Review on Adjudication of Equal Opportunities Claims by the District Court

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CHAPTER 1: INTRODUCTION

I. Background

1.1 Anti-discrimination statutes are social legislation with a view to protecting civil rights. Equal Opportunities claims ("EO claims") should be adjudicated in a speedy manner and the costs of litigation should be reduced as much as possible.

1.2 At present, anti-discrimination ordinances in Hong Kong include the Sex Discrimination Ordinance (Cap. 480) ("SDO"), the Disability Discrimination Ordinance (Cap. 487) ("DDO"), the Family Status Discrimination Ordinance (Cap. 527) ("FSDO") and the Race Discrimination Ordinance (Cap. 602) ("RDO"). These ordinances make discrimination unlawful in specified circumstances. Victims of unlawful conduct may bring legal proceedings to the court to claim compensation or other remedies. Some common case types include sex discrimination, sexual harassment, pregnancy discrimination, disability discrimination and disability harassment.

II. Background leading to the review

1.3 This review is conducted in response to the judgment (Decision on Costs) in *Sit Ka Yin Priscilla v Equal Opportunities Commission*[1] and the *Equal Opportunities Commission's Recommendations to the Government on the Establishment of an Equal Opportunities Tribunal in Hong Kong* ("*EOC Recommendations*")[2]. It is also part of the Judiciary's ongoing initiative to review rules and procedures of the court on a regular basis.

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

2 Equal Opportunities Commission, *Equal Opportunities Commission's Recommendations to the Government on the Establishment of an Equal Opportunities Tribunal in Hong Kong* (March 2009).

(A) *Sit Ka Yin Priscilla v Equal Opportunities Commission*

1.4 In the Decision on Costs of *Sit Ka Yin Priscilla v Equal Opportunities Commission* delivered on 27 October 2010[3], Judge Lok[4] expressed the view that since anti-discrimination statutes are social legislation with a view to protect civil rights, EO claims should be adjudicated in a speedy manner and the costs of litigation should be reduced as much as possible. There is room for improvement of the procedural rules of Equal Opportunities proceedings ("EO proceedings") by making them simpler and more flexible. In Judge Lok's opinion, the time is ripe to review whether the pleading system is suitable for the adjudication of discrimination claims. The costs of such kind of proceedings should also be reduced as much as possible.

(B) Equal Opportunities Commission's Recommendations

1.5 In March 2009, the Equal Opportunities Commission ("EOC") submitted the *EOC Recommendations* to the Government. The *EOC Recommendations* highlighted several weaknesses of the then civil justice system in adjudicating EO claims, namely –

(a) the procedural rules are too complicated;

(b) the court has very little case management powers and the court adopts a passive role in the management of cases; and

(c) the adjudication system does not specialize in discrimination and harassment cases.

1.6 In its recommendations to the Government, the EOC proposed the establishment of a specialized Equal Opportunities Tribunal ("EOT") to adjudicate EO claims, and that the rules and procedures of the proposed EOT should ensure that the case is dealt with as expeditiously and informally as appropriate[5].

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[3] See footnote 1.

[4] The judge in charge of the Equal Opportunities List.

[5] *EOC Recommendations*, Recommendation 1.2.1, page 51.

1.7 We have taken on board the EOC's concerns and observations in conducting this review. It is noted that the *EOC Recommendations* were made before the implementation of the Civil Justice Reform ("CJR") by the Judiciary in April 2009. Many of the concerns and observations in the *EOC Recommendations* may no longer be valid after the implementation of the CJR. While the Judiciary agrees that there is still room for improvement regarding the procedural rules and practice in the adjudication of EO claims in the District Court ("DC"), the Judiciary objects to the proposed establishment of a specialized tribunal within the Judiciary to adjudicate Equal Opportunities cases ("EO cases").

1.8 As in many common law jurisdictions, our civil justice system has to keep abreast with the needs and developments of modern times. The procedural system of justice in Hong Kong is adversarial based, meaning that the court will leave it to the parties themselves to bring cases to court and on the whole let them define the nature and extent of their disputes.

1.9 However, this has led to the pace and timetabling of litigation often in the hands of the parties rather than the court. This in turn has resulted in excessive costs, delay and complexity, which have been criticized as the common faults of the pre-CJR system.

1.10 For instance, (i) pleadings, which should focus on the issues between the parties, are at times unclear and obscure rather than clear; (ii) discovery, which should be candid disclosure of documents to promote a fair resolution of the dispute, are taken to excessive lengths on arguments on the relevance of the documents, resulting in severe delays and therefore inflating costs; (iii) numerous interlocutory applications are often made to court and such applications serve little useful purpose but to increase the costs of an action and cause significant delays.

1.11 As the system was largely party-driven rather than being court-driven, these excesses were permitted to exist. In addition, the failure to identify the real issues in a case at an early stage or the fact that parties were able to reveal the true strengths and weaknesses of their cases only at a relatively late stage of the proceedings resulted in cases not being settled before significant costs were incurred and delays having already occurred.

1.12 The CJR was introduced in April 2009, with a view to –

(a) preserving the best features of the adversarial system but curtailing its excesses. One of the primary ways to achieve this is by giving even greater case management powers to the court. This would prevent tactical manipulation of the rules to delay proceedings and also ensure that court and judicial resources are fairly distributed;

(b) streamlining and improving the civil procedures; and

(c) facilitating early settlement by parties, cutting out unnecessary applications and, if necessary, penalizing such applications.

1.13 Under the new regime, with the statutory underlying objectives and proactive case management power, civil proceedings move on more expeditiously than before with lesser litigation costs as a result. Every step permitted by the court will go toward the just and efficient resolution of the dispute before the court, bearing in mind the said objectives. The court will at a relatively early stage of the proceedings adopt a "hands-on" approach to ensure that proceedings are court-controlled rather than party-driven. In this way, costly and unnecessary steps (that at present can lead to expenses and delays out of all proportion to the amount at stake in the proceedings) are avoided and parties are put on an equal footing (for example, the party with the greater resources is not able to prejudice the other side by tactics).

1.14 As a result, civil proceedings would become more efficient and expeditious, promoting a sense of reasonable proportion and economy. The intention is to reduce delay and eliminate unnecessary expenses in litigation. There would also be greater equality between parties to proceedings and settlements would be both encouraged and facilitated. As far as the administration of the court is concerned, its resources would be more fairly distributed and utilized.

1.15 The CJR has marked an important development of our civil justice system. The Judiciary considers that active case management should be the answer to the weaknesses of the system as identified by the EOC in the *EOC Recommendations*.

1.16 Indeed, after the implementation of the CJR in April 2009, it is noted that many of the concerns and observations in the *EOC Recommendations* may no longer be valid. As will be described in Chapters 2 and 3, there has been improvement to the case management in EO claims after the introduction of the CJR. As these measures were implemented after the release of the *EOC Recommendations*, they have not been reflected in the *EOC Recommendations*.

1.17 Moreover, as EO claims can be complicated in nature, the Judiciary is of the view that having a specialized tribunal on EO claims would not necessarily lead to speedy resolution of claims. This will be discussed in Chapter 3.

1.18 In addition, for the past five years, there are only 10 EO claims filed with the court per year on average. The small caseload does not justify the establishment of a specialized tribunal. The Judiciary considers that the proposal would not be conducive to the efficient deployment of the Judiciary's resources.

III. The review

1.19 This paper seeks to review the institutional, legislative and procedural frameworks, rules and practice of the DC in the adjudication of EO claims. Based on the issues identified, the review also makes recommendations to –

(a) lessen delays commonly found in EO claims;

(b) improve the cost-effectiveness of the system by reducing the number of unnecessary interlocutory applications; and

(c) further simplify the procedural rules after the implementation of the CJR in April 2009,

thereby providing a more accessible platform for parties to pursue EO claims in court.

1.20 The review does not seek to embark upon such wider issues as the practice and procedures in handling Equal Opportunities disputes before a claim is filed in the court and after the claim has been adjudicated by the DC.

1.21 As a start, the Judiciary has conducted an internal review on the existing adjudication system of EO claims by the DC and identified a number of recommendations to improve the working of the system. The findings and recommendations are set out in this paper. We would now like to gauge the views of interested parties and organizations on the review and recommendations before deciding on the way forward.

1.22 Please send your comments to us on or before 31 October 2011 by one of the following means –

Post: Judiciary
LG2, High Court Building
38 Queensway
Hong Kong

Fax: (852) 2501 4636

1.23 It is voluntary for any respondent to supply his or her personal data upon providing comments on this paper. Any personal data provided with a response will only be used for the purpose of this consultation exercise.

1.24 Unless otherwise specified, all responses will be treated as public information and may be publicised in future, in whole or in part, in any form without seeking permission or providing acknowledgement of the respondent. The Judiciary may, either in discussion with others, whether privately or publicly, or in any subsequent report, refer to and attribute comments in response to this paper.

1.25 The Judiciary will respect the wish of respondents to remain anonymous and/or keep the views confidential in part or in whole. If the respondents do not request anonymity or confidentiality in their responses, the Judiciary will assume that the respondents can be named and the responses can be published in their entirety.

1.26 Any respondent providing personal data to the Judiciary in the response will have the right of access and correction with respect to such personal data. Any request for data access or correction of personal data should be made in writing to –

Post: Administrative Officer (Development)
Judiciary
LG2, High Court Building
38 Queensway
Hong Kong

Fax: (852) 2501 4636

CHAPTER 2: OVERVIEW OF THE PRESENT SITUATION

2.1 This Chapter gives an overview of the present institutional, legislative and procedural frameworks, rules and practice in the adjudication of EO claims by the DC.

I. Caseload

2.2 The numbers of EO cases (i) filed in the DC and (ii) filed in other courts and subsequently transferred to the DC in the past five years are set out in the table below.

Table 1: Numbers of EO cases filed from 2006 to 2010

Year	2006	2007	2008	2009	2010
No. of cases	10	7	7	16	10

II. Institutional and procedural frameworks

2.3 In this section, we would first set out the institutional framework for adjudicating EO claims by the DC before moving on to the procedural framework.

(A) Institutional framework

2.4 In 1990s, the Legislative Council passed a series of ordinances with a view to eliminating discrimination and promoting equal opportunities in Hong Kong, including the SDO, the DDO and the FSDO. In 2008, the RDO was also passed to tackle race discrimination.

2.5 The EOC was set up in 1996 with the power to implement the provisions in the various anti-discrimination ordinances.

2.6 These ordinances make discrimination and harassment unlawful under specified circumstances.

2.7 Victims of unlawful discrimination and harassment may lodge a complaint to the EOC. The EOC will then investigate the complaint and endeavour, by conciliation, to effect a settlement between the parties in dispute.

Proceedings in the DC

2.8 Irrespective of whether a victim lodges a complaint to the EOC, the victim can make a legal claim against the alleged wrongdoer in the court.

2.9 According to the anti-discrimination ordinances, all the claims are to be treated as tortuous claims[6], and they have to be commenced in the DC[7].

2.10 The District Court Rules Committee has power to make rules relating to the procedures and practice in EO claims[8]. Pursuant to such power, the District Court Equal Opportunities Rules (Cap. 336G) ("DCEOR") were enacted to regulate the procedures in EO claims.

2.11 There are only a few provisions in the DCEOR, which provide for –

(a) the establishment of a register for cases under the anti-discrimination legislation[9];

(b) the transfer of claims to the Labour Tribunal[10]; and

(c) the right of audience for specified persons including

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6 SDO, section 76(1); DDO, section 72(1), FSDO, section 54(1); RDO, section 70(1).

7 SDO, section 76(3); DDO, section 72(3); FSDO, section 54(3); RDO, section 70(3).

8 District Court Ordinance (Cap. 336) ("DCO"), sections 73B, 73C, 73D and 73E.

9 DCEOR, rule 3.

10 DCEOR, rule 5.

EOC members and staff, trade unionists, carer or associates of a person with disability[11].

2.12 For all other procedures not provided for in the DCEOR, the DCEOR state that the Rules of the District Court (Cap. 336H) ("RDC") shall apply[12]. Because of such provision, the procedures and practice in EO claims are very much the same as ordinary civil claims in the DC.

2.13 The DC shall not be bound by the rules of evidence in dealing with EO claims[13].

2.14 There is an Equal Opportunities List ("EO List") in the DC. A designated judge is in charge of the List. The judge is responsible for management of the cases in the List and, if possible, to hear all the interlocutory applications of such cases. Case management existed even before CJR; but under the reform, the underlying objectives and case management power are expressly identified under Order 1A[14] and Order 1B[15] of the RDC respectively.

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[11] DCEOR, rule 6.

[12] DCEOR, rule 4.

[13] DCO, sections 73B(5), 73C(5), 73D(5) and 73E(5).

[14] The underlying objectives of the CJR as stipulated in Order 1A, rule 1 of the RDC are –
(a) To increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the DC;
(b) To ensure that a case is dealt with as expeditiously as is reasonably practicable;
(c) To promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
(d) To ensure fairness between the parties;
(e) To facilitate the settlement of disputes; and
(f) To ensure that the resources of the DC are distributed fairly.

[15] The DC may by order –
(a) Extend or shorten the time for compliance with any rule, court order or practice direction (even if an application for extension is made after the time for compliance has expired);
(b) Adjourn or bring forward a hearing;
(c) Require a party or a party's legal representative to attend the DC;
(d) Direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;
(e) Stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
(f) Consolidate proceedings;
(g) Try two or more claims on the same occasion;
(h) Direct a separate trial of any issue;
(i) Decide the order in which issues are to be tried;
(j) Exclude an issue from consideration;
(k) Dismiss or give judgment on a claim after a decision on a preliminary issue;
(l) Take any other step or make any other order for the purpose of managing the case and furthering the underlying objectives set out in Order 1A.

(B) Procedural framework

2.15 The following paragraphs outline the main stages and proceedings in an EO claim begun by issuance of writ of summons after the implementation of the CJR in April 2009.

2.16 In essence, the main objectives of the CJR are to increase cost-effectiveness, ensure fair and expeditious administration of justice, and facilitate settlement of disputes between parties at an early stage. The court takes a more pro-active role in case management in order to achieve these objectives.

Stage I: Pre-action stage

2.17 Most plaintiffs lodge complaints with the EOC, which conducts investigation and conciliation before initiating proceedings in the DC but this is not a prerequisite.

Stage II: Pleading stage

- The plaintiff issues a writ of summons indorsed with a statement of claim (verified by a statement of truth).
- If applicable, the writ would be accompanied by Form No. 16 or Form No. 16C for making admission under Order 13A of the RDC.

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- The defendant files an acknowledgment of service.
- If the defendant fails to do so, the plaintiff may enter judgment.

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- The defendant files a defence and (if applicable) counterclaim (verified by a statement of truth).
- The defendant may (if applicable) make submission in Form No. 16 or Form No. 16C in respect of an application to pay admitted sum by way of instalments upon making admission.

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- The plaintiff may file a reply (if necessary), with a view to further narrow down issues.
- If there is a counterclaim, the plaintiff has to file a defence to the counterclaim (verified by a statement of truth).
- If there is a defence to counterclaim, the defendant may file a reply to defence to the counterclaim (verified by a statement of truth).

2.18 Pleadings are subject to various technical rules as laid down in Order 18 of the RDC, with some of the examples listed out as follows –

(a) a pleading has to satisfy various requirements as set out in Order 18, rule 6 of the RDC;

(b) a pleading must contain only a statement of the summary form of the material facts on which a party relies for his or her claim or defence, and not the evidence by which they are to be proved[16];

[16] RDC, Order 18, rule 7; *Hong Kong Civil Procedure 2011*, vol. 1, paragraph 18/7/5.

(c) only facts which are material should be stated in a pleading, and statements of immaterial and unnecessary facts may be struck out[17];

(d) pleading law is not permitted, whilst raising a point of law in the pleading is allowed and often necessary[18];

(e) sufficient particulars in support of an averment need to be included in the pleading[19]; and

(f) in preparing the defence, the traverse, which includes denial and non-admission of certain matters raised in the statement of claim, must be specific and not general[20].

Stage III: Close of pleading and preparation for trial stage

- The parties have to fill in, file and serve timetabling questionnaire.
- If applicable, the parties may issue case management summons.
- Case management conference(s) ("CMC(s)") held before a judge/master [21].
- The parties have to make discovery and inspection of documents, exchange witness statements and (if applicable) expert reports.

2.19 Since the implementation of the CJR in April 2009, the DC has more case management powers to deal with the cases before it and the court has taken a more pro-active approach in the case management of EO cases.

2.20 Firstly, to facilitate the giving of case management directions within 28 days after the close of pleadings or pleadings are deemed to be closed, parties are required to file and serve a timetabling questionnaire to set out the directions to be sought in respect of the future steps of the

[17] RDC, Order 18, rule 7; *Hong Kong Civil Procedure 2011*, vol. 1, paragraph 18/7/6.

[18] RDC, Order 18, rule 11; *Hong Kong Civil Procedure 2011*, vol. 1, paragraph 18/7/4.

[19] RDC, Order 18, rule 12.

[20] RDC, Order 18 rule 13; *Hong Kong Civil Procedure 2011*, vol. 1, paragraph 18/13/5.

[21] For EO cases, CMCs are primarily heard by the judge in charge of the EO List.

proceedings such as the exchange of witness statements. Under Order 24, rule 2 of the RDC, a list of documents should be served within 14 days after the pleadings are deemed to be closed. In so far as the proposed directions are agreed, that should be recorded by way of a consent summons without oral hearing, otherwise, oral hearing may be conducted to resolve the differences. These directions should also cover whether a CMC is required.

2.21 At a later stage of litigation and before a case is set down for trial, a CMC will be held before a judge/master to ensure that the case is ready to be set down for trial[22]. Parties are to file and serve listing questionnaires seven days before the CMC, informing the DC as to whether the parties are ready for trial; if not, explanation would be required. They are also under the duty to set out the summary of the case, list of issues and estimation of the length of the trial. The judge/master[23], who is familiar with the issues of the case, will seek to dispose of all remaining matters, if any, during the CMC hearing, so as to expedite the litigation process. The operational provisions of the case management summons and the CMC are governed by Order 25 of the RDC and the Practice Direction on Case Management ("PD 5.2").

2.22 Secondly, the court is now empowered, on its own initiative, to ask for further details of a claim or defence[24]; or to strike out the claim or defence where there is no merit[25] or where the claimant fails to appear in important hearings[26]. In the past, without such power, the role of the court was rather passive under the adversarial system. With the enlargement of power, the court can now draw the boundary of issues, identify the real questions in controversy and make suitable orders as soon as practicable. This should be conducive to saving time and costs in the litigation process.

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[22] See footnote 21.

[23] See footnote 21.

[24] RDC, Order 18 rule 12(3A).

[25] RDC, Order 18 rule 19(1).

[26] RDC, Order 25 rule 4(1).

2.23 Thirdly, with the introduction of the "milestone date" concept, the adjournment of the CMC/pre-trial review ("PTR")/trial hearings is becoming more difficult. As "milestone date hearings", these hearings shall not be varied unless there are exceptional circumstances[27].

Stage IV: Getting to trial

- PTR hearings(s) held before a judge.
- Setting down the action for trial.
- The trial.

2.24 When a case is ready for trial, the court will give permission for the action to be set down for trial. For a complicated case, it may be adjourned from the CMC to the PTR for final scrutiny of the case by the judge who will conduct the trial. At the PTR, the trial judge may refine issues and give further directions for the conduct of the trial, if necessary.

Stage V: After the trial

- Taxation of costs.

Suitable costs orders and taxation

2.25 Generally speaking, the usual costs order in EO claims is that each party shall bear its own costs unless the court makes adverse costs orders against one of the parties. Once suitable costs orders are made, the trial judge is empowered to assess the amount of costs summarily. The trial judge may order the amount of costs to be decided by a taxing officer. In such case, the receiving party may commence the process of taxation of costs so as to decide the appropriate amount of costs to be paid by the paying party.

[27] "Milestone date" means a date is fixed for a CMC/ PTR and the trial. The significance is that the DC shall not vary a CMC date unless there are exceptional circumstances (see Order 25, rule 3 of the RDC).

2.26 One of the important considerations for a complainant in deciding whether to commence legal action is costs, which in turn depends on the following two issues –

(a) whether the plaintiff has to pay for the costs of the defendant if he or she loses the claim; and

(b) whether legal representation is allowed in EO claims.

2.27 Potential liability to pay costs is an important concern for a complainant, particularly as most of the defendants may be the Government, public institutions or large commercial enterprises which have considerable financial resources to defend their reputations. This is the reason why the ordinances provide that the normal costs rule for EO cases is that each party shall bear its own costs of action[28].

2.28 There are two provisos in the statutory provisions which allow the court to make an adverse order against a losing party –

(a) if the proceedings were brought maliciously or frivolously; or

(b) there are special circumstances which warrant an award of costs.

2.29 In the past, there were instances in which the court relied on the provisos in making adverse costs orders against the losing parties. A table showing the numbers of cases in which the court made an adverse costs order after trial is as follows –

[28] DCO, sections 73B(3), 73C(3), 73D(3) and 73E(3).

Table 2: <u>Numbers of adverse costs orders made by the DC in EO cases from 2006 to 2010</u>

Year	2006	2007	2008	2009	2010
No. of adverse costs order made against plaintiff	0	3	4	0	1
No. of adverse costs order made against defendant	1	4	2	0	1
Total No. of adverse costs orders made[29]	**1**	**7**	**6**	**0**	**2**

<u>Stage VI: Settlement and mediation</u>

2.30 An important objective of the CJR is to encourage mediation as a means of alternative dispute resolution. Since some of the EO claims have gone through the conciliation process in the EOC and some claims are pursued because they involve matters of public importance, it may not be necessary to require all cases to go through the mediation procedures as laid down in the Practice Direction on Mediation ("PD 31") which was introduced after the CJR. That is the reason why the PD 31 is not applicable to EO proceedings[30].

2.31 However, this does not mean that the court should not refer appropriate EO claims to mediation. In particular, the court will consider referral after the close of pleadings, the stage when parties are put to focus on the crux of the issues. At that stage, the parties should be in a better position to assess the pros and cons of mediation or litigation. They are thus given an option other than litigation as an alternative to resolve the dispute. That is often done after the implementation of the CJR in April 2009, and in many cases with successful results. Statistics showing the numbers of EO cases referred by the court to mediation since CJR together with the results are as follows –

[29] Under the legislation, the normal costs rule for EO cases is that each party shall bear its own costs of the action. In this paper, adverse costs order refers to costs order made to the other party.

[30] Practice Direction on Mediation ("PD 31"), Appendix A.

Table 3: Numbers of EO cases referred by the DC for mediation since CJR

Year	2009 (Apr – Dec)		2010 (Jan – Dec)		2011 (Jan – June)	
Total No. of cases referred	**0**		**7**		**1**	
Outcome	**Settled after mediation**	**Cases proceeded after mediation attempt**	**Settled after mediation**	**Cases proceeded after mediation attempt**	**Settled after mediation**	**Cases proceeded after mediation attempt**
No. of cases	0	0	2	5	0	1

III. Other related issues

(A) Legal representation

2.32 At present, legal representation is allowed for EO cases.

(B) Litigants in person ("LIPs")

2.33 If a complainant lodges a discrimination complaint to the EOC, the EOC would investigate the complaint in appropriate cases. EOC would also offer an opportunity to the parties to settle their disputes by way of conciliation. If that is not successful, the EOC may provide legal assistance to the complainant to commence legal proceedings in the DC. Under such circumstances, the complainant would be represented by the EOC in the legal proceedings.

2.34 A complainant may also apply for legal aid in commencing an EO claim in court. Or if the complainant has the means, he or she may engage private lawyers to represent himself or herself in the legal proceedings.

2.35 If a complainant cannot obtain or does not want to have legal assistance, he or she may conduct the legal proceedings himself or herself.

2.36 A significant portion of the cases were conducted by parties without legal representation. Tables showing the numbers of Equal Opportunities hearings ("EO hearings") involving litigants in person being heard at different stages in the DC since the CJR are as follows –

Table 4: Numbers of EO hearings involving LIPs being heard at different stages in the DC (2.4.2009 – 31.3.2010)

DC	**Post-CJR Period (2.4.2009 – 31.3.2010)**		
	No. of Hearings		
	At least one litigant in person involved	All represented	**Total**
Interlocutory applications	10 (47.6%)	11 (52.4%)	**21**
Case management summons	0 (0%)	1 (100%)	**1**
CMC	0 (0%)	1 (100%)	**1**
PTR	1 (14.3%)	6 (85.7%)	**7**
Trial	1 (50%)	1 (50%)	**2**

Table 5: <u>Numbers of EO hearings involving LIPs being heard at different stages in the DC (1.4.2010 – 31.3.2011)</u>

DC	Post-CJR Period (1.4.2010 – 31.3.2011)		
	No. of Hearings		
	At least one litigant in person involved	All represented	**Total**
Interlocutory applications	7 (43.7%)	9 (56.3%)	**16**
Case management summons	1 (33.3%)	2 (66.7%)	**3**
CMC	0 (0%)	4 (100%)	**4**
PTR	0 (0%)	1 (100%)	**1**
Trial	0 (0%)	1 (100%)	**1**

IV. Experience in other jurisdictions

2.37 In considering possible reform, it would be useful to make reference to the procedural rules relating to the adjudication of discrimination claims in other jurisdictions.

2.38 The anti-discrimination statutes in Hong Kong are modelled on those in the United Kingdom and Australia, and so the experiences in these two jurisdictions are most relevant. Further, Canada has a long history of dealing with discrimination claims and it has a legal system similar to that in Hong Kong. It may also be useful to make reference to the experience in Canada.

2.39 An overview of the procedural rules relating to the adjudication of discrimination claims in these jurisdictions is at **<u>Appendix</u>**.

CHAPTER 3: REVIEW AND RECOMMENDATIONS

3.1 In this Chapter, the effectiveness of the present framework, rules and practice in the adjudication of EO claims as outlined in Chapter 2 will be evaluated. Recommendations will also be made to improve the working of the present system.

I. Institutional and procedural frameworks

3.2 In this section, we will review the procedural framework first and tackle the institutional framework afterwards.

(A) Procedural framework

Stage I: Pre-action stage

3.3 Pre-action stage falls outside the scope of this paper.

Stage II: Pleading stage

3.4 Judge Lok in *Sit Ka Yin Priscilla v EOC* expressed the view that the complicated procedural rules might have contributed to the delay in that particular case, and the judge also expressed doubts as to whether the rigid pleading system is suitable for the adjudication of EO claims. Judge Lok said the following in the judgment –

> "*19. Despite that the Plaintiff is the one mainly responsible for the delay in the proceedings, I believe that a more simplified set of procedural rules can reduce some of such delay. After the implementation of the civil justice reform in 2009, the court has already adopted a more pro-active approach in the case management of discrimination claims. The court has referred appropriate cases for mediation with some successful results. The court would also set speedy timetables for the progress of the cases with a view to reduce some of the delays. Despite that, the court is still faced with a lot of interlocutory applications such as applications for extension of time to file pleadings, applications for*

provision of further and better particulars of pleadings and striking out applications. Although there are no formal statistics, my observation as the judge-in-charge of the Equal Opportunities List shows that there were more such interlocutory applications in discrimination claims than other ordinary civil claims.

20. *As I see it, the problem may lie with the use of pleadings in the adjudication of discrimination claims. One of the features of such kind of actions is that they usually involve a series of incidents over a period of time which eventually lead to the ultimate detriment suffered by the complainant, for example the termination of the complainant's employment. These incidents are usually closely related. Because of the large number of incidents involved, the legal advisers often take great care in listing out all such incidents in the pleadings and the relationship between them. On the other hand, litigants in person may experience great difficulty in listing out their complaints clearly in the pleadings. The result is that the pleadings may become very lengthy documents, which would in turn lead to a lot of interlocutory applications such as applications for provision of further and better particulars and striking out applications.*

21. *With the lengthy technical pleadings, one can also easily overlook some of the important facts of the case, which was actually what happened in the present case. … For some reasons, these facts did not appear in the pleadings and the parties might not appreciate the significance of these facts until the trial itself. In such circumstances, one would query the wisdom of continuing to adopt the pleadings system in the adjudication of discrimination claims.*

22. *In a number of jurisdictions including the United Kingdom (with the exception of the adjudication of non-employment related discrimination claims), Australia and Canada, the courts or tribunals have already dispensed with formal pleadings in the adjudication of discrimination claims. Instead, complainants and respondents have to file more informal Points of Claim or Points of Defences. The procedural rules are also less complicated.*

> *23. In my opinion, the time is now ripe for us to review whether the pleadings system is suitable for the adjudication of discrimination claims. One must bear in mind that anti-discrimination statutes are social legislations which involve the protection of civil rights. In order not to deter complainants with legitimate grievances of enforcing their rights in the court, discrimination claims should be adjudicated in a speedy manner. The costs of such kind of proceedings should also be reduced as much as possible. I believe that the use of more simplified claim forms can, to a great extent, achieve such result.*"

3.5 As reflected in the above judgment, the main problem lies with the use of pleadings in EO proceedings.

3.6 As mentioned in Chapter 2, pleadings are subject to the various technical rules as laid down in Order 18 of the RDC.

3.7 Apart from the technical nature of pleadings, the unique features of EO claims also call for the use of informal claim forms in the adjudication of such kind of claims.

3.8 Firstly, EO claims often involve disputes in an employment context, and a lot of the complainants are former employees of the defendants. Unlike other civil claims, discrimination or harassment complaints are usually based on a series of incidents which occurred over a considerable long period of time during the employment. Some of these incidents, when considered in isolation, might not amount to discrimination, but the cumulative effect of these incidents might suggest that the employers have unlawfully discriminated against the employees. Under such circumstances, it would be most difficult for the complainants to decide what to include in the pleading.

3.9 If a litigant has included immaterial facts and matters in the pleading, the other side may apply to court to strike out those irrelevant parts in the pleading. On the other hand, if the litigant fails to include some matters which turn out to be relevant later in the proceedings, he or she may not be allowed to reply on such matters at the trial. Hence, as a matter of caution, parties in such kind of litigations usually require much longer time for the drafting and preparation of pleadings.

3.10 Since discrimination and harassment complaints usually involve a lot of incidents, a pleading may become a very bulky document. With the lengthy technical pleading, it would be easy for the parties to overlook some important facts of the case. That was actually what happened in *Sit Ka Yin Priscilla v EOC*. The plaintiff in that case complained that the defendants had adopted a discriminatory practice against female employees by denying their opportunity of acting appointment. However, the facts revealed at the trial showed that it was not the case. The plaintiff herself always asked her male subordinate to act in her post when she was absent from office, and the defendants had appointed another female senior staff, who was of the same rank as that of the plaintiff, to act up the post of the Chief Executive at least on one occasion whilst the latter was on leave. Such important facts showed that the defendants were not adopting a discriminatory practice against female employees. As the parties had to deal with a lot of facts and allegations in drafting the pleadings, they overlooked such important facts at the pleading stage and such facts were only revealed at the trial of the action[31].

3.11 Secondly, it would be difficult for parties to clarify the issues in EO claims at the early stage of the proceedings, in particular before the discovery of documents and exchange of witness statements.

3.12 In determining whether there is unlawful discrimination on the part of the alleged discriminator, the various anti-discrimination ordinances require the court to compare the treatment received by the complainant with that of a "comparator", who is a person with similar circumstances of those of the complainant except that he or she is not a person with disability in the case of a disability discrimination claim[32], of the same sex of the complainant in the case of a sex discrimination claim[33], of the same family status of the complainant in the case of a family status discrimination claim[34] and of the same race of the complainant in the case of a race discrimination claim[35].

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[31] *Sit Ka Yin Priscilla v EOC* (see footnote 1), at paragraph 21 (Judge Lok).

[32] DDO, sections 6 and 8.

[33] SDO, sections 5 and 10.

[34] FSDO, sections 5 and 7.

[35] RDO, sections 4 and 8.

3.13 Before the discovery stage, it would be most difficult for the complainant to know the treatment received by the potential "comparators", in most cases the other employees, and to identify the proper "comparator" for the purpose of determining whether there is any unlawful discrimination on the part of the defendant. In fact, even at the trial, the court often has difficulty in identifying the proper "comparator". If the parties are requested to identify the proper "comparator" for the purpose of the use of pleading, it may unnecessarily complicate the issues at the early stage of the proceedings.

3.14 As a significant number of litigants in EO claims are LIPs, they would find it most difficult to comply with these technical rules. If they breach any of such rules by, for example, including irrelevant materials or evidence in the pleading, the other side can make an application to court to strike out the pleading. It may result in a lot of interlocutory applications.

3.15 With the exception of the adjudication of non-employment related discrimination claims in the United Kingdom, the courts and tribunals in the United Kingdom, Australia and Canada have dispensed with the use of pleadings in the adjudication of discrimination claims. Parties only need to file more informal claim forms or response forms.

3.16 As observed by Judge Lok in *Sit Ka Yin Priscilla v EOC*, since anti-discrimination statutes are social legislations with a view to protect civil rights, EO claims should be adjudicated in a speedy manner and the costs of litigation should be reduced as much as possible[36]. There is room for improvement of the procedural rules of EO proceedings by making them simpler and more flexible.

3.17 It is recommended that technical pleadings should be replaced by more informal claim forms in EO proceedings. It would be more desirable for the complainant just to list out the general nature of his or her complaint in an informal claim form with the detailed accounts of the various incidents to be covered in the witness statements rather than in the technical pleading. The court will seek to identify the issues as early

[36] *Sit Ka Yin Priscilla v EOC* (see footnote 1), at paragraph 23 (Judge Lok).

as possible from those informal claim forms and response forms so as to give parties directions to collect and produce evidence within the ambit of the framed issues.

3.18 It would also be desirable to introduce a more user-friendly claim form. For example, there are four main areas of anti-discrimination complaints, namely sex discrimination, disability discrimination, family status discrimination and race discrimination. A claimant may fill in one or more boxes to identify the nature of the claim before accounting for the gist of events leading to the complaint. The simplified claim form would assist the party being complained of to know the allegations better and to respond systematically.

3.19 Guidance notes may also be issued to assist the parties to account the sequence of events such as the date, persons involved, place and contents (four essentials in writing a narrative).

3.20 In Hong Kong, more informal claim forms have already been in use in employees' compensation cases[37] and proceedings in the Lands Tribunal[38]. The DC and the Lands Tribunal have more flexibility to deal with the claims in these proceedings.

3.21 Subject to the adoption of this recommendation, the DCEOR should be amended to replace the pleadings with informal claim forms and response forms. The Judiciary will set up a working group consisting of judges to consider what should be included in the informal forms.

3.22 While informal claim forms and response forms should replace pleadings under normal circumstances, it is also recognized that they may not be suitable under all circumstances. For example, some EO claims may be complicated in nature. For such cases, the judge may consider that pleadings should continue to be used for case management purposes. It is recommended that after the introduction of informal forms, it should be left open for the judge to direct pleadings as he or she considers appropriate in suitable cases.

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[37] See the forms in the Schedule to the Employees' Compensation (Rules of Court) Rules (Cap. 282B).

[38] See the forms of the Lands Tribunal Rules (Cap. 17A).

3.23 **Recommendation 1**: Technical pleadings should be replaced by more informal claim forms and response forms in EO proceedings under normal circumstances. The Judiciary will set up a working group consisting of judges to consider what should be included in the informal forms. After the introduction of the informal forms, a judge may still direct pleadings under exceptional circumstances for case management purposes.

Stage III: Close of pleading and preparation for trial stage

3.24 It has been pointed out in the past that the lack of case management powers was one of the defects of the then procedural rules.

3.25 Such comment may no longer be valid after the implementation of CJR in Hong Kong in April 2009.

3.26 As shown in Chapter 2, since the implementation of the CJR, the judge in charge of the EO List in the DC has adopted a more pro-active approach towards the case management of EO cases by applying the underlying objectives of the RDC as provided for in Order 1A of the RDC and the case management powers introduced by the new procedural rules.

3.27 Similar provisions about the underlying objectives of the procedural rules can be found in regulation 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 in the United Kingdom; and rule 1(1) of the Canadian Human Rights Tribunal Rules of Procedure in Canada. One may also note that similar case management powers are provided for in rules 10 to 19 of Schedule 1 to the United Kingdom's Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004; and Practice Note 3 issued by Canadian Human Rights Tribunal. In order to ensure that cases will proceed in an efficient manner, the procedural rules in other jurisdictions have provided the court or tribunal with sufficient case management powers to manage the process of the cases.

3.28 It is noted that implementation of CJR on the EO proceedings

has on the whole been smooth for the past two years. While the reform is heading towards the right direction, the implementation of the CJR is still at an early stage. Improvements should continue to be made. It will take probably at least two to three years before meaningful trends and conclusions could be drawn.

First direction hearing

3.29 EO claims usually involve complicated factual and legal issues. As pointed out in Chapter 2, it is sometimes difficult for parties to crystallize the issues in the early stage of the proceedings. A first direction hearing would therefore be important for the court to have a general understanding of the issues of the dispute between them at the first available opportunity.

3.30 In most of the cases where the claims are filed by LIPs, it would be difficult for the court to understand the true basis of the claim. If that happens, the court can ask the complainant, in the first direction hearing, to clarify his or her claim and to provide further particulars if necessary. This would reduce the number of unnecessary interlocutory applications. It would also enable the court to manage the progress of the case by giving appropriate case management directions, and to refer the cases for mediation if appropriate. As there are only a few EO cases and there are not too many legal practitioners who have experience in this sort of litigations, early intervention by the court in the management of the case should be desirable.

3.31 One may also note that Practice Note 3 issued by the Canadian Human Rights Tribunal requires a first case management conference to be fixed within two weeks of the date of the issuance of the Initial Letter by the Registry.

3.32 Under the existing listing practice in the DC with the Registrar's directions, the Registry would take the initiative to fix a first case management hearing for those cases transferred from the Small Claims Tribunal or the Labour Tribunal. However, for cases commenced in the DC, even if any of the parties is not legally represented, a first case management hearing would not be fixed automatically by the Registry

except that the case remains dormant for a long time. But once the judge or master discovers that any case involves a LIP, a hearing date will be fixed for adjourned cases so as to monitor the progress of the litigation.

3.33 Early intervention by the court is desirable to clarify the issues in complicated EO claims. In order to ensure that the cases are to be dealt with in a speedy manner, it is recommended that there should be a first direction hearing to be fixed within a certain time, say, eight weeks, after the filing of the claim. The listing practice of fixing the first case management hearing should be introduced for all the EO proceedings irrespective of whether the parties are legally represented or not.

3.34 Instead of amending the procedural rules, the practice of fixing a first direction hearing within a certain time after the filing of claim can be introduced by way of issuance of a Practice Direction[39].

3.35 **Recommendation 2**: There should be a Practice Direction providing for a first direction hearing to be fixed within a certain time, say, eight weeks, after the filing of an EO claim.

Stage IV: Getting to trial

3.36 As mentioned above, the use of formal pleadings is identified as the main problem causing delays and unnecessary interlocutory applications. According to past experience, most of the interlocutory applications in EO proceedings were related to pleadings, for example applications for provision of further and better particulars and striking out applications.

3.37 After the implementation of the CJR, the existing practice concerning the legal proceedings is working reasonably well. With the proposed introduction of simple claim forms and response forms (Recommendation 1), first case management hearings (Recommendation 2), early identification of issues, proactive case management and milestone date concept, parties would be better navigated to prepare for the trial.

[39] Similar practice has been adopted under the Practice Direction for personal injury cases ("PD 18.1").

Hence, apart from the reform identified above, it is proposed that other reform is not necessary at this stage.

3.38 **Recommendation 3**: Apart from the reforms introduced by CJR, other reform measures are not necessary at this stage.

Stage V: After the trial

Costs

3.39 At present, each party shall bear its own costs of the action and the court may make adverse costs orders[40].

3.40 Some of the reasons given by the court in making adverse costs orders are as follows –

(a) The court will lose the power to regulate the progress of the proceedings if the court cannot make an adverse costs order against a party who acted unreasonably in interlocutory proceedings[41];

(b) It will open a floodgate to unmeritorious claims if a plaintiff who brought an unmeritorious claim does not have to bear any responsibility in the case that he loses the claim, and the court will have to balance the rights of all the parties involved in the litigation[42]; and

(c) The court will show its disapproval of the outrageous conduct of a defendant, in particular in sexual harassment claims[43].

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[40] See paragraphs 2.27-2.29 above.

[41] *Cano-Shearer Anne v Cathay Pacific Airways Ltd*., unreported, Equal Opportunities Action No. 1 of 2001 (DC, 1 November 2002), at paragraph 33 (Judge Lok).

[42] *Cano-Shearer Anne v Cathay Pacific Airways Ltd.* (see footnote 41), at paragraph 18 (Judge Lok); *Sit Ka Yin Priscilla v EOC* (see footnote 1), at paragraph 3 (Judge Lok).

[43] *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731; *L v David Roy Burton* [2010] 5 HKLRD 397.

3.41 As shown in these judicial decisions, there are many cases in which, as a matter of fairness, the losing plaintiffs should be asked to pay for the costs of the defendants, and so the discretionary power of the court in making adverse costs orders should be retained.

3.42 One may also note that in some other jurisdictions, for example discrimination claims filed in the federal courts in Australia, the general principle is that the losing party shall have to pay for the costs of the winning party.

3.43 **Recommendation 4**: The current rule that each party shall bear its own costs of action and the court may make adverse costs orders should be maintained.

Stage VI: Settlement and mediation

3.44 For discrimination claims, some of the complainants have made a complaint to the EOC before filing a claim in court. The EOC may help the parties resolve the dispute by conciliation. On the other hand, some of the cases are pursued because they involve matters of public importance. Because of this unique feature of EO cases, it may not be appropriate to require all the cases to go through the procedures laid down in the PD 31 introduced after the CJR.

3.45 Nevertheless, mediation is considered as a very effective and efficient means to resolve disputes between parties. In fact, there are many reasons why parties of EO dispute should avoid going through a full trial in litigation. For a plaintiff who complains of discrimination, he or she can avoid the pressure and the embarrassment caused by the litigation if the case can be settled through mediation. For a defendant who faces a discrimination claim, it can avoid the bad publicity associated with the litigation if the claim can be settled before the trial.

3.46 After the implementation of the CJR in April 2009, two EO cases have been settled after referral by the court for mediation within two to three months after the referral. Considering the few number of cases filed in the court in the first and second year after the implementation of the CJR, namely 12 and 13 cases respectively, this result is satisfactory.

3.47 In the United Kingdom, some of the statutes provide for conciliation in the case of employment disputes[44]. Because of this, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and the United Kingdom have detailed provisions relating to conciliation, including the power of the Tribunal to stay the proceedings during the conciliation period.

3.48 Under the existing regime, the new procedural rules of the DC introduced by the CJR together with the PD 31 have provided sufficient powers to the court to make directions facilitating the resolution of dispute by mediation, including the power to stay the proceedings and to make adverse costs orders in the case of unreasonable refusal to take part in mediation. Although the PD 31 does not automatically apply to EO claims, it is always within the judge's power to direct parties to abide by it under Order 1A and Order 1B of the RDC.

3.49 The existing practice is working well and the court would continue to refer cases to mediation as appropriate.

3.50 **Recommendation 5**: The court should continue to encourage and promote mediation as an alternative dispute settlement and refer suitable cases to mediation.

[44] For a complete list of the statutes, readers can refer to rule 22 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom).

(B) Institutional and legislative framework

Whether a separate Equal Opportunities Tribunal should be established?

3.51 In March 2009, the EOC published a report recommending the establishment of an EOT. In the report, the following observations were made about the existing system –

(a) the procedural rules are too complicated;

(b) the court has very little case management powers and the court adopts a passive role in the management of cases[45]; and

(c) the adjudication system does not specialize in discrimination and harassment cases[46].

3.52 According to the press release issued by the EOC in March 2011, there was also a view by some EOC Members that a new specialized tribunal would provide better focus and a shift in attitude so as to lead to actual changes.

3.53 As a matter of principle, the Judiciary does not support a proliferation of tribunals. In dealing with different types of cases, a pragmatic and cost-effective approach should be adopted –

(a) Generally, cases should be dealt with under the respective jurisdiction of the relevant court.

(b) Specialist lists are established for cases which are dealt with in a manner tailored to meet the needs of the type of case. Practice Directions may be issued in relation to each list. A judge would be assigned to be in charge of each list with the intention of allowing the judge of the

[45] *EOC Recommendations*, paragraph 2.4.

[46] *EOC Recommendations*, paragraph 4.13.

relevant list to case-manage more effectively[47]. They reflect the degree of control exercised by the judge in charge of the particular list and how the practice of each of the specialist lists has been tailored to meet the needs of that list.

(c) Specialized tribunals should only be established under very special circumstances. Exceptionally strong grounds need to be put forward in justifying the setting up of any specialized courts and tribunals within the Judiciary. For examples, the case types should be highly specialized and complex, the rules and practices to be applied should be distinct from the normal rules and practices of the court, and the caseload should justify the establishment of the tribunals[48].

3.54 At present, there is an EO List in the DC. A judge is in charge of the List to case-manage the cases effectively. As mentioned in Chapter 2, if possible, the judge would hear all the interlocutory applications of the cases on the List. The system has worked well.

3.55 Moreover, with the proposed adoption of more simplified claim forms and response forms (Recommendation 1), the first observation of the EOC may no longer be valid.

3.56 With the implementation of the CJR in April 2009, the second observation of the EOC may also be no longer valid. The court now has more case management powers and has adopted a more pro-active approach in the management of the cases. The proposed fixing of a first hearing would facilitate the court to identify the relevant issues at an early stage (Recommendation 2). All these measures should help reduce delays, complexity and enhance cost-effectiveness in EO litigations.

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[47] Examples of specialist lists include the Commercial List, the Construction and Arbitration List, the Administrative and Constitutional Law List and the Personal Injuries List.

[48] At present, there are four tribunals established within the Judiciary. They are the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal.

3.57 It should also be noted that a specialized tribunal will provide no guarantee of speedy resolution of the EO claims because by nature, EO claims can be complicated.

3.58 First, EO claims are civil right claims which may involve principles of some public importance. The court will often be asked to draw the line as to what amounts to unlawful discriminatory conduct. The repercussion of the case may go beyond the individuals involved in the case and may have far-reaching and complicated implications on various matters in the community. The decision of the court may affect Government's policies, practices in commercial enterprises and even behavior of individuals. By reason of such feature, the parties of EO claims would usually deploy substantial resources for the preparation of their cases which would add to the complications involved in this sort of litigations.

3.59 Second, the law on discrimination can be complicated and is still in the early stage of development. Since the anti-discrimination statutes are relatively new in Hong Kong, the court is often asked to determine a point of law which has not been argued before. Preparation of the cases would usually involve substantial legal research into the laws and cases of other common law jurisdictions such as Australia and Canada. This will happen whether the claim is heard by a specialized tribunal or not.

3.60 Third, under the anti-discrimination statutes, the court may grant a wide range of remedies, including orders to direct a respondent (usually the employer) to perform any reasonable act to redress any damages suffered by a claimant (for example the giving of an apology), to employ or re-employ or promote the claimant and to pay punitive or exemplary damages[49]. Because some of these remedies are unique to EO claims, the court may be asked to consider some issues which may not be relevant in other ordinary civil claims.

3.61 Fourth, as mentioned earlier in this paper, some EO claims may involve series of incidents with cumulative effect leading to the complaint of discrimination. That may involve serious dispute of facts and substantial disclosure of documents surrounding each and every episode.

[49] SDO, section 76(3A); DDO, section 72(4); FSDO, section 54(4); RDO, section 70(4).

3.62 Indeed, it is after having regard to the complicated nature of EO claims that the Judiciary proposes that legal representation should continue to be allowed in EO claims. This will be discussed further below in this Chapter.

3.63 As such, the resolution of complicated EO cases may take time. In exercising its powers, the court always recognizes that the primary aim is to secure the just resolution of disputes in accordance with the substantive rights of the parties. Even if a specialized tribunal is established, there can be no guarantee that there would be speedy resolution of the claims.

3.64 As for overseas experience, with the exception of Canada, other jurisdictions, including the United Kingdom and Australia, do not have a court or tribunal which deals exclusively with discrimination claims.

3.65 Regarding caseload, for the past five years, there are only 10 EO claims filed with the court per year on average. The small number of EO claims does not justify the establishment of a separate tribunal.

3.66 On balance, the Judiciary is of the view that the proposal of establishing a specialized tribunal to hear EO cases would not be conducive to the efficient deployment of the Judiciary's resources.

3.67 In sum, the Judiciary does not support the proposed establishment of a specialized tribunal within the Judiciary to hear EO cases.

II. Other related issues

(A) Whether legal representation should be allowed?

3.68 A way to remove the costs concern of a potential plaintiff is to disallow legal representation in EO claims. Just like the proceedings in the Small Claims Tribunal and the Labour Tribunal, it is believed that the restriction of legal representation can reduce the costs of the proceedings.

3.69 However, this proposal would take away the civil right of the parties to have their cases be argued by lawyers. Whilst the principle of proportionality may justify the exclusion of legal representation for the simple claims in the Small Claims Tribunal and the Labour Tribunal, it may not justify the exclusion of legal representation in EO claims, in particular some of these claims may be complicated in nature or involve principles of some public importance.

3.70 The exclusion of legal representation had been considered by Hon. Justice Kevin Bell in the President's Review of the Victorian Civil & Administrative Tribunal in Victoria of Australia[50]. This Tribunal has jurisdiction to hear many kinds of claims including discrimination claims. There are some restrictions to legal representation in the proceedings in the Tribunal. But after reviewing the arguments, Hon. Justice Bell recommended not to impose further restrictions on legal representation, and the reasons included: (i) the right to legal representation is very important; (ii) it is wrong to blame the lawyers for doing their job; (iii) the court will provide appropriate assistance to litigants in person even if the other side is legally represented; and (iv) the exclusion of legal representation will deprive the Tribunal of the benefit of submissions on complicated legal and factual issues.

3.71 The same arguments should also be applicable in Hong Kong. There is no compelling reason to exclude legal representation in EO claims.

3.72 **Recommendation 6**: Legal representation should continue to be allowed.

(B) Assistance to LIPs

3.73 LIPs are litigants who do not have legal representation in court proceedings. In recent years, there has been an increase in such litigants in the courts. LIPs pose particular challenges to the Judiciary. A multi-faceted approach is being adopted.

[50] The paper was published on 30 November 2009 and is available at www.vcatreview.com.au.

3.74 The promotion of pro-bono legal services offered by the legal profession is to be encouraged.

3.75 The Administration continues to be supportive in this area. The extension of legal aid by way of the lowering of the financial threshold for recipients of legal aid; and the discussion of a proposed pilot scheme to provide assistance to LIPs on civil procedural matters are to be welcomed.

3.76 The Legal Aid Ordinance (Cap. 91) provides that the Director of Legal Aid may waive the means test requirement for a person involved in proceedings in which a breach of the Hong Kong Bill of Rights is an issue[51]. To address the lack of financial means of potential litigants to pursue their cases in court, the Administration may wish to give consideration to extending the provision to anti-discrimination proceedings under the statute.

3.77 The Judiciary continues to provide appropriate assistance to LIPs. The proposed use of simplified forms on pleading (Recommendation 1) and the fixing of a first direction hearing (Recommendation 2) should help reduce the complexity of EO proceedings and expedite the process as appropriate, thus enhancing the cost-effectiveness of the system. Publicity materials on EO proceedings in court may also be produced for reference of court users and the public.

3.78 **Recommendation 7**: To tackle the increasing number of LIPs, a multi-faceted approach should continue to be adopted –

(a) The legal profession would continue to promote pro-bono services;

(b) The Administration may consider extending legal aid and assistance to Equal Opportunities litigants as appropriate. In particular, consideration may be given to the feasibility of waiving the means test requirement for a person involved in proceedings in which a breach of anti-discrimination statutes is an issue; and

[51] Legal Aid Ordinance (Cap. 91), section 5AA.

	(c)	The Judiciary would consider producing suitable publicity materials to assist court users on EO proceedings.

CHAPTER 4: SUMMARY OF THE OUTCOME OF REVIEW AND RECOMMENDATIONS

4.1 The Judiciary has conducted an internal review of the institutional, legislative and procedural frameworks of the DC in the adjudication of EO claims. We consider that the institutional framework works smoothly and we do not support the establishment of a specialized tribunal within the Judiciary to hear EO cases. Nevertheless, there should be room for improvement in the procedural rules, active management of the cases and provision of assistance to LIPs. Based on the issues identified, we make a number of recommendations to simplify the procedural rules, enhance active case management and adopt a multi-faceted approach on LIPs, thereby providing a more accessible platform for parties to pursue EO claims in court. We would now like to gauge the views of interested parties and organizations on the recommendations before deciding on the way forward.

Recommendation 1:

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

Recommendation 2:

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

Recommendation 3:

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

Recommendation 4:

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

Recommendation 5:

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

Recommendation 6:

- Legal representation should continue to be allowed.

Recommendation 7:

- To tackle the increasing number of LIPs, a multi-faceted approach should continue to be adopted –

    (a) The legal profession would continue to promote pro-bono services;

    (b) The Administration may consider extending legal aid and assistance to Equal Opportunities litigants as appropriate. In particular, consideration may be given to the feasibility of waiving the means test requirement for a person involved in proceedings in which a breach of anti-discrimination statutes is an issue; and

    (c) The Judiciary would consider producing suitable publicity materials to assist court users on EO proceedings.

Judiciary
September 2011

Appendix

Experience in other jurisdictions

The United Kingdom

In the United Kingdom, employment-related discrimination claims are heard by the Employment Tribunals, whilst the other discrimination claims are heard by the County Courts[1].

2. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 provide for procedural rules for the claims in the Employment Tribunals[2]. It is a comprehensive set of procedural rules providing for, amongst other things –

(i) the overriding objectives of the rules[3];

(ii) the express power of the President to make practice directions about the procedures in the Tribunals[4];

(iii) the institution of proceedings by filing of more informal claim forms and the procedure of responding to a claim by filing of more informal response forms[5];

(iv) the provision of various case management powers of the Tribunals[6];

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1 Equality Act 2010 (United Kingdom), sections 114 and 120.

2 The Regulations are available at www.legislation.gov.uk/uksi/2004/1861/contents/made.

3 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), regulation 3.

4 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), regulation 13.

5 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rules 1 and 4.

6 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rule 10.

(v) the provision of various kinds of hearings in the Tribunals including case management discussions and pre-hearing reviews[7];

(vi) provisions enabling the use of electronic communications in the conduct of hearings[8];

(vii) provisions relating to conciliation if that is so required by statutes, including the power of the Tribunals to stay proceedings[9]; and

(viii) provisions enabling the Tribunals to make costs orders, including wasted costs orders against legal representatives[10].

3. The proceedings in the Employment Tribunals are informal in nature. Claims are commenced using specified forms rather than pleadings. There is active case management by the Tribunals and legal representation is permissible. The general rule for costs is that each side shall bear its own costs of the proceedings[11].

4. For the other discrimination claims in the County Courts, the ordinary County Courts civil procedural rules apply.

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7 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rules 14 to 19.

8 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rule 15.

9 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rules 21 to 24.

10 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rules 38 to 48.

11 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (United Kingdom), Schedule 1, rules 38 to 48.

Australia

5. In Australia, for discrimination claims falling within federal jurisdiction, they have to be commenced in the Federal Court or the Federal Magistrates Court which are formal courts of law. Claimants can only make a claim in such courts if they have lodged a complaint to the Australian Human Rights Commission and the complaint has been terminated by the Commission[12]. Legal representation is allowed and the general principle for costs is that costs follow the event, that is, the losing party has to pay for the costs of the winning party.

6. In the Federal Court, the procedures are governed by the Federal Court Rules[13]. Division 34.8 of the Rules deals specifically with human right proceedings including discrimination claims. It provides for the commencement of the proceedings in the court by the filing of specified form, namely Form 116[14]. There is also active case management by the court.

7. Proceedings in the Federal Magistrates Court are governed by the Federal Magistrates Court Rules[15]. Part 41 of the Rules deals specifically with discrimination claims, and it provides for the filing of points of claim and defence in approved forms.

8. In the state of Victoria in Australia, discrimination claims are heard by the Victorian Civil and Administrative Tribunal, which has jurisdiction over a range of different matters from discrimination cases to land valuation and tenancies under different specialist lists. Undergoing investigation and conciliation process by the Victorian Equal Opportunity and Human Rights Commission is a pre-requisite for bringing a discrimination claim in the Tribunal. Proceedings are commenced by referral from the Commission. There is active case management by the Tribunal. There is no general right to legal representation and parties normally bear their own costs of the legal proceedings.

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[12] Part IIB of the Australian Federal Human Rights and Equal Opportunity Commission Act 1986 (Australia), which is available at www.austlii.edu.au/au/legis/cth/consol_act/ahrca1986373.

[13] The Rules are available at www.comlaw.gov.au/Details/F2011L01551.

[14] The Form is available at www.fedcourt.gov.au/fff/fff_federalcourtrules.html.

[15] The Rules are available at www.fmc.gov.au/law/html/rules.html.

9. The proceedings in the Victorian Civil and Administrative Tribunal are governed by the Victorian Civil and Administrative Tribunal Rules 1998[16]. Rule 6 deals with the procedures of the claims under the Anti-Discrimination List and it provides for the filing of particulars of complaint using informal forms.

10. In the state of New South Wales, discrimination claims are heard by the Administrative Decisions Tribunal, which has jurisdiction over a range of different matters under different specialist divisions, from discrimination cases to taxation reviews[17]. Commencement of claims and procedures are similar to those in the Victorian Civil and Administrative Tribunal. The procedures in the Administrative Decisions Tribunal are governed by the Administrative Decisions Tribunal Rules 1998[18], and the claims in the Tribunal have to be made using approved forms. One may also note that there is a Practice Note to provide guidelines for the conduct of the discrimination claims in the Tribunal[19], and the Note provides that the Tribunal's objectives include acting informally and quickly and giving all parties the fullest opportunity practicable to be heard.

Canada

11. Canada has various statues on anti-discrimination protection. In Canada, discrimination claims are heard by an independent tribunal known as the Canadian Human Rights Tribunal. Cases are commenced by referral from the Canadian Human Rights Commission. The procedures in the Human Rights Tribunal are governed by the Canadian Human Rights Tribunal Rules of Procedure[20]. There is active case

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16 The Rules are available at www.austlii.edu.au/au/legis/vic/consol_reg/vcaatr1998477.

17 Anti-Discrimination Act 1977 (New South Wales).

18 The Rules are available at www.legislation.nsw.gov.au/sessionalview/sessional/sr/2009-1.pdf.

19 The Practice Note is available at www.lawlink.nsw.gov.au/practice_notes/nswadt_pc.nsf/5ab5d5b26b500891ca256755000ac4b2/04b79f19773460baca2578b80019d205?OpenDocument.

20 The Rules are available at www.chrt-tcdp.gc.ca/NS/about-apropos/trp-rpt-eng.asp.

management in the Tribunal, legal representation is allowed and normally each party shall bear his own costs of the proceedings.

12. The Human Rights Tribunal has issued various Practice Notes in respect of the practices and procedures in the Tribunal[21]. Practice Note 1 stipulates that the proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow. Practice Note 3 deals with case management, and it requires the first case management conference to be fixed within two weeks of the date of the issuance of the Initial Letter by the Registry which represents the commencement of the claim.

Common features of the procedural rules in the other jurisdictions

13. With the exception of the adjudication of the non-employment related discrimination claims in the County Courts in the United Kingdom, the procedural rules in the other jurisdictions have the following common features –

(i) the proceedings are informal in nature;

(ii) parties do not need to file technical pleadings which are replaced by more informal claim forms or response forms;

(iii) they provide a lot of case management powers to the court or tribunal;

(iv) delay to proceedings should be avoided as much as possible; and

(v) mediation should be encouraged as a way of alternative dispute resolution.

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[21] The Practice Notes are available at www.chrt-tcdp.gc.ca/NS/about-apropos/trp-rpt-eng.asp.