

Committee on the Elimination of Racial Discrimination (CERD)
96th Session (6 to 30 August 2018)

Submission by the Equal Opportunity Action Coalition, for consideration of the
report of the Hong Kong Special Administration Region, China

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The Equal Opportunity Action Coalition is a group of over ten civil society organisations and non-governmental organisations with a mandate to promote equal opportunities in Hong Kong. The Coalition was formed in May 2017 to call for reform of the Equal Opportunities Commission (EOC). The Coalition would like to draw the Committee's attention to the ineffectiveness of the EOC to provide protection and remedies against acts of racial discrimination and to promote racial equality through policy, research, and training.

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With regards to legal, institutional and public policy framework for combating racial discrimination (arts. 2 to 7)

Weak Equal Opportunities Commission inconsistent with the Paris Principles

1. The Equal Opportunities Commission (“EOC”) is a statutory body which implements the four anti-discrimination ordinances covering the grounds of sex, pregnancy, marital status, disability, family status, and race. Its mandate is limited to the four anti-discrimination laws, leaving a lot of grounds uncovered, such as age discrimination and political opinions, etc. The glaring gaps have also been identified by the EOC itself in its Discrimination Law Review.

Lack of public legitimacy

2. Since its establishment in 1996, the EOC’s public legitimacy has been called into question due to its lack of independence from the Government. Under section 63(3) of the Sex Discrimination Ordinance, the Chief Executive has the power to appoint the members of the EOC, comprising a full-time Chairperson and between 4 to 16 members.
3. The Government’s appointment of the EOC’s upper echelons gives tremendous power and control to the Government over the strategic priorities and developments of the EOC, which contradicts the meanings of independence in the Paris Principles. To consider the full impact of this appointment system on the EOC’s competence, the following should also be taken into account:
 - a) How and why individuals are selected for public appointment is not made public, though clearly the Government’s power to select Board members will no doubt help to prevent or minimise any potential criticisms and challenges by the EOC to government policies, practices and programmes.
 - b) The opaque public appointment system and the people who are appointed over the years suggest strongly of political patronage and personal favouritism involved in the selection process. Unsurprisingly, the current EOC Board lacks diversity in its composition, and many incumbents are very close to the Government politically. They are not representative of Hong Kong society, and they do not inspire public confidence in their supervision and guidance of the work of the EOC.
 - c) The Chairperson is both the head of the EOC Board and the executive head. This concentration of powers is against the norm of good corporate governance and severely undermines the system of checks and balances within the EOC.

- d) The Chairperson's salary is currently pitched at the rank equivalent to Point 8 of the Directorate Pay Scale of the Civil Service.¹ This is the same pay scale for Permanent Secretaries in the Government, which starts at HK\$270,750 per month (US\$34,647 per month).² This means at least a staggering HK\$10 million (US\$1.28 million) would have been spent on the Chairperson's remuneration package for a three-year term, not to mention the approximately HK\$8 million (US\$1 million) for the three-year remuneration package of the Chief Operation Officer.
- e) At such a high pay scale for the Chairperson, the public can rightly expect the appointee to be exceptionally qualified with the highest integrity and professionalism, a champion of equality and human rights with proven record of bold and principled public advocacy in these areas, and a strong leader with a clear vision for the promotion and protection of equality and human rights and the ability to inspire others to follow suit. The appointment of Chairpersons over the years, however, suggests the Government does not seem to apply the same selection criteria. With the current Chairperson, for example, who started his term in April 2016 by openly admitting he had limited knowledge of anti-discrimination law and needed a lot of time to pick up on law and issues, was accused by women's groups in 2017 of espousing sexist views on women's gender roles, and more recently accused of cronyism and turning the EOC into a "men's club" by driving out experienced senior female employees.³
4. **The Committee is urged to call on the Government to (a) examine the executive role of the EOC's Chairperson with a view of either removing the executive role altogether or changing it into a part-time role; (b) set up a transparent selection process for the appointment of the EOC's Chairperson that is proportional to the rank, importance and sensitivity of this role; and (c) develop a system for public appointments that has clear principles, strong control framework and robust external scrutiny to instil and maintain public confidence.**

¹ Audit Commission Hong Kong, report on Equal Opportunities Commission, 27 March 2009, available at: https://www.aud.gov.hk/pdf_e/e52ch03.pdf

² Civil Service Bureau, Directorate pay scale, available at: <https://www.csb.gov.hk/english/admin/pay/48.html>

³ Jeffie Lam, "Trouble at top of Hong Kong's Equal Opportunities Commission as senior staff quit, sparking fears about performance and diversity, *South China Morning Post*, 3 June 2018. Available at: <http://www.scmp.com/news/hong-kong/community/article/2149026/trouble-top-hong-kongs-equal-opportunities-commission>

Overly demanding and unfair investigation and conciliation process

5. In the EOC's annual report for 2016-17, they claimed to be "dedicated to maintaining an effective and efficient public enquiry and complaint-handling system."⁴ Yet, the EOC's track record since its establishment in 1996 highlights its limited ability to investigate and provide remedies for discriminatory conduct. The EOC has been unconcerned and unwilling to take a serious look at their *real* performance output, and would typically gloss over their case statistics when presenting to the public. They would highlight only a few figures to give the impression of efficacy, such as the conciliation success rate. These figures, however, do not tally with the experiences of complainants supported by NGOs. The coalition has been pressing the EOC to make significant changes to its complaint handling and legal assistance mechanisms. In our submission dated 25 May 2017 made to the EOC, we set out our concerns and suggestions for reform in key areas including complaint handling, legal assistance and promoting sustainable and long-term changes through strategic policy development. Despite the submission and numerous meetings with the EOC, the EOC has made no changes and is dragging its feet on reform. They are inexplicably passive and unforthcoming in working with key stakeholders to find ways to improve the redress system.

6. The EOC misleads the public by being highly selective in the statistics they present to the public, hence NGOs had to painstakingly conduct their own analysis of EOC's complaints and legal assistance provided on their website. Looking firstly at closed complaints that had undergone the EOC's investigation and conciliation process (ICP), we found that in the 10 years from 2008 to 2017, the outcomes of complaints were:
 - a) **63.56% discontinued;**
 - b) 24.89% conciliated;
 - c) 11.55% not conciliated.

7. The percentage breakdown of outcomes is alarming: the EOC only helped 25% of victims to resolve their complaints through conciliation, and they discontinued 64% of cases. This explains why the EOC does not voluntarily mention the large number of discontinued case. From the experience of NGOs representing or supporting complainants over the years, we find the EOC's ICP to be overly-demanding due to a long, cumbersome and complex investigation process. For example, Hong Kong Unison has often represented ethnic minority (EM) victims on cases relating to employment and access to bank services, and they found the correspondence between the complainant

⁴ Equal Opportunities Commission

<http://www.eoc.org.hk/EOC/Upload/AnnualReport/201617/006.pdf>

and the respondent could last anywhere from six months to two years, with repeated requests to the complainants to provide responses and information. Although the respondents might have to do the same, but they were all large organisations, such as banks, government departments and public bodies, all of which had resources to get legal advice on preparing their submissions to the EOC. It is blatantly unfair of the EOC to ignore the power difference between the parties in preparing their information, especially when the EOC uses the information to make critical decisions against the victims, such as discontinuing their complaints or not granting them legal assistance.

8. Even though practitioners in the field of anti-discrimination law understand that discrimination cases are difficult to prove, cases are heavily reliant on circumstantial evidence, and the victims often do not hold or have access to information that could support their claims, yet the EOC has designed its investigation process to resemble a court evidence collection and discovery process without the necessary safeguards. It is intimidating to the complainants and places a substantial burden on them to gather information, recall events and find witnesses. Although the EOC will summarise the key points in the Respondents' replies, it tends to act very much like a "post-box", assuming the role of messenger. The EOC does not provide advice on how the complainants should approach issues in the claim or what further information they need to provide. Then after investigation, the EOC will act as judge and decide on whether the case has substance even though it has no adjudication powers, and cases are very often argued on facts. Without the power to cross-examine the parties and to determine their credibility, the EOC is in no position to decide against the complainants except in glaringly obvious cases, which should only make up a small percentage.

9. To illustrate the EOC's unfair treatment of victims in their investigation of complaints, it is useful to consider a sexual harassment case where the Court dismissed the respondent's Summons to ask the claimant to provide further and better particulars (FBP), such as date, time and circumstances of the incidents.⁵ The Court ruled that FBP was not necessary because (i) it could be reasonably contemplated that the claimant, a victim of sexual harassment, would not be able to remember all such details of the alleged acts on each and every occasion; and (ii) the claimant would give evidence at the trial and could be cross-examined then. The Court opined that the respondent's request for FBP was an attempt to cross-examine the claimant on paper and to show up the perceived weaknesses in her claim. The Court's views and the EOC's high number of discontinued cases confirm our belief that the EOC's ICP is biased against the complainants, because it is usually the respondents who are the custodians of

⁵ *X v. Melvyn Kai Fan Lai and Another* [DCEO4/2016]

information, such as employers, and are better resourced to pay for legal representation. Ultimately, the EOC's assessment is cross-examination on paper because they have no power to determine the credibility of parties. There is no reason to trust the EOC is discharging its duties properly when there are such high numbers of discontinued complaints.

10. NGOs have been asking EOC to reform its ICP, because complainants whose cases have been discontinued are not eligible to apply for legal assistance, bringing their access to redress to an end. Discontinued cases known to NGOs who applied for legal aid had all failed because the Legal Aid Department followed the EOC's decisions, and very few complainants could afford to fund their own court actions against the respondents.
11. **We believe EOC's investigation and conciliation process should be a substantially shorter and simpler process, geared towards alternative dispute resolution by helping the parties to find practical solutions. If no settlement could be reached, the complainant's case should proceed quickly to the legal assistance stage.**

Ineffective Legal Assistance

12. The EOC has a sizeable legal team of 8 lawyers, representing 8.5% of the overall number of staff at a cost of HK\$11.67 million for 2017-2018.⁶ The team handles a small number of legal assistance applications each year (29 in 2015, 38 in 2016 and 47 in 2017) of which only a handful is pursued further to the Courts. Despite the small number of cases, not one single EOC lawyer had represented a claimant in court in the last 10 years. Instead, the representation work is outsourced to external counsels. This is very surprising since the EOC has been established for over 22 years, and its legal team should rank amongst the most experienced and knowledgeable in handling contentious and non-contentious discrimination case in Hong Kong.
13. To apply for legal assistance, the complainants must have firstly undergone the EOC's ICP and their cases were not resolved by conciliation. In the last 10 years, around 11.55% of cases fell into this category where the complainants might apply for legal assistance. From EOC's statistics on legal assistance in the last 10 years from 2008 to 2017, slightly over half of the complainants (55%) would apply, **representing only 6% of the total number of closed complaints**, and their outcomes were:
 - a) 2% were under consideration;

⁶ Secretary for Constitutional and Mainland Affairs Session No.: 6, "Replies to initial written questions raised by Finance Committee Members in examining the Estimates of Expenditure 2017-18", Reply Serial No. CMAB013. Available at: https://www.legco.gov.hk/yr17-18/english/fc/fc/w_q/cmab-e.pdf

- b) 52% of cases were declined;
 - c) 46% (193 cases) granted assistance.
14. Another crucial point to note is that in the 46% (193) of cases that were granted legal assistance in the last 10 years, there is no information on how many received **full assistance**, which is a category the EOC does not clearly explain on its website. Why is the EOC hiding this figure? Their statistics only refer to the number of cases granted legal assistance without differentiating between the two categories of ‘full assistance’ and ‘limited assistance’ which have very different outcomes:
- a) Full assistance – this means the EOC considers there is a prima facie case for court action, and the EOC’s lawyer will explore the possibility for pre-action settlement before initiating proceedings.
 - b) Limited assistance – from NGOs’ experience, this always means the EOC’s lawyer will do further investigation or seek external legal advice, and then present the case back to the EOC’s Legal and Complaints Committee for a final decision. In all the cases known to NGOs over the years, the EOC often ceased legal assistance after obtaining further information, and they do not provide detailed reasoning for their decisions. This is a very difficult outcome for complainants to understand, especially when it is the only avenue open to them for redress.
15. With the EOC refusing to provide detailed reasons for declining or discontinuing with legal assistance, NGOs are very concerned that the EOC’s lawyers are doing little more than cross-examining the parties on paper. The lawyers also do not meet with the complainants before the EOC has decided on their applications, and they do not provide any legal advice to complainants whose applications were declined. Of the lawyers involved in handling cases, there is no information on their litigation experience, which is important for the public to know to instil confidence in a legal assistance process that is shrouded in so much secrecy. Providing legal assistance is a core and important function of EOC, and if EOC’s lawyers are not engaged and experienced in representation work, this raises serious questions on their competence to assess the merits of cases for legal assistance and why there is a need for such a large team of counsels.
16. With so many problems surrounding the EOC’s legal assistance function, it is no wonder they had not brought one single case to court under the Race Discrimination Ordinance (RDO) in the nine years since its enactment. The only case to have reached the courts in all that time was pursued privately by a minor against the police and was unsuccessful.

The plaintiff failed partly because the RDO exempts government exercise of powers and functions from its purview.⁷

17. **The Committee is urged to call on the Government to take reference from similar commissions in other jurisdictions that provide legal assistance to enhance service and transparency.**

EOC refusing to use its powers under the law to help victims of discrimination

18. Under all anti-discrimination Ordinances, the EOC has the duty to provide assistance to aggrieved persons that includes providing legal advice,⁸ but the EOC has so far refused to carry out these statutory duties by using different excuses, such as the EOC's Chief Legal Counsel claiming in one meeting with the coalition that in-house lawyers could not give advice directly to clients, or the EOC claiming they could not give legal advice because this involved use of public funds and the EOC had to be impartial.
19. The coalition finds the EOC's reasons to be blatant misrepresentations for these reasons:
 - a) The purpose of the Ordinances is to eliminate discrimination, and the Ordinances empowered the EOC to provide legal assistance to aggrieved person only. There is no ambiguity here, and the EOC only needs to consider providing legal assistance from the positions of the aggrieved persons. Put simply, the EOC's role under the law is not only to achieve formal equality but also substantive equality. If the EOC refuses to differentiate this, then clearly the wrong people are doing the jobs.
 - b) By the EOC's continued refusal to carry out their statutory duties, they are in fact legitimising the status quo, i.e. supporting the existing dominant groups in maintaining their positions of superiority over those groups which are subject to discrimination and prejudice. There is nothing impartial about the EOC's current position, which is a most disturbing fact.
 - c) In all EOC's annual reports from 1999/2000 to 2016/2017, each one had stated that legal assistance varied from the giving of legal advice by the EOC's lawyers to legal representation in legal proceedings by the EOC's lawyers and barristers briefed by the EOC.
 - d) If the Chief Legal Counsel's view about in-house lawyers is correct, the EOC should wind down its large team of 8 in-house lawyers and use the money instead to pay for external lawyers to give legal advice.

⁷ *Singh Arjun v Secretary for Justice* [2016] HKDC 626

⁸ S.85(3) of Sex Discrimination Ordinance, s.81(3) of Disability Discrimination Ordinance, s.63(3) of Family Status Discrimination Ordinance and s.79(3) of Race Discrimination Ordinance.

- e) The EOC's website publishes an 'Impartiality Statement' that is only concerned with its role in investigation and conciliation.⁹ No similar statement is made on its provision of legal assistance.
20. The Ordinances also give EOC the power to prescribe forms by which an aggrieved person may question the respondent on their reason for doing any alleged unlawful act. If the respondent replies, this may be admissible as evidence in court proceedings.¹⁰ This form provides an important channel for an aggrieved person to find information on his/her case, but in the last 22 years and despite requests made by the NGOs, the EOC has not taken any steps to introduce these forms. It is untenable that the EOC does not make full use of its powers under the law to assist aggrieved persons to the fullest extent.
21. The importance of domestic equality laws and their effective implementation cannot be overstated. For many ethnic minority individuals, the RDO represents the only means of redress for discrimination. With such a shamefully low number of cases being given full legal assistance, the EOC should make immediate and substantial changes, be proactive and find innovative ways of implementing all anti-discrimination legislation to give full effect to the substantive content of the articles in ICERD.
22. **The Committee is urged to call on the Government to push the EOC to make immediate and significant reform to its complaint handling and legal assistance processes to address the problems that have been ongoing for many years, and to take urgent steps to make full use of its powers under all the anti-discrimination Ordinances to fulfil their mandate under the law, including but not limited to providing legal advice and prescribing forms for victims to use. In the long term, the Government should establish a statutory, independent and autonomous Human Rights Commission with a broad mandate and wide powers in line with the Paris Principles.**

Ineffective policy and training to raise awareness of racism and the prohibition of racial discrimination

23. Policy analysis and development are important components for action plans to eliminate race discrimination, but the EOC's policy work to date has been very disappointing and

⁹ Full statement under 'Enquiries & Complaints' is available at:

<http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=impartiality%20statement>

¹⁰ S.83 of Sex Discrimination Ordinance, s.79 of Disability Discrimination Ordinance, s.61 of Family Status Discrimination Ordinance and s.77 of Race Discrimination Ordinance.

superficial. They have yet to provide a clear policy framework and action plans for effectively addressing the underlying causes of discrimination by considering the lives of marginalised groups in a contextual way. Nor has the EOC advocated measures that could bring about a real transformation of opportunities, institutions and systems so that marginalized groups are no longer grounded in historically determined paradigms of power and life patterns. Without any strategies to effectively address the underlying causes of discrimination, the positions of marginalized groups could not be improved.

24. On the issues of race discrimination and racial prejudice, the EOC has not taken a strong lead in pressing the Government to fulfil their obligations under the law and ICERD in an integrated fashion to achieve de facto equality for ethnic minority groups, and to create an enabling environment that empowers ethnic minority groups to achieve equality of results. Despite the RDO has been in force for nine years, the EOC has not pushed the Government and public bodies to mainstream race in their policies, services and programmes, and to monitor the impact.
25. The EOC also has not proactively called on the Government and public bodies to conduct ethnic monitoring of their stakeholders as part of its regular data collection, and to provide data disaggregated by race, gender, disability, age and other relevant demographic features. Without data being readily available on subpopulations, it is difficult to ascertain any important patterns or trends that are masked by larger aggregate data, and harder still to plan and devise appropriate services and programmes that cater to the needs of subpopulations within ethnic minority communities. For example, little is known of the extent to which ethnic minority persons could access mental health services and the quality of care; whether there are differences in the type and quality of care provided to elderly ethnic minority women and men by families and service providers; what are the experiences of LGBTI individuals from ethnic minority groups; are ethnic minority parents of children with special educational needs able to engage fully with the schools to understand their children's needs and play an active part in supporting them; is there a disproportionate number of ethnic minority individuals being targeted by the police for discriminatory treatments; and do public ethnic minority tenants experience different extent of harassment and neighbour nuisance etc.?
26. **The EOC should lead by example by providing disaggregated data on its own website to reflect the multi-dimensionality of ethnic minority individuals who approach the EOC for assistance on matters that may not be obviously race-related but may have race implications.** For example, even the EOC does not provide any basic demographic information on their website on people who made use of their

services, such as making enquiries and complaints, attending EOC's events and trainings, responding to EOC's consultations etc. How can the EOC measure the accessibility of all its services to ethnic minority groups and find out if any improvements are needed?

27. The EOC tends to conduct research projects and surveys that do not progress beyond describing, or confirming, a particular social phenomenon. Some surveys are small scale and on the same topic, such as at least nine questionnaire surveys on sexual harassment in different sectors. But the EOC does not do the same with other types of harassment, such as racial harassment against ethnic minority in various sectors. The number of complaints made to the EOC should not be the indicator. For example, **RDO continues to be underused**, and while information can be power, marginalised groups such as ethnic minority communities will need tangible support too if they are to come forward, especially when the consequence is serious, such as a migrant domestic worker being prepared to lose her job if she takes action against her employer for racist abuse.
28. Other than listing the studies that it had commissioned, the EOC's website does not explain how these studies would feed into any ongoing and coherent action plans on addressing inequalities, and how the EOC will measure the outcomes and impact of those initiatives. If the EOC does not use the research and surveys to inform and advance its work for change, then these studies have limited use, especially when they often confirm what is already known. We are not aware of the EOC undertaking any continuous medium and long term work to achieve social structural change, but without this important component, it is not possible to address injustice and inequalities that arise out of societal and political institutions.
29. One area that has not been rigorously pursued by EOC is the development of equality plans in the public sector, an issue included in the 2009 CERD concluding observations at para 28.¹¹ The four anti-discrimination Ordinances do not impose positive legal obligations on governmental and public bodies to formulate statutory equality plans periodically for the effective pursuit of anti-discrimination measures and the promotion of and development of equal opportunity wherever it is lacking. Discrimination in HK is primarily addressed in a passive manner through the making and handling of complaints and, in very rare cases, through litigation. The EOC does not proactively identify and investigate to eradicate institutionalized racism in the public or private sectors.

¹¹ Para 28 states, inter alia, "The Committee recommends that all Government functions and powers be brought within the scope of the Race Discrimination Ordinance. It also recommends the adoption of an equality plan with a view to ensuring the effective implementation of the law and that the Equal Opportunities Commission be strengthened."

- 30. The EOC should immediately prioritise race mainstreaming and disaggregated data collection by the Government and public bodies as part of its work, setting itself as an example for others to follow. It should provide regular impact assessment of its policy and research work, and to set up regular consultative groups that include a wide range of stakeholders.**

- 31. In the short term, the EOC should conduct a comprehensive review of all aspects of its functions to pursue greater effectiveness in the process and discharge of its statutory obligations. Reforms must be introduced that include recommendations for the enactment of relevant equal opportunities legislation to cover areas not yet protected. Fundamentally, such reforms should include the imposition of a statutory positive duty for the governmental and public bodies to eliminate all forms of racial discrimination and the promotion of racial equality. If the Government is truly serious about eliminating racial inequality and discrimination, which is pervasive, it will take the lead and implement these reforms.**