

# THE RIGHT TO EQUALITY IN THE PUBLIC SECTOR: AN ASSESSMENT OF POST-COLONIAL HONG KONG

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*The Bill of Rights Ordinance established an enforceable right to equality in Hong Kong's public sector. This right was further developed in 1995 when the Sex Discrimination Ordinance and the Disability Discrimination Ordinance were enacted. This legislation should have spurred a comprehensive review of government policies. However, recent cases demonstrate that the government has failed to conduct such a review and that it has actively resisted the Equal Opportunities Commission's (EOC's) efforts to enforce the laws. The government's failure to comply with its own legislation sets a poor example for the private sector and undermines the entire enforcement model, which is supposed to be based largely upon conciliation and public education. In light of this record, the author argues that the EOC should be given stronger enforcement powers and broader jurisdiction over discriminatory acts by the government and public authorities.*

## Introduction

In the colonial era, Hong Kong's domestic legislation did not provide a right to equality and the government regularly discriminated against certain classes of people. In the 1960s and 1970s, the colonial government became bound not to discriminate under international law,<sup>1</sup> but victims of discrimination

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<sup>1</sup> In particular, the government was bound (by virtue of the United Kingdom's ratification on behalf of Hong Kong) by the International Convention on the Elimination of All Forms of Racial Discrimination (ratified by the United Kingdom and extended to Hong Kong in 1969); by the equality provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both ratified by the United Kingdom and extended to Hong Kong in 1976). These and other international human rights instruments (with information and commentary on their application to Hong Kong in the colonial period) can be found in Andrew Byrnes and Johannes Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Hong Kong, Singapore, Malaysia: Butterworths, 1993). For an analysis of the equality provisions of these conventions and their application to Hong Kong, see Andrew Byrnes, "Equality and Non-Discrimination," in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford Univ. Press, 1992).

were largely unaware of this obligation and could not enforce it in domestic courts. Thus it was not until 1991, when the Hong Kong Bill of Rights Ordinance<sup>2</sup> was enacted, that the people of Hong Kong obtained an enforceable right to equality in the public sector. The Bill of Rights prohibits discrimination by the government and public authorities on several grounds, including race, sex and religious affiliation. For the past several years, the government has also been bound by the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Discrimination Ordinance.<sup>3</sup> The Basic Law (Hong Kong's constitution since 1 July 1997) also requires equal treatment by the government.<sup>4</sup>

This legislation should have spurred a comprehensive review of government policies, many of which reflect long outdated prejudices. However, recent cases demonstrate that the government itself has failed to conduct such a review. Instead, the Equal Opportunities Commission (EOC) has been compelled to devote significant resources to investigating the government and persuading it to reform unlawful practices. Moreover, certain government departments have failed to conciliate complaints of discrimination or to comply with EOC recommendations. The behaviour of these departments undermines the entire enforcement model, which relies primarily on non-litigious methods of enforcement (public education, investigation and conciliation). The EOC regularly urges private sector employers to comply with the law voluntarily and to conciliate any genuine complaints that arise. Yet the public can see that the government has often pursued exactly the opposite strategy – resisting EOC enforcement efforts, compelling it to litigate and delaying reforms for as long as possible.

The first part of this article briefly describes the right to equality in Hong Kong's public sector and the existing enforcement model, including the relationship between the EOC and the government. Recent examples of government discrimination, including *K, Y, and W v the Secretary for Justice*,<sup>5</sup> in which the District Court held two government departments liable for employment discrimination, and *Equal Opportunities Commission v Director of Education*,<sup>6</sup> in which the Court of First Instance issued a declaration that the Department of

<sup>2</sup> See Hong Kong Bill of Rights Ordinance (Cap 383), especially s 8, Arts 1 and 22 (hereinafter the "Bill of Rights").

<sup>3</sup> See Sex Discrimination Ordinance (Cap 480) and Disability Discrimination Ordinance (Cap 487), both of which were enacted in 1995. The Family Status Discrimination Ordinance (Cap 527) was enacted later, in 1997. The three ordinances are also published on the website of the Hong Kong Equal Opportunities Commission (<http://www.eoc.org.hk>).

<sup>4</sup> Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Art 25 (providing that all Hong Kong residents shall be equal before the law) and Art 39 (incorporating the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights into the Basic Law).

<sup>5</sup> *K, Y, and W v Secretary for Justice* [2000] 3 HKLRD 777.

<sup>6</sup> *EOC v Director of Education* [2001] 2 HKLRD 690. (The judgment is also available on the EOC website at [http://eoc.vh.hk.linkage.net/textmode/ep/rulings/sspa\\_judge.htm](http://eoc.vh.hk.linkage.net/textmode/ep/rulings/sspa_judge.htm)).

Education's system of allocating students to secondary schools is unlawful, are then discussed.<sup>7</sup> Both judgments set important precedents for Hong Kong anti-discrimination law. However, the events leading up to the litigation are equally important as they demonstrate how the three government departments involved in the cases interacted with the EOC and took advantage (particularly in the latter case) of certain weaknesses in the enforcement system. The article concludes by suggesting how the government could develop a more consistent and proactive approach to ensure that individual departments abide by the law and do not try to thwart EOC enforcement actions. This section also suggests ways to strengthen the EOC's enforcement powers with respect to discrimination in the public sector.

### Equality Rights in the Public Sector and Hong Kong's Enforcement Model

The concept of equality was recognised as early as the time of Aristotle and embraced in the constitutional documents of the American and French revolutions. However, it was not until the second half of the 20th century that an enforceable right to equality became prominent in domestic and international law. Numerous countries have now adopted constitutional provisions and / or domestic legislation prohibiting discrimination. In the field of international law, the primary human rights treaties all include a right to equality and emphasise the particular importance of equal treatment by the government. There are also specialist treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), that address particular types of discrimination. The international committees that monitor compliance with these treaties consistently urge governments to enact legislation that prohibits discrimination in both the public and private sectors. However, these committees give special attention to complaints of governmental discrimination and they expect state parties to redress them promptly.

The challenge of eradicating discrimination in Hong Kong has been complicated by its colonial history. The United Kingdom is often praised for having been a relatively "benign" colonial ruler. This is true, in the sense that the

<sup>7</sup> The government has clashed with the EOC on other issues as well. See, for example, *Secretary for Justice & Others v Chan Wah & Others* [2000] 4 HKC 428 (in which the EOC appeared as *amicus curiae* on the issues related to the Sex Discrimination Ordinance), and the EOC's *Report on Case Study of Kowloon Bay Health Centre*, which reports on some very extreme cases of disability discrimination and harassment and notes that certain government departments failed to support (and indeed hampered) the EOC's efforts to curb them. (The report is available at [http://eoc.vh.hk.linkage.net/textmode/investigation/e\\_invest.html](http://eoc.vh.hk.linkage.net/textmode/investigation/e_invest.html).)

British allowed the people of Hong Kong a good deal of freedom, particularly economic freedom. However, the colonial system was inherently undemocratic and institutionalised inequality. Hong Kong's history books are full of examples of official discrimination against the local Chinese population<sup>8</sup> and also against women.<sup>9</sup> In the absence of democracy, victims of discrimination had little opportunity to lobby for legislation. The Governor of Hong Kong was appointed by the government of the United Kingdom and was invariably a white British male. For most of the colonial era, the government banned political parties and the appointed legislature was disproportionately chosen from the ranks of expatriate businessmen. Indeed, even the business community was not really monitoring government policy as a whole. Although the old cliché was that Hong Kong was run by the Jockey Club, Jardine and Matheson, the Hong Kong and Shanghai Bank and the Governor (in that order), it is likely that power over most government policies lay with the civil service itself. In the absence of real politics, the civil service constituted a bureaucratic elite, one that made decisions "behind closed doors" and was largely unaccountable.<sup>10</sup>

In the years following World War II there were calls for greater democracy in Hong Kong, but these were ultimately rejected (initially because of political developments in mainland China and the fear of communism and later on the assumption that China would not tolerate increased democracy in Hong Kong as it would make it harder to eventually regain control). Although the government arguably became more consultative in the 1970s and 1980s, the fact remained that the civil service answered only to the Governor and was almost entirely insulated from political pressures. If the civil service did consult groups in society, this was "more to facilitate smooth implementation of the policy than it was to improve the quality of policy or raise the legitimacy of government by sharing decision-making power".<sup>11</sup> Thus it is

<sup>8</sup> See Richard Klein, "Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong" (1995) 18 *Hastings International & Comparative Law Review* 223, which provides a detailed account of laws and government policies (dating back to the start of British rule) that sought to segregate the expatriate and Chinese populations.

<sup>9</sup> For examples of sex discrimination in the laws and government policies of Hong Kong, see Carole J. Petersen, "Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong" (1996) 34 *Columbia Journal of Transnational Law* 335, especially pp 339–336. See also Harriet Samuels, "Women and the Law in Hong Kong: A Feminist Analysis," in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: HKU Press, 1993); and Carol Jones, "Women and the Law in Colonial Hong Kong," in Benjamin K.P. Leung and Teresa Y. C. Wong (eds), *25 Years of Social and Economic Development in Hong Kong* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1994).

<sup>10</sup> See Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong: Oxford University Press, 1989), p 65.

<sup>11</sup> John P. Burns, "The Hong Kong Civil Service in Transition" (1999) 8(20) *Journal of Contemporary China* 67, 68. See also Lau Siu-kai, *Society and Politics in Hong Kong* (Hong Kong: Chinese University Press, 1982), pp 28–29.

not surprising that numerous discriminatory policies continued to be applied. The civil service was further insulated by the fact there was no real right to access information from the government during most of the colonial period. Thus, government departments could keep discriminatory policies quite secret from the public. (Indeed, this is precisely what occurred, for many years, with respect to the policies analysed later in this article.)

In the 1960s and 1970s, the government became bound by a number of international treaties that included a right to equality. For example, the British Government ratified, on behalf of Hong Kong, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>12</sup> However, in practice, these treaties did not give the people of Hong Kong a right to equal treatment because they were not directly enforceable and there was no domestic legislation implementing them in Hong Kong. Thus, the right to equality existed in theory but could not be enforced in the local courts. As a result, the colonial government felt little or no pressure to reform discriminatory laws and policies.

Until June 1989, the Hong Kong colonial government opposed any sort of domestic human rights law, taking the position that the Joint Declaration<sup>13</sup> and the Basic Law would adequately protect human rights after 1997. However, in 1989, as part of a package designed to boost public confidence following the Tiananmen Square massacre, it proposed a Bill of Rights. After a period of public consultation, the government decided that the Bill of Rights would be largely copied from the ICCPR, essentially incorporating this treaty into Hong Kong's domestic law. Although the Chinese government initially threatened to repeal the Bill of Rights Ordinance in 1997, only a few (largely inconsequential) amendments were ultimately made.

By itself, the Bill of Rights Ordinance had very little impact on discrimination in Hong Kong. This is largely because most victims of discrimination did not have the resources to challenge the government in court<sup>14</sup> and there

<sup>12</sup> See Byrnes (n 1 above).

<sup>13</sup> See the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* 1984, which sets forth rights and freedoms to be enjoyed by the people after Hong Kong was returned to China in 1997.

<sup>14</sup> One exception was the Association of Expatriate Civil Servants, which applied for a judicial review of the government's localisation policy (during the transition in 1997), on the ground that it was discriminatory and violated the Bill of Rights Ordinance. The application was only partly successful as the court held that most elements of the policy were justified under the circumstances. See *R v Secretary for Civil Service and the Attorney General, ex parte Association of Civil Servants* (1995) 5 HKPLR 490. The challenge was somewhat ironic given that expatriate civil servants enjoyed preferential treatment for years under the colonial system in Hong Kong (when local employees had no Bill of Rights to rely upon).

was no EOC to assist them. However, the Bill of Rights (together with the democracy reforms of the transition period) did strengthen Hong Kong's equality movement and made it possible for the first specific anti-discrimination legislation to be introduced into the legislature in the mid-1990s. The first of these bills was the Equal Opportunities Bill (EOB)<sup>15</sup>, which was drafted and introduced by legislator Anna Wu. The EOB was based upon Western Australian legislation and sought to prohibit discrimination on a broad range of grounds, including race, sex, age, disability, family status and sexuality. Wu also drafted a companion bill, the Human Rights and Equal Opportunities Commission Bill (the Commission Bill),<sup>16</sup> which sought to establish an independent commission to promote and protect human rights and a specialist "equal opportunities tribunal" to resolve complaints of unlawful discrimination where conciliation failed. Hong Kong's colonial constitution permitted a legislator to introduce a "private member's" bill but required that the proponent of the bill obtain the Governor's permission before introducing any bill that would require public money.<sup>17</sup> From the start, Wu recognised that the Governor might deny permission to introduce the bill, which is why she elected to split her proposal into two bills: (1) the EOB, which established the substantive right to equality and could be drafted so as not to require public money; and (2) the Commission Bill, which did, of course, require public money.

The Executive Council rejected the proposal and the Governor thus denied Wu permission to introduce her Commission Bill. However, the Governor had no power to prevent the introduction of the EOB (as it had been drafted so as not to have any "revenue implications" for the government). The Democratic Party and several independent legislators had promised to support the EOB and public consultation exercises demonstrated substantial support for the concept of anti-discrimination legislation. Fearing that Wu's EOB might be enacted, the government introduced two competing "compromise" bills and the Sex Discrimination Ordinance and Disability Discrimination Ordinance were therefore enacted in 1995. The Family Status Discrimination Ordinance followed in 1997, shortly before China resumed sovereignty over Hong Kong. The legislation binds the government and public authorities.

<sup>15</sup> Equal Opportunities Bill 1994, *Hong Kong Government Gazette*, Legal Supplement No 3, 1 July 1994.

<sup>16</sup> Human Rights and Equal Opportunities Commission Bill 1994 (circulated for public consultation, March 1994). Since Governor Patten refused permission for the bill to be introduced into the Legislative Council, it was never published in the *Government Gazette*. However, the Commission Bill was published as an Appendix to Anna Wu, "Human Rights – Rumour Campaigns, Surveillance and Dirty Tricks and the Need for a Human Rights Commission," in George Edwards and Andrew Byrnes (eds), *Hong Kong's Bill of Rights: 1991-1994 and Beyond* (Hong Kong: University of Hong Kong Faculty of Law, 1995).

<sup>17</sup> Art XXIV of the Royal Instructions (which, together with the Letters Patent, made up Hong Kong's colonial constitution).

However, it also applies to important areas of the private sector, including employment, education, housing and the provision of goods and services.<sup>18</sup>

To assist with enforcement of the new laws the legislature also established the EOC. Although appointed by the government and publicly funded, the EOC operates as an independent body. The EOC's primary enforcement mechanism is the power to investigate and conciliate complaints (from both the public and private sectors). It exercises its other powers – such as the power to conduct formal investigations; assist complainants who wish to litigate; and litigate in its own name – far less often. The EOC's jurisdiction is restricted to complaints under the three anti-discrimination ordinances. Thus, individuals who complain of discrimination by the government on the grounds of race or religion receive no assistance from the EOC, although such discrimination is unlawful by virtue of the Bill of Rights.

Hong Kong adopted an enforcement model that emphasises conciliation (rather than litigation) largely because the government and legislature believed it would be faster, less expensive and less stressful for the parties than litigation. It has also been argued that there is a traditional Chinese preference for mediation<sup>19</sup> and that the model is therefore particularly appropriate for Hong Kong. Indeed, one local expert in the labour field suggested that Hong Kong should follow the example of Japan, where the first employment discrimination law lacked any real legal remedies.<sup>20</sup> Although this suggestion was not followed (as women's organisations had made it clear that they would not accept any "non-enforceable" legislation),<sup>21</sup> the model that was ultimately adopted does have the effect of limiting court-based enforcement. Strictly speaking, victims of unlawful discrimination and harassment are not required to use the EOC at all or to participate in conciliation. They may, if they wish, commence litigation directly in the District Court. However, given Hong Kong's high legal fees, lack of legal clinics and the ban on contingency fees, most victims of discrimination cannot afford to litigate. Thus they will rely heavily upon the EOC, which has a statutory obligation to attempt to conciliate a complaint before granting assistance to litigate. Indeed, a complainant is not permitted even to apply for legal assistance until after efforts to conciliate have failed. Moreover, there is no guarantee that an application for legal

<sup>18</sup> For further discussion of the substantive provisions of Hong Kong's anti-discrimination ordinances, see Carole J. Petersen, "Equal Opportunities: a New Field of Law for Hong Kong," in Raymond Wacks (ed), *The New Legal Order in Hong Kong* (Hong Kong: HKU Press, 1999).

<sup>19</sup> For an interesting recent article on the origins of this preference, see Bobby K. Y. Wong, "Traditional Chinese Philosophy and Dispute Resolution" (2000) 30 *HKLJ* 304.

<sup>20</sup> Ng Sek-hong, "Employment and Human Rights in Hong Kong: Some Recent Developments" (1994) 24 *HKLJ* 108, 124–125.

<sup>21</sup> For example, in the *Green Paper on Equal Opportunities for Women and Men* (1993) (at paras 137–140), the government raised the possibility of adopting a non-enforceable "charter" of rights for women. However, the majority of public submissions supported the enactment of enforceable legislation, as well as the extension of CEDAW to Hong Kong.

assistance will be granted since the EOC has a limited budget and must make strategic decisions as to which cases are important enough to support. Thus, although the EOC has now received more than 2,000 complaints for investigation and conciliation, only a handful (fewer than 10) of these complaints have gone to court.

Clearly then, the Hong Kong enforcement model has been designed to encourage parties to keep their disputes out of court. Indeed, many women's and disability groups have expressed the view that it leans too far in this direction. This criticism is discussed further in the conclusion of the article. At this stage, the main point that should be established is that a long and careful process is undertaken before the EOC grants legal assistance or takes other coercive enforcement action. The combined effect of the statutory and budgetary limits is that it will do so only when it is certain that it has a strong case, one that cannot be resolved through negotiation. This is probably even truer when the EOC is considering litigating against the government, which has access to virtually unlimited funds and will therefore be a formidable opponent (not only in court and but also in the arena of public opinion). The cases discussed in the following two sections illustrate this fact – and the extent to which the government has been willing to use its resources to resist the EOC.

### **Employment Discrimination: The Case of *K, Y, and W v The Secretary for Justice***

Hong Kong employers often make offers of employment conditional on medical examinations. There is always a danger that an employer may use such an examination as a vehicle for discrimination. For example, an employer may decide to exclude an applicant because of a past illness or because of his or her genetic history, even if it has no real bearing on the applicant's ability to perform the job. The EOC has warned employers that such practices are unlawful. It has also developed numerous public education programmes aimed at reducing the general prejudice towards people who suffer from certain disabilities, particularly mental illness. Unfortunately, the Hong Kong government has turned out to be one of the chief offenders and has publicly sought to defend practices that can only undermine the EOC efforts to change public attitudes.

The five branches of the disciplinary forces – the police, fire services, correctional services, immigration, and customs and excise – have had a long-standing (although previously unpublicised) policy of rejecting any job applicant who had a first-degree relative with a history of mental illness.<sup>22</sup> The policy was applied to a wide range of jobs and in a very sweeping manner.

<sup>22</sup> The facts discussed in this section are summarised from the court's judgment in *K, Y, and W v Secretary for Justice* (n 5 above).



Job applicants were required to give detailed information about their parents and siblings. If one of those relatives suffered from mental illness, the civil service's Medical Examination Board would simply declare the candidate unfit for the job, although the candidate was perfectly healthy and showed no signs of developing the illness. There was no *individual* assessment of the extent to which the applicant was actually at risk of developing the disease and he or she was given no opportunity to refute the assumption that he or she was unfit for the job. Indeed, applicants generally were not even told why they had been rejected, although many of them guessed the reason.

Since the government drafted the Disability Discrimination Ordinance, it was fully aware that section 11 prohibited employment discrimination, not only on the ground of an actual disability, but also on the ground of a disability that is imputed to a person<sup>23</sup> or a disability of one's associate.<sup>24</sup> Thus, one would expect it to have taken a close look at its own hiring practices. Indeed, this did occur to an extent. When the ordinance came into force, the Department of Health convened a Task Force on Mental Health Requirements of Disciplinary Forces, which proposed that the policy regarding first-degree relatives be relaxed. However, it appears that there was almost no follow-up by the government as to whether this recommendation would be implemented by particular departments. In any case, both departments involved in these cases (the Fire Services Department and the Customs and Excise Department) simply applied the old policy, without any amendment in light of the new law.

The three plaintiffs were identified in the judgment only by initials (as they would have suffered terribly had their identities been widely reported). Their cases can be summarised as follows:

- 1 Plaintiff K applied to the Fire Services Department for the post of ambulance man in October 1997 and was rejected in March 1998 because his mother suffered from schizophrenia. He was not told the reason, but learned it by chance from his mother's doctor when he accompanied her on a medical appointment.
- 2 Plaintiff Y applied for the post of fireman in August 1996. His application was drawn out over 11 months because the Fire Services Department had difficulty obtaining a complete medical diagnosis for Y's late father. It eventually rejected Y because it *guessed* that his father's diagnosis was relevant to its hiring policy. Y discovered this only because he asked the doctor who was involved in his medical examination when preparing for a subsequent job application.

<sup>23</sup> See the definition of disability in s 2(1) of the Disability Discrimination Ordinance.

<sup>24</sup> With respect to these three plaintiffs, the court decided that the discrimination was on the ground of the disability of an associate (their respective parents), which is prohibited by s 11(1)(c) when read in conjunction with ss 2(7) and 6(c). See *K, Y, and W v Secretary for Justice* (n 5 above), pp 784–787.

- 3 Plaintiff W applied to the Customs and Excise Department for the post of customs officer and was offered employment, conditional on the results of the medical examination. Meanwhile, he was employed as a trainee on a day-to-day basis. In July 1997 he was told that his performance was fine but he had failed to pass the medical examination and was therefore dismissed. Since W had been asked about his mother's illness at the medical examination and her consent had been obtained to get her medical report, W guessed that his termination was related to his mother's schizophrenia.

All three plaintiffs filed complaints with the EOC, which investigated and found that the complaints had substance. At this stage, the government could have elected to conciliate the complaints in a variety of ways. For example, they could have offered to follow the original recommendation of its Task Force, relax the policy, and reconsider the complainants' applications. However, both government departments refused to conciliate. The applicants therefore applied for legal assistance and the EOC decided to grant them assistance to litigate their claims in the District Court. Even at that point, the government probably could have settled the cases before trial. (Most plaintiffs would prefer a reasonable settlement to a long trial, especially one that will involve detailed discussion of the mental illness of a close relative.)

The government attempted to rely upon section 12 of the Disability Discrimination Ordinance at the trial. This affirmative defence provides an exemption from the duty not to discriminate only if the government could demonstrate that:

- 1 it is a genuine occupational requirement of the job that the applicant *not* have a first-degree relative with the relevant mental illness; or
- 2 that the applicant would be unable to carry out the inherent requirements of the particular employment because of the disability of the applicant's first-degree relative; or
- 3 that the applicant could only carry it out with accommodations that would put an unjustifiable hardship on the employer.

In essence, the government argued that "safety" was an inherent requirement of the job in question and that the disabilities of the plaintiffs' respective *parents* would prevent the *plaintiffs* from performing it. Of course, the first prong of that argument – that safety is a requirement of the three jobs – is easy to justify and the court readily agreed. However, the second prong of the argument, that the mental illness of a parent would prevent a person from performing the job safely, is a much greater leap and requires careful scrutiny.

In assessing the government's defence, the court reviewed numerous Canadian and Australian cases interpreting similarly-worded exemptions and developed a test based upon comparative analysis. The court's judgment is very long and detailed, but its approach can be summarised as follows: a defendant who wishes to rely upon section 12 for what would otherwise be an unlawful act cannot rely upon overly broad assumptions and stereotypes. Rather there must be a true assessment of the actual risk that the plaintiff will develop the disease suffered by his or her parent and the potential consequences if he or she did so. The court must then *compare* the level of risk to the public with and without the discriminatory policy. In other words, it must consider how much safer (if at all) the public really would be if the policy were allowed to continue.

The court then applied these principles to the three plaintiffs. In the case of Y, the court found that the Fire Services Department had failed to prove that Y was at any greater risk than the general population of developing mental illness. The Medical Examination Board's report had noted that it could not determine the illness from which his late father had suffered. However, the government had rejected Y's application on the *assumption* that his father had an illness of a hereditary nature. When further records were obtained (by the EOC), it was discovered that one hospital had indeed discharged Y's father with a diagnosis of paranoid schizophrenia. However, expert testimony convinced the court that the correct diagnosis should have been delusional disorder and the government offered no evidence that Y had any greater risk than the general population of acquiring that disorder. In short, the government failed to prove that the illness of Y's father's was relevant in any way to Y's ability to carry out the requirement of safety. Thus the exemption in section 12(2) did not apply and the discrimination against Y was unlawful.

The analysis of K and W was more complex. Here, there was no dispute that their respective mothers suffered from schizophrenia. However, that factor alone does not imply that K or W has a significant risk of contracting the same disease. Schizophrenia results from the combined effect of many genetic and environmental factors and there is a wide spectrum of risk. As the court noted:

"Whereas at one end of the spectrum, 13% of such children will manifest clinical schizophrenia during their lifetime, a similar proportion (11.5%) at the opposite end of the spectrum are so little at risk that they are *below* the average liability of the general population to develop schizophrenia. K and W, before individual factors are taken into account, may be at either end of the spectrum."<sup>25</sup>

<sup>25</sup> *Ibid.*, p 796.

Unfortunately, the government had made no attempt to assess the plaintiffs' actual risk. Had it done so, it would have found that their estimated risk should be reduced by factors such as their age (they had already lived through part of the onset period without developing the disorder), and the fact that they themselves showed no psychiatric symptoms and no developmental risk markers. Relying on these factors and expert testimony, the court concluded that the risk that K or W would actually develop the disease was approximately four per cent. While this is higher than that of the general population, it is still a very low risk. The court also found that there was no evidence to support the government's assumption that the jobs for which K and W had applied would increase their risk of developing schizophrenia. In fact, the expert witness was adamant that these jobs would not have that effect. Finally, the court considered the potential consequences in the unlikely event that one of the plaintiffs did develop schizophrenia while employed by the government. Contrary to many people's assumptions, the research showed that men suffering from schizophrenia do not present an appreciable source of violence and that it would be extremely rare for a person to commit an act of violence at the first onset of the disease. Normally, a person would show other, much less worrying, symptoms that should be detected well before any incident.

The court thus concluded that the four per cent risk that K and W might develop the disease from which their mothers suffered, when weighed against the possible consequences if that risk occurred, simply did not "present a real risk to safety at either place of employment". The two government departments were wrong to assume that K and W could not perform the respective jobs safely because of their genetic history. Thus, the decisions to exclude them could not be justified under the exemption in section 12 and were unlawful.

The court also noted that the vast majority of people who develop schizophrenia do not have a parent who suffered from the disease. Thus, a more effective way of achieving the stated goal of public safety would be to devote more resources to monitoring all members of the disciplinary forces for signs of mental instability. The court found that the police force (numbering approximately 30,000) has only three psychologists on staff. This is particularly significant because the major incident cited by the government (in which a member of Hong Kong's disciplinary forces committed an act of violence due to mental illness) was the result of a failure to adequately monitor an officer with clear symptoms. In 1997, a police officer shot and killed a suspect under his guard because he suffered a delusion that the suspect was a ghost and about to attack him. The officer had suffered a similar psychotic episode in 1994 and a Medical Examination Board had directed that he should be observed for two years before being allowed access to a gun. The intention was that the members of the Board (psychiatrists) would re-examine him before he was allowed to carry a gun. Unfortunately, this never happened and permission to be armed was

instead given by one police force psychologist and the officer's commanding officer. Although the government sought to rely on this case as evidence of its need for a discriminatory hiring policy, the tragedy obviously was not (and would not be) prevented by the policy at issue. However, it might have been prevented by better monitoring of all officers, particularly those who show signs of mental illness while actually employed in the disciplinary services.

The government was ordered to pay close to HK\$3,000,000 in combined damages. The bulk of the damages (HK\$2,471,820) compensated the three plaintiffs for their lost earnings, housing and other benefits. The government argued that these damages should be reduced because the departments in question had offered to employ them *if* the court held that the discriminatory hiring policy was unlawful. Of course this was not a genuine offer to employ the plaintiffs but rather a fairly insincere litigation tactic and the court correctly refused to reduce the damages. Had the government offered to employ the plaintiffs during conciliation proceedings (or even when litigation was first commenced) the court might well have decided that the plaintiffs had a duty to accept the offers and thereby mitigate the damages. However, the government's "offer" of employment was conditional on the plaintiffs suing and winning – which meant that they had no choice but to establish themselves in other careers (while they awaited the trial) and to endure the stress, delay and publicity of the litigation. Moreover, given that the government continued to maintain (throughout the trial) that the plaintiffs were unfit for the jobs in question, there would be a real danger that they would not be accepted by their colleagues if they joined the disciplinary forces. Indeed, the court's summary of the testimony of the Acting Superintendent of the Customs and Excise Department illustrates this point very well: "If W were employed [the Acting Superintendent testified that he] would not allow him to carry firearms and would not have the confidence to assign him to operational duties."<sup>26</sup> In the face of this kind of prejudice, it would have been unjust to reduce the damages on the basis of the government's belated offers to employ the plaintiffs should they succeed in court.

The other major component of the damage awards was for injury to feelings. The government was ordered to pay HK\$100,000 to each of Y and K, and HK\$150,000 to W (whose injury to feelings had been increased by the fact that he was employed for seven weeks by the Customs and Excise Department and then dismissed in front of his colleagues when his mother's illness was discovered). The court found that the plaintiffs had all suffered significant disappointment and embarrassment and that this had been exacerbated by the government's insistence on defending its policy in court. Even though the court had tried to keep the plaintiffs' identities confidential, it was inevitable that they would

<sup>26</sup> *Ibid.*, p 800.

receive a certain amount of publicity (and at least one of the plaintiffs received unwanted visits from the press at his home). Their families also would have endured significant stress and embarrassment during the litigation. Had the two government departments been willing to conciliate the cases, the plaintiffs could have enjoyed a much more confidential settlement process (which is one of the reasons that the legislature created the EOC and the conciliation model of enforcement).

Finally, the court ordered the government to pay the EOC's litigation costs, approximately HK\$1.6 million. This is a particularly interesting part of the decision because Hong Kong's normal costs rule (that "costs follow the event") does not apply in discrimination cases tried in the District Court. Rather, each party "shall bear its own costs unless the Court orders otherwise on the grounds that (a) the proceedings were brought maliciously or frivolously; or (b) there are special circumstances which warrant an award of costs".<sup>27</sup> The court found that the government's failure to implement the recommendation of its own task force (to reform the hiring policy in light of the Disability Discrimination Ordinance) constituted special circumstances, justifying an order that the government pay the costs of the litigation. The court also noted that the plaintiffs could not have litigated without the EOC's support and that the EOC is not given a separate budget for litigation. Thus, if the government were not ordered to pay the costs of the litigation, the money that the EOC was compelled to spend on it would inevitably curtail other EOC projects.

Of course, from the perspective of the taxpayers it does not matter which party paid the costs, since both the EOC and the government are publicly funded. However, the court's decision to award the EOC its costs is an important comment on the behaviour of these two departments. Their failure to follow (or even carefully study) the recommendations of the task force showed, at best, a careless disregard for their obligations under the law. The subsequent refusal to conciliate the complaints was much worse, since by then the government should have realised that its legal position was weak. In short, the government chose to make it as difficult as possible for these three plaintiffs to assert their rights. Had it not been for the fact that the EOC was willing to fund the litigation, the government's strategy would have worked – since it is highly unlikely that the plaintiffs could have paid HK\$1.6 million of their own money to sue the government. This raises the question of what will happen to other complainants (who may not be so lucky as to receive EOC assistance) if other government departments or private sector respondents follow the same strategy.

<sup>27</sup> District Court Ordinance (Cap 336), s 73C(3).

### Discrimination in Education: The Case of *EOC v Director of Education*

In this case, the Education Department's system of allocating students to secondary schools (known as the Secondary Schools Placement Allocation System (the SSPA)), was found to violate the Sex Discrimination Ordinance. Since the case arose out of the first formal investigation<sup>28</sup> conducted by the EOC, it is a good example of that type of enforcement power and its limitations. The government refused to follow the recommendations arising from the investigation, compelling the EOC to apply for judicial review. The judgment granting judicial review is the first in Hong Kong to interpret the meaning of section 48 of the Sex Discrimination Ordinance (the "special measures" exemption). It is also the first Hong Kong judgment to rely upon the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as a tool for interpreting the Sex Discrimination Ordinance.

In order to appreciate the significance of the case, one first needs to understand the hierarchical nature of Hong Kong's secondary school system.<sup>29</sup> In many countries, students are allocated to schools primarily on the basis of location and schools educate students across the full range of academic abilities. In contrast, Hong Kong's Education Department administers what was described by its own expert witness as a "highly ability-segregated secondary school system."<sup>30</sup> Students completing primary school are assessed and categorised into different ability bands. Their applications to secondary schools are then processed in order of band, ensuring that those who perform well have priority and are assigned to the elite schools. The entire process of assessment and allocation is an extremely tense one for the students and their parents, since the reputation of one's secondary school has enormous consequences for one's future. Many people have criticised the system on the ground that 11 years of age is far too early to make such a life-determining assessment of students' abilities. However, others defend the system, arguing that it is easier to teach students within a narrow range of abilities. In any event, the existence of an ability-segregated system was not the issue in this case. Indeed, the EOC had no power to question it since the law does not prohibit differential treatment on the basis of academic ability. The issue was that students were receiving markedly differential treatment in the allocation system, depending upon their sex.

Until 1978, students were allocated to secondary schools by a single competitive examination. However, the Education Department replaced that

<sup>28</sup> See EOC, *Formal Investigation Report: Secondary School Places Allocation (SSPA) System* (Hong Kong: Equal Opportunities Commission, 1999) (hereinafter the "Formal Investigation Report").

<sup>29</sup> Except where otherwise noted, the facts noted in this section are summarised from the court's judgment in *EOC v Director of Education* (n 6 above).

<sup>30</sup> See Affirmation of Professor Hau Kit Tai, dated 9 Nov 2000, para 1.2, p 4 (filed in opposition to the EOC's application for judicial review in *EOC v Director of Education* (n 6 above)).

examination with a system of internal assessments (known as the IAs), which are administered in three semesters in Primary Five and Six and cover a wide range of subjects. Since there was concern that some primary schools might mark too leniently, the government used a centrally administered Academic Aptitude Test (the AAT) to “scale” the IA scores. The stated purpose of the AAT was not to rank individual students within schools, but rather to compare the relative standards of different primary schools – if the overall performance of a school on the AAT was poor, then the IA scores of its students would be “scaled down” relative to a school that performed better on the AAT. The government then created five “bands” of students, with the top 20 per cent (based upon the scaled SSPA scores) to be placed in “band one”, the second 20 per cent in “band two”, and so on. The band to which a student was assigned was crucial – it basically determined whether she or he would be assigned to a high-ranking school.<sup>31</sup>

For many years, there was no way for the public to monitor the SSPA system. However, in 1998 the Education Department made public, for the first time, the banding of individual students, allowing students to make comparisons. The EOC began to receive complaints from parents who believed that their children had been discriminated against. Under the law, the EOC was obligated to investigate and attempt to conciliate these complaints. However, this would not have been an efficient way of addressing the issue in the long term, because so many students could be affected. Since the government was not willing to change its system on the basis of the complaints alone, the EOC decided to conduct a formal investigation. This is considered appropriate for a case of *systemic* discrimination (meaning that an entire system or policy is alleged to violate the law and could potentially affect a large group of people).

The procedures that the Hong Kong EOC must follow when conducting a formal investigation<sup>32</sup> are based upon British legislation, which has been criticised as being unduly complex and cumbersome.<sup>33</sup> In essence the EOC is empowered to conduct two types of formal investigation: a *belief investigation* (where the EOC believes that an unlawful act has been committed by a named respondent) and a *general investigation*. In this case, the EOC commenced a general investigation, which does not require a named respondent. This meant, however, that the EOC had no power to issue an enforcement

<sup>31</sup> The government also introduced an element of randomisation into the system in the sense that a student's placement *within* a particular “band” was determined by a random allocation of a computer-generated number. However, this did not significantly decrease the hierarchical nature of the system, since the band to which a student was assigned remained the key factor.

<sup>32</sup> See Sex Discrimination Ordinance, ss 70–74.

<sup>33</sup> See, for example, George Appelbey and Evelyn Ellis, “Formal Investigations: the Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies” (1984) *Public Law* 236.



notice<sup>34</sup> against the government or individual schools. In essence, the EOC had to rely upon the government to co-operate with the investigation (which it apparently did) and to implement any recommendations arising from it.

The EOC's investigation was a major undertaking and took almost a year to complete. An Investigation Team was formed and an Expert Panel was also appointed to advise the Investigation Team on technical issues relating to education and assessment. The Investigation Team submitted numerous questions and requests for documents to the Education Department. It also met with officials from the Education Department, held focus groups with professional educators and surveyed parents. In August 1999, the EOC published its Formal Investigation Report, consisting of 36 pages of text and 120 pages of appendices. The EOC concluded that the following three features in the SSPA system violated the Sex Discrimination Ordinance:

- 1 Contrary to what the public had assumed, a student's rank *within* his or her school could be affected by the AAT examination results because male and female students were scaled separately by a "gender curve" obtained from those results. Assume, for example, that student A and student B obtained the same IA score in the same school. If A was a boy and B was a girl, they could nonetheless receive different SSPA scores because they would be scaled by different gender curves.<sup>35</sup>
- 2 Contrary to what the public had assumed, "band one" did not consist of the top 20 per cent of the students in a particular school net. Rather, it contained the top 20 per cent of the girls and the top 20 per cent of the boys. In most school nets, girls performed better than boys and therefore were required to obtain higher SSPA scores than boys in order to be placed in a particular band. As a result, fewer girls than boys were placed in one of their first three choices of school (despite the girls' better performance in the IAs).<sup>36</sup> However, in some school nets (the term used to refer to school districts in Hong Kong), individual boys were adversely affected. In either case the differential treatment constituted less favourable treatment on the ground of sex.<sup>37</sup>
- 3 Co-educational schools were allowed to indicate the number of boys and girls that they wished to admit and the Education Department

<sup>34</sup> Pursuant to s 77 of the Sex Discrimination Ordinance, if the EOC becomes satisfied during the course of a formal investigation that the named person is committing or has committed unlawful acts (specified in s 77(1)), then the EOC may issue a notice requiring that person not to commit the unlawful acts and may also require the person to furnish to the EOC information verifying that the notice has been complied with. Section 78 provides that the person may appeal the enforcement notice to the District Court.

<sup>35</sup> See *Formal Investigation Report* (n 28 above), p 21, paras 17–19.

<sup>36</sup> *Ibid.*, p 25, para 34.

<sup>37</sup> *Ibid.*, pp 21–22, paras 20–23.

would then set a quota for male and female places. As a result, a girl could be rejected from an elite co-educational school because the places for girls in that school were already taken, while a boy with lower scores could be admitted.<sup>38</sup> The EOC discovered that in some schools far more than 50 per cent of the places were allocated to boys, although this meant that girls with higher scores were rejected. For example, one female complainant was rejected from the secondary “feeder school” for her primary school (although male students with lower scores were admitted) because that school admitted a fixed quota of 150 males and only 78 females.<sup>39</sup>

The Education Department did not dispute the facts found by the EOC. It also admitted that the reason that girls’ and boys’ applications were treated differently in the SSPA was that girls would otherwise obtain a majority of the places in the higher-ranked secondary schools, a result which was not considered to be acceptable.<sup>40</sup> It appears that the Education Department had made no effort to study or reform the system when the Bill of Rights Ordinance came into force in 1991 or when the Sex Discrimination Ordinance came into force in 1996. The government also did not disclose the differential treatment of male and female students to the public when it published the *Green Paper on Equal Opportunities Between Men and Women* (in 1993), although education constituted a significant portion of that document and the SSPA was certainly relevant to that consultation exercise.

All three mechanisms identified by the EOC constituted less favourable treatment on the ground of sex and were therefore unlawful – unless the government could show that the SSPA system fit within one of the exemptions provided in the Sex Discrimination Ordinance. The Education Department offered, in the course of the formal investigation, a number of policy-based “justifications” for these practices, including its assumption that boys mature later than girls (although the EOC Expert Panel found no evidence to support this).<sup>41</sup> The Education Department also argued that the SSPA system served the “greater good” by ensuring that a roughly equal number of boys and girls were admitted to elite schools, despite the boys’ lower scores.<sup>42</sup> However, neither of these arguments fit within any exemption in the Sex

<sup>38</sup> *Ibid.*, pp 25–27, paras 34–41.

<sup>39</sup> See affirmation of Anna Wu Hung-yuk, Chairperson of the EOC (dated 14 July 2000, filed in support of the EOC’s application for judicial review), para 7(d).

<sup>40</sup> See *Formal Investigation Report* (n 28 above), p 33, para 23 (recording meeting with Education Department at which representatives from the Department argued that the system was for the greater good because it minimised disadvantages to boys).

<sup>41</sup> *Ibid.*, pp 22–23, paras 25–27 and p 33, para 22. In particular, the EOC noted that the results of the HKAT (which assess students several years later) do not show any narrowing in the gap for the subjects in which girls outperform the boys.

<sup>42</sup> *Ibid.*, p 33, para 23 (recording the EOC’s meeting with the Education Department).

Discrimination Ordinance. The EOC expressly asked the Education Department whether it would seek to rely upon section 48 of the Sex Discrimination Ordinance, which permits special measures (commonly known as “affirmative action”) for members of one sex in certain circumstances. However, the Education Department responded that it did not have “tangible evidence” to support such an argument and that it “was not claiming ‘special measures’ to justify its acts”.<sup>43</sup> This was duly recorded by the EOC in its *Formal Investigation Report*, which recommended that all three discriminatory features of the SSPA be reformed to comply with the law.

The EOC published its *Formal Investigation Report* in August 1999. Needless to say, it attracted substantial publicity and attention from parents, women’s organisations, and also the Legislative Council. Since the Education Department was not claiming that the SSPA fit within any existing exemption in the Sex Discrimination Ordinance, a rumour circulated among women’s organisations that it planned to ask the Legislative Council to add a new exemption for the SSPA. Indeed, in a meeting before legislators, Education Department officials admitted that the SSPA might be in breach of the Sex Discrimination Ordinance and raised the question: “should the law serve society or should education and society become the slave of the law?”<sup>44</sup> However, several legislators reacted quite negatively to this comment and urged the Department to abide by the law and reform the SSPA system.<sup>45</sup> The discussion became somewhat heated and the Director of Education eventually felt compelled to withdraw the suggestion that educational policy need not be constrained by the law.<sup>46</sup> This meeting also seemed to put an end to any rumours that the government would ask the legislature to add a specific exemption to the Sex Discrimination Ordinance for the SSPA.

At this point the strategy of the Education Department seemed to change significantly. It began to publicly *agree* with the EOC on the need to reform the SSPA. For example, in November 1999, the EOC organised a conference<sup>47</sup> to discuss the SSPA system and invited several local and international experts in the legal and educational fields. One of the key issues on the conference programme was whether the SSPA might fall within the “special measures” exemption in section 48. Andrew Byrnes, an expert on anti-discrimination law, presented a paper<sup>48</sup> on this issue. He noted that case law and

<sup>43</sup> *Ibid.*, pp 32–32, para 16.

<sup>44</sup> See Minutes Joint Meeting of the Legislative Council’s Panel on Education and Panel on Home Affairs, 26 Oct 1999 (Ref: CB2/PL/ED+HA), paras 12–13.

<sup>45</sup> *Ibid.*, paras 14, 18, 24, and 28.

<sup>46</sup> *Ibid.*, para 29.

<sup>47</sup> The conference was entitled “Equal Opportunities in Education: Boys and Girls in the 21st Century”, held on 8 Nov 1999, at the Hong Kong Convention and Exhibition Centre.

<sup>48</sup> See Andrew Byrnes, “Affirmative Action, Hong Kong Law, and the SSPA” presented at “Equal Opportunities in Education: Boys and Girls in the 21st Century”, *ibid.*

experience with special measures outside Hong Kong all indicated that such measures should be “restricted to cases where there is evidence of historical discrimination against a particular group in the community concerned”.<sup>49</sup> Of course, this makes perfect sense – the justification for departing from equal treatment is the need to make up for the effects of past discrimination. The concept was developed in the United States (where it is known as “affirmative action”) as a means of redressing the long history of discrimination against African-Americans. Similarly, Article 4 of CEDAW only permits special measures on behalf of *women*, since the purpose of the convention is to redress the historical pattern of discrimination that women have suffered. Given that the government could offer no evidence that boys had been victims of discrimination in Hong Kong’s educational system, Byrnes concluded that “such a use of [section] 48 seems little more than a theoretical possibility and could not be plausibly argued for in the case of the SSPA”.<sup>50</sup>

Interestingly, the government representative did not even attempt to refute the conclusions in Byrnes’ conference paper.<sup>51</sup> Indeed, the government representative cut short any debate on the subject of section 48 by stating orally that the government would actually *reform* the system, as part of its ongoing review of the education system. The Secretary for Education and Manpower made a similar statement in the Legislative Council. In response to a motion calling upon the government to reform the system in time for the 2000 allocation, the Secretary assured legislators that the EOC *Formal Investigation Report* had “underscored an issue that we must address squarely” and that the “government has decided to overhaul the SSPA”.<sup>52</sup> However the Secretary would not explain how the system would be overhauled and asked for patience while the government completed its review.

The EOC and the community then waited for several months, anticipating an announcement of substantial reforms. However, it was not forthcoming. Instead, in April 2000, the government suddenly shifted its position again, announcing that it had obtained new legal advice and would seek to defend the differential treatment of male and female students.<sup>53</sup> The government now declined to implement any of the recommendations arising from the formal investigation. The only changes that it would make in 2001 were to

<sup>49</sup> *Ibid.*, p 6.

<sup>50</sup> *Ibid.*, p 7.

<sup>51</sup> See Mr K. S. Lee, Principal Assistant Secretary for Education and Manpower, “The SSPA System from the Education Department’s Point of View”, conference paper distributed in Chinese at “Equal Opportunities in Education: Boys and Girls in the 21st Century” (n 47 above).

<sup>52</sup> See speech of the Secretary for Education and Manpower (responding to the motion by legislator Christine Loh and the speech of legislator Yeung Yiu-chung) *Hong Kong Hansard*, 11 Nov 1999 (English translation is also available at <http://www.yeungyiuchung.org.hk/edebate/ye036.htm>).

<sup>53</sup> See EOC Press Release of 19 Apr 2000, “Equal Opportunities Commission’s Response to Education Department’s decision on the Secondary School Places Allocation System” (available on the EOC website: <http://ww/eoc.org.hk>).

reduce the number of bands from five to three and to require co-educational schools to aim for a gender-balanced student body. The second reform was intended to stop the practice, uncovered by the EOC, of elite schools accepting more than 50 per cent boys even though girls with better scores had applied and been rejected. (The government knew that it could not possibly defend this aspect of the system.) However, the Education Department insisted that it would continue the practices of gender scaling,<sup>54</sup> separate banding and fixed quotas for boys and girls.

At this point, the EOC had little choice but to take the government to court. From November 1999 to March 2000, the Education Department had acknowledged the need to “overhaul” the SSPA and it was reasonable for the EOC to give it time to decide upon specific reforms. But once the government changed its position and opposed the EOC, a legal battle was inevitable. Had the EOC allowed the government to openly defy the findings of the formal investigation, the EOC would have lost credibility as an independent enforcement agency. The community could have justifiably concluded that the formal investigation had been a waste of money and that the EOC had given the government special treatment. A failure to litigate also would have encouraged other government departments to disregard their obligations under the anti-discrimination ordinances.

Thus, in July 2000, the EOC instituted judicial review proceedings against the Director of Education, seeking a declaration from the court that the three discriminatory elements of the SSPA system were unlawful.<sup>55</sup> Even at this point, the government might have been able to settle the matter out of court, had it been willing to commit to a definite schedule of reforms. However, it opposed the application and the case was heard in May 2001. Both the EOC and the government retained leading barristers from the United Kingdom, as well as numerous expert witnesses from Hong Kong and abroad.

In the judicial review hearing (which lasted seven days) the government asserted two alternative defences. First, the Director of Education argued that differential treatment of male and female students is not discriminatory because it only corrects indirect discrimination against boys that is inherent in the system of IAs. Interestingly, the government did not argue that the

<sup>54</sup> Ironically the government announced that it would abolish the actual AAT examination “to eliminate unnecessary drilling and create more room for learning”. However, despite this rejection of the test itself, the government insisted that it would continue to scale IA results with AAT scores, using the average of each school’s results (by gender) in the past 3 years. Thus the AAT score that was assigned to each student (and would be used to scale down the results of one sex relative to the other, within the same school) became even more remote from the student and more difficult to defend legally.

<sup>55</sup> This was the most efficient way to proceed since individual students could then rely upon the court declaration if they chose to file complaints of discrimination. In contrast, if the EOC had simply decided to assist an individual complainant, the decision in that case might have been limited to those facts and might not have been fully applicable to other cases.

questions themselves were gender-biased (as it had always maintained that all efforts were made to render the IAs gender-neutral). Rather it insisted that the mere fact that girls outperformed boys showed that the IAs must be “flawed”. The government also relied upon its theory that boys develop later than girls, claiming that girls enjoy, by reason of their earlier maturity, a temporary advantage over the boys. According to the government, gender-based scaling of the assessment scores does not create discrimination, but actually removes discrimination by taking away the “artificial” and temporary advantage that girls enjoy on the IAs.

The EOC submitted expert evidence to refute the theory that boys are “late bloomers” and catch up with girls in secondary school.<sup>56</sup> However, the court held that the government’s theory would not, in any event, make gender-based scaling any less discriminatory. The right to equality is an individual right and therefore the Director of Education has a duty to treat each girl and boy equally. The Director has no way of knowing whether a particular girl has outperformed a particular boy because she matured earlier or because she simply studied harder. Thus the Director’s generalised assumptions about male and female development cannot render the decision to penalise that particular girl any less discriminatory. The court summarised the Director’s error as follows:

“Is it to be said that all of those girls [who had their scores lowered] are more mature than the boys and therefore the adverse scaling did no more than make them equal with the boys? Has biology in every instance dictated their better IA scores? Or may it not be the case that a number of those girls, enjoying no developmental advantage of any kind over the boys, have simply applied themselves more diligently to their school work and ensured they were fully prepared for their assessments? If those girls are treated unequally, it does not spring from a personal advantage which must be negated, it is due solely to the fact that they are girls. But for that fact they would have enjoyed a better choice of secondary school.”<sup>57</sup>

The court thus rejected the government’s entire contention that unequal treatment of individual girls could be legally justified by a generalised theory (even a widely believed one) about male and female development. As the court concluded, the force of the Sex Discrimination Ordinance “is not to be deflected by broad assumptions, even if statistically well-founded, that categorise women according to stereotypes”.<sup>58</sup> This holding could not have come as a

<sup>56</sup> For example, the EOC’s expert witness performed an analysis of public examination results that showed that Hong Kong girls continue to out-perform boys throughout secondary school. See EOC *v* Director of Education (n 6 above), para 132.

<sup>57</sup> *Ibid.*, para 94.

<sup>58</sup> *Ibid.*, para 91.

surprise to the government, as it is entirely consistent with jurisprudence from countries with similar sex discrimination laws. For example, in Northern Ireland, a directive that 50 per cent of the non-fee-paying places must be awarded to boys was held unlawful because a number of boys had been granted places while girls with higher test scores had been denied places. The Northern Ireland Education Department's argument (that it believed boys had equal potential with girls despite the boys' lower test scores) did not remedy the fact that individual girls had been treated less favourably on the ground of sex.<sup>59</sup>

The court also held that the Sex Discrimination Ordinance should be interpreted (where reasonably capable of bearing such a meaning) so as to carry out Hong Kong's obligations under CEDAW,<sup>60</sup> including the obligation (in Article 10) to eliminate stereotyped concepts of men and women. This is an important precedent as it is the first Hong Kong judgment to rely upon CEDAW as an aid to interpreting the Ordinance. Although the Ordinance does not expressly refer to CEDAW, it is a general rule of statutory construction that the legislature is presumed to intend to conform to public international law.<sup>61</sup> If "one of the meanings which can be ascribed to the legislation is consonant with the treaty obligation and another or others are not, the meaning which is consonant is to be preferred."<sup>62</sup> Moreover, when the Hong Kong government first proposed the Sex Discrimination Bill it stated that it was doing so in order to comply with CEDAW (which was about to be extended to Hong Kong).<sup>63</sup> The government has also frequently cited the Sex Discrimination Ordinance as its principal means of implementing CEDAW in Hong Kong.<sup>64</sup> Thus there is ample support for the court's holding, which hopefully will be followed by other courts in sex discrimination cases.

<sup>59</sup> *In re the Equal Opportunities Commission and Others (No 1)* [1998] NI 223. The court referred to this case, as well as *City of Los Angeles, Department of Water and Power v Manhart* (1978) 98 SCt 1370, in which the US Supreme Court held unlawful a policy of charging women a higher pension premium than men. Although statistics showed that women tended to live longer than men, there was no evidence to show that individual women in the department would live longer than their individual male comparators.

<sup>60</sup> *EOC v Director of Education* (n 6 above), paras 90 and 109.

<sup>61</sup> *See R v Sin Yau-ming* (1991) 1 HKPLR 88, at 105. *See also Garland v British Rail Engineering Ltd (No 2)* [1983] 2 SC 751 (HL) (which was cited by the court in *EOC v Director of Education* (n 6 above) at para 90).

<sup>62</sup> *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, per Diplock LJ, at 143.

<sup>63</sup> In 1994 the government informed the Legislative Council that "we will need to introduce some form of legislation prohibiting discrimination, which would include equal pay legislation, before CEDAW is formally extended to Hong Kong". *See Home Affairs Branch, Legislative Council Brief: Equal Opportunities for Women and Men*, June 1994, para 10 (reprinted as Doc No 298, p 336, in *Hong Kong Equal Opportunity Law — Legislative History Archive 1993-1997*) (Hong Kong: Centre for Comparative and Public Law, University of Hong Kong, 1999). Similarly, a government press release of 3 June 1994 stated that the "institution of sex discrimination legislation is a means to implement the provisions of CEDAW". *Ibid.*, Doc No 26, pp 333-335.

<sup>64</sup> *See, for example, the Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women* (Hong Kong: Hong Kong Government Printing Department, 1998).

The court then considered the Education Department's second defence, which was that the SSPA was discriminatory but fell within the exemption provided in section 48. Sub-section 48(a) (on which the Director of Education principally relied) provides that an act shall not be unlawful if it is *reasonably* intended to "ensure that persons of a particular sex ... have equal opportunities with other persons in circumstances in relation to which a provision is made by this Ordinance".<sup>65</sup> Sub-sections 48(b) and (c) (on which the Director of Education indicated it might also rely)<sup>66</sup> provide, in relevant parts, that an act shall not be unlawful if it is reasonably intended to afford persons of a particular sex access to services, facilities, opportunities grants, benefits or programmes "to meet their *special needs* in relation to education ...".<sup>67</sup>

Women's organisations must have found the government's attempt to rely upon this defence as the height of irony, given that the government has never suggested affirmative action on behalf of those who have actually been the victims of discrimination in our society. For example, government-funded universities in Hong Kong have never lowered standards for female applicants so as to redress the fact that women were originally banned from the universities altogether and traditionally discouraged from entering certain fields. To the extent that Hong Kong girls have entered what were traditionally viewed as "male" areas of study (such as law, business, medicine, and science), they have been required to compete on equal terms with male students, with no special treatment granted. This may explain why the Education Department initially maintained (in the course of the formal investigation and in public statements afterward) that it did not view the SSPA as a form of "affirmative action" for boys and therefore would not rely upon the exemption for special measures provided in section 48. The government may have realised that to publicly rely upon section 48 would leave it open to attack and give women's organisations a reason to demand affirmative action on behalf of women in the many fields in which they are still underrepresented (such as engineering). Of course, if that was the government's thinking, then it was arguably disingenuous of it to later rely upon section 48 when it was finally compelled to defend the SSPA in court.

<sup>65</sup> Emphasis added.

<sup>66</sup> *EOC v Director of Education* (n 6 above), para 108, where the court noted that "the Director relies essentially on subsection (a) but accepts that there may, in part, also be some reliance on (b) and (c)".

<sup>67</sup> Emphasis added. Interestingly, s 48 did not appear in the government's Sex Discrimination Bill when it was first introduced into the Legislative Council (and so the government clearly did not draft it with the intention of covering the SSPA). The language that now appears in s 48 was borrowed from clause 37 of Anna Wu's Equal Opportunities Bill (which is based upon Australian law) after she proposed that it be added as an amendment to the government's bill. See Equal Opportunities Bill 1994 (n 14 above). Of course, Wu also was not thinking of the SSPA when she proposed the language in s 48, since the gender-based mechanisms were not then known outside the Education Department.



However, in the judicial review hearing, the court was not concerned with the political acceptability of the government's decision to give boys an advantage in the SSPA system or whether such a decision was consistent with the government's insistence on meritocracy when it comes to proposals that might benefit female students. The court's only concern was whether the Director of Education could establish that the discriminatory measures in the SSPA fell within the legal requirements of the exemption provided in section 48. Since section 48 is an affirmative defence, the burden of proof was on the government. The court decided that the Director failed to meet this burden, on several, independent grounds.

The court first examined CEDAW (having already held that the Sex Discrimination Ordinance should be interpreted consistently with CEDAW as the Ordinance was enacted to implement CEDAW in Hong Kong). The court could have rejected the government's defence on the ground that CEDAW does not permit special measures for boys, but rather only for girls or women.<sup>68</sup> However, the court relied upon another factor, which is that the SSPA system appeared to be intended to establish permanent special treatment for boys. Since affirmative action is normally only considered justifiable when it is used to overcome the effects of past discrimination, the intention should be to return to equal treatment once an "equal playing field" has been established. Although the words "temporary" do not appear in section 48 itself, the court held that this meaning can be inferred by reference to CEDAW. Article 4 of CEDAW provides that:

"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

Moreover, the court found that the alternative interpretation of section 48 would defeat the purpose of the legislation, noting that "if settled regimes that are discriminatory are allowed under section 48, that will result in an indefinite maintenance of unequal treatment and will thereby, in all practical terms, undermine the central purpose of the legislation".<sup>69</sup> On this basis alone, the Director's attempt to rely upon the exemption would have to fail – because the differential treatment of male and female students had been in place for 20 years and the Director intended to maintain it for the indefinite future.

<sup>68</sup> See Byrnes (n 48 above).

<sup>69</sup> *EOC v Director of Education* (n 6 above), para 110.

However, the court also held that even if no reference to CEDAW were made, the section 48 defence would still fail. This is because it is a general principle that a legislative provision purporting to restrict a fundamental right must be narrowly interpreted and the burden is upon the person relying upon that provision to justify its use. Thus, in the absence of a specific legislative exemption for the SSPA, the government must give “convincing and weighty reasons” to demonstrate that the restriction is necessary; that it is rational (in the sense that it is not arbitrary, unfair or based upon irrational considerations); and that it is a proportionate response to the problem.<sup>70</sup>

With respect to the SSPA, the court held that the government failed to meet the second and third requirements. The government’s main rationale for unequal treatment of boys and girls (the notion that boys were “late bloomers”) was seriously undermined by the results of other public examinations, which showed that Hong Kong boys do not, in fact, “catch up” with girls by the end of secondary school.<sup>71</sup> Moreover, since girls generally perform better than boys in the AAT up to the 70th percentile, the practice of scaling IA results with gender curves derived from historic AAT results would normally benefit only the top 30 per cent of the boys (what Lord Lester referred to in his submissions on behalf of the EOC as the “male elite”).<sup>72</sup> Thus the boys who were least likely to need assistance were the ones most likely to benefit from the government’s so-called special measures. The government could not have been surprised when the court held that such a departure from equal treatment was an “entirely disproportionate” response.<sup>73</sup> The court also rejected the government’s policy arguments as to why it must maintain fixed quotas of girls and boys in co-educational schools, noting that “nothing has been placed before me to convince me that [gender quotas] are required in order to ensure that co-education, as a system, works to best effect”.<sup>74</sup> (The court might have also added that it was not until after the formal investigation that the Education Department even began to insist upon a rough gender balance. Prior to that time, the Department was quite willing to allow elite schools to apply gender quotas that resulted in significantly more boys than girls, despite the fact that girls with higher scores than boys were being rejected.)

The court concluded by emphasising that it was a matter of “considerable disquiet” that none of three gender-based mechanisms in the SSPA were actually intended to assist boys to *overcome* whatever caused them to

<sup>70</sup> *Ibid.*, para 116.

<sup>71</sup> *Ibid.*, para 132.

<sup>72</sup> *Ibid.*, para 129. The majority of boys would have had their scores lowered through the scaling process since the boy’s historic AAT gender curve is normally lower than the girls’ curve from the 0–70th percentile. Thus the majority of boys become what the court referred to as “casualties of ‘friendly fire’”. *Ibid.*, para 136.

<sup>73</sup> *Ibid.*, para 129.

<sup>74</sup> *Ibid.*, para 135.

perform at a lower standard than girls. Rather, the government had simply developed allocation mechanisms to “manufacture an advantage in favour of one gender at the intended expense of the other”.<sup>75</sup> Ironically, this distinction had been made long ago by the EOC, which had never questioned the right of the government to institute special measures designed to assist boys (or girls) with their special learning needs. The EOC also would not have objected if the government had chosen to abandon the hierarchical system of secondary schools altogether, in favour of an allocation system based upon the neighbourhood principle. What was objectionable was the fact that the government purported to operate a system based upon academic merit but then tried to cover up the under-performance of boys by giving certain boys preferential treatment within that system.

The court thus issued a declaration (on 22 June 2001) that all three gender-based mechanisms in the SSPA violated the Sex Discrimination Ordinance and were unlawful. The only thing that the government gained by this very expensive litigation was time – since it took one year to prepare for the hearing and the EOC will now have to allow it some additional time to implement the judgment. However, the court made it clear that it would be willing to issue an order quashing the SSPA if the EOC requested it and reforms were not promptly made. Indeed, the court noted that the “evidence shows that there are remedial measures that can be taken. I confess to finding it puzzling, that in light of the provisions of the Ordinance, the Director has not earlier taken more proactive steps to implement such measures.”<sup>76</sup>

The government continued to use the SSPA (including the three discriminatory mechanisms) for the allocation process in the summer of 2001. The Education Department took the position that it could not remove the unlawful elements immediately because parents had already indicated their 30 preferred schools (in order of preference) and might have made different choices had they known that the system would be applied without the gender-based adjustments.<sup>77</sup> However, using an unlawful system for one more year created its own problems, as the EOC received an entire new batch of complaints from students alleging discrimination. This is a major concern because the EOC's Gender Division had to investigate a far larger number of complaints under the Sex Discrimination Ordinance in 2001 (1165) than in 2000 (only 323).<sup>78</sup> The complaints filed regarding the SSPA are the single greatest cause of that increase. (In contrast, complaints filed under the Disability Discrimination Ordinance increased by much less, from 339 in 2001 to 416 in 2002.) Of course, in many

<sup>75</sup> *Ibid.*, para 136.

<sup>76</sup> *Ibid.*, para 139.

<sup>77</sup> See government press release of 8 July 2001, “Relief measures for the SSPA system announced” (available at <http://www.info.gov.hk/gia/general/200107/08/07081.htm>).

<sup>78</sup> See statistics on complaints available at <http://www.eoc.hk>.

cases, the EOC's investigation revealed that the complaint lacked substance because the individual student was not actually disadvantaged by the SSPA. However, the parents (who, in Hong Kong, take their children's education very seriously) had filed the complaint because they did not *know* whether their child had been affected and could not be certain until the EOC obtained the information regarding their child from the government and analysed it for them. In fact, a significant number of parents of boys filed complaints, on the offchance that they might have been disadvantaged, although this was rarely the case.<sup>79</sup> Thus, the waste of resources caused by the government's refusal to voluntarily reform the SSPA system continues to mount, even after the court's decision.

Of course, those children who were disadvantaged by the use of the SSPA system in 2001 will have the benefit of the court's declaration if they litigate. For that reason, the government did attempt to redress their complaints by finding them places in more desirable schools than the ones to which they were initially allocated.<sup>80</sup> These remedial measures caused a certain degree of chaos, since students were changing schools and principals were required to add classes. It is inevitable that some of the anger and frustration felt by principals and the general public will be directed at the EOC. This is unfortunate since the blame for the last-minute panic clearly rests with the government, which was given every opportunity to reform the unlawful system at a more leisurely pace. It should also be noted that the movement of certain students in 2001 does not even begin to address the injuries suffered by students in earlier years. Indeed, at this rate, the initial complainants (who filed complaints with the EOC in 1998) will be more than halfway through secondary school by the time the Education Department gets around to complying with the court's judgment.

The Education Department will certainly have to implement a lawful system in 2002. If it simply removes the discriminatory elements from the system then a larger proportion of the places in the elite secondary schools will be allocated to girls. However, one of the reasons that the Department did not simply do this in the summer of 2001 is that it hopes to introduce other changes designed to soften that result. For example, it hopes to change the nature of the IAs in ways that will improve the boys' results.<sup>81</sup> There is some cause for concern that the Education Department may be so determined to raise boys' results that it will give undue weight to certain subjects or adopt methods of assessment that are not considered educationally sound. In an effort to prevent this, the EOC recently organised a conference on gender differences in learning,

<sup>79</sup> Information provided by the Gender Division of the EOC.

<sup>80</sup> *Ibid.*

<sup>81</sup> The Director of Education stated that before removing the unlawful gender-specific elements of the SSPA the Education Department "will need to adjust the format and content of internal assessments so that students' performance in different domains could be assessed more comprehensively". *Ibid.*

which will hopefully inject some real research into the process.<sup>82</sup> In the meantime, the government has also recently increased the number of “discretionary places” that schools may fill through their own admissions process and it has directed schools not to use written tests, but rather to interview students for these places. There is, of course, a danger that schools may intentionally skew the interview process to the advantage of boys (to counter-act the impact of the court’s judgment). It would be easy to do this, since the interviewers will know the gender of the interviewee. Moreover, the motivation to do this clearly exists in at least some quarters, as evidenced by the fact that certain co-educational schools were setting gender quotas of more than 50 per cent boys, although this meant rejecting girls with better scores. Those schools were willing to lower their admission standards in order to maintain a predominantly male student body. Clearly, the EOC will have to keep a close watch on any new mechanisms adopted by the Education Department and individual schools.

### Conclusion and Recommendations

Fortunately, not all of the EOC’s interactions with the government are this combative. The EOC also advises on necessary amendments to the anti-discrimination laws and it appears that the government has been reasonably receptive to EOC suggestions. The EOC is also currently conducting a study of the extent to which “equal pay for work of equal value” is practised in public sector jobs and the government has co-operated, thus far, by providing salary data and other information.<sup>83</sup> The Immigration Department has also recently sent officers to an EOC training course on how to interact with people with mental disabilities (a response to the tragedy that occurred when Hong Kong immigration officers mistakenly sent a 15 year-old autistic boy across the Hong Kong-mainland China border on his own, where he disappeared).<sup>84</sup> No doubt EOC officers interact with many other government departments on a regular basis (for example in the course of investigating complaints) without difficulties.

<sup>82</sup> See EOC Press Release of 30 Nov 2001, “EOC Organises Education Conference on Gender Differences in Learning”. See also the proceedings of the conference, “Boys and Girls in the 21st Century: Gender Differences in Learning” (Hong Kong: Equal Opportunities Commission, 30 Nov 2001).

<sup>83</sup> For a discussion of some of the issues raised by the concept of equal pay for work of equal value, see the various chapters in *Proceedings – Equal Pay for Work of Equal Value: A Conference Organized by the Equal Opportunities Commission* (Hong Kong: EOC, 2000).

<sup>84</sup> The young man, Yu Man Hon, had become separated from his mother in Hong Kong and appeared on his own at the border between Hong Kong and mainland China. He could not answer questions, due to his disability. Unfortunately, rather than contact police (the boy’s mother was searching for him and filed a report with police) the immigration officers simply sent the young man to the mainland as though he were an illegal immigrant and he disappeared. Despite an extensive search he has never been found. In addition to providing the training course, the EOC has also produced a *Study Report on the Procedures and Training Needs of the Immigration Department in Handling Persons with Disabilities* (Hong Kong EOC, 2001).

However, the cases discussed in this article reveal that there is a fundamental problem with the government's understanding of its obligation to treat citizens equally. Recently there has been much discussion of accountability of government in Hong Kong. However, as Anna Wu (who is now the Chairperson of the EOC) has frequently pointed out, equal treatment is "an intrinsic aspect of the rule of law" and compliance with the law is "a salient feature of accountability".<sup>85</sup> Rather than wasting public money fighting against the EOC, the government should assign its lawyers to conduct a comprehensive and objective review of government policies, perhaps with assistance from the EOC. Such a review should have been completed in 1991 when the Bill of Rights was enacted and again in 1995 when the first anti-discrimination ordinances were enacted. However, it is clear that unlawful policies have been missed and allowed to continue in operation. Individual departments should not be relied upon to complete this review themselves, as most civil servants lack expertise in the field. They may also tend to rationalise long-standing practices that are no longer lawful. Granted, Hong Kong's civil servants have dealt with enormous change in the past decade and they may be weary of demands for reforms. However, as Justice Hartman took care to point out, the right to equal treatment is a fundamental right, which has "high constitutional importance".<sup>86</sup> Thus, government departments cannot be lax in their adherence to the law. Institutions in the private sector regularly seek legal advice and review their practices when new legislation comes into force. Surely we can expect at least that much from the government that actually drafted and introduced the anti-discrimination laws.

The Executive Council also needs to set a firm and consistent policy regarding the government's response to EOC enforcement actions. The Executive Council is well aware that the EOC rarely goes to court and would not litigate against a government department unless it had a strong case. Yet three major departments (Education, Fire Services, and Customs and Excise) have been permitted to resist the EOC and have conclusively lost in court. Moreover, it appears that the Police Force is still trying to defend the discriminatory hiring policy, even after the District Court held it to be unlawful.<sup>87</sup> This continued resistance to the EOC inevitably undermines EOC public education programmes. The public can hardly be blamed for refusing to abandon old prejudices if government officials are unwilling to do so.

<sup>85</sup> Anna Wu, Chairperson of the EOC, "Equal Opportunities Issues in Policy Making: Creating a Level Playing Field", speech delivered on 14 Feb 2001, available on the EOC website.

<sup>86</sup> *EOC v Director of Education* (n 6 above), para 86.

<sup>87</sup> A writ was filed, in February 2000, alleging that the plaintiff was denied a position as a police inspector because of his sibling's history of mental illness. See *Equal Opportunities Commission Annual Report 1999/2000*, Appendix 6, p 75. It is surprising that the decision in *K, Y, and W v Secretary for Justice* did not lead the Police Force to immediately settle the case. As of March 2002, there had been no settlement and the EOC is expecting the case to go to trial.

It also appears that the EOC may need stronger enforcement powers with respect to the government. For example, the procedures governing formal investigations could be simplified, so as to allow the EOC to issue an enforcement notice in a general investigation of a government department. It may also be that government departments (and respondents generally) need to be given more incentive to conciliate genuine complaints. Unlike the cases discussed here, the vast majority of complaints filed with the EOC never receive legal assistance. Instead, the complainant conciliates with the respondent in an informal process, with no legal representation and no trained advocate (since the EOC officer is not permitted to take sides in the conciliation conference). Community groups have often complained that this emphasis on conciliation may perpetuate the power imbalance that the legislation seeks to redress.<sup>88</sup> They also complain that respondents *know* that they are unlikely to be sued and thus have little incentive to reach an agreement. Data from EOC case files does reveal that a substantial percentage of respondents either refuse to conciliate or offer very small remedies (such as an oral apology or a token payment). Of course, in certain cases, the respondent may justifiably believe that the complaint is weak and that it does not warrant a substantial offer. However, the recent behaviour of the Hong Kong government reveals that even respondents facing very strong cases can be painfully stubborn. In such situations, an enforcement regime that makes it too difficult to litigate may inadvertently allow respondents to escape responsibility. It may be necessary to increase the EOC's budget (so that it can litigate more cases) or to find other sources of legal assistance (for cases that have merit but are unlikely to set a precedent and therefore might not receive legal assistance from the EOC itself). In the longer term, consideration should also be given to creating a specialist equal opportunities tribunal. Although the decisions of a specialist tribunal would not have the same precedential value of the two judgments discussed here, it could provide an inexpensive forum for those complainants who do not receive adequate offers through conciliation and may genuinely want their cases to come to a hearing. Moreover, the knowledge that the complainant has that forum available might give respondents an added incentive to conciliate the complaint in the first place.

Finally, the government should abandon its long-standing opposition to race discrimination legislation. There is an active campaign for such

<sup>88</sup> See, for example, *The Frontier's Position Paper on the Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women* (February 1999); and the *Submission to the CEDAW Committee on The Initial Report on Hong Kong Under the Convention on the Elimination of All Forms of Discrimination Against Women by Non-Governmental Organizations* (endorsed by 10 women's and human rights organisations). (Both reports are available on the "CEDAW in Hong Kong" homepage, maintained by the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong (<http://www.hku.hk/cppl/cedawweb>).

legislation<sup>89</sup> and individual legislators have introduced bills that would apply to both the public and private sectors. However, the government has successfully blocked every bill and has failed to introduce legislation of its own. Hong Kong has been strongly criticised for this by international human rights monitoring bodies, as the failure to introduce domestic legislation breaches its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (which has applied to Hong Kong since 1969). In its defence, the government likes to point out that race discrimination is already prohibited in the public sector. However, since the EOC has no jurisdiction over complaints of race discrimination, it is extremely difficult for victims to enforce their rights. Thus, while we wait for a race discrimination bill, the government should introduce legislation allowing the EOC to enforce the equality provisions of the Bill of Rights and the Basic Law.<sup>90</sup> As the two cases discussed here demonstrate, in the absence of EOC assistance (or some other form of legal aid) the right to equality carries far too little weight in Hong Kong's public sector.

<sup>89</sup> Interestingly, even the business community has now expressed support for race discrimination legislation, making the government one of the last opponents. See Ravina Shamdasani and Quinton Chan, "Strong backing for race bias law", *South China Morning Post*, 5 Nov 2001.

<sup>90</sup> This was, in fact, the intention of Anna Wu's Human Rights and Equal Opportunities Commission Bill, (see n 16 above and accompanying text).