Submission of the Hong Kong Bar Association
in Response to the Judiciary's Consultation Paper:
Review on Adjudication of Equal Opportunities Claims by the District Court

1. The Hong Kong Bar Association ("the Bar") welcomes the Judiciary's recommendations in the Consultation Paper to provide a more accessible platform for parties to pursue Equal Opportunities claims ("**EO claims**") in the District Court by simplifying the procedural rules, enhancing active case management and adopting a multi-faceted approach on Litigants in Person ("**LIPs**").

Background

2. Anti-discrimination statutes are social legislation with a view to protecting civil rights. Thus, EO claims should be adjudicated in a speedy manner and the costs of litigation should be reduced as much as possible.[1]

A. The EOC Recommendations

3. In March 2009, the Equal Opportunities Commission ("**EOC**") made recommendations to the Government on the establishment of an Equal Opportunities Tribunal in Hong Kong ("***EOC Recommendations***").[2]

4. In the *EOC Recommendations*, the EOC noted that although there were 1225 EO complaints not conciliated by the EOC as at 30 September 2008, there were at most 11 new EO claims in the District Court per year, indicating that EO complainants may be:

   (1) unable to commence and conduct proceedings by themselves because of the complexities of the rules and procedures;

   (2) unable to obtain legal assistance from the EOC or legal aid from the Legal Aid Department;

   (3) deterred by the costs and complication of proceedings if they were to fund their own legal representation.[3]

---

1 *Sit Ka Yin Priscilla v Equal Opportunities Commission and Others*, DCEO 11 of 1999 (unreported, 26 October 2010) at §23.

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

3 *EOC Recommendations* §2.4.5.

The EOC suggested that the situation could be improved if the adjudication system was reformed to provide for a user-friendly, informal and flexible process with active case management and appropriate facilities to enable the parties to commence and conduct proceedings without necessarily engaging professional legal representation, or where professional legal representation was engaged, the costs could be reduced by reason of the process being more user-friendly and less formal.[4]

5. In the EOC's view, the establishment of a specialised tribunal to hear EO claims would alleviate the issue of a significant number of potentially arguable cases not being pursued by EO complainants.[5]

6. Since the *EOC Recommendations* were issued in March 2009, the Judiciary implemented the CJR in April 2009. In the light of the statutory underlying objectives of and the active case management powers introduced by the Civil Justice Reform (**"CJR"**),[6] there has been improvement to the case management of EO claims.[7]

B. Sit Ka Yin Priscilla v Equal Opportunities Commission

7. In the Decision on Costs of *Sit Ka Yin Priscilla v Equal Opportunities Commission and Others*, DCEO 11 of 1999 (unreported, 26 October 2010), HH Judge Lok[8] observed (at §19) that there were more interlocutory applications, such as applications for extension of time to file pleadings, applications for provision of further and better particulars of pleadings and striking out applications, in EO claims than other ordinary civil claims.

8. The learned Judge expressed the view that the problem may lie with the use of pleadings in the adjudication of EO claims, which would usually involve a series of closely related incidents over a period of time which eventually led to the ultimate detriment suffered by the complainant.[9] LIPs may experience great difficulty in listing out all their complaints clearly in the pleadings.[10] Further, with lengthy technical pleadings, the parties could easily overlook some of the important facts of the case and might not appreciate the significance of those facts until the trial.[11] In

---

4 *EOC Recommendations* §2.4.6.
5 *EOC Recommendations* §4.1.
6 *Rules of the District Court* (Cap.336H), Orders 1A and 1B.
7 Consultation Paper §1.16.
8 The Judge in charge of the Equal Opportunities List.
9 At §20.
10 *Ibid.*
11 At §21.

the learned Judge's opinion, the time was ripe to review whether the pleadings system was suitable for the adjudication of EO claims.[12]

The Consultation Paper

9. In the Consultation Paper, the Judiciary does not support the establishment of a specialised tribunal to hear EO claims, but makes various recommendations to reform the procedural framework. Those recommendations may be summarised as follows:

(1) Technical pleadings should be replaced by more informal claim forms and response forms in EO proceedings under normal circumstances.

(2) There should be a Practice Direction providing for a first direction hearing to be fixed within a certain time, say, 8 weeks, after the filing of an EO claim.

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

(4) The current rule that each party shall bear its own costs of action and the Court may make adverse costs orders should be maintained.

(5) The Court should continue to encourage and promote mediation as an alternative dispute settlement and refer suitable cases to mediation.

(6) Legal representation should continue to be allowed.

(7) To tackle the increasing number of LIPs in EO claims, a multi-faceted approach should continue to be adopted:
   (a) the legal profession would continue to promote *pro bono* services;
   (b) the Administration may consider extending legal aid and assistance to EO litigants as appropriate; and
   (c) the Judiciary would consider producing suitable publicity materials to assist Court users on EO proceedings.

A. The Procedural Framework

The Pleading Stage

---

12 At §23.

10. The Consultation Paper notes that apart from the technical nature of pleadings, the following unique features of EO claims also call for the use of informal claim forms in the adjudication of such claims:

(1) Discrimination or harassment complaints are usually based on a series of incidents which occurred over a considerable long period of time. Some of these incidents, when considered in isolation, might not amount to discrimination, but the cumulative effect of these incidents might suggest unlawful discrimination. Hence, as a matter of caution, parties in EC claims usually require much longer time for the drafting and preparation of pleadings. Also, with the lengthy technical pleadings, it would be easy for the parties to overlook some important facts of the case, as it was actually happened in *Sit Ka Yin Priscilla v EOC* (*supra*).[13]

(2) It would be difficult for parties to clarify the issues in EO claims at the early stage of the proceedings. For instance, it would be most difficult for the complainant to identify the proper "comparator", as required under the various anti-discrimination ordinances for the purpose of determining whether there is any unlawful discrimination on the part of the defendant,[14] and to know the treatment received by such comparator before the discovery stage.[15]

11. As a significant number of litigants in EO claims are LIPs, they would find it very difficult to comply with the technical rules of pleadings. If they breach any of such rules by, for example, including irrelevant materials or evidence in the pleading, the other party can make a striking out application. It may result in a lot of interlocutory applications.[16]

12. It is therefore recommended in the Consultation Paper that technical pleadings should be replaced by more informal, user-friendly and simplified claim forms in EO proceedings, such that the complainant would only have to list out the general nature of his or her complaint in the informal claim form with the detailed accounts of the various incidents to be covered in the witness statements. Guidance notes may also be issued to assist the parties to account the sequence of events such as the date, persons involved, place and contents.[17]

---

13 Consultation Paper §§3.8-3.10.

14 See sections 5 and 10 of the Sex Discrimination Ordinance (Cap.480), sections 6 and 8 of the Disability Discrimination Ordinance (Cap.487), sections 5 and 7 of the Family Status Discrimination Ordinance (Cap.527), and sections 4 and 8 of the Race Discrimination Ordinance (Cap.602).

15 Consultation Paper §§3.11-3.13.

16 Consultation Paper §3.14.

17 Consultation Paper §§3.17-3.19.

13. It is also recommended that after the introduction of informal claim forms and response forms, it should be left open for the Judge to direct pleadings as he or she considers appropriate in suitable cases.[18]

14. The Bar supports the proposed introduction of informal claim forms and response forms in EO proceedings under normal circumstances to allow more flexibility and to reduce costs, subject to the Court's discretion to order the use of pleadings in appropriate cases for case management purposes.

Close of Pleadings and Preparation for Trial Stage

15. Since the implementation of the CJR, the Judge in charge of the EO List has adopted a more pro-active approach towards the case management of EO cases.[19] It is recommended that a first direction hearing should be introduced for the Court to have a general understanding of the issues of the dispute between the parties at the first available opportunity.[20]

16. The Bar agrees that early intervention by the Court in the management of EO cases is desirable. It would allow the Court, in the early stage of the proceedings, to understand the true basis of the claim, identify the real issues in dispute, request for the provision of further particulars if necessary, manage the progress of the case by giving appropriate case management directions and refer cases for mediation if appropriate.

17. In our view, it would be preferable for the Judge in charge of the EO List to preside at the first direction hearing of all EO cases, so as to allow the Court to exercise effective case management over EO cases at the first available opportunity. The Bar observes that this is consistent with the current practice of the Judge in charge of the EO List to hear all interlocutory applications of EO cases if possible,[21] and of a District Court Judge presiding at the first hearings of Employees' Compensation cases.

Getting to Trial

18. The Consultation Paper suggests that apart from the reforms introduced by the CJR, other reform measures are not necessary at this stage.

---

18 Consultation Paper §3.22.
19 Consultation Paper §3.26.
20 Consultation Paper §3.29.
21 Consultation Paper §2.14.

19. In line with the current practice of the Judge in charge of the EO List to hear all interlocutory applications of EO cases if possible,[22] the Bar would wish to point out that, for the purpose of effective case management, it would be preferable for the same Judge to hear all case management conferences and pre-trial reviews of EO cases.

After the Trial - Costs

20. It is recommended that the current rule that each party shall bear its own costs of action and the Court may make adverse costs orders should be maintained.[23]

21. The Bar agrees that the Court should retain its discretionary power to make adverse costs orders as part of its wider power to regulate the progress of the proceedings, and to avoid the opening of a floodgate to unmeritorious claims. In the particular context of sexual harassment claims, the Court may continue to show its disapproval of the outrageous conduct of a defendant by way of making an adverse costs order.[24]

Settlement and Mediation

22. In the Consultation Paper, it is noted that for discrimination claims, some of the complainants have made a complaint to the EOC before filing a claim in Court, and the EOC may have helped the parties resolve the dispute by conciliation. On the other hand, some EO claims are pursued because they involve matters of public importance. Because of this unique feature of EO cases, it may not be appropriate to require all the cases to go through the procedures laid down in Practice Direction 31 ("**PD 31**") introduced after the CJR.[25]

23. Although PD 31 does not automatically apply to EO claims,[26] the Bar agrees with the Judiciary's recommendation that the Court should continue to encourage and promote mediation as an alternative dispute settlement and to refer suitable EO cases for mediation.[27] In this regard, the Bar recognises that the Judge in charge of the EO List would play a pivotal role in identifying suitable EO cases for mediation at the proposed first direction hearing to be fixed shortly after the filing of an EO claim.[28]

---

22 *Ibid.*
23 Consultation Paper §§3.39-3.43.
24 *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731 at §68; *L v David Roy Burton* [2010] 5 HKLRD 397 at §§39-40.
25 Consultation Paper §3.44.
26 See §2 and Appendix A of PD 31.
27 Consultation Paper §3.50.
28 See §17 above.

B. The Institutional Framework – Whether a separate Equal Opportunities Tribunal should be established?

24. At present, there is an EO List in the District Court, and a Judge in charge of the List to manage the cases. With the implementation of the CJR and the proposed adoption of more formal claim forms and response forms, the Bar anticipates that these measures would help reduce delays and enhance the cost-effectiveness in EO cases.

25. The Bar agrees with the Judiciary's view that a specialised tribunal will provide no guarantee of speedy resolution of EO claims because by nature, EO claims can be complicated and may involve principles of some public importance.[29] The Bar also observes that with the exception of Canada, other jurisdictions (including the United Kingdom and Australia) do not have a court or tribunal which deals exclusively with discrimination claims.[30]

26. Further, as observed by the EOC in the *EOC Recommendations*[31] and confirmed by the Judiciary,[32] there are only 10 EO claims filed with the Court per year on average.[33] The Bar agrees that the small caseload does not justify the establishment of a separate tribunal for EO claims.

27. The Bar anticipates that the CJR, coupled with the proposed reforms in the procedural framework of EO cases, would effectively address the issues identified in the *EOC Recommendations* and enhance the efficiency, simplicity and cost-effectiveness in the adjudication system of EO cases.

C. Other Issues

Legal Representation in EO Cases

28. It is recommended in the Consultation Paper that legal representation should continue to be allowed, for reasons including:

    (1) the right to legal representation is very important;

    (2) some EO claims may be complicated in nature and/or involve principles of some public importance;

---

29 Consultation Paper §§3.57-3.62.
30 Consultation Paper §3.64.
31 *EOC Recommendations* §2.4.5.
32 Consultation Paper §2.2 and Table 1.
33 Consultation Paper §3.65.

(3) the exclusion of legal representation would deprive the tribunal of the benefit of submissions on complicated legal and factual issues.[34]

29. The Bar agrees that there is no compelling reason to exclude legal representation in EO claims. The Bar has provided, and would continue to provide, useful assistance to the Court on anti-discrimination law which is relatively new in Hong Kong and is still in the early stage of development.[35]

Assistance to LIPs

30. It is recommended that a multi-faceted approach, as stated in §9(7) above, should continue to be adopted to tackle the increasing number of LIPs.

31. The Bar always been active in the provision of *pro bono* services for the community and those in need of such services. Members of the Bar have been providing freely of their time and effort through existing channels including the Free Legal Advice Scheme run by the Duty Lawyer Service, as well as the Bar's own Free Legal Service Scheme. The Bar will continue to encourage our members to provide *pro bono* services.

32. The Bar believes that the publication of suitable publicity materials, including guidance notes,[36] would enhance the public access to the adjudication system of EO cases and assist Court users on EO proceedings.

5th November 2011
Hong Kong Bar Association

34 Consultation Paper §§3.68-3.70.
35 Consultation Paper §3.59.
36 Consultation Paper §3.19.