

DISCRIMINATION LAW IN HONG KONG

1.1 Background

Anti-discrimination protection in Hong Kong is provided by legislation (termed ‘Ordinances’), as interpreted and applied by the Hong Kong courts. The level of anti-discrimination protection afforded to individuals in Hong Kong is relatively low, considering the rights and protections enjoyed by individuals in comparable developed jurisdictions. However, there has been a recent momentum towards broadening protections, which will result in an improved anti-discrimination law landscape in the near future.

The core principles underpinning anti-discrimination law are set out in the Hong Kong Bill of Rights Ordinance (Cap 383) which was enacted in July 1991. The Hong Kong Bill of Rights was modelled on the International Covenant on Civil and Political Rights (‘ICCPR’) which encapsulates rights relating to freedoms but also contains important prohibitions against discrimination. The Bill of Rights was largely symbolic and applied only to public bodies or any person acting on behalf of a public body. The debate surrounding its enactment helped to raise awareness of discrimination, particularly against women. Following significant lobbying, the government enacted legislation from 1995 to 2008 as follows:

- Sex Discrimination Ordinance (1995)
- Disability Discrimination Ordinance (1995)
- Family Status Discrimination Ordinance (1997)
- Race Discrimination Ordinance (2008)

Taken together, this legislation provides that it is unlawful to discriminate on the grounds of sex, marital or family status, pregnancy, disability or race in Hong Kong. Sexual, disability and racial harassment are also prohibited. There is currently no legislation prohibiting discrimination on the grounds of religion, age, sexual orientation and no legislation governing equal pay. The various anti-discrimination ordinances protect against direct and indirect discrimination, victimisation, hostile work environment, harassment and vilification. It should be noted that not all of these protections apply to all of the anti-discrimination legislation.

During the course of this introductory chapter, we provide a high-level overview of each Ordinance; an outline of the important role of the Equal Opportunities Commission; a synopsis of the Discrimination Law Review; the Discrimination Legislation (Miscellaneous Amendments) Bill; and an analysis of the future direction of anti-discrimination laws, based on recent developments. In the chapters which follow, we examine each Ordinance in detail, with a particular focus on anti-discrimination laws in the context of the employment relationship.

1.2 Purpose and function of the Equal Opportunities Commission

The Equal Opportunities Commission (EOC) was established in May 1996. It is a statutory body which was introduced to implement the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance, and the Race Discrimination Ordinance in Hong Kong. The Commission works towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race.

[80.01] England

The wording of this section is similar to s 70 of the Sex Discrimination Act 1975.

[80.02] Person

As to meaning, see [2.15] above.

[80.03] Definitions

For 'Commission', 'enforcement notices' and 'notice', see s 2(1) above.

Other Enforcement by Commission

81. Persistent discrimination or sexual harassment

If, during the period of 5 years beginning on the date on which either of the following became final in the case of any person, namely—

- (a) an enforcement notice served on him;
- (b) a finding by the District Court under section 76 that he has done an unlawful discriminatory act or unlawful act of sexual harassment,

it appears to the Commission that unless restrained he is likely to do one or more acts falling within paragraph (b), or contravening section 42, the Commission may apply to the District Court for an injunction restraining him from doing so; and the District Court, if satisfied that the application is well-founded, may grant the injunction in the terms applied for or in more limited terms.

[81.01] England

The wording of this section is similar to s 71 of the Sex Discrimination Act 1975.

[81.02] General note

Under this section, the Equal Opportunities Commission has the power to apply for an injunction not only in cases where the person has persistently contravened the provisions of the Ordinance, but also where it appears that an act of unlawful discrimination or sexual harassment might be repeated, even if such an act has only been committed once before. Although the Commission should have reasonable grounds for that belief, its members are protected if they acted in good faith under s 68 above. Note that by virtue of s 4 above, one act may be sufficient to constitute an unlawful act of sexual harassment or discrimination. See also [4.02] above.

[81.03] Year

As to meaning, see [27.02] above.

[81.04] Person

As to meaning, see [2.15] above.

[81.05] District Court

As to meaning, see [2.25] above.

[81.06] Unlawful discriminatory act

ie acts made unlawful under Pt 3 (ss 11–24), Pt 4 (ss 25–41) or Pt 5 (ss 42–47) above as a result of discrimination under ss 5, 6, 7, 8 or 9 above, based on gender, marital status, pregnancy or victimisation. For general exceptions, see Pt 6 (ss 48–62) above.

[81.07] Act of sexual harassment

ie under ss 23–24 and 39–40 above. As to sexual harassment generally, see [23.02] and [23.06]–[23.07] above.

[81.08] Act

As to meaning, see [2.03] above.

[81.09] Contravening

As to meaning, see [9.08] above.

[81.10] Section 42

ie discriminatory practices (the application of a requirement or condition resulting in an act of discrimination which is unlawful by virtue of any provision of Pt 3 or 4 read in conjunction with s 5(1)(b), 7(1)(b) or 8(b) above).

[81.11] Definitions

For ‘act’, ‘Commission’ and ‘discriminatory’, see s 2(1) above; for ‘sexual harassment’, see s 2(5) above.

82. Enforcement of sections 43, 44 and 45

- (1) Proceedings in respect of a contravention of section 43, 44 or 45 shall be brought only by the Commission in accordance with the provisions of this section.
- (2) The proceedings shall be—

- (a) an application for a decision whether the alleged contravention occurred; or
 - (b) an application under subsection (4), or both.
- (3) An application under subsection (2)(a) shall be made to the District Court.
- (4) If it appears to the Commission—
- (a) that a person has done an act which by virtue of section 43, 44 or 45 was unlawful; and
 - (b) that unless restrained he is likely to do further acts which by virtue of that section are unlawful,
- the Commission may apply to the District Court for an injunction restraining him from doing so; and the District Court, if satisfied that the application is well-founded, may grant the injunction in the terms applied for or in more limited terms.
- (5) Without prejudice to subsection (4), if it appears to the Commission that a person has done an act which was unlawful by virtue of section 43, the Commission may apply to the District Court for an order imposing a financial penalty on such person; and the District Court, if satisfied that the application is well-founded, may make such an order.
- (6) The financial penalty imposed under subsection (5) shall not exceed \$10,000 for the first occasion on which a penalty is imposed, and \$30,000 for the second and any subsequent occasion on which a penalty is imposed in respect of the same person.

[82.01] England

The wording of this section is similar to s 72 of the Sex Discrimination Act 1975.

[82.02] Contravention

As to meaning, see [9.08] above.

[82.03] Sections 43, 44 or 45

ie provisions relating to discriminatory advertisements (s 43 above), instructions to discriminate (s 44 above) and pressure to discriminate (s 45 above).

[82.04] District Court

As to meaning, see [2.25] above.

[82.05] Person

As to meaning, see [2.15] above.

[82.06] Act

As to meaning, see [2.03] above.

[82.07] Definitions

For 'act' and 'Commission', see s 2(1) above.

Help for Persons Suffering Discrimination or Sexual Harassment**83. Help for aggrieved persons in obtaining information, etc.**

- (1) With a view to helping a person (*the person aggrieved*) who considers he may have been discriminated against or sexually harassed in contravention of this Ordinance to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner, the Commission may prescribe—
 - (a) forms by which the person aggrieved may question the respondent on his reasons for doing any relevant act, or on any other matter which is or may be relevant;
 - (b) forms by which the respondent may if he so wishes reply to any questions.
- (2) Where the person aggrieved questions the respondent (whether or not in accordance with forms referred to in subsection (1))—
 - (a) the question, and any reply by the respondent (whether or not in accordance with such a form) shall, subject to subsections (3), (4) and (5), be admissible as evidence in the proceedings;
 - (b) if it appears to the District Court that the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the Court may draw any inference from that fact it considers it just and