

Hong Kong improves anti-discrimination legislation

DENTONS

July 17, 2020

Anti-discrimination legislation in Hong Kong has recently taken a leap forward.

On 19 June 2020, following the passage of the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 by the Legislative Council, the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020¹ (“**Ordinance**”) was gazetted. This long-awaited Ordinance takes into account recommendations made by the Equal Opportunities Commission four years ago in its Discrimination Law Review, and implements enhanced protection from discrimination and harassment, particularly for breastfeeding women, ethnic minorities and non-employee workers, under the existing four anti-discrimination ordinances, namely, the Sex Discrimination Ordinance (“**SDO**”), Disability Discrimination Ordinance (“**DDO**”), Family Status Discrimination Ordinance (“**FSDO**”) and Race Discrimination Ordinance (“**RDO**”).

The key amendments brought about by the new Ordinance are as follows:

1. Outlawing discrimination against breastfeeding women

New provisions are added to the SDO to introduce a prohibition of direct and indirect discrimination, as well as victimisation, on the ground of “breastfeeding”, which is broadly defined to cover the act of breastfeeding, the expression of milk and the status of being a breastfeeding woman. This protection will apply to all fields specified in the SDO, such as education, employment and the provision of goods, services and facilities, and disposal or management of premises. Although there is no express requirement in the Ordinance or any existing law for work places to make suitable accommodation for breastfeeding women, for example, by allowing them suitable breaks or providing a hygienic space for expressing milk, employers should turn their minds to these concerns and see how they can accommodate breastfeeding women so as to comply with the Ordinance.

Unlike the other provisions of the Ordinance, which take effect immediately, these provisions will come into force one year later, i.e. on 19 June 2021. Thereafter, any person can be held liable for unlawful discrimination on the ground of breastfeeding if he/she (1) treats a breastfeeding woman less favourably than he/she would treat another woman who is not breastfeeding; or (2) applies a blanket requirement to all persons but fewer breastfeeding women, to their detriment, would be able to comply with it compared to other women, and such requirement cannot be shown to be justifiable.

2. Introducing protection from racial discrimination and racial harassment to cover “associates” and prohibiting racial discrimination and racial harassment by imputation under the RDO

References to “near relative”² in the RDO are replaced by references to “associate”³ such that, not only will a person be protected from direct racial discrimination and harassment on the basis of his/her immediate family, the person will further be shielded from racial discrimination by association in relation to, for example, his/her partners, friends,

carers, and work colleagues.

The Ordinance also widens the scope of protection from racial discrimination and racial harassment to cover situations where these prohibited behaviours are targeted at a person who is perceived, assumed or imputed to be of a particular race, even if he/she is not. Hence, it will now be possible for a person to be held liable for racial discrimination or racial harassment (as the case may be) if he/she discriminates against or harasses another person on the basis of a mistaken perception that the other person is of a particular racial group.

3. Expanding the scope of protection from sexual, disability and racial harassment to benefit all “workplace participants”

The scope of unlawful sexual, racial and disability harassment under SDO, RDO and DDO is expanded to cover situations where the perpetrator and the victim are working in a common workplace, but there is no employment or employment-like relationship between them. In other words, so long as the victim of harassment is a “workplace participant”⁴, he or she may potentially bring claims of unlawful harassment against the perpetrator in the common workplace, regardless of whether there exists a relevant employment relationship.

It should be noted that provisions are specifically introduced to SDO, RDO and DDO to the effect that, not only will an intern/a volunteer answer for any unlawful act of harassment committed at the workplace in the course of an internship/performing the volunteer work, the principal who engages them can be held vicariously liable for such act, even if the act was done without his/her knowledge or approval. As with vicarious liability in other contexts of harassment, the principal can establish a defence by demonstrating that reasonably practicable steps have been taken to prevent the intern/volunteer from doing the act, or from doing acts of that description, for example, by having in place clearly communicated policies and providing regular training to staff.

4. Providing protection from racial and disability harassment between service providers and customers under the DDO and RDO, including where such acts occur overseas but on Hong Kong registered aircraft or ships

Previously, unlike the SDO, which expressly prohibits sexual harassment between service providers and customers, the DDO and RDO did not protect a person providing goods, facilities or services from disability and racial harassment by a customer. To align the anti-harassment provisions in the DDO and RDO with those in the SDO, the Ordinance amends the DDO and RDO to make it unlawful for a person to harass another person on grounds of disability and race in the above scenario. The harassment provisions in DDO and RDO are further amended to cover situations where the harassment takes place outside Hong Kong but on Hong Kong registered aircraft or ships.

5. Providing protection from sexual and disability harassment for members and prospective members of clubs, by the management of the clubs

Provisions are added in the SDO and DDO to render it unlawful for a club, the committee of management of a club or a member of the committee of management of a club to sexually harass a woman or harass a person with a disability who is, or has applied to be, a member of the club.

6. Repealing requirements of intention to discriminate as a pre-condition to awarding damages for indirect discrimination under the SDO, FSDO and RDO

Under the DDO, a victim of unlawful indirect discrimination may apply for an award of damages even though the wrongdoer can prove that there was no intention to treat the victim unfavourably. The SDO, FSDO and RDO have been amended to similarly allow damages to be awarded to victims of indirect discrimination on grounds of sex, family status and race, without proof of the wrongdoer’s intention to discriminate.

The passing of the Ordinance is very much a welcome development in Hong Kong. Apart from offering a wider and more direct pathway for victims of discrimination to seek justice, it is hoped that the Ordinance can serve to advance public and private organisations' attitudes towards the promotion of equality. As a starting point, all organisations should, in light of the new law in place, review their anti-discrimination policies and provide updated training to their staff and members (including interns and volunteers).

1. For full text of the Ordinance, please click the link here: <https://www.gld.gov.hk/>↔
2. "Near relative" is defined as including the person's spouse, a parent of the person or the spouse, a child of the person or the spouse of such a child, a brother or sister of the person or of the spouse or of the spouse of such a brother or sister, a grandparent of the person or spouse, a grandchild of the person or the spouse of such a grandchild.↔
3. "Associate" is defined as including, a spouse of the person, another person who is living with the person on a genuine domestic basis, a relative of the person, a carer of the person; and another person who is in a business, sporting or recreational relationship with the person.↔
4. "Workplace participant" is defined to mean an employee, an employer, a contract worker, the principal of a contract worker, a commission agent, the principal of a commission agent, a partner in a firm, an intern or a volunteer.↔

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