PRIVATE CONCILIATION OF DISCRIMINATION DISPUTES:
CONFIDENTIALITY, INFORMALISM AND POWER

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I INTRODUCTION

“Of all forms of human rights, nothing could be more basic than the rights to life and survival. A natural extension of these rights is the right to development. By providing individuals with equal access to education, employment and participation in community life, society provides a platform for individual development.”

Per Ms. Anna Wu Hung-yuk, Chairperson of the Hong Kong Equal Opportunities Commission

Fundamentally important to the success of any community is the ability of individuals within that community to have equal access to and equal opportunities to participate in education, employment and other aspects of community life free from prejudice and discrimination.

Anti-Discrimination Legislation in Hong Kong

It is only relatively recently with the enactment in late 1996 and 1997 of the Sex Discrimination Ordinance, Disability Discrimination Ordinance and the Family Status Discrimination Ordinance that Hong Kong has had anti-discrimination legislation prohibiting discrimination based on the limited grounds of gender, disability, and family status. The policy underlying this legislation is the elimination of discriminatory behavior and practices with the Hong Kong community and the empowerment of individuals suffering discrimination to lodge complaints seeking redress. In 1996 the Hong Kong Equal Opportunity Commission (EOC) was established to help ensure compliance with and enforcement of this new anti-discrimination legislation.

1 See the Sex Discrimination Ordinance, Cap 480, Laws of Hong Kong [hereinafter LHK] and the Disability Discrimination Ordinance, Cap 487, LHK that came into force in September 1996 and the Family Status Discrimination Ordinance, Cap 527, LHK which came into force in November 1997 (and related subsidiary legislation). At present, there is no provision dealing with discrimination based on race, age or sexuality in the Hong Kong legislation. Although there is a strong lobby within Hong Kong for inclusion of these grounds of discrimination within the legislation, the current legislation does not extend to cover these grounds of discrimination. It is likely, however, that the HKSAR Government will respond to pressure and introduce an anti-racism bill before the Executive Council in the near future.


3 The establishment of the EOC originates from the initiative of Ms. Anna Wu, who drafted a private member’s bill to establish a Human Rights and Equal Opportunities Commission. See Equal Opportunities Bill 1994, Hong Kong Government Gazette, Legal Supplement No. 3, July 1, 1994 and the Human Rights and Equal Opportunities Bill 1994 (circulated for public consultation, March 1994). Although this latter bill was never formally introduced, it did spur the Hong Kong Government on to enacting the limited anti-discrimination legislation and creating the EOC to help ensure compliance with these legislative provisions.
checks and balances established to guard against excess and abuse of executive power. The current anti-discrimination legislation in Hong Kong provides for the resolution of individual complaints of discrimination by the process of conciliation. As with comparable anti-discrimination legislation in other jurisdictions, the legislation places a high degree of emphasis on alternative methods of resolving disputes with provisions for complaints to be investigated and conciliated by conciliation officers within the EOC. When the EOC was originally established, the conciliation model for resolution of discrimination complaints was considered more appropriate than a “litigation based” enforcement model in view of Hong Kong’s cultural, economic and social context.

Multiple Roles of the Hong Kong Equal Opportunities Commission

The EOC was only recently established in 1996 as a government institution to administer the anti-discrimination legislation and ensure compliance with its provisions. As such the EOC plays multiple roles in enforcing anti-discrimination legislation, educating the community about the provisions of the anti-discrimination legislation and promoting anti-discrimination behavior and practices in Hong Kong (both within the government and the private sector). The EOC Chairperson recently stated that one of the jobs of the EOC is “…to introduce the values of equal opportunity into the government’s decision-making process.” A central role of the EOC is as the enforcer of public anti-discrimination legislation within the community. Thus, the EOC plays an investigatory role in analyzing individual complaints of anti-discrimination acts and alleged breaches of the anti-discrimination laws. At the same time, the EOC helps compel legal accountability from the government and compliance with anti-discrimination legislation from the private sector. Secondly, the EOC fulfills an advocacy role that is unique among independent statutory bodies of its type. The EOC has strategic litigation power in that it can support commencement of litigation proceedings in strategic cases where a large number of people are involved or where the public interest is affected. This allows the EOC to assist in facilitating individual justice but also to play an educational role in promoting anti-discriminatory legislation,

4 In Hong Kong there is no equivalent of a national human rights commission and the EOC does not have as broad a mandate that a human rights commission would have in other jurisdictions.
6 See further discussion of dispute resolution in the social, cultural and economic context of Hong Kong, see infra Chapter 9. See also discussion in Bobby K. Y. Wong, Traditional Chinese Philosophy and Dispute Resolution, 30 Hong Kong Law Journal 304 (2000).
7 See comments of Ms. Anna Wu Hung-yuk, Chairperson of the Hong Kong EOC, in “Hong Kong’s Greatest Asset: Diversity”, South China Morning Post, June 2003. The EOC has many different functions ranging from enforcement and compliance, education, research, training and policy making.
8 The EOC investigation and conciliation process which takes place in the shadow of the legal system acts as an inducement to conciliate and settle discrimination disputes by raising the threat of legal action in formal and expensive litigation proceedings in the state courts.
9 Two of the EOC’s best known cases are: (a) the judicial review application brought against the Hong Kong SAR Government in connection with the Secondary School Places Allocation System (SSPA) resulting in a court declaration in June 2001 that the SSPA was illegal [EOC v Director of Education, [2001] 2 HKLRD 690]; and (b) the damage award obtained for three plaintiffs who had passed medical examinations themselves but had been denied jobs in the Fire Services Dept. and the Customs and Excise Dept. because they each had a parent with schizophrenia [K, Y and W v Secretary for Justice, [2000] 2 HKLRD 777].
behavior and practices within the Hong Kong community.\footnote{The EOC assists in educating people about anti-discrimination laws and empowering individuals to file complaints against discriminatory practices and behavior in Hong Kong. The EOC can also offer legal assistance to complainants wising to pursue their claims in litigation in the District Court (assuming they have already attempted conciliation which has been unsuccessful). See further discussion below.} Thirdly, the EOC conciliation process (both the early conciliation process and the conciliation after investigation process) acts a substitute for state courts for individuals seeking redress for discriminatory practices. In this sense, the EOC can be viewed as dispensing with a form a justice in a private confidential forum substituting the justice provided by the state courts. This highlights the important multiple roles played by the EOC as an organized statutory institution, as well as by the individual conciliation officers within the EOC. As will be discussed further below, these multiple roles may lead to conflicting expectations among various participants in the EOC conciliation process – complainants, respondents and NGO’s – about the approach of the EOC and its conciliation officers and the operation of the investigation and conciliation process.

**Process of EOC Investigation and Conciliation**

The process of EOC conciliation can be briefly summarized as follows. The process is initially triggered by the making of a complaint to the EOC by an individual alleging discrimination.\footnote{Under the existing Hong Kong legislation, however, a complaint can only be filed by an individual or an organization authorized to act on their behalf. Consequently, the representatives of disabled groups cannot file a grievance complaint on behalf of its constituent members, e.g. a generic complaint about accessibility discrimination in the absence of an individual prepared to file a complaint. See further discussion of this issue in \textit{infra} Chapter 11.} Once a complaint is received by the EOC, initial consideration is given to whether it should be accepted for investigation. Prior to an investigation commencing, the EOC may advise the respondent of the complaint and give them the opportunity to resolve the matter through conciliation before an investigation commences.\footnote{The process of “early conciliation” was only recently introduced in October 2000. See further discussion of this scheme in \textit{supra} Chapter 2.} If this system of early conciliation is not utilized, the complaint is then investigated by an EOC conciliation officer and may be resolved by negotiation at that stage.\footnote{A number of complaints may be discontinued (or voluntarily withdrawn) at this point due to factors such as: (a) lack of unlawful act; (b) complaint lodged outside the 12 month time limit; or (c) the EOC consider that the complaint is vexatious, frivolous or lacking in substance. Of the 451 cases in the EOC research sample, almost one half (203 complaints – 45%) were discontinued, and a further 135 cases were discontinued either during or after the investigation.} If the complaint is not resolved, a conciliation conference may be convened at which an attempt is made to resolve the dispute through the process of conciliation.\footnote{Of the 241 complaints in the EOC research sample that progressed to conciliation, 158 were concluded with either early conciliation or conciliation following investigation.} Where the complaint still remains unresolved a decision must be made whether or not proceed to formal litigation in the District Court (with or without legal assistance from the EOC).

The aim of Hong Kong’s anti-discrimination legislation is to challenge discrimination by an informal and consensual process involving negotiation and agreement whenever that is feasible. It attempts to resolve discrimination disputes outside formal litigation in courts by a method that is inexpensive, accessible, quick, informal and sensitive to the needs of both parties to the dispute.\footnote{This use of informal methods of resolving disputes reflects the trend in other areas as well. In November 2001 the HKSAR Chief Justice’s Working Party on the Reform of Civil Justice System in Hong Kong proposed the increased use of alternative dispute resolution methods (such as conciliation and mediation) in a broad spectrum of civil and commercial disputes in Hong Kong. See Chief Justice’s Working Party on Civil Justice Reform, \textit{Interim Report and Consultation Paper}, HKSAR (November 2001).}
There is no doubt that the use of conciliation (rather than courtroom litigation) has many advantages, including the speed and efficiency of resolving the disputes and the confidentiality and privacy afforded the parties (particularly the complainants). Despite these apparent advantages, however, the use of conciliation to resolve discrimination disputes is not necessarily a panacea for all the problems associated with formal litigation of discrimination complaints. In particular, the use of conciliation to resolve discrimination disputes raises interesting issues of power disparities between disputing parties, and notions of distributive and procedural justice. Distributive justice refers to participation satisfaction with the outcome of the conciliation process (or justice with regard to the outcome of the dispute) and procedural justice refers to the perceived fairness of the process of conciliation through which decisions are made (in other words, justice with regard to the actual process of conciliation).

Focus of this Paper

The current research project on the EOC considers 451 discrimination complaints based on gender, disability and family status lodged with the EOC during a nine-month period between July 2000 and March 2001 and analyzes the process by which the EOC investigates and attempts to conciliate such discrimination complaints. This paper briefly considers the unique nature of discrimination disputes and addresses various issues arising out of the use of a private informal process of conciliation by the EOC to enforce and ensure compliance with public anti-discrimination legislation. The important role of EOC conciliation officers is analyzed along with various procedural and distributive justice issues arising from the conciliation of discrimination disputes. In particular, the following specific issues are considered: (a) the consensuality and speed of the EOC conciliation process; (b) the capacity of individual complainants to effectively articulate and negotiate their own needs and interests in the conciliation process; (c) the impact of power imbalances between the disputing parties on the dynamics of the conciliation process; (d) role of EOC conciliation officers as neutral third parties in the conciliation process; (e) the suitability of utilizing private informal methods of dispute resolution to resolve issues of discrimination and prejudice; and (f) the ability of the EOC investigation and conciliation process to effectively challenge and eradicate the underlying social attitudes and conditions that produce discriminatory behavior. The paper concludes with some brief proposals for potential reform of the EOC conciliation model.

II NATURE OF DISCRIMINATION DISPUTES

The nature of gender, disability and family status discrimination disputes often involve subject matter and incidents that are complex and difficult for a complainant to describe (particularly before the alleged perpetrator of the conduct). Such discrimination disputes often involve the resolution of disputed facts and acrimonious accusations between the disputing parties. There are generally varying interpretations between the parties as to what occurred and whether such acts constitute unlawful discrimination and a determination of this is often dependent upon a number of factors including, the nature of the act complained of, the context and situation in

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16 This paper is part of a larger Hong Kong Research Grants Council project entitled Enforcing Equal Opportunities in Hong Kong: A Study of Investigation, Conciliation and Other Enforcement Mechanisms (Primary Investigator: Carole J. Petersen; Co-Investigators: Cecilia Chan and Katherine Lynch; and Senior Research Assistants: Janice Fong and Gabrielle Rush) which analyzed 451 discrimination complaints (254 disability discrimination complaints and 197 gender discrimination complaints) lodged with the EOC in a nine month period between July 1, 2000 and March 1, 2001.

17 In sexual harassment cases, in particular, the complainant may be required to describe traumatic incidents that have taken place in their places of employment before the alleged perpetrator of the conduct. See further discussion of this point in ASTOR & CHINKIN, supra note 5, at p. 364-365.
which it occurred, the relationship between the parties and any power disparities between them. As a result, discrimination complaints by their very nature are inherently difficult to resolve.\textsuperscript{18}

**Complainants Filing Discrimination Complaints**

Discrimination complaints are not generally made by persons in positions of power or privilege within communities but often by persons who are in disadvantaged and oppressed situations.\textsuperscript{19} Most of the complainants in the EOC research sample were unemployed, job applicants, homemakers, students or retired persons when they filed the complaint. Women constituted 66.8\% of the total number of complainants and men 33.2\%, with a high percentage of women filing complaints under the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance.\textsuperscript{20} Not surprisingly, there was a more balanced distribution of men and women filing complaints under the Disability Discrimination Ordinance.\textsuperscript{21} Many discrimination complaints often involve wide disparities in power and status between the complainant and the respondent. For example, discrimination complaints are often made by employees or former employees against employers or by subordinates or former subordinates against superiors (with the respondent having much greater authority and power relative to the complainant).\textsuperscript{22} This unequal power relationship between the complainant and the respondent affects the dynamics of the conciliation process and attempts by the EOC conciliation officer to balance the power relationship between the parties may compromise the officer’s impartiality and threaten the success of the conciliation.

**Nature of Discrimination Complaints: Gender, Disability and Family Status**

The alleged discriminatory acts complained often involve important areas of the complainants’ life, including employment, education, and access to goods, services, facilities and housing.\textsuperscript{23} The EOC research sample indicates that the most common ground of complaint to the EOC was

\textsuperscript{18} See further discussion of this point in \textit{infra} Chapter 11 and ASTOR & CHINKIN, supra note 5, at 364-365.

\textsuperscript{19} For example, persons with physical or mental disabilities and women (particularly pregnant women). For a detailed analysis of the socio-economic background of discrimination complainants and respondents in the EOC research sample under the anti-discrimination legislation, see \textit{infra} Chapter 10.

\textsuperscript{20} Of all complaints filed under the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance, 91.7\% were filed by women with men filing only 8.3\% of the total complaints. This is not surprising given that the pregnancy discrimination and sexual harassment form the two largest categories of discrimination filed under the Sex Discrimination Ordinance. See further discussion of this point in \textit{infra} Chapter 10.

\textsuperscript{21} Under the Disability Discrimination Ordinance 56\% of the complainants were men and 44\% were women. See further discussion of these statistics in \textit{infra} Chapter 10.

\textsuperscript{22} In the EOC research sample employees or former employees comprised the largest category of complainants in the employment related complaints (due in part to the lack of effective redress available under labor laws in Hong Kong). The research indicates that very few of the employers named as respondents in the research sample had any sexual harassment or equal opportunity code of practice or policy in place at the time the alleged discriminatory acts occurred. See further discussion of this point in \textit{infra} Chapters 10 and 11.

\textsuperscript{23} In the EOC research sample employment related discrimination complaints made up the majority of the complaints (72.3\% overall), with goods, services and facilities the second largest category (10.2\%) and access to premises or facilities the third category (8.4 \%). Within the employment field, discriminatory dismissal was alleged in 44\% of the employment related complaints, “other detriments” comprised 13.2\% of employment related claims (including being bullied, forced to resign, experiencing bias etc.), while sexual harassment comprised 10.1\% of all employment related complaints. See further discussion of the fields of discrimination complaints in \textit{infra} Chapter 11.
disability discrimination, followed by pregnancy discrimination and sexual harassment.\textsuperscript{24} An EOC sample survey of disability discrimination cases indicates that people with disabilities are denied equal opportunities in many areas in Hong Kong, including employment, social interaction, provision of goods, services and facilities and education.\textsuperscript{25} Most of the complaints filed with the EOC under the Disability Discrimination Ordinance allege different types of disability discrimination, including discrimination or harassment in access to (or lack of entry to) facilities and premises (mostly concerning insufficient wheelchair access).\textsuperscript{26} 

The EOC research project also indicates that pregnancy discrimination is a very serious and pervasive problem in Hong Kong, particularly in the employment context. Complaints about pregnancy discrimination accounted for 39\% of all complaints filed under the Sex Discrimination Ordinance.\textsuperscript{27} Sexual harassment formed the second largest category of complaints lodged with the EOC under the Sex Discrimination Ordinance, with unwelcome oral statements of a sexual nature forming the largest category of discriminatory behavior alleged.\textsuperscript{28} The EOC research sample shows that only a small number of complaints (9 in total) were lodged under the Family Status Discrimination Ordinance alleging family status discrimination in employment. All of the complaints alleged that they had been dismissed or denied promotion because they had to care for their children or could not work overtime on weeknights or weekends.\textsuperscript{29} In addition, the overwhelming majority of complaints in the EOC research project alleged direct rather than indirect discrimination,\textsuperscript{30} which may reveal a lack of understanding about the nature of “indirect”

\textsuperscript{24} Since the enactment of anti-discrimination legislation in Hong Kong until March 2001, the total number of discrimination complaints filed with the EOC totaled 1890 complaints, with 1027 complaints (54.3\%) filed under the Disability Discrimination Ordinance, 795 complaints (42.1\%) filed under the Sex Discrimination Ordinance and 68 complaints (3.6\%) under the Family Status Discrimination Ordinance. Within the EOC research sample, more than half complaints (254 – 56.3\%) were filed under the Disability Discrimination Ordinance, 188 complaints (41.7\%) were filed under the Sex Discrimination Ordinance, and 9 complaints (2\%) were filed under the Family Status Discrimination Ordinance. See further discussion in infra Chapter 11.

\textsuperscript{25} See the EOC study of the attitude of the general public towards persons with disabilities in Hong Kong: EOC, A Baseline Survey on Public Attitudes Towards Persons With a Disability, discussed in greater detail in supra Chapter 6. There are also barriers to lodging discrimination complaints and pursuing EOC conciliation for people with various disabilities. See discussion of this issue in National ADR Advisory Council (NADRAC) Discussion Paper: Issues of Fairness and Justice in ADR, 1997, NADRAC, Canberra (for discussion of problems for disabled people in pursuing discrimination claims). See further discussion in ASTOR & CHINKIN, supra note 5 at 366.

\textsuperscript{26} Disability dismissal accounted for 30\% of all complaints filed under the Disability Discrimination Ordinance, while discrimination or harassment in access (or lack of entry to) facilities and premises accounted for 15\% of all complaints filed. See further discussion of these cases in infra Chapter 11.

\textsuperscript{27} Instances of alleged pregnancy discrimination included immediate dismissal after employee had advised employer of pregnancy, unfavorable treatment during pregnancy (e.g. lack of promotion, demotion etc.), and dismissal or unfavorable treatment upon returning from maternity leave. For further discussion of these cases, see infra Chapter 11.

\textsuperscript{28} Of all complaints filed under the Sex Discrimination Ordinance, 29.3\% were sexual harassment complaints alleging a variety of behavior, including unwelcome physical or verbal sexual advances, unwelcome conduct of a sexual nature (physical, oral or written conduct), unwelcome request for sexual favors or a sexually hostile environment. Of these complaints, 28.6\% were discontinued by the EOC on the ground that they lacked substance. See further discussion in infra Chapter 11.

\textsuperscript{29} Of these 9 complaints, 2 were conciliated and 7 cases were discontinued, either because early conciliation was successful or because the EOC found that the complaint was lacking in substance. See further discussion of these cases in infra Chapter 11.

\textsuperscript{30} More than 92\% of all complaints filed in the sample period alleged direct rather than indirect discrimination. See further discussion of this issue in infra Chapter 11.
forms of discrimination”.31 There are many obvious examples of indirect discrimination against disabled persons in Hong Kong, including the placement of barriers at supermarket entrances to prevent shopping trolleys from being removed that effectively prevents wheelchair access and entry to the supermarket.32

Complainants’ “Narratives” of Discrimination Suffered

The complainants’ descriptions of the nature of the discrimination suffered (referred to as the “narratives” or “stories”) are important in the context of EOC conciliation process.33 The narratives told by the complainants in discrimination cases may be hard to describe in a clear and convincing manner, and may subject the complainants to a high degree of stress.34 Moreover, given that the narratives are often told by “outsiders” or disadvantaged persons, they may challenge the beliefs and attitudes of the dominant culture. Hilary Astor and Christine Chinkin describe how human rights legislation plays an important role in affirming the legitimacy of such narratives by outsiders and providing a positive forum in which such stories may be told.35 It is important to bear this in mind in the context of EOC conciliation and to ensure that the complainant is given a fair opportunity to speak first and present their case to create a fairer power relationship between the complainant and the respondent.36 However, the telling of discrimination stories may unfortunately result in an increase of discrimination rather than resolving it.37 Pursuing a discrimination complaint may also threaten significant relationships and create a high degree of stress as a result.38 There is often fear by the complainant that the actions of the respondent may have a detrimental effect on their lives and perhaps even trigger some form of victimization.39 While the legislation does provide for some protection against victimization, the possibility that complaining will make things worse is often a deterrent for making of a complaint and may impact upon the way certain cases are conducted.40

31 Under anti-discrimination law in Hong Kong, direct discrimination refers to the less favorable treatment of a person based on the person’s gender, disability or family status than if the gender, disability or family status were disregarded. Examples of direct forms of discrimination are refusing to employ an individual because of their gender or disability. Indirect forms of discrimination are often more insidious and refer to applying the same treatment as between the sexes, able bodied and disabled persons or persons with different marital status, but the treatment in practice is discriminatory in its effect.  
32 See further discussion of the forms of direct and indirect discrimination in infra Chapter 11.  
33 Conciliation of discrimination disputes involves “the construction of narratives around the experience of discrimination.” See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 365 citing Sara Cobb, Empowerment and Mediation: A Narrative Perspective, (1993) 9 NEGOTIATION JOURNAL 245 (discussing the importance of stories told in conciliation and mediation).  
34 The complainant is required to relive the stress of the original incident which is often a highly charged emotional experience or set of experiences. See further discussion of this point in infra Chapter 12.  
35 See ASTOR & CHINKIN, supra note 5, at 365.  
36 Id, at 365 and Sara Cobb & Janet Rifkin, Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation, (1991) 11 STUDIES IN LAW, POLITICS AND SOCIETY 69. See also further discussion of power imbalances below.  
37 See further discussion in ASTOR & CHINKIN, supra note 5, at 366.  
38 The EOC research project indicates that many complainants of pregnancy discrimination in Hong Kong suffer mental and physical stress as a result of the discrimination and over concern about potential repercussions of lodging the discrimination complaint with the EOC. See further discussion of this point in infra Chapter 11.  
39 For example, in the EOC research sample, some complainants voiced fears that they would lose their jobs and thus, did not lodge any complaint until they were dismissed or could no longer tolerate the harassment. See further discussion of this point in infra Chapter 11.  
40 See discussion of this point in ASTOR & CHINKIN, supra note 5, at 364 and infra Chapter 12.
Respondents in Discrimination Complaints

As this EOC research project has revealed, the complainants alleging discriminatory behavior will often be challenging the conduct of respondents who are characteristically business proprietors (small and medium size businesses), local and multinational corporations, hotel and shopping center owners and managers, public service departments and government authorities. Consequently, discrimination cases almost invariably involve imbalances of power between the complainant and the respondent – with respondents who are often more powerful than the complainant by virtue of their relatively higher status and better access to financial or other resources, including access to legal advice and representation.

There may be cases, however, where the respondent is not particularly powerful as compared to the complainant and is upset by the allegation of discrimination. Formulating a response to the allegation may prove stressful and difficult for the respondent. Unfortunately, anti-discrimination legislation may be utilized by complainants who have not actually suffered discrimination but who may nonetheless feel that they have been treated badly or unfairly (whether by the respondent or otherwise). In many cases the respondents often feel disadvantaged because they have to deal with a government agency (such as the EOC) established to implement anti-discrimination legislation that they may perceive is inherently biased in favor of the complainant.

III PROCESS OF EOC INVESTIGATION AND CONCILIATION

Prior to any redress or remedy for the discrimination being offered, the affected individual must first lodge a complaint with the EOC alleging discrimination. This action assumes that the individual is aware of: (a) the existence of the anti-discrimination legislation; (b) the existence of legislative provisions offering protection from and redress for the discriminatory harm being suffered; and (c) the manner and place in which to lodge a discrimination complaint. It also assumes the ability of the complaint to articulate their complaint and actively participate in the

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41 The EOC research sample indicates that private sector companies (37.8%), including both local companies and multinational corporations, and individuals (37.2%) were the most commonly named respondents in complaints filed under Hong Kong’s anti-discrimination legislation. Local companies (24.7%) represented almost double the percentage of multinational companies (13.1%) named as respondents. There were also more disability discrimination complaints filed against government departments and public sector organizations under the Disability Discrimination Ordinance and less against private sector companies. See further socio-economic analysis of respondents in discrimination complaints in infra Chapter 10.

42 This EOC research sample reveals that few complainants had access to legal advice or other support, and a large proportion of respondents were also not legally represented at any stage in the proceedings. See further discussion of this point below and in infra Chapter 10.

43 See discussion of this point in ASTOR & CHINKIN, supra note 5, at 366.

44 Id.

45 The multiple roles of the EOC may create a conflict in expectations among complainants, respondents, conciliation officers, NGO’s and the community at large (e.g. between the advocacy roles and enforcement roles of the Commission). There has been some concern expressed in other jurisdictions about the potential bias of human rights agencies against respondents. See, for example, Annemarie Devereux, Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission’s Use of Conciliation, (1996) 7 AUSTRALIAN DISPUTE RESOLUTION JOURNAL 280, at 284.

46 It also possible for the complainant to seek redress by commencing litigation in the District Court but such litigation may prove too costly and time consuming. See further discussion below.
investigation and conciliation process.\textsuperscript{47} Moreover, the individual must have sufficient trust in the EOC to trust that lodging of the complaint will not make them vulnerable to increased risks.\textsuperscript{48} However, the filing a discrimination complaint with the EOC and engaging in the investigation and conciliation process is often a daunting prospect.\textsuperscript{49} Moreover, those individuals with mental disabilities face tremendous difficulties in comprehending sufficient amounts so as to even make a complaint. Those persons with physical disabilities may also face barriers of access or transport to lodge a complaint with the EOC or even seek advice.\textsuperscript{50}

**Overview of the EOC Conciliation Process**

Once a complaint is filed with the EOC, the EOC conciliation officer gives initial consideration as to whether it should be accepted for investigation by the EOC. Prior to an investigation commencing, the EOC may advise the respondent of the nature of the complaint and give them the opportunity to resolve the matter through a process of early conciliation before an investigation commences.\textsuperscript{51} If this system of early conciliation is not utilized, the complaint is then investigated by an individual EOC conciliation officer and may be resolved by negotiation at that stage. If the complaint is still not resolved, a conciliation officer may arrange a conference within which an attempt is made to resolve the dispute through the process of conciliation conducted within the parameters of the law.\textsuperscript{52} Settlements arising from conciliation of discrimination disputes are varied and are not limited to the legal definitions or remedies provided in the relevant anti-discrimination legislation.\textsuperscript{53} Such redress and remedial terms often include familiar remedies found in litigation including reinstatement, restitution for lost wages, monetary damages, but also non-statutory remedies such as apologies, handshakes, offers of training, reinstatement at same level of employment, work references, improvement in providing services or a change of employment policy.\textsuperscript{54}

If conciliation does not result in the matter being resolved, the complainant must decide whether to pursue the complaint by litigating before the District Court in Hong Kong.\textsuperscript{55} If agreement is not

\textsuperscript{47} The EOC research sample supports the theory that highly articulate complainants have a better chance of securing a conciliated outcome than less articulate complainants. The research also indicates that passive complainants who do not actively try to advance their complaint through the EOC conciliation process have a lower chance of securing a conciliated outcome. See further discussion in infra Chapter 12.

\textsuperscript{48} See discussion of this point in ASTOR & CHINKIN, supra note 5, at 368.

\textsuperscript{49} The EOC research sample indicates that many victims of discrimination find the conciliation process daunting, have no real understanding of what conciliation is prior to attending their own conciliation conference and do not know what to request as possible terms of settlement.

\textsuperscript{50} See discussion of this point in ASTOR & CHINKIN, supra note 5, at 368.

\textsuperscript{51} Beginning in October 2000 both the EOC Disability Division and the EOC Gender Division provisionally adopted the early conciliation process for a six-month period and started actively encouraging this process. See further discussion of the early conciliation process in Petersen, supra note 2, at 10-11.

\textsuperscript{52} Of the 241 complaints in the EOC research sample that progressed to conciliation, 158 were concluded with either early conciliation or conciliation following investigation.

\textsuperscript{53} In the Australia study of sex discrimination conciliation, Rosemary Hunter and Alice Leonard found that the most frequent settlement terms were an apology (30.5%), financial compensation (29.4%), and changes in policy (29.8%) or practice (14.5%). See Rosemary Hunter & Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases*, 1995, Center for Employment and Labour Relations Law, Melbourne University, Victoria, Working Paper No. 8. See also infra Chapter 12 for discussion of processing times for the discrimination complaints in the EOC research sample.

\textsuperscript{54} See further discussion in infra Chapter 12.

\textsuperscript{55} While the process of EOC conciliation and formal courtroom litigation proceedings are separate methods of dealing with discrimination complaints, they do impact upon each other. If the courts provide hearings
reached within the conciliation process, it may be reached at a later stage when the respondent has to deal with the expensive costs of any courtroom litigation. However, most victims of discrimination cannot afford to litigate discrimination disputes given the high costs of legal representation in Hong Kong and a prohibition against contingency fee arrangements.

**Investigation Process**

As this brief summary of the EOC conciliation process indicates, individual conciliation officers play a central role in the investigation and conciliation and are under increasing pressure to process an expanding caseload – in 2001 the EOC received 1622 complaints for investigation and conciliation. Once a complaint is filed with the EOC, individual EOC officers initially analyze whether it should be accepted for investigation or offered for early conciliation prior to an investigation commencing. The aim of this early conciliation process is to increase the rate of successful conciliation by encouraging settlement before the parties’ positions have become entrenched following an investigation and to reduce the time spent by EOC officers on investigations. If the system of early conciliation is not utilized, the complaint is subject to a full investigation by an individual EOC conciliation officer and may be resolved by negotiation at that stage. EOC conciliation officers are obliged to investigate and “endeavor by conciliation to effect a settlement” of all complaints filed with it – even though some discrimination disputes may not be suitable for conciliation. Certain cases, particularly those involving lack of access for disabled persons in public institutions or commercial premises, may be better resolved by the EOC Legal Division negotiating directly with the respondent rather than requiring an individual complainant to proceed through conciliation.

Discrimination complaints may be resolved at the point of initial telephone contact between the EOC conciliation officer and the respondent. Subsequent discussions about the facts or the applicable law, the exchange of relevant documents and correspondence, or meetings between the EOC conciliation officer and the complainant or the respondent, may also result in the complaint being resolved. Thus, EOC conciliation officers are often engaged in a “shuttle negotiation” process, relaying relevant information between the parties, as well as offers to settle, without the

that are lengthy, expensive and difficult to access then EOC conciliation may be a more attractive option. See discussion of this point in ASTOR & CHINKIN, supra note 5, at 368.

56 In the EOC research sample, 17 complainants received legal assistance from the EOC to commence litigation proceedings following unsuccessful conciliation. Such assistance is generally only granted when the case raises a question of principle or it is unreasonable to expect the applicant to deal with the case unaided.

57 It should be noted that the District Court Ordinance does provide in section 73 that in proceedings under the anti-discrimination legislation each party shall bear its own costs except where the proceedings were brought maliciously or frivolously or there are special circumstances warranting the award of costs. The District Court has previously awarded costs to successful plaintiffs on the basis of “special circumstances” when the court concluded that the defendant should have conciliated the case. See further discussion of the issue of costs in Petersen, supra note 2.

58 See further discussion of the caseload of the EOC in infra Chapters 10-12.

59 See detailed discussion of early conciliation process in supra Chapter 2.

60 The EOC research sample shows that this is effective – of the 130 cases referred to early conciliation, 110 complaints were conciliated. By comparison, out of the 111 complaints referred to conciliation following investigation, only 48 were successfully conciliated. See further discussion in infra Chapter 12.

61 With the exception of those cases that lack substance or can be discontinued on other grounds under the legislation. Some discretion should be granted to the EOC to make a determination on a case-by-case basis of the suitability of conciliation to resolve the complaint. See discussion of this point in Petersen, supra note 2, at 13-14.
parties actually meeting face-to-face. If the investigation stage of the discrimination complaint does not yield a solution, the next step is for the EOC conciliation officer to determine whether a conciliation conference is appropriate. It may be determined that a conciliation conference is not appropriate or that the complaint is frivolous, vexatious or lacking in substance such that the EOC may discontinue the complaint and decline to proceed any further.

**Conciliation Process**

It is difficult to offer a precise definition of conciliation because the term is used to refer to a broad range of dispute resolution processes and it is often used generically to refer to any consensual, non-adversarial dispute resolution process. A distinction is sometimes drawn between mediation and conciliation with some attributing a more active role to conciliators, while at other times the terms are used interchangeably. Conciliation can be broadly defined as a structured process involving a third party who is impartial as between the parties and who strives to remain as neutral as possible. There is no specific definition of conciliation in Hong Kong’s anti-discrimination legislation. Essentially the EOC conciliation process can be characterized as “assisted structured negotiation” in that as the neutral third party the EOC officer assists the parties in the bilateral negotiations aimed at resolving the discrimination complaint. However, given that the EOC conciliation process is pursuant to statutory provisions, there will be a more direct impact of the anti-discrimination legislation on the parties, on the EOC conciliation officers that have been trained and employed to work within the context of the statutory scheme and on the nature of the conciliated agreement.

The role of the third party within the process of conciliation and mediation may vary considerably. Laurence Boulle offers four different analytical models of conciliation and mediation – the settlement, facilitative, therapeutic and evaluative models – and the EOC model of conciliation corresponds most with Boulle’s evaluative paradigm. The main objective of the evaluative model is to reach settlement according to the legal rights and entitlements of the parties and is generally characterized by a high degree of intervention by the mediator. However, this EOC research indicates that the EOC conciliation officers tend to play quite a...

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62 The process by which the conciliator repeatedly moves between the parties and is often the sole vehicle of communication and negotiation is often referred to as “shuttle” mediation or conciliation and serves to help the parties save face, balance power disparities and reduce the level of animosity between the parties. See discussion of this issue in Laurence Boulle, Mediation: Principles, Process, Practice 151-152 (2001).

63 The complainant may also voluntarily withdraw the complaint prior to conciliation.

64 See G. Kurien, Critique of Myths of Mediation, (1995) 6 Australian Dispute Resolution Journal 43 (discussing the difficulties with defining mediation).

65 See discussion distinction between conciliation and mediation in Astor & Chinkin, supra note 5 at 85-86.

66 There is a lack of guidance within the anti-discrimination legislation as to the meaning of “conciliation” and thus, it is difficult with making generalizations about the process since there may be significant variation in the approach of individual conciliation officers within the EOC.

67 Unlike the litigation process in state courts that is in the public domain, the EOC conciliation process for discrimination cases is confidential. Consequently, it is difficult to know whether a conciliation conference was held, and if so, what occurred at within the conciliation.

68 See further discussion of this issue in Astor & Chinkin, supra note 5, at 87.

69 Also referred to as “advisory” or manageral” mediation. See discussion of these four models of mediation in Boulle, supra note 62, at 28-29 and in H. Brown & A. Marriott, ADR Principles and Practice 388 (1999, 2nd ed).

70 The role of the mediator is to provide additional information, advise and persuade the parties and bring their professional expertise to bear on the content of the negotiations. See Boulle, supra note 62, at 29.
passive role in the conciliation process and appear reluctant to shift from a neutral role to a more interventionist model offering a degree of guidance and advice to the complainant. In this respect, the research also indicates that there is a division between the expectations of the disputing parties (both complainants and respondents), the EOC conciliation officers, as well as the public, the government, the NGO’s and other local community organizations as to the precise role of conciliation officers and the degree to which they will intervene in the process. As will be discussed further below, determining the appropriate level of intervention by conciliation officers in the conciliation process is particularly important given the degree of power imbalance that tends to characterize most discrimination disputes.

The speed of resolution is also an important aspect of the conciliation of discrimination complaints, particularly in the context of employment related cases where the complainant may be forced to leave employment if the discrimination complaint (e.g. a complaint about sex discrimination or harassment) is not resolved quickly. The EOC has a performance pledge of processing all discrimination complaints before it within 6 months and the EOC research sample indicates that the majority of cases were resolved within this time frame. The introduction of the early conciliation system has also reduced the time required to handle complaints and improved the chances of complaints being successfully conciliated. Thus, it is important that sufficient financial resources be available to the EOC to ensure adequate staffing levels to continue to provide for efficient investigation and conciliation of discrimination complaints. Conciliation may provide speedy resolution of discrimination disputes in some cases, but it may also result in considerable delay in other cases and such delays may deter potential complainants. However, delays in the resolution of discrimination complaints may not always be counter productive and may allow for the identification of systemic and institutional discriminatory practices and a negotiation of ways of affecting institutional change.

IV PRIVATE CONCILIATION TO ENFORCE PUBLIC ANTI-DISCRIMINATION LEGISLATION

An important measure of success of the EOC process for investigating and conciliating discrimination complaints is the degree to which the process and results meet the larger public policy interests at stake. This is particularly important in discrimination disputes that deal with important public rights such as anti-discrimination and equal opportunities. Procedural justice can be defined as the “perceived fairness of the process through which decisions are made”, whereas

71 See further discussion in infra Chapter 12.
72 This is particularly true in cases where there is ongoing problems of discrimination or harassment, or problems of victimization. See further discussion of this issue in ASTOR & CHINKIN, supra note 5, at 380.
73 Although this 6 month performance pledge may be difficult to maintain in the future given the increasingly heavy caseload of complaints received by the EOC.
74 The EOC research appears to indicate that the sooner the discrimination complaint is filed, the greater the chance of successfully conciliating the complaint.
75 Particularly in view of the increasing caseload of the EOC. The early conciliation process has been an effective tool in the speedy resolution of discrimination complaints. Other jurisdictions have developed “fast track conciliation procedures” for those discrimination disputes in need of speedy resolution. See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 370.
76 Some studies of discrimination conciliation in other jurisdictions have noted that there is often considerable delays in resolving discrimination disputes. See, for example, Hunter & Leonard’s study of sex discrimination cases in Australia that noted delays of several months and up to one year: see Hunter & Leonard, supra note 66. See also, the 1997 study of sexual harassment cases in New Zealand by Claire Bayliss, Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions, (1999) 30 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 279.
77 See ASTOR & CHINKIN, supra note 5, at 370.
distributive justice considers the satisfaction of the participant with the outcome of conciliation and their perceptions about the fairness of the outcome. Various distributive and procedural justice issues arise from the use of a private informal confidential forum such as conciliation to resolve discrimination complaints arising out of public anti-discrimination legislation. It is important to consider whether the EOC conciliation model provides access to the enforcement of legal rights to those complainants who lack sufficient resources to pursue a claim. It is also important to consider how the EOC investigation and conciliation process deals with the ability of complainants to adequately articulate and pursue anti-discrimination complaint. Of equal importance is the degree to which the EOC conciliation process is able to spur institutional and organizational changes affecting discriminatory behavior and attitudes in Hong Kong (particularly within the employment context) and encourage innovations that may enhance the overall system for resolving discrimination disputes.

Consensuality of EOC Conciliation Process

One of the central features of conciliation is that it is a consensual process, chosen by the parties and allowing them freedom to shape and define their own disputes and fashion relevant creative solutions independent of legal definitions and remedies. Consensuality can be contrasted with coerciveness, in reference to the imposition of a decision or an order on the disputing parties by the court following litigation. In recent years many court-annexed and statutory-based conciliation schemes have been established raising concerns about the potential erosion of this important feature of consensuality given the close connection of the conciliation process with the formal court system or other government institutions. Many commentators have questioned the level of consensuality and party control over a dispute in such court-connected or statutory-based conciliation schemes. The concern is that many disputants will not understand that: (a) mediation and conciliation should offer them a measure of control over both the process and the outcome; and (b) that the party’s control over the process will be diminished in court-annexed and statutory-based conciliation schemes that often involve “directive” or “evaluative” rather than “facilitative” intervention by the mediator or conciliator. Also of concern is the ability of authorities to mandate participation in the mediation process – such compulsion power affects the consensual nature of mediation. Moreover, disputants may feel constrained in the conciliation process by the power of the third parties in such court-annexed and statutory-based schemes given that they are endowed with a degree of status and authority.

In the case of EOC conciliation, victims who have suffered unlawful discrimination are referred to the conciliation process through the auspices of the EOC rather than by selecting the dispute resolution process independently. However, complainants are not obligated to use the services of the EOC or to participate in any prior conciliation. They are free to pursue their claim directly in

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78 See BOULLE, supra note 62, at 25 and ASTOR & CHINKIN, supra note 5, at 269.
79 There are energetic debates surrounding mandated court-connected mediation schemes. Carrie Menkel-Meadow, for example, has argued that the “…power of our adversarial systems will co-opt and transform the innovations designed to redress some, if not all, of our legal ills.” See Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR”, (1991) 19 FLORIDA STATE UNIVERSITY LAW REVIEW 1, at 10.
80 See, for example, Simon Roberts, Three Models of Family Mediation, in DIVORCE MEDIATION AND THE LEGAL PROCESS (Robert Dingwall and John Eekelaar, eds 1988) and Richard Ingelby, Court Sponsored Mediation: The Case Against Mandatory Participation (1993) 56 MODERN LAW REVIEW 441.
81 The conciliator because of their status and authority may fulfill a quasi-adjudicative function. See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 269 and Ingelby, supra note 80, at 445.
82 It is important, therefore, to maximize consensual decision making within such court-annexed or statutory-based schemes. See further discussion in ASTOR & CHINKIN, supra note 5, at 273.
the District Court, although as mentioned earlier prohibitive legal costs and the unlikelihood of a large damage award in the event of a successful outcome mean that this rarely happens. Consequently, most complainants are unlikely to commence litigation on their own but are more likely to rely on the free legal assistance offered by the EOC that is not normally granted unless conciliation has been attempted under the auspices of the EOC. Thus, a complainant cannot apply to the EOC’s Legal Division for legal assistance in commencing litigation unless prior efforts to litigate have been attempted and failed. As a result, although there is no mandatory requirement in the anti-discrimination legislation that a victim asserting unlawful discrimination must participate in the EOC conciliation process, the practical effect is that the complainant must participate in the conciliation process if the respondent is willing. If they do not participate in the conciliation process, no further legal assistance will be forthcoming from the EOC.

Moreover, while victims of discrimination are not compelled by legislation to use conciliation, in reality they do not have much choice as the alternative of court litigation is prohibitively expensive, time consuming and stressful – EOC conciliation is probably their best chance at finding a negotiated resolution of their discrimination complaint. Thus, the degree of consensuality (or voluntariness) and party control in the EOC conciliation model is questionable at best. As a result, the quality of the EOC conciliation program is of the utmost importance in guarding against many of the possible problems arising from increased levels of coercion. This highlights the importance of effective resource allocation by the government to the EOC and effective training of conciliation officers in handling discrimination complaints.

**Important Role of Conciliation Officers**

The individual EOC conciliation officers are key to the ultimate success of the investigation and conciliation of discrimination disputes. The individual EOC officers have quite broad powers to: (a) completing an initial review of the discrimination complaints; (b) discontinue complaints deemed to be lacking in substance or vexatious or frivolous; (c) offer early conciliation process; (d) investigate discrimination complaints; (e) manage the conciliation process; and (f) grant assistance to support litigation in the District Court. EOC conciliation officers all have differences in background, training, education, levels of skill and operational style. Under Hong Kong’s existing anti-discrimination legislation there is no specific requirement for formal qualification or accreditation for conciliation officers in discrimination disputes, although the EOC conciliation offices do undertake conciliation training under the auspices of the Hong Kong Mediation Council. Given the diverse professional background and experience of the EOC conciliation

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83 See further discussion in Petersen, *supra* note 2, at 9.

84 If the complainant refuses participation in the conciliation process or rejects a reasonable offer made by the respondent, then the EOC may refuse to grant the complainant any further assistance.

85 Where conciliation is a pre-condition for legal assistance the voluntariness of the participant in questionable.

86 In this regard, it may be worthwhile to consider more subtle dimensions of voluntariness: (a) voluntary entry into and participation in the conciliation, (b) the absence of settlement pressures, (c) a mutually acceptable outcome, and (d) the ability to accept or reject a particular outcome. See discussion of this idea in B. Wolski, *Voluntariness, Consensuality and Coercion: In Defence of Mandatory Mediation* (1994) referred to in BOULLE, *supra* note 62, at 15.

87 See ASTOR & CHINKIN, *supra* note 5, at 275.

88 It is understandable that conciliators’ skills and expertise, styles and strategies will vary.

89 The conciliation officers undertake commercial mediation training under the auspices of the Hong Kong International Arbitration Center.
officers, it is important to establish a well-recognized system of training standards and accreditation.  

**Bargaining in the Shadow of the Law**

The EOC investigation and conciliation process can be characterized as a process of bargaining within the “shadow of the law” in that a shadow is cast by legal rules outlawing discrimination over the resolution of the dispute. This is particularly so in discrimination conciliation that is statutorily prescribed with respondents’ conduct being measured against standards of conduct established by the relevant anti-discrimination legislation. In this sense, the EOC conciliation officers are the “guardians” or “protectors” of the standards established within the legislation—they are required to enforce principles enshrined within Hong Kong’s public anti-discrimination legislation. However, at the same time the conciliation officers also have an obligation to act impartially in the investigation and conciliation process. David Bryson aptly refers to the role of conciliation officers as “…being an advocate for the law while remaining impartial to the parties.”

**The Neutral Role of EOC Conciliation Officers**

Definitions of conciliation frequently refer to the conciliator as a neutral intervener in the parties’ dispute. The concept of neutrality has a legitimating function for mediation and conciliation but many commentators argue that it is an indeterminate concept that is impossible to attain. The term neutrality has several subtle meanings in the context of conciliation and mediation and it is important to distinguish between: (a) neutrality in the sense of disinterestedness by the conciliator; and (b) neutrality in the sense of fairness. The former refers to neutrality relating to the conciliator’s background and their prior relationship to either of the parties or the dispute, whereas the latter refers to impartiality or a fair, objective and evenhanded approach by the conciliator to the parties during the conciliation.

EOC conciliation officers come from various educational and professional backgrounds and each have their own cultural, social, personal, and political biases. The perception of the EOC conciliation officers as “neutral” conciliators is questionable, given that they were previously involved in the earlier investigation which concluded that an act of discrimination had occurred in breach of the relevant anti-discrimination legislation. Moreover, the conciliation officers are not neutral as to the outcome of the conciliation since any agreement reached between the parties must result in the respondent’s compliance with the rules of the anti-discrimination legislation. As

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90 See discussion of the importance of training standards for conciliation officers in ASTOR & CHINKIN, supra note 5, at 244-245.
91 See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 375.
92 The EOC conciliation officers have duty to act as impartial third parties in conducting the investigation and conciliation of discrimination complaints between the complainant and the respondent.
93 Id. at 375 citing David Bryson, Mediator and Advocate: Conciliating Human Rights Complaints, (1990) 11 A USTRALASIAN DISPUTE RESOLUTION JOURNAL 136 at 137.
94 See discussion about the neutrality debate in BOULLE, supra note 62, at 17-19.
95 Neutrality considers the extent of prior contact between the conciliator and the parties and the dispute. By contrast, impartiality refers to issues such as fair time allocation, avoidance of any favoritism or bias.
96 They also have their own interests in the conciliation process – e.g. success rates, reputation, and development of their practice etc. See discussion of this point in BOULLE, supra note 62, at 19.
97 The EOC conciliation officer would have taken a decision, at least prima facie, that a breach of the legislation occurred – or least one sufficient to warrant proceeding to conciliation. See further discussion of this point in ASTOR & CHINKIN, supra note 5, at 375.
this brief review of the EOC investigation and conciliation process indicates, there is currently no clear separation between the investigation and the conciliation stage of the proceedings. In this sense there is a conflict in the roles played by the EOC conciliation officer: initially the officer acts as an investigator and then subsequently acts as a conciliator. It is worth considering the division of the investigative and conciliatory functions of the EOC conciliation officers assuming there are sufficient financial resources to support this proposal.98

EOC conciliation officers tend to play a passive role in the conciliation process viewing themselves as impartial third parties facilitating the conduct of the conciliation and assisting the parties in settlement negotiations. They are mindful of applying principles of natural justice in the conciliation to ensure the fairness and efficacy of the process.99 As a result, despite the frequent power imbalances between the parties, the conciliation officers may decline to assist the complainant in any overt way for fear of being accused of bias. There is often a disparity, however, between the EOC conciliation officers’ view of themselves as impartial third parties in the conciliation process and the complainants’ expectation of the EOC officers to enforce anti-discrimination laws and act as advocates on their behalf during the investigation and conciliation proceedings. This is particularly so in cases where a complainant is un-represented in the investigation and conciliation process while the respondent has legal representation (or at least some high level managerial representation).100 This expectation is heightened by the public’s view of the important social justice role played by the EOC. Many complainants mistakenly expect that EOC officers will act as their legal advisers and advocates during both the investigation and conciliation stages, but the EOC officers tend to follow a rather strict model of impartiality.101

There is considerable debate about the acceptable level of intervention by a conciliator in the dispute resolution process, ranging from a “minimalist intervention” approach (restricting the conciliator to a facilitative role) which is appropriate in cases where persons have approximately equal bargaining power, to the “directive intervention” approach that allows the conciliator to intervene more actively in the conciliation process (appropriate where there is a large disparity in power between the parties).102 The different approaches to conciliator intervention result from differences in conciliation training (or lack of training), differences in professional backgrounds of conciliation officers, personal differences in conciliation style and differences in community expectations.103 It also depends upon the institutional setting and the particular approach of that institution – some institutions like the EOC may tend to train its personnel in a non-interventionist manner so as to minimize giving advice to the parties and recommending options to the parties. The focus should be on determining acceptable levels of positive intervention by

98 See ASTOR AND CHINKIN, supra note 5, at 375.
99 See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 374-375 (discussing relevant court cases in Australia concerning allegations of bias by conciliation officers in the conduct of conciliation conferences and holding that the rules of natural justice should be observed by a person presiding at a conciliation conference).
100 An imbalance of power often arises in employment related discrimination cases. Some NGO’s argue that the neutral stance of the EOC officers only exacerbates the power imbalance between the parties in these cases and argue for a more active role for the EOC officer. See discussion of this point in Petersen, supra note 2, at 11.
101 Interviews conducted with participants from among the EOC research sample indicate that the lack of legal advice and advocacy from the EOC officers during the investigation and conciliation process is a source of frustration for many complainants. See discussion in infra Chapter 12.
102 Boulle refers to the different approaches as “orchestrators” versus “dealmakers. For further discussion of these approaches, see BOULLE, supra note 62, at 21.
103 Id. at 24.
the EOC conciliation officers, permitting them to apply the relevant anti-discrimination laws and encouraging consensual agreement between the parties, but prohibiting them from giving their personal opinion on the substance of dispute.\textsuperscript{104} This is particularly important given the power imbalances that often arise between the parties in discrimination disputes, and the parties’ lack of representation in the process.

**Power Imbalances Between Disputing Parties**

Two important issues concerning power imbalances arise in the context of the EOC conciliation process.\textsuperscript{105} Firstly, whether certain discrimination disputes should be solved by conciliation because of serious power imbalances between the disputing parties. Secondly, how to apply appropriate conciliation strategies to deal with the power imbalances characteristic of most discrimination disputes.\textsuperscript{106} Power imbalances may be problematic in discrimination conciliation between victims of unlawful discrimination and the alleged perpetrators, especially in an employment context involving large corporations or institutions where the discriminatory behavior results from lack of knowledge about the relevant standards of behavior or legal procedures.\textsuperscript{107} Although conciliation has the same underlying assumptions as the formal litigation system, it lacks the coercive power to redress the power imbalance.\textsuperscript{108} An important issue is whether the EOC conciliation model reinforces or minimizes the power imbalances that arise in many discrimination complaints.\textsuperscript{109} This imbalance of power may be exacerbated when the complainant is un-represented in the investigation and conciliation process, while the respondent may have some representation (either legal representation or at least some high level managerial or human resource personnel representation).\textsuperscript{110}

Adequate training of conciliation officers and sufficient funding of the EOC conciliation scheme are important to enable EOC conciliation officers to deal with the invariable power imbalances that arise in the conciliation of discrimination disputes. Conciliators must learn to perceive and evaluate power relationships between disputing parties and ascertain how the power differential manifests itself in the dynamics of the conciliation process. Multiple conciliation sessions may have to be held and provisions made for access to and support for appropriate resources for the weaker party in the conciliation process.\textsuperscript{111}

\textsuperscript{104} See discussion in ASTOR & CHINKIN, supra note 5, at 376.

\textsuperscript{105} Consider Mayer’s 10 different sources of power, including resource power, formal authority, associational power, procedural power, expert/informational power, sanction power, nuisance power, habitual power, moral power and personal power. See Bernard Mayer, The Dynamics of Power in Mediation and Negotiation, (1987) 16 MEDIATION QUARTERLY 75. See also discussion of power imbalances in ASTOR & CHINKIN, supra note 5, at 160-164.

\textsuperscript{106} This requires considering whether it is possible to redress imbalances of power that may arise from differences between the parties’ status, access to financial resources, and access to legal advice and representation. Moreover, does the presence of lawyers affect any power imbalances between the parties and does it impact the outcome of the conciliation?

\textsuperscript{107} See further discussion of this point in Boulle, supra note 62, at 71.

\textsuperscript{108} Litigation of discrimination disputes may be more adversarial than the process of conciliation but it may be better at protecting parties who are in a relatively less powerful position (due to the relevant procedural and evidentiary safeguards in place) See discussion of this point in Owen Fiss, Against Settlement, (1984) 93 YALE LAW JOURNAL 1073.

\textsuperscript{109} How does the EOC conciliation process deal with potential or real power imbalances between disputing parties?

\textsuperscript{110} See earlier discussion in supra note 42.

\textsuperscript{111} See detailed discussion of these proposals in ASTOR & CHINKIN, supra note 5, at 162-163.
While the EOC conciliation process is designed to be an informal forum for resolution of discrimination disputes, the presence of lawyers – either as representatives of the complainants or the respondents – may introduce increasing levels of formalism and an adversarial approach into the process.\footnote{112} It may also create further power imbalances between the parties. As Hilary Astor and Christine Chinkin highlight, the presence of lawyers in the conciliation process as advocates has both pros and cons.\footnote{113} Interestingly, the EOC research sample and a similar 1995 study completed of sex discrimination conciliation in Australia found legal representation in only a small number of cases.\footnote{114} In the EOC research sample a large proportion of the respondents were not represented (legally or otherwise) at any stage in the proceedings. There does appear to be a higher chance of conciliation in complaints involving legally represented respondents than in cases where the respondent was un-represented.\footnote{115}

\section*{Informalism and Risk of Prejudice}

In the context of ADR generally, many scholars have written about the dangers associated with informal methods of dispute resolution in dealing with issues of prejudice and discrimination.\footnote{116} Some empirical research suggests that prejudice is more likely to increase and be acted upon in informal settings absent any formal rules of evidence and procedure.\footnote{117} Related to this issue is the concern that informal methods of dispute resolution, including conciliation, create a second (and by implication, inferior) system of justice for those who cannot afford the “first class” justice through the courts.\footnote{118} The fact that the EOC conciliation process is private and free from public scrutiny may undermine its perception as a fair process. Procedural fairness concerns may arise from a lack of process safeguards in conciliation as found in courtroom litigation.\footnote{119}

Richard Delago, for example, suggests that the risk of prejudice increases when there is face-to-face dialogue and confrontation between the disputing parties in any private informal dispute resolution process that lacks procedural rules and does not clearly enunciate the public values to

\begin{footnotes}
\item[112] This may allow legalism to “percolate” into the conciliation arena. See discussion in ASTOR & CHINKIN, supra note 5, at 372. Some Australian legislation provides that lawyers are allowed in conciliation only with permission: see, for example, section 93 of the Anti-Discrimination Act 1977 (New South Wales) and section 95(6) of the South Australia (Equal Opportunity) Act 1984.
\item[113] See discussion in ASTOR & CHINKIN, supra note 5, at 372-373 and in infra Chapter 12.
\item[114] In the EOC research sample, only 6 complainants (less than 2%) had legal representation at any stage of the investigation and conciliation process, while 54 respondents had legal representation. This is not surprising given the high cost of legal representation in Hong Kong. This result mirrors the results from the Australian study in which Hunter and Leonard found that complainants were represented at conciliation conferences in 35.8% of cases and respondents were represented in 29.4% of cases. See Hunter & Leonard, supra note 53.
\item[115] The EOC research sample indicates that 46% of complaints involving legally represented respondents resulted in conciliation while only 33.5% resulted in conciliation where respondents did not have legal representation. However, the involvement of legally represented respondents also increased the rate of unsuccessful conciliation (20.4% of complaints involving legally represented respondents resulted in unsuccessful conciliation compared to 15.1% of complaints where the respondents were not legally represented.
\item[116] See, for example, RICHARD ABEL, THE CONTRADICTIONS OF INFORMAL JUSTICE (1982).
\item[117] See Richard Delago, Chris Dunn, Pamela Brown, Helena Lee and David Hubbert, Fairness and Formality: Minimizing the Risk of Prejudice in ADR, (1985) 6 WISCONSIN LAW REVIEW 1359.
\item[118] Consider, for example, the work of Richard Abel on the politics of informal justice, see ABEL, supra note 116. See also J AUERBACH, JUSTICE WITHOUT LAW, (1983) and O. Fiss, Against Settlement, (1984) 93 YALE LAW JOURNAL 1073.
\item[119] See discussion of this point in BOULLE, supra note 62, at 68-69.
\end{footnotes}
be applied. Unlike formal litigation in state courts that provides procedural protection through civil procedural rules and evidentiary rules, informal dispute resolution methods such as conciliation are not constrained by such inherent procedural protections. However, while discrimination conciliation in Hong Kong lacks some of the procedural protections inherent in courtroom litigation, it is conducted under the auspices of a statutory body established to enforce anti-discrimination legislation in Hong Kong – the EOC – and controlled by individual employees of this government agency – the EOC conciliation officers. Skilled conciliation officers can provide equivalent checks and balances to the formal procedural safeguards in the court system. Moreover, the EOC conciliation process occurs within the shadow of the provisions of the relevant anti-discrimination legislation. As a result, the presence and active participation of an EOC conciliation officer in the conciliation process (as a representative of the EOC, an agency established to uphold equal opportunities and anti-discrimination legislation in Hong Kong) may diminish the potential impact of prejudice and unfairness on the EOC conciliation process.

Privacy and Confidentiality of EOC Conciliation Process

One of the important aspects of the EOC conciliation process is the confidential nature of the dispute resolution forum. Margaret Thorton has commented on this important feature of discrimination conciliation as follows:

As a strategy, deormalisation is a double edged sword. On the one hand, it encourages victims of discrimination to file complaints because of the guarantees of privacy and confidentiality, factors which also encourage respondents to co-operate. On the other hand, it precludes public scrutiny.

There are obvious advantages to having a private and confidential conciliation process, particularly for complainants who may be reluctant to lodge a discrimination complaint in a public forum. In some cases of sex discrimination, confidentiality may be particularly important since it allows a complainant to pursue redress for the discriminatory behavior in private before a sympathetic anti-discrimination agency such as the EOC. Respondents in a discrimination complaint may also value the confidentiality of the EOC conciliation process if they want to avoid adverse negativity resulting from the complaint, or from having failed to comply with the relevant anti-discrimination legislation. The private nature of the forum also allows the respondents to privately reform their policies and practices so as to conform to relevant

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120 People holding prejudicial views are least likely to act upon their beliefs if the immediate environment highlights the differences between their publicly professed beliefs and the private personal prejudices. See, for example, discussion of this issue in Delago et al, supra note 117 and Tina Grillo, The Mediation Alternative – The Dangers for Women, (1991) 100 YALE LAW JOURNAL 1545] See also ASTOR & CHINKIN, supra note 5, at 384-385.

121 Thus, it is argued that the informality of ADR methods such as conciliation can result in increased risk of prejudice and a lack of assertion of certain rights. See discussion in ASTOR & CHINKIN, supra note 5, at 384-385.

122 As such, the EOC conciliation officers must operate in accordance with principles of due process and natural justice.

123 See more detailed discussion of this issue in ASTOR & CHINKIN, supra note 5, at 385-386.


125 Or who may suffer additional discrimination if a discrimination complaint is made publicly. See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 377.

126 This is particularly so in serious cases of sexual assault in the employment field. See further discussion in ASTOR & CHINKIN, supra note 5, at 377.
anti-discrimination law. However, if the respondent is seeking a public defense of their actions, particularly if they feel that they have not contravened the anti-discrimination legislation, then the private forum of discrimination conciliation is a detriment.

The inherent privacy and confidentiality of the EOC investigation and conciliation process may also hide systemic problems of discrimination within the Hong Kong community. Respondents may acknowledge unlawful organizational and institutional practices in an individual EOC conciliation case but then subsequently fail to adequately redress the situation. The personalizing of the individual discrimination complaint may allow such systemic or institutional change to be avoided. As a result, it may be difficult to make attitudinal and systemic changes to discriminatory beliefs and practices in Hong Kong. Moreover, the confidentiality of the EOC conciliation process and its outcomes creates difficulties in gaining an accurate assessment and analysis of the conciliation of such discrimination complaints. Due to the confidential nature of monetary compensation and other settlement terms, there is a resulting lack of precedents indicating successful conciliations or good settlements because the outcomes of the conciliation process are kept confidential. The privacy and lack of precedential value of the settlement may be a significant disadvantage to third parties who have been victims of discrimination and are attempting to conciliate their dispute. In addition, whereas there is public articulation of norms and values by courts in formal litigation proceedings, positive law norm enforcement is subordinated in the conciliation process with compromise predominating.

The EOC conciliation model indicates the difficulties of enforcing and implementing policies and principles enshrined in public legislation through a private and confidential process. The challenge is how to translate individual complaints about discriminatory practices back into the system to have a meaningful educational impact and affect systemic changes to discriminatory practices (particularly within government departments and organizations and private companies, both local and multinational). Some commentators have argued that the notion of confidentiality in the context of discrimination conciliation should not be absolute with a “less categorical

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127 See further discussion of the merits of the confidential forum of conciliation for respondents in discrimination complaints in ASTOR & CHINKIN, supra note 5, at 377-378.
128 Despite providing a more cost effective means of resolving the dispute as compared to courtroom litigation.
129 Public knowledge and understanding of the relevant issues are prevented and reform may be delayed by lack of information.
130 They may refuse to reform organizational and institutional practices in compliance with anti-discrimination legislation.
131 In the Australian study of sex discrimination conciliation, Hunter and Leonard found that 49% of the sex discrimination complaints they analyzed has direct impact beyond the individual complainant. Unfortunately, a large percentage of systemic cases lapsed, were withdrawn or failed to reach agreement in the conciliation process. See Hunter & Leonard, supra note 53, at 27-28 and further discussion of the issue in ASTOR & CHINKIN, supra note 5, at 378.
132 See further discussion of this issue within the context of Australia in ASTOR & CHINKIN, supra note 5, at 378-379.
133 Unlike court judgments rendered in public by the state courts, conciliation settlements do not have the same weight as precedents or benchmarks – they cannot be used by other potential complainants as a binding guide or model for other discrimination disputes.
134 See discussion of this issue in ASTOR & CHINKIN, supra note 5, at 40-42, Edward Brunet, Questioning the Quality of ADR, 62 TULANE LAW REVIEW 1 (1987) and M. Galanter, Reading the Landscape of Disputes: What we know and don’t know (and think we know) about our allegedly contentious and litigious society, (1983) 31 UCLA LAW REVIEW 4.
approach” taken to confidentiality.\textsuperscript{135} Thus, the degree of confidentiality may be determined in each case between the EOC conciliation officer and the parties to the discrimination complaint, considering both the interests of the parties and the public interest. This may help establish publication and dissemination of a more detailed conciliation or “settlement register” summarizing selected cases conciliated by the EOC.

**Empowerment of the Individual and Systemic and Institutional Reform**

It is often suggested that the use of informal methods of dispute resolution such as conciliation empowers individuals and offers greater control over and participation in resolving disputes than formal litigation in state courts would allow.\textsuperscript{136} Discrimination conciliation allows the complainants to tell their “story” (or their “narrative”) of the discrimination they have suffered in a supportive and non-threatening environment, supported by a legal framework of anti-discrimination legislation and an enforcement agency. The process allows the complainant direct involvement in the negotiation with the respondent of any potential settlement of the discrimination complaint, although it also highlights the need for the complainant to have adequate advice and assistance in articulating their case (and their needs and interests) and preparing for the negotiation with the respondent in the conciliation process.\textsuperscript{137} Of course, there may be situations in which the conciliation is not an empowering experience for the complainant, particularly in any serious cases of sex discrimination or where there are serious disparities in power between the complainant and the respondent.\textsuperscript{138} However, it has also been argued that while coercion of the parties may be reduced in informal methods of dispute resolution such as conciliation, it is not totally removed. This is particularly true in court-annexed conciliation schemes or conciliation schemes within statutory bodies such as the EOC where the process of conciliation is managed by the conciliation officers – often despite an illusion that control over the process is with the parties themselves.\textsuperscript{139}

One of the inherent dangers of conciliating discrimination complaints is that the lodging of the individual discrimination complaints with the EOC and the subsequent process of investigation and conciliation may serve to individualize systemic problems of discrimination within the society of Hong Kong. As discussed earlier, the current anti-discrimination legislation in Hong

\textsuperscript{135} See, for example, ASTOR & CHINKIN, *supra* note 5, at 379. See also comments concerning the distinction between privacy and confidentiality in the context of arbitrations, and the ruling that confidentiality is not intrinsic to arbitration in *Esso Australia Resources Ltd. v Plowman (Minister for Energy and Minerals)* 183 CLR 10. In this case the Australian High Court stated that there was a public interest exclusion to confidentiality in the context of arbitration and it is arguably that this same principle would extend to other forms of ADR such as conciliation and mediation.

\textsuperscript{136} Particularly for oppressed groups within any society. However, some commentators such as Richard Abel argue that in reality informal methods of dispute resolution such as conciliation have the capacity to expand state control over disputes. He argues that ADR increases the total number of cases processed than decreasing them since disputes that would otherwise be rejected by the formal justice system are instead referred to ADR. See ABEL, *supra* note 116. But consider commentators such as Roger Matthews who refute this argument: *Reassessing Informal Justice*, in *INFORMAL JUSTICE?* 10 (Roger Matthews ed. 1988).

\textsuperscript{137} The nature of the conciliation process is such that the complainant must be able to effectively articulate their position and negotiate for their own needs and interests with a respondent who may have greater resources and power. For further discussion of the importance of adequate preparation of the complainant in discrimination conciliation, see ASTOR & CHINKIN, *supra* note 5, at 382.

\textsuperscript{138} Hilary Astor and Christine Chinkin note that if such power differences are not adequately accounted for within the conciliation process, the conciliation experience may amount not “exploitation” of the complainant rather that “empowerment”. See ASTOR & CHINKIN, *supra* note 5, at 382.

\textsuperscript{139} See further discussion of this point in Simon Roberts, *Mediation in Family Disputes* (1983) 46 MODERN LAW REVIEW 537 at 556.
Kong requires individuals to complain about discriminatory acts or behavior or denials of equal opportunities. However, such discrimination may result from systemic or institutional problems within Hong Kong society that are not amenable to individualized solutions. Moreover, many ADR methods, such as publicly sponsored mediation and conciliation schemes, tend to neutralize conflicts within society. Richard Abel argues that referring such discrimination disputes to informal ADR schemes serves to “depoliticize” the dispute or grievance. Establishing a process such as the EOC conciliation scheme may create an impression that something is being done about the problem of unlawful discrimination within society when in fact, it may simply provide for individual compromise rather than any real solution to a genuine grievance. Thus, the likelihood that necessary structural reforms will be introduced is reduced – there is less likely to be public complaints and calls for reform. It is unlikely to result in any systemic or structural change or reforms with real chance for the removal of discrimination. While there may be an outward appearance that the government and the various respondents (e.g. small business owners, local and multinational corporations and government bodies and organizations etc.) are progressive and committed to the elimination of gender and disability discrimination, it may actually conceal the lack of substantive reform. The overall effect is that the origins of the disputes are depoliticized or ignored and the resolutions are “…internalized by the individual form of participation. Conflict in this setting is absorbed into a rehabilitative model of minor dispute resolution.”

Moreover, the EOC conciliation process is essentially a process of structured assisted negotiation within which bargaining and compromise occur, albeit it in the shadow of the legal rules and policies outlawing certain forms of discrimination in Hong Kong. However, it is worth considering whether the laws against discriminatory behavior and practices should really be the subject of negotiation and compromise. Given their fundamental importance to society, they should be viewed as “non-negotiable” from which there should be no derogation by any member of the community. There is an inherent danger that the conciliation process will reduce the anti-discrimination laws to a set of guidelines or principles rather than a statement of unlawful behavior. Moreover, the essential legislative policy of eliminating discrimination in Hong Kong may be disregarded within this conciliation process with the result that the important guidance and ordering function of the anti-discrimination laws may be negated.

V CONCLUSION

In view of the foregoing discussion of the imbalance of power in discrimination disputes and the difficulty of addressing systemic discrimination problems, a number of reform proposals may be considered for implementation to ensure the effectiveness and efficiency of the EOC investigation and conciliation process.

Government Support of Institution of EOC and Chairperson

140 On this issue, see the work of ABEL, supra note 116 and Martha Fineman, Dominant Discourse, Professional Language and Legal Change in Child Custody Decision Making, (1988) 101 HARVARD LAW REVIEW 727.
141 See Christine Harrington, Delegalisation Reform Movements: A Historical Analysis, in ABEL, supra note 116 at 62 cited in ASTOR & CHINKIN, supra note 5 at 28.
142 See discussion in Brunet, supra note 134. See also discussion of this issue in the context of the Australian study on sex discrimination conciliation in Hunter & Leonard, supra note 53, at 30 cited in ASTOR & CHINKIN, supra note 5, at 383.
There must be overt government commitment to and support of the EOC and its ideals promoting equal opportunities and the elimination of discriminatory behavior in Hong Kong. It is important for the continued development of equal and open society in Hong Kong that the EOC and its conciliation officers continue their valuable and important work. Of fundamental importance is that the EOC function as an independent statutory body and that the post of EOC Chairperson not be downgraded. Moreover, it is important that there be increased public awareness and better education of the Hong Kong community about the promotion of equal opportunities and the problems associated with anti-discriminatory attitudes and behavior, the provisions of the existing anti-discrimination laws and means of redressing victims who have suffered discrimination, and the important work of the EOC. There must be a renewed commitment by the HKSAR Government to providing the necessary resources to ensure compliance with and promotion of equal opportunities and anti-discrimination legislation in Hong Kong. It is imperative that sufficient financial resources be provided to support the existing EOC investigation and conciliation model and the hiring, training and development of sufficient numbers of EOC conciliation officers.

Reform of Existing Anti-Discrimination Legislation

It is important to expand the existing grounds of anti-discrimination law to cover race, sexual orientation and age. The recent reports of the pending enactment of the Race Discrimination Bill before Executive Council are welcome. Moreover, the existing anti-discrimination legislation should be reformed to allow representative groups and organizations to file complaints alleging discrimination, without requiring them to identify an individual complainant. This is particularly so in situations where the nature of the alleged discrimination is such that its detrimental effect on the relevant group is clear.143

Revise Existing EOC Investigation and Conciliation Procedures

The EOC research project indicates that while the conciliation model of enforcement used by the EOC is effective, there are reforms that could be introduced that would benefit both the complainants and the respondents, as well as the EOC itself. Consideration should be given to establishing a sophisticated early evaluation and screening process for discrimination cases filed with the EOC with referral to the most appropriate dispute resolution mechanism (which may or may not involve conciliation). This is similar to the “multidoor courthouse” originally proposed by Professor Frank Sander of Harvard Law School in 1976 to establish “…a center offering sophisticated and sensitive intake services, along with an array of dispute resolution services under one roof.”144 Factors to be considered at this initial intake and screening stage could include: history of the discrimination problem, nature of breach of anti-discrimination laws, seriousness and duration of dispute, nature of the parties’ relationship, degree of power imbalance between the parties, degree of hostility and acrimony between the parties, involvement of third parties, and the systemic nature of alleged discriminatory act or behavior.145 Essentially, this

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143 See further discussion of this reform proposal in infra Chapter 11.
144 See Frank Sander, Varieties of Dispute Processing, (1976) 70 FRD 111. Multi-door courthouse models have been established in the US and other jurisdictions. See description of one such program in Linda Finkelstein, The DC Multidoor Courthouse, (1986) 69 JUDICATURE 305.
145 See further discussion of this point in ASTOR & CHINKIN, supra note 5, at 256-257 and BOULLE, supra note 62 at 92-97 (discussing the important indicators of the suitability and non-suitability of conciliation).
proposal calls for some form of increased case management of discrimination complaints filed with the EOC.\textsuperscript{146}

In addition, it would be worthwhile to establish an independent legal advisory and advocacy service that can offer advice and assistance to the complainants (as well as the respondents) throughout the EOC investigation and conciliation process. This is particularly important when the parties are not represented (legally or otherwise) in the investigation and conciliation process. It also is preferable to separate the investigative and conciliatory functions of the EOC conciliation officers assuming there are sufficient financial resources. Finally, it is important to expand the existing EOC “settlement register” to include publication of more conciliated agreements reached, remedies offered, and appropriate level of monetary compensation in order to build up precedents for future complainants to utilize. This is important for providing guidance for potential victims of unlawful discrimination, but also for providing a public articulation of the norms and values of equal opportunities and anti-discrimination for the Hong Kong community.

\textbf{Establishment of Equal Opportunities Tribunal}

At this stage, consideration should also be given to re-examining the proposal calling for the establishment of a specialist equal opportunities tribunal to resolve complaints of unlawful discrimination.\textsuperscript{147} Such a tribunal may enhance the impact of anti-discrimination legislation in Hong Kong and give more public exposure to government policies against discrimination than does the current conciliation model. There are many obvious advantages of such a specialist tribunal. Firstly, decisions made by the tribunal about discrimination complaints are made in a public forum and as a result, there is greater publicity for the anti-discrimination legislation and its underlying policies. Secondly, tribunal decisions may assist in enunciating legal principles and clarifying government policies and help in future conciliation of other discrimination disputes. Thirdly, it may be more effective than conciliation in effecting systemic changes in policy and practice than what can be achieved through conciliation. It may also provide victims of unlawful discrimination with a more accessible and affordable public forum for “justice” than time consuming and expensive litigation in the District Court.

\textsuperscript{146} In line with the increased case management reforms being implemented in the state courts. For a discussion of case management reform in the Hong Kong courts, see Chief Justice’s Working Party, \textit{Report on the Reform of the Civil Justice System in Hong Kong}, November 2001, \textit{supra} note 15.

\textsuperscript{147} The proposal for the establishment of a specialist tribunal to hear discrimination complaints was originally made by Anna Wu at the time of the drafting and implementation of Hong Kong’s first anti-discrimination laws.