



June 2008

Equal Opportunities Commission
Bills Committee on Race Discrimination Bill
Race Discrimination Bill Parts 7, 8 and 9

- 1 The Equal Opportunities Commission (EOC) is invited to provide information on a number of issues raised by the Bills Committee on the Race Discrimination Bill. These issues are set out in 2 letters to EOC by the Bills Committee, respectively dated 23 May and 27 May 2008. This paper seeks to address these issues and other relevant matters.

Differences compared to other ordinances

(23 May letter, issue (a))

- 2 Parts 7, 8 and 9 of the Bill and the corresponding Parts VII, VIII and IX of the other 3 anti-discrimination ordinances are similarly worded and have similar effects. No material differences are observed.

Application of Parts 7 to 9 of the Bill

(23 May letter, issue (b))

- 3 As there are no material differences between them, the application of Parts 7 to 9 of the Bill is likely to be similar to the other ordinances. It is convenient to make some general points here first, before moving on to the experience with the other ordinances:-

- 3.1 The EOC is given functions under the Bill. These functions may be considered under 2 main themes, public education and enforcement (the items listed under each theme below are not exhaustive):-

Public education

- 3.2 Under the theme of public education, the EOC would do many things including:-

- ◆ conduct wide-ranging publicity activities, education or training

programmes at different levels of depth;

- ◆ conduct survey, study or research on relevant matters and may make proposals and recommendations as appropriate;
- ◆ produce and publish materials such as codes of practice, guidelines, training modules, and on-line materials.

Enforcement

3.3 Under the theme of enforcement, the EOC:-

- ◆ may conduct formal investigation in order to make recommendations for changes in policies and procedures or in the law;
- ◆ has the duty to investigate and attempt to conciliate individual complaints;
- ◆ may grant legal assistance to those complainants who could not resolve their disputes through conciliation.

Experience with other ordinances

(23 May letter, issue (c))

4 The EOC has always applied the other ordinances in the way they are designed to operate. Like the Bill, EOC's functions under the ordinances can also be considered under the 2 themes of public education and enforcement.

Public Education

5 Under the theme of public education, there have been a host of different activities and programmes to raise public awareness, and to encourage and promote equality in practice. In this respect, no significant difficulties arising from the drafting of the ordinances have been observed.

Enforcement

6 Under the theme of enforcement, it is convenient here to deal first with

individual complaint handling, the EOC's functions in terms of formal investigation and legal assistance will be dealt with in later parts of this paper. .

Individual complaint handling

- 7 The complaint handling process is composed of 2 different functions: the investigation function and conciliation attempt function.
- 8 The main purpose of investigation is to equip the EOC and the parties with appropriate information about the case, so as to conduct conciliation attempts effectively, maximising the chances of success. It is an exercise to help clarify the issues for the EOC and the parties, and to give the parties the opportunity to comment on any of the issues which may affect their interests. The EOC will assess the information obtained during investigation and advise the parties to consider conciliation if the information could not preclude the possibility of discrimination. The EOC will not make any definitive judgment on the merits of cases. The EOC has the power to decide not to conduct, or to discontinue, an investigation into a complaint for reasons such as the complaint is lacking in substance or is misconceived, or the complainant has no desire to continue.
- 9 The main objective of the whole process is conciliation, which is a settlement of the complaint by the parties. The emphasis on conciliation is in keeping with the general trend on dispute resolution. The EOC will attempt conciliation at any point, whether before, during or at the end of the investigation, if the parties express a wish to engage in such attempts.
- 10 In attempting conciliation, the EOC's role is a neutral conciliator assisting the parties, with information about the law and with information gathered from the investigation, to assess their own position and to decide whether to conciliate and on what terms.
- 11 The EOC's role as an impartial investigator and conciliator can sometimes draw criticisms from the parties. For example, complainants often approach the EOC with a strong belief that a discriminatory act had taken place, and are disappointed that the EOC would not give a definitive judgment and interpret this as bias for the respondents. As for the respondents, they may consider the EOC biased against them for even initiating an investigation based on the complainant's allegation. The EOC is aware of these issues of expectation gap

and public understanding of its role and functions. It will continue to work towards a better understanding of its role and reduce any perception of biases.

Complaint investigation and formal investigation

(23 May letter, item (d))

- 12 Complaint investigation within the complaint handling process and formal investigation are 2 different processes. Complaint handling is focused on the individual case. The outcome, if successful, is a settlement between the complainant and the respondent, which usually involves a settlement sum being paid to the complainant. Formal investigation is focused on systemic issues, rather than any individual case. This is indicated by the expected outcome from a formal investigation, which may be a recommendation or an enforcement notice by EOC calling for changes in policies, practices, procedures or in law. A recommendation or an enforcement notice is not focused on any one incident and is forward looking, whereas a settlement in an individual complaint is usually concerned with compensating damage done in a specific incident.

Formal investigation

- 13 There are in fact 2 types of formal investigation. The first type may be called a named person or a belief investigation. The terms of reference of this type of formal investigation are confined to the activities of a named person. This type of investigation may be conducted if the EOC believes that the named person may have done unlawful acts and proposes to investigate into his activities, and the terms of reference have to state that belief. The other type of formal investigation may be called general investigation. This type of investigation is not premised on any allegation or belief of unlawful act, but is more in the same nature as a research study or enquiry on a general issue.
- 14 Following a general formal investigation, the EOC may make recommendations for changes. Following a named person investigation, if the EOC is satisfied that the named person has committed an unlawful act, an enforcement notice may be served on him requiring him not to commit unlawful acts by making changes to his practices. After service of the enforcement notice, if he is likely to persist in doing further unlawful acts within 5 years unless restrained, the EOC may apply to the District Court for an injunction.

Complaint handling

- 15 For complaint handling, the EOC does not make a judgment on the case but would assist and encourage the parties to conciliate. It is for the parties, assisted by the EOC, to decide whether they will agree to settle their dispute and on what terms. If they do not settle, that will be the end of the matter as far as the investigation and conciliation process is concerned. But it is open for the complainant to further pursue his case through legal proceedings. In order to do so, the complainant may apply for legal assistance from the EOC, or he may apply for legal aid from the Legal Aid Department, or he may rely on his own legal advisers. EOC's legal assistance function will be dealt with below. If the complainant does not wish to pursue the matter, generally nothing more will happen with the case.

Power to obtain information

- 16 Formal investigation, being designed to target systemic issues, is likely to require significantly more resources and involve wider range of considerations than individual complaint handling. But whether the EOC is conducting a formal investigation or complaint investigation, it will need to be able to obtain relevant information. There are provisions in relation to both processes that would enable the EOC to obtain information. Apart from isolated cases, parties concerned in all types of investigation have been co-operative. No significant difficulties have been observed.

Whether bound to conciliate

(23 May letter, item (e))

- 17 Under the Bill and other ordinances, when a complaint is lodged with the EOC, the EOC shall (is bound to) conduct investigation and endeavour to conciliate. No exception is provided for situation where the complaint is lodged after the complainant has already commenced proceedings. It is to be noted that there is an emphasis on conciliation in the overall design of the legislation, and that conciliation may work even if parties are already engaged in litigation, so long as they are both willing to put the litigation aside and engage in the conciliation process.
- 18 In situations where parties' positions may be prejudiced in on-going litigation or

investigations by other agencies (e.g., the police), the EOC may suspend its complaint investigation.

Criteria and type of legal assistance

(23 May letter, item (f))

19 In deciding whether to provide legal assistance, the legislation gives the EOC a wide discretion and listed 2 factors which the EOC should consider and which are in favour of giving legal assistance, namely:-

- ◆ The case raises a question of principle
- ◆ It is unreasonable to expect the applicant to deal with the case unaided, having regard to the complexity of the case or the relative positions of the parties

20 Applications for legal assistance are considered by the EOC's Legal and Complaints Committee (LCC) formed by EOC members and chaired by the Chairperson. In addition to the above factors, the LCC may also consider the following factors:-

20.1 The strength of the evidence

20.2 Whether the case can establish useful precedents

20.3 Whether the case can effectively enhance and sustain positive public awareness on equal opportunities issues

20.4 Whether EOC's work in promoting equal opportunity can be effectively enhanced if assistance is given

20.5 Whether the case reinforces a policy objective emphasized by the EOC

20.6 Whether suitable and effective remedy could be obtained through legal proceedings

20.7 Whether other sources for assistance, such as Legal Aid Department, are available

20.8 The attitude and behaviour of the parties during the complaint-handling process

- 21 The type of assistance given would be legal services including advice and representation by EOC's in-house lawyers or external lawyers. More specifically, there would be continuing assessment of evidence, negotiation before action, all appropriate preparation for litigation (such as obtaining expert opinions), conduct of interlocutory hearings, the substantive trial, appeal proceedings or enforcement of judgment.

Undue influence over investigations

(27 May letter, item (a))

- 22 Under the ordinances, EOC members appointed by the Chief Executive are the governing body of the EOC. Complaint investigations are conducted by EOC officers, under the supervision by different levels of senior officers, and are generally overseen by the LCC formed by EOC members. Applications for legal assistance are decided by the LCC. The conduct of formal investigations is led by working groups formed by EOC members as well as officers.
- 23 As pointed out above, for complaint investigation, the first purpose is to facilitate conciliation. The parties themselves, assisted by the EOC, will decide the outcome of the conciliation process. For formal investigation, the purpose is to examine systemic issues and call for appropriate changes in policies, practice or procedure or in law. The EOC will remain impartial in all types of investigation, and it has internal procedures to independently investigate and address any allegations of undue influence or bias.
- 24 As a public body, the EOC's decisions are subject to judicial review, or if the EOC issues an enforcement notice in relation to a formal investigation, it is subject to an appeal to the District Court. If its processes are affected by improper considerations, the EOC's decisions are liable to be quashed. The EOC will not allow its processes to be affected by improper considerations.

Means test

(27 May letter, item (b))

- 25 Unlike the Legal Aid Department operating under the Legal Aid Ordinance, the

EOC does not apply a means test to applicants for legal assistance under the ordinances. Factors considered by the EOC in deciding whether to give legal assistance are dealt with above in paragraphs 19 and 20.

- 26 Discrimination claims under the ordinances may be made subject of civil proceedings in the same way as any other tort claims. It is open for persons who wish to make a discrimination claim to apply for legal aid from the Legal Aid Department. The EOC currently does not have information on the number of persons who have applied or wished to apply to the Legal Aid Department for legal aid to pursue discrimination claims, the number of such persons who have not applied or have been declined legal aid and the reasons they have not applied or have been declined.
- 27 In relation to the difficulties faced by persons who wish to make discrimination claims, the EOC observes that ordinary civil litigation procedures are followed in discrimination cases. The procedural complication, length of time and costs often associated with ordinary civil litigation would also occur in discrimination cases. In an internal EOC review in 2004, it was observed that formal court procedures and practices make it difficult for people making discrimination claims.
- 28 One way to tackle these problems may be to explore the establishment of a dedicated adjudication process for discrimination cases which is user-friendly and inexpensive. To this end, the EOC has been looking at the possibility of establishing an Equal Opportunities Tribunal, with informal procedures and active case management functions, so as to make the adjudication process speedy and accessible even to ordinary citizens without professional representation. EOC's study on this subject is nearing conclusion and appropriate recommendations to the Government are expected before the end of 2008.

Time limit under clause 72(4)

(27 May letter, item (c))

- 29 The time limit of 5 years under clause 72(4) does not necessarily mean that there will be a period of 5 years before information is furnished. The EOC may specify any time after the enforcement notice has become final for information to be furnished, which can be less than 5 years. The effect of clause 72 is to

require the EOC to specify a time less than 5 years (or at most not more than 5 years).

Injunction

(27 May letter, item (d))

30 Under the ordinances, the situations where the EOC may apply to the District Court for an injunction are:-

30.1 Persistent discrimination – where EOC has served an enforcement notice on a person, or there is already a finding by the District Court that a person has done and unlawful act, but within 5 years it appears to the EOC that that person is likely to do further unlawful acts

30.2 Discriminatory advertisement, instructions or pressure to discriminate – where it appears to the EOC that a person has published a discriminatory advertisement or has instructed or pressurized another person to do an unlawful act, and that he is likely to further do the same thing.

31 So far, the EOC has not encountered any of the above situations. There has been no occasion in which the EOC has applied for an injunction. There were however occasions where publishers have published unlawful discriminatory advertisements more than once, and the EOC applied to the District Court for a larger financial penalty.

Clause 80 legal assistance

(27 May letter, item (e))

32 The following observations are made on the EOC's legal assistance functions:-

32.1 The law allows the EOC to give legal assistance if it thinks fit.

32.2 The EOC's approach is to use the legal assistance function in the most effective way to support its general functions of elimination of discrimination and promotion of equal opportunities.

32.3 To do this, the EOC will give priority to cases which are strong in evidence and which may establish important legal principles (for example, the case

is likely to resolve an uncertainty in the application of the law).

32.4 The EOC will also give priority to cases which are strong in evidence and may serve as a public education vehicle (for example, the case is representative of a widespread problem)

32.5 An individual case that does not involve legal principles but is mainly a dispute on facts or is not representative of a widespread problem may stand less chance of being given assistance.

32.6 Having said that, the EOC will also look at individual circumstances. The factors which the EOC will consider are set out in paragraphs 19 and 20 above. For example, a case that is mainly a dispute on facts may be given assistance if the evidence is strong, or the respondent has been unco-operative in the investigation and conciliation process; or if the case is complex, for example, involving elaborate statistical evidence, that the complainant cannot deal with it unaided.

32.7 Discrimination claims are the same as ordinary civil claims, and legal aid from the Legal Aid Department is available to them. The EOC does not operate another legal aid system for discrimination cases to overlap with the Legal Aid Department. An individual claimant that does not fall within EOC's priorities may apply for legal aid.

Other matters

33 On the whole, in terms of enforcement, the general framework of the Bill is similar to the other ordinances. Within this general framework, the EOC suggested a number of legislative proposals to the Government in 1999. Most of these proposals are specific to other ordinances and do not concern the Bill. While there may be questions as to whether the current framework is adequate, these are issues for anti-discrimination legislation as a whole and may be more appropriately considered in another wider discussion. From the present EOC's operation perspective, it is desirable that the Bill follows the same framework as the other ordinances.

34 Having said that, some minor clarifications in the Bill arising out of the experience with other ordinances may be desirable. These are:-

- 34.1 In clause 71(1)(b), employer and principal liability is specifically mentioned in respect of an act of discrimination, but no specific mention is made for harassment or vilification. The same omission is found in other ordinances. The Government had agreed to a clarification amendment, though not yet implemented. The EOC has always interpreted the relevant provision as covering employer and principal liability for harassment and vilification.
- 34.2 In clause 81(3), the period disregarded in deciding the time limit for making a claim refers only to the date when conciliation was concluded. It should also refer to the date the EOC decides not to conduct or to discontinue the investigation.
- 35 Lastly, there appears to be a typo in clause 72(5) in that the reference in that clause to “Section 67(4)” should read “Section 67(5)”.

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