



Equality for All

How will Hong Kong's new anti-discrimination legislation affect the employment market?

In the summer of 1995, Hong Kong enacted its first anti-discrimination legislation, the *Sex Discrimination Ordinance* and the *Disability Discrimination Ordinance*. As of July 1996, most provisions of the new laws (including the employment provisions) were still not in force, leading many women's and disability groups to accuse the Government of deliberately delaying their implementation.

It is well known that the Government long opposed anti-discrimination legislation for the private sector (and only agreed to introduce the two Bills under the threat of Anna Wu's much broader Equal Opportunities Bill). Nonetheless, the Equal Opportunities Commission (which will play a crucial role in enforcing the new laws) has finally been established and it is now considering draft Codes of Practice (to guide employers on their obligations under the Ordinances).

Once the Commission is fully operational and the Codes of Practice have been approved, the Secretary for Home Affairs will likely feel compelled to



bring the employment provisions of both Ordinances into force.

Sex, Marital Status and Pregnancy Discrimination

Section 11 of the *Sex Discrimination Ordinance* states the basic obligation not to discriminate on the basis of sex against applicants for jobs and existing employees (see Figure 1).

In addition to s 11, there are a number of provisions which protect workers who do not fall within the legal definition of 'employee'.

For example, ss 13 and 20 prohibit discrimination against contract workers and commission agents. The legal profession should take special note of s 36 (which prohibits discrimination by and in relation to barristers and their pupils), and s 15 (which prohibits discrimination by partnerships with six or more partners against a prospective or actual partner).

Discrimination by trade unions, qualifying bodies, employment agencies, and providers of vocational training is also prohibited (ss 16-19).

However, none of these provisions actually define what is meant by 'discrimination'. Section 5 defines sex discrimination against women (see Figure 2).

The first part of this definition is commonly referred to as 'direct discrimination', as it requires proof that the victim was treated less favourably on the ground of his or her sex. The second part of the definition (s 5(1)(b)), known as 'indirect' discrimination, addresses rules or requirements which on their face are neutral, but in fact put women applicants or employees at a disadvantage (height requirements are one of the classic examples of 'indirect discrimination').

On its face, s 5 appears to define only sex discrimination against a woman. However, s 6 states: 'Section 5, and the provisions of Parts III and IV relating to sex discrimination against women, shall be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as necessary.'

This approach is unnecessarily confusing – non-lawyers are likely to forget to apply s 5 and incorrectly assume that one of the many provi-

Sexual Discrimination

Section 11 of the *Sex Discrimination Ordinance* states:

- (1) It shall be unlawful for a person, in relation to employment by him at an establishment in Hong Kong, to discriminate against a woman –
 - (a) in the arrangements he makes for the purpose of determining who should be offered that employment;
 - (b) in the terms on which he offers her that employment; or
 - (c) by refusing or deliberately omitting to offer her that employment.
- (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Hong Kong, to discriminate against her –
 - (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them;
 - (b) in the terms of employment he affords her;
 - (c) by dismissing her, or subjecting her to any other detriment.

Figure 1



sions that refers only to discrimination against a 'woman' does not apply to men.

Gender neutral language, such as that used in Anna Wu's Equal Opportunities Bill which referred, for example, to discrimination 'against a person on the grounds of that person's sex', would have avoided this problem. However, the Government refused to consider such language, preferring to copy the language of the UK's *Sex Discrimination Act*.

In addition to discrimination on the ground of sex, the Ordinance also prohibits discrimination on the ground of marital status or pregnancy. The definitions of these types of discrimination, contained in ss 7-8, are substantially similar to the definition of sex discrimination, adopting the same two-part (direct and indirect) structure.

In most cases, the motive behind the discriminatory action will be irrelevant to determining whether unlawful discrimination has occurred. However, s 76(5) does provide that no damages shall be awarded for indirect discrimination if the employer proves that the requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of his or her sex, marital status or pregnancy.

Exemptions

The Ordinance provides a number of exemptions from the duty not to discriminate. For example, s 12 permits employers to refuse to hire a woman where 'being a man is a genuine occupational qualification for the job' and provides a list of the situations in which being a man (or a woman) will be considered a 'genuine occupational qualification' (eg, jobs involving a state of undress).

Small businesses (employing five or fewer employees) will enjoy a three-year exemption from the duty not to discriminate against applicants and employees. This exemption will expire three years after the enactment of the Ordinance (ie, in the summer of

Sexual Discrimination Against Women Defined

- (1) A person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Ordinance if –
- (a) on the ground of her sex he treats her less favourably than he treats or would treat a man; or
 - (b) he applies to her a requirement or condition which he applies or would apply equally to a man but –
 - which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
 - which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
 - which is to her detriment because she cannot comply with it.

Figure 2

1998), and not three years after the employment provisions are brought into force.

Sexual Harassment in Employment

Section 23 of the *Sex Discrimination Ordinance* makes it unlawful for an employer to sexually harass an employee or a person who is seeking to become an employee. It is also unlawful for one employee to harass another fellow employee, or a person who is seeking to become a fellow employee. Workers who are outside the strict definition of 'employee' are similarly protected.

The definition of 'sexual harassment' appears in s 2(5) (the Interpretation Clause), after the alphabetical list of defined terms (see Figure 3).

Subsection (a) is often described as *quid pro quo* harassment. The unwelcome advance, request or conduct must have been made 'to her' or 'in relation to her'. Subsection (a) also imposes a partly objective test, by requiring that the request, advance or conduct occurred in circumstances in which 'a reasonable person' would have anticipated that the victim would be offended, humiliated or intimidated.

Subsection (b) of the definition is broader, in that it covers situations in which the sexual conduct may not have been directed specifically at the victim, but nonetheless created a 'sexually hostile or intimidating working environment for her' (sexually-explicit

posters in the lunch room are a good example of this form of harassment).

The Disability Discrimination Ordinance

The *Disability Discrimination Ordinance* will prohibit discrimination, harassment and vilification on the grounds of physical and mental disabilities. The well-publicised protests against the establishment of centres for the mentally disabled were the motivating force behind the enactment of the *Disability Discrimination Ordinance*. But physically disabled people also suffer discrimination in Hong Kong. Indeed, they are disadvantaged by the very nature of Hong Kong's environment, which is far from being 'barrier free'.

The definition of discrimination under the *Disability Discrimination Ordinance* employs the familiar two-part (direct and indirect) structure. However, the definition also includes certain forms of discrimination that are especially relevant to the disabled, such as discrimination on the ground that a person uses a particular auxiliary aid or is accompanied by a reader or carer.

The *Disability Discrimination Ordinance* prohibits discrimination against applicants and employees, in language that is similar to s 11 of the *Sex Discrimination Ordinance*. Like the *Sex Discrimination Ordinance*, it has special provisions to protect workers who are outside the legal definition of employee and to prohibit discrimination by trade



unions, employment agencies, and qualifying bodies.

However, in the area of exemptions, the *Disability Discrimination Ordinance* differs significantly from the *Sex Discrimination Ordinance*. The *Sex Discrimination Ordinance* provides a fairly specific (and limited) list of situations in which sex is a 'genuine occupational qualification'. In contrast, the *Disability Discrimination Ordinance* sets forth a more general exemption, one that takes into account the ability of the employer to make accommodations required by the disabled employee or applicant.

For example, s 12(2) provides that the obligation not to discriminate in the hiring (and firing) process shall not apply if, taking into account all relevant factors:

[T]he person, because of the person's disability—

- would be unable to carry out the inherent requirements of the particular employment; or
- would, in order to carry out those requirements, require services or facilities that are not required by persons without a disability and the provision of which would impose an unjustifiable hardship on the employer.

While s 12 provides certain other exceptions, the 'unjustifiable hardship' clause will be the one relied upon most often by employers who do not wish to employ someone with a disability. Section 4 provides some guidance as to the meaning of this term: in determining what constitutes 'unjustifiable hardship', all relevant circumstances of the particular case are to be taken into account including:

- the reasonableness of any accommodation to be made available to a person with a disability;
- the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
- the effect of the disability of a person concerned;
- the financial circumstances of and the estimated amount of expendi-

Sexual Harassment Defined

For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if —

- (a) the person —
 - (i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or
 - (ii) engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated, or intimidated; or
- (b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her.

Figure 3

ture (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.

Thus the concept of 'unjustifiable hardship' requires the court to balance the needs of the disabled worker against those of the employer. But it also makes it clear that the mere fact that an employer may have to spend some money to accommodate the needs of the disabled job applicant (for example, to install a ramp or widen the doors for a wheelchair) will not automatically excuse an employer for refusing to hire that person.

Remedies, Enforcement and Compliance

The Equal Opportunities Commission has the power to conduct formal investigations of discrimination and to issue 'enforcement notices'. But the efficacy of the Ordinances will depend largely on the ability of the victims to obtain effective remedies.

In this regard, the *Sex Discrimination Ordinance* is extremely weak. It makes no specific provision for the remedy of re-instatement and expressly limits damages for sex discrimination or sexual harassment to a maximum of HK\$150,000 regardless of the amount of actual damages the victim has suffered.

Given the cost of litigating in Hong Kong, victims may well decide that the

limited damages are simply not worth commencing a lawsuit.

It is hoped that the Equal Opportunities Commission will be able to mediate many complaints of discrimination, without the need to go to court. But the limitation on damages may also work against successful mediation, as it gives employers little incentive to mediate.

Interestingly, the remedies under the *Disability Discrimination Ordinance* (which was enacted about one month after the *Sex Discrimination Ordinance*) are significantly better.

Here there is no limit on damages and the court has the express power to order that the victim of discrimination be employed or re-employed by the respondent.

Apparently, legislators had more sympathy for victims of disability discrimination than for victims of sex discrimination.

However, women's organisations have already protested this anomaly and are lobbying for amendments to improve the remedies under the *Sex Discrimination Ordinance*. While the Government has declined to introduce such amendments, Christine Loh has proposed them in her *Sex and Disability Discrimination Amendment Bill*.

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