

EQUAL OPPORTUNITY COMMISSION:

WHAT, WHY AND HOW?

REPORT BY THE EXPERT GROUP
TO EXAMINE AND DETERMINE THE STRUCTURE AND
FUNCTIONS OF AN EQUAL OPPORTUNITY COMMISSION
SET UP BY THE MINISTRY OF MINORITY AFFAIRS,
GOVERNMENT OF INDIA
FEBRUARY, 2008

EQUAL OPPORTUNITY COMMISSION: WHAT, WHY AND HOW?

Report by the Expert Group

To examine and determine the structure and functions of
an Equal Opportunity Commission

Set up by the Ministry of Minority
Affairs, Government of India

February, 2008

Prof. (Dr.) N.R. MADHAVA MENON
Chairman,
Expert Group on Equal Opportunity Commission

20th February, 2008

Honorable Minister,

The Expert Group on Equal Opportunity Commission have pleasure in submitting herewith our report on the structure, scope and functions of the proposed Commission along with a Draft Bill on the subject.

Though the Notification constituting the Expert Group came on 31st August, 2007, the Committee with its full membership of seven members and a consultant could be made functional only from October 2007. The Group later got a Research Assistant to provide research and secretarial support to its work. The members of the Expert Group, despite pre-occupation with their own teaching, research and professional activities, found time not only to give inputs in formulating definitive positions on many complex issues, but also undertook to do several drafts of the report and the Bill for discussion. The contributions of the Consultant (Mr. Dharmendra Sharma) and the Research Assistant (Ms. Nimisha Kumar) require special mention in this regard. The Ministry of Minority Affairs not only extended all logistic support but responded positively to many demands of the Group at short notice.

The Expert Group had eight formal meetings which extended from morning till late evening on almost all days. Besides, several informal meetings among groups of Members assigned with specific tasks facilitated the completion of report and the Bill in record time of less than five months. Initial draft of the Bill was sent for critical comments to select persons knowledgeable on the subject by the Chairman. Their advice did help us to bring clarity and enrich the report and its legislative framework.

Another important event which helped the Group in addressing some complex issues affecting stakeholder interests is a Consultation Meeting held in New Delhi on 15th February, 2008. Over thirty selected experts and stakeholder representatives gave their critical feedback on certain key ideas and proposals contained in the recommendations of the Group. The deliberations at the Consultation Meeting have

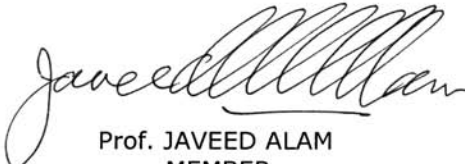
indeed helped the Expert Group to test the acceptability of its views to the stakeholders and to the general public. The Expert Group alone, however, is responsible for the recommendations contained in the final report and the draft Bill.

Equality is not only an energizing civilisational goal and a guaranteed fundamental right but also an integral part of our national ethos and a constitutional value intended to sustain our diversity and unity. As such, any effort to institutionalize its dynamic mission is to be welcomed by all political parties and all sections of people of our great Republic. We, in the Expert Group do hope that our recommendations would prove useful to the Government in making the constitutional philosophy meaningful to millions of our countrymen patiently waiting to claim their share of freedom, dignity and development.

In the final analysis, any institution is as good as the commitment and dynamism of the persons who come to occupy positions for implementing its mission. This is true of the proposed Equal Opportunity Commission as well.

We wish to thank the Government of India and the Ministry of Minority Affairs for the opportunity given to us to serve in a national endeavour of great public interest and significance.


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(TO BE PUBLISHED IN PART II, SECTION 3.SUB-section (ii)
OF THE GAZETTE OF INDIA

No.14-12/2006(EOC)-PP-I
Government of India
Ministry of Minority Affairs

Paryavaran Bhavan, 11th Floor, CGO Complex,
Lodhi Road, New Delhi-110003.

Notification

Subject: Constitution of an Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission

The Sachar Committee had, inter-alia, recommended as follows:-

“It is a well accepted maxim in law that not only must justice be done but it must appear to be done. It is in that context that the Committee recommends that an Equal Opportunity Commission (EOC) should be constituted by the Government to look into the grievances of a deprived groups.”

2. It has been decided to set up an Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission. The Expert Group shall consist of the following:-

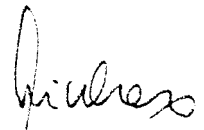
- | | | | |
|-------|--------------------------------|---|----------|
| (i) | Prof. (Dr.) N.R. Madhava Menon | - | Chairman |
| (ii) | Prof. Javeed Alam | - | Member |
| (iii) | Prof. Satish Deshpande | - | Member |
| (iv) | Prof. Yogendra Yadav | - | Member |
| (v) | Prof. Gopal Guru | - | Member |

3. If considered necessary, the Chairman of the Expert Group may co-opt upto two additional members possessing expertise required by the Group.

4. The terms of reference of the Expert Group shall be as follows:-

- (i) to recommend the structure, scope and functions of the proposed Equal Opportunity Commission.
- (ii) to advise on an appropriate legislative framework for such a Commission.
- (iii) to make any other recommendations relevant to the above.

5. The Expert Group may incur an expenditure upto a sum of Rs.50,000/- only for secretarial assistance for preparation of the report.
6. Assistance for convening meetings of the Expert Group shall be provided by the Ministry of Minority Affairs.
7. The Expert Group shall submit its report within a period of three months.
8. (i) The expenditure on TA/DA of the non-official members of the Expert Group in connection with the meeting of the Group will be borne by the Ministry of Minority Affairs. They will be entitled to TA/DA as admissible to Grade-I Officers of the highest category in the Government of India.
- (ii) Out-station-official members, will be allowed reimbursement of single room rent in terms of Department of Expenditure O.M.No.19020/2/94/EIV dated 10.8.1994.
- (iii) Non-official members will be entitled to a sitting fee of Rs.2,000 per day.
9. This issues with the approval of the Competent Authority and concurrence of JS&FA vide diary No26/JS&FA/MA dated 24.8.2007.



(A. Luikham)

Joint Secretary to the Government of India

P.S.

In terms of clause 3 of the Notification, the Chairman Co-opted the following two additional members to the Expert Group:

- (vi) Mr. R. VenkataramaniMember
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ACKNOWLEDGEMENTS

Several institutions and individuals helped the Expert Group in preparing the report and drafting the Bill in a record time of less than five months. To begin with if it were not for the consistent and unstinted support extended by the Secretariat of the Ministry of Minority Affairs led by Mr. M.N. Prasad, Secretary to the Department and Mr. A. Luikham, Joint Secretary and their team of officers particularly Mr. Ashish Joshi and Mr. A.K. Srivastava, the work would not have been completed as planned. We record our sincere appreciation of their contribution rendered with a rare commitment, unusual for the bureaucracy.

Mr. Dharmendra Sharma, a senior civil servant attached to the Ministry of Petroleum shared his expertise in structuring the powers and functions of the EOC. We acknowledge his contribution and thank the Petroleum Minister for sparing his part-time services.

Ms. Nimisha Kumar, a young lawyer from Bangalore engaged by the Group as a Research Assistant not only worked in assembling the documentation and processing the deliberations but also helped in the research and writing of the report. We would like to acknowledge the research and secretarial assistance extended to the Expert Group by her during the last four months.

A cross section of society including lawyers, judges, social activists, academicians and representatives of government and non-government organizations who were consulted on several issues identified in the initial drafts gave their expert views and we would like to record our thanks to them. A list of people/organizations thus consulted is appended to the report.

We are grateful to Mr. Subachan Yadav who allowed his drawings to be included in the report.

We thank Ms. Shweta Rao of Banyan Tree Designs who imaginatively designed the layout and supervised the production of the report.

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EXECUTIVE SUMMARY

1. 'Equal Opportunity Commission: What, Why and How?' is a report of the Expert Group appointed by the Ministry of Minority Affairs, Government of India, to determine the structure, scope and functions of an Equal Opportunity Commission. The Expert Group is of the opinion that there is a need for an Equal Opportunity Commission in the country and recommends that the Government of India should set it up along the lines suggested in this report. The setting up of an Equal Opportunity Commission (EOC), sooner than later, will be a significant step towards fulfilling the Constitutional promise of equality in its different dimensions. The Expert Group has also drafted a Bill, published with this report, and recommends that after due consideration the Bill should be placed early before the Parliament. What follows is a summary of the main points in this report.

2. Though Equality is a foundational value of our Republic, stark inequalities mark our present social reality and prospects for the future generations. Inter-group inequalities often coincide with boundaries of communities and are becoming more visible than before. Hence there is an urgent need to address these inequalities and supplement the existing policies of reservations by fine tuning the definition of the beneficiaries, expanding the range of modalities and evolving a forward looking and integral approach to affirmative action. That is why we need an Equal Opportunity Commission. The proposed EOC will serve as a path-finding institution that serves as a mechanism to evolve and evaluate mechanisms for affirmative action, following an evidence-based approach.

3. The Right to Equality enshrined in the Constitution goes beyond a formal requirement of ensuring absence of direct discrimination. The Constitution, as interpreted by the judiciary, provides a positive mandate for creation of a level playing field by appropriate State action. The proposed EOC is anchored in this approach that puts a positive obligation on the State to control direct as well as indirect discrimination, eliminate extreme forms of deprivation and take into account the burden of history.

4. A review of EOCs or similar bodies across the world demonstrates the utility of such an institution, if it is tailored to the specific socio-economic, judicial and institutional context of the country. The experience of such institutions shows that there is no alternative to recognizing social identities and to developing, gathering and publishing of evidence about persisting inequalities in opportunity, that the EOC needs to be pro-active and autonomous of the government; and; that a wide range of context-specific policy options are needed in each country.

5. The jurisdiction of the proposed EOC should be wide ranging in terms of social groups and sectors but delimited in terms of domains and the nature of issues that it can take up. It would serve its purpose best if it is open to any citizen of India and the beneficiaries are identified by evidence, rather than being pre-determined at this stage. The scope of the EOC should extend both to the public and the private sector. The EOC should give priority to education and employment

and should entertain only group equality related cases. Thus defined, the scope of EOC may apparently overlap with other Commissions, yet the EOC will have its own niche and unique role, for it would provide a service that is not currently on offer. Parliament has the requisite power to legislate on this subject.

6. The EOC should focus on advisory, advocacy and auditing functions rather than grievance redressal. Such an evidence-based advocacy role would involve many functions: research and data gathering, monitoring and auditing, advisory and consultative role, policy intervention, grievance redressal in a limited and supportive capacity, coordination, promotion and advocacy, and dissemination including the preparation and publication of performance reports and Status Reports on Equal Opportunity situation.

7. The EOC needs the powers of a Civil Court, but not penal powers, for its inquiries and investigations. The impact and the efficacy of the EOC would depend mainly on its ability to influence public opinion and provide credible evidence. Accordingly, the proposed EOC would have the power to announce Codes of Good Practice; the standard powers of a Civil Court relating to inquiries; power to provide legal assistance to complainants and engage legal counsel; power to demand information and to inspect records; and power to require compliance of equal opportunity practice codes.

8. The EOC would be expected to adopt a fresh approach and come up with innovative procedures. Generating, collecting, processing and disseminating various kinds of data on equal opportunity issues – generic data, reporting data, indices and data from case studies - is going to be the key to the success of the EOC. Besides, the EOC would conduct general and special investigations by following a standard, transparent, fair and time-bound procedure.

9. The composition of the EOC needs to reflect its diverse constituencies and multiple functional requirements. These can be met if the proposed EOC has a chairperson and six (at least two full time) members, enjoying a tenure of five years. The members should be selected from among experts (at least one each from law and social science), professionals and activists, with due representation to women and other disadvantaged groups, by a bipartisan Committee, following the model of the selection of the members of the NHRC. The EOC would need to work in a transparent manner and involve various stakeholders. Five Regional Commissions are proposed, within two years of setting up of the EOC, to make the institution accessible and relevant in different regions of the country.

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AT A GLANCE

1. Why an Equal Opportunity Commission?

- 1.1 Equality is a foundational value of our Republic which is
- 1.2 Secured by the Constitution through Fundamental Rights
- 1.3 Strengthened by the Directive Principles of State Policy and
- 1.4 Widely shared in public policy and democratic arena
- 1.5 Yet stark inequalities mark our contemporary social reality
- 1.6 Inequalities often coincide with boundaries of communities
- 1.7 Hence the need to re-envision and expand policies to address inequalities
- 1.8 So as to supplement the existing policy of reservation and
- 1.9 To fine-tune expand and reformulate the affirmative action policies
- 1.10 The EOC will serve as a path-finding institution for this purpose

2. What is “Equality of Opportunity”?

- 2.1 Equality of Opportunity can be understood in two different ways
- 2.2 Formal approach involves merely openness of opportunity without discrimination
- 2.3 The Constitution provides this guarantee of formal equality of opportunity
- 2.4 Substantive approach involves neutralizing the effect of circumstances
- 2.5 Including indirect discrimination or burden of history by a positive duty on the State
- 2.6 The Constitution and the judiciary support the substantive approach
- 2.7 As do the International Covenants signed by India
- 2.8 The report follows this approach in defining equal opportunity
- 2.9 In understanding what constitutes ‘discrimination’, and
- 2.10 In using the idea of ‘deprivation’

3. What are the lessons from EOCs across the world?

- 3.1 EOCs are becoming the norm in democracies across the world
- 3.2 Their experience offers lessons despite very different jurisprudence
- 3.3 Lesson one: there is no alternative to recognizing social identities
- 3.4 Lesson two: EOCs need to be pro-active
- 3.5 Lesson three: EOC should be autonomous of the government
- 3.6 Lesson four: Developing, gathering and publishing of evidence is crucial
- 3.7 Lesson five: Wide range of context-specific policy options are needed
- 3.8 South Africa offers an instructive model, specially with respect to
- 3.9 The making and enforcement of ‘equity plans’, and
- 3.10 The provisions of the Employment Equity Act
- 3.11 These practices are relevant to us
- 3.12 The newly constituted CEHR in the UK
- 3.13 Offers lessons for the structure and composition of the EOC, and
- 3.14 Suggests the possibility of integration of functions of various bodies

4. What is to be the mandate of the EOC?

- 4.1 The EOC should have wide ranging but delimited scope
- 4.2 The EOC has to deal with particular groups
- 4.3 And there are many deserving candidates
- 4.4 Yet it should be open to any citizen of India
- 4.5 The beneficiaries must be identified by evidence, not apriori
- 4.6 Scope of the EOC should extend to the public and private sectors

- 4.7 The EOC should prioritise education and employment
- 4.8 And should entertain only group equality related cases
- 4.9 Thus the scope of EOC may overlap with other Commissions
- 4.10 Yet the EOC will have its own niche and unique role
- 4.11 Parliament has the requisite power to legislate on this subject

5. What should be the functions of the EOC?

- 5.1 The EOC should focus on advice and audit rather than grievance redressal
- 5.2 And thus adopt an evidence-based advocacy role involving many functions, including
- 5.3 Research and data gathering function, so as to allow identification of beneficiaries
- 5.4 Monitoring and auditing function, in order to assess the impact of laws and policies
- 5.5 Advisory and consultative function, for various organs and levels of government
- 5.6 Policy intervention function, by way of various equal opportunity practice codes
- 5.7 Grievance redressal function, in a limited and supportive capacity
- 5.8 Coordination function, in its role as an equal opportunity watchdog
- 5.9 Promotion and advocacy function, aimed at shaping public opinion, and
- 5.10 Reporting and dissemination function, including the preparation and publication of performance reports and Status Reports on Equal Opportunity.

6. What powers would the EOC require?

- 6.1 The EOC needs the powers of a Civil Court for its inquiries and investigations
- 6.2 But it would draw much of its powers from its ability to influence public opinion
- 6.3 And occasional reference to other Commissions or interventions in courts of law
- 6.4 The EOC would have the power to announce Codes of Good Practice
- 6.5 The standard powers of a Civil Court relating to inquiries
- 6.6 Powers to utilize any officer or agency for its investigation
- 6.7 Power to provide legal assistance to complainants and to the Commission
- 6.8 Power to give orders and directions to demand information and to inspect records, and
- 6.9 Power to require compliance of equal opportunity practice codes and to take violators to the court

7. How would the EOC carry out its mandate?

- 7.1 In order to be cogent and credible, the EOC would need to adopt a fresh approach
- 7.2 Generating, collecting, processing and disseminating various kinds of data on equal opportunity issues is going to be the key to the success of the EOC
- 7.3 Besides, the EOC would conduct General and Special Investigations
- 7.4 In response to specific complaints, or otherwise,
- 7.5 Following a fair and time-bound procedure,
- 7.6 Which may result in mediation or an order within the EOC's powers

8. What should be the structure and organization of the EOC?

- 8.1 The EOC can balance its diverse constituencies and functional requirements
- 8.2 If it has a chairperson and six (at least two full time) members
- 8.3 Enjoying a tenure of five years
- 8.4 The members should be selected from among experts, professionals and activists,
- 8.5 With due representation to women and other disadvantaged groups
- 8.6 By a Committee that follows the NHRC model
- 8.7 The government would need to provide the EOC with an efficient secretariat
- 8.8 The EOC would need to work in a transparent manner and involve various stakeholders
- 8.9 The Central government would provide sufficient grants to the EOC
- 8.10 Five Regional Commissions would help make the EOC accessible and relevant.

PREFACE

Equality of Opportunity for all Citizens: A Constitutional Commitment:

The idea of India as captured in the Constitution is an egalitarian, multi-cultural society firmly entrenched in rule of law, human dignity and harmonious co-existence of diversity in all its forms, hues and shades. The State is directed by the Constitution “to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life” [Article 38(1)]. By an amendment in 1976, the mandate is further clarified by adding a positive duty on the State which reads:

“The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations” [Article 38(2)].

Several mechanisms including preferential treatment (reservation of seats for certain identified groups in legislative bodies, in public employment and in educational institutions) have been adopted by the provisions of the Constitution itself. Equality of opportunity in matters of public employment is a guaranteed fundamental right of every citizen [Article 16(1)]. This is ensured by prohibiting under Article 16(2) all forms of discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them in respect of any employment or office under the State.

The Constitution of India is itself the anti-discrimination law in the country both for individuals and for groups of people who find themselves discriminated on grounds only of religion, race, caste, sex, place of birth or any of them [Article 15(1)]. The right of individuals so discriminated to seek constitutional remedies by approaching the Supreme Court is also a guaranteed fundamental right (Article 32).

State’s Obligation to Create Conditions for Enjoyment of Equal Opportunity :

Are the protection of individual rights enough to secure the rights of groups of persons discriminated and long suppressed with the sanction of customs and State authority? Are anti-discrimination provisions in the Constitution enough to achieve equality of status and of opportunity to all citizens? The Constitution makers felt otherwise and have provided for a series of other “affirmative action” measures to achieve the social justice objective. Reservation in public employment and in education is just one such measure. More importantly, the Constitution, anticipating the changes in society and the limited scope of reservation, in securing equal opportunities for all deprived groups has adopted a long-term strategy of enabling the State to bring in special provisions in terms of the Directive Principles for the advancement of deprived sections [Articles 15(3),(4),(5); Article 16(3),(4),(4A),(4B)]. This is followed up by special mention of a number of areas like education, employment, nutrition and health (Articles 41,46,47) where the State, through legislation or schemes or otherwise is obliged to bring in conditions where deprived sections of people are enabled to avail of equality of status and of opportunity. It is this long-term strategy of progressive realization of conditions of equality that the State has been attempting to introduce through a series of social justice-oriented legislation during the last six decades. The process of planning and development was intended to supplement it with resources and executive action.

The question arises as to how adequate are these two strategies of anti-discrimination as part of the right to equality and of Directives of State Policy for creation of level playing field in securing equal opportunities to the disadvantaged sections of people? The data available through national

surveys by official agencies and expert committee reports suggest that while considerable progress has been achieved in some sectors, a large number of groups are still disadvantaged in terms of even accessing the basic necessities of life for survival with dignity. They are either discriminated or disproportionately denied of opportunities because of a variety of circumstances which are neither of their creation nor within their control to overcome. The lapse may be of the institutional arrangements in place or the weakness of policies involved. The differential impact of some developmental policies are either not noticed or documented. It is this data and institutional deficit that the proposed Equal Opportunity Commission is expected to address. The object is removal of unfair discrimination and pro-active creation of conditions in order to enable such neglected groups to avail of the constitutionally guaranteed right to equality. The new mechanism therefore should be such that, based on well-researched qualitative and quantitative data around the status of deprived groups, it should be able to influence policy (legislature), intervene in the implementation of laws and schemes (executive) and enable the accessing of equal justice under the law (judicial processes). The development of such a mechanism and determining its structure, scope and functions are the tasks assigned to the Expert Group.

Inclusive growth is what is sustainable in the long run. This is the socialist/egalitarian model that the Indian Constitution has envisaged for the Republic. Given the vast numbers who are in the disadvantaged category and the complex nature of disabilities they have been suffering from, it is not easy to bring about equality of status and of opportunity for all through rule of law and democratic processes. Entrenched attitudes and conventional mindsets constitute a major limitation in bringing about social change. History is replete with instances of how well-intentioned initiatives have brought more misery than good when authoritarian methods were employed and balance of interests not maintained. In other words, social engineering through legal and democratic institutions and processes has to necessarily acknowledge group identities and opt for incremental and consensual change. The consensus model depends a great deal on evidence-based advocacy and a balance between liberty and freedom. With the market forces not being favourably disposed to ideals of equity and equality, it becomes the duty of the State to be pro-active in the matter of equalization of opportunities for disadvantaged people. The human rights jurisprudence as it developed globally during the last few decades has decidedly supported State intervention against discriminatory practices even against private enterprise. Indian Constitutional law as interpreted and developed by the Supreme Court has also shown a remarkable trend to invoke the human rights discipline in constructing the egalitarian social order through qualitative and quantitative criteria. Courts sought measurable indices evaluated statistically to determine beneficiaries of affirmative action. The proposed Commission can profitably build on this trend with its evidence-based advocacy to promote equality of opportunity to deprived sections.

The equality jurisprudence contained in the Constitution, interpreted and developed by Parliament and Judiciary in India is rich and dynamic to serve the social justice vision of the Republic. The challenge is to translate it into appropriate policies and programmes without disturbing the democratic commitment to rule of law and harmonious relations among the different communities and groups. Multi-cultural societies all over the world have been experimenting with diverse institutional mechanisms to achieve the desired results with varying degrees of success. India too set up almost a dozen commissions at the national level to look after the special interests of disadvantaged sections of society. They are doing their best to focus the attention of the authorities on the problems of communities entrusted to their care. However, the issue of equal opportunity in different walks of life to disadvantaged groups has not received the attention it deserved for want of detailed quantitative and qualitative data, adequate legislative support and vigorous public advocacy.

The unorganized sector and the vast mass of self-employed persons do need the support of the State to be able to share the opportunities provided by economic development. The identity of

the deprived sections is not so much based on caste and religion but on their common plight of deprivation and consequent inability to access equality of opportunity. They are people with per capita consumption of less than Rs.15 per day whose numbers, we understand, exceed 500 million people. They do not belong to any one caste or religion. They largely come from among the Scheduled Castes, Scheduled Tribes, disabled persons, minorities and even from some sections of the majority communities. Thanks to the Constitution-makers, these persons are not helpless before law and the Constitution. They are endowed with rights and entitlements in respect of education, employment, health and dignity. The problem is with respect to their inability to assert the rights and fight discrimination. Our legal system can help only those who can reach the court and prove the discrimination based on facts and figures. The proposed Equal Opportunity Commission is expected to assume the role of a public advocate for the deprived groups. The evidence it collects and the arguments it constructs on the basis of equality jurisprudence can deliver reliefs and remedies administratively, and wherever required, through the courts and tribunals.

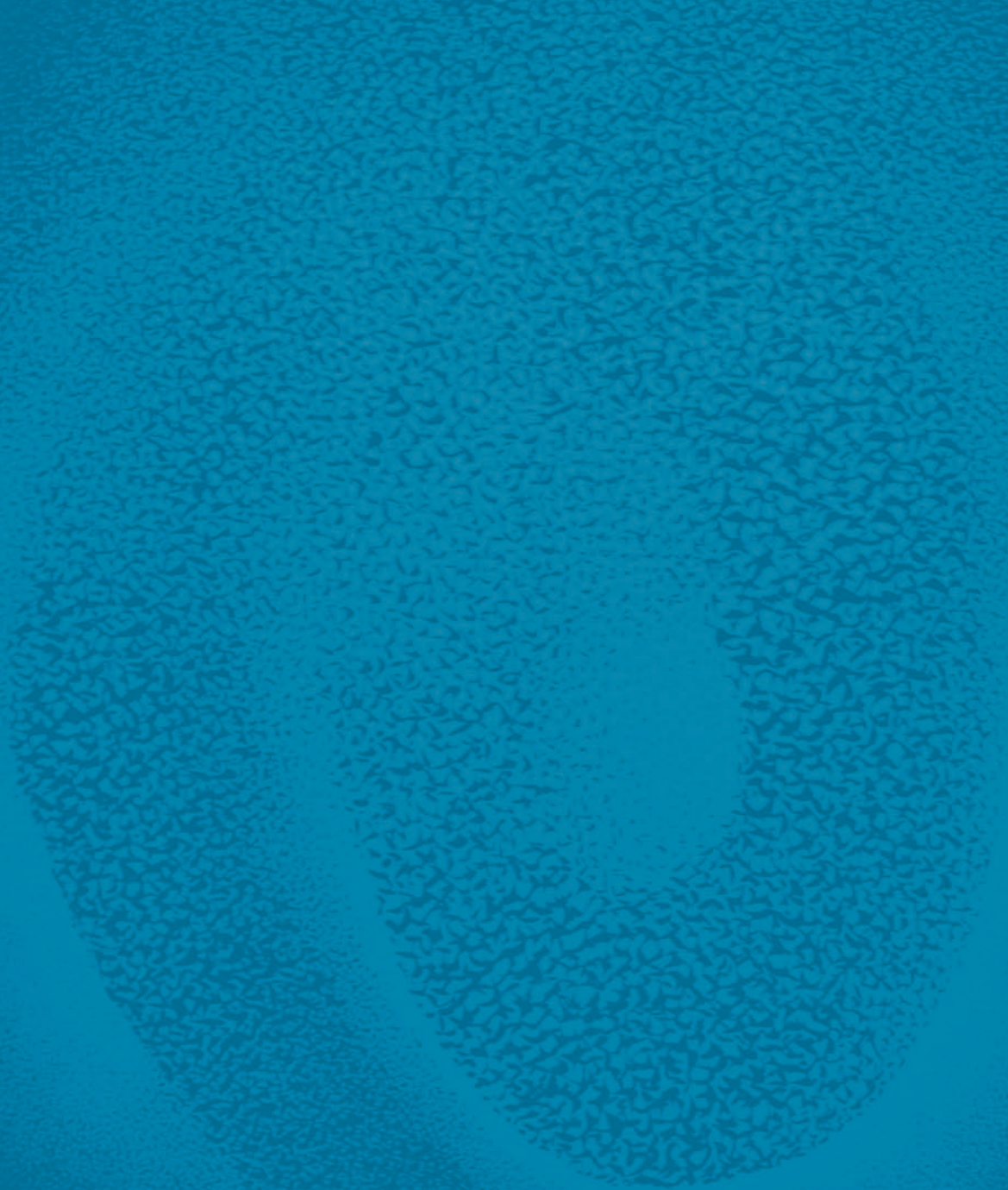
Unique Role of Equal Opportunity Commission:

No community or group should feel discriminated against. Nor should any group suffer denial of equal opportunity for want of capacity to marshal facts and advance arguments based on them. If there are gaps and inadequacies in policies or programmes, the proposed watchdog body should be able to intervene effectively and restore equality of opportunity in each and every sector of public life. A culture of equality and fraternity should be cultivated so as to permeate every section of society if the Preamble Promise of Justice, Social, Economic and Political, has to be redeemed. This is a task in which the Equal Opportunity Commission will take a lead role with a missionary zeal. The various other commissions now functioning can be partners in this mission.

Perhaps the equal opportunity situation would have been different had the Government set up the Equal Opportunity Commission immediately after the enactment of the Constitution. Now it is up to Government not to delay the establishment of the Commission. There are expectations generated among deprived groups including minorities that the proposed Commission would not just be a recommendatory body but one which can remedy the discrimination and denial of equal opportunity of deprived groups through appropriate, expeditious action. The country cannot afford to disappoint them and still hope to be a nation committed to equality, fairness and dignity. With the economy looking up and all the political parties subscribing to the ideal of inclusive development, the time is opportune for a breakthrough in the conventional style of administration of the social justice agenda. It is hoped that the Government would find the Equal Opportunity Commission Bill attached to this report suitable to be enacted immediately so that the Commission may be in place well before the end of the year.

Institutions are as good as the people who come to manage them particularly in its infancy. Special care should be taken in the constitution of the first Commission which will determine its character, capacity and esteem among the stakeholders. The attached Bill has attempted to structure the procedure constituting the Commission with a view to attract the best available persons for the onerous and challenging responsibilities entrusted to the Commission. Let the Equal Opportunity Commission herald a new era of hope and empowerment to the many “deprived groups” to enjoy the fruits of freedom and development and to live a life of dignity equal to their fellow citizens in this great land of Bharat.

Prof. N.R. MADHAVA MENON



PART – I: REPORT

INSPIRED BY IDEALS OF OUR TIME ...

“On the 26th of January 1950 we are going to enter a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.”

Dr. B.R. Ambedkar

“[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you’re free to compete with the others”, and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. . . . To this end equal opportunity is essential, but not enough, not enough.”

Lyndon B. Johnson

... AND ROOTED IN THE CONSTITUTIONAL VISION

The right to equality before the law, equality of opportunities and protection against discrimination are fundamental rights under the Constitution of India, founded on principles of liberty, dignity, fraternity and social justice.

The constitutional vision to secure for all citizens equality of status and opportunity is emphatically spread over various provisions of the Constitution. The Constitution recognizes that social and economic empowerment are both means and ends in this regard.


The fundamental right to carry on any occupation, trade or profession depends on the availability of a "fair" working environment for all, particularly for the disadvantaged sections of society.

Discrimination based on sex, caste, ability, religion or place of birth may undermine the attainment of high levels of education and employment and may consequently undermine equality in standard of living, quality of life, social harmony and solidarity.

To respect rights of equality and promote their universal and equal enjoyment among all peoples in the country, it is necessary to provide access to, and provision of opportunities in all spheres of public and private life to sections of people who are deprived of access and enjoyment of the fruits of such access.

The adoption and implementation of special measures aimed at compensating disadvantages suffered by particular groups of persons, as recognized by the Constitution of India and beneficial legislations based on the constitutional mandate are by itself of great constitutional value.

In recognition of the fact that fundamental rights set out in the Constitution are not exhaustive and after taking note of the inequalities widely prevalent in areas other than those specified, but nonetheless implicit in Part III of the Constitution, it is necessary to take positive action to implement rights of equality in those areas where inequality persists.



WHY AN EQUAL OPPORTUNITY COMMISSION?

Equality is a foundational value of our Republic. This is secured by the Constitution through Fundamental Rights and Directive Principles of State Policy and is widely shared in public life. Yet stark inequalities mark our social reality for the present generation and prospects for the future generations. Worse, these inequalities often coincide with boundaries of social groups and communities, making inter-group inequalities more visible than before. Hence there is a need to address inequalities and supplement the existing policies of reservations by fine tuning the definition of the beneficiaries, expanding the range of modalities and evolving a forward looking and integral approach to affirmative action. That is why we need an Equal Opportunity Commission. The proposed EOC will serve as a path-finding institution that serves as a mechanism to evolve and evaluate mechanisms for affirmative action, following an evidence based approach.

WHY AN EQUAL OPPORTUNITY COMMISSION?

1

1.1. The idea of equality is one of the foundational values of our Republic. This was one of the core values shared by the various visions of India articulated by the different strands of our freedom movement. These strands drew upon different egalitarian traditions within India and the west, placed different emphases on the various spheres of equality, advocated different strategies for achieving equality and indeed differed in how much weight they accorded to the idea of equality in their vision of future India. Yet it was quite evident to the builders of modern India that the freedom movement drew a good deal of its energy not just from an urge to achieve political freedom but also from the aspiration for equality. It was natural therefore that the idea of equality was enshrined as first among the Fundamental Rights in the Constitution of India. The Preamble to the Constitution includes “Equality of Status and of Opportunity to all Citizens” as one of the guiding values for the new Republic.

1.2. This foundational value was secured through two kinds of provisions in the Constitution. Articles 14, 15, 16 and 17 secure formal equality before the law, stipulate equal opportunity in employment and prohibit unjust discrimination based on accidents of birth. Having secured this, the Constitution goes on to make some provisions for substantive equality. Some of these provisions for substantive equality were included in Articles 15(3), (4) and (5), 16(3), (4), (4A), (4B) and (5) and 17 in Fundamental Rights in Part III of the Constitution and Articles 330 to 342 in Part XVI of the Constitution. As such, a model of equality of opportunity that goes beyond the formal to recognize substantive equality is very much a part of the “basic structure of the Constitution.” This privileged constitutional status for substantive equality places any mechanism for ensuring equality of opportunity on a sounder footing than is the case elsewhere in the world.

1.3. A substantive reading of the idea of equality in the Constitution is considerably strengthened by Directive Principles of State Policy in Part IV. The Directive Principles expand the scope of the idea of equality beyond political equality to include equality in the socio-economic sphere. The Directive Principles also enjoin a positive duty upon the State to secure these rights of the citizens. These provisions require the State to eliminate

FUNDAMENTAL RIGHTS

Article 14: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 15(4): Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 15(5): Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause(1) of article 30.

Article 16(1): There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Article 16(2): No citizen shall, on grounds only of religion, race, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Article 17: “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

Article 29(1): Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

Article 29(2): No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

DIRECTIVE PRINCIPLES OF STATE POLICY

Article 38: State to secure a social order for the promotion of welfare of the people:

- i) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
- ii) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39: Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing:

- (a) That the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) That the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) That there is equal pay for equal work for both men and women;
- (e) That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39-A. Equal justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 41. Right to work, to education and to public assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 43. Living wage, etc., for workers: The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

Article 45. Provisions for early childhood care and education to children below the age of six years: The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections: The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Article 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

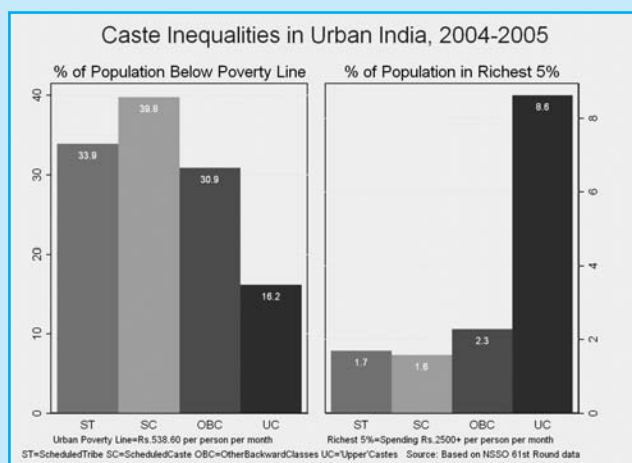
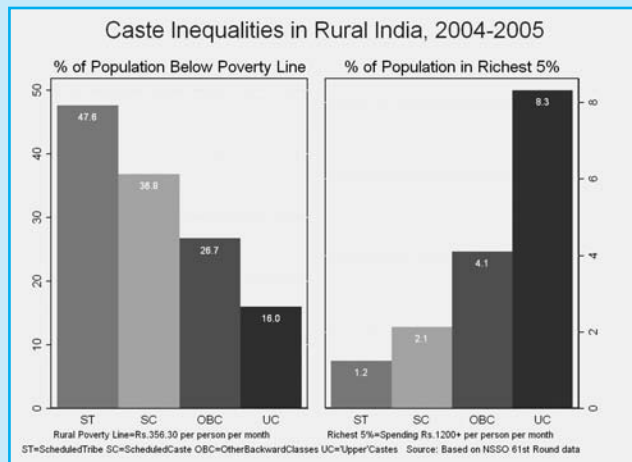
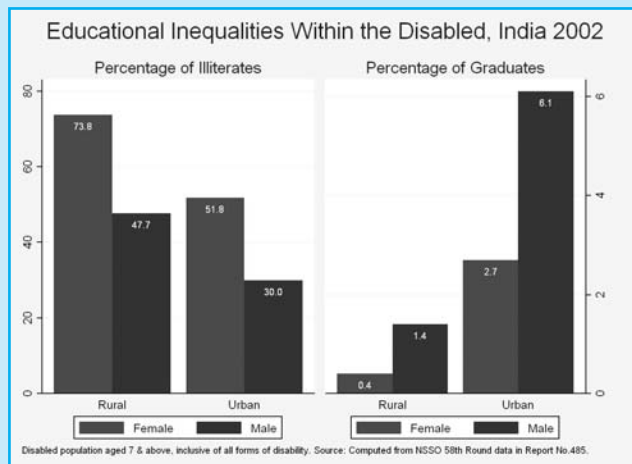
inequalities of opportunity among individuals as well as groups, to secure a just social order, and provide education, work and social welfare benefits to all its citizens. The creation of an institutional mechanism to secure and protect equality of opportunity flows from this constitutional mandate.

1.4. The idea of equality is not merely a principle propounded by legal experts and respected by courts of law. It has a much wider resonance in the country's public life. The egalitarian strands in the freedom movement acquired a much wider presence in post-independence India and have come to shape the language of State policy, political discourse and public opinion. Every one of the eleven Five Year Plan documents talks of elimination of poverty, reduction of inequalities and securing just conditions of life for the most deprived groups in society. The National Policy on Education identified that its main task was to 'strengthen the base of the pyramid'. Expressions such as these are routinely used in the Presidential Address to the Parliament and to the Nation. There is perhaps no political party that does not mention the ideal of equality in its objectives and does not appeal to this sentiment in its election manifestos and promises. Such a widespread use of the vocabulary of equality is not merely a reflection of the burden of history. State policy and political actors use this language because equality as an ideal has much deeper resonance in public opinion in our country than is the case in many other parts of the world. The Indian public supports policy measures that seem to promote equality. The electorate expects their representatives to work for the disadvantaged. Indeed the citizens understand democracy itself in a way that privileges equality, justice and dignity. Thus there is a wider democratic sanction and mandate behind any attempt to realize the Constitutional value of equality of opportunity.

1.5. Yet the continued presence of stark inequalities is among the most disturbing aspects of our social reality today. These inequalities cover the entire spectrum of material life from basic survival needs like food, water and shelter to higher order goods or benefits like technical education or representation amongst the privileged segments of society. Such inequalities are not only structuring the life chances of the people they currently affect but are also creating the conditions for the reproduction of these inequalities among future generations. There is plentiful evidence on the nature and extent of these inequalities in the reports of various commissions (like the National Commission for Women, or the

“It is no longer necessary to emphasise that equality contemplated by Article 14 and other cognate articles including Articles 15(1), 16(1), 29(2) and 38(2) of the Constitution, is secured not only when equals are treated equally but also when unequals are treated unequally. Conversely, when unequals are treated equally, the mandate of equality before law is breached. To bring about equality between the unequals, therefore, it is necessary to adopt positive measures to abolish inequality. The equalizing measures will have to use the same tools by which inequality was introduced and perpetuated... “Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results..... It is a positive right, and the State is under an obligation to undertake measures to make it real and effectual. A mere formal declaration of the right would not make unequals equal. To enable all to compete with each other on an equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged”.

The Supreme Court of India speaking through Sawant J. in Indira Sawhney v. Union of India, (1992) Supp 3 SCC 215.



National Commission for Scheduled Castes, National Commission for Scheduled Tribes and National Commission for Backward Classes and the offices of the Commissioners of Disability) and data gathering institutions like the National Sample Survey Organisation or the Census of India. These inequalities are often patterned in ways that tend to magnify rather than diminish differences across social groups and communities.

1.6. While the existence of poverty and deprivation in an absolute sense is bad enough, its unequal incidence across social groups and communities makes it much worse. This is arguably the most serious challenge faced by the idea of India as a nation. In a paradoxical sense, our poverty and backwardness at the time of Independence were also a source of inspiration because they were seen as a shared burden. Relative inequalities were not as visible and absolute deprivations were emphasized, thereby serving as an invitation to join in the collective project of 'nation building'. Today the undeniable intensification of inter-group inequalities produces the opposite effect of inciting cynicism. Poverty and deprivation become much less bearable when they can no longer be thought of as shared problems. If differential incidence is patterned in ways that coincide with caste, community or other social boundaries then the situation becomes incendiary. For example, if one compares the respective proportions of population that are below the poverty line in urban India in 2004-05, the Scheduled Caste figure is almost four times as much as the figure for 'Upper Caste' Hindus. At the other end of the economic

spectrum, if one compares the proportion of population that is able to spend Rs.2,500 or more per capita per month, then the 'Upper Caste' Hindu figure is six times that for the 'Scheduled Castes'¹. Similar gaps exist in education, employment and most fields of opportunity, and across different kinds of communities and groups defined by religion, gender, age, ethnicity, region, ability and other social criteria. These gaps point to the fact that the burden of deprivation falls disproportionately on identifiable social groups. Such differences are bound to create tensions that may stretch the social fabric to tearing point. The thoroughly media-saturated world that we now live in ensures that the lifestyles of the 'haves' are visible to the 'have-nots', thus stoking expectations and discontent. In a democratic society, both ethical and pragmatic considerations dictate that legitimate grievances – such as those born out of unjustified inequalities – be urgently redressed.

1.7. This is perhaps the key difference between the situation at the time of Independence and the present moment. Six decades ago the world knew India – and we also thought of ourselves – as simply a poor nation. Today the awareness of significant enclaves of unprecedented wealth and privilege heightens sensitivity to disproportionately distributed poverty and deprivation. Thus far, the overwhelming majority of our state-led development programmes have rightly emphasized poverty alleviation and other universalised measures to improve conditions of life for the disprivileged. While we must obviously persist with such programmes, today they are no longer enough. Development programmes in the general sense must now be accompanied by a parallel effort aimed specifically at redressing disproportionate inequalities. Like many other societies, we too are discovering that the pursuit of universalistic goods can often conceal the growth of particularistic evils, and that it is precisely in order to attain universal ideals that the particular must be monitored. Moreover, the state must now not only address inter-group inequalities urgently, it must be seen to be doing so. Although India has had a long history of major programmes targeted at particular social groups and sectors seen as specially disadvantaged, these efforts need to be re-visioned and expanded if they are to meet the challenges of the present. The proposed Equal Opportunity

“The content of the expression “equality before the law” is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39-A, 41 and 46. Among others, the concept of equality before the law contemplates minimizing the inequalities in income and eliminating the inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation.”

The Supreme Court of India speaking through Sawant J. in Indira Sawhney v. Union of India, (1992) Supp 3 SCC 215.

¹Based on the National Sample Survey Organisation's 61st round survey of 2004-05, where the official urban poverty line was set at a total consumption expenditure of Rs.538.60 per person per month. 39.8% of the Scheduled Caste population is at or below this level compared to 10.5% of 'Upper Caste' Hindus. Rs. 2500 represents roughly the top 5% of the (urban) consumption expenditure distribution. Only 1.6% of SCs are in this category compared to 9.6% of 'Upper Caste' Hindus. The term 'Upper Caste' is in quotes because it is an approximation – it refers to the residual category that does not belong to the ST, SC or OBC groups.

Commission (EOC) needs to be conceptualised in this overall context.

1.8. The strategy of reservation of equalising opportunities for identified groups long discriminated has been in vogue for the last several decades. However, for a variety of reasons, the strategy of removal of disabilities could not automatically bring about equalisation of life chances to many groups in our heterogeneous society. Deprivation and exclusion are complex processes which warrant multi-pronged approaches by way of creation of parity of conditions through legislative and executive action. This is the affirmative action agenda which is in addition to the reservation strategy that is now available only for certain deprived groups. In other words, we need to look now for policies and programmes to supplement the existing system of reservations to enable the deprived groups to find equal opportunities to access rights and entitlements.

1.9. Existing modalities for dealing with problems of unequal opportunity, disproportionate deprivation and various forms of discrimination are in urgent need of rethinking for three main reasons. First, our methods of diagnosing the problem need to become more sophisticated; second, the range of proposed solutions needs to be expanded; and third, an integrated, forward-looking strategy needs to be formulated for tackling the many different kinds of problems associated with inequality of opportunity in a systematic and phased manner.

The ways of identifying disadvantage currently in use have tended to treat membership in a particular social group as a sufficient condition. However, we have now arrived at a stage where group membership alone – while continuing to be relevant and even important – may no longer be a sufficient criterion. For sub-groups may emerge within any given group that can legitimately claim to be disadvantaged not only vis-à-vis society as a whole but also in comparison to other members of their own larger group. If subdivisions within groups earlier treated as unitary is one problem, the undeniable presence of multiple axes of disadvantage is another. We need fresh thinking on how to handle the interaction effects of more than one axis of disadvantage, which undoubtedly magnify the effects of disadvantage disproportionately. Finally, new and hitherto unforeseen sources of systematic inequality are emerging and demand to be addressed. These include, for example, ‘development displacement’ – the previously invisible category of people uprooted from their original environment due to the ‘normal’ demands of ‘development’ in the form of dams, large industrial projects, or special economic zones. The calculus

“Existing modalities for dealing with problems of unequal opportunity, disproportionate deprivation and various forms of discrimination are in urgent need of rethinking for three main reasons. First, our methods of diagnosing the problem need to become more sophisticated; second, the range of proposed solutions needs to be expanded; and third, an integrated, forward-looking strategy needs to be formulated for tackling the many different kinds of problems associated with inequality of opportunity in a systematic and phased manner.”

of compensation which sufficed – or could not be successfully challenged – in the past is no longer effective. Instances of taking away of existing or available sources of livelihood opportunities without putting any better or equal substitution in place are noticed.

We also need to broaden the spectrum of programme and policy options that can be deployed to tackle inequalities of opportunity. The policy option that has been most commonly used is the fixed proportionate quota, or ‘reservation’ as it is popularly known. This remains a robust and administratively simple method that has many advantages. However, it is not the only method available to redress different kinds of inequality of opportunity in their varied contexts. We urgently need to develop a wide variety of context-sensitive, evidence-based policy options that can be tailored to meet specific requirements. This repertoire of policies needs to be organised into sector and area-wise options that include: broadly indicative guidelines as well as specific schemes; voluntary or incentive-based as well as mandatory or punitive mechanisms; short term or urgent as well as medium and long term initiatives; and lastly, a corresponding set of appropriate criteria and modalities for implementation, monitoring and modification.

For reasons that are understandable but no longer condonable, there has been a tendency in the recent past to devise ad hoc solutions to deal with specific issues and demands as they arise. This ad-hocism is clearly unsustainable – we badly need an integrated national approach to problems of inequality of opportunity. Such an integrated approach would need to:

- a) Take account of the collective impact and mutual interaction of the group-specific initiatives that already exist;
- b) Pro-actively identify emerging issues and problem areas, particularly those that involve overlapping axes of disadvantage or discrimination;
- c) Evolve evidence-based approaches to redressal including the effort to identify or create

“Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalization and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest that progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities. Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities... It is, therefore, necessary to take into account de facto inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, in order to bring about real equality. The State must, to use again the words of Krishna Iyer, J. in Jagdish Saran case (SCC p.782, para 29) “weave those special facilities into the web of equality which, in an equitable setting, provide for the weak and promote their leveling up so that, in the long run, the community at large may enjoy a general measure of real equal opportunity.”

The Supreme Court of India speaking through Bhagwati J. in Dr. Pradeep Jain and Others v. Union of India and Others, (1984) 3 SCC 654 at pages 676-677

regular sources of data, information and indices relating to inequality of opportunity; and

- d) Develop a coherent body of expertise on the design and implementation of programmes for redressing inequality of opportunity.

In short, we now need to think beyond particular solutions to particular problems – we need a mechanism to conceptualise and evaluate mechanisms. This meta-mechanism will have to concern itself with the second order problems and opportunities that emerge from the proliferation and mutual interaction of singular solutions.

1.10 The proposed EOC is a device designed to meet these very needs. It is an institution that will be entrusted with the task of addressing the problem of inequality of opportunity as such, rather than being associated with a specific constituency or class of claimants. It will seek to synthesize the lessons learnt from India's long experience of dealing with different kinds of inequality. At the same time, it will also endeavour to identify the future directions in which policy needs to move. Towards this end, it will strive to act as a storehouse of expertise on the design, implementation and evaluation of evidence-based equal opportunity initiatives. By actively involving itself in redressing existing and emergent inequalities of opportunity it will act as a forum to which the Government, aggrieved groups and other concerned bodies can turn for advice and action. The EOC will work towards creating a public environment where issues and problems relating to inequality of opportunity will receive the careful consideration that they deserve. It will strive to act as a pathfinding institution charting the route to an eventual future where gross inequalities of opportunity are truly absent in all walks of life.

What then is the Equality of Opportunity that the Constitution envisages? Let us take up this vital question first before turning to the structure and functions of the proposed EOC.

The proposed EOC will be:

- A pathfinding institution
- A storehouse of expertise
- A mechanism to conceptualise and evaluate mechanisms

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WHAT IS “EQUALITY OF OPPORTUNITY”?

Equality of Opportunity can be understood in two different ways: formal and substantive. Formal approach involves merely openness of opportunity without direct discrimination. The Constitution no doubt provides this minimal guarantee. But inherent in the Constitutional Right to Equality is a substantive understanding of equality of opportunity. This approach involves creation of level playing fields by neutralizing the effect of circumstances on achievement of key objectives. Supported by judicial reading of the Constitution and required by India's international obligations, this approach puts a positive obligation on the state to control direct as well as indirect discrimination and take into account the burden of history. The report follows this approach in defining 'equal opportunity', in understanding what constitutes 'discrimination', and in using the idea of 'deprivation'.

WHAT IS “EQUALITY OF OPPORTUNITY”?

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A formal approach to equality of opportunity is about ‘openness of opportunity’ and procedural fairness rather than about equality of opportunity. The equality of opportunity as understood in the Constitution is not limited to this formal meaning of the term.

2.1. The concept of ‘equality of opportunity’ needs to be examined carefully, for its attractiveness leads it to be used – and misused – in a variety of ways. The idea of ‘equality of opportunity’ has a much wider appeal than the idea of equality itself. Equality of opportunity may or may not lead to equal outcomes; the concept suggests a fair race at the end of which some participants get rewards, others don’t. Unequal rewards are morally acceptable – indeed even desirable – as long as everyone had an equal chance in the race, and as long as the unequal rewards were due only to unequal ability or effort. Thus the idea of equality of opportunity is in principle compatible with inequality of outcomes; it offers an equal chance to be unequal. That is why the idea attracts supporters from opposite ends of the ideological spectrum. This is also the reason why it is crucial to distinguish between two different models of equality of opportunity in order to specify which of these is closer to the letter and spirit of the Indian Constitution, and should therefore form the basis of the proposed Equal Opportunity Commission.

2.2. The formal approach to equality of opportunity places minimum demands on the state. In this approach, the requirements of equality of opportunity are satisfied if all the public offices and resources are in principle open to everyone, if there is no discrimination on grounds only of immutable group identity and if the outcome reflects a criterion relevant to the task. A formal approach to equality of opportunity would insist that there be no requirement in addition to these three basic requirements of a ‘fair competition’. While this approach rules out explicit discrimination, this is very much compatible with indirect or structural discrimination. To repeat a famous example, this is compatible with a former Warrior class that continues to have a monopoly of Warrior positions in a ‘fair’ competition because only they have the resources to cultivate the qualities required in that competition. This understanding of equality of opportunity has no room to look for background conditions that go into the making of ‘opportunities’. In a strict sense this approach is about ‘openness of opportunity’ and procedural fairness rather than about equality of opportunity.

2.3. To be sure the Constitution of India provides for this minimal guarantee of openness, absence of discrimination and appropriateness of the criterion of selection. The Constitution prohibits discrimination on a number of grounds. This list can be expanded to come up with a wider definition of equality of opportunity: absence of unjust distinction, exclusion or restriction made on the basis of sex, caste, language, religion, disability, age, descent, place of birth, residence, HIV status, race or any other factor which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of equality of opportunity in fields such as education and employment. But the equality of opportunity as understood in the Constitution is not limited to this formal meaning of the term.

2.4. The idea of equality of opportunity, as enshrined in the Constitution of India, involves the second, substantive approach. A substantive model of equality places a much higher burden on the state compared to the formal model. In this second model equality of opportunity involves creating parity of conditions or a level playing field. The policy of equal opportunity involves the use of the instruments of State policy in such a way that the degree to which an individual achieves some key objective is independent of her circumstances, and is a function only of her effort or choice. In this approach too the outcomes may justifiably differ, if they are due only to differential effort or choice, but not if they are due to differential circumstances. In other words, persons who have the same ability to make choices and put in the same degree of effort should have the same prospects of success in competitions that determine who gets positions that lead to realisation of key objectives. Here *circumstances* mean those aspects of an individual's environment that are beyond her control, but that influence her pursuit of welfare. *Effort* includes those behaviors of an individual that influence her status and over which she has at least some control. *Opportunities* can be defined in terms of qualifying actions through which an agent can achieve an advantageous position. *Key objectives* stand for those goals which are the key to realization of things people value most and for which we wish to equalize opportunities.

2.5. Thus a substantive approach to equality of opportunity differs from a formal approach in three fundamental but related ways. First, a substantive approach goes beyond the absence of *direct discrimination* and includes within the scope of equality of opportunity a mandate to eliminate *indirect discrimination*. However, the acknowledgement of the existence of indirect or societal discrimination is not premised upon an intended behaviour but

“ The inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances. Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide a level playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalizing results with respect to various groups. Both the conceptions constitute “equality of opportunity”.

Supreme Court of India speaking through Sabharwal J. in *Nagaraj v. Union of India*, (2006) 8 SCC 212.

The policy of equal opportunity involves the use of the instruments of state policy in such a way that the degree to which an individual achieves some key objective is independent of her circumstances, and is a function only of her effort or choice.

predicated on *unintended* negative consequences of the existing system, operating in “business as usual” scenario, on a class or group of citizens which results in denial of equal opportunity. Second, it follows that a substantive approach requires the State policy to take into account and neutralize not just the current circumstances but also historical burden of circumstances. These are usually and primarily because of the historically built-in tendencies or the force generated by the socio-economic structures. It thus happens that outcomes or consequences of the existing system disadvantage certain groups or communities in an enduring way. Third, following from the first two, this approach implies an obligation on the state and thus creates a positive duty on public authorities. The state cannot limit itself to a negative role of non-discrimination; in this understanding, the state carries a responsibility to strive to create parity of circumstances. It should be noted here that a substantive approach in itself does not commit the state to any particular way of achieving this parity. This leaves open the question of which instrumentalities the state should use to realize this objective.

2.6 The Constitution as interpreted by the courts supports the substantive approach to equality of opportunity. The provisions of the Constitution make it quite clear that the Constitution goes beyond merely prohibiting direct discrimination. The Directive Principles clearly enjoin upon the State a positive duty to strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The Supreme Court of India has variedly spelt out the rich dimensions of Art 14 of the Constitution. The court has perceived the mandate of Art 14, as the obligation of the State to progressively ensure equality of status and parity of conditions in order that every citizen is able to realize her welfare and well-being without any externally created impediment. Some of the landmark judgments of the Supreme Court provide an interpretation of the idea of equal opportunity that can form the basis of the proposed EOC.

2.7 Non-discrimination and equal treatment is not only a constitutional requirement but also an internationally binding obligation on State parties who have ratified the human rights covenants. For example, the Covenant on Civil and Political Rights as well as the Covenant on Social, Economic and Cultural Rights require State parties to amend and update their statute books to conform to the standards set in these treaties. Besides, there are special treaties like the Convention on Elimination of All Forms

A LANDMARK JUDGMENT

In *State of Kerala v. N.M. Thomas and Others*, the proviso to a rule on departmental tests for promotion of lower division clerks to upper division clerks had been challenged as it granted a temporary exemption of two years to Scheduled Castes and Scheduled Tribes whereby they got additional time to take the tests after they had been promoted. The rule was challenged on the ground that it was violative of equality of opportunity guaranteed under Article 16 (1) and that promotion did not fall under the non-obstante clause of Article 16 (4).

The Supreme Court upheld the validity of the impugned rule. Chief Justice Ray said “The guarantee of equality before the law or of the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims.” He further said “The rule of classification is not a natural and logical corollary of the rule of equality but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions.”

Justice K. K. Mathew gave a detailed opinion on the equality of opportunity while upholding the validity of the rule. According to him,

“The ultimate reason for the demand of equality for the members of backward classes is a moral perspective which affirms the intrinsic value of all human beings and calls for a society which provides those conditions of life which men need for development of their varying capacities.” ... ““The notion of equality of opportunity is a notion that a limited good shall in fact be allocated on the grounds which do not a priori exclude any section of those that desire it.” “The question therefore is: On what basis can any citizen or class of citizens be excluded from his or their fair share of representation? As I said, the notion of equality of opportunity has meaning only when a limited good or, in the present context, a limited number of posts, should be allocated on grounds which do not a priori exclude any section of citizens of those that desire it.”

“What then, is a priori exclusion? It means exclusion on grounds other than those appropriate or rational for the good (posts) in question. The notion requires not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, but the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them.””

““Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains in so far as, and only in so far as, each member of a community, whatever his birth or occupation or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence.”

Supreme Court of India speaking through K.K Mathew J. in State of Kerala v. N.M Thomas (1976) 2 SCC 310.

of Discrimination against Women (CEDAW) that impose special obligations to create parity of conditions for women in different walks of life. Similar State obligations exist vis-à-vis the indigenous people, the displaced and the disabled. India is a signatory to these conventions. Article 51 of the Constitution places on the country the duty to respect its international obligations by appropriate legislative and executive actions. Thus, setting up of a mechanism to promote non-discrimination and equal opportunity is to be seen as a step towards India's commitment to its international obligations as well.

2.8 Following the analysis of the constitutional provisions in the light of judicial interpretation, the proposed Equal Opportunity Commission could be instituted with the following operational definitions:

“Equal Opportunities” mean such measures through and by which a person or persons can achieve parity of conditions or shedding of disadvantages in accessing education, employment, livelihood, health care, housing, credit or such other rights and entitlements.

“Denial of equal opportunity” means any action, conduct, or measures resulting in or likely to result in discrimination or deprivation, and includes any action of taking away existing resources or opportunities for livelihood, occupation or employment or any other rights and entitlements.

“Equal Opportunity Practice” – means and includes steps taken for the progressive elimination of discrimination – direct and indirect – against deprived groups, and the creation of policies and practices evolved for equal access in sectors like education and employment.

2.9 Another way of delineating our definition is to understand what equal opportunity is not, by spelling out the idea of discrimination and deprivation that informs our approach and should form the basis of the working of the proposed EOC. *Discrimination* means any distinction, exclusion or restriction made on the basis of sex, caste, religion, descent, disability, place of birth etc which results in less favourable treatment or has the effect of impairing or nullifying the recognition, enjoyment or exercise of equality of opportunity. However, this does not include favourable treatment given in fulfillment of constitutional obligations towards deprived groups. This understanding of discrimination includes direct as well as indirect discrimination. In this sense discrimination :

- a) can be *unintentional* in the sense that it is not the planned outcome of a deliberate effort on the part of some

EQUALITY DIMENSION OF INTERNATIONAL COVENANTS SIGNED BY INDIA

- 1) **Universal Declaration of Human Rights (UDHR)**
Articles 1, 2 and 7 of the UDHR guarantee all persons with the rights and freedoms provided in the Declaration without any distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. All persons are entitled to equal protection before the law and to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
- 2) **International Covenant on Civil and Political Rights (ICCPR)**
Article 26 guarantees the right to equality and to the equal protection of the law. It prohibits discrimination based on the grounds of race, colour, religion, national or social origin, birth or other status, property and political or other opinion.
- 3) **International Covenant on Economic, Social and Cultural Rights (ICESCR)**
Article 7 guarantees the right to the enjoyment of just and favourable conditions of work as well as fair remuneration, and in particular recognizes that equal opportunity be provided so that everyone can be promoted to an appropriate higher level based solely on their seniority and competence.
Article 13 recognises the right to education of all persons and states that secondary and higher education, including technical and vocational education shall be available as well as accessible by all persons by appropriate means. Secondary and higher education shall progressively be made free.
- 4) **Convention on the Elimination of Discrimination Against Women (CEDAW)**
Article 3 mandates state parties to take appropriate measures in the political, social, economic and cultural spheres to ensure the full development and advancement of women.
Article 4 states that temporary special measures aimed at accelerating de facto equality between men and women shall not be considered as discrimination as defined in the Convention, and shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
- 5) **Convention on the Rights of Persons with Disabilities**
Article 3 lists non-discrimination, equality of opportunity and, the respect for difference and acceptance of persons with disabilities as part of human diversity, as the general principles of the Convention. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the present Convention.

individual, group or institution, although, of course, it can be such; and

- b) can even be an *unconscious* effect, i.e., an effect or outcome of which the people involved are unaware.

While the above are attributes that discrimination may (but need not necessarily) possess, it *must* have the following characteristics in order to count as discrimination for the purposes of the EOC's interventions:

- c) it must be *systematic*, i.e., non-random – discrimination cannot be an accidental or chance event;
- d) it must be the *result of human actions* – discrimination cannot be an act of God or nature; and finally
- e) discrimination must produce real differences – i.e., it must *set apart or distinguish in an unjustifiable manner* a particular group (or groups) from other groups.

2.10 Generally speaking, the idea of 'deprivation' is relevant to equality of opportunity where minimum threshold conditions for a decent and dignified human life are not met. Deprivation can be suffered by an identifiable sub-group within a larger group, all of whose members are otherwise expected to be in similar circumstances. Within a deprived category, everyone may suffer from inequality of opportunity in one way or another. Inequality of opportunity makes sense only when there exists a contrast class of persons or groups that do not suffer inequality or disadvantage. However, deprivation – more precisely, disproportionate deprivation – can be useful in a strategic sense in terms of the functions of the EOC. It can help to underline the damage inflicted by inequality of opportunity and thus counter the connotation of an 'extra' opportunity foregone or denied. It can also help to link inequality of opportunity to the positive duties enjoined upon the state by the Directive Principles of State Policy. Finally, disproportionate deprivation can be a useful universal standard by which to measure inequality of opportunity. For example, showing that the group X has a much higher rate of illiteracy or much lower levels of formal employment than groups Y and Z can be a readily understandable method of establishing that it could be suffering from the effects of discriminatory processes that prevent it from enjoying equality of opportunity vis-à-vis the other groups. On the other hand, with some forms of stark deprivation that are universally conceded to be morally offensive, a specific contrast class may not be necessary. Severe malnutrition or the complete absence of primary schooling are examples of such deprivation, where their contribution to the creation and perpetuation of inequalities of opportunity is beyond dispute. Impairment or destruction of existing or available sources of livelihood by state or private action can also be seriously depriving.

3

WHAT ARE THE LESSONS FROM EOCs ACROSS THE WORLD?

EOCs or similar bodies are becoming the norm in democracies that are waking up to the challenge of diversity across the world. Their experience varies, as does their jurisprudence, yet there are many lessons to be learnt: there is no alternative to recognizing social identities; EOCs need to be pro-active; EOCs should be autonomous of the government; developing, gathering and publishing of evidence is crucial; and, wide range of context-specific policy options are needed. South Africa and United Kingdom offer instructive models though we need not replicate their legislation or structures. EOCs need to respond to the specificities of the challenge of equal opportunity in each country.

WHAT ARE THE LESSONS FROM EOCs ACROSS THE WORLD?

3

3.1 EOCs or similar bodies are becoming the norm in all the democracies of the world that are marked by significant social and cultural diversity. In embarking on the exercise of designing an EOC for India, the Expert Group has also tried to assess the experience of other countries wherever relevant. In particular, the expert group has discussed the EOCs (or equivalent bodies or issues) in the following countries: Australia, Brazil, Canada, France, Hong Kong, South Africa, United Kingdom, and the United States of America. Of these we found the examples of South Africa and United Kingdom particularly instructive and have therefore discussed these in some detail.

3.2 When considering the experience of other countries, we have been mindful of both the similarities as well as the differences with the Indian experience. One major difference is in the fact that equality of opportunity was recognised as an issue from the outset in independent India. Many western countries began with the assumption of equality and only came to discover the presence of inequalities after affected groups acquired the strength and visibility to protest. Other societies found that historical changes had converted what used to be socially sanctioned inequalities into politically indefensible and unacceptable ones. Both these routes are different from the Indian case, where we have extensive experience of both pre-colonial and colonial forms of institutionalised inequality. As a result, the Indian Constitution took shape in a context where equality of opportunity was built into it as a foundational ideal. That is why our jurisprudence permits much stronger state interventions in order to achieve such equality, including interventions that may interfere with other's right to equality. In other words, the Indian constitution permits a much more direct and explicit pursuit of the ideals of equality of opportunity than is possible under the jurisprudence of many other countries. Without entering into the details of each context, the main lessons of interest from an Indian perspective are summarised below.

3.3 As is well known, attempts to redress inequalities of opportunity involve an unavoidable conceptual paradox. This is the paradox of requiring attention to particulars in order to meet universal ideals. Although they are justified by the logic of

Lesson 1: There is no alternative to recognizing social identities. We need to measure and monitor precisely those inequalities and institutions that we hope to abolish or end.

equality – the refusal to allow discrimination on grounds of race, caste, religion or other such categories – programmes and schemes to secure such equality necessarily involve recognising precisely such markers of identity. This commonly invites responses that reiterate the virtues of a deliberate ‘inattentiveness’ towards such attributes in the form of a state that consciously chooses to be ‘unaware’ of the race, caste, gender or other such attributes of its citizens. However, the experience of every diverse country in the world shows that it is not always possible, nor desirable, to take the high moral road of ignoring all ascriptive attributes. If one really wishes to work towards equality of opportunity, non-recognition of social identities is simply not available as an option. This is the first lesson to be learnt from the world experience – even the most staunchly ‘identity-unaware’ and universalistic states such as France and Brazil have been forced in the recent past to recognise the need to redress persistent racial, ethnic, gender or other kinds of inequalities. And this is what the Indian state must also recognise; while such programmes need to be handled with care, there is no way around social identities. We need to measure and monitor precisely those inequalities and institutions that we hope to abolish or end.

3.4 A second lesson to be learnt from the experience of other countries (especially the United Kingdom) is that bodies entrusted with this task need to be pro-active rather than retro-active. Diligent efforts to identify likely problem areas and beginning the process of redressal at an early enough stage is imperative because only then can the most damaging effects of such inequalities be avoided. Moreover, an early start means that the array of options available is much wider than it would be under the standard crisis response format where immediate action is needed and the room for maneuver is very limited.

3.5 A third lesson concerns the need for autonomous bodies to deal with these problems, bodies that are seen to be independent of the government. In the long run, it is such non-partisan institutions that inspire confidence. An associated requirement is that they function with the maximum feasible level of transparency and public accountability. If all parties concerned are given a public hearing, both the legitimacy of the proceedings as well as the chances of favourable outcomes is greatly increased.

3.6 Fourthly, most contexts point to the importance of developing publicly debated criteria of evidence for establishing inequalities of opportunity. This may sometimes require the initiation of new forms of data gathering and reporting, including

EOC needs to be pro-active rather than retro-active. Early redressal is imperative to avoid the most damaging effects of inequalities.

Lesson 3: EOC should be non-partisan and autonomous of the government. It must function with maximum transparency and public accountability.

HIGHLIGHTS OF EOCs IN SOME COUNTRIES

Countries	Target Areas	Functions	Structure	Powers
Hong Kong (Commission set up in 1996 - to address discrimination based on sex, disability and family status)	<ol style="list-style-type: none"> 1. Employment 2. Education 3. Provision of goods & services 4. Management of premises 5. Eligibility to vote/be elected to advisory bodies 6. Activities of Government 	<ol style="list-style-type: none"> 1. Complaint redressal 2. Conciliation 3. Legal Assistance 	<ol style="list-style-type: none"> 1. Chairperson 2. Operations Division 3. Legal Service 4. Planning & Administration 5. Policy & Research Unit 6. Corporate & Communications 	<ol style="list-style-type: none"> 1. Investigation of complaints. 2. Enter legally binding conciliated agreements. 3. Training & consultancy services. 4. Partnerships with different sectors to promote EOs.
Australia (Human Rights & Equal Opportunity Commission)	<ol style="list-style-type: none"> 1. Employment 2. Education 3. Provision of goods, services & facilities 4. Accommodation 5. Sport 	<ol style="list-style-type: none"> 1. Complaint redressal 2. Public inquiries 3. Human rights education/programmes 4. Provide advice to courts. 5. Provide advice to the Government 	<ol style="list-style-type: none"> 1. President 2. Individual Commissioners to handle discrimination on grounds of – Race, Human Rights, Disability, Sex, Age 	<ol style="list-style-type: none"> 1. Conduct examinations/inquiries - not bound by rules of evidence. 2. May direct non-disclosure of identities. 3. Obtain information, examine witnesses & impose punishments.
Canada (Canada Multicultural Act, 1988)		<ol style="list-style-type: none"> 1. Assist individuals and organizations in promoting multiculturalism. 2. Undertake projects and research on multiculturalism. 3. Encourage cooperation among diverse communities. 4. Assist ethno-cultural minorities in overcoming any discriminatory barriers. 	<p>No statutory commission has been set up to implement the provisions of the Canadian Multiculturalism Act. The Minister along with other Ministers has been entrusted with the responsibility of implementing the Act.</p>	<ol style="list-style-type: none"> 1. Enter into agreements with provinces for the promotion of multiculturalism. 2. Enter into agreements with foreign states to foster the multicultural character of Canada. 3. Minister may establish an advisory committee to assist her/him on the implementation of the Act.
South Africa Commission for Employment Equity under the Employment Equity Act 1998	Employment	<ol style="list-style-type: none"> 1. The Commission advises the Minister on Codes of good practice, Regulations, & any other matter concerning the Act. 2. Reward employers who further the purpose of the Act; 3. Research and report to the Minister on matters relating to the application of this Act, including the setting of numerical goals in various sectors; 4. Hold public hearings. 	<ol style="list-style-type: none"> 1. Chairperson 2. Eight members comprising persons who represent: <ol style="list-style-type: none"> a) Organised labour; b) Organised business; c) The State; and d) Community and development interests. 	<ol style="list-style-type: none"> 1. Enter & inspect premises. 2. Obtain written undertaking from employers to comply with Act within a specified period. 3. Issue compliance orders to employers for failure to submit or comply with written undertaking. 4. Discuss employment equity plans with employers. 5. Refer employers' non-compliance with the Act to Court.

<p>USA (Equal Employment Opportunity Commission under Title VII of the Civil Rights Act, 1964)</p>	<p>Employment - (Age, Disability, National Origin, Religion, Sex)</p>	<ol style="list-style-type: none"> 1. Prevent persons from engaging in unlawful employment practices. 2. Cooperate with regional & local agencies and eliminate conflicts among the various agencies of the Govt. 3. Interventions in cases pertaining to equal opportunities in employment. 4. Research, educational and outreach activities 	<p>General Counsel and five Commissioners (not more than three of whom shall be members of the same political party).</p>	<ol style="list-style-type: none"> 1. Powers of investigation. 2. Conciliation
<p>United Kingdom (Commission for Equality & Human Rights under the Equality Act 2006)</p>	<ol style="list-style-type: none"> 1. Health & social care 2. Housing & property 3. Justice & the legal system 4. Education 5. Shops and services 6. Transport 7. Working & earning 	<ol style="list-style-type: none"> 1. Legal assistance 2. Enforce equality duties of organisations. 3. Monitor Govt. activities. 4. Promote good practices in public & private sectors. 5. Monitor efficacy of equality & human right enactments. 6. Conciliation 	<ol style="list-style-type: none"> 1. Chairperson 2. Deputy Chairperson 3. Chief Executive Officer <p>Backed by Senior Management Team and supported by statutory committee disability.</p>	<ol style="list-style-type: none"> 1. Inquiries and investigations. 2. Issue 'unlawful act' notice 3. Action plans 4. Enter into binding agreements 5. Apply to courts for injunctions 6. Applications to restrain unlawful advertising, pressure etc.

Lesson 4: Developing, gathering and publishing of evidence is crucial. Evidence enables calibration of redressal to match degrees of inequality or disadvantage.

statutory requirements. Although this raises legitimate concerns about ‘hardening’ categories that the policy itself hopes to render impotent eventually, there is no easy alternative available. The availability of evidence also allows for the possible calibration of redressal efforts to match degrees of inequality or disadvantage.

3.7 Finally, the experience of all countries points to the imperative to develop a wide range of policy options in order to meet context-specific requirements. The one-size-fits-all approach has more costs than benefits, and in the long run it is better to distribute the effort of redressal across a variety of policy vehicles. Of particular importance here are indicative guidelines, incentives and other voluntary measures that non-state institutions can be encouraged to adopt. These positive incentives can be backed by a carefully calibrated set of disincentives or costs that can be imposed in a transparent and pre-announced manner. Contexts where inequality redressal has been universalised – that is, treated as an issue that society as a whole needs to be concerned about, rather than just the state sector – are the ones where the most innovation seems to happen.

3.8 Affirmative action in South Africa offers an instructive model. Like the Indian Constitution, the South African Constitution gives the right to equality a special status with an injunction to the State [(Article 9 (2)² & Article 36³] to ensure that special measures are taken to remove the effects of past societal discrimination. Unlike India, South Africa passed two major legislations aimed at creating equal opportunities to the disadvantaged sections, namely, The Unemployment Equity Act, 1998 and The Promotion of Equality & Prevention of Unfair Discrimination Act, 2000. Both the Acts contain specific obligations on State and non-State actors to promote equality

3.9 The Preamble to the Promotion of Equality & Prevention of Unfair Discrimination Act prevents and prohibits unfair

² Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

³ A. 36 – (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a) the nature of the right; b) the importance of the purpose of the limitation;
- b) the nature and extent of the limitation;
- c) the relation between the limitation and its purpose; and
- d) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

discrimination (Article 9) and requires the State to develop action plans, develop codes of practice and guidelines, provide assistance, advice and training on issues of equality, and develop appropriate internal mechanisms to deal with complaints. All government departments must prepare and implement equality plans, which must include a time frame for implementation. These plans must be submitted to the South African Human Rights Commission, which will monitor compliance in terms of the statute. Regulations can be passed to mandate private bodies to prepare equality plans or abide by codes of practice and report to monitoring bodies. The Human Rights Commission may ask for information from the State or any person on any measures relating to the achievement of equality, including the extent of compliance with legislation and codes of practice and it may assist complainants' in conducting investigations, and make recommendations to equality courts. The Equality Courts set up under the Promotion of Equality & Prevention of Unfair Discrimination Act, 2000 undertakes inquiries with the help of "Assessors" and give relief to aggrieved persons.

3.10 The Employment Equity Act similarly tries to promote equal opportunity and fair treatment in employment through:

- a) Eliminating discrimination
- b) Implementing affirmative action mechanisms to redress the disadvantages in employment experienced by designated groups. (Designated groups include black people including Indians, women of all races and people with disabilities.)

Affirmative action measures include:

- a) Measures to identify and eliminate employment barriers affecting designated groups.
- b) Measures designed to further diversity in the workplace based on equal dignity of all people.
- c) Making reasonable accommodation for people from designated groups to ensure equal opportunities at workplaces for those from designated groups.

Redressal of disadvantages is the responsibility of employers for which they have to prepare equity plans. Labour Inspectors in the first instance monitor implementation of these plans. They may issue compliance orders and impose fines on others.

3.11 It is important to note that in the South African model, a range of positive duties to promote equality is factored in seeking long term structural changes to integrate equality goals in public and private bodies in the matter of organization and management of their work. Identifying and addressing areas of continued

Lesson 5: Wide range of context-specific policy options are required.

“The government believes that fairness for all is the basis for a healthy democracy, economic prosperity and the effective delivery of our public services. Equality and human rights therefore matter to all of us, not just those who experience discrimination and unfair treatment.”

*Fairness for All:
A New Commission for
Equality and Human Rights,
A White Paper presented to
the Parliament of the United
Kingdom.*

inequality and discrimination becomes a binding obligation and this is primarily done through equity plans and codes of practice.

3.12 The United Kingdom is just completing a major overhaul of its equal opportunity legislation and redressal machinery. The new Equality Act of 2006 seeks to create a single Commission for Equality and Human Rights that will take over the functions of three previous commissions which looked after Racial Equality, Equal Opportunity and Disability Rights. The new Commission for Equality and Human Rights (CEHR) will seek to encourage and support the development of a society in which people's achievements will not be constrained by prejudice or discrimination. The CEHR will also work to promote and celebrate a diverse Britain. The British example suggests a trend towards the narrowing of focus in terms of evolving an integrated structure and norms which addresses the issue of discrimination per se.

3.13 While the CEHR in the United Kingdom has wide ranging functions and appropriate powers, it should be noted that the CEHR has not been provided with punitive or judicial powers. The formal structure of the CEHR has a Board led by a Chairperson as the apex body which will run the institution. Both the Chair and the Board members will be appointed by the government through the usual public service commission route, but specific requirements have been laid down for the members of the Board. These members must possess the necessary professional skills and expertise related to the tasks of the CEHR, and while due regard is to be given to representation of disadvantaged groups, there are no specific stipulations regarding composition. One member is to be a disabled person, and one member each to have detailed knowledge of Scotland and Wales. The Board will be primarily non-executive, with the executive functions of the CEHR being conducted by a professional CEO and other senior officials recruited through a corporate-sector type open selection process. At the executive level, the entire emphasis is on professional credentials and expertise. The CEHR will be funded by the government through a grant in aid, and will be financially accountable to Parliament.

3.14 It is noteworthy that the United Kingdom is going in for a single institution to deal with all forms of discrimination. Among the specific arguments in favour of this move is the conviction that overlapping and intersecting axes of discrimination need to be considered, and that an integrated body of expertise on dealing with all kinds of discrimination issues needs to be created. Also notable is the emphasis on a corporate model for the executive functions of the CEHR, with the CEO and her team being held accountable in exactly the same manner that a private corporation head would be accountable. The British example suggests the trend towards the narrowing of focus in terms of evolving an integrated structure and norms which address the issue of discrimination per se. The UK model suggests that the road forward for the EOC in India cannot be viewed as fixed and static. The dynamics between the proposed EOC and the other Commissions, including the experience which will be gained from their interaction and functioning may lead to an integration of functions and synergized exercise of power, if not integration of structures in the future. Hence, multiplicity of commissions per se is not an issue.

4

WHAT IS TO BE THE MANDATE OF THE EOC?

The jurisdiction of the proposed EOC should be wide ranging in terms of social groups and sectors but delimited in terms of domains and the nature of issues that it can take up. The EOC has to deal with particular groups and there are many communities that have a claim for inclusion. Yet the EOC would serve its purpose best if its mandate is not limited at this stage to any social group, if it is open to any citizen of India. The beneficiaries must be identified by evidence, not in an a priori manner. The scope of the EOC should extend both to the public and the private sector. The EOC should prioritise education and employment and should entertain only group equality related cases. Thus defined, the scope of the EOC may apparently overlap with other Commissions, yet the EOC will have its own niche and unique role, for it would provide a service that is not currently on offer. Parliament has the requisite power to legislate on this subject.

WHAT IS TO BE THE MANDATE OF THE EOC?

4

4.1 In defining the scope of the proposed EOC there is a need to balance two kinds of considerations. On the one hand the very idea of an Equal Opportunity Commission demands that the commission should be able to address and redress any and every form of inequality of opportunity, cutting across domains, groups and sectors. On the other hand, care has to be taken to ensure that the new Commission does not duplicate the work already being done by pre-existing commissions and is not overwhelmed by the number of cases that it has to address. We therefore suggest that the jurisdiction of the EOC should be wide-ranging in terms of the sectors and social groups, but it should be delimited in terms of the domains as well as the nature of complaints that it can take up.

4.2 The question of target groups for the EOC presents a difficult choice. Discrimination – and therefore the idea of equality/inequality of opportunity – is about particulars, not universals. It is concerned precisely with unjustified exclusions from principles or outcomes that are otherwise expected to be universal. Thus, it is only in an abstract and initial sense that ‘all citizens of India’ can avail of the EOC’s good offices. It is only as an opportunity that the EOC is available to all – anyone can approach it. However, the EOC will only take up matters where some particular group appears (on prima facie evidence) to be the victim of direct or indirect discrimination.

4.3 In the past, a number of such particular groups who suffer (or may suffer) from discrimination have been identified by our polity and targeted for special initiatives by the executive, and this process has been ratified and regulated by the judiciary. The groups thus identified include the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, women, minorities, children, persons with disability, the elderly, and so on. All these groups have suffered deep rooted and systematic discrimination and thus have legitimate claims to be addressed by the EOC. Besides, there are some other groups, such as backward Muslims, denotified tribes, or displaced persons who may not yet have been adequately addressed by equality jurisprudence, but who also need priority attention by the EOC since their deprivation and disadvantage are substantial.

4.4 Still we are of the opinion that the opportunity offered by the setting up of the EOC must not be restricted only to SCs, STs, OBCs, minorities, persons with disabilities or to any other set of pre-defined groups. The EOC should in principle be open to any person who feels disadvantaged, deprived or discriminated against on grounds of belonging to any social group. Thus the jurisdiction of the Commission should extend to all “deprived groups” who have been denied or who claim to have been denied equal opportunities. The EOC should be open to examining all forms of inequalities barred by the Constitution. We believe that such an approach is more sustainable in the long run and true to the spirit of the idea of equal opportunity. Besides, freezing the list of potential beneficiaries to some identified social groups would hamper the Commission’s ability to respond to the newer forms of social inequality that are emerging in our country.

4.5 This needs to be clarified. The proposed EOC is intended to deal with inequalities of opportunity as such, not with any particular group of already identified (or to be identified) victims of discrimination. This does not mean that the EOC will not entertain specific complaints or requests from such groups. It means that every such complaint or request will be considered on its merits regardless of the nature of the particularistic group that is making it. In short, the scope of the Commission need not be spelt out in terms of statements of the form ‘the EOC is for X group’ with their implied corollary statements of the form ‘the EOC is not for Y group’. Which particular groups the EOC eventually takes up is a matter for it to decide; who it is ‘for’ or ‘not for’ will thus become visible through its practice and is not the subject of an a priori decision. However, we do hope that the EOC will inaugurate an evidence based approach to such questions, and that this approach will eventually become the norm in preference to an approach based solely on identity.

4.6 We also believe that the scope of the EOC should not be restricted to any sector of opportunities. In particular we are of the firm opinion that the jurisdiction of this Commission should not be limited to the public sector which occupies a small and shrinking part of the economic opportunities in the country. The changes in the country’s economy in the last two decades have meant that most of the emerging and lucrative opportunities lie in the private sector which has so far remained outside the scope of affirmative action. Therefore we suggest that the jurisdiction of the EOC should extend to all instrumentalities of the state, to public enterprises and to private enterprises and institutions which are governed by various existing labour law regulations which

The EOC should in principle be open to any person who feels disadvantaged, deprived or discriminated against on grounds of belonging to any social group. Thus the jurisdiction of the Commission should extend to all “deprived groups” who have been denied or who claim to have been denied equal opportunities. The EOC should be open to examining all forms of inequalities explicitly or implicitly barred by the Constitution.

themselves are premised on constitutional provisions. Proceeding with the argument that no enterprise whether private or public will deliberately or intentionally practice indirect discrimination or denial of equal opportunity, but may end up doing so unwittingly, the codes of practice and other good practice advisories given by the EOC should be binding on all notified establishments. The underlying argument of state support to private enterprises through various fiscal and financial measures which deliver invisible subsidies in terms of costs of revenues forgone should be used effectively to enforce compliance if the need arises.

4.7 We propose to delimit the scope and work of the EOC by suggesting that the commission focuses its work initially on two key domains of education and employment. The grounds for this prioritisation are largely practical, mainly to avoid loading the Commission with work that it may not be able to handle and which might overlap with the legitimate sphere of action for the executive. This is not to say that equality of opportunities is any less significant in other key domains such as health, housing or infrastructure but simply to recognize that employment and education are opportunities that open the window for accessing other opportunities and are critical to transferring inequality from one generation to another. Having made this point, we would suggest that these two items themselves should not be interpreted narrowly. Employment should include access to employment including self-employment and conditions thereof. Thus the question of access to credit, for example, would fall squarely within the priority area of the proposed EOC. Similarly education should be understood to include primary, secondary, tertiary, special education, professional and vocational, and conditions thereof. Since this limitation is governed by practical consideration, the Commission should be able to look into equality of opportunity or otherwise in any domain other than education and employment as well, if the situation so demands or if there is a specific request from the central or a state government to this effect. In due course it would be open to the Commission to review its priorities and include domains other than employment and education in its priorities for action.

4.8 The other major limitation would be that that the EOC should entertain only those complaints which manifest a group equality dimension. That is to say that it should not take up an individual grievance if it is an isolated incident and does not constitute a systematic practice leading to deprivation and discrimination. This limitation is necessary to save the Commission from a flood of litigation that is pending in the Indian courts involving the Right

to Equality claims. The Commission may assume jurisdiction on any of the above suo motu or on any complaint or representation by an individual or a group or by reference to it by the Central or State Government.

4.9 The scope of the EOC thus defined raises the question of overlapping jurisdiction. As noted above there already are many commissions that do address specific complaints of discrimination for some disadvantaged groups. Although none of these Commissions focus exclusively on education and employment, these subjects are not excluded from their scope. Thus it is inevitable that more than one institution will exercise jurisdiction over one subject, thus opening more than one option to any aggrieved party. In this context we need to note that such overlap already exists between the jurisdiction of the National Human Rights Commission and the National Commission for Women or the National Commission for Scheduled Castes or National Commission for Scheduled Tribes. The National Human Rights Commission (NHRC), a statutory body set up under the Protection of Human Rights Act 1993, has as its primary purpose, the function of combating human rights violations. The definition of human rights that guides the work of the NHRC is “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.” While socio-economic rights do fall within the mandate of the NHRC as well, the primary focus is on civil and political rights. Each of the other commissions, whether constitutional or statutory, addresses the needs of particular designated groups.

4.10 The Equal Opportunities Commission, it is envisaged, will address the concerns of all deprived groups, with respect to equality of opportunity in education, employment and other sectors in a pro-active manner. Each of the other commissions, whether constitutional or statutory, addresses the needs of particular designated groups. While there may be areas of overlap with other existing commissions, the Equal Opportunities Commission, will take further the work of each of these commissions, and will help in the better realisation of their objectives as well in the area of non discrimination and equal opportunities. By this token, women, dalits, adivasis, minorities, persons with disabilities and other deprived and discriminated groups will be able, through remedial action and intervention by the EOC, to combat discrimination in specific ways. The EOC will also audit the performance of employers and educational institutions on non discrimination and equal opportunity on cross cutting indices and issue codes

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of good practice in different sectors – public and private – that will make the formulation of policy and its monitoring simpler at an institutional level. We think that the EOC's evidence based approach will allow it to offer a specialized service that is currently not on offer. In the long run these different Commissions will tend to develop a functional specialization.

4.11 Parliament has the requisite power to legislate on the proposed EOC on the same premise on which it exercised its power to enact the Protection of Human Rights Act 1993. It is part of the functions of the administration of justice, labour welfare, education as well as economic and social planning (Items 11 A, 20, 24 and 25 of List III of the Seventh Schedule of the Constitution), and part of the wider obligations of the State under Part III & Part IV of the Constitution. The proposed legislation providing for the establishment of the Equal Opportunity Commission has to be seen as an important measure being under taken by the State, to act in furtherance of and in discharge of the obligations under Article 38 of the Constitution. The functions that may be discharged by the Commission relate to various other obligations under Articles 39, 41, 42, 45, 46 & 47 of the Constitution.

Under Article 248(1) the Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List. The entries in List III of the 7th Schedule are not powers of legislature but only fields of legislation. They are of an enabling character. They neither impose any implied restrictions on the legislative power conferred by Article 246, nor impose any other limitation. The few entries in the Concurrent List set out above are such fields or areas which may necessarily involve undertaking of measures for advancement or the realization of the Directive Principles of State Policy. The said entries can be said to collectively relate to several principles set out in the part IV of the Constitution. Thus by a conjoined reading of Articles 245, 246 and 248, it can be safely stated that Parliament is competent to enact a legislation falling in the domain of Equal Opportunities in the various walks of life.

COMPARATIVE CHART ON THE FUNCTIONS AND POWERS OF SOME OF THE EXISTING COMMISSIONS

Functions	Powers
I. National Human Rights Commission (NHRC) The Protection of Human Rights Act, 1993	
<ol style="list-style-type: none"> 1. Inquiry into complaints alleging human right violations 2. Intervening in court proceedings involving human right violations. 3. Visit jails and other institutions of the State where persons have been detained. 4. Review constitutional and legislative safeguards as well as international instruments for the protection of human rights. 5. Spread human rights literacy. 6. Such other functions considered necessary for the protection of human rights. 	<ol style="list-style-type: none"> 1. The NHRC shall have the powers of a civil court under the Code of Civil Procedure 1908, and in particular the following: <ol style="list-style-type: none"> a) Summoning and enforcing attendance of witnesses. b) Discovery and production of documents. c) Receiving evidence on affidavits. d) Requisitioning public records. e) Issuing commissions for examination of witnesses. 2. Require person to furnish information required by law. 3. Entry into buildings and seizure of documents. 4. Punishment for non-compliance.
II. National Commission for Scheduled Castes (NCSC) Article 338 of the Constitution of India	
<ol style="list-style-type: none"> 1. Monitor matters relating to the safeguards provided for the Scheduled Castes. 2. Inquiry into specific complaints relating to deprivation of rights/safeguards of SCs. 3. Participate in the planning process of socio-economic development of SCs. 4. Make recommendations for the effective implementation of safeguards for protection and welfare of SCs. 5. Such other functions for the development of SCs. 	<ol style="list-style-type: none"> 1. The NCSC shall have all powers of a civil court while investigating any matter. 2. The NCSC is to be consulted by the Union and State Governments on all major policy matters affecting SCs.
III. National Commission for Scheduled Tribes (NCST) Article 338-A of the Constitution	
<ol style="list-style-type: none"> 1. Monitor matters relating to the safeguards provided for the Scheduled Tribes. 2. Inquiry into specific complaints relating to deprivation of rights/safeguards of STs. 3. Participate in the planning process of the socio-economic development of STs. 4. Make recommendations for the effective implementation of safeguards for protection and welfare of STs. 5. Such other functions for the development of STs. 	The NCST has the same powers of a civil court while investigating matters.
IV. National Commission for Backward Classes (NCBC) National Commission for Backward Classes Act, 1993	
<ol style="list-style-type: none"> 1. Examine requests for inclusion of any class of citizens in the Central List of Backward Classes. 2. Hear complaints of over or under inclusion of backward classes in the Central List. 3. Assist the Central Government in the revision of lists of backward classes. 	The Commission shall have the same powers that have been vested in a civil court.

Functions	Powers
V. National Commission for Minorities (NCM) National Commission for Minorities Act, 1992	
<ol style="list-style-type: none"> 1. Monitor constitutional and legal safeguards for minorities, and make recommendations for their effective implementation. 2. Inquiry into specific complaints relating to deprivation of rights/safeguards of minorities. 3. Conduct studies, research and analysis on the socio-economic and educational development of minorities. 	Shall have the same powers as a civil court.
VI. National Commission for Women (NCW) National Commission for Women Act, 1990	
<ol style="list-style-type: none"> 1. Monitor and review constitutional and legal safeguards for women, and make recommendations for their effective implementation. 2. Take up cases of violation of constitutional and legislative provisions for women. 3. Inspect jails, remand homes or any other institutions where women are being kept as prisoners or otherwise. 4. Fund litigation involving large numbers of women. 5. Participate in the planning process of socio-economic development of women. 6. Constitute Expert Committees to deal with specific issues. 	<ol style="list-style-type: none"> 1. The NCW has the same powers as the civil court. 2. Complaints received by the NCW are handled as follows: <ol style="list-style-type: none"> a) Investigations by the police are expedited. b) Disaggregated data is made available to state authorities to facilitate action. c) Family disputes are resolved through counselling. 3. In cases of serious crimes, the NCW constitutes an Inquiry Committee which conducts spot enquiries, examines witnesses, collects evidence and submits its findings and recommendations.
VII. Commissioner for Disabilities Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995	
<ol style="list-style-type: none"> 1. Safeguard rights and facilities provided for persons with disabilities. 2. Hear complaints pertaining to the deprivation of rights of persons with disabilities. 3. Monitor utilisation of funds disbursed by the Central Government. 	The Commissioner has the same powers as have been vested in a civil court.
VIII. National Commission for Nomadic, Semi-Nomadic & De-notified Tribes Resolution No. 12016/17/2004 – SCD (RI Cell) dated 14th March 2005 (Ministry of Social Justice and Empowerment)	
<ol style="list-style-type: none"> 1. To identify programmes required for the education, development and health of these tribes. 2. To specify measures to raise their living standards through asset creation and self employment opportunities. 	<ol style="list-style-type: none"> 1. Can devise its own procedure of working and may visit any part of India as and when considered necessary. 2. Shall obtain such information as it considers necessary and relevant from Government and public authorities.
IX. National Commission for Safai Karamcharis The National Commission for Safai Karamcharis Act, 1993	
<ol style="list-style-type: none"> 1. Evaluate implementation of programmes relating to the social and economic rehabilitation of safai karamcharis. 2. Recommend a time bound action plan for the elimination of inequalities in status, facilities and opportunities. 	Power to call for information from any Government, local or other authority.

5

WHAT SHOULD BE THE FUNCTIONS OF THE EOC?

The EOC should focus on advisory, advocacy and auditing functions rather than grievance redressal. Such an evidence-based advocacy role would involve many functions: research and data gathering function, so as to allow identification of beneficiaries; monitoring and auditing function, in order to assess the impact of laws and policies; advisory and consultative function, for various organs and levels of government; policy intervention function, by way of various equal opportunity practice codes; grievance redressal function, in a limited and supportive capacity; coordination function, in its role as an equal opportunity watchdog; promotion and advocacy function, aimed at shaping public opinion; and reporting and dissemination function, including the preparation and publication of performance reports and Status Reports on Equal Opportunity situation.

WHAT SHOULD BE THE FUNCTIONS OF THE EOC?

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5.1 Broadly speaking there are two options for thinking about the functions of the proposed Commission. The first approach involves thinking of the Commission as principally a grievance redressing body like the Consumer Courts. This approach has the merit of making the Commission immediately relevant to many citizens as the Commission would be able to offer relief in concrete situations. But this approach has some serious drawbacks. One, as noted above, a focus on redressal of individual grievances is likely to overwhelm the Commission, leading to the familiar scenario of a long queue of pending cases and little time to attend to any long-term policy matter. This approach would also involve making the Commission a quasi-judicial body that needs to be placed in the judicial hierarchy. Experience of similar commissions in other countries suggests that a focus on advisory, advocacy and auditing functions can be far more effective in the long run than the conventional approach of grievance redressal. In view of these considerations, we are of the opinion that the proposed EOC should focus primarily on policy advisory and intervention, data gathering and dissemination and equal opportunity auditing. We visualize a limited and secondary grievance redressal and settlement role for the Commission.

5.2 Given its unique role in evidence-based advocacy on behalf of the discriminated and deprived groups, it is but natural that the EOC should be involved in research and dissemination of data on all forms of discrimination and denial of equal opportunities in every sector of public activity. In the process, it has the difficult task of creation of indices to measure inequality or discrimination in different sectors of activity and of different sections of people. It is this capacity to collect, evaluate and disseminate hard data which gives the Commission the authority to intervene on behalf of the deprived and discriminated groups. Closely related to the above is the monitoring, overseeing and auditing function of equality-related laws, policies, programmes and practices. Arising from the above two, the Commission will have advisory and consultative functions with government departments, private enterprises and autonomous institutions in respect of equal opportunity practices for which the EOC will evolve Equal Opportunity Practices Codes in different sectors and regions. A policy intervention function and a co-ordination function naturally flows from the EOC's

development of Equal Opportunity Practices Codes. Finally, the EOC has to have a grievance redressal function in individual cases where groups are found discriminated against or have been denied equal opportunities. The Commission's overall role would thus be to work towards ensuring the elimination of discrimination and denial of equal opportunities in all walks of life. This would cover many specific functions listed below. Besides, the Commission would be required to perform such other functions as it may find appropriate for giving complete equality of opportunities to all sections as mandated by the Constitution.

5.3 Research and data gathering function:

One of the major functions of the EOC is to develop robust traditions and transparent modalities for an evidence based approach to equality of opportunity issues. The advantages of such an approach are many - it allows for open debate and discussion on the relevant criteria by which disadvantage, deprivation or discrimination might be determined; it helps distinguish different levels and intensities of such disadvantage or deprivation; consequently, it permits the calibration of policies to match the degree of deprivation or disadvantage; and finally, it lays a foundation for the long term evolution of policies including consensual criteria for groups to be brought in or phased out of equal opportunity programmes. This function includes a mandate:

- ▶ To investigate practices/presence of inequality of opportunities particularly in education and employment and propose remedial measures.
- ▶ To evaluate the attainment of equal opportunities and the obstacles to such attainment for different groups of people.
- ▶ To collect and disseminate information about the educational and employment status of various social groups and the social profile of educational institutions and public and private organizations that offer jobs
- ▶ To create indices to measure the extent to which different institutions or sectors offer equal opportunities to all sections of society.

5.4 Monitoring and auditing function of equality related laws and state policies:

An important function of the EOC is to monitor and audit laws and policies pertaining to equality in order to assess their efficacy and impact. In furtherance of this function, the proposed EOC would be expected:

EOC should focus primarily on policy advisory and intervention, data gathering and dissemination and equal opportunity auditing, with a limited and secondary grievance redressal and settlement role.

- ▶ To conduct Equal Opportunity Audit in public and private enterprises, Government departments and other institutions and to invite their attention to shortcomings, deficiencies or other factors affecting the equality of opportunities and to require them to draw up action programmes for ensuring equal opportunities.

5.5 Advisory and consultative function:

Having been empowered to collect data and evidence on the state of equal opportunities in various organisations and establishments, the EOC will be a storehouse of information and expertise on matters of equal opportunity. In this capacity, it has been conferred with an advisory and consultative role:

- ▶ To report to Government on its own or when so requested about the laws that should be made or programmes of action to be undertaken to eliminate the denial of equal opportunity.
- ▶ To examine enactments and proposed enactments (when so requested by a department/ministry of the government) to find out its impact on equality of opportunity in education or employment and to report to the Ministry the results of such examination.
- ▶ To interact with institutions of local government and to advise them towards adoption of measures to eliminate discriminatory practices leading to denial of equal opportunities at the level of Panchayats and Municipalities.

5.6 Policy intervention function:

A crucial role that has been envisaged for the EOC is providing its expertise to the Government in determining and shaping policies for the promotion of equal opportunities. In this respect, it has been entrusted with the function:

- ▶ To evolve “A Good Practices Code” based on information already available in particular sectors, so as to encourage voluntary compliance with practices of equal opportunity in Government, public and private enterprises and institutions
- ▶ To evolve “Equal Opportunity Practice Codes” for the promotion of understanding and acceptance of equal opportunity practices in Government, public and private enterprises and institutions.

5.7 Grievance redressal function:

Since the EOC does not have an adjudicative function per se, it has been given a supportive role whereby it can make attempts to redress grievances and prevent denial of equal opportunities in the following ways:

- ▶ Direct the appropriate Government or authority to take action including prosecutions or the imposition of civil sanctions or penalties on persons in authority found to be acting in a manner prejudicial to the equal opportunity measures suggested by the Commission.
- ▶ Conduct public inquiries or hearings in matters of denial of equal opportunities and to ask the party concerned to take remedial measures within a specified period.
- ▶ To intervene, initiate and facilitate judicial proceedings in matters involving denial of equal opportunities.
- ▶ To mediate, conciliate and settle disputes relating to the denial of equal opportunities.
- ▶ To inquire and investigate into specific complaints of denial of equal opportunity.

5.8 Co-ordination function in the discharge of its role as an equal opportunity watchdog:

In order to facilitate coordination and integration of the roles of the various commissions, and to avoid duplication with respect to their work pertaining to equality, the EOC has been entrusted with the following functions:

- ▶ To study the reports of other commissions at the central and state level which have a bearing on the promotion of equality of opportunity and strive towards an integrated approach in policy development and programme implementation.
- ▶ To relate to and involve in its functioning various organizations, agencies and activists who are striving for equality of opportunity in different walks of life so as to ensure a stronger impact on public life

5.9 Promotion and advocacy function:

An important role of the EOC is to increase public awareness of equal opportunity through its promotion and advocacy functions in order to facilitate participative processes. This function aims:

- ▶ To promote public awareness of and respect for equality of opportunity.
- ▶ To undertake and support opinion making and dissemination activities aimed at creating a culture conducive to equality of opportunity.

5.10 Reporting and dissemination function:

The EOC has been entrusted with the duty to report, publicise and disseminate information to provide complete transparency and accountability in its functioning. In this regard, it has to:

- ▶ Prepare annual and periodical performance reports on equal opportunities and to seek their implementation by appropriate authorities.
- ▶ To prepare and disseminate Status Reports on the Equal Opportunity situation in different sectors for alerting the appropriate government and informing the beneficiary groups.
- ▶ To mobilize public opinion in favour of an equal opportunity culture through measures found suitable and cost-effective.

6

WHAT POWERS WOULD THE EOC REQUIRE?

The EOC needs the powers of a Civil Court, but not penal powers, for its inquiries and investigations. Yet the impact and the efficacy of the EOC would depend more on its ability to influence public opinion and provide credible evidence than its legal powers. Accordingly, the proposed EOC would have the power to announce Codes of Good Practice, the standard powers of a Civil Court relating to inquiries, powers to utilize any officer or agency for its investigation, power to provide legal assistance to complainants or engage legal counsel, power to give orders and directions to demand information and to inspect records, and power to require compliance of equal opportunity practice codes by taking violators to the court

WHAT POWERS WOULD THE EOC REQUIRE?

6

To be able to effectively discharge all these functions, the EOC is to be duly empowered to conduct inquiries, call for information, institute detailed investigations, inspect premises and records, and seek explanations from any agency of the government or public/private enterprises.

6.1 The proposed EOC has to be endowed with adequate power and resources to fully discharge its functions and to perform the difficult role set up for it. Since we do not visualize grievance redressal to be the principal function of the EOC, it would not require strong punitive or quasi-judicial powers. The EOC would, however, need to be endowed with extensive powers for its investigative, data gathering, auditing, advocacy and advisory functions. To be able to effectively discharge all these functions, the EOC is to be duly empowered to conduct inquiries, call for information, institute detailed investigations, inspect premises and records, and seek explanations from any agency of the government or public/private enterprises. It will have all the powers of a Civil Court to gather information through discovery proceedings. These powers would have to be balanced with due protections to individuals, enterprises and utilities who may be adversely affected by its actions. However, the EOC is not intended to be a Court and will not have penal powers. If the situation so demands, the Commission can ask for criminal proceedings to be initiated. Otherwise, the EOC can issue orders and directives intended to correct policies and practices. If it considers necessary it can mediate and get mutually satisfactory settlements promotive of equal opportunity practices in identified enterprises/departments.

6.2 Given the universal appeal of the idea of equality of opportunity, the impact and efficacy of the EOC depends more on its ability to influence public opinion and provide credible evidence than on its legal or coercive powers. Worldwide experience with equal opportunity struggles shows that exposure of inequitable practices in the public domain creates formidable pressure for their redressal. Institutions such as EOCs become powerful by harnessing the energies and aspirations of the disadvantaged through public dissemination of relevant information. The mass media, social movements, civil society organisations and the judiciary can all play a critical role in amplifying the impact of the EOC. Needless to say this kind of 'power' would have to be earned by the EOC through its non-partisan, credible and committed actions in promoting equality of opportunity.

6.3 One way in which it is proposed to situate the EOC with the existing Commissions is to interpret its adjudicatory powers in a manner that once an evidence based denial of opportunity is established, the EOC maximizes its resources by taking tactical decisions to refer the matter to the various Commissions already functioning for different sectors or to a court of law. In crucial cases, it may become the complainant in a relevant forum including judicial forums and follow up the same. Per se adjudicatory functions and powers are not being recommended to reduce the tendency to see the issue purely from a legal adversarial perspective. This will protect the legitimate and much needed space for qualitative and quantitative data based on statistical evaluation towards understanding the problem in the context of discrimination or denial of equal opportunity.

6.4 In order to bridge the gap between the enforceable/existing norm and what ought to be enforceable benchmarks, the EOC is being empowered to announce a Code of Good Practice as well as a Code of Equal Opportunity Practices. Once evidence is produced indicating indirect discrimination in the employment practices of an enterprise, a group of enterprises or a sector as the case may be, the enterprise is given a chance for voluntary compliance with an adequate time frame to achieve the agreed remedy. After the lapse of the agreed time frame, the announced Code of Practice should itself become a fair benchmark to take remedial action.

6.5 Powers relating to inquiries:

While inquiring into complaints, the Commission shall have all the powers of a civil court , including the following powers:

- ▶ Summoning and enforcing the attendance of witnesses and examining them on oath;
- ▶ Discovery and production of any document;
- ▶ Receiving evidence on affidavits;
- ▶ Requisitioning any public record or copy thereof from any court or office;
- ▶ Issuing commissions for the examination of witnesses or documents;

The Commission shall have the power to require any person to furnish information on such points or matters as may be useful for, or relevant to, the subject matter of the inquiry. The Commission can authorize any officer to enter any building or place to procure or make a copy of any document relating to the subject matter of the inquiry. The Commission shall be deemed to be a civil court and when any offence as is described in Section 175, Section 178,

Institutions such as EOCs become powerful by harnessing the energies and aspirations of the disadvantaged through public dissemination of relevant information. The mass media, social movements, civil society organisations and the judiciary can all play a critical role in amplifying the impact of the EOC.

Section 179 or Section 180 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same.

6.6 Powers of investigation:

The Commission may, for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.

6.7 Power to provide legal assistance

In all cases where the complainant is eligible for legal aid, the Commission can order provision of appropriate legal aid.

In special cases, if the Commission needs professional expertise, it may appoint *amicus curiae* or engage legal counsel.

6.8 Power to give Orders and Directions to Demand Information and to Inspect Records and Premises

In addition to the powers to carry out inquiries and investigations, the Commission should be empowered to issue orders and directions to demand information and to inspect the premises of Government bodies, public and private enterprises and of autonomous institutions

6.9 Power to require compliance of Equal Opportunity Practice Codes

The Commission will have the power to recommend “Good Practices Code” to all the enterprises and to recommend to the appropriate government, the recognition of such enterprises which keep a consistent record of following the prescribed codes of practices by giving such incentives as may be permissible under the existing law.

If the Commission finds that the party against whom the complaint has been filed has intentionally engaged in discrimination or denial of equal opportunity, it may take any of the following courses of action – provide a copy of the inquiry report to such party and ask it to justify such discriminatory conduct; direct such party to refrain from carrying out such practices; ask the concerned authority to initiate proceedings against such party; or approach the Supreme Court or High Court for writs or orders as appropriate. If the Commission finds that the party has unintentionally engaged in discriminatory practices, it may order such party to prepare an action plan which redresses such discrimination within a time frame and comply with equal opportunity practices.

7

HOW WOULD THE EOC CARRY OUT ITS MANDATE?

Since the EOC is expected to shift the thinking on equal opportunities from the anecdotal and reactive to a pro-active, evidence based understanding, it would need to adopt a fresh approach and come up with innovative procedures. Generating, collecting, processing and disseminating various kinds of data on equal opportunity issues – generic data, reporting data, indices and data from case studies - is going to be the key to the success of the EOC. Besides, the EOC would conduct General and Special Investigations, either in response to specific complaints or on its own. Such inquiries would have to follow a standard, transparent, fair and time-bound procedure. On the conclusion of the inquiry, the EOC may decide not to initiate any action, may facilitate reconciliation or take action against non-compliant organizations.

HOW WOULD THE EOC CARRY OUT ITS MANDATE?

7

7.1 The primary imperative for the EOC is to move the discourse on denial of equal opportunity away from anecdotal and reactive to the realm of the measurable and verifiable, and thus towards a proactive, evidence-based understanding of inequality. It must be able to detect, investigate and make cogent persuasive rulings, advisories and give directions defensible in forums as diverse as the legislature, judiciary and executive. The data generation function will thus be crucial to enable the EOC to fulfil its role and will indeed place it in a preeminent position as data provider to the informed functioning of other Commissions and instrumentalities of the State on the equality front. The EOC, to effectively discharge its mandate, has to utilize existing data generating agencies and have the power to give directions for fresh data generation to suit its road map of action.

7.2 An evidence based approach obviously presupposes a systematic ongoing programme for generating, collecting, processing and disseminating data. The Commission can help enhance the compliance levels of equal opportunity in society by publishing Equal Opportunity Status Reports in different sectors and suggesting strategies for promoting it. The Annual Performance Report to be submitted to Parliament is yet another important strategy in promoting equality levels as the nation gets an opportunity to re-examine the issue every year in relation to governmental policies and programmes.

We anticipate that the EOC's data gathering activities will involve four major types of data:

a. Generic data that helps profile relevant social groups and sectors of activity: Generic data gathering will involve coordinating with existing institutions like the National Sample Survey Organisation and the Census. An important and much needed initiative here is the extension of ongoing surveys and censuses to disaggregate existing groups or recognise emerging ones. Examples include the collection of data on specific communities or groups (rather than only aggregates like Scheduled Castes, Scheduled Tribes, Other Backward Classes etc.) which would allow for disaggregation, and identification of new groups like displaced persons. Such generic data would provide the crucial raw material and baseline from

which insights about patterns of inequality can be discerned and generated.

b. Reporting data deposited with the EOC via statutory rules or voluntary norms: Reporting data would essentially result from the institution of statutory or voluntary practices of routine reporting. Thus, for example, all notified employers and educational institutions could be asked to provide certain statistics on an annual basis to the EOC, which would monitor these and take necessary follow up action.

c. Indices and Benchmarks developed by the EOC based on the above sources: Indices and benchmarks would be based on generic and reported data, and could be designed to meet the requirements of the domains in the focus of the EOC such as education or employment. The indices would be essential to enable the EOC to reach a reasonably quantifiable basis to define ‘groups’ which will be the main basis of its interventions. Deprivation Index and other such conceptual matrices could also be notified from time to time to further an evidence based understanding of inequality in India. It could also be incorporated into a standardised periodic report such as a National Equal Opportunity Status Report.

d. Case studies and specific enquiries taken up suo motu or by request: Case studies would investigate particular problems or issues as they arise, and would be conducted as an in house enquiry by the EOC itself, or take the form of a study involving specially recruited academics, experts or NGOs specially invited for this purpose.

We feel that it is neither necessary nor desirable to go into further detail on these issues, which are best left to the EOC. The crucial role of the EOC in institutionalising an evidence-based approach cannot be overemphasized. It is true that collection of group-specific data may temporarily strengthen identities that we hope to render irrelevant in future. But this hoped-for tomorrow will only arrive if we carefully monitor inequalities of opportunity today, and this needs more – not less – data on groups and communities.

7.3 The Commission may either decide to take up a formal investigation in matters of equal opportunity on its own or if it is requested to do so by the Central or State Governments. If the Commission is of the opinion that certain parties have engaged in acts that are contrary to the letter or spirit of the law with respect to equality of opportunity, it can conduct a special investigation of the acts in question after giving notice of the holding of such investigation to the concerned parties.

It is true that collection of group-specific data may temporarily strengthen identities that we hope to render irrelevant in future. But this hoped-for tomorrow will only arrive if we carefully monitor inequalities of opportunity today, and this needs more – not less – data on groups and communities.

The Commission may by issuing notice, require any person to provide oral and written information about matters under investigation.

7.4 Inquiry into Complaints

During the process of inquiring into complaints, the Commission may call for information from the Central or State Governments or any subordinate organisations or persons, that is to be provided within a stipulated time period. It may proceed with the inquiry on its own if the information has not been received within the specified time period. On receipt of the information, if the Commission is satisfied that no further inquiry is required or that necessary action has been taken by the concerned authority, it may discontinue with the inquiry and inform the complainant of its decision.

7.5 Processing of Complaints

Once a complaint is filed by a party claiming to be aggrieved, the Commission shall serve notice of the complaint on the establishment/person against which the complaint has been filed. The Commission may maintain confidentiality of the proceedings. The Commission shall dismiss the complaint if it finds that there are no reasonable grounds to believe that the complaint is true or that it does not involve or reveal group discrimination. If it finds reasonable grounds to believe that the complaint is true, it shall attempt to address the complaint through informal dispute settlement methods such as mediation and conciliation. It may either proceed on its own or adopt courses of action under S. 89 of the Code of Civil Procedure. The Commission should arrive at a decision within 90 days from the date of filing of the complaint. If it is unable to secure an acceptable conciliation agreement, then it may proceed to dispose of the matter according to law.

7.6 Dealing with Infringement of Equal Opportunity Practices Code

In case of infringement of the Equal Opportunity Practices Code by an establishment, the Commission would have to issue notice to such establishment and carry out processes of investigation and hearing. The burden of proving infringement would be on the Commission. It would attempt to bring about a mediated/conciliated settlement failing which it may issue orders within its power such as compensation, denial of privileges, blacklisting or civil, criminal or constitutional action in court.

8

WHAT SHOULD BE THE STRUCTURE AND ORGANISATION OF THE EOC?

The composition of the EOC needs to reflect its diverse constituencies and multiple functional requirements. These can be met if the proposed EOC has a chairperson and six members (at least two full time), with a tenure of five years. The members should be selected from among experts (at least one each from law and social science), professionals and activists, with due representation to women and other disadvantaged groups, by a bipartisan Committee, following the model of the selection of the members of the NHRC. The government would need to provide the EOC with an efficient secretariat and sufficient grants. The EOC would need to work in a transparent manner and involve various stakeholders. Five Regional Commissions would be required to make the EOC accessible and relevant in different regions of the country.

WHAT SHOULD BE THE STRUCTURE AND ORGANISATION OF THE EOC? 8

8.1 The above mentioned functions and powers of the proposed EOC make it clear that the new Commission would have to be different from the existing Commissions in many ways. The proposed EOC would need to inspire confidence in its professionalism by functioning in a swift, efficient and transparent manner. It would need to win the trust of two very different groups: the disadvantaged persons, groups and their social movements on the one hand and the various pillars of democracy including the judiciary and the media on the other. The nature and status of personnel of the Commission will determine its character in this regard. As such, extreme care is required from the government while constituting the Commission for which a high-powered selection committee and a transparent procedure are recommended. The EOC should be constituted in such a way so as to be autonomous of the government of the day and be capable of responding quickly and effectively to any challenge it is faced with.

8.2 The Commission needs to perform a wide range of functions that would necessitate professional expertise and functional specialization. Besides there is a need to give representation to the various disadvantaged groups within the Commission. This dual requirement can be met if the Commission has seven members. Therefore it is proposed that in the beginning the EOC shall consist of a Chairperson and at least two full time members. The provision of part-time membership would allow the Commission to draw upon talent from various fields of public life including those who are unable or unwilling to join full time service. In due course the membership can go up if the government sets up Regional Commissions as described below. In that case the Chairpersons of the Regional Commissions shall be ex-officio members of the Commission.

8.3 The usual term of three years for members of many of the present commissions may not be adequate for doing justice to the nature of the job in the EOC. Therefore it is proposed that every member, full time or part time, shall hold office for a period of five years. In order to ensure smooth functioning of the Commission there should be a provision for filling of any vacancy within six months.

The proposed EOC would need to inspire confidence in its professionalism by functioning in a swift, efficient and transparent manner. It would need to win the trust of two very different groups: the disadvantaged persons, groups and their social movements on the one hand and the various pillars of democracy including the judiciary and the media on the other.

8.4 A Commission of the kind envisaged here should comprise of professionals or activists from fields such as education, personnel management, trade union or similar organizations, law, public administration, journalism and social sciences. In order to keep this focus, it would be advisable not to confine the recruitment of members to the three categories that usually dominate most other Commissions: serving or retired civil servants, serving or retired judges, and politicians. The inputs from all the three categories mentioned above are vital but are best utilized when processed by professionals and activists of the kind described above. The Chairperson is to be an eminent person distinguished in public service and possessing good understanding of the secular and egalitarian values of the Constitution. While it should be left free to the appointing authority to arrive at a judicious mix of various professional skills, it is advisable that of the two full time members at least one member each should be required to be an expert in law and in the social sciences respectively. Given their role in the day-to-day working of the Commission, both these members should be full-time members.

8.5 Experience of the working of similar commissions show that such bodies inspire more confidence among the deprived communities if the members themselves have experienced deprivation and have a record of working for the deprived. We propose that at least two of the seven members shall be women. In addition to these two women members, every effort should be made to give representation to persons from other deprived groups in constituting the Commission.

8.6 In order to ensure autonomy of the Commission from the government of the day, it is advisable to follow the model prescribed under the Protection of Human Rights Act that ensures a say for the government as well as the opposition in Parliament. Thus we recommend that the Commissioners should be appointed from among those recommended by a Committee consisting of:

- The Prime Minister — Chairperson
- Speaker of the House of the People — Member
- Minister in-charge of the Ministry of Minority Affairs in the Government of India — Member
- Leader of the Opposition in the House of the People — Member
- Leader of the Opposition in the Council of States/ — Member
- Deputy Chairman of the Council of States — Member
- A nominee of the Chief Justice of the Supreme Court

The EOC should be constituted in such a way so as to be autonomous of the government of the day and be capable of responding quickly and effectively to any challenge it is faced with

8.7 The Commission would require and should be provided with an efficient secretariat. The Commission should be able to appoint such other administrative, technical and scientific staff as it may consider necessary.

8.8 The wider acceptance of the Commission would be enhanced considerably if it functions in a transparent manner and involves several stake holders in its working. Since the Commission will be a public body under the Right to Information Act, the information collected by the EOC will be in the public domain unless statutorily excluded. Fairness would require that the information in the case under investigation may not be made public. The Commission will also have to guard against breach of personal confidentiality. However, the legislation and the rules should be framed in such a way so as to ensure maximum possible disclosure. The EOC will be seriously hampered in achieving its objectives if NGOs, campaign groups, and activists and the media cannot easily access its information for public campaigns. Thus we propose the following measures to facilitate the participation of civil society organizations:

a. The Commission can recognize any organization such as an NGO, a Trade Union or a movement group as its associate and provide it a special status for purposes of filing complaints;

b. The Commission can associate any media organization or media person with its inquiries and accept any media report as if it is a preliminary inquiry conducted by the Commission;

c. The Commission can set up Facilitation Centres to disseminate information about equal opportunity and to help the deprived groups gain access to educational and employment opportunities. The Commission may recognize any existing organization or institution to run these centres.

8.9 As in the case of other Commissions, the EOC will be provided sufficient grants by the Central Government. This provision will have to include adequate grants to allow the Commission to carry out large-scale data gathering operations necessary for the discharge of its functions and to hire services of consultants and experts from various fields for purposes of preparation of its reports. The Central Government would pay such sums of money in the form of grants to the Commission, as it deems suitable for the purposes of the Act. The Commission would be expected to maintain proper accounts and records as prescribed by the Central Government and the Comptroller and Auditor General of India. The annual statement of accounts along with the audit report would be placed before each House of Parliament.

8.10 We visualize that the EOC would need to have a presence in different regions of the country to be able to discharge its functions well. This would make the EOC more accessible, allow it to function in local languages and specialize in issues relevant to each region. For this purpose we recommend that the government shall set up five Regional EOCs in the different regions of the country. The government may specify the geographical jurisdiction of the Regional EOCs and their respective headquarters. Each Regional Commission shall have a structure similar to the EOC. The Chairpersons of the Regional Commissions will be the ex-officio members of the EOC. The Expert Group suggests that the Regional Commissions should be set up after learning from the experience of the working of the EOC, within two years of its establishment.

PART – II: BILL

THE EQUAL OPPORTUNITY COMMISSION BILL, 2008

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PREAMBLE

Whereas the constitution of India in its Preamble promises to secure to all its citizens EQUALITY OF STATUS AND OF OPPORTUNITY and (a) directs the State (Article 38(2)) to strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only among individuals but also amongst groups of people residing in different areas or engaged in different vocations, (b) mandates the State (Article 41) to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want, and (c) imposes a positive duty (Article 46) to promote with special care the educational and economic interests of the weaker sections of the people in order to protect them from social injustice and all forms of exploitation (emphasis added);

Whereas discrimination on grounds only of religion, race, caste, sex or place of birth is constitutionally prohibited and equality of opportunity for all citizens in matters of public employment is constitutionally guaranteed as part of the Right to Equality (Article 15 and 16);

Whereas as part of the fundamental right to equality, the State is empowered to make special provisions by way of affirmative action for the advancement of any socially and educationally backward classes of citizens (Articles 15(4) and 16(4)) in tune with the positive duties stipulated under the above mentioned Directive Principles of State Policy; and

Whereas the State is bound to ensure (Article 39-A) that the operation of the legal system promotes justice, on a basis of equal opportunity and towards that end evolve suitable legislation or schemes.

Be it enacted by Parliament in the Fifty Ninth year of the Republic of India as follows:

THE EQUAL OPPORTUNITY COMMISSION ACT, 2008

Act No..... of 2008

An Act to promote Equality of Opportunity to all sections of people particularly the deprived groups' and towards that end to establish Equal Opportunity Commissions to effectively intervene in policy development, programme implementation and public administration on behalf of the deprived and discriminated groups and for matters related thereto:

Be it enacted by the Parliament in the fifty ninth year of the Republic of India as follows-

CHAPTER I: PRELIMINARY

I. SHORT TITLE, EXTENT AND COMMENCEMENT

- (1) This Act may be called the Equal Opportunity Commission Act, 2008.
- (2) The Act extends to the whole of India except to the State of Jammu and Kashmir.
- (3) The Act shall come into force immediately on receiving Presidential assent except with reference to such provisions of the Act which the Government may by order reserve for implementation on a later date.

2. DEFINITIONS

- (1) In this Act, unless the context otherwise requires –
 - (a) “Act” – shall mean the Equal Opportunity Commission Act.
 - (b) “Appropriate Government” means the Central, State or local government as the case may be.
 - (c) “Commission” means the Equal Opportunity Commission established under Section 4 of this Act.
 - (d) “Regional Commission” means any of the five regional Commissions established under Section 13 of the Act.
 - (e) “Good Practices Code” means the Code declared as such by the Commission for any sector or region under Section 37 of the Act containing recommended practices designed to avoid discrimination and provide equal opportunity to all sections particularly the deprived groups.
 - (f) “Equal Opportunity Practices Code” – means the code declared as such by the Commission containing recommended practices of non-discriminatory character for any sector or region under Section 38 of the Act.
 - (g) “Deprived group” means a group of persons who find themselves disadvantaged or lacking in opportunities for reasons beyond their control or suffer from impaired ability to make good existing opportunities to access rights and entitlements available under law or schemes of the government .
 - (h) “Equality of Opportunity” means existence of conditions which would enable the disadvantaged to overcome the disabilities in accessing rights and entitlements like other groups, whether similarly placed or not.
 - (i) “Denial of Equal Opportunity” means any action, conduct or measures resulting in or is likely to result in discrimination or deprivation, and includes any action taking away in any manner existing opportunities for livelihood, vocation, occupation or employment or any other livelihood rights and entitlements.

(j) “Deprivation Index”

“Deprivation Index” means the formula or scheme by which the Commission would identify the “deprived groups”. These may vary according to the sectors and regions surveyed in relation to the equal opportunity situation. There may be different levels of deprivation as well. The formula or scheme thus evolved may employ indicators legally recognized in the past for determining social and economic backwardness and may include other factors found relevant by the Commission. It may assign weighted scores to various indicators in order to evolve an index of deprivation, which it considers fair to all concerned. The Deprivation Index thus worked out together with the basis of such calculation may be notified by the Commission. It may modify it if found necessary after proper notice.

(k) i) “Discrimination” means any distinction, exclusion or restriction made on the basis of sex, caste, language, religion, disability, descent, place of birth, residence, race or any other which results in less favourable treatment which is unjustified or has the effect of impairing or nullifying the recognition, enjoyment or exercise of equality of opportunity, but does not include favourable treatment given in fulfillment of constitutional obligations towards Scheduled Castes, Scheduled Tribes, backward classes, women and children.

ii) Discrimination includes direct and indirect discrimination.

iii) ‘Direct discrimination’ occurs when a person intentionally or with knowledge violates the principle of equality guaranteed by the Constitution.

iv) Any other discrimination which has the effect of impairing or nullifying the exercise of equality of opportunity or which results in less favourable treatment will be deemed to be ‘indirect discrimination’.

(l) “Equal Opportunity Practice” – means and includes steps taken for the progressive elimination of discrimination – direct and indirect – against deprived groups, and the creation of Policies and Practices evolved for equalisation of opportunities in different sectors/regions.

(m) “Equal Opportunity Audit” means a socio-legal audit of Government bodies, public or private enterprises that may be carried out by the Commission for the purpose of evaluating existing provisions for equal opportunities in such enterprises or institutions.

(n) “Group” is an aggregate of people who are identifiable in terms of shared attributes and circumstances.

(o) “Her” or “She” shall be deemed to include “his” or “he” as the case may be for the purposes of this Act.

(p) “Member” means a Member of the Commission or of the Regional Commission, as the case may be, and includes the Chairperson;

(q) “National Equal Opportunity Status Report” refers to a report that may be prepared and published by the Commission in addition to the annual and periodical reports in order to inform the state of equal opportunities in different sectors at the national level.

- (r) “Notification” means a notification published in the official Gazette under the Act;
- (s) “Orders” – means orders issued by the Commission under Section 35 of the Act.
- (t) “Prescribed” means prescribed by rules made under this Act;
- (u) “Public servant” shall have the meaning assigned to it in Section 21 of the Indian Penal Code;
- (v) “Record” – means the official data or documents authenticated by an officer of the Commission designated for the purpose.
- (w) “Rules” – means the rules made by the Central Government under Section 48 or rules made by the Commission under Section 49 of the Act as applicable.

3. INTERPRETATION

- (i) Discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth is expressly forbidden by the Constitution itself. Arbitrariness is against the spirit of equal opportunity. There is therefore no need for a separate anti-discrimination law to afford equal opportunity to citizens against the State or State-sanctioned private enterprises.
- (ii) The equal opportunity provisions of Part III and Part IV of the Constitution including the statutes enacted there under shall inform and guide the interpretation of the provisions of the Act and the Rules.
- (iii) Words and phrases used in the Act or the Rules made under it shall be construed in the light of the general purposes of the Act and the statement of objects and reasons appended to the Act. Any matter not directly specified by the legislation but falling within the subject matter of the Act, shall be dealt with through recourse to the general purposes of the Act and the principles stated above.
- (iv) Definitions of words and phrases not given in the Act may be given the meaning provided for in the related statutes in so far as they are relevant for the effective discharge of the functions under the Act.
- (v) The principles enunciated in relevant international conventions, covenants or treaties acceded to by India and relating to discrimination and equality of opportunity in so far as they have a bearing on the appreciation or understanding of the meaning or content of the provisions of the Act or for promoting the objects of the Act, shall be legitimate instruments in the interpretation of the Act.
- (vi) Private and autonomous enterprises which could not have carried on the activity concerned excepting through delegation, licence or authorization by State under the laws in force, shall be deemed to be ‘State’ for the purposes of anti-discrimination and equal opportunity laws and the Commission will have jurisdiction over them.

CHAPTER II: EQUAL OPPORTUNITY COMMISSION: STRUCTURE AND ORGANIZATION

4. CONSTITUTION OF THE EQUAL OPPORTUNITY COMMISSION

- (i) The Central Government shall constitute a body known as the Equal Opportunity Commission to perform the functions assigned to it and exercise the powers conferred upon it under the Act.
- (ii) The Commission shall consist of a Chairperson, two full-time members and not more than four part-time members.
- (iii) The Chairpersons of the Regional Commissions shall be ex-officio members of the Commission.
- (iv) Two thirds of the total number of members of the Commission shall constitute the quorum for meetings.

Provided the total number of members shall be counted as seven till the Regional Commissions are duly constituted under the Act.

5. APPOINTMENT OF CHAIRPERSON AND OTHER MEMBERS

- (i) The Chairperson and Members shall be appointed by the President by warrant under her hand and seal.

Provided that every appointment under this section shall be made after obtaining the recommendations of a Committee consisting of:

- (a) The Prime Minister — Chairperson
- (b) Speaker of the House of the People — Member
- (c) Minister in-charge of the Ministry of Minority Affairs in the Government of India — Member
- (d) Leader of the Opposition in the House of the People — Member
- (e) Leader of the Opposition in the Council of States — Member
- (f) Deputy Chairman of the Council of States — Member
- (g) A Supreme Court Judge (sitting or retired) nominated by the Chief Justice of India — Member

Provided that in constituting the Commission, every effort shall be made to give representation to persons from deprived groups.

And provided that at least two of the seven members of the Commission shall be women.

And provided that one of the two full-time members is an expert in social sciences research and public policy and the other full-time member is an expert in constitutional law and governance.

- (ii) The Chairperson is to be an eminent person distinguished in public service and possessing a good understanding of the secular and egalitarian values of the Constitution.
- (iii) The Chairperson and Members shall not have completed 65 years of age at the time of appointment to the Commission and shall be in good health.

6. REMOVAL OF CHAIRPERSON AND OTHER MEMBERS

- (i) The President may by order remove from office any Member including the Chairperson if such Member,
 - (a) becomes an undischarged insolvent; or
 - (b) gets convicted on a criminal charge; or
 - (c) refuses to act or becomes incapable of acting as a member.
- (ii) Provided that no person shall be removed under this clause until that person has been given reasonable opportunity to be heard in the matter.

7. TERM OF OFFICE OF MEMBERS

- (i) Every member including the Chairperson shall hold office for a period of five years.
- (ii) A member may by writing and addressed to the Central Government, resign from the office of Chairperson or, as the case may be from membership at any time.
- (iii) A vacancy in the Commission arising from removal, resignation or otherwise shall be filled by fresh appointment not later than six months after such vacancy arises.

8. MEMBER TO DISCHARGE THE CHAIRPERSON'S FUNCTIONS IN CERTAIN CIRCUMSTANCES

- (i) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of her death, resignation or otherwise, the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.
- (ii) When the Chairperson is unable to discharge her functions owing to absence on leave or otherwise, one of the Members as the President may, by notification, authorise on her behalf, shall discharge the functions of the Chairperson until the Chairperson resumes her duties.

9. CONDITIONS OF SERVICE OF MEMBERS

The salaries and allowances payable to, and other terms and conditions of service of the Members shall be such as may be prescribed.

Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to her disadvantage after her appointment.

10. VACANCIES NOT TO INVALIDATE THE PROCEEDINGS

No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission.

11. PROCEDURE TO BE REGULATED BY THE COMMISSION

- (i) The Commission shall meet at such time and place as it may decide.
- (ii) The Commission shall regulate its own procedure.
- (iii) All orders and decisions of the Commission shall be authenticated by such officer that it may designate in this behalf.

12. OFFICERS AND OTHER STAFF OF THE COMMISSION

- (i) The Central Government shall make available to the Commission such other officers as may be necessary for the effective functioning of the Commission.
- (ii) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.
- (iii) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (ii) shall be such as may be prescribed.

CHAPTER III: REGIONAL EQUAL OPPORTUNITY COMMISSIONS

13. ESTABLISHMENT OF REGIONAL COMMISSIONS

- (i) The Central Government shall establish not later than 2 years after the establishment of the Commission, five Regional Commissions in consultation with the Commission to perform the functions assigned to it under the Act.
- (ii) The Regional Commissions shall consist of a Chairperson, two full-time Members and not more than four part-time Members.

14. APPOINTMENT OF CHAIRPERSON AND OTHER MEMBERS

- (i) The Chairperson and other Members shall be appointed by the President by warrant under her hand and seal.

Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of:

- (a) The Prime Minister — Chairperson
- (b) Speaker of the House of the People — Member
- (c) Minister in-charge of the Ministry of Minority Affairs in the Government of India — Member
- (d) Leader of the Opposition in the House of the People — Member
- (e) Leader of the Opposition in the Council of States — Member
- (f) Deputy Chairman of the Council of States — Member
- (g) A Supreme Court Judge (sitting or retired) nominated by the Chief Justice of India — Member

Provided that in constituting the Regional Commission, every effort shall be made to give representation to persons from deprived groups and persons settled in the region.

And provided that at least two of the seven members of the regional Commission shall be women.

And provided that one of the two full-time members is an expert in social sciences research and public policy and the other full-time Member an expert in Constitutional law and governance.

- (ii) The Chairperson is to be an eminent person distinguished in public service and possessing good understanding of secular and egalitarian values of the Constitution.

- (iii) The Chairperson and Members shall not have completed 62 years of age at the time of appointment to the regional commission and shall be in good health.

15. REMOVAL OF CHAIRPERSON AND MEMBERS

- (i) The President may by order remove from office any Member including the Chairperson if such Member,
 - (a) becomes an undischarged insolvent; or
 - (b) gets convicted on a criminal charge by a Competent Court; or
 - (c) refuses to act or becomes incapable of acting as a member.
- (ii) Provided that no person shall be removed under this clause until that person has been given reasonable opportunity to be heard in the matter.

16. TERM OF OFFICE OF MEMBERS

- (i) Every member shall hold office for a period of five years.
- (ii) A member including the Chairperson may by writing and addressed to the Central Government, resign from the office of Chairperson or, as the case may be, from membership at any time.
- (iii) A vacancy arising from removal, resignation or otherwise shall be filled by fresh appointment not later than six months after such vacancy arises.

17. MEMBER TO DISCHARGE THE CHAIRPERSON'S FUNCTIONS IN CERTAIN CIRCUMSTANCES

- (i) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of her death, resignation or otherwise, the President may, by notification, authorise one of the members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.
- (ii) When the Chairperson is unable to discharge her functions owing to absence on leave or otherwise, one of the Members as the President may, by notification, authorise on her behalf, shall discharge the functions of the Chairperson until the Chairperson resumes her duties.

18. CONDITIONS OF SERVICE OF MEMBERS

The salaries and allowances payable to, and other terms and conditions of service of the members shall be such as may be prescribed. Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to her disadvantage after her appointment.

19. VACANCIES NOT TO INVALIDATE THE PROCEEDINGS

No act or proceedings of the Regional Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of such Commission.

20. PROCEDURE TO BE REGULATED BY THE REGIONAL COMMISSIONS

- (i) The Regional Commission shall meet at such time and place in the region as it may decide.
- (ii) The Regional Commission shall regulate its own procedure subject to the directions of the National Commission.
- (iii) All orders and decisions of the Regional Commission shall be authenticated by such officer that it may designate in this behalf.

21. OFFICERS AND OTHER STAFF OF THE REGIONAL COMMISSIONS

- (i) The Central Government shall make available to the Regional Commission such other officers as may be necessary for the effective functioning of the Regional Commission.
- (ii) Subject to such rules as may be made by the Central Government in this behalf, the Regional Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.
- (iii) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (ii) shall be such as may be prescribed.

CHAPTER IV: JURISDICTION, FUNCTIONS AND POWERS

22. JURISDICTION

- (i) The jurisdiction of the Commission extends to all “deprived groups” who have been denied or who claim to have been denied equal opportunities by government, public and private bodies, and in particular with reference to:
 - (a) Access to employment including self-employment and conditions thereof.
 - (b) Access to education including primary, secondary, tertiary, special education, professional and vocational, and conditions thereof.
 - (c) Such other areas which the appropriate Government may decide and request the Commission to include in its jurisdiction.
- (ii) The Commission may assume jurisdiction on any of the above suo motu or on any complaint or representation by an individual or a group or by reference to it by the Central or State Government or a statutory body under government or by a competent Court seized of the matter.

Provided in the case of a complaint from an individual the complaint manifests a group dimension, that is to say that it is not an isolated incident affecting one individual and is a practice that may constitute discrimination or denial of equality of opportunity.
- (iii) The jurisdiction of the Regional Commissions shall extend to such groups and areas as may be assigned to them by the Commission.

23. FUNCTIONS

- (a) Deprived groups are entitled to seek remedial action from the appropriate government and it is the function of the Commission to assist such groups in securing equal opportunities through suitable schemes or legislation.
- (b) The specific functions of the Commission inter alia, include the following:
 - (i) To work towards ensuring the elimination of all forms of discrimination and denial of equal opportunities in all walks of life.
 - (ii) To investigate practices/presence of inequality of opportunities particularly in education and employment and propose remedial measures.
 - (iii) To evaluate the attainment of equal opportunities and the obstacles to such attainment for different groups of people.
 - (iv) To inquire and investigate into specific complaints of denial of equal opportunity.
 - (v) To mediate, conciliate and settle disputes relating to discrimination and the

denial of equal opportunities in any establishment or enterprise, whether public or private.

- (vi) To intervene, initiate and support judicial proceedings wherever found appropriate in matters involving discrimination or denial of equal opportunities.
- (vii) Conduct public inquiries or hearings in matters of denial of equal opportunities and to ask the party concerned to take remedial measures within a specified period.
- (viii) To conduct Equal Opportunity Audit in public and private enterprises, Government departments and other institutions and to invite their attention to shortcomings, deficiencies or other factors affecting the equality of opportunities and to require them to draw up action programmes for ensuring equal opportunities.
- (ix) To undertake research, collection of data, information and materials relating to deprived groups either by itself or through the census or any other accredited source (public or private) and engage in its dissemination so as to promote an evidence based understanding of the equal opportunity situation in different sectors.
- (x) To evolve “equal opportunity practice codes” for the promotion of understanding and acceptance of equal opportunity practices in Government, public and private enterprises and institutions.
- (xi) To report to the Government on its own or when so requested, as to the laws that should be made or programmes of action to be undertaken to promote equal opportunity for weaker sections generally and deprived groups in particular.
- (xii) To examine enactments and proposed enactments (when so requested by a department/ministry of the government) to find out its impact on equality of opportunity in education or employment and to report to the Ministry the results of such examination.
- (xiii) To direct the appropriate Government or authority to take action including prosecutions or the imposition of civil sanctions or penalties on persons in authority found to be acting in a manner prejudicial to the orders and directives made by the Commission.
- (xiv) To study the reports of other commissions at the central and state level which have a bearing on the promotion of equality of opportunity and strive towards an integrated approach on promotion of equality in policy development and programme implementation.
- (xv) To interact with institutions of local government and to advise them towards adoption of measures to eliminate discriminatory practices leading to denial of equal opportunities at the level of Panchayats and Municipalities.
- (xvi) To prepare annual and periodical performance reports and the National Equal Opportunity Status Report if and when considered necessary.
- (xvii) To perform such other functions as it may find appropriate for giving

complete equality of opportunities to all sections of people as mandated by the Directive Principles of State Policy in Part IV of the Constitution.

(xviii) Any other matters which are incidental and ancillary to the above functions, and which will facilitate the discharge of such functions.

- (c) The functions of the regional Commissions shall be as may be prescribed by the Commission within the framework stipulated in clause (b) above.

24. POWERS RELATING TO INQUIRIES

- (i) While inquiring into complaints under the Act, the Commission shall have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular enjoy the following powers, namely;
- a) summoning and enforcing the attendance of witnesses and examining them on oath;
 - b) discovery and production of any document;
 - c) receiving evidence on affidavits;
 - d) requisitioning any public record or copy thereof from any court or office;
 - e) issuing commissions for the examination of witnesses or documents;
 - f) any other matter which may be prescribed.
- (ii) The Commission shall have the power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of Section 176 and Section 177 of the Indian Penal Code.
- (iii) The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may procure any such document or take extracts or copies there from subject to the provisions of Section 100 of the Code of Criminal Procedure, 1973, in so far as it may be applicable.
- (iv) The Commission shall be deemed to be a civil court and when any offence as is described in Section 175, Section 178, Section 179 or Section 180 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under Section 346 of the Code of Criminal Procedure, 1973.

25. POWERS OF INVESTIGATION

- (i) The Commission may, for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.
- (ii) For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under sub-section (i) may, subject to the direction and control of the Commission.
 - (a) summon and enforce the attendance of any person and examine him;
 - (b) require the discovery and production of any document; and
 - (c) requisition any public record or copy thereof from any office.
- (iii) The provisions of Section 28 of the Act shall apply in relation to any statement made by a person before any officer or agency whose services are utilized under sub-section (i) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.
- (iv) The officer or agency whose services are utilised under sub-section (i) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.
- (v) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under sub-section (iii) and for this purpose, the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.

26. POWER TO PROVIDE LEGAL ASSISTANCE

- (i) In all cases where the complainant is eligible for legal aid, the Commission can order provision of appropriate legal aid as available under the Legal Services Authority Act 1987.
- (ii) In special cases, if the Commission so desires to have professional expertise to assist in its proceedings, it may appoint amicus curiae or engage legal counsel on such terms as it deems fit.

27. POWERS TO DEMAND INFORMATION AND TO INSPECT RECORDS AND PREMISES

In addition to the powers to carry out inquiries and investigations under Sections 24 and 25, the Commission is empowered to issue orders and directions to demand information and to inspect the premises of Government bodies, public and private enterprises and of autonomous institutions to facilitate the discharge of its functions under Section 23.

28. STATEMENTS MADE BEFORE THE COMMISSION ARE PROTECTED

No statement made by a person in the course of giving evidence before the Commission shall subject her to, or be used against her in any civil or criminal proceeding, except a prosecution for giving false evidence by such statement:

Provided that the statement —

- (a) is made in reply to the question which she is required by the Commission to answer; or
- (b) is relevant to the subject matter of the inquiry.

29. PERSONS LIKELY TO BE PREJUDICIALLY AFFECTED TO BE HEARD

If, at any stage of the inquiry, the Commission-

- (a) considers it necessary to inquire into the conduct of any person; or
- (b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry;

it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence.

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

CHAPTER V: PROCEDURE FOR INVESTIGATION, INQUIRY AND REVIEW

30. GENERAL AND SPECIAL (NAMED PERSON OR ENTITY) INVESTIGATIONS

- (l) (a) The Commission may suo motu decide to conduct a formal investigation in matters of equal opportunity for the purpose of any of its functions under Section 23.
- (b) The Commission shall conduct a formal investigation in matters relating to equal opportunities if requested to do so by the Central or State Governments.
- (c) The terms of reference for the investigation shall be drawn up by the Commission or, if the Commission is required by the Central or State Government to conduct the investigation, by the appropriate Government after consulting the Commission.
- (d) The Commission shall give notice of the holding of the general investigation, but if the investigation is confined to the activities of certain persons, then the Commission shall give notice to such persons.
- (e) Where the Commission is of the opinion that certain persons have engaged or are engaging in acts that are contrary to the object of the Act, it can conduct a special investigation and shall:
 - i) inform that person of its opinion and of its proposal to investigate the acts in question; and
 - ii) offer her an opportunity of making oral or written representations; and a person so named who avails of the opportunity of making oral representations may be represented by Counsel or by some other person of her choice
- (f) The Commission may at any time decide to stop or suspend investigations under this section. In case of investigations directed by the Central or State Governments, then any decision to stop or suspend investigations may be done in consultation with the appropriate Government.
- (g) For the purposes of an investigation under the Act, the Commission may:
 - i) Nominate one or more commissioners to conduct the investigation on its behalf; and
 - ii) Authorise the commissioner to exercise such of its functions in relation to the investigation as it may determine.
- (h) The Commission or, if the Commission were required by the Central

or State Government to conduct the investigation, the appropriate Government, after consulting the Commission may from time to time revise the terms of reference.

- (2) For the purposes of an investigation under sub section (1), the Commission by a notice in the prescribed form served on her in the prescribed manner:
 - (a) may require any person to attend at such time and place as is specified in the notice and give oral information about, and produce all documents in her possession or control relating to, any matter specified in the notice.
 - (b) If a person fails to comply with a notice served on him under clause (a) or the Commission has reasonable cause to believe that she intends not to comply with it, the Commission may apply to an appropriate authority for an order requiring her to comply with it.

31. INQUIRY INTO COMPLAINTS

The Commission while inquiring into the complaints of discrimination or denial of equal opportunity may-

- (i) call for information or report from the Central Government or any State Government or any other person or organisation subordinate thereto within such time as may be specified by it;

Provided that

- (a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;
 - (b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;
- (ii) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, the Commission may initiate an inquiry.

32. PROCESSING OF COMPLAINTS

- (i) Whenever a complaint is filed by or on behalf of a group claiming to be aggrieved alleging denial of equal opportunity, the Commission shall serve a notice of the complaint (including the date, place and circumstances of the alleged unlawful employment practice) on such employer or educational institution within 30 days from the date of filing of the complaint.
- (ii) Complaints shall be in writing under oath or affirmation and shall contain such information and be in such form as may be prescribed by the Commission.
- (iii) The Commission may maintain confidentiality of the proceedings as it deems fit.

- (iv) While investigating a complaint, the Commission may make written requests for information, interview people, review documents and as needed, visit the premises where the alleged discrimination occurred.
- (v) If the Commission determines after such investigation that there is no reasonable cause to believe that the complaint is true, or that the complaint does not reveal group discrimination, it shall dismiss the complaint and immediately notify the person and the respondent of its decision.
- (vi) If the Commission determines that there is reasonable cause to believe that the complaint is true, it shall endeavour to eliminate any such alleged discriminatory practice by informal methods of mediation and conciliation.
- (vii) The Commission shall make its determination on reasonable cause not later than 90 days from the filing of the complaint.
- (viii) If within 90 days after a complaint has been filed with the Commission, it has been unable to secure a conciliation agreement that is acceptable, it may proceed to dispose of the matter according to law.
- (ix) If the Commission decides to intervene for conciliatory settlements, it may either do so by itself or adopt such courses of action as prescribed under S. 89 of the Code of Civil Procedure.
- (x) Where the Commission carries out conciliation by itself, and the respondent does not abide by the conciliatory settlements, the Commission may proceed to enforce such settlements according to law including imposition of costs and penalties.

33. PUBLIC PARTICIPATION AND CIVIL SOCIETY INVOLVEMENT

- (i) The Commission can recognize any Civil Society organization found credible to act as its partner in the discharge of its functions and authorize it to file complaints after verifying facts. In this regard it may accept a media report for initiating action in appropriate cases.
- (ii) The Commission may set up Facilitation Centres involving respectable Members of the locality to disseminate equal opportunity and non-discrimination norms and standards or recognize existing organizations for this purpose.

34. DISCLOSURE OF INFORMATION

- (i) No information given to the Commission by any person in connection with an investigation shall be disclosed by the Commission, except:
 - a) on the order of any court
 - b) with the informant's consent
 - c) in the form of a summary or other general statement published by the Commission which does not identify the informant or any other person to whom the information relates.

- d) in a report of the investigation published by the Commission or made available for inspection.
 - e) to the Commissioners, additional Commissioners or employees of the Commission, or, so far as may be necessary for the proper performance of the functions of the Commission, to other persons.
 - f) for the purpose of any judicial proceedings under this Act to which the Commission is a party.
- (ii) In preparing any report for publication or for inspection, the Commission shall exclude, so far as is consistent with its duties and the object of the report, any matter which relates to the private affairs of any individual or the business interests of any person where the publication of that matter might, in the opinion of the Commission, prejudicially affect that individual or person.

35. REVIEW OF PROPOSED LEGISLATIONS AND SCHEMES

The Commission may suo motu or on request by any person or groups aggrieved, take up for consideration any legislative proposal or scheme of the Central or State Government which has or is likely to have an adverse impact on equal opportunities for some groups and if it finds necessary, propose to the appropriate Government such measures which, in the opinion of the Commission will promote equality of opportunity in matters covered by such legislation or scheme.

CHAPTER VI: ORDERS, DIRECTIVES AND THEIR ENFORCEMENT

36. ACTIONS TO ENFORCE COMPLIANCE OF ORDERS:

- (1) If the Commission finds that the party against whom a complaint has been made has intentionally engaged in or is continuing to engage in, discriminatory practices and denial of equal opportunity, it may:
 - a) provide a copy of the inquiry report to such party or her representative asking her to explain or justify the conduct found to be discriminatory;
 - b) enjoin such party to refrain from engaging in such practices and order appropriate action which it may deem suitable;
 - c) it may recommend to the concerned Government or authority the initiation of appropriate proceedings as the Commission may deem fit against the party or parties;
 - d) approach the Supreme Court or the High Court concerned seeking such directions, orders or writs as that Court may deem necessary;
 - e) The Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, as well as the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.
- (2) If the Commission finds that the party against whom the complaint has been made unintentionally and without knowledge engaged in discriminatory practices, it may make, inter alia, one of the following orders as it considers just and equitable:
 - (a) Require such party to:
 - (i) propose an adequate action plan within a specified period with a view to attaining equal opportunities in her enterprise;
 - (ii) once an action plan proposed by her has become final, to take action thereunder within a specified period;
 - (b) An order requiring the party to compensate costs.

37. COMMISSION TO EMPLOY INCENTIVES TO PROMOTE EQUAL OPPORTUNITY PRACTICES

It shall be the endeavour of the Commission to make equal opportunity and non-discrimination a normal practice of every enterprise as envisaged by the Constitution not only in public services but also in the non-state sector as well. For this, the Commission may adopt a two-fold approach of incentives and disincentives factored

into an Equal Opportunity Practices Code prepared sector-wise or, if necessary, sub-sector wise in activities taken up by the Commission.

38. GOOD PRACTICES CODE AND VOLUNTARY COMPLIANCE

- (a) “A Good Practices Code” is what the Commission may issue with information already available in particular sectors, supported or verified by such inquiries/ investigations/consultations it might wish to conduct before issuing such codes so that the parties likely to be affected may have notice of it.
- (b) “A Good Practices Code” shall apply to all enterprises in the relevant sector; it might involve not only obligations of good practice as prescribed, but also duty to document and notify such information as prescribed by the Commission.
- (c) The compliance with good practices under the Code will remain entirely voluntary and enterprises may be obliged to explain in their submission/explanation why they are not able to comply with all or any of them.
- (d) On the basis of such experiential evidence, the Commission may revise the “Good Practices Code” for particular sectors, if found necessary.
- (e) It is open to the Commission to recommend to the appropriate government to recognize such enterprises which keep a consistent record of following the prescribed codes of practice by giving such incentives as may be permissible under the existing law.

39. EQUAL OPPORTUNITY PRACTICES CODE:

- (a) Within two years after the establishment of the Commission, the Commission shall formulate and notify “Equal Opportunity Practices Code” in as many sectors as possible after analyzing data, looking at the experience gained in implementing the Good Practices Codes and after consulting the stakeholders involved, particularly the appropriate State/Central Government.
- (b) “The Equal Opportunity Practices Code” is binding law in the same way as the “Standing Orders” are binding on establishments under the Industrial Disputes Act, though the methods of its enforcement in case of violation will be as prescribed under the Act/Rules.
- (c) It shall be the duty of every enterprise identified in the Equal Opportunity Practices Code to organize its affairs within two years of notification of such a code in such manner as it thinks fit to fully conform to the provisions of the Equal Opportunity Practices Code. During this grace period if it finds any practical problems, the Commission’s advice may be extended to overcome them if sought by any enterprise. The consequences of infringement of the Code will follow only after the two year grace period.
- (d) On the basis of experiential evidence gathered or research conducted during the above two year period, if the Commission thinks it necessary to revise and notify the “Equal Opportunity Practices Code” it may do so in such sectors as it deems fit.

40. DEALING WITH INFRINGEMENT OF EQUAL OPPORTUNITY PRACTICES CODE

Infringement of the Code after the grace period by any enterprise may invite one or more of the following consequences:

- (i) A notice will be issued to the defaulting enterprise and after due hearing and investigation, the Commission may issue such orders within its power which include compensation, denial of privileges, blacklisting or a civil, criminal or constitutional action in Court.
- (ii) In all such proceedings the burden of proving infringement shall vest in the Commission
- (iii) Before passing the orders under (i) above, it may ask a duly authorized officer to try and conciliate/mediate a settlement under such conditions which the Commission may decide.
- (iv) Recommend to the Governments as well as Public and Private authorities to impose such sanctions so that the enterprise may not find it socially and economically viable to be in public activities without conforming to Constitutional requirements of equality.
- (v) In any proceedings under the Act before a Court or tribunal, the Equal Opportunity Practices Code issued under this section shall be admissible in evidence and if such court or tribunal finds it relevant to any question before it, it shall be open to the court or tribunal to decide such question accordingly.

41. FINALITY OF ORDERS OF THE COMMISSION

- (i) No proceedings calling into question any directions, recommendations, orders, guidelines or others of the Commission may be initiated in any court after three months have elapsed from the date on which the party concerned has received the same from the commission.
- (ii) If the court is satisfied that the party concerned was prevented by sufficient cause from approaching the court within the said period of three months, it may grant time upto another month to challenge the orders, directions or recommendations but not thereafter.
- (iii) On the expiry of the time for approaching the court as aforesaid, if any application to any court has been made and has been refused, the orders, directions or recommendations of the commission shall become enforceable according to law.

CHAPTER VII: FINANCE, ACCOUNTS AND AUDIT

42. GRANTS BY THE CENTRAL GOVERNMENT

- (i) The Central Government shall after due appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Central Government may find appropriate for being utilised for the purposes of the Act.
- (ii) The Commission may spend such sums as it decides appropriate for performing the functions under this Act, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

43. ACCOUNTS AND ITS MAINTENANCE

The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

44. AUDIT OF ACCOUNTS AND FOLLOW UP:

- (i) The Accounts of the Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by her and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General.
- (ii) The Comptroller and Auditor-General or any person appointed by her in connection with the audit of the accounts of the Commission shall have the same rights, privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.
- (iii) The accounts of the Commission as certified by the Comptroller and Auditor-General or any other person appointed by her in this behalf, together with the audit report thereon shall be forwarded only to the Central Government by the Commission and the Central Government shall cause the audit report to be laid as soon as it may be after it is received before each House of Parliament.

CHAPTER VIII: ANNUAL AND SPECIAL REPORTS

45. ANNUAL PERFORMANCE AND AUDIT REPORT

- (i) The Commission shall present a comprehensive report on its working to Parliament annually along with the audited statement of accounts.

Provided that if the Commission deems it necessary, it may submit other reports to Parliament on issues of relevance to equality of opportunity for deprived groups.

- (ii) The annual and periodical reports put out by the Commission shall contain detailed analysis of the state of equal opportunity in identified sectors which the Commission would have taken up during the period identifying areas where policy changes or governmental action would be necessary.

CHAPTER IX: MISCELLANEOUS PROVISIONS

46. PROTECTION OF ACTION TAKEN IN GOOD FAITH

No suit or other legal proceeding shall lie against the Central Government, State Government, Commission, the Regional Commission or any member thereof or any person acting under the direction either of the Central Government, State Government, Commission or the Regional Commission in respect of anything which is done in good faith or intended to be done in pursuance of this Act or of any rules or any order made there under or in respect of the publication by or under the authority of the Central Government, State Government, Commission or the Regional Commission of any report or other proceedings.

47. MEMBERS AND OFFICERS TO BE PUBLIC SERVANTS

Every Member of the Commission, Regional Commission and every officer appointed or authorised by the Commission or the Regional Commission to exercise functions under the Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.

48. POWER OF CENTRAL GOVERNMENT TO MAKE RULES

- (i) The Central Government may, by notification, make rules to carry out the provisions of this Act.
- (ii) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:
 - (a) the salaries and allowances and other terms and conditions of service of the Members under Sections 9 and 18;
 - (b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the Commission and the salaries and allowances of officers and other staff under sections 12 and 21;
 - (c) the form in which the annual statement of accounts is to be prepared by the Commission under Section 38;
 - (d) the maintenance of accounts under Section 43; and
 - (e) any other matter which has to be, or may be, prescribed at the level of the Central Government.
- (iii) Every rule made under this Act shall be laid before each House of Parliament within a total period of hundred days. If both Houses agree on any modifications to the rule or agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or not have any effect, as the case may be.

49. POWER OF THE COMMISSION TO MAKE RULES

- (i) The Commission is empowered to make such rules and regulations as it may deem necessary for the effective implementation of the Act.
 - (ii) All such rules made by the Commission may be sent to the appropriate Government, and if the Government concerned suggests any changes, the Commission shall consider them for incorporation.
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STATEMENT OF OBJECTS AND REASONS

Equality is not only a guaranteed fundamental right but is one of the cherished values of the Freedom Movement. Equality has many dimensions, some integral to civil liberties and non-arbitrary behaviour, while others concern to equal opportunity to access resources and exercise freedom of choice. Largely speaking, one set of equality rights relate to equality before law and non-discrimination based on caste, religion etc., and the other talks about developing a level playing field through affirmative action in favour of disadvantaged groups. The Indian Constitution provides for both these dimensions of equality, some through the guaranteed rights in Articles 14 to 18 of Part III and others through Directive Principles for State action in Part IV. Unless every person is provided equal opportunity to access public assets and sharing of fruits of development, disparities will grow taking away even the existing capacity of already impoverished persons to avail of opportunities provided by development. It is in this context, an Equal Opportunity Commission is found necessary to ensure inclusive growth fulfilling the goals of social justice incorporated in the Directives Principles.

It is noticed that even after 60 years of freedom, persons belonging to the lowest strata of society are over-represented in low-paying, unskilled occupations while very few of them are found in highly paid professional jobs despite the reservations already granted in education and employment. Discriminatory practices reportedly continue to exist in education, employment, housing and other areas where women, dalits, tribals, disabled persons, minorities and other “deprived sections” are sometimes denied of equal opportunity. They are handicapped to seek remedies because of insufficient data available in the public domain about equality status in different sectors of society and of the economy. It is this data deficit and consequent disempowerment that the proposed Equal Opportunity Commission is expected to address. The Commission by gathering facts and undertaking investigation in sectors where discrimination is pronounced will endeavour to remedy the problem through appropriate interventions and evidence-based advocacy on behalf of deprived groups. It will have the power to negotiate and settle at the enterprise level, to initiate legal action if practices are not corrected within reasonable time, to prescribe equal opportunity practices and to recommend incentives and disincentives to promote the objectives of equal opportunity for the deprived in public services and resources.

The functions of the proposed Commission are not specifically in the domain of any of the existing Commissions though some of them share common objectives. In some countries, the Commission on Human Rights and Equal Opportunity is a joint one. The size and complexity of issues in a vast country like India would warrant specialized agencies to promote the Constitutional goals particularly on behalf of deprived and disadvantaged sections of people. This is the mandate of the Constitution and the State has positive obligations in this regard. It is this obligation as explained in the Preamble to the Bill that is intended to be addressed by the Equal Opportunity Commission. While individual discrimination is remedied at the level of the Supreme Court and High Courts, there is no effective method to address group discrimination and denial of equal opportunity to disadvantaged sections. The Equal Opportunity Commission will take up such issues on behalf of the disadvantaged sections for remedial action initially in the areas of education and employment and eventually in other sectors as well.



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