The Review Panel Members cannot equate this to a leap of logic that the investigation should be for the purpose of conciliation. This is because there is a need to have a holistic view of a case prior to attempts at conciliation. This is part of the art of case management. As noted, under the existing EOC Internal Operating Procedures Manual (IOP) (i.e. clause 4.1) the objectives of complaint investigation are (i) to collect and examine the factual information in respect of the complaint; (ii) to decide whether or not to conduct, or to discontinue, an investigation; (iii) to provide a basis on which conciliation can be endeavoured and (iv) to provide a basis upon which to determine what action, if any, should be taken in the event conciliation is not successful (i.e. whether legal assistance should be granted by EOC). As such, the EOC needs to adjust CSD's Key Performance Indicators (KPIs) which are currently focused on conciliation rate to allow CSD to effectively fulfil its case management function in compliance with the IOP which has set out the applicable policy and procedures.

[7] See e.g. Section 84(3) of SDO

(x) On the issue of preservation of the victims' privilege which attaches to conciliation only, CSD should explain up-front that the victim should seriously consider agreeing to release anything said and done by the victim where conciliation fails, otherwise the case would not be on firm grounds for legal assistance.

(xi) On the other hand, the CSD should limit investigations over respondents and potential respondents which attract privilege for conciliation. The CSD has powers of investigation under applicable rules and regulations under the Anti-Discrimination Ordinances. These allow for it to obtain information and evidence generally from a respondent, potential respondents and/or third parties. The CSD should be ready to use its powers as regulator for effectiveness in discharging its regulatory objectives.

(xii) The EOC should seek to allocate resources, including using technology, like videos or interactive programme on its website accessible by the public. This is to provide a ready interactive tool for a general overview of the different types of discrimination cases, the processes involved to manage the general expectations of victims under a victim-centric approach by addressing the issues raised above.

(xiii) The victims of discrimination should be given the opportunity, following an unsuccessful conciliation, to meet a legal professional from the LSD team. This would be after LSD's review of the facts and evidence up to the stage of conciliation which are not subject to privilege. The purpose of the meeting is for the LSD to provide the victim with an analysis of what the gaps in the case are and in relation to which the LSD would need further information and/or would need to investigate for the purpose of providing an impartial legal analysis to the LCC to assist the LCC to determine whether to grant legal assistance, and the extent of such (limited or full assistance), depending on the legal and policy considerations of the LCC. The Review Panel Members believe that this aspect is important to the victim-centric approach and EOC should seek to reorganise its resources and/or seek Government funding to achieve this objective. The Chairperson is

recommended to make this a priority agenda item at the A&FC for effective resourcing.

8.5 There are some 25 recommendations made under the Independent Report. In fact, under existing practice, and matters already being implemented and/or under consideration by the EOC, the desired outcomes for the great majority of these are already covered. For the rest of the contents and recommendations under the Independent Report, these could be considered under future law reform, as and when appropriate, should the Process Review and practical implementations recommended herein not improve the overall investigation/legal assistance functions of the EOC based on a victim-centric approach. At this juncture, the Review Panel recommends that the immediate focus should be on the practical governance focus and related implementation measures as detailed in this Report.

8.6 In conclusion, none of the observations and measures recommended by the Review Panel Members require legislation, and many of them have already been taken up at the operational level. After all, the effectiveness of the EOC is measured by its delivery on its power and functions to the victim and related policy of anti-discrimination under the Anti-Discrimination Ordinances.

8.7 The Review Panel Members would again express their gratitude to the dedicated staff of the EOC, led by the Chairperson, Professor Alfred Chan. They all contributed to the Review Panel Members' Review and appeared aligned with the adoption of a victim-centric approach, where relevant.

Appendices

Appendix 1

Review of Governance, Management Structure and Complaint Handling Process

Scope

1. The scope of the Review Panel was confirmed at two successive Meetings of the EOC Board (the 118th Meeting held on 15 June 2017 and the 119th meeting held on 21 September 2017): In summary the scope included (a) review the effectiveness of a management structure implemented in 2015 to address mainly the issue of separation of the Chairperson and the Chief Executive posts; (b) review EOC governance in the light of EOC's handling of two staff complaint cases; (c) review whether the current processes are the most efficient and effective to allow the EOC to give effect to its statutory ambit in relation to complaint handling; (d) review the role of the CSD; and (e) review the role of the Legal Service Division.

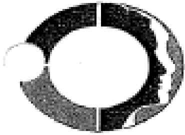
2. The Review Panel Members, with the agreement of EOC Members took the scope to mean that the Process Review should be focused upon EOC's proper *governance, management structure and complaint handling process as the* three fundamental matters under the scope of the Review. The Review Panel Members are grateful to the support of EOC Members in its adopting this approach and the related funding support in the appointment of the CPM to assist the Review Panel Members in compiling this report at EOC's 119th Meeting.

3. The EOC Board also noted the context of the non-binding motion passed by the LegCo Panel on Constitutional Affairs on 14 February 2018: 'that this Panel urges the Government to set up an independent committee to review the overall operation of the EOC and make improvement recommendations, with its membership being drawn from people with anti-discrimination work experience in the legal and academic sectors in various community groups'.

4. In a written response the CMAB pointed out that EOC had already set up a Review Panel to steer a Review of Governance, Management Structure and Complaint Handling Process and that it would seek updates on the review progress. The CMAB took the view that it is not necessary to separately set up an independent committee at that juncture to review the EOC operation.

Appendix 2

Professor REYES's Appointment Letter



Appendix 2

平 等 機 會 委 員 會

EQUAL OPPORTUNITIES COMMISSION

香港太古城太古灣道14號太古城中心三座19樓
19/F., Cityplaza Three, 14 Taikoo Wan Road
Taikoo Shing, Hong Kong
網址 Website : http://www.eoc.org.hk

Our Ref: EOC/CR/COMM/02/03
Tel No: 2106 2123
Fax No: 2511 8142

Confidential

17 October 2017

Professor Anselmo Reyes
10/F, Cheng Yu Tung Tower,
Centennial Campus,
The University of Hong Kong,
Pokfulam Road, Hong Kong

Dear Professor Reyes,

Re: External Consultancy Review Exercise of the Complaints Handling Process of the EOC

On behalf of the Equal Opportunities Commission ("the Commission"), I sincerely invite you to be the Commission's consultant for our review exercise of the complaints handling process. Your attention is kindly drawn to section 64(2)(f) of the Sex Discrimination Ordinance (Cap. 480) (SDO) which provides that the Commission may, for the better performance of it functions, engage the services of such technical and professional advisers as it thinks fit to advise the Commission on any matter relating to the performance of its functions or the exercise of its powers.

As you are aware, the Commission is a statutory body established under the SDO. The Commission discharges functions and exercises powers under the provisions of the SDO, as well as the Disability Discrimination Ordinance (Cap.487), the Family Status Discrimination Ordinance (Cap.527) and the Race Discrimination Ordinance (Cap.602).

Under each of the above-mentioned Ordinances, the Commission has both general functions and specific statutory functions which, to a large extent, spell out the statutory remit of the Commission. The Commission is required to fulfill all its statutory obligations and to act in furtherance of the objectives of the anti-discrimination legislation. The major statutory functions of Commission relating to complaints handling are investigation and conciliation (e.g. section 84 of the SDO), and legal assistance (e.g. section 85 of the SDO).

In response to recent critical feedback from service users, stakeholders and some Members of the Legislative Council, both the Complaint Services Division and Legal Service Division of the Commission have reviewed their operations with a view to improving and ensuring fitness for purpose. Some structural and process challenges have been identified by both Divisions. The Commission now would like to seek an external consultant to conduct a process review of the entire complaints handling process (from receiving a complaint to pursuing the claim in Court) to identify whether any changes to the structure and process are required. The purpose of the review is to assess whether current processes are the most efficient and effective to allow the Commission to give effect to its statutory ambit in relation to complaint handling and to identify if there is any room for improvement. The roles of the two Divisions will be reviewed to ensure they carry out their functions effectively and efficiently within the ambit of the statutory framework laid down by the four anti-discrimination ordinances, international practice on conciliation and rules on confidentiality.

After some deliberations within the Commission, we take the view that given your strong legal and ADR experiences and qualifications, you are the most suitable person to carry out the review exercise. We also believe that your independent and impartial status would help the Commission to secure the confidence of the Legislative Council, service users and stakeholders on the review exercise.

For the benefit of the Commission and the general public, I hope you would kindly agree to accept our appointment as the consultant of the review exercise. However, given that the Commission is a statutory body with a very tight budget, we may not be able to remunerate your

invaluable contributions. I would, therefore, be most grateful if you would kindly accept our appointment on a pro bono basis.

I look forward to receiving your favourable reply and thank you in anticipation.

Yours sincerely,

Alfred C.M. Chan
Chairperson
Equal Opportunities Commission

Appendix 3

Summary of recommendations in the EOC's Discrimination Law Review submissions prioritised by the Government

Recommendation

5 It is recommended that the Government introduce express provisions prohibiting direct and indirect discrimination on grounds of breastfeeding. These provisions could be included by an amendment to the Sex Discrimination Ordinance as a form of sex discrimination, a separate category of discrimination, or alternatively as an amendment to the Family

Status Discrimination Ordinance. The definition of breastfeeding should also include expressing milk.

7 It is recommended that the Government amend the Race Discrimination Ordinance provisions prohibiting direct discrimination and harassment by association by repealing the provisions regarding near relatives, and replacing it with a definition of an associate to include:

(a) a spouse of the person;
(b) another person who is living with the person on a genuine domestic basis;
(c) a relative of the person;
(d) a carer of the person; and
(e) another person who is in a business, sporting or recreational relationship with the person.

8 It is recommended that the Government amend the Race Discrimination Ordinance to include protection from direct discrimination and harassment by perception or imputation that a person is of a particular racial group.

15 It is recommended that the Government amend the provisions of the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment to persons in a common workplace such as consignment workers and volunteers.

16 It is recommended that the Government amend the provisions of Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users.

Recommendation

17 It is recommended that the Government amend the provisions of the Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users, where such harassment takes place outside Hong Kong, but on Hong Kong registered aircraft and ships.

18 It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection of tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises. [Note: Subsequently not taken up]

19 It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment by management of clubs of members or prospective members.

22 It is recommended that the Government repeal the provisions under the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance which require proof of intention to discriminate in order to award damages for indirect discrimination claims.

CMAB
March 2017

Appendix 4

List of Chairperson of EOC

1.	Prof Fanny CHEUNG, SBS, OBE, JP	20 May 1996 – 31 Jul 1999
2.	Ms Anna WU, GBS, SBS, JP	1 Aug 1999 – 31 Jul 2003
3.	Mr Michael WONG, GBS	1 Aug 2003 – 6 Nov 2003
4.	Mrs Patricia CHU, BBS	15 Dec 2003 – 14 Dec 2004
5.	Mr Raymond TANG	12 Jan 2005 – 11 Jan 2010
6.	Mr LAM Woon-kwong, GBS, JP	1 Feb 2010 – 31 Mar 2013
7.	Dr York CHOW, GBS, SBS, MBE	1 Apr 2013 – 31 Mar 2016
8.	Prof Alfred CHAN, SBS, JP	1 Apr 2016 – now

Appendix 5

List of Current EOC Members

Chairperson

- **Prof CHAN Cheung-ming, Alfred, SBS, JP**

EOC Members

- **Prof CHAN Lai-wan, Cecilia, JP**
  - Si Yuan Chair Professor in Health and Social Work, The University of Hong Kong
  - Member, Women's Commission
  - Chair of Executive Committee, Hong Kong Society for Rehabilitation
- **Mr CHAN Ka-yan, Samuel, JP**
  - Barrister at Denis Chang's Chambers
  - Member of the Competition Commission
- **Prof CHIU Man-chung, Andy**
  - Tony Yen Chair Professor of Law, Law School, Beijing Normal University
  - Director, China Law Society
- **Prof CHOI Yuk-ping, Susanne**
  - Professor, Department of Sociology, The Chinese University of Hong Kong
  - Former Director, Gender Research Centre, Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong
- **The Hon CHOW Ho-ding, Holden**
  - Member, Legislative Council
  - Solicitor
  - District Councillor, Islands District Council

- **Mr Mohan DATWANI**
  - Solicitor, Accredited Mediator and Chartered Governance Professional
  - Member, Protection of Wages on Insolvency Fund Board
  - Member, Radio Television Hong Kong Board of Advisors
- **Miss HO Chiu-ha, Maisy, BBS**
  - Executive Director, Shun Tak Holdings Limited
  - Member, Committee on the Promotion of Civic Education
  - Council Member, The Hong Kong Academy for Performing Arts
- **Ms Elizabeth LAW, MH, JP**
  - Managing Director, Law & Partners CPA Ltd
  - Founding President, Association of Women Accountants (Hong Kong) Limited
  - Chairman, Hong Kong Employment Development Services Limited Association
- **Dr Trisha LEAHY, BBS**
  - Chief Executive, Hong Kong Sports Institute
  - Member, Personalized Vehicle Registration Marks Vetting Committee
  - Member, Hotel, Catering and Tourism Training Board, Vocational Training Council
- **Prof Hon LEE Kok-long, Joseph, SBS, JP**
  - Member, Legislative Council
  - Professor and Head, Division of Nursing & Health Studies, The Open University of Hong Kong
  - Non-Executive Director (non-official), Urban Renewal Authority
- **Ms LEUNG Chung-yan, Juan**
  - Vice President, The Hong Kong Federation of Trade Unions
  - Member, Women's Commission
  - Council Member, Hong Kong Productivity Council
- **Dr LEUNG Sai-man, Sigmund, BBS, JP**
  - Chairman of the Board of Governors of the Prince Philip Dental Hospital
  - Former President of the Dental Association

- **Ms Shirley Marie Therese LOO, BBS, MH, JP**
    - General Secretary, Family Development Foundation
    - Vice-Chairman, Public Libraries Advisory Committee
    - Member, Standing Committee on Language Education and Research (SCOLAR)
- **Dr SHIE Wai-hung, Henry**
    - Vice Chairman, Industry Training Advisory Committee – Elderly Care Service, Qualifications Framework
    - Chairman, Association of Bought Place Elderly Services
    - Honorary Secretary, Hong Kong Alzheimer's Disease Association
- **Dr Rizwan ULLAH**
    - Member, Youth Development Commission
    - Lay member, Joint Committee on Student Finance, Education Bureau
    - Council Member, Pakistan Association Hong Kong
- **Miss YU Chui-yee, BBS, MH**
    - Hong Kong Paralympics representative in wheelchair fencing
    - Member, Sports Committee

Appendix 6

EOC Member Attendance Records

Member	EOC	No. of Meeting attended	CPPC	No. of Meeting attended	LCC	No. of Meeting attended	PRTC	No. of Meeting attended	A&FC	No. of Meeting attended
	Overall Attendance from 20 May 2013 to 30 September 2018									
Prof Alfred CHAN Cheung-ming	100%	10 of 10	90%	9 of 10	100%	15 of 15	80%	8 of 10	100%	11 of 11
Mr Mohan DATWANI	100%	6 of 6	-	-	100%	8 of 8	100%	6 of 6	-	-
Miss Maisy HO Chiu-ha	100%	6 of 6	-	-	-	-	67%	4 of 6	83%	5 of 6
Dr Henry SHIE Wai-hung	100%	6 of 6	-	-	75%	6 of 8	-	-	100%	6 of 6
Dr Rizwan ULLAH	100%	6 of 6	80%	4 of 5	-	-	83%	5 of 6	-	-
Dr LEUNG Sai-man, Sigmund	100%	2 of 2	100%	1 of 1	-	-	-	-	100%	3 of 3
Ms LEUNG Chung-yan, Juan	86%	12 of 14	77%	10 of 13	-	-	-	-	100% from May 2017 to May 2018	3 of 3
Ms Shirley LOO	86%	12 of 14	85%	11 of 13	-	-	-	-	-	-
Prof Cecilia CHAN Lai-wan	83%	5 of 6	100% from May 2017 to May 2018	4 of 4	100%	2 of 2	75% from May 2017 to May 2018	3 of 4	100%	3 of 3
Dr Trisha LEAHY	82%	18 of 22	-	-	90%	28 of 31	-	-	67%	4 of 6
Prof CHOI Yuk-ping, Susanne	79%	11 of 14	-	-	-	-	85%	11 of 13	-	-
Mr CHOW Ho-ding, Holden	77%	17 of 22	-	-	-	-	74%	17 of 23	-	-
Prof Hon LEE Kok-long, Joseph	73%	16 of 22	90%	19 of 21	-	-	65%	15 of 23	100%	3 of 3
Ms Elizabeth LAW	71%	10 of 14	-	-	-	-	82% from May 2015 to May 2018	9 of 11	100% from May 2015 to May 2018	12 of 12
Dr Andy CHIU Man-chung	67%	4 of 6 (2 Out of Town)	-	-	63%	5 of 8	-	-	-	-
Mr CHAN Ka-yan, Samuel	**50%**	**1 of 2 Out of Town**	**0%**	**0 of 1 Clash of meeting**	**50%**	**1 of 2 Clash of meeting**	-	-	-	-
Miss YU Chui-yee	**43%**	**6 of 14 (6 Out of town / other engagement; 2 unknown)**	-	-	55%	11 of 20	-	-	-	-

EOC = EOC Board Meeting
A&FC = Administration and Finance Committee
CPPC = Community Participation and Publicity Committee
LCC = Legal and Complaints Committee
PRTC = Policy, Research and Training Committee

Appendix 7

Independent Report

THE EOC'S COMPLAINT HANDLING PROCESS:
EXTERNAL REPORT

I. INTRODUCTION

1. By email dated 27 October 2017 I agreed in principle to conduct an independent review of the EOC's complaint handling process on a pro bono basis. My remit has been to look into the complaint handling process and recommend ways in which it could be improved. In conducting that review my methodology has been to interview as many EOC officers and members of EOC's board (including the chairperson) as possible and solicit their views on the problems of the current process and how those difficulties might be resolved. I also interviewed a number of the EOC's critics, including individuals working within the Legislative Council and certain NGOs. All interviews were conducted on a non-attribution basis to enable those interviewed to express their views freely and frankly. In keeping with my undertaking of confidentiality to the interviewees, I do not identify them by name in this report. Nevertheless, I thank them all for freely sharing their views with me and for their unfailing courtesy when responding to my questions. I have incorporated their criticisms in this report and attempted to respond to them in my analysis. They may not agree with my proposed solutions, but that does not detract in any way from the importance of our discussions in the development of my recommendations.

2. The EOC was established a little over 20 years ago.[1] From the outset, it has been bedeviled by criticism. The typical complaint has been that it lacks the teeth to have any significant impact in eradicating discrimination in Hong Kong. Over the years the government has been accused of lacking the will to empower the EOC to do its job well, instead paying only lip-service to the rhetoric of promoting equality of opportunity and treatment in Hong Kong. Critics have repeatedly complained that the EOC has focused too narrowly on the conciliation of disputes and has provided legal assistance in far too few cases. Many have observed that in any event, it takes too long for the EOC to investigate a complaint, attempt conciliation of the same, and (where conciliation is abortive) determine whether to grant legal assistance to an aggrieved person for the purpose of pursuing a wrongdoer in court. The

[1] An short account of the EOC and its operations is in Annex 1. Abbreviations are convenient, but can be annoying. I have therefore used as few as possible in the body of this report. A glossary of the main abbreviations used is in Annex 2. At my request, the EOC provided me with revised statistics of their work. The statistics were revised because it became apparent that the statistics provided in the past (for instance in the EOC's Annual Reports) had not always been consistently compiled. Cases were treated as "enquiries" when they ought to have been characterised as "complaints" pursuant to an internal EOC guideline of giving a person the benefit of the doubt whenever it is unclear whether a matter should be treated as an enquiry or complaint. There was also double-counting in the sense that matters originally classified as enquiries were treated as separate cases when upgraded as complaints. An extract from the revised statistics provided by the EOC is at Annex 3. In this report, I have also drawn on the empirical findings in Carole J. Petersen, Janice Fong and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (Hong Kong: Centre for Comparative and Public Law, HKU, 2003). That pioneering research paper is cited here as Peterson et al (2003). See also the perspicacious insights in Katherine Lynch, "Private Conciliation of Discrimination Disputes: Confidentiality, Informalism and Power", a paper presented at a conference on *Enforcing Equal Opportunities in Hong Kong: An Evaluation of Conciliation and Other Enforcement Powers of the EOC*, June 2003, especially at 15–16. I gratefully acknowledge my indebtedness to the authors of those papers. I also acknowledge the help of my research assistant, Mr. Wilson Lui Chi Yin, in the conduct of my external review and in the preparation of this report.

current complaint handling process (the critics contend) is such that persons who have suffered discrimination feel further victimised by the persistent stream of questions to which they (as opposed to the alleged wrongdoers) are subjected during the detailed investigations carried out by the EOC as part of conciliation. The critics say that, given the process, the outcome can hardly be surprising: aggrieved persons are discouraged from pursuing legitimate complaints, many cases are simply dropped, and wrongdoers escape punishment.

3. Mine is not the first review of the EOC and it is unlikely to be the last. From Annex 1, it will be seen that operational reviews or audits have been a regular feature over the 20-odd years of the EOC's existence. Even at present, in parallel with my external review, there is an internal review being conducted by Mr. John Leung of the EOC's management organisation and complaint handling process. What I think differentiates my review from those undertaken in the past is that I do not see it as part of my remit (nor do I seek) to attribute blame on anyone. My focus has instead been on system and process, based on my experience as judge, arbitrator and mediator, and on suggesting ways in which those can be improved.

4. I acknowledge at the start that this report has its limitations. First, I have taken the anti-discrimination statutes (the SDO, the DDO, the FSDO and the RDO) (the bases of the EOC's jurisdiction) as a given. I do not suggest how those ordinances might be strengthened, although there are certainly ways in which that can be done. The task of legislative reform is left for others to undertake. I have instead asked, taking the existing statutory framework as constraining what the EOC can and cannot do, how might the EOC's complaint handling process be made better. Second, I have taken the organisational structure of the EOC as it presently is. I have not, for instance, entered into the recurring debate on whether there should or should not be a part-time non-executive chairperson and a full-time executive CEO.[2] Third, while noting from reports how certain problematic cases were handled by the EOC recently, I have not interviewed past or present complainants to elicit their views, for or against, the existing system. Putting to one side questions of privacy and confidentiality, I decided that such interviews would be of limited utility, especially weighed against the risk that interviewing a complainant about the handling of her or his complaint might unnecessarily cause the person to re-live the trauma of discriminatory treatment and trigger painful memories. Fourth, I have not attempted to analyse how past complaints should have been handled by EOC officers and, with the clarity that hindsight always brings, to pontificate on how this or that step could have been better managed by the officers in charge of particular cases. Rightly or wrongly, I do not perceive my role to be one of second-guessing how EOC officers should have reacted to specific circumstances of a given complaint.

5. If I were to encapsulate the thrust of the recommendations in this report, it would be as follows: there is a mismatch of perception between the public and the EOC. I respectfully submit that this mismatch of perception needs to be addressed. It is far from ideal where the public, which funds an organisation through taxes, expects one type of service to be provided, but receives something else. The public seeks pro-active guidance from the EOC at an early stage on the strengths and merits of a complaint and how best the same might be resolved through conciliation, litigation or otherwise. The EOC, on the other hand, sees itself as a quasi-adjudicative body. It believes that, as such, it should maintain a scrupulous impartiality

[2] See Annex 1 for details of the debate.

while investigating a complaint, attempting to conciliate the same, and (following unsuccessful conciliation) determining whether the complaint merits legal assistance to litigate the same in court. It is only if and when a decision is taken to grant legal assistance for the litigation of a complaint that the EOC truly advises an aggrieved person on how best to conduct her or his complaint. But that stage will usually only come months down the road from the time when a complaint was first raised. In the meantime, the complainant is likely to feel alienated or discouraged by the whole process. Expecting to receive advice early on, the complainant instead finds oneself constantly called upon to answer probing questions, provide evidence, and justify the merits of one's complaint.

6. If I am right that there is a mismatch of expectation between the EOC and the users of its services, how should the EOC respond? It is with the aim of answering that question and narrowing the gap between the two perceptions that I put forward the recommendations in this report.[3]

II. DISCUSSION

7. In this section, I consider in turn criticisms of the EOC's complaints handling process. The criticisms may be classified into 3 broad categories:

(1) **The nature of the conciliation and investigation process.** It is said that the conciliation and investigation process takes too long and is too intrusive. As a result, aggrieved persons undergoing the process feel victimised afresh and are discouraged by the system from pursuing wrongdoers.

(2) **The outcomes of the legal assistance process.** It is said that legal assistance is granted and court proceedings are instituted in too few cases.

(3) **The integrity of the complaint handling process.** This category embraces a range of miscellaneous matters that need to be considered if the complaint handling process is to be (and is to be perceived as being) robust, time-efficient, cost-effective, and due process-compliant.

In my analysis below, I use the expressions "alleged wrongdoer" and "respondent" interchangeably.

A. The nature of the conciliation and investigation process

A.1 The problem

8. The EOC distinguishes between "early conciliation" and "conciliation" in its complaints handling process. "Early conciliation" takes places within 2 or 3 months of the receipt of a complaint. Where early conciliation fails, the Complaint Services Division (CSD) investigates the aggrieved person's complaint with a view to achieving a settlement through "conciliation" with the alleged wrongdoer. The conciliation process (inclusive of investigation) is supposed to take place within 6 months of the receipt of a complaint. But sometimes the process of conciliation can take longer. The CSD officer who carries out the investigation of a case will also usually be the person who acts as conciliator during the conciliation session.

[3] A draft of this report was provided to the EOC for comment before this final version was prepared.

9. Just about everyone has a good word to say about early conciliation. It has undoubtedly led to the speedy resolution of many complaints. The approval has not, however, been unanimous. Some suggest that early conciliation is not appropriate in complex cases where a more detailed investigation before any conciliation is attempted might assist in identifying the real issues between the parties and lead to more effective conciliation hearings. Others maintain that, given the imbalance in power between aggrieved person and wrongdoer and the uncertainty over whether the EOC will grant legal assistance to pursue a case to court if conciliation fails, victims are prone to settle with respondents for lack of a more viable alternative. Yet others argue that too much focus on conciliation (whether early or otherwise) reinforces a perception among respondents that they can "buy" their way out of wrongdoing through confidential settlements. Thus, while not wholly against early conciliation, the contention is that the EOC should also focus on bringing cases to court in order to usher a much-needed culture change. The EOC has to signal to the public that discriminatory practice will not be tolerated or condoned. I respond specifically to these views in Section C.6.

10. In contrast to the generally favourable impression of early conciliation, there is widespread unhappiness with the investigation and conciliation that follow an abortive early conciliation. Investigation is thought to be too protracted and intrusive. Numerous questions are put to a complainant. Letters setting out the complainant's detailed allegations are then sent to the wrongdoer for comment. The wrongdoer's comments are afterwards forwarded to the complainant for response. Further information may be sought from both parties in light of their allegations and counter-allegations. The result is that the aggrieved person feels victimised yet again in having to rehearse, in excruciating detail, the circumstances underlying her or his allegations. There may be surprise and even resentment at the fact that a battery of questions is directed at the complainant by the EOC investigation, rather than the alleged wrongdoer. At times, parties respond to each other's accusations and counter-accusations with intemperate or sarcastic language, all of which being recorded in correspondence and capable of being read and re-read many times after receipt by a party for comment, only heightens already existing tensions.

11. Throughout investigation, complainants are more or less left to fend for themselves. Since the CSD officer carrying out the investigation is also supposed to act as conciliator, the EOC is careful to maintain its neutrality. Although the officer may give legal advice of a general nature as to the constituent elements of a discriminatory offence and the sort of evidence needed to establish each element, she or he will normally refrain from commenting on the merits and weaknesses of a complainant's case. Accordingly, little substantial advice is given during the investigation on how specifically to counter a respondent's alleged defences by way of legal argument, evidence or strategy.

12. In those circumstances, it is no wonder (the critics say) that an aggrieved person's sense of powerlessness is exacerbated. Victims will feel discouraged by the process and may simply give up through exhaustion. Of the complaints that proceed, the parties will have become so incensed at each other's comments and at the length and intrusiveness of the investigation, that only a small percentage of cases are likely to be successfully conciliated in any event. The investigation conducted as part of conciliation itself adversely affects the chances of settlement.

13. There is an additional problem. Where conciliation (as opposed to early conciliation) fails and an aggrieved person wishes to take a complaint to court, the EOC needs to decide whether to grant legal assistance. At this point LSD takes over from CSD. The LSD is supposed to prepare a brief for the LCC, advising whether legal assistance (either limited or in full) should be granted to a complainant. Current practice at the EOC is for the results of CSD's investigation to be provided to LSD to assist LSD to prepare the brief. Tensions have arisen between LSD and CSD over the thoroughness of CSD's investigations. The LSD has complained that CSD's investigations are often insufficient to enable an LSD officer to make any useful recommendation to the LCC for or against legal assistance.

14. This has upset the CSD, which feels that its professionalism has been impugned. From the CSD's viewpoint, its mandate is to carry out the investigation needed to support the conciliation process; no more, no less. If the LSD feels that further information is needed to enable a proper legal analysis to be made, (CSD argues) it is up to the LSD to carry out such additional investigation as may be required for LSD's purposes. The CSD points out that, while some CSD officers may have some legal background (such as a law degree), few have actual experience as legal practitioners. CSD officers are specialists in conciliation. They know what investigation is needed for that objective. They cannot be expected to know what is required for the purpose of bringing an action to court. That (CSD concludes) is the province of the LSD.

15. On the other hand, in response, the LSD regards its role as analogous to counsel asked to advise whether a case is worth bringing to court. From the LSD's viewpoint, its officers specialise in legal analysis and it is for CSD to conduct any necessary investigatory leg-work.

16. A further difference between the CSD and the LSD has arisen in relation to the practice of transferring to LSD the information gathered during CSD's information. The CSD has expressed concern that the practice contravenes the principle of the confidentiality of the conciliation process. It has been suggested that the information obtained from CSD's investigations in support of the conciliation process must all be subject to confidentiality. If so, the information should not be handed to the LSD at all. LSD should instead carry out its own investigative process to obtain whatever information it thinks necessary to undertake a legal analysis. The question of confidentiality is discussed in detail in Section C.2.

17. In practical terms, whatever its rights and wrongs, this "turf war" between the CSD and the LSD has led to (and has the potential to lead to more) operational problems.

18. First, the friction between the two camps has resulted in a loss of morale and trust among officers of both divisions. The two divisions have found It difficult to work with each other over the last year or so. This may explain, at least in part,[4] the high turnover of staff (including senior CSD officers) that the EOC has witnessed. This loss has meant that the EOC has been operating well below normal strength. Officers in the CSD have had as a result to handle more cases than would normally be the case, and there is a general sense of overwork and fatigue among officers.

[4] The balance of the explanation may include personality differences, perceived limited promotional prospects, stress, overwork, the desire for a break or to do something different, and purely private considerations.

19. Second, one can imagine the frustration that aggrieved persons would feel when, having already gone through a protracted investigation in connection with a failed conciliation, they are faced with yet further queries about their complaint. At this stage, six months or more from the time of making a complaint, a victim would be anxious to know whether the EOC will be granting legal assistance to take her or his case further. Upon learning that more information is needed before the legal merits of the complaint can be determined, the aggrieved person will likely wonder in what way the information previously provided was deficient and why more time needs to be spent just to arrive at a decision on whether the EOC will provide legal assistance. The delay in obtaining an answer one way or the other from the EOC could well aggravate an aggrieved person's sense of victimization and powerlessness.

20. Third, throughout this process of further investigation in connection with legal assistance, the EOC continues to maintain a neutral stance. Thus, aggrieved persons will not be receiving specific advice or guidance on the merits and weaknesses of their case and how their complaint can most effectively be litigated in court. Even at this more advanced stage, an aggrieved person will more or less have to cope with demands by the EOC for more information or evidence as best one can, with potentially little understanding of the reasons why particular further information or evidence is only being requested now.

A.2 The proposed solution

21. The EOC is required to attempt conciliation in all cases that it handles. For example, SDO s. 84 (entitled "Assistance by way of conciliation") provides:

> "(1) A person may lodge with the Commission a complaint in writing alleging that another person has done an act which is unlawful by virtue of a provision of this Ordinance.
>
> (2) ....
>
> (3) Subject to subsection (4), where a complaint is lodged under subsection (1), the Commission shall—
>
> (a) conduct an investigation into the act the subject of the complaint; and
>
> (b) endeavour, by conciliation, to effect a settlement of the matter to which the act relates.
>
> (4) The Commission may decide not to conduct, or to discontinue, an investigation into an act the subject of a complaint lodged under subsection (1) if—
>
> (a) it is satisfied that the act is not unlawful by reason of a provision of this 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) ....; or
>
> (e) it is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.
>
> ...."

22. "Assistance by way of conciliation" is to be contrasted with "Assistance other than by way of conciliation", which is covered by SDO s. 85. That provides:

> "(1) Where a complaint has been lodged under section 84(1) but, for whatever reason, there has not been a settlement of the matter to which the act the subject of the complaint relates, then any person who may institute proceedings under this Ordinance in respect of that act may make an application to the Commission for assistance in respect of those proceedings.

(2) The Commission shall consider an application under subsection (1) 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.

(3) Assistance by the Commission under this section may include—

(a) giving advice;

(b) arranging for the giving of advice or assistance by a solicitor or counsel;

(c) arranging for representation by any person including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings;

(d) any other form of assistance which the Commission may consider appropriate,

but paragraph (c) shall not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend and address a court in, any proceedings except to the extent permitted under rules made in accordance with section 73B of the District Court Ordinance (Cap. 336).

...."

23. The anti-discrimination statutes do not distinguish between "early conciliation" and "conciliation" in the way that the EOC currently does. I recommend that the EOC require all aggrieved persons submitting a complaint to attempt what is now called "early conciliation". Such process should normally be completed in most cases within 2 to 3 months of the making of a complaint. Where "early conciliation" fails, the EOC should straightaway proceed to considering whether and (if so) in what form it should grant legal assistance to a complainant. This approach means that there would no longer be the protracted and cumbersome detailed investigation and conciliation process that is presently undertaken by the CSD. Instead, at this early stage in the handling a complaint, a CSD officer would only conduct such preliminary investigation as may be necessary to glean the essential facts of a complaint in order to conduct a neutral "early conciliation" between the complainant and respondent. To avoid confusion, there no longer being a subsequent "conciliation" stage if "early conciliation" fails, it is suggested that what is now known as "early conciliation" might be more simply renamed as "conciliation". Unless otherwise stated, in the remainder of this report I shall refer to "early conciliation" as "conciliation"

24. The foregoing recommendation essentially being only a renaming, the success rate of what is henceforth to be known as "conciliation" should not be affected, but should likely mirror the success rate of what is currently known as "early conciliation".[5] Since only a

[5] It will be seen that, by SDO s. 84(3) and its equivalent in the other anti-discrimination statutes, the EOC "must endeavour, by conciliation, to effect a settlement". It may be asked whether what is currently called "early conciliation" is sufficient by itself to amount to "[endeavouring], by conciliation, to effect a settlement" within the meaning of s. 84(3). I respectfully suggest that it is sufficient. In this connection, I note from the statistics in Annex 3 that 1,345 of the 3,316 cases (40.6%) that went into early conciliation between 2008 and 2017 were successfully settled, in comparison to only 271 of the 1,037 (26.1%) that went into post-investigation conciliation (PIC) over the same period. Further, of the 6,698 complaints that reached some conclusion between 2008 and 2017, it seems that 1,771 (26.4%) were discontinued following investigation. This suggests that the investigation currently being carried out as part of PIC is (1) unlikely to lead to successful settlement and (2) just as (if not more) likely to lead to discontinuance as to successful settlement. Thus, insofar as the investigation that precedes what is now called "conciliation" can lead (a) to discontinuance by aggrieved persons of their legitimate complaints or (b) to the aggravation of tensions between an aggrieved person and a respondent so that

preliminary investigation will have been carried out as at the time of conciliation envisaged in this report, where that conciliation does not succeed, it will almost certainly be necessary to carry out a more detailed investigation. At that point, consistently with SDO ss. 85(2) and (3) or their equivalent in the other anti-discrimination statutes, the EOC can grant assistance for the limited purposes of:

(1) providing initial advice to an aggrieved person on the strengths and weaknesses of a complaint;

(2) developing a plan *in conjunction with an aggrieved person* for bringing a complaint to court (including the degree of investigation required, the evidence to be gathered through such investigation, and the timetable to be followed); and,

(3) in light of the results of the detailed investigation to be carried out, assessing *in conjunction with the aggrieved person* the legal merits, the strength of the evidence, and the likely outcome of any court proceedings.

It is anticipated that this limited legal assistance will be granted by the EOC in almost all cases. It will be necessary to have a full appreciation of the actual circumstances of a complaint before deciding whether to bring the matter to court. Consequently, limited legal assistance will likely only be refused in those instances where it is plain on the facts as known at the end of the conciliation stage that a complainant's case falls within one or more of the situations in SDO s. 84(4) or its equivalent in the other anti-discrimination statutes. The limited legal assistance provided as recommended above should result in a compilation of sufficient information on the strengths and weaknesses of a case to enable the LSD to draft an analysis for the LCC as to whether court proceedings are merited.

25. Under Rule 5 (also known as section 5) of the subsidiary legislation to the anti-discrimination statutes,[6] the EOC may "for the purposes of investigating into an act and in endeavouring to settle the matter to which the act relates, by notice in writing served on a person require that person to furnish such information as specified in the notice, and in the notice specify a place, time, period or date for furnishing such information". Absent a reasonable excuse, a person failing to comply with the notice will be committing an offence and be liable on conviction to a level 4 fine. It appears that, so far, the EOC has rarely used this power in support of its conciliation process. Given the relatively short period in which conciliation is to be attempted under the recommendation here, it is submitted that greater use should be made of this power and a reasonable resort to the power in support of conciliation should become the rule, rather than the exception. By reasonable resort is meant that a request for information from (say) a respondent should be polite and non-judgmental and should require no more than that the respondent set out its position on the complainant's allegations. The respondent might also be requested to set out settlement proposals (if any) that it wishes to put forward at a conciliation conference. The notice and the information requested thereby should be kept as short and simple as possible. Detailed questions should as much as possible be avoided at the conciliation stage. The objective is to obtain from the

---

successful conciliation becomes unlikely, the present PIC process may in reality be more counter-productive than productive as an "endeavour" towards settlement within the terms of s. 84(3).

[6] Namely, the Sex Discrimination (Investigation and Conciliation) Rules (Cap. 480B), the Disability Discrimination (Investigation and Conciliation) Rules (Cap. 487B), the Family Status Discrimination (Investigation and Conciliation) Rules (Cap. 527A), and the Race Discrimination (Investigation and Conciliation) Rules (Cap. 602B). The expression "subsidiary legislation to the anti-discrimination statutes" will be used to refer to these four sets of rules

respondent a statement which the officer assigned to act as conciliator can use to bring a conciliation session towards a successful outcome.

26. If conciliation fails and a full-blown investigation ensues, the EOC's role changes from the conciliatory to the adversarial. The EOC is then essentially assisting a complainant to mount a case against the alleged wrongdoer. At this point, it would no longer be appropriate to use Rule 5 to obtain information from the respondent. Rule 5 itself acknowledges this, since the pre-requisite for resort to the power there (namely, the condition that the EOC is "endeavouring to settle the matter to which the [alleged wrongdoing] relates") would no longer be applicable. That does not mean that further attempts at conciliation are completely ruled out. As in any litigation, it always remains open to the parties of their own volition to make further attempts at conciliation. The EOC (just as any solicitor or barrister in ordinary litigation) can make this clear to one or even both parties, and can encourage one or both parties (as appropriate) to undertake further conciliation. If the parties are so minded, the EOC can also facilitate further attempts at conciliation by identifying freelance conciliators whom the parties can jointly approach, or, subject to both parties' consent, assigning a CSD officer who has not had prior dealings with (or knowledge of) the case to act as a conciliator. But there should be no mis-conception. Following the failure of conciliation (formerly called "early conciliation"), subject always to considerations of merits and evidence, the EOC should be working towards preparing an aggrieved person's complaint for court. It may turn out that the EOC's detailed investigation shows that a case has no prospects and is not worth taking to court. That possibility would not alter the nature of the process once conciliation has proved abortive.

27. In terms of a time frame for carrying out any necessary investigations, assessing the strengths and weaknesses of a complaint, and recommending to the LCC whether a case should be pursued in court, reference might be made to the applicable anti-discrimination statute. For example, SDO s. 86 provides:

> "(1) The District Court shall not consider a claim under section 76 unless proceedings in respect of the claim are instituted before the end of the period of 24 months beginning—
>
> (a) when the act complained of was done; or
>
> (b) ....
>
> whichever is the later.
>
> (2) The District Court shall not consider an application under—
>
> (a) section 82(2)(a) unless it is made before the end of the period of 24 months beginning when the act to which it relates was done;
>
> (b) section 82(4) unless it is made before the end of the period of 5 years so beginning.
>
> (2A) For the purposes of determining the period under subsection (1) within which proceedings may be brought, where an act to which the claim relates was the subject of a complaint lodged under section 84(1), then the period that elapsed between the date when the complaint was lodged and the date when the complaint was disposed of under section 84(3) or (4), as certified in writing by the Commission, shall be disregarded.
>
> (3) Notwithstanding subsections (1) and (2), the District Court may consider any claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.
>
> (4) For the purposes of subsection (3), the circumstances of the case include, in relation to any claim, whether the act to which the claim relates was the subject of a complaint lodged under section 84(1) and, if so, the period that elapsed between when the act was done and when that complaint was so lodged.
>
> ...."

The EOC thus needs to initiate a court action within the two years stipulated by s. 86 (disregarding, as provided in s. 86(2A), the period between the lodging of the complaint and the end of the conciliation process). In most cases, a goal might be to have a decision one way or the other on granting full legal assistance for the purpose of bringing a claim to court within (say) 6 months from the failure of conciliation.

28. That leaves the question as to who precisely within the EOC are to (1) carry out preliminary investigation, (2) conduct conciliation, (3) carry out detailed investigation, and (4) provide the limited legal assistance envisaged above.

29. My recommendation is that conciliation (including the preliminary investigation described above) be undertaken by a CSD officer. The EOC might consider out-sourcing some or all of such conciliation work in the future to independent freelance conciliators. But at present CSD's officers have a significant amount or knowledge and experience in the conduct of conciliation and the EOC should be tapping into that wealth of expertise. The reality is that, at present, in all likelihood CSD officers are more experienced in the conciliation of discrimination cases than most freelance conciliators in Hong Kong.

30. If conciliation fails, the initial legal assistance provided (that is, giving preliminary advice on a complaint, carrying out detailed investigation and evidence-gathering, and assessing in light of investigation results whether there is a case for going to trial) could be undertaken by a team of officers drawn from CSD and LSD. In simple cases, a single person (for example, a CSD officer with a legal background or an LSD officer with practical experience of conducting investigations) can perform all the functions of this initial legal assistance. But otherwise, it is suggested (albeit not as an inflexible rule) that there be 2 officers in an investigatory team, one drawn from CSD, the other from LSD. Which person is to serve as team leader (if any) could be left to the decision of the officers assigned or (if they are unable to agree) to the decision of the Chief Operations Officer (COO) or chairperson. A team eventually will assess whether, in light of investigation, a case merits going to court with full legal assistance. But, if a team is not optimistic about the prospects of litigation, it should also consider how best the dispute might be resolved with a view to advising a complainant accordingly. Giving such advice would (it is hoped) avoid a complainant feeling that one has simply been dropped in mid-stream by the EOC when full legal assistance is refused.

31. Additional observations may be made in connection with the foregoing proposals.

32. First, CSD has 2 sub-divisions (known as "A" and "B"). CSD officers are assigned to work in either sub-division. A Chief Officer is in charge of each sub-division. At full strength there are supposed to be 3 Senior Officers in each sub-division. Below the Senior Officers, some 9 officers are allocated between the 2 sub-divisions. The CSD officer who acts as the conciliator for a given dispute must be (and should be perceived by all parties to be) impartial. Even after a conciliation has failed, in order not to convey the impression that the relevant CSD officer has disclosed or used confidences imparted during the conciliation process, it is important that the officer maintain the appearance of impartiality. The officer should thus not be involved in subsequent detailed investigation and assessment of the merits of a complaint. It would be wrong in principle for such officer to deploy or to be perceived as deploying, whether in subsequent legal proceedings or howsoever otherwise, confidential information

communicated during the conciliation process. Accordingly. the EOC will need to ensure that Chinese walls are in place to prevent an officer who has acted as conciliator in a case from later having anything to do with the detailed investigation and legal assessment of that same case. One step to achieving such outcome might be to implement a rule that, where an officer from one CSD sub-division has acted as conciliator of a complaint, then only a CSD officer from the other sub-division can be part of the team tasked with the detailed investigation and legal assessment of the relevant complaint.

33. Second, a striking feature encountered in my review has been that officers in the CSD and the LSD appear to have little day-to-day interaction with each other, insofar as carrying out work on a case is concerned. This is despite the fact that the EOC is a relatively small organisation with compact premises. All its officers, regardless of division, have their officers on the same floor in the building where the EOC is situated. But it does not seem routine for officers of one division to solicit advice from or "pick the brains" of a colleague in another division. There seems to be a "silo" culture within the EOC, conciliation/investigation services constituting one silo and legal services constituting another. LSD relies on CSD to feed it with information for the purposes of making a legal assessment. But, insofar as necessary, especially in difficult cases, it seems to me that there would be benefit from CSD and LSD officers sitting down together and discussing at an early stage what information would, as a matter of practice, be required by way of evidence in a specific case. By the same token, CSD perceives its role as bringing about conciliation, but that should not rule out the possibility of seeking LSD's advice at an early stage of a specific case, especially in problematic situations, as to what information or evidence may be legally pertinent in preparing a case for trial.

34. This arrangement may be the result of a perception that conciliation and legal assistance are separate functions of the EOC. However, the lack of interaction does not seem advisable. For one, it detracts from a sense of collegiality that the EOC should be nurturing within itself. Accordingly, the suggestion (which is not meant to be an inflexible rule) that, where conciliation fails and detailed investigation follows, there should be CSD and LSD officers in a team, is meant to foster a greater sense of camaraderie ("we are all in it together") between both divisions. Shared responsibility will (it is hoped) give officers from the divisions a stake in how a case progresses and impart a greater sense of cooperation towards the achievement of a public good.

35. Third, in proposing that limited legal assistance be granted more generously upon failure of conciliation, I do not mean to imply that all will be plain sailing or that every complaint will be worth pursuing through to judgment by a court. There will inevitably be frustration and perhaps annoyance among EOC officers when detailed investigation shows a complaint to be trivial and frivolous. There will, by the same token, be heartbreaking cases where the evidence may simply not justify bringing a case to court, however sympathetic officers may be with the plight of a victim. There may well be disagreements among team members on how to proceed. But the ability to discuss and debate the practicalities of how to handle cases (even bad cases) with colleagues holding different perspectives should assist in sharpening the minds of all involved on the optimum way forward. I suggest that teamwork will make for better focused briefs to the LCC which take account of all relevant factors, not just the letter of the law, but special circumstances arising out of the nature of the alleged wrongdoing and the particular background of a complaint.

36. Fourth, when describing the limited legal assistance that should normally be given to complainants wishing to proceed to litigation following abortive conciliation, I have stressed that the assistance should be carried out *in conjunction with* an aggrieved person. I have done this is because the natural expectation of a member of the public seeking assistance from the EOC, is that she or he will receive advice on one's complaint, including how best to proceed with the same (if at all) as a matter of law. My impression is that currently the EOC is not meeting that expectation. It is instead scrupulously neutral in the way that it handles complaints, both during the conciliation process and when deciding whether to grant legal assistance. In one sense, such approach is laudable. Conciliators must be impartial and a cardinal principle of Hong Kong law is that an alleged wrongdoer should be presumed innocent until proven guilty. Unfortunately, it may also strike many in the public (especially the victims of discrimination) as remote, cold or insensitive. If this impression is to be dispelled, it is necessary as much as possible to keep a complainant "in the loop", that is, to explain to the complainant the rationale for particular inquiries addressed by the EOC to her or him and at all times to give the complainant a frank appraisal of the strengths and weaknesses of her or his case.

37. Fifth, by in effect bringing forward the time when legal assistance is to be considered to when what has been called "early conciliation" failed, I have attempted to bridge the gap between the differing views on how the EOC should approach a complaint. The goal is to convey to the public that the EOC is a service-oriented organisation. It is not an organisation that stands aloof. It does not merely provide conciliation services and facilities in the manner of (say) the Hong Kong Mediation Centre. Nor does it merely sit as a quasi-judicial body that determines whether discrimination complaints have legal merit. On the contrary, within the constraints set by the discrimination statutes, it exists to assist, as much as it can and to the best of its ability, members of the public having legitimate complaints about discriminatory conduct to resolve their complaints in a fair and equitable manner through conciliation and (where appropriate if conciliation fails) litigation. I suggest that the anti-discrimination statutes empowering the EOC be construed broadly in light of such aim.

38. Thus, for instance, it seems consonant with SDO ss. 85(2) and (3) (and equivalent provisions in the other anti-discrimination statutes) for the EOC, following failure of conciliation, to grant legal assistance by way of initial legal advice (s. 85(3)(a)), especially where (as in many of the EOC's cases) there will be a power imbalance between a complainant and a respondent. It would be "unreasonable" (applying the test in s. 85(2)(b)) to expect a complainant in a position of power imbalance vis-à-vis a respondent to deal with a complaint unaided. Consequently, I suggest that it is likewise consonant with ss. 85(2) and (3) for the EOC to conduct detailed investigation into a complaint by way of "any other form of assistance which the Commission may consider appropriate" (s. 85(3)(d)), in particular where there is a disparity between the means of the complainant and the respondent.

39. Sixth, in the course of conducting interviews for this report, the question arose as to whether legal advice might be provided even earlier, during the conciliation process itself. As far as I can see, it is unclear from the anti-discrimination statutes whether there is a bar to the EOC providing legal advice to a complainant in the course of conciliation. SDO s. 85, for example, provides that the EOC can give legal advice as part of legal assistance following an

abortive conciliation. It does not necessarily follow from such express provision in the SDO that legal advice cannot be provided before conciliation has failed. But I accept that there is an argument (applying the maxim *expressio unius, exclusio alterius*) that the express provision may by implication exclude the possibility of giving legal advice before conciliation has failed. On the assumption that the legal maxim is not applicable, then under the conciliation regime recommended here it would be possible for (say) an LSD officer to provide legal advice to a complainant during the conciliation process. But that would be subject to the proviso that the CSD officer who acts as conciliator is not to have contact or communication with the LSD officer acting as advisor to the relevant complainant. In other words, a system of Chinese walls, common enough in many organisations including solicitor firms and barristers' chambers, would need to be maintained by the EOC, if it were to offer a service whereby LSD officers gave advice to complainants in the course of conciliation. For the purposes of this report, I simply recommend that the EOC seriously consider the possibility of LSD officers providing specific legal advice to complainants even during the conciliation stage.

40. Seventh, an issue that arose in my discussions about the provision of legal advice during the conciliation process is whether that would ultimately be beneficial to a complainant. Based on personal experience, lawyers will normally be extremely cautious in expressing a favourable view of a case, especially at an early stage when all pertinent facts are unlikely to be known. There is good reason for that, as it would be questionable practice to "hype up" the merits of case without a full consideration of all relevant circumstances. Thus, good lawyers often pour cold water on a client's prospects of success, envisaging numerous legal and evidential difficulties along the way. Discrimination cases being notoriously difficult to prove, the result may be that most complainants will be discouraged by any early legal advice received from pursuing a case to court. They may then opt for a quick settlement as the more certain option. I express no view on whether it is good or bad for discrimination cases to settle early. But, if it is a matter of worry that receiving early initial legal advice may too readily lead to settlements, it seems to me that such concern might be addressed to a certain extent by the EOC requiring LSD officers who provide early advice and CSD officers who act as conciliators to undergo advanced sensitivity training, in order to recognise (and know how to deal with) the possibility that, due to (say) power imbalance, complainants may be deterred by the difficulties of litigation and instead prefer quick settlements that do not truly reflect the gravity of their grievances.

41. Eighth, if it is to succeed, the regime of conciliation and investigation advocated here will require that CSD and LSD officers regularly take part in capacity-building workshops and seminars. Such courses might cover matters such as sensitivity to subtle psychological dynamics that may be in play where there are power or other imbalances between the parties to a conciliation; techniques for dealing with difficult complainants; advising lay persons; the carrying out of investigations; working as a team; etc.

A.3 Summary

42. In relation to the conciliation and investigation process, the key recommendations that I am making are as follows:

(1) The EOC require all complainants to attempt what is now called "early conciliation", such process should normally be completed within 2 to 3 months of the making of the complaint. Where this "early conciliation" fails, the EOC should straightaway proceed to considering whether and (if so) in what form it should grant legal assistance to a complainant. To facilitate this change in operating procedure, it is suggested that what is now known as "early conciliation" should simply be renamed as "conciliation".

(2) Routine use should be made of Rule 5 (as found in the subsidiary legislation to the anti-discrimination statutes) during the conciliation process.

(3) Following the failure of conciliation (formerly early conciliation), save in cases that plainly are outside of the EOC's remit or are frivolous, vexatious, misconceived or lacking in substance, limited legal assistance should normally be granted to a complainant to enable the EOC to perform one or more of these functions:
   (a) providing initial advice to an aggrieved person on the strengths and weaknesses of a complaint;
   (b) developing a plan *in conjunction with an aggrieved person* for bringing a complaint to court (including the degree of investigation required, the evidence to be gathered through such investigation, and the timetable to be followed); and,
   (c) in light of the results of such detailed investigation as is carried out, assessing *in conjunction with the aggrieved person* the legal merits, the strength of the evidence, and the likely outcome of any court proceedings.

(4) Conciliation (including preliminary investigation) should be undertaken by a CSD officer.

(5) If conciliation fails, the initial limited legal assistance to be provided (that is, giving preliminary advice on a complaint, carrying out detailed investigation and evidence-gathering, and assessing in light of investigation results whether there is a case for going to trial) could be undertaken by a team of officers drawn from CSD and LSD. In simple cases, a single person can perform all the functions of this initial legal assistance. Otherwise, it is suggested (albeit not as an inflexible rule) that there be 2 officers in a team, one drawn from CSD, the other from LSD.

(6) The EOC will need to ensure that Chinese walls are in place to prevent a CSD officer who has acted as conciliator on a complaint from later having anything to do with the detailed investigation and legal assessment of that same complaint. One way to achieve this is to implement a rule that, where an officer from one CSD sub-division has acted in a conciliation, only a CSD officer from the other sub-division can be part of a team tasked with the detailed investigation and legal assessment of the relevant complaint.

(7) In most cases, the EOC should target making a decision on whether or not to grant full legal assistance for the purposes of bringing a case to court within 6 months from the failure of conciliation.

(8) EOC officers should regularly take part in capacity-building workshops and seminars, covering matters such as sensitivity to the subtle psychological dynamics that may be in play where there are power or other imbalances between the parties to a conciliation; techniques for dealing with difficult complainants; advising lay persons; the conduct of investigations; working as a team; etc.

(9) The EOC should seriously consider the possibility of LSD officers providing specific legal advice to complainants even during the conciliation stage.

B. The outcomes of the legal assistance process

B.1 The problem

43. The LSD prepares a brief for the LCC on a complaint. On the basis of that brief, the LCC decides whether or not legal assistance is to be granted and (if so) what sort of legal assistance.

44. The criticism that the EOC has not been sufficiently pro-active in granting legal assistance and in taking cases to court is nothing new. It has repeatedly been suggested that the EOC is too focused on resolving cases through conciliation, rather than bringing cases to court. For instance, Kapai (2009) has written (footnotes omitted):

> "In its thirteen year-tenure, the EOC has only rendered legal assistance in a handful of discrimination-related cases. Out of the thirty or so discrimination claims brought under the three anti-discrimination laws before Hong Kong courts, the EOC has offered legal assistance by way of representation in twelve of them, appeared as amicus in three of them, and been the plaintiff bringing the action in just two of them. This amounts to just slightly over 50 per cent of the reported cases involving discrimination since the anti-discrimination laws were enacted. Whilst this is encouraging, when viewed in light of the number of requests for assistance received, the number of cases in which the EOC has rendered legal assistance amounts only to about 40 per cent of the total requests received to date. This means that more than half of the complainants seeking legal assistance are turned away by the EOC. The limited number of cases in which the EOC has been involved is reflective of the strong conciliation-oriented settlement principle which underlies the EOC's statutory mandate and duty, under which many complainants have little choice but to opt for the conciliation procedure especially since there is no certainty as to whether or not they will receive legal assistance from the EOC once conciliation has failed. As a study into the investigative and conciliatory powers of the EOC has found, the 'conciliation-first' model has essentially undermined the impact of antidiscrimination laws in Hong Kong due to the lack of visibility of these incidents and subsequent complaints since there is no 'judgment' at the end of the conciliation process, nor are the facts or findings made public. This enables a respondent to a complaint to pressure the complainant into settling for meagre remedies, without adverse publicity if the complainant is unable to fund litigation or uncertain whether legal assistance from the EOC will be forthcoming. The fact that the identity of parties, the facts and the outcome of conciliated claims are not available except in limited form on the settlement register, only further limits the impact of the law and its possibilities as a precursor for social change because it enables the perpetrators to hide behind the cloak of anonymity and persist in their invidious attitudes at very little cost. This approach has also undermined the urgency with which discriminatory attitudes are dealt with. The time lag between the complaint, failure to conciliate (which may signal the end for some complainants), court hearing (if the case is filed in court) and eventual

outcome, only exacerbates the suffering of a complainant and gives the appearance that the issue is unimportant enough to warrant a better system of redress."[7]

45. Examining a sample of 451 complaints which the EOC concluded between July 2000 and March 2001, Petersen et al (2003)[8] found that there were applications for legal assistance by the complainants in 32 of 71 cases (45.1%) that were not successfully conciliated. Legal assistance was granted in 17 of 32 cases (53.1%). More recently, the EOC has found that between 2008 and 2017, the EOC received 424 applications for legal assistance. Over that period, the LSD completed 416 applications and legal assistance was granted in 193 cases (46.3%). Between January and September 2018, the LCC granted legal assistance in 25 of 40 cases (62.5%). As at September 2018, the LSD was handling 37 cases for which legal assistance had been granted and was processing applications for legal assistance in 25 cases. The foregoing results suggest that the prospects of a complainant receiving legal assistance is roughly around 50%.

46. It is difficult to say, in a vacuum, whether 50% is a good or bad statistic. I therefore express no view on whether 50% or thereabouts is or is not a respectable figure. As Kapai (2009) accepts, a higher figure "does not necessarily mean that society would be better off if it were litigious" (at 344). If a case is unmeritorious, it would be an abuse of process and a waste of taxpayers' money to bring a case to court. It would also be unfair and oppressive to a respondent for the EOC to litigate a complaint that is frivolous or vexatious or has no real prospect of success.

47. The problem, however, is that it will usually be difficult to prove discrimination. For example, in sexual harassment cases under the SDO, documentary evidence will inevitably be scant. It will often come down to the court choosing between the oral testimony of the complainant and that of the respondent. Both will almost certainly be subjected to intense cross-examination, if they elected to give evidence. For most victims, that would be a traumatic and daunting experience. Further, because of the gravity of the accusation which can have repercussions on a respondent's reputation, the court will require that the complaint be proved on a more stringent basis than the simple balance of probabilities.[9] The court will instead wish to satisfy itself that the complaint has been made out beyond a reasonable doubt. In those circumstances, it might be hard to distinguish, when deciding whether to grant legal assistance, between a hopeless case which has little or no foundation as a matter of fact and law, and a meritorious case for which, apart from the complainant's oral testimony, there is little evidence and which may result in failure at court. Plainly, one should not grant legal assistance in the former, but what of the latter situation?

---

[7] Puja Kapai, "The Hong Kong Equal Opportunities Commission: Calling for a New Avatar" (2009) 39 HKLJ 339, at 342–344.

[8] At 150–151. Petersen et al (2003) is the study to which Kapai (2009) refers in the passage quoted immediately above.

[9] This is despite the District Court Ordinance (Cap. 336) providing that the court in the exercise of its jurisdiction under each of the anti-discrimination statutes "shall not be bound by the rules of evidence and may inform itself on any matter in such manner as it sees fit, with due regard to the rights of the parties to proceedings therein to a fair hearing, the need to determine the substantial merits of the case and the need to achieve a prompt hearing of the matters at issue between the parties". See ss. 73B(5), 73C(5), 73D(5) and 73E(5) of Cap. 336 on the proof of offences.

48. The EOC can seek the advice of counsel in the latter situation. But the legal advice received may amount to no more than the view that the case is a difficult one and it all depends on how the complainant holds out in cross-examination. In that event, what is the EOC to do? What I am concerned about is whether the EOC's complaint handling process can be improved to reduce the possibility of complainants being deterred from seeking judicial redress by the difficulties inherent in proving discrimination to a court's satisfaction. Can the risk of complainants feeling pressured to accept only "meagre remedies" in conciliation be minimised? How might the EOC approach the grant of legal assistance with that systemic objective in mind?

B.2 The proposed solution

49. The statutory criteria for the grant of legal assistance have already been mentioned (and in respect of the SDO set out above). The criteria are fleshed out in the EOC's Internal Operating Procedures (IOP) Manual. By way of guidance, the IOP Manual observes in paragraph 6.3.3 that, in considering whether to grant legal assistance, the EOC should take account of a range of factors, including:

(1) the strength of the evidence in the case;
(2) any question of principle involved;
(3) the complexity of the issues;
(4) the prevalence of the particular act/conduct;
(5) the attitude of the respondent during (or in respect of) conciliation;
(6) the educational value of assisting the case;
(7) the individual redress of the particular case;
(8) the positive/negative results that a court case could achieve;
(9) whether the case falls within an area which requires special attention or raises an issue which needs to be decided by a court;
(10) whether the matter was initially referred to the EOC for investigation and conciliation and a genuine attempt at conciliation was made;
(11) what implications the case has for the EOC's resources; and,
(12) whether EOC assistance is warranted in all the circumstances.

50. It will be seen from the anti-discrimination statutes that legal assistance is not limited to bringing a case to court. The EOC can certainly grant full legal assistance for that purpose. But it can also provide limited legal assistance for the purposes of (say) only advising a complainant on the strengths and weaknesses of a case or assessing whether or not a case is worth bringing to court. Adoption of the recommendations in Section A, especially the suggestion that upon failure of conciliation (formerly early conciliation) most complainants should be provided with some legal advice on the merits and weaknesses of their case, should mean that at least some legal assistance will be granted in more cases. Whether full legal assistance to bring a case to court is to be granted will depend on an assessment of the range of factors identified in the IOP Manual. It is difficult to be more comprehensive than what has been set out there.

51. My only caveat is that, when evaluating the "strength of the evidence" and "any question of principle involved", the LSD and LCC should bear in mind that a sizeable number of cases are unlikely to be clear-cut. When I practiced at the bar, given the reality of litigation

risk, I rarely evaluated a client's prospects of success at more than 50%. When I evaluated a case's prospects at 20% or 30%, I regarded that as equivalent to having a fair prospect of success. Thus, the LCC should be cautious about refusing legal assistance for court proceedings because a case has less than a 50% chance of success. A case with significantly less than a 50% chance of success, for instance, may enable the court to give guidelines, even if only in *obiter*, on substantive areas of discrimination law or on best practices for institutions to follow in order to eliminate discrimination. Such statements of the court may be valuable, even where ultimately the case is unsuccessful due to a complainant's poor performance under cross-examination and the lack of supporting evidence.

52. In terms of minimizing the risk of complainants being discouraged by the hurdles involved in bringing a case to court, it is hoped that the more liberal regime of legal assistance described in the previous section will reassure aggrieved persons that they do not have to opt for a conciliated settlement early on, if they are uncomfortable about doing so. They will have the prospect of at least having initial legal advice on the strengths and weaknesses of their case and (subject to the results of detailed investigation and a rigorous analysis of the merits of their complaints in light of those results) of the EOC bringing their case to court.

53. As far as a time-frame is concerned, if (as suggested in Section A) the detailed investigation and assessment of a case can occur within a period of 6 months (following a conciliation process of about 2 to 3 months), it should be a normal expectation that the LCC decides whether to grant full assistance within 9 to 12 months of a complaint being made or of a specific enquiry being classified as a complaint.

54. Where the LCC refuses full legal assistance, a complainant is entitled to know why. The EOC currently gives reasons for any refusal of full legal assistance.

55. The EOC is essentially a public body providing specialist dispute resolution, advisory and advocacy services in connection with discrimination complaints. Once conciliation fails, the EOC assists an aggrieved person to map out a strategy for obtaining redress, including (where appropriate) through litigation in court. In those premises, where the LCC decides that a case does not merit going to court, the member of the public who has initiated the complaint and invested energy in seeking redress for the perceived wrong done to her or him, is entitled to know at least in broad terms why the EOC has decided not to grant full legal assistance. If (as suggested in Section A) a complainant has been "kept in the loop" during the detailed investigation and assessment of her or his case, the person should be more or less already aware of the likely reasons for the EOC's decision. But the complainant should still be entitled to a written determination formally setting out the grounds for refusal.

56. When refusing full legal assistance, the LCC does not act as a court. It exercises an administrative discretion, rather than a judicial function. As mentioned, in coming to its decision, it takes account of a broad range of factors, including (but not limited to) the legal and evidentiary merits of a case. Thus, the reasons that the LCC gives for a refusal do not need to be set out in the same detail as in a court judgment. Succinct paragraphs stating the gist of its reasoning should be sufficient. But it will not be enough merely to issue a terse statement, claiming that a complaint lacks legal or evidentiary merit and no principle of importance is involved.

57. The complainant may not be happy with the refusal and the reasons given. The complainant may seek reconsideration. In support of such application, the complainant may provide further materials or repeat arguments canvassed previously. The EOC should have a formal system of review whereby a complainant (say) puts in a request for reconsideration (with any supporting materials) within 2 weeks and the LCC reconsiders its decision within 2 weeks thereafter. But it is suggested that a line needs to be drawn at some point. After (for instance) one reconsideration, the LCC should stand by its decision. It would not benefit anyone to have a protracted series of reviews of the LCC's decision, merely because a complainant with little merit in her or his complaint does not accept the same. It is conceivable that a complainant, whose application for full legal assistance is refused, will seek judicial review of the EOC's decision. The complainant may, for instance, challenge the LCC's grounds for refusal as *Wednesbury* unreasonable. But, given that the EOC has been transparent in its procedures, applications for judicial review will in all likelihood fail at the threshold stage, the court according a wide margin of deference to the EOC in the exercise of its discretion whether to grant legal assistance.

58. On occasion, the EOC seeks legal opinions from lawyers to help the LCC to decide whether to grant or refuse legal assistance. Where this is done, the EOC will need to be transparent as to whom it appoints. Otherwise, the EOC will be susceptible to accusations that it only appoints particular persons because of the likelihood of obtaining a view favourable to the EOC's stance from such lawyers. Transparency might include steps such as maintaining a public roster of solicitors and barristers qualified to advise on discrimination law. There might be a requirement that lawyers on the roster undergo a specified number of capacity-building activity-hours (continuing professional development) annually to keep abreast of the latest ideas and developments in discrimination law and practice. Appointments to advise should be in accordance with the roster, save in special instances where deviations from the roster may be warranted. Fees for advising on EOC cases might be at a standard hourly rate with the number of hours capped to a pre-agreed maximum.

59. Recently, there has been debate over the extent to which complainants refused legal assistance may have sight of counsel's opinion used by the LCC in coming to its decision. While not being against disclosure of counsel's opinions in principle, the LCC has been reluctant to provide copies of the same to complainants. The LCC takes the view that counsel's opinions belong to the EOC and not to the complainant, as counsel draft their advice to assist the LCC in determining whether there is a case for legal assistance. The LCC is also concerned that, where counsel's opinion is provided to a complainant and where that complainant later decides to bring court proceedings on her or his own, the opinion will have to be disclosed to the opposing side in general discovery, the opinion being a third-party document (that of the EOC) not subject to legal professional privilege (LPP) in the complainant's hands. In the situation posited (namely, where counsel has taken a negative view of the merits of a complaint and this has been made a reason for the LCC's refusal of legal assistance), the LCC is afraid that the opinion (if disclosed to a respondent) may prove detrimental to the complainant's court case.

60. I have doubts whether the LCC's analysis is correct. For example, I have doubts whether counsel's opinion belongs exclusively to the EOC, merely because it pays for the same and

uses the opinion as a basis for its decision on legal assistance. It is arguable that, in seeking the opinion, the EOC is also acting as agent for a complainant. The complainant has ownership over her or his case. If the EOC assists the complainant in investigating her or his case, the complainant does not lose ownership over the complaint. Accordingly, where the EOC seeks legal advice, it does so on behalf of itself and the complainant, to assist in assessing whether a contemplated court action is worth bringing as a matter of law and evidence. In those circumstances, counsel's opinion could well be covered by LPP, even in the hands of a complainant. Even if the opinion is not subject to LPP because it belongs to the EOC as a matter of strict law, it may still be covered by litigation privilege in the complainant's hands.[10]

61. Whether or not the EOC's analysis of LPP is correct, and even if there is a potential problem because a complainant may have to disclose the opinion to the respondent in court proceedings, the difficulty can be explained to the complainant. If the complainant still insists on having sight of the opinion, then it seems as a matter of principle that the complainant should be provided with a copy. The complaint is her or his case. She or he should on that basis be entitled to know why it is said that the complaint lacks legal or evidentiary merit. The EOC might be concerned as to where the complainant's requests will end. For instance, what happens if the complainant alleges that the instructions to counsel might have been drafted in a way that was bound to elicit a negative assessment and consequently asks to see counsel's instructions? Again, it seems that, in the interests of transparency, the complainant may well have a right to see counsel's instructions. There may be a fear that the request to have sight of counsel's instructions and opinion are a prelude to an application for judicial review of the EOC's decision. But the prospect of judicial review would not be a valid ground for denying a complainant sight of material to which she or he should be entitled in principle, given that the EOC is not actually standing in final judgment of the merits of her or his complaint, but is instead providing a service to the complainant.

62. Where counsel's opinion is provided, that would not absolve the EOC from the requirement to support a refusal of legal assistance with its own succinct reasons. Counsel's opinion can only touch upon the strengths and weakness of a complaint as a matter of law and evidence. Counsel would not be in a position to take account of the much wider range of factors which according to the IOP Manual the EOC needs to consider. Thus, counsel's opinion would at best be only one factor in the EOC's decision. The EOC would still need to identify all other factors leading it to refuse legal assistance.

63. A suggestion has been made that, in the interests of efficiency, the LCC's function of deciding whether or not to grant legal assistance (in full or part) should be exercised by the chairperson. The LCC on this model would only serve as a review body when a complainant is unhappy with the chairperson's refusal. But, in light of the wider range of factors (legal and non-legal) that need to be considered in deciding whether to grant legal assistance, the LCC would probably be in a better position to decide than the chairperson. The LCC does not only consist of lawyers. It also comprises lay persons appointed to speak out for the interests of minority and other interests in Hong Kong society. Consequently, given the broad range of experience represented within the LCC's membership, the LCC ought to be much better

[10] On litigation privilege, see Charles Hollander QC, *Documentary Evidence in Hong Kong* (Hong Kong: Sweet & Maxwell, 2015), [16–001] and [16–002].

placed to weigh the relevant factors than a single individual, such as the chairperson, no matter how cosmopolitan she or he might be. What is more important would be for the LCC to meet regularly, fortnightly or even weekly when the volume of cases and discussion points justify such frequency, so as to make its decisions (whether at first instance or on review) as speedily and efficiently as possible.

B.3 Summary

64. In relation to the process of deciding whether to grant legal assistance, the key recommendations that I am making are as follows:

(10) The EOC should bear in mind that a sizeable number of cases are unlikely to be clear-cut. Thus, the LCC should be cautious about refusing legal assistance for court proceedings merely because a case has less than a 50% chance of success. A case with significantly less than a 50% chance of success may nonetheless enable the court to give guidelines, even if *obiter*, on substantive areas of discrimination law or on best practices for institutions to follow in order to eliminate discrimination.

(11) it should be a normal expectation that the LCC decides whether to grant full assistance within 9 to 12 months of a complaint being made or of a specific enquiry being classified as a complaint.

(12) The LCC should continue its practice of giving reasons for any refusal of full legal assistance. It will not normally be enough merely to issue a terse statement that a complaint lacks legal or evidentiary merit and no principle of importance is involved. Reasons can be succinct, but they should convey the gist of the considerations that the LCC has taken into account.

(13) The EOC should have a formal system of review whereby a complainant (say) puts in a request for reconsideration (with supporting materials) within 2 weeks of a refusal of legal assistance and the LCC reconsiders its decision within 2 weeks thereafter. There should not be a protracted series of reviews by the LCC of a decision to refuse legal assistance, merely because a complainant with little merit in her or his complaint does not accept the same.

(14) The EOC should have a transparent procedure for the appointment of lawyers from whom legal opinions are sought to assist in the decision whether to grant or refuse legal assistance. Transparency might include maintaining a public roster of solicitors and barristers qualified to advise on discrimination law. There might be a requirement that lawyers on the roster undergo a specified number of capacity-building activity-hours (continuing professional development) annually to keep abreast of the latest thinking and developments in discrimination law and practice. Appointments to advise should normally be in accordance with the roster, save in special instances where deviations from the roster may be warranted. Fees for advising on EOC cases might be at a standard hourly rate with the number of hours capped to a pre-agreed maximum.

(15) As a matter of principle and in the interests of transparency, where legal assistance is refused on the basis of external legal advice, complainants should be entitled to sight of instructions to counsel and counsel's opinion.

(16) Decisions on whether or not to grant legal assistance should continue to be the responsibility of the LCC, rather than being delegated to the chairperson. However, depending on the volume of cases in which legal assistance is being considered, the LCC should be prepared to meet more frequently, even weekly or fortnightly, in order to ensure that decisions on legal assistance are made in a timely and efficient manner.

C. The integrity of the process

65. I deal here with miscellaneous matters needed to support the complaint handling process.

C.1 The handling of enquiries

66. Not all complaints are coherently formulated when they first come to the EOC. A matter may initially be brought to the EOC as an "enquiry". A person may want to know whether a matter falls within the EOC's mandate, may wish to vent some grievance, may be seeking general or specific information on discrimination, may be requesting guidance on whether and how to make a complaint against someone, or may want to draw the EOC's attention to some actual or perceived general or particular discriminatory practices in Hong Kong society today. The enquiry mat be initiated by letter, telephone, fax, email, text message or in person.

67. The EOC procedures for dealing with enquiries are set out in Part 2 of the IOP Manual. In gist, the procedures provide for a roster of Duty Officers (drawn from CSD) to handle enquiries on a day-to-day basis. Upon receipt of an enquiry, a Duty Officer must first be satisfied that the matter falls within the EOC's jurisdiction. Where necessary, due to the complexity of an enquiry, the Duty Officer may seek advice from a more senior person within CSD. Where an enquiry raises a matter believed to be outside the EOC's remit, the Duty Officer will so inform the person making the enquiry. The Duty Officer may refer the enquirer to an appropriate government agency for dealing with the matter.

68. The EOC's internal standard is to handle telephone enquiries immediately, walk-in enquiries within 30 minutes, and written enquiries within 14 days. That does not necessarily mean that the enquiry will be resolved within those time-frames, as it may be necessary for an enquirer to revert with further information or for the Duty Officer to consult with senior staff on how best to respond.

69. At some point, the enquiry can crystallise into a complaint[11]. Paragraph 2.5.6 of the IPO Manual states:

> "When enquirer wishes to lodge a complaint, but the information available is not sufficient to formulate a case, Officer needs to find out more relevant information for final decision. The

[11] But, before it can become a "complaint", a verbal "enquiry" must be put in written form.

> enquiry is treated as Enquiry for [a] Complaint for Investigation [and Conciliation] (CIC). After satisfying that sufficient information is available in support of the allegation, the Officer will then submit to [Chief Equal Opportunities Officer] for upgrading the case to the status of CIC or SII [Self-Initiated Investigation]."

This provision has caused difficulty in the past because CSD might treat an enquiry for too long, before classifying it as a complaint. A case, which ought to have been classified as a complaint much earlier on, will languish as an enquiry. Contrary to what should happen, there will be no early attempt to conciliate the matter or investigate the same. Instead, the enquirer may have to contend with a seemingly endless stream of questions and correspondences apparently intended to help she or he formulate her or his grievance into a coherent complaint.

70. I recommend that the EOC adopt an internal guideline of fully responding to an enquiry within 4 weeks. That means that, within 4 weeks, the enquiry must either be disposed of or classified as a complaint. There may be exceptional circumstances where, for one reason or another, it will not be possible to resolve an enquiry one way or another within a standard of 4 weeks. Such cases should be carefully monitored by the COO, ideally on a weekly basis, to ensure that an enquiry does not drag on longer than necessary. As much as possible, all information needed to classify an enquiry as a complaint should be requested from the person making the enquiry within the 4-week standard period.

71. Where requested information is not forthcoming, the EOC may have to warn an enquirer that the EOC is unable to take the enquiry further as the material provided does not justify the making of a complaint. Sooner rather than the later, the EOC may have to make a judgment call and close the matter for lack of information. But the EOC will have to guard against overwhelming an enquirer with too many requests for additional information. Section A has recommended that a conciliator carry out the preliminary investigation needed to enable one to understand in broad terms the nature of a complainant's grievance and a respondent's position. It is suggested that the information required for the purposes of upgrading a matter from an enquiry to a complaint, be kept to a minimum with that in mind. The information requested might perhaps be little more than the following: by whom a wrong was allegedly done; when and where the wrong is said to have been perpetrated; how the wrong is said to have been committed; and what relief is being sought.

72. As a matter of practice, to preserve the impartiality of the EOC officer who eventually acts as conciliator of an enquiry that has become a complaint, it may be advisable for the CSD officer handling the enquiry not also to be assigned to act as conciliator of the resultant complaint. But I put forward the latter suggestion only tentatively. Inevitably, where an enquiry appears to involve discriminatory conduct falling within the EOC's jurisdiction, an officer will likely assist the enquirer in formulating a coherent complaint. Thus, the officer may not be perceived by a respondent as sufficiently neutral to act as conciliator. On the other hand, the information that the CSD officer will be eliciting from the enquirer would probably be no more than the information that I have suggested a conciliator needs to conduct an effective conciliation. Accordingly, in those circumstances, it may be acceptable for the officer assisting the enquirer also to act as conciliator. This is a matter that the EOC can monitor, assessing in individual cases whether it would or would not be appropriate for an officer also to act as conciliator.

73. There has been criticism of the fact that, where an enquiry has been elevated into a complaint, the CSD officer assigned to handle the complaint then asks the aggrieved person the same questions that have already been answered when the aggrieved person first brought her or his enquiry. The process of investigation then appears to the aggrieved person to start all over again from scratch, as if no information had previously been gathered. This can be frustrating for the aggrieved person. There are a number of ways to deal with this. One way, subject to the caveat in the previous paragraph, is for the officer handling the enquiry also to act as conciliator. Another way, where a different officer acts as conciliator, is for the information that the aggrieved person has provided to be made available to the conciliator, but subject to the aggrieved person agreeing to the provision of such information (in whole or part) to the conciliator.

74. Another criticism of the enquiry process has been that the EOC is not carrying out a sufficient number of Self-Initiated Investigations (SIIs). These result when a complaint is made about alleged general discriminatory practice in some sector of Hong Kong society. For example, under SDO s. 70, the EOC has power to "conduct a formal investigation for any purpose connected with the carrying out of any of its functions". Critics say that the EOC should be conducting more such formal investigations to root out discrimination. It is also said that the EOC (through its Policy, Research & Training Division (PRTD)) is not systematically carrying out research into discrimination in Hong Kong to inform the EOC as to what practices in which sectors of Hong Kong society are in need of investigation.

75. It appears that the EOC itself wishes to be in a position to conduct more regular and systematic SIIs. But it is constrained from doing so by limited budgetary resources and available personnel. The EOC is currently under-staffed as a result of recent resignations, due in part to the tensions discussed above. Even when it is back at full strength, there is a general feeling that it would assist to have one or two more officers to alleviate the workload on current staff. In all likelihood, the recommendations put forward in this report, insofar as they lead to limited legal assistance being granted to more unsuccessfully conciliated complainants, will mean that CSD and LSD officers have more rather than less work. Thus, I recommend that the government consider increasing the head count at the EOC by one or two junior officers above present full-strength level. That should enable the EOC to carry out more SIIs with a view to more systematically dealing with discrimination in Hong Kong.

76. In suggesting that manpower at the EOC be increased, I am fully aware of the criticism, especially by NGOs, that too few cases are being brought to court or granted legal assistance despite the EOC employing some 8 legal counsel at a cost of about HK$10,792,000 per year. The picture sought to be conveyed is of lawyers in the LSD being over-paid for very little work. I think that the criticism is unfair and unjustified. The EOC does not refuse legal assistance lightly. Whether or not legal assistance is granted, LSD officer have to spend much of their time analyzing a complaint in depth. A decision to refuse is only made after a detailed investigation and review of the merits and prospects of a complaint. It is crude and superficial as an analysis simply to divide the total salary paid to officers of the LSD by the number of cases in which legal assistance is granted. The time spent in the assessing the merits of cases which do not qualify for legal assistance also needs to be brought into the calculus.

C.2 The handling of confidentiality

77. The discrimination statutes provide in their subsidiary legislation for the handling of confidential information. For example, section 6 (also known as Rule 6) of the Sex Discrimination (Investigation and Conciliation) Rules states:

> "(1) The information furnished to the Commission by a person (the informant) in response to a notice served on him under section 5 [that is, Rule 5 discussed above] shall not be disclosed by the Commission, any member of the Commission or a committee, employee of the Commission, conciliator or any person who has been such a member, employee or conciliator, except—
>
> (a) with the informant's consent;
>
> (b) in the form of a summary or other general statement published by the Commission which does not identify the informant or any other person to whom the information relates;
>
> (c) in a report under section 8(4);
>
> (d) to members of the Commission or a committee, employees of the Commission or conciliators or, so far as may be necessary for the proper performance of the functions of the Commission, to other persons; or
>
> (e) subject to section 84(6) of the Ordinance, for the purposes of any court proceedings.
>
> (2) Any person who discloses information in contravention of subsection (1) commits an offence and is liable on conviction to a fine at level 4."

78. The discrimination statutes also provide rules in relation to the conduct of conciliation conferences. For example, Rule 8 (also known as Section 8) of the SDO (Investigation and Conciliation) Rules states:

> "(1) A conference is to be held in private.
>
> (2) The person presiding at a conference may determine its order of proceedings and the manner of conducting it.
>
> (3) Unless the person presiding at a conference consents—
>
> (a) an individual is not entitled to be represented at the conference by another person (unless otherwise provided in any provision in the Disability Discrimination Ordinance (Cap. 487) which is applicable to the particular case);
>
> (b) a body of persons, whether corporate or unincorporate, is not entitled to be represented at the conference by a person other than an officer or employee of that body.
>
> (4) Where the person presiding at a conference—
>
> (a) is of the opinion that a matter cannot be settled by conciliation;
>
> (b) has endeavoured to settle a matter by conciliation but has not been successful; or
>
> (c) is of the opinion that the nature of a matter is such that it should be referred to the Commission,
>
> he shall refer the matter to the Commission together with a report relating to any investigation made into the matter.
>
> (5) A report for the purposes of subsection (4) shall not include or describe anything said or done in the course of the conference."

79. SDO section 84(6) states:

> "Evidence of anything said or done by any person in the course of conciliation under this section (including anything said or done at any conference held for the purposes of such conciliation) is not admissible in evidence in any proceedings under this Ordinance except with the consent of that person."

80. The gist of the foregoing provisions is: (1) When information is obtained from a respondent under Rule 5 during the conciliation process, such information may be disclosed by the conciliator to other EOC officers for the purposes of detailed investigation and assessment of the merits of a complainant's case; (2) Where a respondent has said anything in a conciliation conference, the conciliator may not disclose such statements to anyone

(including other EOC officers) without the respondent's consent; (3) Any information communicated by a respondent in the course of conciliation will not be admissible as evidence in court proceedings without the respondent's consent.

81. It is assumed that, after an abortive conciliation, a complainant will not be averse to having her or his confidential information disclosed to other EOC officers for the purposes of receiving limited assistance or assessing whether a case merits the initiation of court proceedings. Where an action is brought, the complainant will presumably also not object to her or his confidential information being deployed in the court proceedings, although in appropriate cases the complainant may apply for the same to be disclosed only to the court sitting *in camera*. As a matter of good practice, where any limited assistance is contemplated or granted, the EOC should confirm that the complainant has no objection to the use of her or his confidential information as just outlined.

82. The difficulty arises in the treatment of confidential information obtained from an alleged wrongdoer as part of the conciliation process, howsoever that information is obtained: through Rule 5, through voluntary disclosure during a conciliation conference, or otherwise. Given that confidentiality is a key principle of the conciliation process, it would seem that, notwithstanding Rule 6(1)(d), all information obtained by the conciliator from the alleged wrongdoer should be kept confidential. Such information should therefore not be disclosed to the EOC officers (whether from CSD or LSD) who carry out the detailed investigation and assessment of a complaint following the failure of conciliation. The complainant (who will have taken part in the failed conciliation) may of course inform the EOC officers carrying out the investigation about what happened in the failed conciliation process. That would be much in the manner of a party to litigation informing her or his lawyer about what took place in an abortive mediation. The complainant's account may or may not be an accurate one. That is a difficulty with which the EOC officers handling the complaint for detailed investigation and assessment will have to contend. The point is that the CSD officer who has carried out the conciliation should refrain from communicating anything about the conciliation process (apart from the fact that it failed) to anyone else.

83. The foregoing recommendation is made to preserve the integrity of the conciliation process. It is currently the practice for the results of the detailed investigation carried out in conjunction with what is currently known as "conciliation" (that is, as opposed to "early conciliation") to be provided to LSD. But that seems problematic. The CSD officer conducting detailed investigation in aid of conciliation will inevitably be doing so with a view to ascertaining whether there is a viable complaint against an alleged wrongdoer. If so, the CSD officer can hardly be described as neutral for the purposes of effecting conciliation. Further, because the detailed investigation constitutes part of the conciliation process, its results may only be deployed in court or used in some other way with the consent of the alleged wrongdoer. The process advocated in Section A ensures instead that there is a clear demarcation between "conciliation" (formerly early conciliation), which will only require a superficial preliminary investigation, and an ensuing detailed investigation and assessment of a complaint's prospects. The minimal preliminary information obtained in the conciliation stage will be kept strictly confidential. On the other hand, the results of detailed investigation and assessment may be freely deployed in court, the process having shifted upon failure of conciliation, from being of a conciliatory to being of an adversarial nature. The process

described in Section A caters for the alleged wrongdoer's confidentiality, notwithstanding the conflict inherent in the EOC's twin roles as conciliator and advocate in a given case.[12]

84. A controversy that has arisen internally within the EOC concerns the now regular recording of all telephone conversations between EOC officers and a person making an enquiry or a complaint. Where a respondent telephones a CSD officer (for example, the person assigned to act as conciliator in a case), that call will also be recorded. There has been concern and disquiet among CSD officers that such recordings infringe the confidentiality of the persons involved.

85. To an extent, the recording of telephone calls is intended to protect EOC officers. It sometimes happens that members of the public complain that, in the course of a telephone conversation with an officer, something significant was said by the caller but not acted upon by the officer, or something significant was not said by an officer and so was not appreciated by the caller. A telephone recording provides an easy way of proving or disproving an accusation. It is true that a telephone recording may also be a means of ascertaining whether a member of the public has or has not been treated courteously by an officer when making a call to the EOC. That may upset some officers who might conceivably regard the implementation of a recording system as indicative of a distrust of their professionalism on senior management's part. Nonetheless, it is now commonplace practice to have telephone recordings to ensure that service-providers deal with the public in a manner that is not just efficient, but also polite. It does not seem that the EOC, which is itself a service provider, can be criticised for implementing a recording system on this basis alone.

86. What is more a matter of worry is the treatment of confidential information communicated by any party over the telephone.

87. At the outset, it should be emphasised that communication of confidential information over the telephone is less than ideal. Without a system of telephone recording, it will be difficult to have an accurate record of what was said or not said. In contrast to conferences, where a party can be asked to confirm what was said by signing a summary prepared on the spot, telephone conversations can lead to unproductive disputes over what precisely was said by one person to another. In addition, nuances are often communicated through body language. That element of communication would not be available over the telephone.

88. The communication of confidential information over the telephone can be minimised by having an automatic warning at the start of any conversation that the same is being recorded and may be used for compliance purposes. The EOC's system includes such a warning.

[12] There are analogous difficulties in med-arb where the mediator and arbitrator are one and the same person. Med-arb is possible in Hong Kong, but subject to the safeguards in ss.33(3) and (4) of the Arbitration Ordinance (Cap. 609). The problem is the treatment of confidential information, especially information communicated to a mediator in caucus, when the other party to a dispute is not present. How should the mediator deal with such unilateral communications when she or he later acts as arbitrator in the same case? In practice, the potential for conflict in the handling of confidential information is such that, although med-arb is widely used in Mainland China, most Hong Kong practitioners are unwilling to act as mediator and arbitrator in the same matter.

89. Further, as a rule, conciliation should normally be conducted in face-to-face conferences, so that sensitive information is not merely conveyed over the telephone. In this connection, attention is drawn to the subsidiary legislation of the anti-discrimination statutes. Rule 7 (also known as Section 7) of the SDO (Investigation and Conciliation) Rules, for instance, provides:

> "(1) The Commission may, for the purposes of investigating into an act and in endeavouring to settle the matter to which the act relates, direct, by notice in writing, any person referred to in subsection (2) to attend a conference at a time and place specified in the notice.
>
> (2) The persons the Commission may, under subsection (1), direct to attend a conference are—
>
> (a) any person, who in the opinion of the Commission is likely to be able to provide information relevant to the investigation; or
>
> (b) any person whose presence at the conference is, in the opinion of the Commission, likely to be conducive to the settlement of the matter.
>
> (3) The Commission may pay the reasonable and necessary expenses of the journey to and from the place of the conference, of a person directed to attend under subsection (1).
>
> (4) Where a body of persons, whether corporate or unincorporate, is directed under subsection (1) an officer or employee of that body may attend on behalf of that body.
>
> (5) A person who, without reasonable excuse, refuses or fails to attend a conference as directed under subsection (1) commits an offence and is liable on conviction to a fine at level 4."

The EOC has conference rooms in its new premises in Heung Yip Road. But it might be suggested that, now being located in Wong Chuk Hang, the EOC is no longer as accessible to many Hong Kong residents, especially those under a disability, as the EOC once was when it was in Taikoo Shing. To counteract this, it is suggested that greater use be made of Rule 7, including the payment of travel fare by the EOC to enable complainants and respondents to attend at the EOC's premises for face-to-face conferences at mutually convenient times. This should cut down on the need to communicate confidential information over the telephone.

90. But, even with a warning and an emphasis on face-to-face meetings, confidential information may still be mentioned by a party over the telephone. What then is to be done with the recording of that sensitive part?

91. To address staff concerns, the EOC has recently developed protocols and procedures to protect confidentiality pursuant to advice from the Office of the Privacy Commissioner for Personal Data. The protocols and procedures provide (among other matters) that telephone records will only be retrieved if a dispute arises as to what was said at a relevant time. The records will be used to determine what actually happened. There are strict guidelines on who can access the records and in what circumstances. EOC staff have undergone training in connection with the telephone recording system and the protocols and procedures now in operation.

C.3 The importance of leadership

92. The complaint handling process will not operate effectively without strong leadership from a dynamic chairperson and a forward-looking board.

93. There has been criticism of almost every chairperson appointed to lead the EOC. The government is regularly accused of appointing chairpersons who are said to be too pro-government or pro-business or to have little or no relevant human rights experience. Similar criticisms have been voiced about the appointment of board members.

94. To combat these perceptions, it is recommended that there be greater transparency and rigour in the appointment of chairpersons. The government might, for instance, make use of headhunters to identify appropriate candidates with directly relevant (as opposed to merely peripheral) experience in the pro-active promotion of human rights (especially on anti-discrimination). The search should be carried out on a worldwide basis. The government might, when interviewing candidates, invite them to spell out (1) what they see as the EOC's current strengths and weaknesses, (2) what their vision of the EOC's future is, and (3) how in concrete terms they see themselves as contributing to turning that vision into a reality during their tenure as chairperson. Finally, the government might consult widely with NGOs and other stakeholders, in confidence, as to the suitability of possible appointments.

95. A chairperson is currently only appointed for 3 years. The term may be renewed, but there is no certainty of that happening. Consequently, there is no time for learning on the job. One needs to hit the ground running. Incoming chairpersons should be named in good time to enable them to liaise fully with an outgoing chairperson and thereby familiarise themselves with the work of the EOC well before taking over.

96. It is acknowledged that the government Is looking for exceptional individuals to head the EOC. That is not an easy task. Persons with experience in human rights may not have the patience and inter-personal skills necessary for the job, especially when dealing with EOC staff, complainants, NGOs and other stakeholders. On the other hand, those with inter-personal skills may not have the requisite degree of human rights knowledge and experience. The position comes with an attractive salary at D8 level. But to make it more attractive for the rare charismatic and dynamic candidate, it is recommended that the chairperson's 3-year term be increased to 6 years. That will provide greater security of tenure. It will also make for greater continuity within the EOC. At present, just as a chairperson is getting used to the job, she or he must leave the position as the 3-year tenure will be just about used up. The 6-year tenure can be made subject to a review after (say) 3 years, where the chairperson will need to account to board members for what she or he has so far done. For this purpose, the chairperson's vision statement provided during her or his interview can be used as a checklist to see whether the goals identified by the chairperson while still a candidate for the position have been or are in the process of being accomplished. Depending on the outcome of such review, the chairperson in conjunction with the board can draw up an action plan for the remaining 3 years of her or his tenure.

97. Although it is not necessary for a chairperson to be lawyer, being a lay person should not be used as an excuse for a hands-off approach to the assessment of complaints for the purpose of granting full or limited legal assistance. The chairperson will need to familiarise herself or himself, ideally well before the first day of work, with the substance and procedures of Hong Kong's anti-discrimination legislations. The chairperson should know about conciliation, preferably having had personal experience in conducting mediations. Nor should the chairperson be shy about drawing on her or his practical experience to question legal assessments of complaints, especially where LSD's advice is for refusal of legal assistance. In addition, the chairperson should have some idea of the sectors of Hong Kong society which she or he would, subject to available resources, like to have formally investigated with a view to determining whether discrimination exists within those sectors.

98. Since the board is supposed to support the chairperson in dealing with enquiries and complaints and executing the EOC's mandate to eliminate discrimination, its members should also be rigorously chosen. There should be greater transparency in the system of appointments. There is a feeling that the government's appointments have been the "usual suspects" who are regularly appointed to this or that public body or committee. The government should cast a wide net when considering whom to appoint as members. The job of member is not a sinecure. It is onerous. Ideally, the government should invite expressions of interest for membership in the board. It should consult widely with NGOs and other stakeholders as to potential appointments. There should be interviews with prospective appointees to identify what expertise or insight they propose to bring to the board. For example, an aspiring member should be able to identify (1) which sector of society she or he intends to stand up for while in the board; (2) what she or he perceives to be the EOC's strengths and weaknesses; (3) what her or his vision is of the EOC's future; and (4) how she or he plans to work to make that vision a reality.

99. In conversations with board members, there is too often an impression that one is uncertain or unclear as to what expertise or knowledge she or he brings to the EOC and what relevant interest group's viewpoint she or he is supposed to stand up for while at the EOC. Often there are apologies that a member is new or, being only a lay person, is unfamiliar with the law. Being recently appointed or not being a lawyer cannot be used as excuses. Members are only appointed for two years. Their tenure may be renewed, but there is no guarantee. Just like the chairperson, members need to hit the ground running. Prior to commencing their tenure, they should have familiarised themselves with the functions of the EOC and obtained a working knowledge of Hong Kong discrimination law and practice. From day one of their appointment, they should have a coherent picture of what they wish to accomplish as a member and they should be prepared to speak out for that vision.

100. Membership of the LCC is drawn from the board. The LCC assesses whether legal assistance should be granted in whole or part to a given complainant. That requires the assessment of legal issues. Consequently, it is inevitable that members who are lawyers will sit on the LCC. But, as noted in Section B.2, the LCC does not purely decide matters on legal merits. Thus, it may also be the case that non-lawyers are appointed to the LCC. However, there should be a rationale for such appointment. Thus, a lay member might be appointed to speak up for the interests of some sector of the public that is prone to be discriminated against in Hong Kong society today or a lay member might be appointed because of familiarity with practices (including discriminatory practices) in (say) particular organisations. Careful attention needs to be paid to the appointment of members to the LCC. Every appointment to the LCC should be clear as to what expertise, experience or insight she or he brings to that body and how she or he hopes to contribute to that committee's decisions.

C.4 The importance of support

101. I have already discussed the need for additional officers in Section C.1. I focus here on the importance of technical back-up.

102. The EOC has an in-house database (known as the Case Management System (CMS)) to support its work. In theory that contains records of all the enquiries and complaints handled by the EOC. I say in theory because the CMS is not user-friendly. It is cumbersome to use. It is not a straightforward operation to call up past cases on particular types of discrimination and information on how such cases where handled in the past. Nor is it easy to generate statistics about the EOC's cases in particular areas over specific periods of time from the CMS. Essentially, the CMS is badly in need of modernization.

103. It is accordingly recommended that the CMS be updated. Experts need to sit down with EOC officers at all levels to work out what they need in order to conduct their work efficiently and what sort of statistics they may want to generate from time to time in order to evaluate the EOC's effectiveness both generally and in relation to specific types of discrimination. On the basis of such information, the experts can then revamp the CMS to ensure its utility as an analytical and research tool in the decades to come.

C.5 The interests of the respondent

104. This report has so far concentrated on the interests of complainants. But one should not lose sight of the need to accord due process to respondents.

105. Petersen et al (2003) found at [14] that:

> "Private sector companies (37.8%) and individuals (37.2%) were the most commonly named respondents in our sample, followed by government departments (14.7%) and other public sector organisations (10.2%). We divided private sector companies into multi-national companies and local companies for the purposes of our analysis. Local companies (24.7%) represented almost double the percentage of multinational companies (13.1%) named as respondents.
> Breaking the figures down by ordinance, individuals were named as respondents at a similar rate in complaints filed under both the SDO and FSDO (36.7%) and the DDO (37.5%). However there were significant differences in the nature of the non-individual respondents. Almost half (48.5%) of all SDO and FSDO respondents were private sector companies (30.1% being local companies and 18.4% being multi-national companies). Only 10.2% of SDO and FSDO respondents were government departments and a further 4.6% were other public sector organisations. In contrast, 32.8% of non-individual respondents under the DDO were in the public sector (18.2% being government departments and 14.6% being other public sector organisations). The private sector accounted for only 29.7% of DDO respondents..."

At [15], they estimated that:

> "a higher percentage of SDO and FSDO respondent companies or organisations (51%) were small organisations employing less than 100 people while the reverse was true for DDO respondents. Large organisations employing 1,000 or more people accounted for 43.8% of DDO respondents; medium sized organisations for 25% and small organisations 31.3%."

106. Consequently, a significant percentage of respondents at the receiving end of complaints brought to the EOC are either individuals or MSMEs (micro-, small- and medium-sized enterprises). Multi-nationals and government institutions can fend for themselves as respondents. But individuals or MSMEs will not necessarily have the resources to engage lawyers to assist them during the conciliation process or, when legal proceedings are brought, to conduct their defence. This could lead to possible oppression where legal assistance is mistakenly granted to fight an unmeritorious case with little or no realistic prospect of success in court. There would be moral hazard. The complainant would have little incentive to settle because her or his costs would be covered by the EOC. Indeed, the complainant may be

vindictive and relish putting the respondent in a difficult position financially through the instigation of litigation. At the end of the day, the usual costs order in anti-discrimination cases before the Court will be that each party bear its own costs. Such order is to be made "unless the Court otherwise orders on the ground that—

(a) the proceedings were brought maliciously or frivolously; or
(b) there are special circumstances which warrant an award of costs."

It is unlikely that the court will regard the fact that a respondent is an individual or an MSME as a special circumstance justifying an order of costs against the EOC where a complainant has lost a case. Thus, the respondent may be in the position of having successfully defended against a frivolous case, only to find one's self financially drained.

107. Accordingly, especially in cases involving individual or MSME respondents, in deciding whether to grant full legal assistance for the purpose of taking a case to court, the LCC has a unenviable responsibility. It has to guard against granting full legal assistance to trivial, frivolous or vexatious complaints with little or no realistic prospect. The line between a frivolous or vexatious complaint and one which, albeit hard to prove, has merit, will at times involve a difficult judgment call on the LCC's part. The only point being made here is that in deciding whether to grant full legal assistance the LCC should also bear in mind the financial situation of the respondent and the potential for moral hazard.

108. Insofar as fairness is concerned, the recommendations here on maintaining the respondent's confidentiality are an important aspect of due process. In addition, while the EOC's focus must of necessity be on complainants, it can still provide a standard information package for respondents (in particular, respondents who are individuals or MSMEs), directing them to possible sources of free legal advice.

C.6 The primacy of conciliation

109. I return to the philosophical criticisms of conciliation mentioned in Section A.1. The gravamen of the complaints is that the EOC puts too much stress on conciliation. This could (it is contended) lead to (1) a grievance not being adequately investigated so that a complainant settles on terms that are overly generous to a wrongdoer; (2) a complainant being discouraged from proceeding with a meritorious case by uncertainty as to whether legal assistance will be granted; and (3) respondents believing that they can "buy" their way out of wrongdoing through an early settlement.

110. On the first point, conciliation is required by the discrimination statutes. For instance, SDO s. 84(3) states that the EOC *shall* "where a complaint is lodged ... (a) conduct an investigation into the act the subject of the complaint; and (b) endeavour, by conciliation, to effect a settlement of the matter to which the act relates". It is only after a conciliation fails that, pursuant to SDO s. 85, the EOC can consider whether to grant legal assistance in order (among other matters) to institute court proceedings. Thus, unless the discrimination statutes are amended, conciliation must first be attempted in all cases.

111. On the second point, it is hoped that the recommendations in Sections A.2 and B.2 will give a complainant some assurance that, if conciliation fails, one will at least receive some advice in connection with her or his grievance. Full legal assistance may not be granted in a

case, after detailed investigation and assessment of its merits and reasonable prospects. But at least some legal guidance will normally be provided. The complainant can bear this in mind during the conciliation process when deciding how best to resolve her or his case. The likelihood of at least receiving limited legal assistance in connection with a complaint will to a certain extent redress any power imbalance between complainant and respondent during the conciliation process.

112. On the third point, for reasons similar to those in the preceding paragraph, given that there is a real prospect of receiving at least limited assistance if a conciliation fails, the complainant can evaluate whether to accept an offer made in the course of conciliation or hold out for better. The possibility of at least limited assistance (including legal advice) if conciliation fails, should enable a complainant more accurately to assess her or his options. There will be less uncertainty insofar as being granted some legal assistance is concerned. That ought significantly to circumscribe the scope for a respondent to take advantage of a complainant's fears of not receiving legal assistance and to buy one's way out of wrongdoing cheaply during the conciliation phase. Where a case is meritorious, a respondent will instead face a real likelihood of a complainant being granted some legal assistance to pursue the respondent with the EOC's support, unless a serious settlement offer is made by the respondent during conciliation. Thus, there is a possibility that the recommendations here will lead to more complaints being successfully conciliated with fairer outcomes.

113. Accordingly, while not perfect, within the constraints of the anti-discrimination statutes as presently drafted, I believe that the proposals in this report go some way towards addressing the criticisms levied against the EOC's conciliate first approach.

C.7 The commitment of resources

114. I have not considered in any depth whether the recommendations here will require substantially more resources from government and (if so) how much more. The recommendation for one or two more EOC officers will obviously require extra funding. But that apart, it is unclear that significantly more financial budget will be needed. Further, this is not purely a matter of dollars and cents. Since one is dealing here with upholding human rights and human dignity, it is hoped that even if significant additional costs prove to be involved, the requisite funding will be made available to the EOC.

115. It is true that potentially more cases will be granted limited legal assistance under the scheme being proposed. However, it does not follow that such consequence will necessitate significantly more funds being required for legal assistance than at present. For instance, if the prospect that a complainant is likely to receive limited legal assistance will (as suggested above) prompt respondents to offer fairer settlements and so lead to more cases being successfully conciliated, the additional financial implications may be minimised. Further, detailed investigations are currently already being carried out, albeit as part of "conciliation" following abortive "early conciliation". Under the recommendations here, that detailed investigation will instead form part of the process of assessing the merits of a complaint and deciding whether to grant full legal assistance. The legal guidance to be given to a complainant by way of limited legal assistance will essentially be a report of how the EOC's detailed investigation is proceeding, what needs to be done for there to be a viable court case, and

what difficulties are likely to be encountered along the way. These are precisely the matters that would need to be canvassed in any event in the course of a detailed investigation into a complaint. Thus, it is not apparent that investigating a case and advising a complainant by way of legal assistance pursuant to the proposals here, will entail significantly more resources than investigating a complaint and attempting post-investigation conciliation under the existing system.

C.7 Summary

116. To support and maintain the integrity of the EOC's complaint handling process, the key recommendations that I make are as follows:

(17) The EOC should adopt an internal guideline of fully responding to an enquiry, either disposing of the matter or elevating it into a complaint, within 4 weeks. In exceptional circumstances where it is not possible to resolve an enquiry within the standard of 4 weeks, the enquiry should be carefully monitored by the COO, ideally on a weekly basis, to ensure that it does not drag on longer than necessary. As much as possible, all information needed to classify an enquiry as a complaint should be requested from the enquirer within the 4-week period.

(18) The information required for the purposes of deciding whether to upgrade a matter from an enquiry to a complaint, should be kept to a minimum in the first instance. The information requested might perhaps be little more than the following: by whom a wrong was allegedly done; when and where the wrong is said to have been perpetrated; how the wrong is said to have been committed; and what relief is being sought.

(19) The EOC should monitor whether it would or would not be appropriate for a CSD officer handling an enquiry also to act as conciliator.

(20) The government should consider increasing the head count at the EOC by one or two junior officers above present full-strength level, with a view (among others) to alleviating the workload on existing staff and enabling more SIIs to take place.

(21) A CSD officer who has conducted an abortive conciliation should refrain from communicating anything about the conciliation (apart from the fact that it failed) to anyone else.

(22) Greater use be made of Rule 7, including the payment by the EOC of taxi fares to enable complainants and respondents to attend at the EOC's premises for face-to-face conferences at mutually convenient times.

(23) There should be greater transparency and rigour in the appointment of the chairperson, board members, and the members of the LCC. To make the job of chairperson more attractive to the exceptional persons being sought for that post, a chairperson's tenure should be increased from 3 to 6 years.

(24) The EOC's CMS should be upgraded and made more user-friendly.

(25) In deciding whether to grant full legal assistance, the LCC should also bear in mind the financial situation of the respondent (especially if the respondent is an individual or an MSME) and the potential for moral hazard. Nor should the EOC lose sight of the need to adhere to due process in any dealings with respondents.

III. CONCLUSION

117. This report makes the following recommendations:

(1) The EOC require all complainants to attempt what is now called "early conciliation", such process should normally be completed within 2 to 3 months of the making of the complaint. Where this "early conciliation" fails, the EOC should straightaway proceed to considering whether and (if so) in what form it should grant legal assistance to a complainant. To facilitate this change in operating procedure, it is suggested that what is now known as "early conciliation" should simply be renamed as "conciliation".

(2) Routine use should be made of Rule 5 (as found in the subsidiary legislation to the anti-discrimination statutes) during the conciliation process.

(3) Following the failure of conciliation (formerly early conciliation), save in cases that plainly are outside of the EOC's remit or are frivolous, vexatious, misconceived or lacking in substance, limited legal assistance should normally be granted to a complainant to enable the EOC to perform one or more of these functions:
   (a) providing initial advice to an aggrieved person on the strengths and weaknesses of a complaint;
   (b) developing a plan *in conjunction with an aggrieved person* for bringing a complaint to court (including the degree of investigation required, the evidence to be gathered through such investigation, and the timetable to be followed); and,
   (c) in light of the results of the detailed investigation to be carried out, assessing *in conjunction with the aggrieved person* the legal merits, the strength of the evidence, and the likely outcome of any court proceedings.

(4) Conciliation (including preliminary investigation) should be undertaken by a CSD officer.

(5) If conciliation fails, the initial limited legal assistance to be provided (that is, giving preliminary advice on a complaint, carrying out detailed investigation and evidence-gathering, and assessing in light of investigation results whether there is a case for going to trial) could be undertaken by a team of officers drawn from CSD and LSD. In simple cases, a single person can perform all the functions of this initial legal assistance. Otherwise, it is suggested (albeit not as an inflexible rule) that there be 2 officers in a team, one drawn from CSD, the other from LSD.

(6) The EOC will need to ensure that Chinese walls are in place to prevent a CSD officer who has acted as conciliator on a complaint from later having anything to do with the detailed investigation and legal assessment of that same complaint. One way to achieve this is to implement a rule that, where an officer from one CSD sub-division has acted in a conciliation, only a CSD officer from the other sub-division can be part of a team tasked with the detailed investigation and legal assessment of the relevant complaint.

(7) In most cases, the EOC should target making a decision on whether or not to grant full legal assistance for the purposes of bringing a case to court within 6 months from the failure of conciliation.

(8) EOC officers should regularly take part in capacity-building workshops and seminars, covering matters such as sensitivity to the subtle psychological dynamics that may be in play where there are power or other imbalances between the parties to a conciliation; techniques for dealing with difficult complainants; advising lay persons; the conduct of investigations; working as a team; etc.

(9) The EOC should seriously consider the possibility of LSD officers providing specific legal advice to complainants even during the conciliation stage.

(10) The EOC should bear in mind that a sizeable number of cases are unlikely to be clear-cut. Thus, the LCC should be cautious about refusing legal assistance for court proceedings merely because a case has less than a 50% chance of success. A case with significantly less than a 50% chance of success may nonetheless enable the court to give guidelines, even if *obiter*, on substantive areas of discrimination law or on best practices for institutions to follow in order to eliminate discrimination.

(11) it should be a normal expectation that the LCC decides whether to grant full assistance within 9 to 12 months of a complaint being made or of a specific enquiry being classified as a complaint.

(12) The LCC should continue its practice of giving reasons for any refusal of full legal assistance. It will not normally be enough merely to issue a terse statement that a complaint lacks legal or evidentiary merit and no principle of importance is involved. Reasons can be succinct, but they should convey the gist of the considerations that the LCC has taken into account.

(13) The EOC should have a formal system of review whereby a complainant (say) puts in a request for reconsideration (with supporting materials) within 2 weeks of a refusal of legal assistance and the LCC reconsiders its decision within 2 weeks thereafter. There should not be a protracted series of reviews by the LCC of a decision to refuse legal assistance, merely because a complainant with little merit in her or his complaint does not accept the same.

(14) The EOC should have a transparent procedure for the appointment of lawyers from whom legal opinions are sought to assist in the decision whether to grant or refuse legal assistance. Transparency might include maintaining a public roster of solicitors and barristers qualified to advise on discrimination law. There might be a requirement that lawyers on the roster undergo a specified number of capacity-building activity-hours (continuing professional development) annually to keep abreast of the latest thinking and developments in discrimination law and practice. Appointments to advise should normally be in accordance with the roster, save in special instances where deviations from the roster may be warranted. Fees for advising on EOC cases might be at a standard hourly rate with the number of hours capped to a pre-agreed maximum.

(15) As a matter of principle and in the interests of transparency, where legal assistance is refused on the basis of external legal advice, complainants should be entitled to sight of instructions to counsel and counsel's opinion.

(16) Decisions on whether or not to grant legal assistance should continue to be the responsibility of the LCC, rather than being delegated to the chairperson. However, depending on the volume of cases in which legal assistance is being considered, the LCC should be prepared to meet more frequently, even weekly or fortnightly, in order to ensure that decisions on legal assistance are made in timely and efficient manner.

(17) The EOC should adopt an internal guideline of fully responding to an enquiry, either disposing of the matter or elevating it into a complaint, within 4 weeks. In exceptional circumstances where it is not possible to resolve an enquiry within the standard of 4 weeks, the enquiry should be carefully monitored by the COO, ideally on a weekly basis, to ensure that it does not drag on longer than necessary. As much as possible, all information needed to classify an enquiry as a complaint should be requested from the enquirer within the 4-week period.

(18) The information required for the purposes of deciding whether to upgrade a matter from an enquiry to a complaint, should be kept to a minimum in the first instance. The information requested might perhaps be little more than the following: by whom a wrong was allegedly done; when and where the wrong is said to have been perpetrated; how the wrong is said to have been committed; and what relief is being sought.

(19) The EOC should monitor whether it would or would not be appropriate for a CSD officer handling an enquiry also to act as conciliator.

(20) The government should consider increasing the head count at the EOC by one or two junior officers above present full-strength level, with a view (among others) to alleviating the workload on existing staff and enabling more SIIs to take place.

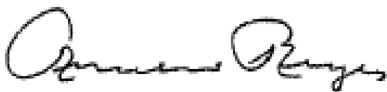
(21) A CSD officer who has conducted an abortive conciliation should refrain from communicating anything about the conciliation (apart from the fact that it failed) to anyone else.

(22) Greater use be made of Rule 7, including the payment by the EOC of taxi fares to enable complainants and respondents to attend at the EOC's premises for face-to-face conferences at mutually convenient times.

(23) There should be greater transparency and rigour in the appointment of the chairperson, board members, and the members of the LCC. To make the job of chairperson more attractive to the exceptional persons being sought for that post, a chairperson's tenure should be increased from 3 to 6 years.

(24) The EOC's CMS should be upgraded and made more user-friendly.

(25) In deciding whether to grant full legal assistance, the LCC should also bear in mind the financial situation of the respondent (especially if the respondent is an individual or an MSME) and the potential for moral hazard. Nor should the EOC lose sight of the need to adhere to due process in any dealings with respondents.



ANSELMO REYES
Hong Kong
30 November 2018

ANNEX 1

THE EQUAL OPPORTUNITIES COMMISSION AND ITS OPERATIONS

I. THE EOC

1. The Equal Opportunities Commission (EOC) is an independent body corporate established by the government to promote equal opportunity and eliminate discrimination on grounds of sex, disability, family status and race in Hong Kong.

2. The passing of anti-discrimination statutes was preceded by the enactment of the Hong Kong Bill of Rights Ordinance (Cap. 383) on 8 June 1991. The latter essentially made the International Covenant on Civil and Political Rights (ICCPR) applicable in Hong Kong. Articles 26 and 27 of the ICCPR read:

> "**Article 26**
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> **Article 27**
> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

3. The EOC came into existence on 20 May 1996, following enactment of the Sex Discrimination Ordinance (Cap. 480) (SDO) (the first anti-discrimination statute) in 1995. It was established as a body corporate with perpetual succession and a common seal, capable of suing and being sued (SDO sections 63(1) and (2)). The SDO came into effect in 1996. Other anti-discrimination statutes, namely, the Disability Discrimination Ordinance (Cap. 487) (DDO), the Family Status Discrimination Ordinance (Cap. 527) (FSDO), and the Race Discrimination Ordinance (Cap. 602) (RDO), came into effect in 1996, 1997 and 2009 respectively. The EOC has responsibility for overseeing the implementation of these Ordinances. The EOC currently operates under the aegis of the Constitutional and Mainland Affairs Bureau, policy responsibility for human rights and access to information issues having been assumed by that office from the Home Affairs Bureau in July 2007.

4. The EOC's mission is to eliminate discrimination and promote equal opportunity in Hong Kong. Its principal functions include:

(1) investigating complaints lodged under the four anti-discrimination statutes and encouraging conciliation between the parties to a dispute;
(2) providing legal assistance to victims of discrimination;
(3) promoting anti-discrimination and equal opportunity values and policies by implementing educational and publicity programmes and offering supporting resources;
(4) reviewing legislation and issuing guidelines; and
(5) conducting research on issues relevant to discrimination and equal opportunity.

II. THE EOC'S STRUCTURE

A. The EOC board

5. According to the SDO, members of the EOC's board are to be appointed by the Chief Executive. The board includes a chairperson and not less than 4 or more than 16 other members. Members must not be public officers. The board has authority to perform the functions and exercise the powers of the EOC.

6. The chairperson is a full-time appointment.[1] Other board members are appointed on a full or part-time basis, for terms not exceeding 5 years. Two reviews of the EOC in 2004 discussed whether the chairperson should be a full-time position. One review suggested that, if a full-time CEO were appointed to oversee the day-to-day management of the EOC's affairs, a part-time chairperson would suffice to provide the EOC with overall leadership and guidance. This view was eventually not taken by the government. Following a review of the EOC's organizational structure, the question was eventually resolved in 2014 by the re-instatement of the full-time position of Chief Operations Officer (COO).

7. The board has 4 committees. They are the Administration and Finance Committee (AFC); the Community, Participation and Publicity Committee (CPPC); the Legal and Complaints Committee (LCC); and the Policy, Research and Training Committee (PRTC). Each committee has a convenor and a deputy convenor. Board members usually are assigned to at least one committee. Committees may include co-opted persons who are not members of the Board.

8. The scope of work of a committee may be seen from its Terms of Reference.[2] As a key focus of this review will be on the working of the LCC, that committee is briefly introduced here. The LCC holds meetings every 2 months, but it can meet more frequently or deal with business through circulation if required. It is responsible for a variety of activities, including providing advice, monitoring and evaluating conciliation, overseeing formal investigations, determining applications for legal assistance, and deciding on the issue of enforcement notices. In addition, the LCC makes recommendations on matters arising out of formal investigations and on proposals for amending the four anti-discrimination statutes. At present, the LCC has 8 members, of whom 2 are legally qualified.

B. The EOC's senior management

9. The chairperson is in charge of the EOC's management and has a rank equivalent to point 8 of the Civil Service Directorate Pay Scale (that is, D8). The Chairperson is appointed on a 3-year contract. The contract may be renewed, but the government has rarely done so. The following have served as chairpersons from the time of the EOC's creation:

---

[1] See SDO s. 64(5).

[2] The Terms of Reference of each committee are available at: <www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=organization#1>.

(1)	Dr. Fanny Cheung	20 May 1996 – 31 July 1999 (2-month extension)
(2)	Ms. Anna Wu	1 August 1999 – 31 July 2003 (re-appointed for 1 year)
(3)	Mr. Michael Wong	1 August 2003 – 6 November 2003 (resigned)
(4)	Ms. Patricia Chu	15 December 2003 – 14 December 2004
(5)	Mr. Raymond Tang	12 January 2005 – 11 January 2010
(6)	Mr. Lam Woon Kwong	1 February 2010 – 31 March 2013 (2-month extension)
(7)	Dr. York Chow	1 April 2013 – 31 March 2016
(8)	Professor Alfred Chan	1 April 2016 – present

10. The EOC currently has 5 divisions and 1 unit. The divisions are the Complaint Services Division (CSD), the Legal Services Division (LSD), the Corporate Planning and Services Division (CPSD), the Corporate Communications Division (CCD), and the Policy, Research and Training Division (PRTD). There is in addition the Ethnic Minorities Unit (EM Unit). That was set up as a separate Unit in 2014 to focus on matters relating to the ethnic minorities.

11. There previously was a Chief Executive Officer (CEO) position with a D3 rank. The CEO position was established in September 1996 for better management of the EOC's day-to-day work. In mid-2000, following the board's endorsement, a revised organizational structure came into effect and the CEO post deleted. The CEO's duties were instead re-allocated between the chairperson and an upgraded position of Director (Planning and Administration) at D2 level (formerly Director (Administration) at D1 level).

12. In 2004 there were 2 further reviews. One suggested that the CEO position be re-instated. The proposal was taken up in 2005 by an Independent Panel of Inquiry that the Secretary for Home Affairs set up to look into certain incidents having potential repercussions on the EOC's credibility. The recommendation was that the CEO be made an executive member of the EOC board, while the chairperson would become a non-executive personnel member appointed on a part-time basis. The Home Affairs Bureau review in January 2006 endorsed this recommendation. However, in January 2006, the Legislative Council's Home Affairs Panel stressed that EOC was different from other public bodies, as the EOC existed to safeguard human rights. Accordingly, it was vital that the EOC have an executive chairperson with the vision and leadership to achieve the EOC's mandate. The government then withdrew the proposal to re-instate a CEO.

13. In March 2009 the Director of Audit released a Report No.52 dealing with the EOC. The

Report recommended that the matter be expedited in light of the general agreement among stakeholders that the posts of chairperson and CEO should be separated, so as to strengthen checks and balances within the EOC's executive leadership.

14. In December 2015, following a self-initiated review of the EOC's organizational structure, the EOC board re-instated the COO post at D3 level. The COO was to report to the chairperson, provide management support, and act as the chairperson's deputy. The intention was for the COO to focus on internal management, including supervision of the work of the CSD, the LSD and the CPSD. This would leave the chairperson to concentrate on the bigger picture, such as forging links with external organizations in Hong Kong and elsewhere, mapping out a strategy for the EOC's future development, and generally working towards the fulfilment of the EOC's objectives.

15. A director, head or chief has charge of each of the 5 divisions. Together with the chairperson and the COO, they comprise the EOC's management team.

16. A Chief Project Manager (CPM) at Chief Officer level was established in 2017. The CPM provides support for an internal review of the EOC's governance, management structure and complaints handling process. That internal review is being carried out under the steer of 3 board members (namely, Dr. Trisha Leahy, Dr. Maggie Koong and Mr. Mohan Datwani). The CPM reports to the chairperson and COO. The internal review is being carried out in parallel with an independent external review of the complaints handling process which Professor Anselmo Reyes has agreed to undertake on a pro bono basis. The incumbent CPM is Mr. John Leung, who started work on 13 November 2017. The CPM is a temporary post. It will be deleted upon completion of the EOC's internal review.

C. The EOC's divisions

17. The Complaint Services Division (CSD) is headed by a Director (DCS). There are 2 sub-divisions (known as "A" and "B") within the CSD, each under the supervision of a Chief Equal Opportunities Officer (CEOO). The CEOOs are identified as CA or CB depending on which sub-division they head. Below them are 6 Senior Equal Opportunities Officers (SEOO), 9 Equal Opportunities Officers (EOO), and 4 Assistant Enquiry Services Officers (AESO). Over the last 3 to 4 years, there has never been a time when all CSD positions have been filled. There has instead been a shortfall in staff of about 30% to 40%.

18. The CSD is responsible for dealing with enquiries and complaints. It is usually the first port of call for a member of the public wishing to make use of the EOC's services. It is also responsible for the conciliation and investigation of complaints. Having determined that a complaint falls within the EOC's statutory remit, CSD officers endeavour to resolve the same through conciliation, by assisting the disputing parties to reach a legally binding settlement agreement. The CSD further undertakes self-initiated investigations (SIIs) (that is, investigations initiated by the EOC of its own motion in response to enquiries or complaints of a general nature from the public) of potential discriminatory practices within Hong Kong society.

19. The Legal Services Division (LSD) is headed by a director (identified as Chief Legal

Counsel). In addition, there are 5 Legal Counsel and 2 Assistant Legal Counsel working within the LSD. Following the failure of conciliation and upon a complainant applying for legal assistance, the LSD assesses whether the complaint merits the grant of legal assistance. The LSD can also provide general or specific advice on legal matters relating to Hong Kong's anti-discrimination statutes.

20. The other divisions are similarly important, but play less of a role in the EOC's handling of complaints. Accordingly, the scope of their duties is not set out here. Details may be obtained from the EOC's website at <www.eoc.org.hk/default.asp>.

21. The following is an organisational chart for reference:

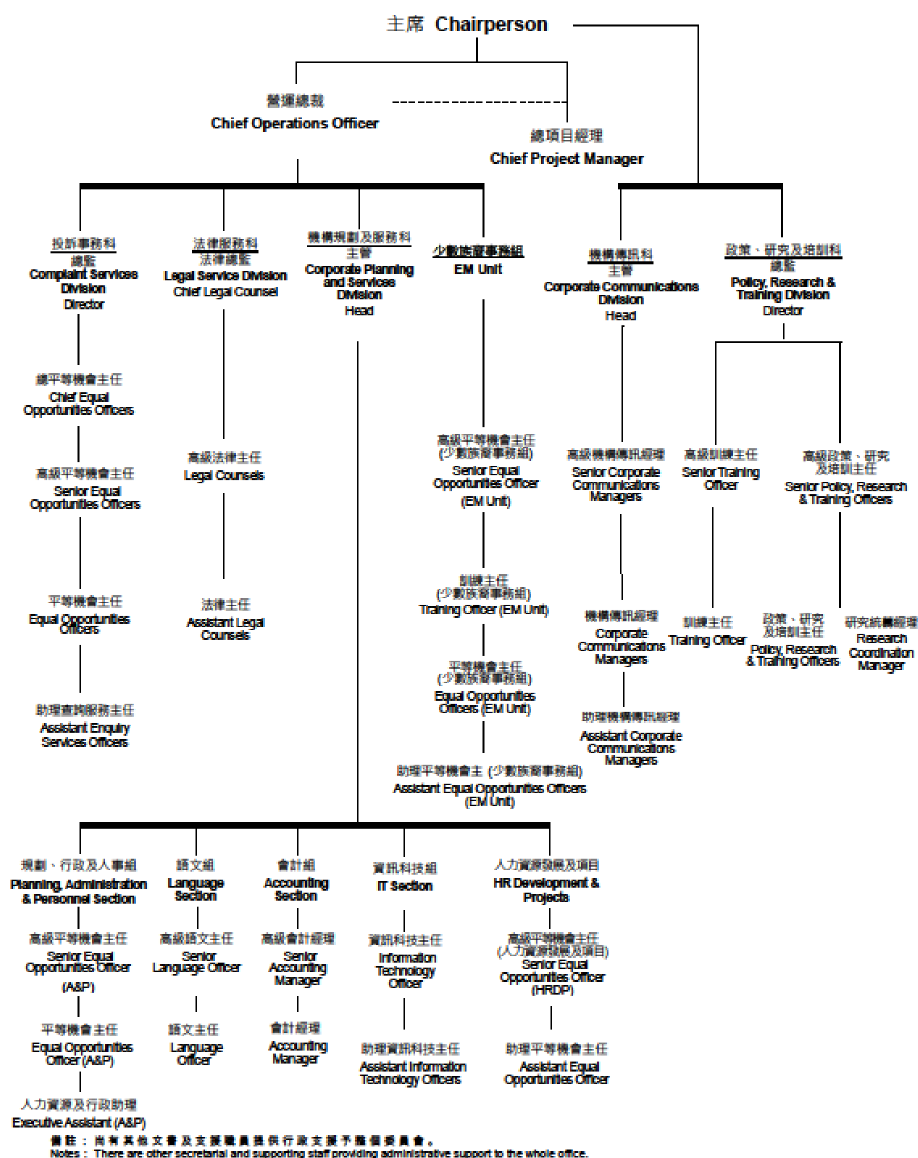


Figure 1 – Organizational structure of the EOC as at 31 December 2017

22. For a long time, the EOC's premises were located in Taikoo Shing. In November 2017 it moved to its present address in Wong Chuk Hang. Before the decision was taken to move there, more than 20 sites were examined. Eventually, the decision was made on the basis of rental cost, location, travelling time by public transport, accessibility, friendliness to persons under a disability, and space efficiency rates.

III. THE EOC'S COMPLAINT HANDLING PROCESS

A. From enquiry to complaint

23. Where a complaint falls within the EOC's statutory jurisdiction, its responsibility is two-fold. It must investigate, and it must endeavour to conciliate.

24. The CSD duty officer on a given day will usually be a member of the public's first point of contact with the EOC. Enquiries may be made by telephone, fax, mail, e-mail, text messaging or in person. Almost all initial contacts with the EOC are classified as enquiries unless, in the case of written correspondence, it is apparent that a complaint is being brought. The CSD will conduct an initial screening to satisfy itself that an enquiry falls within the EOC's jurisdiction. Clarification may be needed if the available information provided is not enough to constitute a coherent complaint. When an enquiry is classified as a complaint, it is either treated as a complaint for investigation and conciliation (CIC) or a complaint for self-initiated investigation (SII). The latter typically targets conduct that affects a sector of the public and does not only only involve the individual who raised the matter with the EOC. If an enquiry does not fall within EOC's statutory remit, the member of the public who brought the same is advised accordingly. When appropriate, the person is referred to another organization.

25. For there to be a complaint under some anti-discrimination statute, a number of conditions will need to be satisfied: (1) The complaint must be in writing; (2) The aggrieved person (as opposed to someone claiming to be an agent of that person) must have lodged the complaint. (3) There must be an allegation that act which is unlawful under one or other of the anti-discrimination statutes has been committed.

B. Early conciliation

26. After receiving a complaint, CSD will attempt early conciliation of the same. Before any detailed investigation is undertaken, the disputing parties will be invited to conciliate their differences with assistance of a CSD officer. If early conciliation succeeds, the case will be closed. If early conciliation fails, the complaint will undergo a detailed investigation with a view to conciliation, unless the complaint is withdrawn.

27. It should be noted that the anti-discrimination statutes explicitly refer to the EOC attempting "conciliation", rather than "mediation". The EOC's Internal Operating Procedures (IOP) Manual distinguishes between the two very similar (some would say, identical) modes of dispute resolution:

> "Conciliation and Mediation are terms that are often used interchangeably. Mediation is about disputing parties appointing a skilled third party – a mediator – to assist them to find a mutually acceptable solution to their differences. Conciliation is usually a mandatory court-annexed process that is found in legislation, and is more interventionist than private mediation, in that a conciliation

officer has certain statutory obligations to promote.
Although both are 'voluntary' processes, in the sense that the parties must both desire to reach a settlement by finding a mutually acceptable solution to their dispute, conciliation pursuant to legislation generally requires the conciliation officer to use his/her best endeavours to bring the parties in a dispute to settlement whilst at the same time furthering the objectives of the legislation."

C. Investigation

28. Investigation involves obtaining information relevant to the complaint from both parties. The complainant will be asked to identify the details of the alleged unlawful act. The complainant will also be asked to gather supporting evidence of any form, including documentary and witness evidence. Potential witnesses (including persons working for the respondent (that is, the alleged wrongdoer)) may be approached if they are likely to provide useful testimony. Details of the complainant's allegation will be provided to the respondent, who will be requested to comment on the same.

29. The EOC may issue notices to persons to compel them to provide information required for the purpose of investigation and conciliation. The failure to comply without reasonable excuse will constitute a statutory offence. This power is contained in section 5 (also referred to as Rule 5) of the four sets of Investigation and Conciliation Rules that serve as subsidiary legislations to the respective anti-discrimination statutes.[3] But, until recently, the EOC has rarely invoked its Rule 5 power.

D. Post-investigation

30. The EOC assesses the complaint throughout the investigation process. It may as a result of its assessment decline or discontinue a complaint, on the ground that the latter is frivolous, vexatious, misconceived, or lacking in substance. It is for the CSD officer handling a complaint to consider whether the facts and circumstances of a case call for the exercise of the EOC's discretion to discontinue the same. Upon completion of investigation, the disputing parties attempt further conciliation, sometimes known as post-investigation conciliation (PIC). The success rate of PIC has, however, been low, estimated to be around 5-10%. Possible reasons include an unwillingness to conciliate and changes in the parties' attitudes in the course of the investigation process.

E. Application for legal assistance

31. Where there has been no settlement of a complaint, the aggrieved person may apply to the EOC for assistance to bring legal proceedings against the respondent. Applications for legal assistance must be made in writing. The EOC is bound by law to consider each application for legal assistance, but it is not obliged to grant assistance in every case. The board has delegated to the Legal and Complaints Committee (LCC) the authority to decide which cases should receive assistance and the type of assistance to be granted.

32. The CSD officer responsible for the case will prepare a report of the complaint. The

[3] Namely, the Sex Discrimination (Investigation and Conciliation) Rules (Cap. 480B), the Disability Discrimination (Investigation and Conciliation) Rules (Cap. 487B), the Family Status Discrimination (Investigation and Conciliation) Rules (Cap. 527A), and the Race Discrimination (Investigation and Conciliation) Rules (Cap. 602B).

report will contain the relevant facts as found during the investigation phases. Issues arising out of the conciliation process which the officer considers pertinent will be flagged. An officer in the Legal Services Division (LSD) will then be assigned to the case. The LSD officer will prepare a brief advising on the law and other policy considerations in connection with the complaint. The LSD officer will make a recommendation on whether or nor legal assistance should be granted. Both the CSD officer's report and the LSD officer's advice are thereafter submitted to the LCC for consideration.

33. The EOC has wide discretion as to which cases it might assist. As it is a public organization with limited funds, it cannot assist every case but must choose those cases which it believes will advance its objectives. There is only limited statutory guidance in respect of the criteria that the EOC must take into account in deciding whether to grant legal assistance. If the EOC decides to grant assistance, the complainant will be advised of the nature of such assistance, and the terms and conditions of the assistance. There will a written agreement between the EOC and the complainant setting out the terms of the assistance. If the EOC decides not to grant assistance, the complainant will be informed of the reasons. Persons who are not granted assistance by the EOC may apply for legal aid from the Legal Aid Department. They may also take the case to court themselves.

34. By way of summary of the complaint handling process, two flowcharts are reproduced below for easy reference.

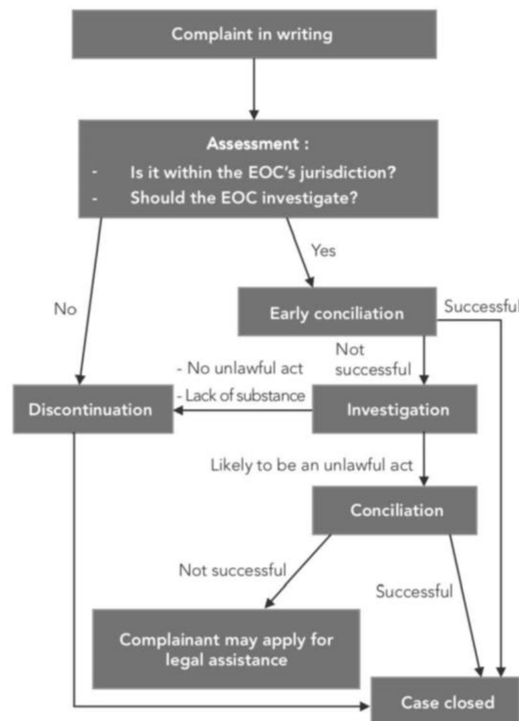


Figure 2 – Simplified diagram of lodging a complaint with the EOC reproduced from the EOC Casebook *(2017), accessible at <http://www.eoc.org.hk/EOC/Upload/booklets/casebook2017/eng/2.pdf>*

Figure 3 – Simplified diagram of applying for legal assistance with the EOC reproduced from the EOC Casebook *(2017), accessible at: <http://www.eoc.org.hk/EOC/Upload/booklets/casebook2017/eng/19.pdf>*

IV. BRIEF OVERVIEW OF DISCRIMINATION LAW AND PRACTICE IN HONG KONG

35. The SDO and DDO were passed in 1995 and implemented inn 1996. The FSDO followed in 1997 and the RDO in 2009. Each regulates a different aspect of discrimination. The SDO forbids discrimination based on sex, marital status or pregnancy, the DDO discrimination based on disability, the FSDO discrimination based on family status, and the RDO discrimination based on race. Harassment, discriminatory advertisements, instructions or pressure to discriminate, vilification (disparagement of others on the basis of differences or because they are under a disability), as well as assistance in the commission of these activities are all illegal under the ordinances. Importantly, all four ordinances explicitly bind the government not to engage in the proscribed discriminatory acts.

36. The EOC recently undertook a comprehensive review of the discrimination laws. The intention was to strengthen protection against various kinds of inequality and discrimination and to develop further the human rights regime in Hong Kong. A public consultation on the EOC's Discrimination Law Review took place between 8 July and 31 October 2014. Views were taken on how the existing discrimination laws should be revised and enhanced. In March 2016 the EOC submitted its Discrimination Law Review report to the government after analysing the 124,573 responses received from individuals and the 288 responses from organisations. The report proposed ways in which the existing discrimination laws should be reformed and made recommendations for further detailed consultation and research.

There were 73 recommendations in all, 27 of which were characterised by the EOC as high priority measures. The government has since been tackling the less controversial areas highlighted by the report, such as improving education and employment opportunities for ethnic minorities and prohibiting direct and indirect discrimination against breastfeeding. More challenging reforms, such as legal protection for sexual minorities (LGBTI+) and eliminating discrimination based on sexual orientation and gender identity, remain the subject of heated debate and are unlikely to reach a consensus in any time soon. What is certain is that the EOC's recommendations will constitute an impetus for the future revision of Hong Kong's discrimination laws.

37. Over the years, there have been calls for the establishment of an Equal Opportunities Tribunal. But so far, the calls have not been heeded on the basis that such a tribunal is not necessary. Consequently, at present, legal proceedings to enforce the anti-discrimination statutes are heard in the District Court. To expedite the hearing of such cases, the Judiciary instituted an Equal Opportunities List (EOL) and issued Practice Direction SL8 setting out the procedures to be followed by actions in the EOL. To ensure consistency in the application of the anti-discrimination statutes, cases in the EOL are assigned, whenever possible, to the same judge for determination. Such practice also enables the relevant judge to develop expertise in discrimination law.

ANNEX 2

GLOSSARY OF MAIN ABBREVIATIONS USED

AESO	Assistant Enquiry Services Officer
AFC	Administration and Finance Committee
CCD	Corporate Communications Division
CEO	Chief Executive Officer
CEOO	Chief Equal Opportunities Officer
CIC	Complaint for Investigation and Conciliation
CMS	Case Management System
COO	Chief Operations Officer
CPM	Chief Project Manager
CPPC	Community, Participation and Publicity Committee
CPSD	Corporate Planning and Services Division
CSD	Complaint Services Division
DDO	Disability Discrimination Ordinance (Cap. 487)
EM Unit	Ethnic Minorities Unit
EOC	Equal Opportunities Commission
EOL	Equal Opportunities List
EOO	Equal Opportunities Officer
FSDO	Family Status Discrimination Ordinance (Cap. 527)
ICCPR	International Covenant on Civil and Political Rights
IOP	Internal Operating Procedures
LCC	Legal and Complaints Committee
LPP	Legal Professional Privilege
LSD	Legal Services Division
MSME	Micro-, Small- and Medium-Sized Enterprise
NGO	Non-Governmental Organisation
PIC	Post-Investigation Conciliation
PRTC	Policy, Research and Training Committee
PRTD	Policy, Research and Training Division
RDO	Race Discrimination Ordinance (Cap. 602)
SDO	Sex Discrimination Ordinance (Cap. 480)
SEOO	Senior Equal Opportunities Officer
SII	Self-Initiated Investigation

Annex 3

Concluded Complaint Cases in 2008 - 2017

(Processing Time at the Enquiry Stage not included)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Ref	2008-2017	
Total cases concluded - CIC	779	864	823	864	681	653	554	450	577	453	a	6698	
Total cases concluded - SII	55	64	92	111	104	62	70	47	42	37		684	
Total cases concluded - CIC and SII	834	928	915	975	785	715	624	497	619	490	b	7382	
Pledge met - CIC	572	685	627	670	557	497	411	335	430	340		5124	
Pledge met - SII	55	64	92	109	104	62	70	46	40	37		679	
Pledge met - all cases	627	749	719	779	661	559	481	381	470	377	c	5803	78.6% (c/b)
Analysis of CIC Cases													
C4x Discontinued after Assessment	261	313	336	379	257	231	216	188	91	108	d	2380	35.5% (d/a)
C4y Discontinued after Investigation	230	242	182	197	185	158	120	83	273	101	e	1771	26.4% (e/a)
Discontinued for other reasons	7	19	25	26	28	25	9	11	4	11	f	165	2.5% (f/a)
Total cases discontinued	498	574	543	602	470	414	345	282	368	220	g	4316	64.4% (g/a)
C5a Successful EC	153	141	162	133	138	149	129	88	124	128	h	1345	40.6% (h/l)
C5b Successful PIC	40	32	30	29	16	22	23	24	24	31	i	271	26.1% (i/m)
Successful EC + PIC	193	173	192	162	154	171	152	112	148	159	j	1616	67.8% (j/k)
C6 Unsuccessful conciliation	88	117	88	100	57	68	57	56	61	74		766	
	281	290	280	262	211	239	209	168	209	233	k	2382	
Total cases concluded - CIC	779	864	823	864	681	653	554	450	577	453		6698	
C4x Discontinued after Assessment	-261	-313	-336	-379	-257	-231	-216	-188	-91	-108		-2380	
No EC	-155	-166	-110	-123	-81	-70	-23	-38	-201	-35		-1002	
Cases for EC	363	385	377	362	343	352	315	224	285	310	l	3316	
C5b Successful PIC	40	32	30	29	16	22	23	24	24	31		271	
C6 Unsuccessful conciliation	88	117	88	100	57	68	57	56	61	74		766	
Cases for PIC	128	149	118	129	73	90	80	80	85	105	m	1037	
Total cases discontinued	498	574	543	602	470	414	345	282	368	220		4316	
Successful EC + PIC	193	173	192	162	154	171	152	112	148	159		1616	
C6 Unsuccessful conciliation	88	117	88	100	57	68	57	56	61	74		766	
Total cases concluded - CIC	779	864	823	864	681	653	554	450	577	453		6698	

Appendix 8

Key Performance Indicator of Complaint Services Division and Legal Service Division in 2008 – 2018

	Initiate action on a written complaint	**Interview a prospective complainant asking for an appointment** Actual number in ( )	**Conclude a complaint case** **(CIC + SII)**	**Complete processing of legal assistance application**
Service Standard	within 3 working days	within 5 working days	within 6 months	within 3 months
Performance Target	95%	95%	75%	85%
Actual Performance				
Year 2008	100%	N/A (0)	75%	90%
2009	100%	100% (1)	80%	88%
2010	100%	100% (1)	78%	96%
2011	100%	N/A (0)	80%	100%
2012	100%	100% (1)	84%	88%
2013	100%	100% (2)	78%	77%
2014	100%	100% (1)	77%	86%
2015	100%	100% (5)	77%	97%
2016	100%	N/A (0)	76%	97%
2017	100%	N/A (0)	78%	97%
2018	100%	100% (2)	81%	100%

Notes:

1. Over the 11-year period, CSD concluded 7,532 Complaint for Investigation and Conciliation (CIC) of which 4,950 (65.7%) were discontinued. In term of the global figure of 7,532 CIC concluded, 23.2% (1,748) was settled through conciliation. Since CSD had attempted conciliation for 2,582 CIC only, the conciliation success rate was 67.7%. Complainants for the remaining 834 CIC for which no settlement was reached could apply for Legal Assistance (LA).

2. In the 11 years 2008-2018, EOC received 478 LA applications. EOC completed the processing of 469 applications of which 225 (48%) were granted. In 2018, LCC granted 32 applications out of a total of 54 (59.3%).

3. LSD is currently handling 36 LA cases which have been granted assistance, in addition to processing 29 LA applications (position as at 31 December 2018).