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A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong's Disability Law

Carole J. Petersen
Faculty of Law, University of Hong Kong
E-mail: carole@hku.hk

Abstract: Although Hong Kong's Disability Discrimination Ordinance has been in force since 1996, only a handful of cases have been litigated because the enforcement model encourages confidential conciliation of complaints. This article reports on the first empirical study of Hong Kong's enforcement process, drawing upon a random sample of 451 complaint files and interviews with EOC officers, complainants, representatives of disability rights organizations and respondents. The study reveals weaknesses in the enforcement model and also calls into question the assumption that Chinese complainants will prefer a model based upon conciliation.

Introduction

Hong Kong's Disability Discrimination Ordinance (DDO) has been described as "one of the most far-reaching" laws for disabled persons in Asia (Degener, 2000, p. 185) and as an example of good practice in the region (UNESCAP, 2001, pp. 22-7). The disabled community has demonstrated a willingness to use the law, having filed more than 2400 complaints with the Hong Kong Equal Opportunities Commission (EOC). Yet it is difficult to assess the impact, since most complaints are dealt with through a confidential process of investigation and conciliation. Although the law has been in force for close to a decade, only a handful of significant cases have been litigated. A dedicated study is therefore necessary to evaluate the process of conciliation and the remedies that are obtained.

The second part of this article introduces the substantive provisions of the DDO and the enforcement model. The third part analyzes data obtained from a random sample of 254 disability-related complaints,1 which show that complaints alleging disability discrimination are less likely to be conciliated and less likely to lead to a substantial remedy than complaints alleging gender discrimination. The

fourth part summarizes interviews with EOC staff and individuals who have participated in the investigation and conciliation processes. The interview results challenge the common assumption that Hong Kong Chinese people have a cultural preference for conciliation. Many interviewees expressed frustration at the barriers to obtaining a public hearing and the limited systemic impact of the DDO. Moreover, the processes of investigation and conciliation were described by our interviewees as far more adversarial than was envisioned when the law was enacted. This is problematic since complainants rarely have legal representation and receive little advice from EOC officers, who follow a strict policy of neutrality. The article concludes by briefly comparing the findings to other jurisdictions (the United States, United Kingdom, and Australia) and by considering the implications for law reform.

Hong Kong's Disability Discrimination Ordinance and Enforcement Model

The colonial government originally opposed anti-discrimination legislation, arguing that it would conflict with Hong Kong's laissez-faire economic policies. The government modified this position during the transition period leading to reunification with China, a time of significant law reform and increased awareness of human rights (Petersen, 1996). In 1991, the Hong Kong Bill of Rights Ordinance was enacted, establishing a general right to equal treatment in the public sector (Byrnes, 1992). In 1994, an independent legislator introduced the Equal Opportunities Bill (EOB), which sought to prohibit discrimination in the public and private sectors on a wide range of grounds, including disability, sex, race, age, and sexuality (Petersen, 1996). To defeat the EOB, the government reluctantly introduced two narrower compromise bills, the Sex Discrimination Bill and the Disability Discrimination Bill. The DDO that was enacted is a mixture of the government's bill and the EOB.

The DDO came into force in late 1996 and prohibits discrimination, harassment, and vilification on the ground of disability. Disability is defined in the statute as including:

"total or partial loss of the person's bodily or mental functions;
total or partial loss of a part of the person's body;
the presence of organisms capable of causing disease or illness;
the malfunction, malformation or disfigurement of a part of the person's body;
a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior" (DDO, 1995, s 2).

This definition is based on the Australian Disability Discrimination Act 1992, which does not require evidence of a substantial or long-term adverse effect. The DDO further prohibits discrimination on the ground of a past disability, a disability that may exist in future, an imputed disability, or a disability of an associate (DDO, 1995, s. 2 and s. 6(c)). As commentators on the Australian law have noted, this approach avoids debates on whether the plaintiff has a "disability" and concentrates upon the alleged discrimination (Basser and Jones, 2002).

Hong Kong's DDO applies to a wide range of fields, including employment, education, housing, government programs, and the provision of goods and services. The DDO makes employers vicariously liable for discriminatory acts by employees in the course of employment, unless the employer took steps to prevent the unlawful act. Employers should therefore have an incentive to adopt policies prohibiting discrimination and promoting equal opportunities (Petersen, 1999).

The DDO provides an exemption where an employer can demonstrate that the absence of disability is a genuine occupational requirement, where the person is unable to carry out the inherent requirements of the job, or where the person could only perform the job with accommodations that place an unjustifiable hardship on the employer. Similar "unjustifiable hardship" defenses are available to providers of education, premises, goods and services. The burden of proof is on the employer and the court will likely take into account its financial resources. Unfortunately, there is no local jurisprudence exploring what constitutes a reasonable accommodation or an unjustifiable hardship. However, the relevant Code of Practice on Employment lists modifications to work premises, changes to job design, and the provision or modification of equipment as examples of reasonable accommodations (DDO Code of Practice on Employment, 1996).

The DDO's remedies are based upon Australian law. The court can award monetary compensation, punitive damages, an order that a person be employed or re-employed, or an order that the respondent "shall perform any reasonable act or course of conduct to redress any loss or damage." In one of the few litigated cases, a taxi driver was ordered to pay damages and apologize to a wheelchair user (*Ma Bik Yung v Ko Chuen*, DCt, 1999). The Court of Appeal partially granted the appeal, deciding that the District Court had no power to order an apology under the DDO (*Ma Bik Yung v Ko Chuen*, CA, 2000; *see* Petersen, 2000 for a critique). The Court of Final Appeal disagreed and held that an apology can be ordered, although only in rare cases due to the interference with freedom of expression. Although damages were not appealed, the Court of Final Appeal criticized the small amount of damages (HK $10,000, about US

$1,250), noting the importance of providing meaningful remedies for disability discrimination and harassment (*Ma Bik Yung v Ko Chuen*, CFA, 2000).

The vast majority of complaints, however, never lead to a judgment or court-ordered remedy. The enforcement model proposed by the government was based on the assumption that most complaints would be resolved through a confidential process of investigation and conciliation. This appealed to the business community and to those commentators who believed that a soft approach to enforcement would suit Hong Kong's Confucian heritage and free-market economic policies (Ng, 1994, pp. 124-5). Some community groups were wary of mandatory conciliation, fearing that it would limit the social impact of the law. The result was a compromise model, one that allows but discourages litigation. Although a person can file a complaint directly in the District Court, this rarely occurs because Hong Kong lawyers are expensive and not permitted to work on a contingency fee basis. Almost all complainants turn first to the EOC. The EOC offers free investigation services but has a statutory obligation to attempt to conciliate a complaint before granting assistance to litigate.

The term "conciliation" is not defined in the DDO and is used differently across jurisdictions and contexts — sometimes to refer to the general concept of facilitated negotiation, sometimes interchangeably with the term "mediation", and sometimes to refer to a process in which the third party is exercising an enforcement power granted by statute (Astor and Chinkin, 2002, pp. 85-86). While conciliation may be viewed as more interventionist than mediation in some contexts, the opposite is true elsewhere (Sternlight, 2004, p. 1406, n. 7). In Australia, conciliators take an active approach in order to address power disparities in discrimination complaints (Australian HREOC, 2004). One might expect the Hong Kong EOC to follow this example, because the statutory provisions are similar and the EOC has borrowed certain of its operating procedures from Australian enforcement bodies. However, as discussed later in this article, it appears that Hong Kong's EOC interprets the duty of neutrality more strictly.

If the Hong Kong EOC grants legal assistance, the complaint is transferred to the Legal Services Division and the duty of neutrality disappears. The complainant does not know, however, whether she will receive legal assistance when she enters a conciliation conference because she cannot apply for assistance until her complaint is deemed "unsuccessfully conciliated". Complainants are reminded that there is no guarantee that they will receive legal assistance and the EOC's Annual Reports confirm that less than half of these applications are successful (Hong Kong EOC, 2003, p. 31; Hong Kong EOC, 2005, p. 81). Thus complainants are encouraged to accept offers during conciliation, since they cannot afford private representation and will not want to leave the process with

nothing. The respondent, however, has little motivation to cooperate, knowing that litigation is rare and that there will be further opportunities to settle in the unlikely event that the complainant obtains EOC legal assistance.

The impact of this system can be seen from the tiny number of complaints that lead to any form of EOC-supported litigation. Out of 451 complaints in our sample (filed under three different anti-discrimination ordinances), 71 (16%) were ultimately deemed "unsuccessfully conciliated." Although 32 (45%) of these complainants then applied for legal assistance, the EOC offered to fully represent the complainant in only 17% (12) cases. (It denied the application in 15 cases and gave only preliminary legal advice in five cases.) Three-quarters of the cases (9 of 12) then settled before legal action was taken and one complainant withdrew. By the end of our study, the EOC was preparing for court proceedings in only two of the 451 cases; these were also expected to settle.

Data from the Random Sample of Complaints

We extracted data from a random sample of 451 files, representing all complaints concluded by the EOC in a nine-month period. While this article focuses on the 254 disability-related complaints, it draws comparisons to the other 197 complaints, which were filed under the Sex Discrimination Ordinance (SDO) or the Family Status Discrimination Ordinance (FSDO).

The 451 files included 305 complainants.2 The majority of complainants were employed when the alleged discrimination occurred, with most working as clerical or sales and services-related workers, or as factory and manual workers. By the time they filed their complaints, however, almost half were unemployed (49.6% of DDO complainants and 46.3% of SDO/FSDO complainants). Information on income was available for only 132 of the 305 complainants. Of these, the medium monthly income was HK $10,000 (US $1,250) for DDO complainants and HK $13,200 (US $1,650) for SDO/FSDO complainants.

Most complainants (83.6%) represented themselves at the EOC, with an additional 9.5% being represented by a spouse or parent. In the remaining cases (about 7%), an NGO, trade union, or (very rarely) a lawyer served as the complainant's representative. The majority of complaints (62%) were filed against government departments or private sector companies. By definition, this type of respondent must be "represented" by someone. Only 6.9% of respondents used outside counsel as their main representative, although 12% of respondents had legal representation at some stage during the EOC process. Private sector companies typically named the owner, director or general manager of the company as the representative. Government departments tended to send

division heads, administrative and personnel officers, or senior government officials.

The disabilities alleged in the 254 disability-related complaints included physical disabilities (27%); chronic illness (23%); mental disorder, malfunction, or impairment (19%); sickness (11%); and impaired vision, hearing or speech (11%). A small number of complaints alleged an imputed disability or did not specify the disability.

The most commonly alleged unlawful act was dismissal from employment or discrimination in the hiring process, representing 91 (36%) of the disability complaints in the sample. The second largest category, representing 58 complaints (23%), alleged discrimination in access to facilities or premises or in the provision of goods and services. About half of these complaints alleged insufficient access or space for wheelchairs, a common problem in Hong Kong. Forty (40) complaints (16%) alleged disability harassment or vilification.3

Seven complaints arose out of what became known as the "Richland Gardens case," which attracted significant media attention. Patients and employees of the Kowloon Bay Health Centre were harassed and prevented from accessing the Centre by a small group of residents from the adjoining Richland Gardens apartment complex. The residents apparently believed that the patients were HIV positive and hoped to drive the Centre out of the neighborhood. The EOC encouraged people to file complaints and these were eventually settled. The EOC published a report on the incident, urging the government and police to be more proactive in preventing such incidents (Hong Kong EOC, 1999, pp. 36-37).

The discontinuation rate for the disability-related complaints in our sample was 52%, which was significantly higher than the discontinuation rate for SDO/FSDO complaints, at 44%. The EOC has an obligation to discontinue a complaint if it does not allege an unlawful act, is misconceived, or lacks substance and 70 disability complaints (26% of our sample of 254) were discontinued on one of these grounds. We found no reason to question the EOC's decision in these cases. What arguably causes greater concern is that 55 DDO complaints (22%) were discontinued because the complainant herself abandoned the complaint. In some cases it appeared that the complainant withdrew because the EOC had indicated that the case was weak or because the complainant did not know how to respond to an argument made by the respondent. Our interviews (discussed below) indicate that many complainants become frustrated and exhausted during the investigation process and decide that the final remedy is unlikely to justify the effort involved.

The EOC originally investigated each complaint before determining whether it should proceed to conciliation. However, during our study period the EOC began a trial programme of "early conciliation," which was later adopted as a general practice. Under this approach, the EOC invites the parties to attempt conciliation before it conducts a full investigation. Early conciliation was adopted in part because of the EOC's increased case load. The officers further found that the parties were more willing to compromise early in the process and that complainants abandon complaints that drag on too long. If early conciliation fails, the complaint can proceed to a full investigation and to post-investigation conciliation.

Of the 451 complaints in our total sample, 229 (51%) went through some form of conciliation. Of these, 158 were categorised as conciliated while 71 were categorised as unsuccessfully conciliated. Thus, agreement was reached in more than 69% of the cases that proceeded to conciliation, generating an *overall* conciliation rate of about 35% of the 451 complaints in the total sample. This rate appears reasonable when compared to studies in Australia (Hunter and Leonard, 1995; Ierodiaconou, 2005).

It is noteworthy, however, that the conciliation rate for the disability-related complaints in our sample was only 29.5%, which is significantly lower than for the SDO/FSDO complaints, at 43.1%. While this is partly because the disability complaints were more likely to be discontinued, the parties in disability cases were also less likely to reach agreement once they entered conciliation. Of the 121 disability complaints that went through conciliation, 75 (62%) were conciliated while 46 (38%) could not be conciliated. In contrast, of the 106 SDO/FSDO complaints that entered conciliation, 81 (76%) were conciliated while only 25 (24%) were classified as unsuccessfully conciliated.

In the 46 disability cases that could not be conciliated, we examined the correspondence and file notes to try to determine why an agreement was not reached. In 24 cases (52% of the unsuccessfully conciliated DDO cases), the file indicated that the respondent had either refused to admit to any wrongdoing or did not even participate in conciliation. In 17 cases (37%) both parties participated in conciliation but could not agree. In only five cases (11%), the complainant refused to conciliate or to consider an offer from the respondent. These findings support the theory that the current system puts less pressure on respondents. This is not to suggest that all cases that proceed to conciliation are strong or that a respondent who believes that a complaint has no merit should offer a remedy. Nonetheless, it is noteworthy that the respondents in our sample felt confident that they could refuse to make concessions. Although complainants feel strongly about their positions they apparently feel more pressure to compromise than respondents. This is a rational response since the EOC is

unlikely to grant legal assistance if the complainant declines to conciliate or rejects a reasonable offer.

The remedies that were most commonly sought in the disability *discrimination* complaints that went to conciliation were: monetary compensation (24); improved access, mobility or facilities (21); and an apology (17). In the cases that were ultimately conciliated, 16 of the 21 obtained an improvement in access, mobility, or facilities, 10 of 24 obtained monetary compensation, and 7 of 17 received an apology. In the disability *harassment* complaints, the most commonly requested remedy was an apology (14), followed by monetary compensation (5). In the harassment cases that were conciliated, an apology was given in 7 complaints and monetary compensation was given in 1 complaint.

The infrequency of monetary compensation is one of the interesting results of this study. While this is partly because many complainants request non-monetary remedies, it also appears that respondents are reluctant to provide a financial settlement. Although monetary compensation was requested in 29 (24%) of the 121 disability complaints that went through conciliation it was obtained in only 11 cases (9%). The majority of the disability cases in which a monetary remedy was sought were in the employment field and were ultimately categorised as "unsuccessfully conciliated."

The amount of compensation tended to be small for disability complaints. The median amount awarded in the 11 complaints that received monetary compensation was HK $12,000 (US $1,539) and none settled for more than HK $50,000 (US $6,250). In contrast, the median award in the 24 gender-related complaints that received monetary compensation was HK $30,000 (US $3,750) and eight of the awards were for more than HK $50,000.

Improvement in physical access to premises and better mobility within premises was requested in 22 (18%) of the 121 cases that proceeded to conciliation and ultimately received in 17 cases (14%). The most common requests were for a ramp to be constructed or for some barrier to be removed to improve access for wheelchair users.

Although Hong Kong is a modern city with a breathtaking skyline, it is far less accessible than cities in the United States. Many public sector institutions with large budgets have not made their older buildings accessible. This is partly because the DDO's enforcement model relies upon individual complaints and people with disabilities have learned to avoid inaccessible buildings. This further isolates them from society and makes complaints against the building owners unlikely. Most of the access complaints in the sample related to buildings that the

complainant could not easily avoid, such as her apartment building, the neighbourhood shopping complex, or a mass transit station.

Of those complaints that proceeded to conciliation, the complainants who sought improved access were significantly more likely to obtain their desired remedy (with a success rate of 77%) than complainants who sought monetary compensation (with a success rate of only 38%).4 Since the construction of a ramp or the modification of building costs money, the higher success rate for those seeking improved access may be attributable to evidentiary issues. An accessibility complaint is easier to prove than a complaint alleging unlawful dismissal, where the employer normally seeks to justify the dismissal on other grounds.

We noted that many of the access complaints in our sample had received some assistance from a disability rights group, known as Rehabilitation Alliance, which has substantial experience with the EOC processes. Moreover, the respondents in access complaints were often public sector institutions, such as the Housing Department. Once a complaint is filed, it is difficult for such a respondent to argue that it lacks the resources to make the necessary alterations. It is, however, worrisome that these complaints even have to go through the EOC. One would think that a government department could address straightforward complaints regarding wheelchair access on its own, without requiring the EOC to devote resources to investigation and conciliation. In some cases the Housing Department ultimately re-housed the complainant to avoid or delay alterations. While this type of remedy improves the situation for the complainant, the original building remains inaccessible. According to our interviews with EOC officers, private owners of buildings are generally even more likely to resist making alterations and to assert "unjustifiable hardship" when faced with an access complaint. Since there is no local jurisprudence on this issue, it is difficult for the complainant or the EOC officer to assess how successful this defense would be if a complaint were litigated.

Interview Results and Conflicting Expectations of the Enforcement Model

We conducted interviews and focus groups with numerous representatives from the EOC, including the Chairperson, officers responsible for investigating and conciliating complaints, and the heads of the Legal Services Division, the Disability Division, and the Gender Division. We interviewed a selection of past complainants and representatives of women's and disability groups who have assisted complainants. Although we could not locate any individual respondents in disability cases who were willing to meet with us, we interviewed a number of people who had represented a respondent, either as a solicitor, in-house counsel, human resource manager, or other employee of the respondent responsible for

such matters. While our sample of complaint files was entirely random, our interviewees were not randomly selected. We depended upon contacts in the EOC and community groups to identify interviewees and their views of the process are not necessarily representative. Most of the comments discussed in this article were made by several interviewees and were consistent with EOC officers' views of the process and their interactions with parties. Where there was a difference of opinion, I have noted this in the discussion.

We began by asking our interviewees about the investigation stage. Some past complainants expressed gratitude to the EOC and to certain officers. However, interviewees from the complainants' side generally described the officers as "powerless," "passive," "cold and bureaucratic," and "lacking a genuine commitment to equality." When asked why they held such negative views, it became clear that there was an enormous gap in expectations regarding the role of EOC officers. Complainants and activists told us that they had expected the EOC officer to go out and actively search for evidence, much like a police officer. In fact, EOC officers rarely leave the office and largely depend upon the complainant to provide evidence. The EOC officers can help to prepare statements of complaint, and the files indicated that some officers put significant time into drafting complaints based upon oral information. The officers then draft letters notifying the respondent of the complaint and requesting information. However, the officers will not give the complainant additional help, citing their duty to remain objective. This is problematic because respondents generally have greater legal knowledge and greater access to evidence and supporting documents. One interviewee recalled a case in which the respondent claimed that it would cost a huge sum to build the requested wheelchair ramp. The complainant and the supporting organization suspected that the estimate was exaggerated but could not prove this. The EOC officer was reluctant to challenge the respondent unless the complainant could produce an alternative estimate, saying that it was not the EOC's responsibility to provide evidence.

Interviewees from the complainants' side commented upon their difficulty in responding to the complicated "legal" letters that respondents send to the EOC in response to the complaint. The EOC officer does not generally explain these letters but rather simply adds a cover letter asking the complainant to respond within a certain period of time. The officers we interviewed confirmed that complainants often feel overwhelmed by this process and ask for help. The officers were, however, adamant that their duty of neutrality prevents them from giving assistance. They cited examples of respondents who had complained of bias when an EOC officer was perceived to have advised the complainant or to have advocated on her behalf.

Of course, an *individual* respondent may feel just as overwhelmed as a complainant.5 However, most respondents are companies or government departments and can assign a lawyer or other skilled person to deal with the matter. Most of the representatives of respondents who were interviewed for this study had handled more than one complaint and were familiar with EOC procedures. Interestingly, none of the interviewees from the respondents' side said that the EOC officers were too passive. Most of the respondents' representatives described the officers as fair, unbiased, efficient, and "working hard to achieve a settlement." They had never expected to receive help from the EOC and were pleased to find that the officers were so objective.

We asked interviewees about the concept of conciliation and their experiences in conciliation conferences. The respondents generally supported the concept of conciliation but they did not cite cultural reasons. Rather they emphasised that conciliation requires less time and money than litigation. They welcomed the introduction of "early conciliation" (which was in a pilot stage during our interviews) and some interviewees went out of their way to point out that a respondent's participation would not necessarily imply that a case has merit. Rather, a respondent might agree to discuss a "weak complaint" because early conciliation offers an opportunity to get rid of it quickly. The respondents' representatives valued the confidentiality of conciliation, noting that a litigated case generates bad publicity regardless of who wins. Respondents' representatives had few complaints about the process of conciliation, other than to say that the conferences take up time that could be better spent at the office. Some mentioned that the EOC was getting better about discontinuing weak cases, allowing them to avoid conciliation all together. Only rarely did an interviewee say that conciliation helps the respondent to gain a better understanding of the complainant's position.

The interviewees from the complainants' side described conciliation differently. They told us that they were disappointed to learn that the EOC officers do not offer an opinion on the strengths and weaknesses of the complaint, but rather would only offer general explanations of the law. They could not understand why the complainant should have to be the one to persuade the respondent that the law had been violated and that a remedy should be provided. They felt that this should be the job of the EOC officer, since the officer would have greater knowledge and skills than the complainant. Interviewees described the conferences as intimidating and stressful meetings, where the imbalance of power was very evident. Respondents' representatives tend to be better educated, better dressed, and more confident than complainants, a disparity that was noted by many interviewees from the complainants' side. Some commented on the fact that a respondent's representative can stay calmer during the meeting, since a representative is not as personally involved as the complainant.

Interviewees noted that respondents are sometimes openly dismissive of the allegations, increasing the complainant's distress. While some interviewees welcomed the idea of "early conciliation," others feared that it would make conciliation harder for the complainant because the investigation would not have been completed and there would be less evidence available.

A complainant often brings a relative, friend, or NGO representative to the EOC but can only bring that person into the conference room if the respondent gives permission. The EOC applies a rule of "equal numbers:" if the respondent sends one representative then the complainant (who normally represents herself) cannot have an extra person in the room unless the respondent agrees. Although follow-up interviews indicated that the EOC would try to relax this policy, some respondents' representatives said they would oppose this. One representative noted that he agrees to the presence of an extra person only if the complainant's supporter agrees not to speak. A representative of a government department said that he almost never agrees to have the complainant's friend in the room, as he does not want to be "out-numbered." If the complainant could name a lawyer as her formal representative this might not be such a problem, since she could just send in the lawyer and stay out of the conference herself. However, the complainants do not have lawyers and the informal supporters they sometimes bring along (from their family, friends, or community groups) generally are not able or willing to serve as the formal representative.

Given these dynamics, it is not surprising that the EOC officers reported that many complainants do not want face-to-face conciliation conferences, preferring "shuttle diplomacy" by telephone. Interestingly, the files in our sample indicate that there are fewer face-to-face conferences in disability than in gender cases. This may be partly because people with disabilities find it more difficult to get to the EOC. Some officers in the Gender Division (which processed complaints separately from the Disability Division during our study period) suggested that they tried harder to arrange a conference because they found that it is more likely to lead to agreement. However, the lower incidence of conferences may reflect the fact that disability complainants and the organizations that assist them are particularly unhappy with the conciliation-based model and what they perceive as passivity by the EOC officers.

The interviews revealed a degree of tension between the EOC and some complainants and disability rights activists. Several officers commented that complainants tend to exaggerate the strength of their complaints or do not fully understand what is unlawful, which may be an accurate observation because the DDO is complex and complainants lack legal advice. Officers noted that complainants often assume that a complaint is strong simply because it goes to conciliation, when in fact the EOC may try to conciliate a complaint that is not

particularly strong. Some EOC staff were critical of the more high-profile disability rights organizations, describing them as "radical" and "unwilling to compromise." Representatives of NGOs confirmed that their relationship with the EOC is often strained, partly because they want the officers to take a more active approach and do not accept the premise that the complainant should have to compromise on rights stated in the DDO.

Our interviewees recognised that the pressure to compromise was not the fault of the EOC, as it has a statutory duty to attempt to conciliate complaints. They made it clear, however, that they would prefer to have the EOC actively investigate and then reach a decision on the complaint rather than putting the burden upon the complainant to persuade the respondent to provide a remedy. While the EOC has no power to issue a decision, the officers probably could play a more assertive role during conciliation without violating the statute (and our interviews indicate that some officers are already more interventionist than others).

The other criticism, often raised in interviews with disability rights groups, is that conciliated cases receive little or no publicity and therefore have no systemic impact. After our study was completed, the EOC attempted to address this problem by creating a "settlement register" of conciliated cases on its website (without parties' identities). However, this cannot have the same impact as litigated cases since people who consult the website tend to be those who already have an interest in the subject.

Interviewees from disability rights groups conceded that many complainants do not want publicity and prefer a confidential forum. Yet they insisted that some complainants do initially want to litigate but become discouraged because they fear that they will not receive legal assistance. The Hong Kong EOC could address this concern by adopting a general policy of granting legal assistance to all meritorious cases that do not conciliate. Although the EOC has a limited budget, most cases settle soon after the EOC grants assistance. Those that go to trial would develop the law and increase public awareness.

A good example is a recent case in which a teacher was fired after he was diagnosed with cancer. The school claimed that it had the right to dismiss him because being absent from more than 10% of one's classes was a "fundamental breach" of his contract, regardless of the reason for the absence (*Siu Kai Yuen v. Maria College*, 2005, para 41). The judge held that reliance on a contract is not a defense to a claim of disability discrimination and that the contract's provisions regarding absence were void under the DDO, as it prohibits discriminatory practices in contractual terms. Apparently, the defendant (and its lawyers) believed that it could rely entirely upon the employment contract and that the

DDO had no effect upon its enforceability. My interviews with EOC staff indicate that this level of ignorance is common, although the DDO has now been in force for nine years and the EOC has produced a wealth of training materials. The EOC granted legal assistance in this case in the hope that the court's decision would attract public attention and "serve as a guideline for employers on the management of sick leave in the workplace" (Hong Kong EOC Press Release, 2004).

Nonetheless, the EOC is unlikely to expand its legal assistance as it has received harsh criticism in some quarters for even the small amount of litigation that it has supported. This is partly because of two controversial cases against government departments. In the first case the EOC obtained a declaration that the government was violating the DDO by maintaining a policy of refusing to hire a person for a job in the five "disciplined services" (police, immigration, customs and excise, fire services, and correctional services) if the applicant had a close relative with mental illness (*K, Y, and W v. Secretary for Justice*, 2000). The other case led to a declaration that the Education Department's system of allocating students to secondary schools violated the SDO because it deliberately boosted boys' assessment scores and made it easier for them to gain admission to elite schools (*EOC v. Director of Education*, 2001).

These cases set important precedents and had systemic impact because they compelled the government to change discriminatory policies that affected many people (Petersen, 2002). However, in 2002, rumors began to circulate that the government was displeased and might not renew the contract of the EOC's Chairperson at the time, Ms. Anna Wu. Human rights groups protested, noting that the government was developing a bad habit of removing assertive leaders of public watchdogs (Human Rights Monitor, 2002). Nonetheless, the government replaced the EOC's Chairperson and altered the membership, giving conservative members a clear majority (Petersen, 2003). Such actions violate the Paris Principles, which require that human rights institutions be given absolute independence and that appointment procedures be open and transparent (United Nations Commission on Human Rights, 1993). However, there is little that can be done to change the government's attitude towards the EOC since it is not an elected government and is primarily accountable to Beijing and the local business community.

Since the EOC is unlikely to expand its legal assistance program, we asked interviewees whether they would support the establishment of an inexpensive "equal opportunities tribunal". The complainants and disability activists generally supported the concept, particularly if there was no obligation to participate in pre-hearing conciliation. They viewed it as a way to raise public awareness and obtain local judgments on what constitutes reasonable accommodation and

unjustifiable hardship. Disability groups further suggested that the EOC could make more use of its formal investigation powers, particularly in the area of accessibility. They argued that the EOC should be looking for inaccessible buildings rather than waiting for individual complaints. Unfortunately, accessibility is not widely viewed as a basic right in Hong Kong. It is considered a special accommodation, one that must be requested by each individual who feels aggrieved and negotiated on a case-by-case basis.

EOC officers were generally supportive of establishing an equal opportunities tribunal, in part because they recognise that many complainants are dissatisfied and want an opportunity to obtain a decision. Some officers estimated that as many as 20% of complainants have no desire to conciliate and would readily choose a public hearing. The officers felt that there was no point in attempting to conciliate these cases. Officers noted that they feel badly when a complaint does not conciliate, as they know that the complainant will likely leave the process with no remedy. The existence of a tribunal would give these complainants another forum and give respondents greater incentive to offer reasonable remedies.

Almost all of the interviewees from the respondents' side rejected the idea of a tribunal, arguing that it would make it too easy for complainants to litigate weak cases and cause undue expense and publicity. While it cannot be denied that some misconceived and unsubstantiated complaints are filed (as evidenced by the group of complaints in our sample that were discontinued by the EOC on that basis), the respondents' opposition to a tribunal may reflect something more fundamental.

For example, several interviewees from the private sector expressed the view that *most* of the complaints filed with the EOC are frivolous and they cited disability discrimination and sexual harassment complaints as the main offenders. Some argued that the DDO itself was too ambitious, particularly the broad definition of disability. Certain interviewees from government departments expressed their strong disagreement with the limited court judgments holding government policies unlawful. These and other comments made by respondents' representatives indicate that the two sides of this debate hold radically different views of the legislation itself and the extent to which it should be enforced.

Implications and Recommendations

The Asian and Pacific Decade of Disabled Persons has been extended for a second decade (2003-2012), in part to promote the implementation of the *Biwako Millenium Framework of Action Towards an Inclusive, Barrier Free and Rights Based Society for Persons with a Disability in Asia and the Pacific*. One of the goals is to encourage governments to "enact and/or enforce legislation and

policies related to equal opportunities and treatment of persons with disabilities . . ." (UNESCAP, 2003, para 14(1)). The drafting of an international treaty on the rights of people with disabilities offers an additional reason to legislate and Asian policy-makers and NGOs are playing an active role in this process (UNESCAP, 2004). While governments in the region may wish to use Hong Kong's DDO as a model for their substantive legislation this study reveals significant weaknesses in its enforcement model.

One of the most interesting results of this study was the dissatisfaction expressed by complainants and disability rights activists. While some criticisms were directed at the approach of the officers, many of our interviewees objected to the very concept of conciliation. This appears to conflict with the common assumption that Chinese communities prefer "a conciliatory approach to the settlement of disputes" (Wong, 2000, p. 304). Although Confucianism places a high value on social harmony and the preservation of personal relationships, Hong Kong Chinese have also been influenced by the British legal system. Surveys in the 1980s noted a decline in the importance of Confucianism (Lau and Kuan, 1988) and the community has become more aware of their rights since the Bill of Rights was enacted in 1991. It is also arguable that the principle of preserving personal relationships is less relevant in the context of anti-discrimination law, since most complaints are not filed against individuals. Chan (1999) argues that the "Confucian community" is not comprised entirely of personal relationships and that the market, the government, and the workplace are spheres where people do not generally interact according to the norms of personal relationships (p. 221). He further notes that Confucianism does not rule out litigation, citing the passage "Recompense injury with justice [chih, or straightness] and recompense kindness with kindness" (p. 227, quoting from *The Analects* XIV: 36). Thus, when other attempts to protect oneself from harm fail, there is nothing immoral in turning to a more coercive forum.

Sternlight's (2004) study of the United States, the United Kingdom, and Australia confirms that there is no one perfect forum for resolving complaints of discrimination. This is partly because the goals are often in conflict. Confidentiality is valued by many parties but private forums (both mediation and arbitration) may limit the impact of the law and perpetuate power imbalances. There is also continual debate on how formal the public enforcement mechanisms should be. The slow processes in the United States federal courts have been widely condemned (Baker, 2002) and the expense of litigation certainly restricts attempts to enforce the Americans with Disabilities Act (ADA) (Rulli, 2000). On the other hand, the more accessible tribunals in other jurisdictions often lack the expertise and procedural safeguards that we associate with just results (Sternlight, 2004, pp. 1437-1443; Employment Tribunal System Taskforce, UK, 2002). Each jurisdiction therefore needs a balance of

mechanisms -- formal and informal, adversarial and consensual, public and private.

Hong Kong lacks that balance because there are too many barriers to litigation. In theory a complainant can bypass the EOC and file a complaint directly in the District Court but in practice this rarely happens. While the three jurisdictions studied by Sternlight have their problems, they have all built up a reasonable body of judicial or tribunal decisions on disability discrimination. The results of these cases are sometimes disappointing (Colker, 1999) but they nonetheless generate important public discussions of disability issues. Activists can then identify weaknesses in the legislative framework and lobby for change. In Hong Kong this public debate is missing because there have been only three litigated cases of any significance since the DDO came into force in 1996.

The Hong Kong EOC could address this problem by granting legal assistance more often and by developing a true litigation strategy, something similar to that published by the UK's Disability Rights Commission (O' Brian, Hughes, Holbrook, and Gooding, 2003). The disability groups we interviewed reported that they would also support an affordable equal opportunities tribunal. The EOC cannot create a tribunal on its own but has established a working party to study the possibility. Should this idea be pursued, the community will have to consider how to make a tribunal sufficiently accessible without compromising on procedural rights. If lawyers are permitted then the process will become expensive, arguably defeating the purpose. On the other hand, prohibiting lawyers may perpetuate power imbalances since respondents are less likely to need an attorney to represent them. The answer may be to exclude lawyers but empower the tribunal to adopt inquisitorial procedures. There should also be a procedure for transferring complex cases to the District Court, with the understanding that the complainant would then receive legal assistance.

The other question raised by the study is whether the Hong Kong EOC could take a more activist approach to the investigation and conciliation processes. It is difficult to compare agency approaches across jurisdictions since the legal frameworks are different and the parties' perceptions depend, to a large degree, on their expectations and their options. In the United States, studies show that the parties are largely satisfied with the mediation program introduced by the Equal Employment Opportunity Commission (EEOC) (McDermott, Obar, Jose, and Bowers, 2000). However, the EEOC refers a case to mediation only if both parties are willing to participate. In Hong Kong, the EOC is required to attempt conciliation and complainants' views of the process may be negatively affected by their perception that they have no choice but to conciliate if they want EOC assistance.

Despite these difficulties in drawing comparisons, it is noteworthy that the EEOC mediators in the United States receive high marks for actively assisting the parties to develop options for settlement (McDermott, Obar, Jose, and Bowers, 2000, Ch. 7). Although adhering to the principle of neutrality, EEOC mediators are not perceived as "passive". In addition to facilitative mediation, they use at least some evaluative mediation tools and can assess the strengths and weaknesses of a case (McDermott, Obar, Jose, and Polkinghorn, 2001). EEOC mediators are considered knowledgeable regarding the law and the parties often rely upon them to give "technical, legal, process, or other guidance" (McDermott, Obar, Jose, and Polkinghorn, 2001, Ch. IV). Moreover, a significant percentage of settlements relating to claims under the ADA result in direct monetary benefits for complainants (Moss, Burris, Ullman, Johnsen, and Swanson, 2001), which was not the case for the disability complaints in our sample. Although critics in the United States continue to express concern at the privatisation of discrimination law and the dangers of power imbalances (Coben, 2004), the EEOC's mediation program is generally considered a positive development. It is particularly valuable for that large group of ADA complaints that are not classified as high-priority charges, which rarely receive a meaningful investigation due to the EEOC's backlog and limited budget.6

In the United Kingdom, the demand for mediation in discrimination cases is also growing. However, the UK's Equal Opportunities Commission has argued that it should be done only by experts in discrimination law who can play an active role and respond to power disparities. In commenting upon the proposals to establish a single enforcement body for equality and human rights, the EOC has argued that mediators in this field must be "working to enforce the rights in the legislation, rather than regarding discrimination claims simply as disputes between parties on a 'level playing field'." (UK EOC, 2004, para 85). Similarly, the UK's Disability Rights Commission (DRC) determined that the Disability Conciliation Service (DCS) for complaints regarding the supply of goods and services should be "rights-based" conciliation (DRC 2002). The service provider has therefore assured the public that the rights of disabled people will be "a non-negotiable issue within the conciliation process" (Mediation UK, undated). The conciliators can address power imbalances and actively suggest ways in which the respondent can meet its obligations. This is more interventionist than the Advisory, Conciliation, and Arbitration Service (ACAS), which currently provides a fairly simple form of "shuttle diplomacy" for general employment disputes (Baker, pp. 122 and 129-130). It will be interesting to see whether the demand for a rights-based approach to conciliation spreads, as some commentators have expressed fear that the UK will embrace mediation for employment disputes without adequate consideration of the power disparities (Dolder, 2004, pp. 335-6).

The Australian HREOC has provided the most explicit endorsement of an active approach to conciliation. While a 1989-90 study of conciliated cases concluded that the Australian HREOC was following a strategy of "minimum intervention", the agency has now committed itself to a more active approach (Gonzalez & McCabe, 2002, citing Devereux, 1996). HREOC is aware of the potential disadvantages of a conciliation-based model and has endorsed specific strategies to minimize these problems (Australian HREOC, 2004). Officers are required to address power differentials, advise on possible settlement options, and ensure that the agreement does not contravene the intent and purpose of the legislation (Raymond & Ball, undated; Raymond & Georgalis, 2003). These interventions are not considered to violate the duty of neutrality, in part because the legislation endorses a substantive concept of equality but also because the concept of neutrality has developed to include a duty to maximize the involvement and control of both parties. Interestingly, a recent survey indicates that very few participants (4%) felt that the conciliator was biased against them and complainants and respondents had similarly low levels (2 to 3 %) of reported bias (Raymond & Georgalis, 2003). Although there are debates on how successful the conciliation-based model is (Chapman, 2000), there seems to be general acceptance that an active approach is appropriate if conciliation is the primary remedy. One study of ADR and disability (based upon responses from 54 Australian organizations with experience in the disability and ADR spheres) strongly endorsed the use of ADR, noting that it can be "a highly empowering experience for a person with a disability" (Simpson, 2002).

Given the influence that Australian legislation and procedures have had in Hong Kong, it is interesting that the Hong Kong EOC has not embraced Australian strategies for rights-based conciliation. The need for an interventionist approach is arguably greater in Hong Kong than in Australia, since private legal representation is even less common for complainants and the Hong Kong trade unions are too weak to fill the gap. Yet the Hong Kong EOC continues to describe the role of its conciliation officers in passive terms, emphasizing only the duty to be impartial and to ensure that both parties have an opportunity to be heard. Thus, in Hong Kong it is the *complainant* who is expected to "take an active part by stating your case clearly" and to suggest options for resolving the dispute (Hong Kong EOC, undated). The EOC produces very little literature on conciliation techniques and it does not even mention the problem of power imbalances or methods for addressing it. Our interviews with EOC officers indicate that they would be reluctant to adopt a rights-based approach to conciliation unless they were supported by an explicit policy statement endorsing it. Given the government's determination, since 2003, to maintain a conservative leadership at the EOC, this may never happen. Thus, the study calls into question Degener's optimistic assessment of the DDO (2000). Although

substantively it is a progressive law, the DDO is unlikely to bring about significant change until the enforcement model can be strengthened.

References

Astor, H. and Chinkin, C. (2002). *Dispute Resolution in Australia.* Sydney: Butterworths.

Australian Human Rights and Equal Opportunities Commission (HREOC) (2004). ADR: An Essential Tool for Human Rights. Address by Hon. John von Doussa, Q.C., President of HREOC, National Mediation Conference, Darwin: 30 June 2004. http://www.hreoc.gov.au/about_the_commission/speeches_president/adr.html [accessed 5 July 2005].

Australian Human Rights and Equal Opportunities Commission (HREOC) (2002). Review of Changes to the Administration of Federal Anti-Discrimination Law — Reflections on the Initial Period of the Human Rights Legislation Amendment Act (No. 1) 1999 (Cth). http://www.hreoc.gov.au/legal/review/index.html [accessed 5 July 2005].

Baker, A. (2002). Access vs. Process in Employment Discrimination: Why ADR Suits the US But Not the UK. *Industrial Law Journal*, 31, pp. 113-134.

Ball, J., and Raymond, T. (undated). Facilitator or Advisor? A Discussion of Conciliator Intervention in the Resolution of Disputes Under Australian Human Rights and Anti-Discrimination Law. http://www.hreoc.gov.au/complaints_information/publications/facilitator_advisor.htm [accessed 5 July 2005].

Baser, L.A. and Jones, M. (2002). The Disability Discrimination Act 1992 (Cth): A Three-Dimensional Approach to Operationalising Human Rights. *Melbourne University Law Review,* 26, pp. 254-284.

Byrnes, A. (1992). Equality and Non-Discrimination, in Wacks, R. (ed.) (1992). *Human Rights in Hong Kong*. Hong Kong: Oxford University Press.

Chan, J. (1999). A Confucian Perspective on Human Rights for Contemporary China, in Bauer, J. and Bell, D. (eds) (1999). *The East-Asian Challenge for Human Rights.* Cambridge: Cambridge University Press.

Chapman, A. (2000). Discrimination Complaint-Handling in New South Wales: The Paradox of Informal Dispute Resolution. *Sydney Law Review,* 22, pp. 321-350.

Coben, J. (2004). Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality. *Cardozo Journal of Conflict Resolution,* 5, pp. 65-86.

Coker, R. (1999). The Americans with Disabilities Act: A Windfall for Defendants. *Harvard Civil Rights-Civil Liberties Law Review,* 34, pp. 99-162.

Devereux, A. (1996). Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation. *Australian Dispute Resolution Journal*, November 1996, pp. 280 - 301.

Degener, T. (2000). Report: International Disability Law — A New Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999. *Berkeley Journal of International Law,* 18, pp. 180-195.

Disability Discrimination Ordinance 1995, Cap. 487, *Laws of Hong Kong* (enacted in 1995 and brought into force in 1996).

Disability Discrimination Ordinance (DDO) Code of Practice on Employment (1996). (Drafted by the EOC and approved by the Hong Kong Legislative Council in December 1996, under Cap. 487, *Laws of Hong Kong*.)

Disability Rights Commission (DRC) UK (2002). Disability Rights, Casework, and Alternative Dispute Resolution. http://www.drc-gb.org/thelaw/lawdetails.asp?id=381&title=la [accessed 5 July 2005].

Dolder, C. (2004). The Contribution of Mediation to Workplace Justice. *Industrial Law Journal,* 33, pp. 320-42.

Equal Opportunities Bill 1994, *Hong Kong Government Gazette*, Legal Supplement No. 3, 1 July 1994, pp. C991-C1275 (not enacted).

Equal Opportunities Commission (EOC) v. Director of Education [2001] 2 HKLRD 690, Hong Kong Court of First Instance.

Equal Opportunities Commission (EOC) United Kingdom (2004). Responses to White Paper: Fairness for All: A New Commission for Equality and Human Rights. London: EOC.

http://www.eoc.org.uk/EOCeng/EOCcs/PolicyAndCampaigns/eoc%20cehr%20response%20final.pdf [accessed 5 July 2005].

Employment Tribunal System Taskforce (2002). Moving Forward: The Report of the Employment Tribunal System Taskforce. London: HMSO.

Family Status Discrimination Ordinance, Cap. 527, *Laws of Hong Kong*.

Gonzalez, P. and McCabe, K. (2002). Giving Them What They Want–Challenges in Using the Positional and Interest-Based Models of Statutory Conciliation. Australian HREOC. http://www.hreoc.gov.au/complaints_information/publications/positional_paper.html [accessed 5 July 2005].

Herr, S. (2001). The Americans with Disabilities Act: Reforming Disability Discrimination Laws: A Comparative Perspective. *University of Michigan Journal of Law Reform,* 35, pp. 305.

Hong Kong Bill of Rights Ordinance, Cap. 383, *Laws of Hong Kong.*

Hong Kong Equal Opportunities Commission (EOC) (2005). *Annual Report 2003/2004*. Hong Kong: Equal Opportunities Commission. http://www.eoc.org.hk/CE/annual/index.htm [accessed 5 July 2005].

Hong Kong Equal Opportunities Commission (EOC) (2004). EOC Gives Legal Assistance. Press Release of 3 June 2004. http://www.eoc.org.hk/CE/press/index.htm [accessed 5 July 2005].

Hong Kong Equal Opportunities Commission (EOC) (2003). *Annual Report 2002/2003*, Hong Kong: Equal Opportunities Commission. http://www.eoc.org.hk/CE/annual/index.htm [accessed 5 July 2005].

Hong Kong Equal Opportunities Commission (EOC) (1999). *Report on Case Study of Kowloon Bay Health Centre*. Hong Kong: Equal Opportunities Commission.

Hong Kong Equal Opportunities Commission (EOC) (undated). *What is Conciliation?* Undated brochure. Hong Kong: Hong Kong Equal Opportunities Commission. http://www.eoc.org.hk/CE/conciliate/index.htm [accessed 5 July 2005].

Human Rights Monitor (2002). EOC Appointment and Independence of Statutory Watchdogs. Press Release and Open Letter to Tung Chee-hwa of 29 July. Hong Kong: Human Rights Monitor.

Hunter, R. and Leonard, A. (1995). *The Outcomes of Conciliation in Sex Discrimination Cases.* Working Paper No. 8. Centre for Employment and Labour Relations Law.

Ierodiaconou, M.J. (2005) *Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?* Working Paper No. 32. Melbourne: Centre for Employment and Labour Relations Law.

K, Y, and W v. Secretary for Justice [2000] 3 HKLRD 777, Hong Kong District Court.

Lau, S.K. and Kuan, H.C. (1988). *The Ethos of the Hong Kong Chinese*. Hong Kong: Chinese University Press.

Ma Bik Yung v Ko Chuen [1999] 2 HKLRD 263, Hong Kong District Court.

Ma Bik Yung v Ko Chuen [2000] 1 HKLRD 514, Hong Kong Court of Appeal.

Ma Bik Yung v Ko Chuen [2000] 4 HKC 119, Hong Kong Court of Final Appeal.

McDermott, E. P., Obar, R., Jose, A., and Bowers, M. (2000). *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, Washington D.C.: Employment Opportunity Commission, Order No. 9/09007632/2. http://www.eeoc.gov/mediate/report/ [accessed 5 July 2005].

McDermott, E. P. , Obar, R., Jose, A., and Polkinghorn, B. (2001). *The EEOC Mediation Program: Mediators' Perspectives on the Parties, Process, and Outcomes*, Washington D.C.: Employment Opportunity Commission, Order No. 9/0900/7632/G. http://www.eeoc.gov/mediate/mcdfinal.html [accessed 5 July 2005].

Moss, K., Burris, B., Ullman, M., Johnsen, M. and Swanson, J. (2001). An Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act. *Kansas Law Review,* 50, pp. 1-110.

Ng Sek-hong (1994). Employment and Human Rights in Hong Kong: Some Recent Developments, *Hong Kong Law Journal,* 24, pp.108-135.

O' Brian, N., Hughes, P., Holbrook, J., Gooding, C. (2003). Disability Rights Commission Legal Strategy 2003-2006. London: Disability Rights Commission. http://www.drc-gb.org/thelaw/lawdetails.asp?id=496&title=ls [accessed 5 July 2005].

Petersen, C. J. (1996). Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong. *Columbia Journal of Transnational Law,* 34, pp. 335-388.

Petersen, C. J. (1999). Equal Opportunities: A New Field of Law for Hong Kong, in Wacks, R (ed.) (1999). *Hong Kong's New Legal Order.* Hong Kong: Hong Kong University Press.

Petersen, C. J. (2000). The Failure of the Hong Kong Court of Appeal to Recognise and Remedy Disability Discrimination. *Hong Kong Law Journal,* 30, pp. 6-21.

Petersen, C. J. (2002). The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong. *Hong Kong Law Journal,* 32, pp. 103-134.

Petersen, C. J. (2003). The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away From the Mark? *Hong Kong Law Journal,* 33, pp. 513-522.

Petersen, C. J., Fong, J. and Rush, G. (2003). *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong*. Hong Kong: Centre for Comparative and Public Law, University of Hong Kong.

Raymond, T. and Ball, J. (undated). *Alternative Dispute Resolution in the Context of Anti-discrimination and Human Rights Law: Some Comparisons and Considerations*, Australian HREOC. http://www.hreoc.gov.au/complaints_information/publications/alternative.html [accessed 5 July 2005].

Raymond, T. and Georgalis, S. (2003). Dispute Resolution in the Changing Shadow of the Law: A Study of Parties' Views On the Conciliation Process in Federal Anti-Discrimination Law http://www.hreoc.gov.au/complaints_information/publications/shadow_paper.html [accessed 5 July 2005].

Rulli, L. (2000). Employment Discrimination Litigation Under the ADA From the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income

Workers in the Next Decade? *Temple Political and Civil Rights Law Review,* 9, pp. 345-93.

Sex Discrimination Ordinance, Cap. 480, *Laws of Hong Kong*.

Simpson, J. (2002). Guarded Participation: Alternative Dispute Resolution and People With Disabilities. Sydney: Law and Justice Foundation of New South Wales. http://www.lawfoundation.net.au/resources/simpson/guarded.pdf. [accessed 5 July 2005].

S*iu Kai Yuen v. Maria College*, DCEO 9/2004, Hong Kong District Court (decided 18 April 2005).

Sternlight, J. R. (2004). In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis. *Tulane Law Review,* 78, pp 1401-1499 .

United Nations Commission on Human Rights (1993). *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of The Programme and Methods of Work of The Commission: National Institutions for the Promotion and Protection of Human Rights.* UN Doc. E/CN.4/1993/33.

United Nations, Economic and Social Commission for Asia and the Pacific (UNESCAP) (2001). *Pathfinders: Towards Full Participation and Equality of Persons with Disabilities in the ESCAP Region.*

United Nations, Economic and Social Commission for Asia and the Pacific (UNESCAP) (2003). *Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights Based Society for Persons with Disabilities in Asia and the Pacific*, E.EXCAP/APDDP/4/Rev.1.

United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) (2004). Reports from Workshop on Regional Follow-up to the Third and Fourth Sessions of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Bangkok: 11-12 October 2004.

Wong. B. K.Y. (2000). Traditional Chinese Philosophy and Dispute Resolution. *Hong Kong Law Journal,* 30, pp. 304-319.

Endnotes

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2 The EOC opens a separate file for each respondent and it is common for the complainant to lodge complaints against more than one respondent, especially in cases of vicarious liability.

3 Some of the complaints alleging discrimination in access to facilities contained elements of harassment.

4 Here the term "success rate" refers to the percentage of complainants who obtained their desired remedy and excludes a few cases that were deemed "conciliated" by the EOC although the complainant did not obtain the remedy she originally requested. See Petersen, Fong, and Rush (2003), pp. 44-6, for a fuller explanation of remedies sought and gained in gender and disability cases.

5 An individual respondent in a sexual harassment complaint who we interviewed said that he was terrified by every EOC letter and eventually retained a lawyer.

6 During or immediately after the charge receipt interview the EEOC classifies a complaint into one of three priority categories. "A charges" are the highest priority cases and should receive "appropriate investigation" within resource constraints. "B charges" receive additional investigation, as resources permit. C charges are dismissed. The "A charges" are further divided into A1 (considered the most litigation worthy) and A2. One study found that most A1 cases received thorough investigations but that some A2 and most B cases received little or no investigation (Moss, Burris, Ullman, Johnsen, and Swanson, 2001, pp. 12-13).