INVESTIGATION AND CONCILIATION OF EMPLOYMENT DISCRIMINATION CLAIMS IN THE CONTEXT OF HONG KONG

BY
CAROLE J. PETERSEN*

* Associate Professor and Director, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, email address: <carole@hkucc.hku.hk>. This article is a revised version of a paper presented at the Association of American Law Schools Annual Meeting, Section on Employment Discrimination, San Francisco, California, January 2001. The article arises from a research project, entitled *Enforcing Equal Opportunities In Hong Kong: A Study of Investigation, Conciliation, and Other Enforcement Mechanisms* (principal investigator, Carole J. Petersen; co-investigators, Andrew Byrnes, Cecilia Chan, and Katherine Lynch), which is funded by a grant from the Hong Kong Research Grants Council and receives additional support from the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong. The author wishes to thank Andrew Byrnes and Robyn Emerton for their comments on an earlier draft of this article and staff at the Hong Kong Equal Opportunities Commission for meeting with me on several occasions and providing me with access to their case files.

I. INTRODUCTION

Employment discrimination law is a quite recent development in Hong Kong. The employment provisions of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance were brought into force in December 1996, while the Family Status Discrimination Ordinance has been in force since November 1997. [1] Many in the business community view the legislation, as well as the associated Codes of Practice on Employment,[2] as an unhealthy departure from Hong Kong's laissez-faire economic policies. The laws are enforced largely through the Equal Opportunities Commission ("EOC"), an independent body established in 1996 and funded by the government. The Hong Kong EOC has accomplished a good deal in its short life, producing a large volume of educational materials, handling a steadily increasing number of complaints, and litigating some high-profile cases. There has, however, been substantial debate within the community on the approach that the EOC should take when exercising what many people view as its primary statutory duty – to "endeavour to conciliate" complaints.[3]

1. Sex Discrimination Ordinance, LAWS OF HONG KONG ch. 480 (1997); Disability Discrimination Ordinance, LAWS OF HONG KONG ch. 487 (1997); Family Status Discrimination Ordinance, LAWS OF HONG KONG ch.527 (1997). The three ordinances are also published on the website of the Hong Kong Equal Opportunities Commission (EOC), *available at* <htpp://www.eoc.org.hk> (last visited Oct. 16, 2001). As Hong Kong now has a bilingual legal system, all laws are published in both Chinese and English. The EOC website is also bilingual, as are most educational materials produced by the EOC.

2. *See* Sex Discrimination Ordinance Code of Practice on Employment, LAWS OF HONG KONG ch. 480, § 69 (1997); Disability Discrimination Ordinance Code of Practice on Employment, LAWS OF HONG KONG ch. 487, § 65 (1997); Family Status Discrimination Ordinance Code of Practice on Employment, LAWS OF HONG KONG ch. 527, §47 (1997) [hereinafter Codes of Practice]. The Codes of Practice are published with their respective ordinances (as subsidiary legislation) in the Laws of Hong Kong. They are also available on the website of the Hong Kong EOC, *available at* <htpp://www.eoc.org.hk> (Last visited Oct. 16, 2001).

3. *See* LAWS OF HONG KONG, ch. 480, §84(3)(b) (1997) (providing in cases of alleged sex discrimination, the EOC shall "endeavour, by conciliation, to effect a

This article reports the preliminary results of an ongoing research project on the investigation and conciliation of employment discrimination complaints in Hong Kong (which is part of a broader study of the enforcement powers of the Hong Kong EOC).[4] The emphasis upon conciliation in Hong Kong's legislative scheme reflects, to a large extent, the influence of Australian legislation and experience, which the Hong Kong EOC has relied upon extensively in its first five years of operation. It has also been argued that conciliation is consistent with the traditional Chinese preference for resolving disputes through mediation and with Hong Kong's laissez-faire economic policies.[5] However, some local organizations have been openly critical of the model, arguing that it requires the EOC to play too "neutral" a role and thus only perpetuates the power imbalance that the legislation seeks to redress.[6] Moreover, unlike Australia, Hong Kong has never had a specialist tribunal to hear complaints of discrimination. Thus, a complainant knows that if she does not accept an offer in conciliation she must either abandon her claim or litigate in the District Court, a slow and stressful

settlement of the matter to which the act relates"), *available at* <http://www.eoc.org.hk/anti/anti.html> (last visited Nov. 18, 2001); *Id.* ch. 487, § 80(3)(b) (providing similarly for cases of alleged disability discrimination); *Id.* ch. 527, §62(3)(b) (providing similarly for cases of alleged family status discrimination).

4. The methodology of the complaints portion of the project is similar in many respects to that used by Rosemary Hunter and Alice Leonard in their study of conciliation of sex discrimination complaints in selected Australian jurisdictions. *See* ROSEMARY HUNTER & ALICE LEONARD, THE OUTCOMES OF CONCILIATION IN SEX DISCRIMINATION CASES (Centre for Employment and Labour Relations Law Working Paper No. 8, August 1995). However, the Hong Kong study also includes complaints filed under the Disability Discrimination Ordinance and seeks to incorporate certain factors that are particularly relevant to Hong Kong.

5. For an interesting recent article on the origins of this preference, see Bobby K. Y. Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304 (2000). For an example of how certain commentators argued during the enactment of Hong Kong's anti-discrimination legislation that the Japanese (largely unenforceable) model of legislation would be more consistent with traditional Chinese culture, *see* Ng Sek-hong, *Employment and Human Rights in Hong Kong: Some Recent Developments*, 24 HONG KONG L.J. 108, 124-5 (1994).

6. See, e.g., The Frontier, *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* (1999), *available at* <http://www.hku.hk/cppl/cedaw/frontier.html> (last visited Nov. 18, 2001); Association for Advancement of Feminism et al., *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* (1999) (submission endorsed by 10 women's and human rights organizations), *available at* <http:www.hku.hk/cppl/CEDAW4.html> (last visited Nov. 18, 2001).

process (and an expensive one unless the EOC grants legal assistance). Hong Kong's trade union movement and the general body of labour law are also quite weak.[7] These factors may further reduce the bargaining power of complainants in the conciliation process.

Part II briefly reviews the legislative history of the laws and their application to the field of employment. Part III outlines the enforcement model adopted in Hong Kong and the factors that influenced the decision not to create a specialist tribunal to hear complaints that are not conciliated. Part IV reviews the approach taken by the Hong Kong EOC thus far to investigation and conciliation and the influence of the Australian model (drawing largely upon preliminary interviews with EOC staff and representatives of women's organisations). Part V presents data on the numbers and types of complaints filed in the first four years. Part VI analyses the conciliation rate for various categories of cases and the range of remedies that have been obtained through conciliation. Part VII concludes by briefly outlining issues to be studied in the next stage of this research project.

II. LEGISLATIVE HISTORY OF HONG KONG'S EMPLOYMENT DISCRIMINATION LAWS

As a British colony, Hong Kong was regarded as the classic example of a laissez-faire economy. The government pursued a policy known as "positive non-interventionism," meaning that it provided the infrastructure necessary for industry and commerce, but refrained from enacting legislation considered unduly burdensome to business. The labor movement was weak and the absence of democracy made it difficult for workers to lobby for law reform. The Governor was appointed, as was the Executive Council, the closest thing Hong Kong had to a cabinet. Prior to the negotiation of the Joint Declaration,[8] the treaty by which the

7. *See* Wilson W. S. Chow & Anne Carver, *Employment and Trade Union Law: Ideology and the Politics of Hong Kong Labour Law*, *in* THE NEW LEGAL ORDER IN HONG KONG 477 (Raymond Wacks, ed., 1999).

8. 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, Dec. 19, 1984 (entered into force May 27, 1985).

United Kingdom agreed to return Hong Kong to China in 1997, the legislature was also entirely appointed and dominated by the business community.[9] Thus, although women's organisations lobbied for the enactment of anti-discrimination legislation these demands were easily rejected. The government's refusal to introduce any anti-discrimination legislation arguably violated Hong Kong's obligations under various international human rights conventions that applied to it by virtue of the British government's ratification.[10]

However, the last years of the transition period leading to Hong Kong's return to China (1989 to 1997) brought greater awareness of human rights issues and greater opportunities to lobby for law reform.[11] In late 1989, in the wake of the Tianamen Square massacre, the government proposed a Bill of Rights for Hong Kong, which was enacted in 1991.[12] The Bill of Rights Ordinance was largely copied from the International Covenant on Civil and Political Rights (which includes a right to equality) and gave greater legitimacy to demands for specific anti-discrimination legislation. At the same time, the pool of appointed legislators was widened (to include some more liberal members) and a limited number of directly elected legislators joined the Legislative Council. As a result, the legislature became much more responsive to public opinion and more willing to challenge established government policies.[13] Legislators also began drafting their

9. For discussion of Hong Kong's colonial government structure, see generally NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG (5th ed. 1991); IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG (1989).

10. For example, the International Convention on the Elimination of All Forms of Racial Discrimination was ratified on behalf of Hong Kong in 1969, although Hong Kong still does not have race discrimination legislation. For a discussion of Hong Kong's obligation to legislate under this and other international treaties, see Andrew Byrnes, *Equality and Non-Discrimination*, *in* HUMAN RIGHTS IN HONG KONG ch. 6 (Raymond Wacks, ed. 1992). It should be noted that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was not applied to Hong Kong until 1996. Although the British Government ratified CEDAW in 1986, the Hong Kong government had previously asked the British government not to apply CEDAW to Hong Kong. For a discussion of the political battle over CEDAW in Hong Kong, see Carole J. Petersen, *Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 363-66 (1996) [hereinafter Petersen, *Equality as a Human Right*].

11. For further discussion of these events, see Petersen, *Equality as a Human Right*, *supra* note 10, at 348-86.

12. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383.

13. *See* KATHLEEN CHEEK-MILBY, A LEGISLATURE COMES OF AGE: HONG KONG'S SEARCH FOR INFLUENCE AND IDENTITY (1995), especially ch. 7.

own bills, which was almost unheard of in the pre-transition period. One legislator, Anna Wu, introduced the Equal Opportunities Bill ("EOB")[14] which 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 Human Rights and Equal Opportunities Commission Bill ("Commission Bill"),[15] which sought to establish an independent commission to promote and protect human rights and a specialist equal opportunities tribunal to resolve complaints of discrimination.

The Governor used his constitutional powers to prevent Wu from introducing her Commission Bill into the legislature.[16] However, he could not prevent the introduction of the EOB, as it had been drafted so as not to have any "revenue implications" for the government. Moreover, 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 Ms. Wu's EOB might be enacted, the government introduced two competing "compromise" bills, the Sex Discrimination Bill and the Disability Discrimination Bill. While this strategy succeeded, in that the government persuaded legislators not to vote for Wu's broader bill, it required the government and pro-business legislators to abandon their previous opposition to all anti-discrimination legislation.

The Sex Discrimination Ordinance and the Disability Discrimination Ordinance were thus enacted in 1995,

14. Equal Opportunities Bill 1994, HONG KONG GOVERNMENT GAZETTE, Legal Supplement No. 3 (July 1, 1994).

15. Human Rights and Equal Opportunities Commission Bill 1994 (circulated for public consultation, March 1994). Unlike the EOB, the Commission Bill was not published in the GOVERNMENT GAZETTE because Governor Patten (Hong Kong's last colonial governor) refused permission for it to be introduced into the Legislative Council. 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* HONG KONG'S BILL OF RIGHTS: 1991-1994 AND BEYOND 73-80 (George Edwards & Andrew Byrnes eds., 1995).

16. Article XXIV of the Royal Instructions (which, together with the Letters Patent, made up Hong Kong's colonial constitution) required that individual legislators obtain the Governor's permission before introducing a bill that would require public money, which a Human Rights and Equal Opportunities Commission clearly would have required.

although the employment provisions did not come into force until the end of 1996. The two laws were amended, primarily to improve remedies, by a bill enacted over the objections of the government in June 1997, in the final days before China resumed sovereignty.[17] The Family Status Discrimination Ordinance was also enacted in 1997. The new laws are an interesting mix of English and Australian law. For example, the Sex Discrimination Bill was largely copied from the English Sex Discrimination Act 1975. However, certain provisions were borrowed from Australian Law, while others were drafted especially for Hong Kong.[18]

One significant departure from the English model is in the field of sexual harassment. The Sex Discrimination Act 1975 does not expressly prohibit sexual harassment, although it has been interpreted by the English courts to do so where it constitutes unlawful sex discrimination. At the request of women's organisations, the Hong Kong government agreed to follow the Australian model and the Sex Discrimination Ordinance thus expressly defines and prohibits sexual harassment. The government used Australian federal legislation as its primary model for the sexual harassment provisions.[19] However, it also added some additional language from Anna Wu's Equal Opportunities Bill (which was based upon Western Australian law) to make it clear that "hostile work environment" harassment is

17. Sex and Disability Discrimination (Miscellaneous Amendments) Ordinance 1997, HONG KONG GOVERNMENT GAZETTE, Legal Supplement No. 1, Part I of II (June 27, 1997). For further discussion of the impact of these amendments on remedies for discrimination see Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market*, 27 HONG KONG L.J. 324 (1997) [hereinafter Petersen, *Hong Kong's First Anti-Discrimination Laws*].

18. For further discussion of the scope and provisions of Hong Kong's anti-discrimination ordinances, see Carole J. Petersen, *Equal Opportunities: A New Field of Law for Hong Kong*, in THE NEW LEGAL ORDER IN HONG KONG, *supra* note 7 [hereinafter Petersen, *A New Field of Law*].

19. For an example of the application of the portion of Hong Kong's statutory definition of sexual harassment that was borrowed from the Australian federal legislation, see Yuen Sha Sha v. Tse Chi Pan [1999] 1 HKC 731, in which the act of secretly filming a female university student while she undressed was held to be unlawful "student-to-student" sexual harassment. The EOC granted the student legal assistance and she successfully sued in the District Court. For analysis of why the defendant's conduct satisfied Hong Kong's statutory definition of sexual harassment, see Carole J. Petersen, *Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws*, 29 HONG KONG L.J. 179, 182-86 (1999) [hereinafter Petersen, *Implementing Equality*]. The precedent can also be applied to employment cases.

prohibited, even where the sexual conduct in question may not have been "in relation" to the complainant.[20]

Although the new laws apply to many areas (including education, housing, and the provision of goods and services), employment is the most significant area and the majority of the complaints received by the EOC to date fall within that field.[21] The new laws have broad application in the field of employment, protecting employees and prospective employees, contract workers, commission agents, partners and prospective partners (in firms of six or more).[22] The laws impose vicarious liability on employers for the unlawful acts of employees committed in the course of their employment.[23] However, the employer can avoid vicarious liability if it can show that it took all reasonably practicable steps to prevent the unlawful acts. In theory, this should give employers an incentive to implement the recommendations in the three Codes of Practice.[24] Technically the Codes do not create additional duties, but the court can refer to them when deciding whether the employer has taken reasonable steps to prevent unlawful acts.[25] The Hong Kong legislation also expressly prohibits victimization, which includes unfavourable treatment on the ground that a person has made a complaint under one of the anti-discrimination ordinances, provided evidence in proceedings relating to them, or alleged facts that would amount to an unlawful act under one of the ordinances.[26]

20. *See* LAWS OF HONG KONG, ch. 480, §§ 23, 24 (1997). For a recent analysis of Hong Kong's statutory definition of sexual harassment in the context of employment, *see* Harriet Samuels, *Sexual Harassment in Employment: Asian Values and the Law in Hong Kong*, 30 HONG KONG L.J. 432 (2000).

21. This section provides a very brief summary of the employment provisions. For more detailed discussion, *see* Petersen, *Hong Kong's First Anti-Discrimination Laws*, *supra* note 17. For a recent Court of Appeal decision interpreting several employment provisions in the Sex Discrimination Ordinance, *see* Tsang v. Cathay Pac. Airways, Ltd., CACV431/2001 (decided November 1, 2001) (holding that different mandatory retirement ages for male and female flight attendants were unlawful).

22. Sex Discrimination Ordinance, §§ 11, 13, 15, 20, 36; Disability Discrimination Ordinance, §§ 11, 13, 15, 20; Family Status Discrimination Ordinance, §§ 8, 9, 11, 16, 26.

23. Sex Discrimination Ordinance, § 46; Disability Discrimination Ordinance § 48; Family Status Discrimination Ordinance, § 34.

24. *See supra* note 2 and accompanying text.

25. Sex Discrimination Ordinance, § 69(14); Disability Discrimination Ordinance, § 65(13); Family Status Discrimination Ordinance, § 47(2).

26. Sex Discrimination Ordinance, § 9; Disability Discrimination Ordinance § 7;

There are certain weaknesses in the legislation. For example, the definition of indirect discrimination is quite narrow (particularly if the Hong Kong courts follow the English cases interpreting similar statutory provisions).[27] However, on balance, the employment provisions are reasonably strong, particularly in view of the longstanding opposition to anti-discrimination law on the part of both the government and the business community. Indeed, given the dominance of the business community (and the fact that Hong Kong still does not have full democracy), it is remarkable that the government was persuaded to adopt this legislation and to fund a public body to enforce it. Subsequent attempts by Wu and other legislators to broaden the scope of anti-discrimination legislation (for example, to enact laws prohibiting discrimination on the grounds of race, age, and sexuality) failed.[28] Under Hong Kong's current constitutional order, as a Special Administrative Region of China, the legislature has become less democratic than it was at the end of the colonial period. Moreover, the constitutional restrictions and voting procedures for bills proposed by individual legislators are also more severe.[29] Thus broader anti-discrimination legislation will only be enacted if the Hong Kong government and business community genuinely

Family Status Discrimination Ordinance, § 6.

27. The definition of indirect discrimination used in all three anti-discrimination ordinances is limited to a "requirement or condition" which has been interpreted by UK courts to require the complainant to identify a requirement or condition that was an "absolute bar" to her hiring or promotion. *See, e.g.*, Meer v. London Borough of Tower Hamlets [1988] IRLR 399, 76 LGR 775 (Eng. C.A.); Perera v Civil Service Commission, [1983] IRLR 166, [1983] ICR 428 (Eng. C.A.); as hiring and promotion decisions are normally made upon a balance of criteria, this can be very difficult to establish. Legislators Anna Wu (in 1995) and Christine Loh (in 1997) attempted to amend this definition but their proposals were strongly opposed by the government and were defeated.

28. For analysis of the unsuccessful campaign to legislate against sexuality discrimination, *see* Carole Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L. REV. 337 (1997).

29. For further discussion of the impact of these changes on the prospects for anti-discrimination legislation, see Petersen, *A New Field of Law*, *supra* note 17, at 624-5. *See also* Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted on April 4, 1990 by the National People's Congress and brought into force on July 1, 1997), at art. 74 (setting forth restrictions on the types of bills that can be introduced by individual members of the Legislative Council, as opposed to the government), Annex I (setting forth the voting requirements for such bills).

support it, which is highly unlikely in the near future.

III. HONG KONG'S ENFORCEMENT MODEL

When the various discrimination bills were being considered by the legislature there was substantial debate on the enforcement model that should be adopted. From the start, it was suggested that a model that emphasised conciliation would be appropriate for Hong Kong's cultural and economic context. Indeed, some experts had argued that Hong Kong should follow the example of Japan, where the employment discrimination legislation initially lacked any effective enforcement mechanism and relied instead upon persuasion. As one Hong Kong academic argued at the time:

> [The Japanese] Act has won approval as a vehicle of "gradualistic" reform for being able to signal to the public, especially the business community, the moral importance of vindicating the rights of women at the workplace, while remaining prudent enough to recognise traditionally enshrined customs and practice, both in family and society.

In Hong Kong, there is no reason why similar prudence at the normative level should not be exhibited, given our Confucian heritage. While the present enthusiasm for human rights should not stop at the factory gate, it is equally important that the assiduous propagation of these standards and values should not undermine or attempt to supplant Chinese family values and traditions among those for whom they are a cherished legacy.[30]

There is no question that Hong Kong employers would have supported this approach. However, women's organisations were aware of the limited impact of the Japanese law and they had already expressed their opposition to a similar proposal based upon "persuasion" (which had been raised by the government in the 1993 *Green Paper on Equal Opportunities for Men and Women*).[31] The women's movement

30. Ng Sek-hong, *supra* note 5, at 124-25.

31. The *Green Paper on Equal Opportunities for Women and Men* (1993) was issued by the Hong Kong government primarily as a way of delaying a more definitive response to a motion passed by the Legislative Council in December 1992 calling for the extension of the CEDAW convention to Hong Kong. Although officially a consultation document, the government did its best in the *Green Paper* to portray sex discrimination as an insignificant problem, which did not require legislation. At the conclusion of the document (at ¶¶ 137-40), the government discussed the possibility

had also gained considerable support in the legislature. Thus, by the 1994-95 legislative session, the Hong Kong government knew that it had to propose something stronger than moral persuasion if it was to serve as a viable alternative to Anna Wu's EOB. It therefore agreed that the Sex Discrimination Bill and Disability Discrimination Bill would create legal duties and that their enforcement would be supported by a publicly funded body.

Thus, although the Governor had used his powers under the colonial constitution to prevent Wu from introducing her own Commission Bill, the government then proposed its own, more limited, Equal Opportunities Commission to assist in the enforcement of the new laws. By so doing, the government secured the support of Anna Wu for the its Sex Discrimination Bill and Disability Discrimination Bill. Wu agreed, in early 1995, to withdraw the sex and disability provisions of her own EOB in favour of the government's two bills. However, the government rejected Wu's proposal to include broader "human rights" issues in the terms of reference of the Commission. It also declined to create a specialist equal opportunities tribunal to resolve complaints under the new laws.[32]

The reluctance by the government to create a specialist tribunal for discrimination complaints arose (in my view) from the fact that the government, the business community, and also some non-governmental organisations wanted complaints to be settled primarily through a confidential conciliation process rather than through an adversarial process. Obviously, a confidential process will be preferred by most respondents, particularly employers. However, it was also argued that complainants, particularly victims of disability discrimination and sexual harassment, would prefer to resolve their complaints in a private, less adversarial

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. For more discussion of the *Green Paper* exercise, see Petersen, *Equality as a Human Right, supra* note 10, at 366-68.

32. There was some initial discussion of assigning employment discrimination cases to the Labour Tribunal, an idea that might have appealed to employers but probably not to employees and NGOs (as the Labour Tribunal is perceived by many NGOs as being too pro-employer). In any event, it almost certainly could not have fulfilled the role of a specialist equal opportunities tribunal.

environment. It should be noted, however, that some women's organizations challenged the assumption that Chinese victims of discrimination would not wish to litigate and insisted upon the right to file complaints directly in the courts, without any obligation to engage in prior conciliation. These women feared that the power imbalance might well be perpetuated in conciliation, particularly if complainants were not legally represented during conciliation meetings. However, most women's organizations did support the concept of an EOC that would investigate and conciliate complaints, if only for the practical reason that they knew that the courts would be inaccessible to most complainants.

The result was a compromise model, but one that has the effect of discouraging litigation. Victims of discrimination and harassment are not obligated to use the services of the EOC or to participate in any prior conciliation. They may, if they wish, file a complaint directly in the District Court. However, most victims of discrimination cannot afford to retain a lawyer, as Hong Kong has notoriously high legal fees and almost no "legal clinics." Contingency fee arrangements are not permitted. Moreover, even if a complainant could afford to litigate, she would have to consider very carefully whether it would be worth her while. There are no jury trials in Hong Kong, except for serious criminal offences and defamation actions, and plaintiffs cannot expect large damage awards. In most litigation, a successful plaintiff can at least obtain an award of costs, since Hong Kong normally follows the English rule that "costs follow the event." However, the District Court Ordinance provides (in Section 73) that in proceedings brought under the anti-discrimination legislation each party "shall bear its own costs unless the Court orders otherwise on the ground that (a) the proceedings were brought maliciously or frivolously; or (b) there are special circumstances which warrant an award of costs."[33] This provision was adopted to remove the fear (among potential plaintiffs) of being ordered to pay the defendant's legal costs should one's case not be successful. However, it also means that a successful plaintiff

33. District Court Ordinance, LAWS OF HONG KONG, ch. 236, § 73B(3) (in relation to claims filed under the Sex Discrimination Ordinance); *id.* § 73C(3) (in relation to claims filed under the Disability Discrimination Ordinance); *id.* § 73D(93) (in relation to claims filed under the Family Status Discrimination Ordinance).

cannot be certain that she will recover her costs, unless she can demonstrate special circumstances.[34]

As a result of these factors, it was always understood that most complainants would not try to litigate on their own but rather would rely upon the free assistance provided by the EOC. The legislation obligates the EOC to investigate and "endeavour to conciliate" all complaints filed with it, except for those that lack substance or can be discontinued on other grounds provided by statute. Thus, although there is no statutory requirement that a victim of discrimination attempt to conciliate her complaint, in practice she is compelled to participate in the conciliation process as long as the respondent is willing to do so. If the complainant refuses to participate in conciliation, or rejects what the EOC believes is a reasonable offer, it is unlikely that the EOC will grant her further assistance.

If conciliation fails then the complainant must either abandon the claim or commence an action in the District Court. At that stage the EOC can, but is not obligated to, grant legal assistance to enable the complainant to litigate. The EOC is careful not to give complainants the impression that all meritorious cases will receive legal assistance.[35] However, the complainant is expressly told (at the onset of the process) that she cannot officially apply for legal assistance from the EOC until after conciliation has failed.[36]

34. It should be noted, however, that the District Court has demonstrated a willingness to award costs to successful plaintiffs, on the grounds of "special circumstances", particularly if the court concludes that the defendant should have conciliated the case. For a discussion of two cases in which costs were awarded on the grounds of special circumstances, see Petersen, *Implementing Equality*, *supra* note 19. Costs were also awarded in K, Y, and W v. Secretary for Justice, DCEO3, 4, 7/99, 694 H.K. Cu. (District Court, Sept. 27, 2000), in which the Hong Kong government's longstanding (though previously secret) policy of refusing to hire a person for *any* job in the disciplined services if s/he had a parent with a mental illness was held unlawful under the Disability Discrimination Ordinance. The government argued that costs should not be awarded because the litigation was the first legal challenge to its hiring policy. However, the judge noted that special circumstances could be found from the facts that (i) the government had been advised by its own task force to change its policy; and (ii) the EOC, which supported the complainants, has no separate budget for litigation.

35. In a brochure given to all parties, the EOC reminds parties that "legal assistance is not guaranteed" and generally will only be granted if the case "raises a question of principle; or it is unreasonable, because of the complexity of the case or the applicant's position in relation to the respondent, to expect the applicant to deal with the case unaided." *What is Conciliation?* 7 (Hong Kong EOC undated pamphlet).

36. The EOC informs parties that it "cannot entertain applications for legal

From interviews with EOC staff, we know that in practice if a complainant makes a special request she may be allowed, before the conciliation stage is completed, to speak to the EOC legal advisor about the procedures for applying for legal assistance and the strength of the complaint. But this does not normally occur. Moreover, the EOC legal advisor cannot make any promises to the complainant in this regard, as the ultimate decision as to whether to grant legal assistance is made by the Commission itself. Thus, a complainant who cannot afford to hire her own lawyer will not know when she is considering an offer from the respondent whether she will be in a position to pursue her complaint if she refuses the offer and conciliation fails. Technically, the complainant can also apply to the government's Legal Aid Department to pursue her complaint in court. However, I am not aware of any case in which a complainant has successfully applied for legal aid to litigate a case under Hong Kong's discrimination laws.

IV. THE HONG KONG EOC AND ITS APPROACH TO CONCILIATION

The legislation gave the government complete discretion as to when to bring the new laws into force and it took the position that the employment provisions could not come into force until the EOC had been established and promulgated the Codes of Practice to advise employers on their new obligations. The government then took its time establishing the EOC, failing even to advertise the post of Chairperson until a full eight months after the legislation was enacted. As a result, the first Chairperson did not take up the position until May 1996, and the employment provisions did not come into force until December 1996, a full eighteen months after they were enacted. The first Chairperson, Dr. Fanny Cheung, was a professor of psychology, who had a record of service on behalf of women and the disabled but was not viewed as a particularly assertive Chairperson. The government also appointed several members to the EOC who either had no prior track record in equality issues or had been openly

assistance unless the applicants have been through the complaints system and conciliation has proved to be unsuccessful." *Id.*

hostile to the concept of strong anti-discrimination legislation.[37] These appointments made women's organizations suspicious of the EOC and they regularly criticised it as being a paper tiger during the first three years of operation.[38]

In 1999, the government appeared to make an effort to counter these charges, as it appointed Anna Wu (the original proponent of the EOB) to be the new Chairperson of the EOC. The appointment startled many people since Wu had already demonstrated her willingness to challenge the government and had the potential to be a real thorn in its side. Indeed, since Wu assumed the Chairperson's position the EOC has successfully sued the government for employment discrimination, obtaining significant damages for three plaintiffs who had been fired or not hired for jobs in the Fire Services Department and the Customs and Excise Department because they each had a parent who suffered from mental illness.[39] The EOC also filed an application for judicial review of the government's system of allocating secondary school places to male and female students and obtained a declaration from the court that the system is unlawful.[40]

The significance of Wu's appointment was not missed by the business community. Indeed, one of its representatives publicly expressed his concern that Anna Wu could be "bad for business" because she would vigorously enforce the anti-discrimination laws.[41] However, statements such as these probably overstate the impact of Wu's appointment –

37. *See* Roger Neill, *Balance of Equality Body Questioned*, EASTERN EXPRESS, May 9, 1996, at 5.

38. *See* HONG KONG COALITION ON EQUAL OPPORTUNITIES, BIANNUAL SUPERVISION REPORT ON THE EQUAL OPPORTUNITIES COMMISSION (original Chinese report and summary English translation circulated to the Hong Kong Legislative Council as Paper No. CB (2) 2349/96-97 (02)).

39. *See* K, Y, and W v. Secretary for Justice, *supra* note 33.

40. *See* Equal Opportunities Comm'n v. Director of Educ., HKAL 1555/2000 (decided June 22, 2001). The application for judicial review arose out of the EOC's first formal investigation, in which the EOC found that the government has been processing separately the applications of girls and boys to secondary schools. The result of this process is that in most "school nets" in Hong Kong girls are required to achieve *higher* results than boys to be admitted to the elitist secondary schools (known as "band one" and "band two" schools"). *See* HONG KONG EQUAL OPPORTUNITIES COMMISSION, FORMAL INVESTIGATION REPORT: SECONDARY SCHOOL PLACES ALLOCATION (SSPA) SYSTEM (1999).

41. *See* May Sin-Mi Hong, *Anna Wu Hits Back at Critic*, SOUTH CHINA MORNING POST, August 9, 1999, at 4.

although she is the only "full-time" member of the Commission, she still needs the agreement of the other part-time members, many of whom are quite conservative, for any major policy moves. Moreover, Wu herself recognizes the need to work with the Hong Kong business community and has sought to reassure it by launching a new "partnership with business" program that emphasises education and training programmes. Of course, in the long run it is probably inevitable that the EOC will be viewed as too aggressive by the business community and too neutral by complainants and NGOs.

The Hong Kong EOC has been strongly influenced by Australian approaches to investigating and conciliating complaints of unlawful discrimination. This influence can be seen in the relevant subsidiary legislation, which draws heavily from comparable provisions in the Australian federal legislation. Similarly, the EOC's internal operating procedures were initially based largely upon comparable Australian federal procedures, although these procedures have since been modified by the Hong Kong EOC legal adviser based upon actual experience with the legislation. The Hong Kong EOC has also brought in experts from Australia to conduct training sessions for its officers and has sent certain officers to visit Australian commissions for further training. This is considered important because the formal mediation training available in Hong Kong, which all EOC officers are expected to complete, focuses on commercial mediation and therefore is not completely relevant to the conciliation of discrimination complaints.

Complaints filed with the EOC are received by one of two divisions, the Gender Division, which receives complaints under the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance, and the Disability Division, which receives complaints under the Disability Discrimination Ordinance. Each division has a "Division Head," who is assisted by a "chief" and eight officers devoted to investigation and conciliation. In general, the same officer who investigates a complaint will also attempt to conciliate it. However, a separate officer can be assigned to conciliate a complaint if one of the parties feels that the investigating officer has become biased against him.

The Hong Kong EOC recently invited an Australian expert to examine and comment upon its complaint files. This led to the recommendation that Hong Kong EOC officers make more of an effort to encourage "early conciliation" (before the investigation stage is complete) as a means of resolving complaints sooner and increasing the rate of successful conciliation. The underlying theory behind this recommendation is that parties become more "hardened" in their positions during the investigation process and thus less willing to conciliate. Early conciliation also obviously reduces the time that officers have to devote to the investigation process, a consideration which has become important in the last year in light of the increasing case-load, an issue that is discussed further below. Beginning in October 2000 both the Disability Division and the Gender Division provisionally adopted the recommendation and started actively encouraging early conciliation, although they are adopting slightly different models, in terms of the distribution of the early conciliation duties. The success of the program was assessed after the first six months (October 2000-March 2001) and a significant number of complaints had been resolved through early conciliation. Both divisions have thus decided to continue to offer early conciliation.

The officers I have interviewed thus far have generally expressed support for the concept of early conciliation, both because it can save time and because they believe that some parties may be more willing to conciliate at an earlier stage. However, some have expressed concern that they do not have the opportunity to investigate the important facts in these cases. Moreover, since only the statement of claim has been prepared, an "early conciliation" conference can proceed with very little information from the respondent. This may make it difficult for the complainant to anticipate and prepare to refute the arguments that the respondent will assert at the conciliation conference.

In the early cases processed by the EOC, a large percentage of parties did not conciliate in person but rather used the EOC officer as a sort of messenger, passing the offers and responses back and forth. From the point of view of the officer, a conciliation meeting is more efficient as it allows the parties to respond more quickly to one another.

Moreover, face-to-face conciliation is more consistent with what people expect of a mediation-based model of enforcement. Thus, the EOC officers have been making a concerted effort to encourage parties to attend conciliation conferences and the percentage of cases conciliated in this manner has increased. In the Gender Division, the officers I interviewed estimated that a conciliation meeting is now held in more than half of the cases that proceed to conciliation. However, certain complainants, particularly those making complaints of sexual harassment or disability harassment, are not willing to meet the respondent and in such cases the EOC officer continues to serve as the messenger.

The officers provide parties with written material explaining the rules of conciliation and the role of the investigation/conciliation officer.[42] They also try to explain the procedures orally to the parties. However, the officers reported that many parties do not appear to fully understand this information and make incorrect assumptions. For example, although the brochure informs complainants that the officer is required to be "impartial,"[43] officers report that complainants often expect them to serve as their advocates. They also reported that complainants mistakenly assume that the case is "established" once the officer has suggested that it is ready to proceed to conciliation or that the case will automatically go to a hearing if the conciliation attempt fails.

One of the challenges faced by the EOC is that Hong Kong now has a bilingual legal system. This means that all the legislation, the Codes of Practice, and procedural materials are published in both Chinese and English. However most legislation in Hong Kong, including the anti-discrimination laws, tends to be drafted initially in English and then translated into Chinese and people often comment that the Chinese translations are not as clear as they should be. Most of the educational and promotional materials that the EOC produces are also published in both languages, as are the EOC policy statements and conference papers. There is no question that this adds considerably to the expense of the EOC's operations, but it is absolutely essential in Hong

42. *See, e.g., What is Conciliation?, supra* note 35.
43. *Id.* at 4.

Kong. The EOC investigation and conciliation officers also are all bilingual.

The officers do generally meet separately with each party and use "reality testing" techniques to try to persuade each party to adopt realistic approaches. The officers will also ask each party what its "bottom line" is, on the understanding that the officer will not pass the information on to the other party without permission. Of course, not all parties are willing to trust the officer with this information and the officers have reported that respondents are generally less willing to provide it than complainants.

In complaints of employment discrimination, the employer will often have legal representation and will almost certainly send a fairly high-ranking manager to the conciliation conference. In contrast, the complainant almost never has legal representation in the conciliation stage, although she is often accompanied by a relative or friend, or a representative from an NGO or trade union. In any event, she will very likely find herself attempting to conciliate with a person who ranked higher than her in the company. Indeed, he may well be her former supervisor and/or the person that she alleges committed unlawful discrimination or harassment against her.

As a result of this obvious power imbalance, and also the public's perception of the purpose of the EOC, the complainant often expects the EOC officer to play the role of her "advocate" during the investigation and conciliation process. However, the EOC's operating procedures require that the officer act impartially during the conciliation of complaints. Thus the officer must avoid conduct which could give rise to a fear of bias. According to EOC officers, respondents have not hesitated to accuse the EOC of failing to maintain impartiality where they perceived that the officer was advocating on behalf of the complainant or where they suspected that the officer may have indicated to the complainant that a particular offer was low and should not be readily accepted.

An interesting observation made by several officers is that complainants often express an initial desire to litigate their claims, particularly if the litigation is funded by the EOC.

This would seem to conflict with the common assumption that Hong Kong Chinese prefer conciliation to an adversarial process. The officers did note that this desire to litigate sometimes fades when the complainant realizes what is involved in litigation, not only the expense, but also the time and stress of appearing in court. However, some officers believe that a certain percentage of complainants (they estimated as many as 20-30 percent) do not want only compensation but also a hearing and a judgement. They noted that it is difficult, and perhaps pointless, to try to conciliate such cases and that a specialist tribunal would give these complainants an opportunity to obtain the remedy that they desire.

V. THE DISTRIBUTION OF COMPLAINTS FROM DECEMBER 1996 NOVEMBER 2000

A. Complaints for Investigation and Conciliation in All Fields

In the period from September 1996, when the non-employment provisions of the legislation came into force, until November 30, 2000, the EOC received a total of 2249 complaints, 1620 of which were for investigation and conciliation.[44] The EOC has experienced a steady increase in the number of complaints. In its first sixteen months of operation it received only 168 complaints for investigation and conciliation. In that early period there was a concern that people were not making use of the EOC and it actively encouraged potential complainants to come forward. The publicity has worked. The annual number of complaints received for investigation and conciliation rose to 393 in 1998 and to 433 in 1999. In the first eleven months of 2000 the EOC had already received 626 complaints for investigation

44. The 629 complaints which are not filed for "investigation and conciliation" are classified as complaints for "follow-up action." For example, a person might complain to the EOC about a discriminatory advertisement. Although the person making the complaint probably will not have suffered any damages as a result of the advertisement, the EOC can look into the matter and take follow-up action. The EOC has frequently written to newspapers and has also litigated to enforce the provisions prohibiting discriminatory job advertisements. *See* Equal Opportunities Commission v. Apple Daily Ltd. [1999] 1 H.K.C. 202 (enforcing section 43 of the Sex Discrimination Ordinance).

and conciliation.

The steady increase in the rate of complaints received is a serious concern of the EOC and its staff. Interviews with the Directors of both divisions and with several officers indicate that they feel an increasing pressure to complete cases more quickly. One officer noted that during the second half of 2000 the agency received an average of more than sixty new complaints per month, but resolved an average of only forty cases per month. This is a worrying trend, since the two divisions do not have the budget to expand the number of officers devoted to investigation and conciliation. The EOC has a "performance" target of completing 75 percent of all cases within six months,[45] but the officers I interviewed expressed concern that they may not be able maintain this target with the heavier caseload. Thus, the recent decision to promote "early conciliation" of complaints (before the investigation is completed) is to a large extent driven by management's concern that staff will not be able to manage the caseload if every complaint is fully investigated.

B. Employment-related Complaints for Investigation and Conciliation

Although the laws apply to a broad range of activities (including education, housing, and the provision of goods and services), the vast majority of the complaints received for investigation and conciliation were in the area of employment. As of November 30, 2000, the EOC had been asked to investigate a total of 1188 employment-related complaints, representing 73 percent of the total complaints received for investigation and conciliation.

Table 1 shows the distribution of the employment-related complaints under the three ordinances There were 533 complaints filed under the Disability Discrimination Ordinance. Of these, 460 (86 percent of the total) alleged disability discrimination. Only sixty-nine complaints (13 percent) alleged disability harassment and only four alleged discrimination by way of victimization (e.g., unfavourable

45. *See* EOC Performance Pledge 2000, *available at* <http://www.eoc.org.hk> (last visited Oct. 16, 2001).

treatment on the ground that the person made a complaint of acts that are unlawful under the Disability Discrimination Ordinance, prohibited under section 7).

There were 602 employment-related complaints filed under the Sex Discrimination Ordinance. However, a fairly small number of these cases alleged pure sex discrimination (119 complaints; 20 percent of the total). The largest category of discrimination alleged under this ordinance was actually pregnancy discrimination (229 complaints; 38 percent) and the second largest category was sexual harassment (199 complaints; 33 percent). The EOC also received thirty-two complaints of unlawful victimization (unfavourable treatment on the ground that the person made a complaint of acts that are unlawful under the Sex Discrimination Ordinance, prohibited under section 9). The remaining twenty-three complaints under this ordinance alleged marital status discrimination.

The large number of complaints of pregnancy discrimination confirms what Hong Kong women's organiza- tions have alleged for many years, that Hong Kong employers are loathe to pay maternity leave and regularly fire women employees who they suspect are pregnant. Employers are also regularly accused of firing women soon after they return from their maternity leave, apparently because they assume that a woman with a small baby at home will not be able to perform at the same level. It may also be that during the recent recession in Hong Kong employers view the pregnancy of an employee as an opportunity to replace her with a junior person at a lower salary. The EOC made a special effort to advise women of their rights when pregnant and has reported a significant increase in complaints of pregnancy discrimination in the past eighteen months.[46]

The Family Status Discrimination Ordinance was enacted much later (in 1997) and is not a significant source of complaints thus far. As of November 30, 2000, the EOC had received a total of fifty-three employment-related complaints under this Ordinance.

Out of the total of 1188 employment-related complaints

46. *See* Stella Lee, *Alarm as Sex Bias Cases Rise by 78pc*, SOUTH CHINA MORNING POST, February 1, 2000, at 1.

received by November 30, 2000, 314 were still in the process of being investigated or conciliated by EOC officers. Of these pending complaints, most were filed with the EOC in the calendar year 2000 and a significant number were not filed until the later half of 2000. In calculating the percentages noted in the next section (e.g. the discontinuation rate and the conciliation rate), I have disregarded these cases entirely and worked only with the 874 cases that had been brought to some conclusion by November 30, 2000.

TABLE 1

Status (as of November 30, 2000) of Employment-Related Complaints filed with the Hong Kong Equal Opportunities Commission from December 1996 – November 2000

Category	Number of Complaints Filed	Number still Investigation or Conciliation	Number of Concluded Complaints
Disability Discrimination	460	118	342
Disability Harassment	69	6	63
Victimization (DDO)[47]	4	3	1
Sub-total DDO	**533**	**127**	**406**
Sex discrimination	119	20	99
Pregnancy discrimination	229	77	152
Marital Status Discrimination	23	5	18
Sexual Harrassment	199	59	140
Victimization (SDO)[48]	32	8	24
Sub-total SDO	**602**	**169**	**433**
Family Status discrimination	53	18	35
Sub-total FDSO[49]		**53**	**1835**
Total Employment Field	**1188**	**314**	**874**

47. Refers to complaints filed pursuant to Section 7 of the Disability Discrimination Ordinance.

48. Refers to complaints filed pursuant to Section 9 of the Sex Discrimination Ordinance.

49. The Family Status Discrimination Ordinance also prohibits "victimization" (in Section 6) but no complaints had been filed in this category as of November 30, 2000.

VI. OUTCOMES OF CONCLUDED COMPLAINTS AND REMEDIES OBTAINED THROUGH CONCILIATION

A. Discontinued Cases

Out of the 874 concluded employment-related cases, 441 never reached the conciliation stage. Of these cases, 111 are classified as "early resolution," meaning that the complaint was resolved early in the course of investigation. However, in 330 cases the complaint was not resolved but the EOC nonetheless discontinued the investigation, either because the complainant decided not to pursue it or because the EOC decided that there were good grounds for discontinuation (e.g. the complaint did not allege an unlawful act or was considered by the EOC to be frivolous or lacking in substance).

One goal of our research project is to assess samples of these discontinued cases. We are particularly interested in ascertaining why the rate of discontinuation for reasons other than early resolution is so much higher among cases filed under the Disability Discrimination Ordinance (177 out of a total of 406 concluded cases, or 44 percent) than it is among cases filed under the Sex Discrimination Ordinance (135 out of 433 concluded cases, or 31 percent). One explanation offered by some EOC officers in preliminary interviews (which we will seek to test), is that a significant number (as much as 10-15 percent) of the complaints filed under the Disability Discrimination Ordinance clearly lack any substance and can be discontinued at the intake stage.

Table 2 shows the outcomes of the 874 employment-related complaints that had been concluded as of November 30, 2000.

TABLE 2

Outcomes of Employment-Related Complaints Concluded (as of Nobember 30, 2000) through the Hong Kong Equal Opportunities Commission's Investigation/Conciliation Process

Category	Total concluded complaints	Early Resolution	Discontinued	Conciliation on Attempted	Conciliated
Disability discrimination	342	39	158	145	65
Disability harassment	63	13	18	32	18
Victimization (DDO)	1	0	1	0	0
Sub-total for DDO	**406**	**52**	**177**	**177**	**83**
Sex discrimination	99	17	37	45	22
Pregnancy discrimination	152	21	47	84	58
Marital status discrimination	18	1	9	8	7
Sexual harassment	140	13	36	91	54
Victimization (SDO)	24	1	6	17	10
Sub-total for SDO	**433**	**53**	**135**	**245**	**151**
Family status discrimination	35	6	18	11	4
Sub-total for FSDO	**35**	**6**	**18**	**11**	**4**
Total employment field	**874**	**111**	**330**	**433**	**238**

B. Conciliation

In 433 of the 874 concluded cases filed under the three ordinances the complaint proceeded to the conciliation stage. In 238 of these 433 cases conciliation was successful. This means that just under 50 percent of the complaints are proceeding to the conciliation stage and that about 55 percent of those complaints are successfully conciliated. This generates a conciliation rate of approximately 27 percent of the concluded employment-related cases.

It should be noted that in the employment field the rate of conciliation varies significantly depending upon what ordinance the complaint was brought under. For example, the conciliation rate, as a percentage of concluded cases, is 35 percent for employment-related cases brought under the Sex Discrimination Ordinance, but only 20 percent for employment-related cases brought under the Disability Discrimination Ordinance. The conciliation rate for employment-related cases brought under the Family Status Discrimination Ordinance is only 11 percent. However, since there were only thirty-five concluded cases under the Family Status Discrimination Ordinance as of November 30, 2000, it is difficult to draw any conclusions about those cases.

Employment-related complaints brought under the Sex Discrimination Ordinance were more likely to proceed to the conciliation stage and also more likely to successfully conciliate than those brought under the other two ordinances. For example, conciliation was attempted in 245 (57 percent) of the 433 concluded cases under the Sex Discrimination Ordinance. In contrast, conciliation was attempted in 177 (44 percent) of the 406 concluded cases filed under the Disability Discrimination Ordinance. Of the 245 Sex Discrimination Ordinance cases that proceeded to conciliation, 151 (62 percent) were conciliated, whereas only 83 of the 177 disability cases (47 percent) that proceeded to conciliation were conciliated.

However, when we examine cases in all areas, as opposed to just employment cases, the rate of conciliation for disability and gender-related cases is much closer. The conciliation rate, as a percentage of concluded cases in all

fields, was 37 percent for cases filed under the Sex Discrimination Ordinance and 32 percent for cases under the Disability Discrimination Ordinance. When we look at the success rate of attempts to conciliate we also find that the rate is quite similar, about 62percent, for the two ordinances when employment and non-employment cases are combined. Thus it is only in the employment field that the disability cases have a significantly lower conciliation rate. We have not yet drawn any conclusions about the reasons for this. However, we have postulated certain theories that we will attempt to test as part of the research. For example, it may be that the prejudices associated with disabilities are stronger than those related to gender and also more hurtful, making both sides less willing to compromise. It may also be that a woman who was unlawfully dismissed as a result of sexual harassment or pregnancy has a better chance than a person with a disability of locating a new job, allowing her to mitigate her damages. This should make it easier for the parties to agree upon monetary compensation. Moreover, a complainant who has secured a new job would presumably have a greater interest in conciliating the complaint quickly, so that it would not interfere with her new job.

C. Range of Remedies Obtained in Complaints Filed Under the Sex Discrimination Ordinance

One of the main criticisms that is often made of a conciliation model is that the conciliation terms tend to provide inadequate compensation. Moreover, in Hong Kong, where there is no specialist tribunal to hear cases that are not conciliated and where the barriers to litigation are quite high, the complainants may feel especially pressured to accept low offers.

We have started our analysis of remedies in employment discrimination cases with the complaints filed under the Sex Discrimination Ordinance, where the conciliation rate was the highest. (We have not yet studied the remedies obtained in the conciliated disability cases.) As indicated in Table 1, most of the complaints filed under the Sex Discrimination Ordinance fall within three main categories: sex discrimination; pregnancy discrimination; and sexual harassment.

While our analysis is still ongoing, we can make the following provisional observations regarding the range of remedies obtained through conciliation in cases completed as of mid-2000.

1. *The Likelihood of Obtaining Monetary Compensation.* There is a marked difference among the three main categories of cases filed under the Sex Discrimination Ordinance. The pregnancy discrimination data-base includes, by far, the largest number of cases in which monetary compensation was part of the conciliation terms. The sexual harassment category has the second-highest category in terms of the frequency of monetary compensation. In contrast, we have found very few pure sex discrimination cases that were conciliated for monetary compensation. It should be noted, however, that there are relatively few conciliated sex discrimination cases in which the complainant alleged that s/he lost an existing job due to the discrimination, whereas there are numerous such cases in the conciliated pregnancy discrimination and sexual harassment categories.

2. *Alternatives to Monetary Compensation.* Other common remedies in the data-base include: a good reference letter; a change to the "testimonial" so as to remove the stigma of being dismissed; and/or a formal apology. From the employer's point of view, these are inexpensive ways to settle cases but such remedies are not always easy to agree upon. For example, in some cases the employee has demanded that the respondent provide a reference letter stating that the complainant resigned of her own accord, despite the fact that she was actually dismissed. A formal apology may also be difficult to obtain, especially if the employer originally insisted that the complainant was dismissed for poor performance.

3. *The Amount of Monetary Compensation Paid.* As of November 2000, the largest amount of monetary compensation obtained through conciliation by the EOC was HK$600,000 (approximately US $77,000), in a case of pregnancy discrimination. However, this was the only case we examined in which compensation over HK$200,000 was obtained through conciliation. There were also several cases in the HK$100,000 200,000 category, but the majority of cases were conciliated for less than HK$100,000

(approximately US$13,000).

4. *Impact of the Category of Case on the Amount of Compensation.* When we compare the pregnancy cases and the sexual harassment cases in which monetary compensation was part of conciliation terms, we find that the awards tend to be higher in the pregnancy cases. This is true even when we focus on the sexual harassment cases in which the complainant alleged that she was dismissed or resigned as a result of the harassment.

We have examined several case files for complaints of pregnancy discrimination that were successfully conciliated for monetary compensation. From these files, we can identify certain factors that may account for the greater chance of obtaining monetary compensation and the larger amounts obtained. First, in several of the pregnancy discrimination cases, the complainant had provided the EOC with a reasonable amount of documentary evidence supporting her claim. A common pattern is that the employee received positive written reviews for several years, but then returned from maternity leave only to receive (sometimes in a matter of days) a written "warning" telling her that she must work harder, make fewer mistakes, spend less time on personal telephone calls, or show a better attitude. This is often followed by a memo of protest by the employee, further warnings, and then ultimately dismissal, all within a remarkably short period of time. The complainant often alleged that her former supervisor had strongly urged her to resign, indicating that if she did so the employer would provide her with a good reference letter. Of course there is rarely documentary evidence of such conversations. However complainants can often name other former employees who had been dismissed, or persuaded to "resign, " when they were pregnant or returned from maternity leave, thus providing witnesses that the EOC officer can contact. When confronted with such evidence the employer may well decide that it would be wise to offer a settlement.[50]

50. Another factor which may influence employers (and needs further study) is that in several cases the complainant also had filed a related complaint (under the Employment Ordinance) in the Labour Tribunal, and the EOC conciliation agreement sometimes settled that claim as well. Although the Labour Tribunal is not known as being particularly sympathetic to employees, the opportunity to settle both claims at

In contrast, in the conciliated cases that I have examined in which pure "sex discrimination" was alleged, there was generally far less documentary evidence. In these cases, the complainant generally was not an existing or former employee but rather a job applicant who alleged that the employer or one of its staff stated that he could not apply for a particular job on the ground of his sex. I use the term *his sex* because in more than half of the conciliated sex discrimination cases I have examined thus far the complainant was a man and the employer was alleged to have told him that the job was only for women. Of course, it is very difficult to prove such claims or to establish damages. In several of these cases the conciliation agreement was simply an apology, an explanation that the employer did not intend to discriminate, or the promise of an interview with no commitment to hire.

However, recently the EOC has received a significant number of sex discrimination complaints from women, who are either existing or former employees of the respondents. These cases appear to have stronger evidence of both discrimination and damages than most of the early sex discrimination cases that have been successfully conciliated. Thus there is a greater chance of obtaining monetary compensation in conciliation. When these cases are factored in to our data-base, our provisional observations on this category of cases may change.

VII. THE NEXT STAGE OF THE RESEARCH PLAN

The next stage of the project is to select a representative sample of cases in the four main categories (sex discrimination, pregnancy discrimination, sexual harassment, and disability discrimination) and perform a quantitative analysis of the factors that may have influenced the outcomes. When the data becomes available, we will also pay special attention to the EOC's use of "early conciliation," comparing it to the approach followed prior to October 2000 under which conciliation was not normally encouraged until after the investigation was completed.

The results of the interviews done to date do call into

once would obviously be attractive to the employer.

question the assumption that Hong Kong Chinese have a particularly strong desire to conciliate, rather than litigate, their complaints of employment discrimination. We need to interview actual complainants, at various stages of the process, to ascertain their preferences and the assumptions that underlie them. If the observation made by the EOC officers we interviewed that complainants tend to desire a hearing initially and only change their mind when they fully appreciate the stresses and strains of litigation is correct, then it may be that Hong Kong Chinese complainants are not that different in this respect from their counterparts in more "western" societies.

We also plan to interview other EOC officers and selected complainants. We hope to interview respondents as well but may have to settle for interviewing representatives of employer organizations. It is clear that there is substantial disagreement between the complainants and the respondents as to what the EOC officer's role should be. From the point of view of respondents, the procedure is only fair if the officer is entirely objective and "neutral." However, from the point of view of the women's and disability rights groups, this defeats the purpose of the legislation and of establishing the EOC. It may be that certain devises can be created to address the power imbalance without sacrificing the objectivity of conciliator. For example, the EOC might consider appointing certain officers to act as advocates, particularly in cases in which the complainant was formerly a fairly junior employee and is attempting to conciliate with a company's manager or legal officer. Of course, this would have resource implications and may be impossible as the EOC is increasingly overloaded with pending cases.

We plan to publish the final results of this study in a format that will be accessible to the Hong Kong community. One of the complaints often made by women's organizations is that the EOC is not sufficiently "transparent." Actually, in many respects the EOC is probably one of the most transparent public bodies in Hong Kong. It publishes an enormous quantity of promotional and educational material, holds many public events, and is frequently in the news. Yet the data that many women's and disability groups really want to see – the outcomes of most of the complaints – is kept

confidential. The EOC does publish, in its annual reports[51] and its quarterly newsletter,[52] the results of a limited number of conciliated cases, with the names and details changed. However, this does not seem to give NGOs the sense that they really understand what is happening to the large bulk of cases. Given that there is no specialist tribunal and very few cases go to court, it is important that the community have certain information on the success rate of complaints as a whole, the types of complaints that tend to succeed, the range of remedies obtained in conciliation, and the factors that may influence whether a case is successfully conciliated.

51. *See, e.g.*, EQUAL OPPORTUNITIES COMMISSION ANNUAL REPORT 1998/99.
52. EOC NEWS.