CONFLICTING EXPECTATIONS AND
THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION
IN HONG KONG ANTI-DISCRIMINATION LAW

By Carole J. Petersen

I. Introduction

This paper assesses the model that has been used thus far to enforce equality rights in Hong Kong, which emphasizes confidential conciliation of complaints. The paper relies in part upon data obtained from a sample of 451 complaints filed with the Hong Kong Equal Opportunities Commission (the “EOC”). However, it also reports the results of interviews conducted with EOC officers and individuals who have participated in EOC conciliations. Part II of the paper introduces the enforcement model, the concept of “impartiality”, and the concerns expressed by EOC officers. Part III discusses the different needs and the competing expectations of the parties, as expressed in interviews with complainants, respondents, and individuals who have represented or assisted them. (Our interviewees were not selected at random but rather on the basis of their willingness to participate. Thus, their comments are not necessarily representative.) However, the interviews offer valuable qualitative information and demonstrate how different groups may have very different opinions – not only as to what the EOC officers should be doing but also as to what they are doing. Part IV concludes by discussing recent changes made by the EOC (which may address some of the concerns expressed by complainants) and

1 Associate Professor and Director of the Centre for Comparative and Public Law. This paper is part of a research project entitled Enforcing Equal Opportunities In Hong Kong: A Study of Investigation, Conciliation, and Other Enforcement Mechanisms, which is generously supported by a grant from the Hong Kong Research Grants Council (RGC Reference HKU 7721/00H; principal investigator: Carole J. Petersen; co-investigators: Cecilia Chan and Katharine Lynch; Senior Research Assistants: Janice Fong and Gabrielle Rush). Special thanks to Janice Fong for her assistance conducting interviews and to Gabrielle Rush for her editorial comments and research assistance. We also would like to express our appreciation to those who participated in interviews and gave us follow-up comments, although I have not named any of these individuals personally in order to protect confidentiality.

2 This paper is confined to complaints under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance. Although the Bill of Rights Ordinance prohibits discrimination on other grounds, the EOC has no power to investigate or conciliate complaints under that Ordinance.

3 The interviews were conducted by the author and by Ms. Janice Fong. Some interviews were originally conducted in Cantonese, in which case Ms. Fong has translated the interview comments into English.
some additional recommendations. ("She" is used to refer to complainants as the majority of complaints in our sample were filed by women. This is because the vast majority of complainants under the SDO are female. However, it should be noted that 56% of the complaints filed under the DDO in our sample were filed by men.)

II. The conciliation-based model and interviews with EOC officers

The EOC has many different functions. In some areas (e.g. education, research, training, and policy advice), the EOC’s powers are not heavily regulated by statute. This enables the EOC to respond flexibly (within budgetary constraints) to community needs. In contrast, the EOC is far more regulated when it exercises its powers with respect to complaints. This group of functions includes the initial intake and screening of the complaint, as well as the power to investigate, discontinue, and/or attempt to conciliate a complaint. It also includes the power to grant assistance to litigate, although this power is exercised only with respect to a small percentage of the complaints filed. The EOC must exercise these powers in accordance with fairly detailed provisions in the three anti-discrimination ordinances, a range of subsidiary legislation, its own operating procedures, and general principles of administrative law. In particular, the EOC has a duty to remain impartial when investigating and conciliating a complaint. In this regard, it should be noted that the EOC has received high marks (both from our study and from a review by independent consultants) for strict adherence to procedures and to the rules of natural justice.

Indeed, it is this high level of impartiality that has disappointed many complainants and NGOs who expected the EOC to serve more as an “advocate” of complainants during investigation and conciliation. The views of our interviewees on this subject will be discussed later in this paper. However, it is worth noting here that this issue (and the

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4 For example, when it was revealed that Hong Kong immigration officials had wrongly sent a young man with mental disability across the border to Shenzhen (where he disappeared), the EOC moved quite quickly to develop a training programme for immigration officials on how to recognize and deal with people with mental disabilities. See Study Report on the Procedures and Training Needs of the Immigration Department in Handling Persons with Disabilities (Hong Kong EOC, 2001) available at the EOC website (website address: http://www.eoc.org.hk:8080/CE/investigation/index.htm).

5 I base this conclusion on our review of the files, our interviews with officers, and also our interviews with people who have participated in EOC complaints procedures. None have complained of personal bias on the part of an EOC officer (although we were told of incidents in which respondents had accused officers of being too pro-complainant, an issue which we discuss at p. 8 of this paper).
question of what “impartiality” really means) is at the heart of many debates on the proper role of equal opportunities commissions generally. Commissions around the world grapple with the question of how to balance their duty to be “fair” to both parties with their duty to enforce the legislation and eliminate unlawful discrimination. It is widely recognized that the traditional neutral mediator may not be able to address the power imbalance that characterizes most complaints of discrimination. A more interventionist approach may be required. However, officers handling complaints will not wish to take a pro-active approach unless they are confident that they are permitted to do so. Thus, it may be necessary to provide expressly for this, either in the legislation or in a commission’s operating procedures. For example, the Australian Human Rights and Equal Opportunities Commission states on its website:

“HREOC is of the view that power differentials between parties in the context of anti-discrimination and human rights disputes must be considered and addressed if the process is to be just and fair and that intervention to enable a fair and just process is central to the achievement of fair and just outcomes. The Commission’s legislation supports the positive intervention of the conciliator to ensure that a party is not significantly disadvantaged in proceedings and to assist the parties to participate on equal terms. Ensuring a fair and just process requires moving beyond notions of formal equality as clearly treating unequals equally will exacerbate rather than ameliorate party disadvantage. . . . this interventionist approach to enable substantive equality of process does not constitute a breach of conciliator impartiality or neutrality. Neutrality can be seen to involve not only a requirement to be aware of and restrain from imposing personal bias on the process but also a requirement to act positively to maintain equality of process.”

Of course, not all sectors of the community would agree with this approach and it is likely that at least some respondents would expressly object to it. This is perhaps even more true in Hong Kong than in some other jurisdictions which have longer experience with (and therefore greater acceptance of) anti-discrimination laws and the concept of a strong enforcement body. That is why it is important to have an open discussion on the question of the EOC’s proper role. I would argue that every equal opportunities commission that is

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empowered to conciliate complaints should consider and adopt an explicit policy on the
meaning of “impartiality”, so that conciliation officers have a clear sense of their proper role
and can fulfil it with confidence.

The approach taken to conciliation is crucial to the efficacy of the legislation
because the vast majority of complaints are not litigated. Diagram 1 shows the outcomes of
our sample of 451 complaints concluded by the EOC in a 9-month period. 204 (45%)
complaints were discontinued by the EOC (either because the complainant chose not to
continue or because the EOC determined that discontinuation was appropriate under the
legislation).7 158 (35%) complaints were eventually conciliated (either through early
conciliation or through conciliation conducted after an investigation). In 71 cases (15.7%),
the EOC attempted to conciliate the case but the parties did not reach an agreement. In most
of the cases that could not be conciliated the complaint essentially died at this point. The
complainant applied for legal assistance in 35 of the 71 unsuccessfully conciliated cases and
received some form of legal assistance in 17 cases.

Even when legal assistance is granted a complaint rarely goes all the way to trial.
This is partly because respondents will often decide to settle the case at this point (knowing
that the EOC only assists a case if it is satisfied that it has merit). In our sample, nine of the
17 legally assisted complaints settled before any further legal action was taken. In another
five of the legally assisted complaints the EOC decided not to give legal support beyond a
certain stage. One legally assisted complaint was withdrawn by the complainant. By the
time we finalized our data, only two of the 17 legally assisted complaints were the subject of
on-going legal proceedings supported by the EOC.

It should be noted that complainants are not legally obligated to go through this
process. Under the Hong Kong model, victims of discrimination and harassment may
choose to bypass the EOC entirely and file an action directly in the District Court.8
However, most victims of discrimination cannot afford to retain a lawyer and contingency
fee arrangements are not permitted. Moreover, even if a complainant could afford to

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768 complaints were discontinued at the intake stage and 136 were discontinued during or after an
investigation.
8Only a few cases have been litigated without EOC assistance, the most notable being Tsang Helen v.
Cathay Pacific Airways Ltd. [2000] 4 HKC 456 (appeal denied in Tsang Helen v. Cathay Pacific Airways
Ltd (No 2) [2001] 4 HKC 585). For a discussion of this case, see Carole Petersen, “Recent Developments
litigate, it might not be worth her while to do so. There are no jury trials in Hong Kong (except for serious criminal offences and defamation actions) and even successful plaintiffs cannot expect large damage awards. In most litigation, a successful plaintiff can at least obtain an award of costs (since Hong Kong normally follows the English rule that “costs follow the event”). However, the District Court Ordinance provides (in Section 73) that in proceedings brought under the anti-discrimination legislation each party “shall bear its own costs unless the Court orders otherwise on the ground that (a) the proceedings were brought maliciously or frivolously; or (b) there are special circumstances which warrant an award of costs”. This provision was adopted to remove the fear (among potential plaintiffs) of being ordered to pay the defendant's legal costs should one’s case not be successful. However, it also means that a successful plaintiff cannot be certain that she will recover her costs, unless she can demonstrate special circumstances.9

As a result of these factors, it was always understood that most complainants would not try to litigate on their own but rather would rely upon the free assistance provided by the EOC. The legislation obligates the EOC to investigate and “endeavour to conciliate” all complaints filed with it (except for those that lack substance or can be discontinued on other grounds provided by statute). Thus, although there is no statutory requirement that a victim of discrimination attempt to conciliate her complaint, in practice she is compelled to participate in the conciliation process as long as the respondent is willing to do so. If the complainant refuses to participate in conciliation (or rejects what the EOC believes is a reasonable offer), it is unlikely that the EOC will grant her further assistance.

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9 It should be noted, however, that the District Court has demonstrated a willingness to award costs to successful plaintiffs, on the grounds of “special circumstances”, particularly if the court concludes that the defendant should have conciliated the case. See, for example, Ma Bik Yung v Ko Chuen [1999] 1 HKC 714 (DC) (costs reduced on appeal in Ma Bik Yung v Ko Chuen [2000] 1 HKC 745 (CA)) and Yuen Sha Sha v Tse Chi Pan [1999] 1 HKC 731 (DC). The reasons why costs orders were appropriate in those two cases are considered in Carole Petersen, “Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong’s Anti-Discrimination Laws”, 29 Hong Kong Law Journal 178 (1999). Costs were also awarded in K, Y, and W v Secretary for Justice [2000] 3 HKLRD 777, in which the Hong Kong government's policy of refusing to hire a person for any job in the disciplined services if s/he had a parent with a mental illness was held unlawful under the Disability Discrimination Ordinance. The government argued that costs should not be awarded because the litigation was the first legal challenge to its hiring policy. However, the judge noted that special circumstances could be found from the facts that (i) the government had been advised by its own task force to change its policy; and (ii) the EOC, which supported the complainants, has no separate budget for litigation. For a discussion of this case, see Carole Petersen, “The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong”, 32 Hong Kong Law Journal 103 (2002).
If conciliation fails then the complainant must either abandon the claim or commence an action in the District Court. At that stage the complainant can apply to the EOC for assistance to litigate but it has no obligation to grant the application. The EOC does not have the resources to assist all meritorious cases and thus advises complainants that “legal assistance is not guaranteed” and generally will only be granted if the case “raises a question of principle; or it is unreasonable, because of the complexity of the case or the applicant's position in relation to the respondent, to expect the applicant to deal with the case unaided”. The complainant cannot officially apply for legal assistance until after conciliation has failed. This means that she does not know, when considering whether to accept or reject an offer made in conciliation, whether she will be able to litigate if conciliation fails.

During its first seven years of operation (including our study period), complaints filed with the EOC were received by one of two divisions, the Gender Division (which received complaints under the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance) and the Disability Division (which received complaints under the Disability Discrimination Ordinance). Each division had a Division Head, assisted by a chief and eight officers devoted to investigation and conciliation. The two Divisions were not only responsible for receiving complaints, but also for a range of other policy-related duties. In 2002 a decision was made to merge the two Divisions into one “complaint” handling division, while moving the policy-related responsibilities to other divisions. The implications of this organisational change, which occurred after our sample period, are not yet clear. However, it appears that one of the goals of the merger is to allow case officers to concentrate on effective case management rather than having to divide their time between complaints and policy responsibilities.

Our study was somewhat complicated by the EOC’s decision to put greater emphasis upon “early conciliation”, which occurred in the middle of our sample period. In its early years of operation, the EOC investigated every complaint unless it was discontinued at the intake stage. (A complaint might be discontinued at the onset for a variety of reasons.

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10 See the brochure *What is Conciliation?*, at p. 7 (Hong Kong EOC) (also available on the EOC website: http://www.eoc.org.hk:8080/CE/conciliate/index.htm).
11 The EOC informs parties that it "cannot entertain applications for legal assistance unless the applicants have been through the complaints system and conciliation has proved to be unsuccessful". Id. at 7.
For example, a complaint that does not allege an unlawful act will be discontinued and a complaint lodged beyond the normal 12 month period will be discontinued unless there are special circumstances.) However, in late 2000, the EOC began (on the advice of an outside expert) a six-month pilot programme in which EOC officers encouraged the use of “early conciliation”, before the investigation stage is complete. The underlying theory behind this recommendation was that parties become more hardened in their positions during the investigation process and thus less willing to conciliate. In addition, the EOC had received feedback from complainants “that they fear pressure, stress, and job loss as a consequence of complaining about discrimination.” (This was also reported in our interviews with complainants and their representatives.) A shorter complaints process should hopefully reduce this period of stress. Early conciliation also reduces the time that officers have to devote to the investigation process (a consideration which has become important in light of the increasing number of complaints received by the EOC). At the end of the six-month pilot scheme, the EOC determined that early conciliation was successful and it is now regularly encouraged. However, if the parties decline to participate in early conciliation (or if it is tried but the complaint is not resolved) a full investigation is conducted and conciliation can be attempted again after the investigation.

The officers interviewed for this study generally expressed support for the concept of early conciliation. However, some expressed concern that they do not have the opportunity to investigate the important facts in these cases. Moreover, since only the statement of claim has been prepared, an “early conciliation” conference can proceed with very little information from the respondent. This may make it difficult for the complainant to anticipate (and prepare to refute) the arguments that the respondent will assert at the conciliation conference. These are valid concerns. However, our study of 451 complaint files (which spanned the six-month trial period of early conciliation) confirms that early conciliation is very effective: out of 130 cases referred to early conciliation 110 were conciliated. In contrast, out of 111 cases referred to conciliation after an investigation, only 48 were successfully conciliated. Of course, the lower conciliation rate at the later stage is at least partly attributable to the fact that many of the “post-investigation” cases were

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tougher to conciliate to begin with, which is why the parties either declined to participate in early conciliation or tried but failed. Still, it is clear that early conciliation has significant advantages for all parties.

A significant percentage of parties do not conciliate in person but rather use the EOC officer as a sort of messenger, passing the offers and responses back and forth. Many respondents and complainants would prefer not to give up the time away from work to attend conferences and in some cases (especially sexual harassment complaints) the parties are uncomfortable facing one another. However, several officers told us that they find a conciliation meeting more efficient as it allows the parties to respond more quickly to offers and counter-offers. Moreover, face-to-face conciliation is more consistent with what people expect of a mediation-based model of enforcement. Some EOC officers told us that they therefore make a concerted effort to encourage parties to attend conciliation conferences.

Several officers reported that they generally meet separately with each party before conciliation (or speak to them on the telephone) and use “reality testing” techniques to try to persuade each party to adopt realistic approaches. These officers will also ask each party what its “bottom line” is (what it is willing to settle for), on the understanding that the officer will not pass the information on to the other party without permission. Of course, not all parties are willing to trust the officer with this information and the officers have reported that respondents are generally less willing to provide it than complainants. (Our interviews with respondents, discussed later in this paper, indicate that respondents generally do not give any confidential information to the officer.)

The officers also provide parties with written material explaining the rules of conciliation and the role of the investigation/conciliation officer.\footnote{See, for example, What is Conciliation?, supra note 10.} They also try to explain the procedures orally. However, the officers reported that many parties do not appear to fully understand this information and make incorrect assumptions. For example, although the brochure informs complainants that the officer is required to be impartial,\footnote{Id. at 4.} officers reported that complainants often do not understand (or do not accept) this rule. The EOC officers who we interviewed were aware that many complainants want them to play more of an adversarial role but stressed that they must be careful to avoid conduct which could give
rise to an allegation of bias. Officers also reported that respondents do sometimes accuse the EOC of failing to maintain impartiality where they feel that the officer was advocating on behalf of the complainant or indicating to the complainant that a particular offer was on the low side. We were told of one case, in which an EOC officer was accused of bias because he had explained the implications of the settlement terms that had been offered to the complainant. The respondent had offered the complainant an “interview” with no guarantee of a successful outcome. The officer explained to the complainant that if she agreed to settle the complaint on these terms she would be giving up her right to sue, even if the interview was not successful. When the complainant realised this she declined the offer. However, the respondent was so angry that it filed a complaint against the EOC officer and asked that that officer not be assigned to any future cases involving that respondent. Clearly this was an overreaction (as a conciliation officer has an obligation to ensure that both sides understand the nature of the proposed agreement) but it demonstrates why EOC officers might err on the side of caution so as to avoid any impression of bias.

The officers interviewed also reported that many complainants are unhappy and frustrated to learn that there is no automatic “hearing” if conciliation fails. They noted that a significant percentage of complainants express an initial desire to litigate their claims, particularly if the litigation is funded by the EOC. This would seem to conflict with the common assumption that Hong Kong Chinese complainants prefer conciliation to an adversarial process. The officers did note that the desire to litigate sometimes fades when the complainant realizes what is involved in litigation (not only the expense, but also the time and stress of appearing in court). However, some officers believe that a certain percentage of complainants (they estimated as many as 20-30%) are not particularly interested in a confidential process that leads only to compensation. Rather they want a hearing and a judgement. The officers noted that it is difficult (and perhaps pointless) to try to conciliate such cases and that a specialist tribunal might give these complainants an opportunity to obtain the remedy that they desire.

EOC officers also reported that the complainants often mistakenly assume that the case is “established” once the officer has suggested that it is ready to proceed to conciliation. In fact, the threshold required for a case to go to conciliation (particularly early conciliation) is much lower than would be required for litigation. Thus, even if the EOC could fund all
meritorious cases (which it cannot do, due to budget constraints and the cost of litigation), it is not necessarily the case that all complaints that proceed to conciliation would be successful if litigated.

III. Interviews with Parties and their Representatives

We conducted a number of in-depth interviews of people who had participated in the investigation or conciliation of a complaint filed with the EOC. I have divided my discussion of the interview results into the complainants’ perspective and the respondents’ perspective. The two groups had very different views of the EOC and the existing enforcement model. In general, the interviewees who had represented respondents at the EOC were happy with the EOC’s approach and the existing enforcement model. In contrast, the complainants and the people who had assisted them at the EOC were almost all quite critical of the current enforcement model.

A. The Complainants’ Perspective

We interviewed several complainants (some on the telephone) and also representatives of organizations that assist complainants with the EOC procedures. These organizations included women’s groups, disability rights groups, and trade unions. Some of the interviewees had assisted several different complainants and had interacted with more than one EOC officer. They had also been to the EOC on many occasions, either to attend a conciliation conference with a complainant or to offer support just outside the conciliation room. We found the comments of these interviewees particularly helpful because they were based upon more than one case or incident. Some of our interviewees had also assisted women with claims and conciliation conferences at the Labour Department and were able to make some comparisons between the two institutions and their procedures. (A woman who has been dismissed as a result of her pregnancy often files two complaints, one with the EOC under the Sex Discrimination Ordinance and one with the Labour Department under the Employment Ordinance.) We did not interview any lawyers who had represented complainants since it is extremely rare for a complainant to have legal representation during the EOC complaints process.

We had expected that the interviewees from the complainants’ side would
complain about the range of remedies obtained in conciliation (as the remedies in many of the files that we studied were quite small). Some complainants did comment upon the small amount of compensation offered by the respondent and said that they found it quite offensive (particularly in cases of sexual harassment). However, the amount of compensation did not appear to be the primary concern of the people that we interviewed. Rather, they were most disappointed with: (1) the EOC’s approach to investigation and conciliation (which they felt placed too much of a burden on individual complainants); (2) the very nature of conciliation and the absence of a “judgement”; and (3) the neutral role played by the EOC officers, which they viewed as contrary to the purpose of establishing the EOC. The following discussion highlights the comments offered by the interviewees on these topics.

Several interviewees commented that the EOC does not investigate cases in the way they had expected. Since the EOC was given a statutory power to “investigate” complaints, they told us that they had initially assumed that the EOC officer would approach a complaint in much the same way that a police officer would investigate a complaint under the criminal law. They had expected the EOC officer to actively gather evidence, contact and interview witnesses – all with the purpose of “building a case” against the respondent. Assuming that the EOC officer could find sufficient evidence, our interviewees had then expected the officer to serve as the complainant’s advocate, advising her on the strength of her complaint and arguing on her behalf in the conciliation conference.

By the time we conducted these interviews, all of the interviewees were aware that these expectations had been incorrect. They now knew that the EOC officers have a duty to remain impartial (they generally used the term “neutral”) and are careful not to take sides. Many of them had also heard (from EOC officers) that a respondent might complain if the EOC officer was seen as doing too much on behalf of the complainant. However, from the point of view of our interviewees, this was not an acceptable answer. In their view, a neutral EOC officer simply did not fulfill the original mission of the EOC.

\[15\] Some interviewees also commented that women complainants in sexual harassment cases find it very difficult to specify the damages sought (when asked to do so by the EOC officer) because this seems to say that it is acceptable to abuse a woman if the respondent later pays for it. These women were more interested in obtaining an apology or a more long-lasting remedy, such as a strong policy against sexual
because such an officer would do little to redress the power imbalance between complainants and respondents. They felt that if the law really required the EOC officer to be completely “neutral” then it should be changed.

Moreover, our interviewees did not completely accept the argument that EOC officers have a duty to be strictly neutral. They felt that EOC officers could and should do more, even within the existing model. For example, several interviewees pointed out that even if an EOC officer could not *advocate* for a complainant in a conciliation conference, then the officer could at least advise the complainant on the strengths and weaknesses of her complaint. As one interviewee complained: “The EOC officers often say that they are impartial and therefore have ‘no comment’ on the complaint. They should not be so neutral, they should have a position”.

Some of our interviewees who have served as support persons for complainants went out of their way to say that they wanted to hear “the bad news” from an EOC officer if the complaint was weak. They said that it was pointless to go through a long and tedious investigation if the complaint was going to be discontinued later in the process. The interviewees recognized that an investigation was sometimes necessary before the officer could tell them if the complaint was weak or strong. But some interviewees insisted that they had been involved in cases in which the complainant had been asked to produce a lot of documents, only to be told later that the complaint had not even alleged an unlawful act. This was particularly irritating to the people who support complainants as they have to deal with the disappointment of the complainant. As one interviewee (who had assisted several complainants) noted:

“If the EOC officer thinks that a complaint is weak, we want to know that. The complainant might then decide that it is not worth the trouble to gather documents and attend the conference. But most of the EOC officers do not seem willing to offer their opinions. They will not say if the complaint is strong or weak.”

Of course, from the point of view of the EOC officer, it is often difficult to assess a case at this early stage. It may be possible to do so where a complaint does not even allege an unlawful act or if the alleged facts are very weak (although even then the EOC officer may find that the complainant did suffer unlawful discrimination but did not know harassment at work.
how to articulate this in the initial complaint letter). However, in many cases the facts as alleged *do* appear to make out a prima facie case and the “strength” of the case will depend on whether those allegations can be proved. This depends on the quality of the evidence, which will not be clear until an investigation has been completed. Even then it is difficult to predict how well a complainant and/or other witnesses would testify at trial or how well they would hold up under cross-examination. Thus, it is understandable that an EOC officer would not wish to tell a complainant that she has a “strong case” without knowing the state of the evidence. This is probably even more true now, with the increased emphasis upon early conciliation, than when the EOC investigated all complaints before they went to conciliation.

Our interviewees also complained that EOC officers rarely offer to help the complainant to calculate the damages that she had suffered. Many complainants have no idea what types of remedies they can ask for or how to calculate damages. For example, they do not know when they can ask for lost wages, medical expenses, or compensation for emotional distress. They also do not know how to justify their claims (e.g. how to demonstrate that the discrimination or the harassment actually caused the losses). According to our interviewees, even when complainants come right out and ask the EOC officer for help on these issues the officers tend to be ambivalent. They might cite some examples of previous cases and the damages that were obtained there, but are very careful to qualify the advice, saying things like “every case is different” or “your case may justify this amount of compensation” or “we cannot compare your case to one that was decided in court because you might not get legal assistance”. Although it is understandable that the EOC officer would not want to give the complainant a false sense of certainty, this approach has left complainants feeling very unsure and confused. (It should be noted that the EOC is attempting to address this problem by producing a “settlement register” (available on the EOC webpage).\(^{16}\) This will be discussed further in Part IV of this paper.)

When asked for other examples of how the EOC officers could give more assistance, our interviewees pointed to the complicated “legal letters” that respondents often submit in response to the letter of complaint. According to our interviewees, the

EOC officers do not sit down with the complainant to help her to digest the respondent’s letter and will not say whether the respondent has raised a defense that would be valid if proved. Rather, the interviewees reported that officers tend to put a cover letter on top of the respondent’s letter and send it on to the complainant, asking for her response. Unfortunately, the complainants often do not understand the terminology and the arguments used by respondents and feel very intimidated by it. As one interviewee commented: “Why can’t the EOC officer sort through the respondent’s letter and give some explanation of what it means?”

Some of the interviewees said that they think the EOC officers are afraid to help, for fear that they may be accused of bias or of giving the wrong advice at some later stage. Others accused the EOC officers of being lazy and still others said that the EOC officers did not seem to truly care about the principle of equality. Our interviews with EOC officers indicate that they take their responsibilities very seriously. However, one can see how a complainant might interpret the refusal to give more definite advice as a sign of disinterest. For example, one interviewee (a complainant who did eventually receive a significant sum of money in conciliation) recalled how upset she became when told that she had to reply to the respondent’s letters on her own. She said that the first officer assigned to her case was very encouraging (and helped to draft her complaint letter). However, the respondent then retained a lawyer, who sent a long and complicated letter responding to the complaint (some 20 pages long with several appendices). The EOC officer sent the lawyer’s letter to the complainant with a cover letter that said: “Kindly let the Commission have your comment on the Respondents’ replies, if any on or before . . .” Since the original EOC officer was about to go on leave the letter also invited the complainant to contact a different EOC officer if she had “any queries”. However, when the complainant asked that new officer for help in responding to the lawyer’s letter she said that the officer refused, saying that officers have to be “neutral towards the complaint” and could not help. When the complainant argued that this was unfair (since the respondent had retained a lawyer) the officer would only say that the EOC could not stop the respondent from retaining a lawyer and that she should seek advice from a women’s concern group if she could not afford a lawyer herself. Ultimately, the complainant did receive help from a women’s organization and she
expressed real gratitude to that organization during the interview. However, she was still quite bitter about the lack of help from the EOC officer. She said that she had “cried a lot when I wrote the rebuttal letter” and that the officer “was just a messenger, putting a cover letter on top of the respondent’s letter and mine and sending it out. I thought anyone could do her job.” She said that whenever she complained about the EOC’s approach she was just reminded about “the impartiality of the Commission”.

When we asked our interviewees about the conciliation conferences, they expressed similar concerns about the neutrality principle. They pointed out that the average complainant has to conciliate with a person who she perceives as having far more power than she and a much higher socio-economic status. For example, if the complainant has filed a complaint against her former employer, then the person across the table may be her former supervisor or the personnel manager of the company she worked for.\textsuperscript{17} One complainant described how she attempted to conciliate with her company’s Human Resource Director. She recalled that she felt “like a primary school student facing a professor”. Although she tried to remind herself to disregard his higher status, she was too frightened and could not think of what to say in his presence. This is why the complainants and their representatives feel that it is inappropriate and unfair for the EOC officer to maintain a strictly neutral stance in the conference. They feel that they need assistance from the EOC officer in order to even out the balance of power.

The complainant is often accompanied by a friend or a representative of an NGO or a trade union. However, the extent to which this can address the power imbalance depends upon the relative expertise of the person accompanying the complainant when compared to that of the respondent. Although some of the NGO representatives that we interviewed were clearly very experienced and knowledgeable, they are not trained lawyers and cannot be expected to advise a complainant if the respondent or its representative makes complicated legal arguments.

Our interviewees were also unhappy with the fact that the complainant could only bring a friend or NGO representative into the conciliation conference if the respondent gave permission. Even then, the supporter could not speak without permission. One

\textsuperscript{17} 72.3\% of the complaints in our sample were employment-related. Of these, 65.3\% of the complainants were employees or former employees of the respondent and 17.2\% were subordinates or former
representative of a woman’s group described how she had to sit outside the conciliation room, although the complainant (who had alleged sexual harassment) was clearly in distress and was actually in tears at the thought of going into the room on her own. The respondent’s position was that it would be “unbalanced” if the supporter entered the room because the respondent was only sending one person. While on the face of it this seems fair, it reflects a very formal understanding of what “balanced” means and does not take into account the imbalance of power that often exists between the two parties. If the “one person” that the respondent sends is a lawyer or a highly experienced human resource manager, then a former clerical worker will clearly be at a disadvantage if she is on her own. Even an individual respondent may have a real advantage over an individual complainant during a conciliation conference. For example, if a woman alleges that her male boss sexually harassed her then the supervisor-supervisee relationship, combined with the traditional male-female power relationship, will often intimidate the complainant. Of course, this will not always be the case (some respondents will be less powerful than complainants) and in some situations additional persons may be counter-productive. However, it would seem that an experienced EOC officer should be able to form a judgement on whether either party needs an additional person and should have the discretion to allow it in some circumstances even where the other party objects.

Interestingly our interviewees expressed the view that conciliators in the Labour Department were more likely to allow a complainant to bring a supporter with her even if the employer expressed opposition. They said that the Labour Department conciliator would “lean on” the employer’s representative and get him or her to agree. They also said that it was easier for complainants’ representatives to actually speak in the conferences at the Labour Department. (In Part IV of the paper I note that the EOC (after our study period) has adopted a more flexible policy on “equal numbers” in the conciliation conferences. Thus, it may now be the case that a complainant will be allowed to bring in a person to assist her, even if there is only one person sitting on the respondent’s side and even if the respondent is not happy with the complainant bringing in another person. We look forward to hearing from NGOs on how the new approach works in practice.)

subordinates of the respondent.
Several interviewees also indicated that complainants would like more information on the likelihood that they will receive legal assistance from the EOC if they decline an offer from the respondent and apply for assistance to litigate. As noted above, under the EOC’s current operating procedures, a complainant cannot apply for legal assistance until conciliation has been deemed “unsuccessful”. Therefore, the complainant goes into the conciliation conference without knowing whether she will be able to pursue the complaint if conciliation fails. This is particularly problematic because we do not have an inexpensive “equal opportunities tribunal”. If conciliation fails the only option is litigation in the District Court, which most complainants simply cannot afford. Thus, the question of whether a complainant would receive legal assistance is absolutely crucial to her stance in conciliation. The uncertainty of legal assistance may also affect the demeanor of the EOC officers. For example, in our interviews at the EOC, several officers commented that they feel very badly if a case does not successfully conciliate because they know that this may be the “end of the line” for the complainant. When asked whether this would influence their advice to complainants, the officers said that they are careful not to tell the complainant whether to accept or reject an offer. However, they might remind the complainant (in private) that she may not receive legal assistance and that there is no “tribunal” to go to if conciliation fails. Many of our interviewees confirmed that they had heard EOC officers warn complainants that the EOC is not obligated to do anything further on her behalf if conciliation fails.

Thus the complainant may feel pressured to accept a meager offer in conciliation rather than risk the chance of receiving nothing at the end of the process. In contrast, the respondent is in exactly the opposite position – the respondent can sit back and offer very little, knowing that the complainant probably cannot afford to sue. If the complainant does reject a low offer and does manage to obtain legal assistance, the respondent can still settle the case at that later stage. So why should the respondent offer a significant remedy in the conciliation conference? I would predict that this will become more of a problem in future years. When the laws first came into force (in late 1996) respondents were probably worried about the possibility of litigation since they had no experience with the EOC. However, after six and one-half years, most employers probably realize that these complaints rarely go to court – only a handful of cases have been litigated (by
the EOC or by individual complainants). As respondents and their lawyers learn that legal assistance is not always granted, they may become less and less willing to really participate in conciliation in a meaningful way.

In a follow-up interview with the EOC we were told that a complainant can, if she makes a special request, speak to the EOC legal advisor before (or during) the conciliation stage about the procedures for applying for legal assistance and the factors that the Committee will look at when deciding whether to recommend granting legal assistance. However, this does not normally occur and complainants may not know they can make the request. Indeed, one NGO representative reported that when she suggested it (because she had heard at a conference that the service was available) the EOC officer did not seem aware that it was possible. Moreover, the EOC legal advisor cannot make any promises to the complainant in this regard, as she does not make the ultimate decision on whether to grant legal assistance. They said that it would also help if the EOC officer would advise the complainant as to whether an offer made by the respondent was a fair one under the circumstances. (The EOC is also attempting to expand the availability of legal services, which will be discussed more in Part IV.)

Our interviewees also reported that many complainants (and the activists who assist them) are disappointed by the fact that conciliation does not include a “judgement” by the EOC or some other body. Although this is not something that the EOC can address within the current statutory regime, it was one of the most interesting results of our interviews. Conciliation is often praised for its non-adversarial and confidential nature and many (perhaps most) complainants do prefer to settle their claims outside of court and thus out of the glare of the media. However, our interviewees reported that many victims of discrimination are deeply frustrated by the lack of a judgement and wonder why they should put effort into an investigation that leads only to a conciliation conference. As one representative of a women’s group commented, “why should the complainant answer all these questions and find all the evidence if the result of the investigation is just a conciliation conference where the respondent can refuse to admit to anything?” Representatives of disability rights groups were even more critical of the obligation to engage in conciliation, particularly in cases involving access to buildings. One representative commented, “the EOC officers always say that we have to compromise. We do not feel that we should have
to compromise our principles. But we have no choice because the EOC will withdraw its help if the complainant does not want to conciliate.” Of course, under the current statutory regime the EOC cannot change this requirement since it has a statutory obligation to attempt to conciliate complaints.

To some extent, the desire for a judgement stems from a desire to be vindicated in the public eye. Some complainants also said that they wanted the respondent to be prevented from committing the same act again and that a confidential agreement will not have that effect. For example, a woman who had filed a complaint of sexual harassment said that she would have preferred to go to court because she wanted to ensure that the respondent never harassed another co-worker. Both women’s organisations and disability rights groups commented upon the limited publicity given to the conciliated cases. Although the EOC does publish the results of some noteworthy conciliated cases (with the names and details changed) in its Newsletter and in the new on-line settlement register, these publications do not generate nearly as much public attention as an actual court case. Moreover, as one supporter of complainants pointed out, a conciliated agreement is unlikely to bring about systemic change as the message it sends out is that a respondent can “buy its way out” of a complaint for a fairly small sum of money and no damage to his reputation. In contrast, a well-publicised court case attracts significant publicity and is far more likely to “scare” other companies into adopting policies prohibiting sexual harassment and discrimination.

The comments made in these interviews indicate that a significant percentage of complainants (and the activists who are assisting them) are interested not only in obtaining a remedy for the individual case, but also in obtaining some public vindication of the complainant’s position and some long-lasting change in society. This may explain why a written apology is the remedy that was most frequently requested in the sample of complaints that we studied. An apology was requested in 52 out of the 146 conciliated complaints in our sample and obtained as a remedy in 35 of those complaints. However, the apologies obtained in conciliation are sometimes rather vague and do not provide the same vindication that a judgement or a public admission of wrongdoing provides.

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18146 is the number of conciliated complaints in the sample for which we were able to identify whether an apology was initially requested. Information was not available for 12 of the conciliated complaints.
Complainants also often seek a more systemic remedy, such as a new or better policy prohibiting sexual harassment in the respondent’s workplace. This type of remedy was requested in 24 (and obtained in 21) of the 146 conciliated complaints for which we could ascertain this information. However, an agreement to establish a new policy often will not be publicly announced (since the preservation of confidentiality is the entire point of conciliation from the perspective of most respondents). The EOC also does not monitor the respondent afterward to ascertain whether the promised policy was actually implemented.¹⁹ Thus, for complainants and activists, these conciliated agreements will have far less impact than a court case. This point was particularly stressed with respect to accessibility complaints filed under the Disability Discrimination Ordinance. Our interviewees felt that a court case on the subject would raise awareness and have a more systemic impact than a series of confidential conciliated complaints.

Some (but not all) of the frustration with the current model arises from the amount of time and energy that the complainant devotes to the EOC investigation process, which leads her to believe that she deserves more than a conciliated outcome at the end of the investigation. If the complainant could resolve the case in a shorter period of time (and with less effort) then her expectations might be more in line with what can reasonably be obtained through a conciliated agreement. As noted earlier in this chapter, the EOC has also concluded that the investigation stage may be counter-productive in many instances and adopted (during our study period) a programme of actively encouraging “early conciliation”, before conducting a full investigation. The representatives of women’s and disability organisations who we interviewed had varying views of early conciliation. Some interviewees were quite sceptical and argued that a complainant who agrees to early conciliation will receive even less assistance from the EOC than under the old model because there will be no investigation to ascertain additional evidence before the conciliation conference. However, other interviewees welcomed the speedier process, which they felt would place less of a burden on individual complainants.

It should be noted that our interviewees from the complainants side may not be entirely representative, since people who are critical of the existing model are generally

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¹⁹However, the EOC will, no doubt, take note if another complaint is made against the same respondent and it finds that the promised policy change was never implemented.
more likely to agree to be interviewed in this type of study. Moreover, our primary source of interviewees were representatives of NGOs who assist complainants and are active in the equality movement. They had campaigned for years for anti-discrimination legislation, had high expectations of the EOC, and were particularly disappointed by the “impartiality” rule. Also, some of the critical comments reflected a lack of understanding of the alternatives to the current model. For example, some interviewees said they would prefer litigation in court because it would be “quicker” than investigation and conciliation at the EOC. This is not the case, since litigation is extremely slow (easily requiring two years from start to finish). It is also quite likely that many complainants and NGO representatives who said that they would prefer litigation are not fully aware of how stressful a trial would be. Even if the plaintiff is assisted by a skilful lawyer, she will have to testify and be cross-examined by the respondent’s lawyer, which is likely to be much more intimidating than a conciliation conference.

B. The Respondents’ Perspective

We were only able to interview one person who had been an individual respondent in a complaint filed with the EOC. Most of our interviewees had represented a company or institutional respondent in one or more complaints filed at the EOC. They represented several different types of respondent, including private sector companies, a public sector (tertiary-level) educational institution, and various government departments. Although respondents do sometimes retain an outside solicitor to handle an EOC complaint, it is far more common for a respondent to designate an employee to represent it. This person may have legal training (e.g. s/he may be “inside counsel” for the respondent) but most of the people we interviewed were not lawyers. Rather they were human resource managers or other managerial-level employees of the respondent. Several of these interviewees had represented their employer in more than one complaint and a few had been involved in many cases. Some of the interviewees had also represented their employers or clients at the Privacy Commission, the Labour Department, or the Labour Tribunal and they sometimes compared the process at the EOC (generally favourably) to the procedures and approaches of these other bodies. All of the respondents’ representatives that we interviewed were confident and articulate.
(For ease of reference, I will sometimes refer to these interviewees as “respondents”, although in fact they were representatives of a respondent and were not personally named in the complaint.)

In general, the respondents’ representatives were far more positive about the role of the EOC and the approach taken by EOC officers than those on the complainants’ side. The interviewees were particularly positive when asked to compare the procedures of the EOC with those of other “complaints bodies”, such as the Privacy Commission, the Labour Department, and the Labour Tribunal. They found the EOC more efficient and easier to work with than these other bodies. One interviewee (a lawyer) said that some of the other complaints bodies made his clients feel “guilty until proven innocent”. In contrast, he said that the EOC officers were fair and impartial.

Several of our interviewees commented on the fact that they thought the EOC officers had improved over the years in terms of efficiency and case management. When asked for examples, they said that the letters sent out by the EOC in the early years tended to be very broad and demanding. However, recent letters (including the letters notifying the respondent of the complaint and letters seeking information from the respondent) were more specific and more relevant to the complaint. One interviewee said that her company had received a letter soon after the EOC was established that had asked over 30 questions, some very broad. However, she had recently received another letter which she described as “much more focussed and reasonable”.

There were some complaints from the respondents’ side. Several interviewees said that the EOC should give them more time to respond to the investigation questions as it takes time to gather all the information (but others noted that the EOC was generally very accommodating about granting extensions as long as the respondent made it clear that it was working on the requests). One interviewee (from a government department) also complained that he was frequently asked to provide repeat copies of his department’s policies on sexual harassment and equal opportunities, although he had already provided them for previous complaints. He felt that the EOC should keep a file of such documents for government departments so that they did not have to ask for them again when another complaint arose. Another interviewee noted that her company did not like the fact that the EOC discouraged respondents from communicating directly with complainants once the
complaint had been filed. She said that her company observed this policy but felt that sometimes they could resolve the matter more quickly with direct communication. However, apart from these fairly isolated complaints, the interviewees seemed to think that the EOC officers were generally very reasonable and efficient.

Interestingly, several of the interviewees described the EOC officers as playing a “pro-active” role in the conciliation conferences. Their views of the EOC officers were very different from the complainants in this regard. The interviewees thought that the EOC officers had become more confident and assertive over the years, and they gave several specific examples of cases in which they felt the officer had worked hard to conciliate the complaint. For example, one interviewee described a case that was initially “very difficult” because the two sides were so far apart. The respondent had felt that the complaint was very weak and that the complainant had initially made very unreasonable demands. However, the respondent had agreed to come to early conciliation in the hope of avoiding a long and time-consuming EOC investigation. The interviewee said that the officer put the two sides in different rooms and suggested some possible terms of settlement. The complaint did not settle that day because the parties were still very far apart. However, the EOC officer then spent more time talking to the complainant. The interviewee felt that the EOC officer must have “convinced the complainant of the weakness of her case” because the complainant then lowered her demands significantly and the case settled. The interviewee felt that the EOC officer had worked hard on the case and “put some pressure” on both of the parties to do so. When asked what she meant by “pressure”, she said that the respondent had been effectively “forced” to come to early conciliation (by the desire to avoid a time-consuming and costly investigation) and that the complainant had later been pressured by the EOC officer’s explanation of the weakness of her case.

Another interviewee (a representative of a government department) told us that she had come to the EOC for many conciliation conferences. She said that in the initial conferences she and her colleagues tried to defend her department’s policy (although it had already been found to be unlawful in a court judgement). The EOC officer took them aside and explained that this was a bad strategy and would prevent the complaints from conciliating. The interviewee and her colleagues then agreed to change their strategy and the complaints began to conciliate much more quickly. A member of another government
department also stated that the EOC officers were generally “quite helpful” in the conferences and worked hard to reach conciliated agreements. A private lawyer who had represented an individual complainant described the EOC officers as “very pro-active”. He also recalled a case in which the parties were initially “very far apart”. He reported that the case had settled quite early (with monetary compensation and an apology) and he attributed this at least in part to the fact that the EOC officer was actively “trying to work out something for the parties”.

At first, it seems quite perplexing that the respondents and their representatives would view the EOC officers as being pro-active while the complainants and their representatives would view them as being so neutral and passive. However, this may be explained by the very different expectations of the two groups. When the EOC was established nobody expected it to work on behalf of respondents (although it is required to treat them fairly). It was clear from our interviews with respondents’ representatives that they had never expected the EOC officer to help them to respond to the complaint, to gather evidence on their behalf, or to advocate on their behalf in the conciliation conference. They also did not expect the EOC officer to give them much advice (except on procedural matters). Indeed, when asked whether they would trust the EOC officer with any confidential information (e.g. if the EOC officer asked them how much their client or employer was willing to pay in order to settle the complaint) all of the interviewees from the respondents side said “definitely not”. They might tell the EOC officer what they were actually going to offer in the conference but they would not tell the EOC officer their true “upper limit”, even if the EOC officer promised not to pass on this information. In other words, the respondents would not tell the EOC officer anything that they would not be willing to disclose to the complainant and would not turn to the EOC officer for any real advice.

It should be noted that these comments were all made by individuals who represented institutional respondents. It is likely that individual respondents would rely more heavily upon EOC officers for advice. However, in our sample, only 37.2% of the respondents were individuals. The rest were companies, government departments, educational institutions or other public sector organisations. This means that the person who was sent to represent the respondent was unlikely to be as emotionally upset by the
complaint because it was not personally about him or her. In contrast, every complainant is personally involved in the complaint and will find the experience stressful and emotionally draining. Complainants are also far more likely to feel upset by things said during a conciliation conference. Moreover, since a company or institutional respondent will naturally try to select a trained and very articulate person to represent it at the conference, the complainant will very often feel that she is at a disadvantage.

Thus, it seems very clear that the majority of respondents have a fundamentally different relationship with the EOC officer than complainants and have hugely different expectations. Most institutional respondents are also accustomed to responding to complaints (not only those filed at the EOC but at other bodies) and recognize that they need to appoint a lawyer or train some in-house person to do so. Thus respondents’ representatives would rarely seek to rely upon the EOC officer in the same way that many complainants do. Respondents come into the process viewing the EOC officer as an opponent and are naturally pleased to find that the officer is impartial and fair to them. Similarly, if the EOC officer suggests settlement terms or makes a reasonable effort to persuade the parties to settle the case then the respondent will view that EOC officer as being pro-active. However, from the complainants’ point of view these actions are not indicative of a particularly pro-active officer, as the complainants were expecting far more support from the EOC to begin with.

The one area where the respondents’ representatives felt the EOC officers were not sufficiently “pro-active” was with regard to discontinuing complaints. Some interviewees said that the EOC seemed more willing now (than in the early years after its establishment) to discontinue cases that were very weak and lacked substance. However, they all felt that the EOC should and could do more in this regard. They pointed out that even a very weak complaint costs the respondent money because it has to devote time to it. If a respondent declines to participate in early conciliation then it will have to spend considerable money and time responding to the EOC’s investigation questions and producing evidence in its defence. However, if the respondent agrees to participate in early conciliation (which it might do even if it thinks the case is weak, just to avoid the investigation stage), then it has to send someone to the conciliation conference, which means losing at least a half-day of work.
The respondents’ representatives said that their employers and clients are also afraid that if they participate in early conciliation, even where they feel that the complaint is very weak, then they may actually encourage other employees to file frivolous complaints. Several interviewees felt that their companies or departments had been named in frivolous complaints; some even described certain complainants as abusing the law. They gave examples of complaints that they viewed as a waste of time, including complaints about sexist remarks at work, which they felt were relatively trivial. Some interviewees also felt that the existing procedures made it too easy for former employees to abuse the law, allowing them to make a complaint to the EOC although they had been fired for reasons that had nothing to do with discrimination. One interviewee commented that complainants often abused the law and that “there were very few genuine cases”. The interviewees were particularly concerned by the area of disability discrimination, which they said seemed to invite abusive and frivolous claims. When pressed for examples, they pointed to cases in which the complainant had been dismissed for abusing sick leave (taking sick leave but then going to Shenzhen for shopping). They also noted that some complaints do not even allege that the complainant had a disability or that the employer thought that he had a disability. In such cases our interviewees argued that the EOC should be able to discontinue the complaint without even seeking a response from the respondent (since such complaints do not appear to allege an unlawful act). They argued that the EOC officers also should be more willing to discontinue a complaint at the onset if it clearly lacks substance.

One interesting result of the interviews is that we noted that the respondents, while largely agreeing on their views of the role played by the EOC, demonstrated very different views of the law and their own approach to conciliation. At one end of the spectrum, one respondent’s representative emphasized that her institution (a university) genuinely wanted to learn from the complaints how to improve their own procedures. She had once brought two other officials from her university to participate in a conciliation conference because they wanted to show their sincerity to the complainant and to assure her that they were trying to learn from the bad experience she had suffered. At the other end of the spectrum, one interviewee (who had represented a government department in several complaints) stated that he has express instructions from his supervisor “never to admit liability and never to offer any compensation”. He said that he could offer his “understanding” or offer to buy
the complainant a cup of coffee and listen to her concerns. But he would never admit that
the respondent might have done something wrong or promise to change anything.

IV. Recent Developments and Recommendations

To its credit, the EOC is already seeking to address concerns expressed by
complainants and NGO representatives. Recent developments (as well as some additional
closing recommendations) are briefly considered here. We look forward to studying their
impact and the community’s response to them.

Settlement register

A “settlement register” of successfully conciliated complaints has recently been
added to the EOC website. Each entry provides a brief summary of the complaint, the
remedy obtained in conciliation, and some “remarks” on the complaint. Although it is still
fairly small (it is in the process of being expanded) the register will eventually give
complainants and respondents very useful data. It should assist complainants in deciding
what remedies to request when filing their complaints and participating in conciliation. It
should also help both parties to determine what may be a reasonable remedy in their case.
Many different factors may affect conciliated settlements, including, for example, the
economic losses of the complainant (if any), the presence of emotional distress, the strength
of the evidence, and the resources available to the respondent. Ideally, the summary of the
conciliated cases should give as much information about these factors as possible (while still
concealing the identity of the parties), so that complainants and respondents can make a
meaningful comparison with their own cases.

The settlement register can also provide more publicity for conciliated cases. This
may partly address one of the criticisms of activists, which is that confidential conciliated
cases rarely have any impact beyond the two parties. (Of course, there is still no doubt that
a litigated case receives far more publicity than a settlement register.)

Legal services within the EOC

The EOC has also reported in follow-up interviews that it hopes to expand its legal
services. In particular, the EOC recognizes that it may need to grant legal assistance to a
meritorious case even where the case is not likely to set a precedent. It is particularly important to do so where the respondent has refused to participate in conciliation or has behaved unreasonably. A good example of this litigation strategy is the case of *Yuen Wai Han v. South Elderly Affairs Limited*.\(^{20}\) On its face, the case was a fairly straightforward case of pregnancy discrimination. Yet the respondent not only failed to conciliate the complaint but actually tried to harass the complainant by making an unfounded and malicious complaint against her to the police, purely because she had filed a complaint with the EOC. If the EOC had not granted legal assistance, the respondent might well have gotten away with this behaviour.

The EOC has also indicated a willingness to provide legal services other than representation at trial, including legal opinions and letters, which may facilitate settlement before trial. Of course, it would be ideal if the EOC could adopt a formal policy of granting legal assistance in all cases where (1) the case has merit and is supported by evidence; (2) the complainant has acted reasonably in conciliation; and (3) the respondent has refused to make a reasonable offer in conciliation. Such a policy would give respondents a strong incentive to behave reasonably and would strengthen the legislation as an agent of social change. However, the EOC does have to work within its budget and a single trial can cost millions of dollars, particularly if outside lawyers or expert witnesses are involved as was the case with *K, Y, and W v the Secretary for Justice*\(^{21}\) and *Equal Opportunities Commission v Director of Education*.\(^{22}\) The EOC also works on an annual budget, which makes it very difficult to plan for litigation expenses since one never knows whether the defendant will appeal and a case could then drag on for several years. It should also be noted that any money recovered from the litigation goes to the plaintiff and the EOC does not charge for legal services. If the court makes an order of costs against the defendant (which it only does in special circumstances) the EOC can use this money to cover expenses (such as filing fees, expert witness fees, and outside counsel) but it cannot use the money to cover any part of the salaries of its own in-house lawyers. (The EOC has proposed that this be changed and the government has apparently agreed to the change in principle but has not introduced

\(^{20}\)See the judgement in *Yuen Wai Han v. South Elderly Affairs Limited*, DECO 6/2001 (District Court, decided 2 May 2003), available on the EOC website, especially para 12.

\(^{21}\) *K, Y, and W v Secretary for Justice* [2000] 3 HKLRD 777.

\(^{22}\) *EOC v Director of Education* [2001] 2 HKLRD 690. (The judgement is also available on the EOC
legislation to effect it.)

**Training for outside advocates**

Given the budget constraints noted above, the EOC is unlikely to be able to provide legal support for all meritorious cases. However, the EOC’s training division is committed to providing increased training to NGOs and trade unions, which could assist them in their advocacy work on behalf of complainants. It also appears that some private lawyers may be increasingly willing to offer pro-bono legal services for meritorious cases. This can be extremely valuable – experience shows that the very existence of a lawyer who is willing to act for the complainant often makes a respondent take the case more seriously. It would be very helpful if NGOs and volunteer lawyers could form a complainants’ advocates panel to which complainants could be referred by the EOC. (This might be developed in conjunction with a legal clinic staffed by law students.)

**An equal opportunities tribunal?**

We asked all of our interviewees whether an informal equal opportunities tribunal would be valuable. A tribunal would be separate from the EOC and would have to be established by legislation (so it is a “long-term” option, not something that could be implemented within the existing legislative framework). Our interviewees from the complainants’ side were interested in the idea, providing that the tribunal members had real expertise in anti-discrimination law. Those interviewees who were unhappy with the confidential nature of conciliation (particularly certain representatives of disability rights groups) found the idea of a tribunal especially appealing, because it might enable them to obtain more publicity for the cause of equality.

However, all of our respondent interviewees indicated that they would strongly oppose such a tribunal because they felt it would make it too easy for complainants to litigate frivolous cases. Thus, it seems unlikely that such a tribunal will be established in the near future. In the short term, the legislature might wish to consider giving the Small Claims Tribunal and the Labour Tribunal jurisdiction over complaints arising from the three anti-discrimination ordinances. (At present the District Court has jurisdiction, although the website at http://eoc.vh.hk.linkage.net/textmode/ep/rulings/sspa_judge.htm).
Court of First Instance hears applications for judicial review, such as *EOC v Director of Education*.) There would be two advantages to expanding the forums for litigating claims of discrimination and harassment. First, since these tribunals are more informal and less expensive, they could provide an alternative forum for a complainant who wishes to litigate but does not obtain legal assistance from the EOC. Second, it might be more efficient in certain situations because it would allow a complainant to consolidate her claims (e.g. a woman who is terminated because of her pregnancy may have a claim under the Employment Ordinance as well as under the Sex Discrimination Ordinance).

**Pro-active case management and the meaning of impartiality**

The EOC has reported that it is encouraging officers to adopt a more pro-active approach to complaint management. As part of this effort, it is attempting to build a closer working relationship between its Legal Division and its Operations Division. On a rotational basis, legal advisors will attend meetings and facilitate the work of the officers on the operations side. The goal is to make it easier for officers to obtain informal guidance (e.g. on the unlawfulness of a particular act, the type of evidence that might be required, the validity of a particular defence). With this support, officers may be in a better position to help complainants (e.g. by assisting them in understanding and responding to the “legal letters” that complainants sometimes receive from respondents). To be fair, similar assistance may also have to be provided to respondents (particularly individual respondents) who indicate that they need advice.

In my view, increased legal support for the officers working in the operations side is a very positive step. More pro-active case-management is also a natural development, well within the EOC’s proper role. Indeed, despite the comments of complainants in interviews, it is clear that the EOC complaints process has never been entirely “neutral”. For example, officers often help complainants to write their letters of complaints. However, according to our interviews, the EOC officers feel that they cannot help a complainant to respond to a respondent’s letter or openly assist a complainant in the conciliation conference (e.g. by articulating the basis of the complainant’s claims or the nature of her losses) -- even if it is clear that the complainant is having real difficulties.

Therefore, I conclude by suggesting that the EOC should discuss, as a Commission,
the meaning of the duty of impartiality. If EOC officers simply start to give more assistance to individuals who are at a disadvantage in conciliation then it is inevitable that some respondents will complain that the EOC is now “biased” against them. Thus, the EOC should consider adopting (and publicizing on its website and in other materials) an explicit policy statement on its interpretation of “impartiality”. A statement like the one used by the Australian Human Rights and Equal Opportunities Commission (quoted on page 3 of this paper) might provide a useful starting point for the commissioners to consider.

The purpose of such a policy statement would be to publicly acknowledge that the EOC was not established to provide a completely “neutral” process for resolving complaints. Rather it was established because the legislature recognized that victims of discrimination generally lack the economic, social and educational power of respondents. If the complainants could retain lawyers to represent them then this power imbalance could be addressed in that way. However, since Hong Kong complainants cannot generally afford legal representation, it is entirely appropriate that the EOC take steps to redress the power imbalance and enforce the legislation.

Finally, the EOC needs strong support from all sectors of the community, and especially from government, NGOs and the business community. This point cannot be over-emphasized. It was extremely disappointing that the government insisted on litigating against the EOC in the cases of K, Y, & W v Secretary for Justice and EOC v Director of Education. In addition to wasting a huge amount of public money and draining much of the EOC’s limited staff time, these two cases set a very poor example in the community. Why should private sector respondents abide by the law voluntarily and conciliate complaints that arise if government departments refuse to do so? The fact that certain powerful figures have apparently reacted to these cases (by seeking to undermine and weaken the EOC) is even more disappointing. A strong and independent EOC is essential, not only for effective complaints handling, but for general enforcement of the anti-discrimination laws. The EOC must be permitted to exercise all of its enforcement powers – not only conciliation but also litigation and formal investigations – without fear of reprisal by the government.
The difference between the complaints classified as “unsuccessful conciliation” after “conciliation” (63) and those categorized as “unsuccessful conciliation” after “investigation” (8) is that the respondents in the latter eight complaints failed to respond at any stage to the EOC.

Diagram 1 Outcome of Complaints (July 2000 – March 2001)