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THE HONG KONG EQUAL OPPORTUNITIES COMMISSION: CALLING FOR A NEW AVATAR

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The Hong Kong Equal Opportunities Commission (“EOC”) was set up to perform the important function of an independent body which would receive and investigate complaints of discrimination within the community and to help Hong Kong strive to become a society in which discrimination on grounds such as sex, disability, family status, and race would not be tolerated. Despite the broad powers of inquiry and investigation given to the EOC to enable it to effectively perform this critical role, its inherent limitations have resulted in the limited impact the EOC has had on the implementation of anti-discrimination laws in Hong Kong. This article discusses some of these inherent limitations and outlines the structural and substantive issues that have plagued the EOC in recent years. In view of these matters, it is argued that without an immediate change in the institutional design, membership and culture of the EOC, it is unlikely that the EOC will have any significant impact in the years to come. The article concludes with some suggestions on the changes that need to be put into place to help the EOC be born anew so that it can lead Hong Kong closer to substantive outcomes in anti-discrimination law and policy.

Introduction

The Hong Kong Equal Opportunities Commission (“EOC”) was set up under the auspices of Hong Kong’s first anti-discrimination law, the Sex Discrimination Ordinance¹ (“SDO”) in 1996. The move came as part the Hong Kong government’s (“the Government”) efforts to comply with its

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¹ Laws of Hong Kong Special Administrative Region (Cap 480), s 63.

international obligations pursuant to the ICCPR² and ICESCR and its intention to ratify the Convention for the Elimination of All Forms of Discrimination Against Women³ (“CEDAW”) at that time. It was to serve as an independent commission to investigate and help conciliate complaints based on discrimination. It was also hoped that through the EOC’s work, Hong Kong would improve its human rights protection and gradually inch towards a more comprehensive framework of protecting individual and minority rights in Hong Kong.

Whilst the EOC has succeeded in attracting publicity, unfortunately, most of it has been negative and has concerned the EOC’s embroilment in numerous scandals. On the one hand, these events help explain the slow snail-paced, yet not insignificant achievements of the EOC. On the other, however, they bode ill for the future of Hong Kong’s anti-discrimination laws and their implementation.

This article reflects upon some of the contentious issues that have dominated public discourse relating to the EOC in the last few years. These issues have not only hampered the EOC’s functioning and effectiveness⁴ but undermined its credibility and ultimately, endangered its viability as an institution charged with a very important role. The discussion briefly charts the course of the EOC’s journey through these controversies, identifying their causes and highlights the critical areas of focus for the EOC’s coming tenure, in light of its objectives and mandate. Such a reflection is particularly timely as the Government prepares to find a new chairman as the current Chairman’s (Mr Raymond Tang) term comes to a close. But one could also say that it is time for a full-scale review of the EOC’s role, powers and work since over its 13 years of existence; the general workings of anti-discrimination law in Hong Kong; the relationship between the anti-discrimination legislation, the Basic Law and other human rights-related laws; and the future scope of the EOC’s work.

² *International Covenant on Civil and Political Rights*, U.N.T.S. 171, entered into force 23 March 1976 (“ICCPR”) and *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3, entered into force 3 January 1976 (“ICESCR”). Articles 2 and 26 of the ICCPR prohibit discrimination on a number of grounds such as race, sex, disability, colour, place of origin, birth, and nationality. The ICCPR was extended to Hong Kong by the United Kingdom’s ratification of the ICCPR on 20 May 1976. By letters of notification of the treaties that would continue to apply to Hong Kong after 1997 deposited by the governments of the United Kingdom of Great Britain and Northern Ireland and the People’s Republic of China with United Nations Secretary-General on 20 June 1997, the provisions of the ICCPR and the ICESCR as applied to Hong Kong would remain in force from 1 July 1997. See <http://treaties.un.org/Pages/HistoricalInfo.aspx> (accessed 17 August 2009). Annotated versions of these letters (and detailed records of the status of specific international treaties as applied to Hong Kong prior to and post-1997) are available at the “Hong Kong Treaty Database” at <http://www.hku.hk/ccpl/hktreaty/database.html> (last visited 17 August 2009).

³ 1249 UNTS 13, entered into force 3 Sept 1981.

⁴ Some of these issues have limited the work of the EOC from its inception.

Objectives and Functions

Section 64 of the SDO sets out the various objectives, functions and powers of the EOC. Although the EOC's ambit was initially limited to the regulation of discrimination on grounds prohibited by the SDO, subsequent to the enactment of three further anti-discrimination ordinances in the territory,⁵ the mandate of the EOC has accordingly been extended to cover discrimination on the additional grounds of disability,⁶ family status⁷ and race.⁸ The main objectives of the EOC include, *inter alia*, "the elimination of discrimination on grounds of sex, marital status, disability, pregnancy, family status and race," "the elimination of sexual harassment, and harassment and vilification on grounds of disability and race," the promotion of "equality of opportunities between the men and women, between persons with a disability and persons without a disability, irrespective of family status and race,"⁹ and receiving complaints and investigating them with a view to the resolution of disputes through conciliation.¹⁰

To help achieve these objectives, the EOC is empowered to receive complaints pertaining to any of the anti-discrimination laws, to investigate the alleged unlawful acts and where appropriate, to effect a settlement between the parties through conciliation. Where conciliation is not possible, the EOC provides legal assistance to complainants if appropriate.¹¹ In addition, given its responsibility to promote equality of opportunities through its research and public education programmes, it has the capacity and resources to provide training to relevant stakeholders to help them effect practices that are compliant with the law. The EOC also issues codes of practice¹² to provide guidance to stakeholders about their rights and responsibilities under the anti-discrimination laws.

⁵ Disability Discrimination Ordinance ("DDO"), Cap 487, Family Status Discrimination Ordinance ("FSDO"), Cap 527, and the Race Discrimination Ordinance ("RDO"), Cap 602. The SDO, DDO, FSDO and RDO are collectively referred to as the "anti-discrimination laws".

⁶ DDO, s 62.

⁷ FSDO, s 44.

⁸ RDO, s 59.

⁹ See <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Vision+and+Mission> (accessed 17 August 2009).

¹⁰ SDO, s 84(3); DDO, s 80(3); FSDO, s 62(3); and RDO, s 78(3).

¹¹ SDO, Pt VII sets out the various powers and functions of the EOC.

¹² SDO, s 69; DDO, s 65; FSDO, s 47; and RDO, s 63.

Mandate and Performance

Powers of the EOC

It is clear from the breadth of the EOC's mandate that it is designed to ensure that the EOC can provide efficient redress in a manner that is accessible to the community. This is apparent from its extensive powers, which equip it with the authority to enforce anti-discrimination laws through its investigative procedures, to initiate an investigation into any unlawful practices that have come to its knowledge in the absence of a formal complaint¹³ and to apply to courts for injunctions in appropriate cases.¹⁴ The EOC is further empowered to review the overall functioning of the anti-discrimination laws and to propose amendments where it considers appropriate, with a view to enhancing the protection afforded by these laws.

With this mandate and its powers, the EOC is fully equipped to advance the cause of complainants against their offenders, to take firm action against perpetrators, to educate the public and finally, through its powers to review the system, to help raise the bar for Hong Kong's fulfilment of its international and constitutional commitments to eradicate all forms of discrimination. Despite this however, when one considers the range and impact of the activities that the EOC has involved itself in since its tenure, it appears that the EOC has tread softly and only in a limited sense, explored the possibilities that are within its powers and responsibilities. A few examples and figures are illustrative of this point.

Enforcement of Anti-Discrimination Laws: Courts or Conciliation?

In its thirteen year-tenure, the EOC has only rendered legal assistance in a handful of discrimination-related cases. Out of the thirty or so discrimination claims brought under the three anti-discrimination laws¹⁵ before Hong Kong courts, the EOC has offered legal assistance by way of representation in twelve of them, appeared as amicus in three of them, and been the plaintiff bringing the action¹⁶ in just two of them. This amounts to just slightly

¹³ SDO, s 70; DDO, s 66; FSDO, s 48; and RDO, s 64.

¹⁴ SDO, s 89; Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation, s 3; DDO, s 86; Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation, s 3; FSDO, s 67; Family Status Discrimination (Proceedings by Equal Opportunities Commission) Regulation, s 3; RDO, s 83; Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation, s 3.

¹⁵ The RDO has only recently come into effect and therefore, none of the cases involve RDO-based claims.

¹⁶ One of these actions, *EOC v Director of Education* [2001] 2 HKLRD 690, 22 June 2001 ("the SSPA decision") is a landmark ruling on the application of the principles of substantive equality and indirect discrimination in Hong Kong.

over 50 per cent of the reported cases¹⁷ involving discrimination since the anti-discrimination laws were enacted. Whilst this is encouraging, when viewed in light of the number of requests for assistance received,¹⁸ the number of cases in which the EOC has rendered legal assistance amounts only to about 40 per cent of the total requests received to date. This means that more than half of the complainants seeking legal assistance are turned away by the EOC.

The limited number of cases in which the EOC has been involved is reflective of the strong conciliation-oriented settlement principle which underlies the EOC's statutory mandate and duty, under which many complainants have little choice but to opt for the conciliation procedure¹⁹ especially since there is no certainty as to whether or not they will receive legal assistance from the EOC once conciliation has failed. As a study into the investigative and conciliatory powers of the EOC²⁰ has found, the "conciliation-first" model has essentially undermined the impact of anti-discrimination laws in Hong Kong due to the lack of visibility of these incidents and subsequent complaints since there is no "judgment" at the end of the conciliation process, nor are the facts or findings made public.²¹ This enables a respondent to a complaint to pressure the complainant into settling for meagre remedies, without adverse publicity if the complainant is unable to fund litigation or uncertain whether legal assistance from the EOC will be forthcoming. The fact that the identity of parties, the facts and the outcome of conciliated claims are not available except in limited form on the settlement register, only further limits the impact of the law and its possibilities as a precursor for social change because it enables the perpetrators to hide behind the cloak of anonymity and persist in their invidious attitudes at very little cost. This approach has also undermined the

¹⁷ The majority of the cases involve disability and pregnancy based discrimination. For further information on a selection of important cases the EOC has been involved with, see http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Significant Court Cases#sd_c1 (accessed 17 August 2009).

¹⁸ This is a cumulative figure based on statistics provided on the EOC's website, available at, <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=8333> (accessed 17 August 2009).

¹⁹ Slightly over 60% of attempted conciliations are successful. The remainder of the complainants who may apply for legal assistance may not receive it because the EOC has to allocate funds from its operational budget to provide for this service since it has no "litigation fund" as yet.

²⁰ See generally, Carole J. Petersen, Janice Fong and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (Centre for Public and Comparative Law, Faculty of Law, the University of Hong Kong, 2003) ("*Enforcing Equal Opportunities*").

²¹ Save to the limited extent that they are now made available through the settlement register which is on the EOC's website and accessible for all, for which, see http://www.eoc.org.hk/EOC/GraphicsFolder/Complaint_Conciliations.aspx (accessed 17 August 2009). Despite the availability of the summaries, the respondent is still has little incentive to offer attractive or offence-appropriate remedies since the identities of the parties involved remains confidential. See also, *Enforcing Equal Opportunities* (cited above n 20), Ch 6.

urgency with which discriminatory attitudes are dealt with. The time lag between the complaint, failure to conciliate (which may signal the end for some complainants), court hearing (if the case is filed in court) and eventual outcome, only exacerbates the suffering of a complainant and gives the appearance that the issue is unimportant enough to warrant a better system of redress.

This may not, however, be the best approach to tackle discrimination²² particularly given that discrimination against persons on grounds of particular attributes which have historically rendered such persons powerless or less favoured (and continue to do so) is a matter of entrenched attitudes and beliefs. It is this attitude, which is pervasive, both at the macro and micro levels, which needs to be addressed emphatically. To eliminate discrimination, there is a need to use creative and powerful means to achieve a genuine and meaningful change in community relations and group dynamics.

Of course, this does not necessarily mean that society would be better off if it were litigious. However, since the present system reassures offenders that they are less likely to face litigation and adverse publicity, given that they incur no cost for refusing to admit their wrong or offering menial redress to victims, they remain apathetic to the complaints of discrimination. Certainly, this cannot be the message the EOC wishes to send out: it falls foul of the EOC's objectives and it undermines its function of "educating" the public.

Equal Opportunities Commission, an Equal Opportunities Tribunal and/or a Human Rights Commission?

For these (and other) reasons, there has been much discussion²³ about the need to set up an equal opportunities tribunal ("EOT") which might be bet-

²² For a comprehensive consideration of the impact and effect of the investigation and conciliation processes on complainants and their claims, see *Enforcing Equal Opportunities* (cited above n 20).

²³ The EOC established a Working Group on the Desirability of Establishing an EOT ("the Working Group"). The question of the implementation of the recommendations made by the Independent Panel of Inquiry and two internal reports prepared by the EOC was placed before the Legislative Council's Panel on Constitutional Affairs. This included discussion over the establishment of an EOT. The item has now been firmly put on the agenda for the Constitutional Affairs Panel which will be following up on this issue in the future. See LC Paper No CB(2)1808/08-09(01), 9 June 2009, para 10, available at <http://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0615cb2-1808-1-e.pdf> (accessed 17 August 2009). See also, Administrations Paper, LC Paper No CB(2)786/05-06(01), "Implementation of Recommendations in: (a) the Report of the Independent Panel of Inquiry on the Two Incidents Relating to the EOC; and (b) Two Other Internal Review Reports of EOC; EOC's Paper", LC Paper No CB(2)786/05-06(02); and Legislative Council Secretariat's Brief, LC Paper No CB(2)786/05-06(04), "Background Brief Prepared by the Legislative Council Secretariat on Implementation of the Respective Recommendations of the Independent Panel of Inquiry on the Incidents Relating to the EOC and the Two Internal Reviews Conducted by the EOC".

ter suited to properly address discrimination claims, help advance the cause of the law by sending appropriate signals about the invidious and destructive nature of discrimination and to stand firm that we will not tolerate it. It would also improve the power imbalance that pervades the current conciliation process²⁴ and through various means, bring to account those who have maintained discriminatory policies for decades, publicly condemning them. This could assist with the EOC's objective of education and has strong deterrence value.

Although the question of whether an EOT should be established has been lingering since 1994 when Hong Kong was first considering the passage of anti-discrimination laws,²⁵ there has to date been very little progress on this question. However, it is promising to note that the EOC has now recommended to the Government that an EOT be established with judicial powers with its own statutory framework and rules of operation, with District Court judges sitting as its presiding officers.²⁶ This is a much-awaited recommendation given that since 1994, there have been numerous calls for such an independent tribunal by NGOs, the United Nations' Human

²⁴ Concerns have been expressed that the EOC's impartiality principle frustrates the process of conciliation because the EOC officers do not provide "legal assistance" to the complainants through the conciliation process, whilst the respondents may have legal support. This renders the process extremely daunting and frustrating for complainants because they are unable to respond to legally-drafted letters or settlement agreements and the like. The system and its inability to deliver the desired outcome for complainants has left many disappointed, stressed and feeling low in morale. They find the EOC's "neutral" role played out to the extreme and the conciliation approach draining because it merely reinforces power balances which play out in the employment context. See *Enforcing Equal Opportunities* (cited above n 20), p 77. The lack of assistance from EOC officers also means that complainants are ill-informed as to what remedies they should be asking for or agreeing to (*ibid.* p.80). The availability of the settlement register on the EOC's website online now provides some guidance on this question but legal assistance would certainly be more desirable in the process of conciliation. For a more extensive discussion of these and other related issues, *Enforcing Equal Opportunities* (cited above n 20), see Ch 6.

²⁵ In 1994, Hong Kong considered its first set of anti-discrimination laws. Anna Wu, an independent legislator who was leading the movement towards initiating such legislation, tabled an Equal Opportunities Bill which intended to prohibit discrimination on a wide range of grounds, including, race, sex, age, marital status, pregnancy, family status, disability, sexuality and political and religious beliefs. See Equal Opportunities Bill 1994, Hong Kong Government Gazette, L.S. No 3, 1 July 1994. For the proposals and the Bills Committee on Equal Opportunities, see online: <http://www.legco.gov.hk/yr96-97/english/bills/fyr9697.htm> (accessed 17 August 2009). The proposed bill was eventually considered as a batch of separate bills, namely, Equal Opportunities (Family Responsibility, Sexuality and Age) Bill, Equal Opportunities (Race) Bill, Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996 and Family Status Discrimination Bill. See Hong Kong Government Gazette, 30 June 1995, LS No 3 at C1660 and 28 June 1996, LS No 3 at C1792. On 27 June 1997, the Equal Opportunities (Family Responsibility, Age and Sexuality) Bill was voted down on account of Wu's refusal to exclude sexuality from the grounds of prohibited discrimination, despite the overwhelming support for age and family responsibility discrimination as prohibited grounds. For a detailed review of the development of anti-discrimination law in Hong Kong in the early days, see C. J. Petersen, "Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong," (1996) 34 *Colum J Transnat'l L* 335.

²⁶ "EOC recommends to the Government the establishment of a specialised Equal Opportunities Tribunal", News Release, 8 April 2009, available at, <http://www.eoc.org.hk/EOC/TextFolder/ShowContent.aspx?ItemID=8144> (accessed 17 August 2009).

Rights Committee²⁷ and the Committee on Economic, Social and Cultural Rights,²⁸ all emphasising the critical need for such an institution to allow victims of discrimination to have suitable recourse.²⁹ The Independent Panel of Inquiry on the Incidents Relating to the Equal Opportunities Commission (“Independent Panel of Inquiry”), in its findings regarding the controversy, recommended the same³⁰ as did the EOC in its own internal reports.³¹ Any further inertia on the Government’s part with respect to the establishment of an EOT is therefore unacceptable in light of all these recommendations and the time that has elapsed since.

This issue is tied to the persistent calls³² for the establishment of a human rights commission in Hong Kong. This has arisen partly as a result of the inherently limiting, “conciliation-first” statutory duty of the EOC, but also the EOC’s limited capacity to fund litigation and that too, only with respect to the anti-discrimination laws, as opposed to the broader range of human rights that Hong Kong protects. Despite the pressure placed on the Government by local and international groups, urging it to establish such an independent body to adjudicate human rights violations, the Government has not relented and continues to insist in its responses to the HRC and CESCR, that given Hong Kong’s strong rule of law tradi-

²⁷ The United Nations Human Rights Committee (“UN HRC”) oversees the reporting process and receives communications pertaining to the ICCPR.

²⁸ Hereinafter “CESCR” oversees reportage by state parties and receives communications relating to the ICESCR.

²⁹ See, “Concluding Observations of the Human Rights Committee” (Hong Kong: China 12/11/99), CCPR/C/79/Add.117, available at, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d3f40053e45c17fd80256820005cfd66:OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d3f40053e45c17fd80256820005cfd66:OpenDocument) (accessed 17 August 2009), where the HRC expressed concern that most of its recommendations put forward in its concluding observations on Hong Kong, were not implemented. It also expressed concerns over the lack of an independent body to investigate and monitor violations of human rights in Hong Kong, para. 8. See also the HRC’s recommendation in *Report of the Human Rights Committee*, Vol 1, G.A. 51st Session, A/51/40, para 68, available at [http://www.unhchr.ch/tbs/doc.nsf/8e9c603f486cdf83802566f8003870e7/3155cbcf88c479a8025662f003387fa/\\$FILE/N9709863.pdf](http://www.unhchr.ch/tbs/doc.nsf/8e9c603f486cdf83802566f8003870e7/3155cbcf88c479a8025662f003387fa/$FILE/N9709863.pdf) (accessed 17 August 2009). See also, Ravina Shamdasani, *UN Officials to Hear List of HK Failings*, SCMP 2 March 2005, reporting that the general sentiment of NGOs in Hong Kong appeared to be that the Government “ignored” recommendations made by the HRC and CESCR.

³⁰ For the *Independent Panel of Inquiry’s* recommendations, see *Report of the Independent Panel of Inquiry on the Incidents Relating to the Equal Opportunities Commission*, February 2005, paras. 4.78, 6.85 and Recommendation 59. Hereinafter “the *Independent Panel Report*”). The *Independent Panel of Inquiry* has further recommended that the EOC adopt the Paris Principles in matters of appointment, governance and operations (Recommendations 2 and 3). The Paris Principles (A/RES/48/134) set out the internationally accepted standards for the establishment and governance of national human rights institutions. These principles were adopted by the UN HRC (Resolution 1992/54 of 3 March 1992) and the UN General Assembly (Resolution 48/134 of 20 December 1993).

³¹ As to EOC’s internal reports on the same, see *New EOC Chairman Maps Out Top Priorities*, News Release, dated 10 October 2003, available at <http://www.eoc.org.hk/EOC/GraphicsFolder/ShowContent.aspx?ItemID=4700> (accessed 17 August 2009).

³² This has been a subject of particular and persistent concern and has been raised in various concluding observations of different committees, including the HRC, Committee on the Elimination of Racial Discrimination (“CERD”) and the Committee on the Rights of the Child (“CRC”), among others.

tion, independent judiciary, a justiciable bill of rights and the existence of the Ombudsman's Office, Office of the Privacy Commissioner for Personal Data Hong Kong, the EOC and an independent and free press, there are sufficient checks against human rights violations in place in Hong Kong without the need for such a body at this time.³³

The establishment of an EOT could be further buttressed by the provision of legal aid in all actions brought under the anti-discrimination laws and waive the means test as is presently done for actions brought under the Hong Kong Bill of Rights Ordinance ("HKBORO").³⁴ The government's failure to make legal aid available to complainants alleging discrimination amounts to treating such claimants less favourably than those bringing claims of HKBORO-based violations. The corollary to this, of course is that the EOC should be able to receive complaints pertaining to equality and non-discrimination provisions under the Basic Law, HKBORO, ICCPR and ICESCR.³⁵ Ironically, the Government's differential treatment of these two sets of claimants in this regard arguably itself contributes to and perpetuates the discriminatory mindset against these vulnerable groups (by invariably implying that claimants bringing human rights related claims based on the Basic Law or the HKBORO are worthier of protection than those relying on anti-discrimination laws) and must be immediately addressed if the Government is serious in its commitment to the principles of equality and non-discrimination. In the meantime, with a view to doing more to provide legal assistance to complainants, the EOC has asked the government for funding to this end.³⁶

³³ See *Supplementary Report by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the International Covenant on Civil and Political Rights*, available at, http://www.cmab.gov.hk/doc/en/documents/references/papers_reports_others/human_rights/icc4-sup.doc (accessed 17 August 2009), paras 13–16. This position is reiterated in subsequent responses to concluding observations on Hong Kong, in its periodic reports to the HRC and most recently in the Government's response to the Legislative Council Panel on Home Affairs' Subcommittee on Human Rights Protection Mechanism. See Home Affairs Bureau, *Existing Human Rights Framework in Hong Kong*, LC Paper No LC Paper No CB(2)1662/06-07(01), dated April 2007, available at, http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/paper_200704_en.pdf (accessed 17 August 2009).

³⁴ In fact, this has been the recommendation of various NGOs in numerous reports made pursuant to the HRC regarding Hong Kong's compliance with the ICCPR and ICESCR. The HRC has echoed this in its own concluding observations and recommendations to Hong Kong on in its last two reports. See n 29 above.

³⁵ This has been argued by A. Byrnes in *The Disability Discrimination Ordinance, the UN Convention on the Rights of Persons with Disabilities, and Beyond: Achievements and Challenges after Ten Years of Hong Kong Anti-Discrimination Legislation* UNSW Law Research Paper No 2008–13, 25 March 2008, p 15–16, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392061 (accessed 17 August 2009), last visited 31 July 2009.

³⁶ See Polly Hui, "EOC Chairman's Budget Too Much for One-Day Seminar, Say Members" (2008) SCMP, 25 January.

Visibility of the EOC's Work

Other concerns pertaining to the EOC's exercise of its mandate relate to the relative passivity of its approach when addressing different spheres of discrimination. Whilst the EOC has undertaken extensive research into a number of different aspects of discrimination³⁷ (most of which relate to employment since many of the complaints brought to the EOC tend to arise in this context) and is to be commended for that, the findings and reports need to be better publicised to raise the awareness of the local community, enable community-level engagement with the findings and to facilitate reflection over sensitive issues and practices.

Research studies revealing community trends, although very important, are also very resource-intensive. Given the limited resources, one might advocate an approach with greater impact-value. For example, although the EOC has investigative powers to initiate an inquiry into policies, practices or incidents, it has only done so on two occasions. The investigation of the school placement policies³⁸ which led to the SSPA decision, the Kowloon Bay Health Centre investigation on discrimination and harassment on grounds of disability³⁹ and a study on the training needs of the Immigration Department when handling persons with disabilities⁴⁰ are all instances in which the EOC's work received immediate attention, mainly due to the shock value of either the facts or the findings, but also because they represented in their respective reports, the subtle nature that discrimination can take. They also showcased the adverse impact of systemic discrimination on minorities. This type of investigative work, therefore, carries greater impact-value and would be well worth conducting with greater regularity, particularly given the vast areas with respect to which such investigations (short of a challenge in the courts) can help unveil both implicit and explicit discriminatory practices.

Thus, the right *type* of work is critical to economise on the limited resources available and to maximise the impact of the EOC's work. Using its investigative powers as well as its ability to bring an action in its own name, selectively yet in a calculated manner could go a long way in raising the visibility of the EOC's commendable work. The power it wields makes it even more important to ensure that the right types of cases are brought to light. The work of overseas equal opportunities bodies should be a constant

³⁷ Available at <http://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Research/default.aspx> (accessed 7 September 2009).

³⁸ Available at <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/list.aspx?itemid=1210&investigationname=1> (accessed 17 August 2009).

³⁹ Available at <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/list.aspx?itemid=1208&investigationname=2> (accessed 17 August 2009).

⁴⁰ Available at <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/list.aspx?itemid=1209&investigationname=3> (accessed 17 August 2009).

reference-point to feed into the creativity and drive of the EOC to take new strides in its efforts to eliminate discrimination in Hong Kong. Thus, a reconsideration of its allocation of resources and a more streamlined plan for future engagements could serve the EOC well in its new term.

Additionally, codes of practice which should serve as a rich resource for the community, particularly employers, are routinely issued by the EOC under the respective anti-discrimination laws. To date however, they have mostly focused on “negative obligations” of organisations and employers rather than their positive obligations. Taking a ‘rights-oriented’ approach towards explicating the terms of the law and practices which would fall foul of it is very important for an institution like the EOC.⁴¹ A rights-based approach, which focuses on the rights of persons and the responsibilities of duty-bearers, is pivotal to achieving a greater awareness of rights that and the compliance demands placed by the law on those in a position to violate those rights. This also helps develop a culture of positive rights obligations, as opposed to negative obligations. This helps entrench the rights concerned and the principles they are supported by (namely, equality and non-discrimination), promising accountability and consistency of application.

In the context of codes of practice, a rights-based approach would require the explanation of the law to be centred on the protection of certain rights. This approach, which takes the existence of the right itself as its starting point, reflects clearly the central purpose of the law and would send the message that there is a positive duty (on the part of an employer, for example) to provide for an appropriate environment rather than a negative obligation “not to discriminate”. In the absence of such an approach, readers are left with guidance that could almost be perceived as ‘circumstances in which discrimination is justified’ as opposed to a resource which provides incentives for a change in policy and attitude on moral, legal or social grounds.⁴²

Taking a Proactive Role

More importantly, the EOC plays a critical role as an intermediary between the government and its people insofar as it represents the interests of the people seeking to impose stricter standards for compliance with international and constitutional measures for equality. This makes consultation with the public a prime role particularly when concerning reform or implementation of legislative reform or the implementation of it. In the context

⁴¹ There has been some criticism, for example, that the codes of practice issued by the EOC effectively guide the reader how to get away with a policy that is implicitly discriminatory.

⁴² The benefits of such an approach have been recognized in the context of the United Kingdom’s Human Rights Act. See British Institute of Human Rights, *The Human Rights Act—Changing Lives* (2006).

of such consultations, when the EOC plays a “neutral” role as opposed to that of an advocate or is inadvertently (albeit by appearance only) complicit in an act of discrimination, the public has much to be concerned about because it is the primary duty of an institution such as the EOC to advocate for the rights of people and to ensure that it puts forward stringent standards that would assist in meeting the aspirations behind the law. If it remains a passive player under the misconception that to be impartial in its cause requires passivity, it is regrettably mistaken.

Sexual orientation discrimination, for example, is a very pertinent social issue and discrimination is rife in this context, ie love motels turning away homosexual couples,⁴³ discriminatory treatment by hospital staff when visiting ill or injured loved ones, discriminatory treatment by the government for the purposes of housing policies⁴⁴ or tax benefits. In response to the love hotels discrimination incidents, the Chairman of the EOC, Raymond Tang commented that discrimination on grounds of sexual orientation was different from that based on gender, disability or race.⁴⁵ The response of the EOC that because there was no legislation pertaining to sexual orientation discrimination and that therefore, the issue was outside the EOC’s jurisdiction, is reflective of its passive attitude and lack of initiative for advocating for a more equal and non-discriminatory position for Hong Kong’s sexual minorities.⁴⁶

This approach can be contrasted with that of the Korean Human Rights Commission (“KHRC”), for example, which has proactively lobbied the Korean government to pass legislation protecting individuals from discrimination on the basis of sexual orientation. Although the Korean government has yet to accede to its calls, the KHRC’s approach has led to greater

⁴³ Vivienne Chow and Yau Chui-yan, “Lack of Legal Recourse Leaves Homosexuals Open to Discrimination” (2008) SCMP, 13 July. This report arose out of an investigation conducted by SCMP journalists posing as homosexuals to book rooms in selected love hotels.

⁴⁴ In 2003, for example, the Hong Kong Inland Revenue Department refused to grant Roddy Shaw and his partner at the time who had contracted their marriage as a gay couple in Toronto, tax relief on the basis that Hong Kong did not recognise their union as a valid marriage. See Tim Cribb, *Newlyweds Fight for Recognition of Marriage in Hong Kong*, Fridae, 19 December 2003 available at <http://www.fridae.com/newsfeatures/2003/12/19/1176.newlyweds-fight-for-recognition-of-marriage-in-hong-kong> (accessed 20 August 2009).

⁴⁵ Mr Tang was quoted as saying, “While [the prohibition against discrimination on grounds of] disabilities reflect[s] societal values, sexual orientation touches on personal values, religious values and different community values. So it becomes more difficult.” Vivienne Chow and Yau Chui-yan, “Lack of Legal Recourse Leaves Homosexuals Open to Discrimination” (2008) SCMP, 13 July.

⁴⁶ Although it has taken a greater interest recently in cases involving discrimination on grounds of sexual orientation, and has, either through its services to the court as amicus or through its website, reflected support for the position that this minority group warrants protection against discriminatory policies.

awareness of the rights of sexual minorities and put pressure on the Korean government to act.⁴⁷

Moreover, it has been repeatedly stated that in light of the public mood, the government does not plan to introduce any such legislation to address discrimination on grounds of sexual orientation.⁴⁸ With similarly apathetic sentiments, the EOC has stated that Hong Kong is not ready for specific legislation relating to transgender issues by reason of the still conservative nature of Hong Kong society in this regard.⁴⁹ But as Director of Civil Rights for Sexual Diversities Roddy Shaw maintains, “A policy or set of practices that will ensure transgender persons proper respect and dignity” is essential to ensure that Hong Kong is sensitive to its minorities.⁵⁰ Any delay in improving the rights of minorities, risks tarnishing the reputation of the body and of Hong Kong as a “world-class international city.” Such ignorance comes at a cost, one of which has already been felt in Hong Kong as a result of its failure to capitalise on the “pink-dollar” due to its LGBT-unfriendly policies.⁵¹ We cannot be held ransom to “public opinion” on the issue forever.

Thus, evidently, numerous opportunities have arisen in the last decade or so for the EOC to take a more proactive stance on the issue of sexual orientation discrimination.⁵² Law has this tremendous ability to mobilise a change in social attitudes. The attributes of legal machinery should therefore be harnessed to capitalise on the impact of legislation on social mores and allow legal change to lead the way to social change. This is particularly important where the community lacks awareness of or is apathetic to the plight of minority groups who suffer the impact of such invidious discrimination. Nothing short of such a proactive approach will assist in the drive for the progressive realisation of our international human rights obligations.

Finally, greater publicity and dissemination of some of the work the EOC does through various means would reaffirm Hong Kong’s commitment to address discrimination proactively and is more likely to have the impact of changing social perceptions and attitudes.

⁴⁷ For a discussion of the KHRC’s work on this front, see nn 147–149 and the accompanying text in Holning Lau, *Sexual Orientation and Gender Identity: American Law in the light of East Asian Developments*, 31 *Harv. J. L & Gender* 67 at pp 91–93.

⁴⁸ Quoting CMAB spokesperson, Vivienne Chow and Yau Chui-yan, “Lack of Legal Recourse Leaves Homosexuals Open to Discrimination” (2008) SCMP, 13 July.

⁴⁹ The EOC has in the past, however, supported claims by transgender complainants brought on the basis of the DDO.

⁵⁰ Yau Chui-yan, “EOC Under Fire for Using Mr in Transsexual Case” (2008) SCMP, 20 April.

⁵¹ Editorial, “Equality Laws Have Passed Us By, Say HK Gays” (2008) SCMP, 27 July.

⁵² The same could be said for racial discrimination in Hong Kong, which it took forty years to legislate, despite Hong Kong’s accession to the International Covenant on The Elimination of Racial Discrimination decades ago.

The EOC as an Equal Opportunities Role Model

In any sphere of life, one always expects that those who preach must practice what they preach. The EOC, unfortunately, has found itself on the receiving end of discrimination allegations. In light of the EOC's role as a promoter of equal opportunities and non-discrimination, any act on its part which is, or is perceived to be, a denial of the same is bound to cause uproar and undermine its credibility as an institution committed to the ideals it preaches. An incident which is reflective of the EOC's indiscretion involves a complaint by a transsexual concerning the title used to address her in her communications with the EOC. She preferred to be addressed in the female gender because this was her desired gender. However, the EOC's position was that it was obliged to use her biological gender ("Mr.") otherwise, it would risk appearing partial to her claim against her employer.⁵³ The EOC should be an example for other organisations in society and should appreciate its potential as a role model organisation which can positively (or negatively) impact Hong Kong's journey towards a society firmly rooted in a tradition of equality and non-discrimination.

Another unfortunate incident in which the EOC failed to set a good example concerns the Draft Code of Practice on Employment with respect to the RDO⁵⁴ ("RDO COP") which was tabled for public consultation. The EOC was heavily criticised for the lack of availability of the draft code in minority languages, which would make it difficult for minority groups, who were the main stakeholders affected by the RDO and the discriminatory practices it addressed in RDO COP, to participate in the consultation. As such, some groups saw the EOC as insensitive and in denial of the practical measures that were required in order to achieve a genuine consultation.⁵⁵ The EOC's response that leaflets containing "highlights" of the code were available in six minority languages, that the official languages of the RDO was English and Chinese and the code merely followed this and that finding suitable translators would be difficult,⁵⁶ merely affirmed its insensitivity and

⁵³ Yau Chui-yan, "EOC Under Fire for Using Mr in Transsexual Case" (2008) SCMP, 20 April. See also, *Sit Ka Yin Priscilla v EOC* [1998] 1 HKC 278, involving a claim against the EOC for discrimination on grounds of disability and sex discrimination. The case has not gone to trial as yet and it may be that the claim is ultimately found to be without merit, but suffice it to say that the perception that the EOC itself discriminates on certain grounds against the people it deals with is one which needs to be worked on and eventually, it is hoped, eradicated. Such an impression, alone, can be damaging for the morale of the people and their desires for a more just and equal society.

⁵⁴ To educate employers and employees pertaining to their rights and responsibilities.

⁵⁵ See Yau Chui-Yan, "Equality Body Under New Language Attack" (2009) SCMP 23 May. Despite these reports in the news however, a staff member of the EOC has confirmed that the draft RDO COP was made available in six minority languages for the consultation. However, perhaps distribution and publicity measures remained inadequate and contributed to the impression that the process was not inclusive enough.

⁵⁶ Eva Wu, "EOC Accused of Discrimination" (2008) SCMP, 18 November.

lack of appreciation of the central issue – that of the inability of minorities to participate in the consultation process at all if resources were not allocated to make this possible. This, of course, had an adverse impact on the quality of the consultation process and is reflective of the problems that lie at the core of Hong Kong's approach towards minorities: a basic insensitivity to their plight in the first place. This will no doubt affect the utility and impact of the RDO COP and the RDO for the groups they are intended to assist.

In sum, the EOC has a fairly extensive range of powers and a broad mandate which could have far-reaching influence in the recognition and development of appropriate and stringent standards to implement the values of equality and non-discrimination which are guaranteed under the Basic Law, the anti-discrimination laws and under various international covenants that Hong Kong is a party to. Broader usage of its investigative powers through more proactive approaches to addressing systemic discriminatory policies and practices would raise the EOC's profile, provide visibility to its work through court-based outcomes and reiterate the importance of eliminating discrimination within the community in all its forms.

Moreover, the EOC should be a visionary body which sets out to address other forms of discrimination which are routinely perpetrated but remain unaddressed in the community either because of a lack of awareness or due to the lack of relevant legislation. For example, the EOC has played an important role as an amicus in two cases and more recently in *Leung T.C. William Roy v Secretary for Justice*.⁵⁷ However, it could, in light of current calls for protection against discrimination on grounds of sexual orientation and age, do much more to lobby the government by proposing draft bills.⁵⁸ Alternatively, the EOC could canvass the argument that the term 'sex discrimination' encompasses sexual orientation discrimination and therefore, even on existing legislation and constitutional principles, such discrimination is unlawful.⁵⁹

A further approach could be to draw on recent dicta from the Court of Final Appeal in the case of *Secretary for Justice v Yau Yuk Lung Zigo and Another*⁶⁰ where the court interpreted the phrase "other status" appearing

⁵⁷ [2005] 3 HKC 77, 24 August 2005, Court of First Instance; [2006] 4 HKLRD 211 (CA), 24 March 2006, Court of Appeal.

⁵⁸ Especially since neither of these issues is new to Hong Kong, both of them having been considered variously over the last fifteen years or so.

⁵⁹ The UN HRC has interpreted the word "sex" in the phrase "sex discrimination" in Article 2 of the ICCPR as including "sexual orientation". See *Nicholas Toonen v. Australia*, 50th Sess, Communication No 488/1992, CCPR/C/50/D/488/1992, 4 April 1994, para 8.7. This approach was followed in *Young v Australia*, Communication No 941/2000, CCPR/C/78/D/941/2000, 18 September 2003 and *X v Columbia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, 14 May 2007.

⁶⁰ (2007) 10 HKCFAR 335, dated 17 July 2007.

in Article 2(1) of the ICCPR and Article 1(1) of the HKBORO as encompassing sexual orientation discrimination.⁶¹

Simply towing the government line based on surveys purportedly showing that Hong Kong people are “not ready” for these changes is not good enough, and particularly so when the issues concerned offend moral and social principles predicated on the foundational ideals of equality and dignity.

Independence and Governance

The quality of the EOC and its services are necessarily tied to and to that extent, also limited by, its leadership, membership and its structure as an institution. Given the importance of the EOC’s mandate and the role it is set up to play, it is imperative that the institution be guided by principles of transparency, independence and accountability. As a body which is set up as a check against discriminatory practices in society practiced by bodies including governmental institutions, it needs to be an institution that is fully independent in order for it to fulfil its duties without compromise. This is all the more important given the absence of a human rights commission or its equivalent in Hong Kong. However, as recent incidents and controversies have shown, the EOC is marred in a spate of controversies that go to the very essence of each of the values of transparency, independence and accountability.

To begin with, the EOC’s very structure bodes ill for its own institutional governance. Despite its being a statutory body, the degree of control and influence that the Home Affairs Bureau (“HAB”) exercises over the EOC undermines the independence of the institution⁶² and violates the Paris Principles. The problem, in large part, is a result of the controversial procedure by which members are appointed to the EOC. The process is typically “closed-door”, no nominations are receivable, nor are candidates’ credentials made available to the public. This lack of transparency gives the impression of a ‘puppet body’ controlled by the government and lacking in

⁶¹ This has also been interpreted as has also been interpreted as including sexual orientation as a category of historically disadvantaged groups against whom discrimination is prohibited. See *General Comment No 14*, Committee for Economic Social and Cultural Rights, UN Soc E/C. 12/2000/4, at para 18. For further elucidation of these arguments, see Kapai Puja, *The Same Difference: Protecting Same Sex Couples Under the Domestic Violence Ordinance*, Art 9, *Asian Journal of Comparative Law*, Vol 4(1) 237, at pp 239–240, available at <http://www.bepress.com/asjcl/vol4/iss1/art9> (last accessed 20 August 2009). This reading of the ground ‘other status’ has also been endorsed recently by the International Commission of Jurists, as reported in International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*, Practitioner’s Guide No 4, at p 34.

⁶² Giving the impression that if the Government perceived that a particular trip would be detrimental to its own interests, it effectively had the power to “veto” the attendance of the EOC if the Government so desired.

independence. This, coupled with the general lack of suitable candidates appointed in terms of background in human rights undermines the value, impact and perceived power of the EOC as an equal-opportunity promoting and rights-protecting institution.

The appointment procedure for membership of the EOC and that of Chairman should both be an advertised and open process in which nominations should be invited from NGOs and representative institutions. There should also be a committee to receive the nominations. The transparency of the process and the availability of the prospective candidates' credentials will serve to foster trust and confidence in the process and the outcome and instil greater respect for the body as a whole. Moreover, the EOC will also be perceived to be more independent as a result of the process. The appointment of members to the EOC has thus far revealed that the government tends to select relatively conservative people with limited or no experience in human rights-related work. This is also true for all the EOC Chairpersons that have been appointed to lead the EOC to date, except for Anna Wu. None of the others have had any background in human rights work. This is all ironic given the "new look" of the commission that was supposed to result from the wholesale replacement of all but one members of the EOC,⁶³ who had been serving on the commission since the body was set up.⁶⁴

This may to a large extent have contributed to the EOC's limited impact over the course of the last few years and it is noteworthy that the term which stands out as the one in which the most was achieved (relatively speaking), was that led by Anna Wu. This reflects the importance of having the right kind of leadership and passion for the position of Chairman in order for the EOC to achieve its objectives effectively. It is therefore, imperative, particularly in light of recent scandals that have marred the process of recruitment of Chairpersons,⁶⁵ that the EOC's Chair be selected carefully, through an open and impartial process of recruitment and with

⁶³ Ravina Shamdasani, "EOC Gets Change to Restore Credibility" (2005) SCMP, 20 April.

⁶⁴ The intention was to put the controversy-plagued body back on track to fulfil its mandate and also, to regain public trust and confidence.

⁶⁵ See, eg, the heavily criticised appointment of the current chairman Mr Raymond Tang, whose appointment was perceived as closed-door and subjective. The appointment was even more controversial for its unusually lengthy five-year term and the fact that Mr Tang had to resign from his post as Privacy Commissioner in order to step up to this role. See Klaudia Lee, "Selection of EOC Chief Sparks Concern" (2005) SCMP, 5 February.

a strong view to the candidates' background and experience in the area of equality.⁶⁶

There is also a need for the EOC to be representative and to be perceived to be representative of the different stakeholders' interests in this pursuit for equal opportunities and the elimination of discrimination. As such, it is vital that some of the members of the EOC be representative voices of the groups⁶⁷ most likely to be affected by the proper enforcement of anti-discrimination laws and people who can speak to the implementation of these laws emphatically. Thus, the appointment of members should also be a process that is transparent for these reasons. In essence, the appointment process should accord with the Paris Principles as has been repeatedly recommended to the Government in various reports from the HRC on the question of the EOC.⁶⁸ However, the Government's response to date has been one of complacency.⁶⁹

The lack of action in this regard has been compounded by a series of controversies and debacles that have marred the EOC over the course of the last few years but is particularly disconcerting in light of recent concerns over accountability and governance issues relating to the EOC, its Chair-

⁶⁶ The appointment of Raymond Tang prior to the release of the *Independent Panel Report* aroused suspicions of the government's intentions and sincerity regarding the probe since it suggested that the findings of the *Independent Panel of Inquiry* and its recommendations were likely to be inconsequential. See Ravina Shamdasani, "EOC Inquiry Panel Blasted for 'whitewash'" (2005) SCMP, 4 February and Carrie Chan, "Democrats' Bid to Probe Watchdog Fails Again" (2005) SCMP, 22 March. One of the proposed recommendations of the *Independent Panel of Inquiry* concerned the separation of the position of the Chair of EOC into two separate posts in order to facilitate checks and balance, with the one being a chairman but as a part-time executive and the other being a chief executive officer in charge of the day-to-day operations. However, Raymond Tang was appointed for a five year term on a full-time basis. See Polly Hui, "Lawmakers Question Five-Year Term for EOC Chief" (2006) SCMP, 14 January.

⁶⁷ The EOC had its first ethnic minority member appointed in 2005. The only other foreigner to have served on commission was John Budge, whose term ended May 19 2005. See Editorial, "Odd Man Out on Equality Panel" (2005) SCMP, 24 April. Despite this positive move, several concerns have arisen over the appointment and questions as to his representativeness of ethnic minority groups have generally dominated in light of his Muslim background. Also in question was the likely impact he would have given that one ethnic minority member would have only limited influence in persuading other members to vote with him when he moved certain proposals pertaining to issues of importance to ethnic minority groups.

⁶⁸ For Instance, in the *Concluding Observations of Human Rights Committee on the Second report of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC)* in light of the ICCPR (30 March 2006).

⁶⁹ The Government has said that although not exactly in line with the Paris Principles, the procedure is very "closely" aligned to such principles. See Secretary for Home Affairs' response to Dr. Law Chi-Kwong's question on the *Controversies Surrounding Equal Opportunities Commission*, at the Legislative Council Meeting on 12 November 2003, at p 1134–1136 of <http://www.legco.gov.hk/yr03-04/english/counmtg/hansard/cm1112ti-translate-e.pdf> (accessed 17 August 2009). See also, the Administration's position as elaborated in its response to the HRC's concluding observations, Home Affairs Bureau, *Existing Human Rights Framework in Hong Kong*, LC Paper No LC Paper No CB(2)1662/06-07(01), dated April 2007, available at, http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/paper_200704_en.pdf (accessed 17 August 2009).

man and its members.⁷⁰ These incidents, a controversial *Independent Panel of Inquiry* which led an inquiry into some of these happenings, and the controversial handling⁷¹ of the Director of Audit's report⁷² on these and related matters have led many to call for the resignation of Raymond Tang as the Chairman⁷³ and hastened the Government to propose hiring a full-time

⁷⁰ For example, a scandal over the claims for overseas trips which were allegedly not taken for EOC-related business, an expenses scandal over large sums of money spent and claimed in respect of a recent dinner in Beijing, and the Chairman's proposed budget of HK\$500,000 for a one-day disability discrimination seminar (which was considered extravagant) all caught extensive media attention and drew criticism from many sectors. Some of the incidents concerned resulted in some EOC members remarking that there may be a conflict of interest in the Chairman's role as Chair of the EOC and of its secretariat and that this blurred the issue of accountability since he was effectively in charge of "reviewing" his own work. See Polly Hui, "EOC Chairman's Budget Too Much for One-Day Seminar, Say Members" (2008) SCMP, 25 January and most recently, the news that the Chairman had taken the liberty to take out an insurance policy which went beyond what he was entitled to under his terms of service (as to which see Director of Audit, *Report No 52 of the Director of Audit: Equal Opportunities Commission*, Ch 3 paras 48–52 (dated April 2009) and *Report of the Public Accounts Committee on the Director of Audit's Report No 52 on the Results of Value for Money Audits*, July 2009, paras 4–25. Surprisingly, Mr Tang apparently remained "non-committal" when asked by the LegCo Panel of Inquiry whether he would return his share of the premium from the policy (merely stating that he would consult the Government). See Albert Cheng King-hon, "What Oversight?" (2009) SCMP, 23 May.

⁷¹ At the Legislative Council's Panel of Inquiry hearing, it was revealed that Mr Tang had withheld the audit report from commission members and had only selectively released the findings in order to shield his misconduct. This most egregious behaviour alone would warrant a vote of no confidence. What was even more appalling was the EOC's response to the report which left LegCo members with the impression that the EOC found the findings of the report 'insignificant' and it did not take seriously the need to address the findings. See Albert Wong, "LegCo Committee Attacks Commission" (2009) SCMP, 9 July. The irony of this lies in the Independent Panel of Inquiry's complete lack of appreciation of the role that the EOC performs in the community. Its central mission being that to promote equality, fairness and justice within the community, demanded that the dealings of the EOC itself, internally or in relation to any external persons or bodies, be fair, both in form and in substance. See Ravina Shamdasani, *Board Members Label Report a Failure* (2005) SCMP, 4 February. It is interesting however, that in its own dealings, the EOC has lacked sensitivity in determining the contractual terms of those under its employ and screening for discriminatory terms. Note the observation by Frank Ching in "Fight the Good Fight" (2005) SCMP, 18 January where he notes that the male incumbents for the EOC's top job were offered terms never offered to their female equivalents, ie Michael Wong was guaranteed that his pay would not be cut during his term, also allowed to collect his full pension despite receiving full salary for his services and Raymond Tang was assured a 5-year term. However, neither Anna Wu, nor Patricia Chu's packages had such terms offered to them for their tenure.

⁷² April 2009. The report expressly highlighted the expense of HK\$15,200 used to pay for a 28-person dinner in Beijing (for which no attendance list was available) and a further HK\$78,000 spent to purchase 32 air purifiers despite the air quality of the offices having been certified as "excellent" by a building management report. The report gave rise to serious concerns reflecting the need for an overhaul in the management of the EOC's operations, including its culture of corporate governance, handling of expenditure and its overall management.

⁷³ The fact that two motions for a vote of no confidence in Mr Tang have failed, despite the persistent and egregious excesses, is reflective of the complete lack of independence the EOC's membership suffers from. See Albert Cheng King-hon, "What Oversight?" (2009) SCMP, 23 May, where he notes that seven of the EOC's pro-establishment members opposed the motion and six of the members were absent from the special meeting which was called to consider the motions.

CEO coupled with a full time Chairman.⁷⁴ After much criticism, government has finally agreed to allow an open-tender process for recruitment of the position of Chairman.⁷⁵ Although this goes some way towards addressing the issue of “independence”, it would still depend very much on *who* is appointed for the position in the end and what criteria are determinative of the appointment. Much would also rest on the remaining composition of the EOC and how representative it is of different groupings in society.

The EOC’s embroilment in such incidents reflects the need for strong governance, oversight and accountability. This is an appropriate juncture for an overhaul in the appointment of its officers, management and systems of accountability. For example, there is room for external audits of the EOC. The Independent Commission Against Corruption (ICAC) can also play a part in the review of the EOC’s functioning. The sooner the EOC is externalised from the governmental structure in structure and in substance, the greater its independence, perceived and actual. The perception of independence and the building of trust through suitable appointments to the body would go a long way toward re-establishing the lost confidence of the public.

Conclusion

The controversies outlined above reflect the serious gaps that present operational, structural and organisational obstacles in the course of the EOC’s work and credibility. These gaps have resulted in a most unfortunate spate of events which have shaken the confidence of Hong Kong people, who had hoped that the EOC would represent them and advocate on their behalf the values of equality and help eradicate discrimination in Hong Kong for good. The events concerned have disappointed the people and dimmed any hopes for the effective championing of human rights in Hong Kong, let alone stand up for the voices of those silenced by long-standing discrimination. Its role as an important intermediary between the Government and its

⁷⁴ As opposed to its earlier proposal to split the position into two part-time positions. See remarks of Stephen Lam, Secretary for Constitutional and Mainland Affairs, at a meeting of the Panel of Constitutional Affairs, a Legislative Council Committee, on 15 June 2009 and Constitutional and Mainland Affairs Bureau’s submission, *Review of Advisory and Statutory Bodies: Interim Report No 15 – Review of Corporate Governance of the EOC*, regarding the proposed reform of the EOC. See also, Albert Wong, “EOC to Face Reform After Damning Audit” (2009) SCMP, 10 June.

⁷⁵ See Albert Wong, “Lawmakers Slam Plan to Begin Tender for New Commission Head” (2009) SCMP, 16 June. Once again, this sparks suspicions about the Government’s sincerity in taking on board the recommendations made pursuant to the many recent reviews and particularly in light of the severe negative publicity the EOC has been subjected to as a result. It is almost as though the Government is prepared to say certain things on paper to appease its critics, but perfectly happy to do exactly as it pleases in any event, disregarding its promises.

people in the process of securing rights and protecting individuals against violations has been undermined.

But all is not lost. A large number of recommendations, proposals and submissions to various bodies set out some of the steps that need to be taken in order to breathe new life into the EOC. Clearly, many things will need to change, outwardly and internally. It is as if the EOC needs to be reborn with new values, fresh ideas and a renewed commitment to equality, transparency, accountability, governance and representation. With the right membership and a revised agenda for the new term, it is hoped that a more independent and proactive body, with a clear vision for the future will stand up to the challenge of setting higher standards for Hong Kong to aspire towards and this will be its calling in its new avatar.