

Dockers) the test to determine whether the members did not constitute a section of the public was one of genuine personal selection. If the rules of the club or association so provide, then a factual question arises as to whether admission is conducted in accordance with the rules. It is hard to see why a society (ie Labour Party) with a serious purpose limited to members interested in that purpose should not be an association whose members are not a section of the public.

[28.09] Discriminate

This refers to discrimination falling within ss 5-6 and 9 above (ss 7-8 above not being relevant here).

[28.10] Against a woman

This section applies, with the necessary modifications, to discrimination against men: see ss 6 and 9(3) above.

[28.11] By refusing or deliberately omitting to provide ... in the like manner and on the like terms

In England, the Court of Appeal held in one case that requiring women, but not men, to sit at a table to be served, and refusing to serve them at the bar amounted to unlawful discrimination, even though they would still be served the same product: see *Gill v El Vino Co Ltd* [1983] QB 425, [1983] 1 All ER 398, [1983] IRLR 206, CA. It is clear that under this section an act can amount to unlawful discrimination even if the end product is the same, if the manner in which or terms on which it is provided are different from those offered to men. (See, however, *Peake v Automotive Products Ltd* [1978] QB 233; [1978] 1 All ER 106; [1977] ICR 968; [1977] IRLR 365, an employment related case where an appeal was allowed on the grounds that men should not be penalised for acts of chivalry and that the law should not concern itself with trifles. This decision, it seems, is wrong as many discriminatory acts could be committed under the pretext of 'protecting' or 'respecting' women, and an unlawful discriminatory act is an unlawful discriminatory act however minor and however virtuous the intentions of the perpetrator.

See also *Twambley v Jamal Nouri Fattah (t/a Jamal's Wine Bar)* (The Times, 2 October 1982, unreported) where the male plaintiffs brought an action against the bar for allowing women to enter free while charging men an entry fee. The proprietor argued that he allowed women in for free because they did not cause any trouble, but to treat men as drunkards and women as 'ladies' is discriminatory, albeit that it is based on a popular stereotype. The County Court judge, Lord J, held that this did amount to unlawful sex discrimination, but awarded only nominal damages on the basis of *Peake v Automotive Products Ltd* above. However, since *Peake v Automotive Products Ltd* above has been overruled, the decision should have been made on the basis of *Gill v El Vino Co Ltd* above. In contrast, the Human Rights Commission in New Zealand has now ruled that charging men a cover charge to enter a bar

or club and allowing women to enter for free amounts to unlawful discrimination.

'Ladies nights' in Hong Kong are a common phenomenon and it is not certain as yet how widely the courts will interpret this section. Certainly, it seems that on the basis of *Gill v El Vino Co Ltd* above, allowing women to enter a club under different conditions from men is sex discrimination; especially since the reasons for that discrimination cannot be argued to be a special measure to ensure equal opportunities or to meet women's special needs (s 48 below): there is no reason why a woman should not be capable of standing at a bar, in the same way that there is no reason why she should not be capable of paying the same entrance fee as men.

Furthermore, it may be unlawful under this section to enforce a grooming code that is not justifiable and which discriminates against persons of a particular gender. See, however, *McConomy v Crofts Inns Ltd* (Belfast County Court, 30 November 1990, EOR 37 p 36, unreported) and [1992] IRLR 561. As to grooming codes generally, see [10.02] above. See also *Waldock v Whitney & Prosser* (Hereford County Court, 25 January 1984, unreported) where it was held that charging women more than men for a haircut did not amount to unlawful discrimination, since the type of service offered to men and women were materially different (see s 10 above).

See further *French v Crosby & Crosby (Links Hotel)* (Great Yarmouth County Court, 7 May 1982, unreported); *Priestley v Stork Margarine Social & Recreational Club* (Birkenhead County Court, 24 June 1988, unreported); *Pinder v Friends Provident Life Office* (Westminster County Court, 15 August 1985, unreported); *Rowe v Trustee Savings Bank of Yorkshire & Lincolnshire* (York County Court, 17 January 1984, unreported); *Football Association Ltd & Nottinghamshire Football Association v Bennett* (Court of Appeal, 28 July 1978, unreported); *Jones v Royal Liver Friendly Society* (Liverpool County Court, 1 December 1982, unreported); *Taylor v Burnett* (Huddersfield County Court, 28 February 1983, unreported); *Capon v Liverpool City Council* (Liverpool County Court, 10 February 1988, unreported); *James v Eastleigh Borough Council* [1990] 2 AC 751, [1990] 2 All ER 607.

[28.12] Subsection (2): Accommodation

This is defined in s 2 of the Hotel Accommodation Tax Ordinance (Cap 348) to mean any furnished room or suite or rooms hired by the proprietor of the hotel to guests, or for the use of guests, for lodging and includes such furnishings, appliances and fittings as are normally provided therein.

[28.13] Hotel; guesthouse

'Hotel' and 'guesthouse' are defined in s 2 of the Hotel and Guesthouse Accommodation Ordinance (Cap 349) to mean any premises whose occupier, proprietor or tenant holds out that, to the extent of his available accommodation, he will provide sleeping accommodation for any person presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and is in a fit state to be received, but

[84.01] England

This section does not have an equivalent in English legislation.

[84.02] Person

As to meaning, see [2.14] above.

[84.03] Act

As to meaning, see [2.02] above.

[84.04] In writing

As to meaning, see [2.18] above.

[84.05] Act which is unlawful by virtue of a provision of this Ordinance

ie acts made unlawful under Pt III (ss 11-24), Pt IV (ss 25-41) or Pt V (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 VI (ss 48-62) above.

[84.06] Subsection (4): Months

As to meaning, see [53.06] above.

[84.07] The complaint is frivolous, vexatious, misconceived or lacking in substance

This section seems to give the Commission fairly wide discretionary powers to abandon or ignore an investigation into an act which is the subject of a complaint under subs (1), regardless of whether that act is actually unlawful and whether the offender intended the act to be discriminatory. For a case where the defendant attempted to use this construction as a defence, but was unsuccessful, see *French v Crosby & Crosby (Links Hotel)* (Great Yarmouth County Court, 7 May 1982, unreported); see also *Peake v Automotive Products Ltd* [1978] QB 233; [1978] 1 All ER 106; [1977] ICR 968; [1977] IRLR 365. Note however, that *Peake v Automotive Products Ltd* above, is no longer good law.

[84.08] Definitions

For "act", "Commission", "conciliation" and "notice", see s 2(1) above.

85. Assistance other than by way of conciliation

- (1) Where a complaint has been lodged under section 84(1) but, for whatever reason, there has not been a settlement of the matter to which the act the subject of the complaint relates, then any person who may institute proceedings under this Ordinance in respect of that act may make an application to the Commission for assistance in respect of those proceedings.

- (2) The Commission shall consider an application under subsection (1) and may grant it if it thinks fit to do so, in particular where-
- the case raises a question of principle; or
 - it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided.
- (3) Assistance by the Commission under this section may include-
- giving advice;
 - arranging for the giving of advice or assistance by a solicitor or counsel;
 - arranging for representation by any person including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings;
 - any other form of assistance which the Commission may consider appropriate,
- but paragraph (c) shall not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend and address a court in, any proceedings except to the extent permitted under rules made in accordance with section 73B of the District Court Ordinance (Cap 336).
- (4) In so far as expenses are incurred by the Commission in providing the applicant with assistance under this section the recovery of those expenses (as taxed or assessed in such manner as may be prescribed by relevant rules) shall constitute a first charge for the benefit of the Commission-
- on any costs or expenses which (whether by virtue of a judgment or order of the District Court or an agreement or otherwise) are payable to the applicant by any other person in respect of the matter in connection with which the assistance is given; and
 - so far as relates to any costs or expenses, on his rights under any compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings.
- (5) The charge conferred by subsection (4) shall be subject to any charge under the Legal Aid Ordinance (Cap 91) and to any provision in that Ordinance for payment of any sum into the Supplementary Legal Aid Fund established under that Ordinance.
- (6) In this section-
- "relevant rules" (有關規則) means any rules made under the District Court Ordinance (Cap 336);

- "unjustifiable hardship" (不合情理的困難) means unjustifiable hardship as construed in accordance with section 4.
- (2) References in this Ordinance to the dismissal of a person from employment or to the expulsion of a person from a position as partner include references-
- (a) to the termination of that person's employment or partnership by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment or partnership is renewed on the same terms;
- (b) to the termination of that person's employment or partnership by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer, or the other partners, as the case may be.
- (3) References in this Ordinance to the provision of facilities shall be construed to include references to making those facilities available or making arrangements for the provision of those facilities or to the provision of those facilities in buildings or premises.
- (4) For the purposes of this Ordinance, an enforcement notice or a finding by the District Court becomes final when an appeal against the notice or finding is dismissed, withdrawn or abandoned or when the time for appealing expires without an appeal having been brought; and for this purpose an appeal against an enforcement notice shall be taken to be dismissed if, notwithstanding that a requirement of the notice is quashed on appeal, a direction is given in respect of it under section 74(3).
- (5) For the purposes of this Ordinance, a person is a near relative of another if that person is the wife or husband, a parent or child, a grandparent or grandchild, or a brother or sister of the other (whether of full blood or half-blood or by affinity), and "child" (子女) includes an illegitimate child and the wife or husband of an illegitimate child.
- (6) For the purposes of this Ordinance, a person (howsoever described) harasses another person if that first-mentioned person engages in unwelcome conduct (which may include an oral or written statement) on account of that second-mentioned person's disability, or on account of the disability of an associate of that second-mentioned person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the second-mentioned person would be offended, humiliated or intimidated by that conduct.
- (7) For the purposes of section 6(c), references in this Ordinance to-

- (a) a person with a disability (or words to the like effect) shall be construed to mean a person (and whether or not he has a disability) with an associate with a disability;
- (b) a person without a disability (or words to the like effect) shall be construed to mean a person without an associate with a disability.
- (8) For the purposes of any of the provisions of sections 22, 23, 37, 38, 39, 46 and 47, references to a person with a disability (or words to the like effect) shall be construed to include a person (and whether or not he has a disability) with an associate with a disability.
- (9) Subject to subsection (10), in this Ordinance "existing statutory provision" (現有法例條文) means any provision of-
- (a) any Ordinance enacted before this Ordinance was enacted;
- (b) any subsidiary legislation made-
- (i) under an Ordinance enacted before this Ordinance was enacted; and
- (ii) before, on or after this Ordinance was enacted.
- (10) Where an Ordinance enacted after this Ordinance was enacted re-enacts (with or without modifications) a provision of an Ordinance enacted before this Ordinance was enacted, then that provision as re-enacted shall be treated for the purposes of subsection (9) as if it continued to be contained in an Ordinance enacted before this Ordinance was enacted.

[2.01] England

This section is based on s 68 of the UK Disability Discrimination Act 1995 (modified by the Disability Discrimination Act 2005), for "act", "employment", "prescribed", "profession" and "trade".

[2.02] Subsection (1): Act

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include, when used with reference to an offence or civil wrong, a series of acts, an illegal omission and a series of illegal omissions.

[2.03] Advertisement: public

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include any class of the public. "Public" is further defined in s 2(2B) of the Film Censorship Ordinance (Cap 392) to include members of a club or a society.

[2.04] Advertisement: newspaper

This term is not defined in this Ordinance. However, s 2 of the Registration of Local Newspapers Ordinance (Cap 268) defines "newspaper" to mean any paper or other publication and any supplement thereto available to the general

[11.01] Enactment history

Subsection (7) was amended by repealing "Governor in Council" and substituting "Chief Executive in Council" pursuant to s 3 and Schedule 6 of the Adaptation of Laws (No 29) Ordinance 1999 (Ord 66 of 1999).

[11.02] England

The wording of this section is based on s 6 of the UK Sex Discrimination Act 1975, except that there is no parallel provision in s 11(2)(b) of the Ordinance compared with the Act.

[11.03] General note

Questions asked during an interview or in the application form can give rise to a valid complaint of unlawful discrimination under this section. Personal questions germane to marital status, disability, number of children may attract complaints of unlawful discrimination. For example, the applicant was awarded damages for unlawful discrimination in *Smith v Commonwealth* (2000) EOC 93-077.

It is no defence for an employer to claim that he or she is not prejudiced, as motive in this section is irrelevant: see *Hafeez v Richmond School* ((1981) COIT 1112/38, unreported); *Din v Carrington Viyella Ltd (Jersey Kapwood Ltd)* [1982] ICR 256, [1982] IRLR 281, EAT; *Ramsey v John James Hawley (Speciality Works) Ltd* ((1978) COIT 804/139, unreported). Under the Race Relations Act 1976 (which is similar to the Sex Discrimination Act 1975), the employers in the cases above, attempted to rely on the defence that they personally lacked any prejudicial motive and that they had committed the discriminatory acts in order to save money, to avoid controversy or to comply with racist customer preferences. It was held in all the cases that this was irrelevant.

It would appear that an employee cannot claim that she has been unlawfully discriminated against if she has knowingly been a party to illegality in that employment: see *Pask v Hothi* (Southampton) (1991) 1249/91, unreported.

Subsection (1) refers to applicants whereas subs (2) refers to existing members of staff and the staff after dismissal, see: *Ray Chen v IBM China/Hong Kong Limited* (DCEO 3/2000, 15 December 2000, unreported), which refers to a similar provision in s 11 of the Sex Discrimination Ordinance (Cap 480). Subsection (3) provides exemption for firms where the total number of employees does not exceed five (except in relation to s 7 above) and subs (5) provides for the expiration of subs (3). Subs (4) excludes benefits, etc that are also offered to the general public.

[11.04] Subsection (1): It is unlawful for a person ... to discriminate

Subsection (1) and (2) above must be read subject to the exceptions, etc in subss (3)-(4) above. Subsections (1)(a) or (c) do not apply to any employment where being a person without a disability is a genuine occupational qualification for the job, and subs (2)(a) does not apply to opportunities for promotion or transfer to, or training for, such employment: see s 12 below.

For general exceptions, see Pt VI (ss 50-61) below. For relevant provisions relating to enforcement, see Pt VIII (ss 71-82) below.

[11.05] Employment ... at an establishment in Hong Kong

Employment is to be regarded as being at an establishment within Hong Kong unless the employee does his work wholly or mainly outside Hong Kong: see s 14 below.

[11.06] Hong Kong

"Hong Kong" is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Hong Kong Special Administrative Region of the People's Republic of China, the geographical extent of which is the land and sea specified or referred to in Sch 2 to that Ordinance.

[11.07] Discriminate

This refers to discrimination falling within ss 6-7, 9-10 above, arising on the grounds of person with a disability, victimization, person possessing palliative or therapeutic device or person accompanied by an interpreter.

[11.08] Person

As to meaning, see [2.20] above.

[11.09] Subsection (1)(a): In the arrangements he makes

Subsection (1) is only concerned with situations arising prior to a contract of employment being entered into: see *Clymo v Wandsworth London Borough Council* [1989] 2 CMLR 577, [1989] ICR 250, EAT.

In the context of sex discrimination, the fact that an employer's arrangements were not intended to be discriminatory against a woman is irrelevant if those arrangements have that effect: see *Brennan v JH Dewhurst Ltd* [1983] IRLR 357, [1984] ICR 52.

[11.10] In the arrangement ... who should be offered that employment

In *Brennan v JH Dewhurst* [1983] IRLR 357, [1984] ICR 52, the EAT held that it was irrelevant that the employer did not intend to discriminate and clarified that 'in all stages in applying for and obtaining employment a woman should be on an equal footing with a man', in the sex discrimination context. This case is later supported by *Nagarajan v London Regional Transport* [2000] 1 AC 501, [1999] 4 All ER 65, [1999] IRLR 572, HL. The judge stated that interviewing and assessing candidates for a post could amount to making arrangement for the purpose of determining who should be offered that employment.

[11.11] Employment

As to meaning, see [2.22] above.

preventing the acts of discrimination in question is not determinative. An employer will not be exculpated if it has not taken reasonably practicable steps simply because, if it had taken those steps, they would not have prevented anything from occurring.

An employer's partners may be liable under this section if it can be shown that he was acting as their agent (see subs (2)); see *Equal Opportunities Commission v (1) Dinorban Hotels & (2) Wainwright* (Shrewsbury IT 33431/90, unreported). See also *Equal Opportunities Commission v (1) Masser (2) Carriages Leisure Centre* (Manchester IT 13013/90, unreported); *Enterprise Glass Ltd v Miles* (1990) 42 IRLIB 15, EAT; unreported); *Johnson v Gateway Foodmarkets Ltd* (Southampton IT 4079/90, unreported); *Garbutt v Gateway Foodmarkets Ltd* (Southampton IT 3041/90, unreported); *Yassen v Strathclyde Regional Council & Anor* (EAT 6/90, unreported); *Irving v Post Office* [1987] IRLR 289; *Brownhill v Gateway Foodmarkets* (Inverness IT S/3968/90, unreported); *Crane v VC Link Ltd* (London (South) IT 07017/89, unreported); *McPhee v Smith Anderson & Co Ltd* (Dundee IT S/2260/89, unreported).

The proper construction of subs (2) was that the 'authority' referred to must be the authority to do an act which is capable of being done in a lawful but discriminatory manner. In *Lana v Positive Action Training in Housing (London) Ltd* [2001] IRLR 501, the applicant was arranged by the respondent as a trainee in its agent company. After she was pregnant, that agent company terminated her placement contract. Then the respondent terminated the training contract with the applicant. EAT held that the agent company was the agent of the respondent and that the respondent was liable for any discriminatory acts done by the agent company. The agent company in this case had the authority to terminate the placement and, if it did so in a discriminatory way, the principal respondent was liable.

Adoption of equal opportunities policy and otherwise of the recommendations in any code of practice issued by the Equal Opportunities Commission will be very significant in determining whether they have established the statutory defence: see *Balgobin and Francis v London Borough of Tower Hamlets* [1987] IRLR 401.

However, it seems that the *Balgobin* may not be followed after the strong policy statements in *Jones v Tower Boot Co Ltd* [1997] 2 All ER 406, [1997] IRLR 168, [1997] ICR 254, CA. In *Earlam v VMP Ltd and Andrews* (1995) DCLD 25, the Tribunal stated that a large company should take the following steps to avoid harassment: (1) issue a policy statement about harassment, defining it and stating that it will not be permitted or condoned; (2) establish a complaints procedure, specifying to whom complaints should be made and setting out the consequences for perpetrators; (3) provide training; and (4) ensure that managers and supervisors are aware of the factors which contribute to a working environment free of sexual harassment.

For provisions relating to enforcement, see Pt VIII (ss 71-82); and note also subs (3) above.

[48.03] Person

As to meaning, see [2.20] above.

[48.04] Act

As to meaning, see [2.02] above.

[48.05] Reasonably practicable

The meaning of this expression and the difference between 'reasonably practicable' and the stricter standard of 'practicable' have been judicially considered in relation to safety legislation: see *Halsbury's Laws of England* (4th Ed 2004 Reissue) Vol 20(1) para 624.

In Australia, the size of the employer is one of the considerations for the level of reasonable steps to be taken. As stated in *Johanson v Blackledge Meats* [2001] FMCA 6, it was said that large corporations would be expected to do more than small businesses in order to be held to have acted reasonably. This view is consistent with the earlier authority *Evans v Lee & Commonwealth Bank* (1996) EOC 92-822 and has been approved in *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109. This proposition was consistent in UK in *A v Civil Aviation Authority* (1996) DCLD 27.

What is reasonable with respect to a particular employer will be different according to the circumstances of each employer: see *Shields v James & Lipman Pty Ltd* [2000] FMCA 2 and *Aleksovski v AAA Pty Ltd* (2002) EOC 93-219.

[48.06] Definitions

For "act" and "employment", see s 2(1) above.

49 Aiding unlawful acts

- (1) A person who knowingly aids another person to do an act made unlawful by this Ordinance shall be treated for the purposes of this Ordinance as himself doing an unlawful act of the like description.
- (2) For the purposes of subsection (1), an employee or agent for whose act the employer or principal is liable under section 48 (or would be so liable but for section 48(3)) shall be deemed to aid the doing of the act by the employer or principal.
- (3) A person does not under this section knowingly aid another to do an unlawful act if-
 - (a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Ordinance, the act which he aids would not be unlawful; and
 - (b) it is reasonable for him to rely on the statement.

[67.02] England

The wording of this section is similar to s 58 of the UK Sex Discrimination Act 1975.

[67.03] Chief Secretary for Administration

As to meaning, see [66.04] above.

[67.04] Person

As to meaning, see [2.20] above.

[67.05] Subsection (4): Act made unlawful

It acts made unlawful under Pt III (ss 11-23), Pt IV (ss 24-40) or Pt V (ss 41-49) above as a result of discrimination under ss 6, 7, 8, 9 or 10 above, based on disability and victimisation. For general exceptions, see Pt VI (ss 50-61) above.

[67.06] Act

As to meaning, see [2.02] above.

[67.07] Written

As to meaning, see [2.24] above.

[67.08] Counsel

"Counsel" is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a person admitted before the Court of First Instance to practise as counsel.

[67.09] Solicitor

"Solicitor" is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a person admitted before the Court of First Instance to practise as a solicitor.

[67.10] Definitions

For "act", "Commission", "formal investigation", "notice" and "prescribed", see s 2(1) above.

68 Power to obtain information

Remarks:

Adaptation amendments retroactively made-see 25 of 1998 s. 2

- (1) For the purposes of a formal investigation the Commission, by a notice in the prescribed form served on him in the prescribed manner-

- (a) may require any person to furnish such written information as may be described in the notice, and may specify the time at which, and the manner and form in which, the information is to be furnished;
- (b) 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 his possession or control relating to, any matter specified in the notice.
- (2) Except as provided by section 75, a notice shall be served under subsection (1) only where-
- (a) service of the notice was authorized in writing by or on behalf of the Chief Secretary for Administration; or (*Amended L.N. 362 of 1997*)
- (b) the terms of reference of the formal investigation state that the Commission believes that a person named in them may have done or may be doing acts of all or any of the following descriptions-
- (i) unlawful discriminatory acts;
- (ii) unlawful acts of harassment;
- (iii) contraventions of section 41, 42, 43, 44, 45, 46 or 47, and confine the investigation to those acts.
- (3) A notice under subsection (1) shall not require a person-
- (a) to give information, or produce any documents, which he could not be compelled to give in evidence, or produce, in civil proceedings before the Court of First Instance; or (*Amended 25 of 1998 s. 2*)
- (b) to attend at any place unless the necessary expenses of his journey to and from that place are paid or tendered to him.
- (4) If a person fails to comply with a notice served on him under subsection (1) or the Commission has reasonable cause to believe that he intends not to comply with it, the Commission may apply to the District Court for an order requiring him to comply with it or with such directions for the like purpose as may be contained in the order; and section 66A of the District Court Ordinance (Cap 336) shall apply to failure without reasonable excuse to comply with any such order as it applies in the cases there provided.
- (5) A person commits an offence if he-
- (a) wilfully alters, suppresses, conceals or destroys a document which he has been required by a notice or order under this section to produce; or
- (b) in complying with such a notice or order, knowingly or recklessly makes any statement which in a material respect is false or misleading,
- and is liable on conviction to a fine at level 4.

[5.04] Intention or motive to discriminate not necessary

The intention or motive to discriminate was not a necessary condition of liability. It is actionable under this Ordinance if the discriminator had no intention to discriminate, and yet did in fact discriminate the complainant on ground of family status. See *James v Eastleigh Borough Council* [1990] 2 AC 751, [1990] 2 All ER 607; *Nagarajan v London Regional Transport* [2000] 1 AC 501, [1999] 4 All ER 65, [1999] IRLR 572, HL; *Secretary for Justice v Chan Wah* [2000] 3 HKLRD 641; *Lam Wing Lai v Y T Cheng (Chingtai) Ltd* [2006] 1 HKC 323, [2006] 1 HKLRD 639.

If the respondent proves that the requirement or condition concerned was not applied with the intention to treat the complainant unfavourably on the ground of family status, no damages will be awarded in cases of indirect discrimination that falls within s 5(b). See s 54(6) of this Ordinance.

[5.05] Para (b): Indirect discrimination

Indirect discrimination is although the discriminator treats the complainant by applying a requirement or condition in the same way as another who does not have a family status, the operation of such requirement or condition has a disproportionately adverse impact upon the complainant than the other person, there is no objective justification to the condition or requirement, and the complainant is thereby subject to detriment.

The 'but for' test does not apply in indirect discrimination under s 5(b). See *James v Eastleigh Borough Council* [1990] 2 AC 751 (in Lord Goff of Chieveley's judgment). It is a test of proportionality and requires a balancing exercise: *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690.

[5.06] General note**Approach of the Court**

The Court will consider whether the plaintiff had established on the balance of probability that the plaintiff received less favourable treatment on the ground of family status. The Court will then consider whether there had been a satisfactory explanation for the complained acts. That did not shift the evidential burden to the defendant. Common sense approach shall be adopted by the Court and the Court shall draw the proper inference from the primary facts found by it. The Court recognized that it was unusual to find direct evidence on discrimination and victimization.

"The outcome of a case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, an inference that it is just and equitable to draw ... from an evasive or equivocal reply to a questionnaire" per Neill LJ, *King v GB-Care Centre* [1992] ICR 516 at 528, [1991] IRLR 513.

See also *Noone v North West Thames Regional Health Authority* [1988] IRLR 195, May LJ at 198, [1988] ICR 813; *Lam Wing Lai v Y T Cheng (Chingtai) Ltd* [2006] 1 HKC 323, [2006] 1 HKLRD 639 at para 40.

[5.07] Corresponding provisions in related ordinances

See ss 5 & 6 of Sex Discrimination Ordinance and s 6 of Disability Discrimination Ordinance.

[5.08] Definitions

For the meaning of "family status" and "immediate family member", see s 2(1) above.

6 Discrimination by way of victimisation

- (1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Ordinance if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised or any other person ("the third person") has-
- brought proceedings against the discriminator or any other person under this Ordinance;
 - given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Ordinance;
 - otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person; or
 - alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance, or by reason that the discriminator knows the person victimised or the third person, as the case may be, intends to do any of those things, or suspects the persons victimised or the third person, as the case may be, has done, or intends to do, any of them.
- (2) Subsection (1) does not apply to the treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

[6.01] General note

This is another type of actionable discrimination. See definition of "discrimination" in s 2(1) above. Section 6 is a general provision on discrimination by victimization. Under this section, it is a discrimination by victimization if the complainant had been treated less favourably than other