

# Discrimination Law Handbook

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## **SEX DISCRIMINATION ORDINANCE**

### **(CAP 480)**

#### **Introduction**

On 14 July 1995, the Sex Discrimination Ordinance (Cap 480) (the 'Ordinance') was enacted in order to render unlawful certain types of discrimination based on sex, marital status and pregnancy and to provide for the establishment of an Equal Opportunities Commission with the purpose of providing equal opportunity between men and women and working towards the elimination of discrimination based on sex.

Subsequent events were surprisingly 'unhurried'. On 20 May 1996, the Equal Opportunities Commission ('EOC') was formed, and on 20 September 1996, following the drafting of Codes of Practice on Employment, the EOC office began to offer services to the public. On the same date, the non-employment related provisions of the Ordinance were brought into operation. On 15 November 1996, the Code of Practice was published in the Gazette and on 20 November 1996, the codes and rules were tabled at the Legislative Council. Finally, on 20 December 1996, the codes, rules and remaining provisions of the Sex Discrimination Ordinance were brought into effect, some 18 months after its enactment. In its newsletter (EOC News, Issue 1, January 1997, EOC) these were described by the Commission as 'milestones' in the implementation of equal opportunities legislation.

In the Code of Practice on Employment under the Sex Discrimination Ordinance (Cap 480) published by the Equal Opportunities Commission in January 1997, the purposes of the Ordinance are summarised as follows:

Equal Opportunities is an important aspect of a fair, open and competitive society and should receive employers' support:

- (1) in order to uphold civil rights;
- (2) in order to attain social harmony;
- (3) in order to utilise skills more effectively;
- (4) in order to achieve organisational success;
- (5) in order to avoid disruptions to the working environment and the adverse effects of discrimination or harassment on staff morale and performance.

## Sex Discrimination Ordinance (Cap 480)

- (8) positive discrimination and discrimination in relation to charities, sport, insurance, communal accommodation, New Territories, land and public security, etc shall not be unlawful in certain circumstances: ss 48–62;
- (9) there is to be an Equal Opportunities Commission established under the Sex Discrimination Ordinance (Cap 480): s 63;
- (10) the Commission shall work towards the elimination of discrimination and sexual harassment, and promote equality of opportunity between women and men generally: s 64.

The Sex Discrimination Ordinance is based on the Sex Discrimination Act 1975 (UK) (repealed) and many sections are almost exactly the same. In order to fully appreciate the reasoning behind the implementation of certain provisions of the Ordinance, it is necessary to examine the background of the English legislation. Note, however, District Court Judge Saunders commented in *Ray Chen v IBM China/Hong Kong Ltd* (unreported, DCEO 3/2000, 15 December 2000) (DC), at [17] that:

As the terms of the legislation are so close it is plain that the courts in Hong Kong may look to the English cases for guidance on the interpretation of the Hong Kong law. They will be persuasive authorities but the courts in Hong Kong should not blindly follow the English approach which may on occasions not be appropriate for Hong Kong conditions.

Judge Saunders repeated this point in *Chang Ying Kwan v Wyeth (HK) Ltd* [2001] 2 HKC 129 (DC), at 134G–135A. This proposition was later supported Judge HC Wong in *Chan Choi Yin Janice v Toppan Forms (HK) Ltd* [2006] 3 HKC 143 (DC).

### England

In *Beresford-Hope v Lady Sandhurst* (1889) 23 QBD 79 (CA, Eng), Lord Coleridge CJ claimed that: ‘... [many] able and acute minds have been much exercised as to what privileges may be conceded to women’.

Sex discrimination legislation has now been in place in England for over 30 years in the form of the Equal Pay Act 1970 (UK), the Sex Discrimination Act 1975 (UK) (repealed), the Employment Protection (Consolidation) Act 1978 (UK), the Sex Discrimination Act 1986 (UK) (repealed), the Protection from Harassment Act 1997 (UK), the Human Rights Act 1998 (UK), the Employment Equality (Sexual Orientation) Regulations 2003 (UK), the Gender Recognition Act 2004 (UK) and some other Regulations and Directives from the European Communities. The Equality Act 2010 (UK) became operative on 1 October 2010. The Equality Act is the consolidation of the existing piecemeal anti-discrimination laws (including sex, sexual orientation, age, marriage, gender reassignment, disability, race, religion and belief and pregnancy and maternity) and extends the duty to public sector organisations and to introduce the concept of positive discrimination and dual discrimination clause. For positive discrimination concept, see Baroness Hale’s speech, at para 7 in *Re E (a child) (Ap) (Appellant) Northern Ireland* [2008] UKHL 66, [2009] AC 536 (HL). Even so, women still do not enjoy the same rights

## *Sex Discrimination Ordinance (Cap 480)*

*v. S-J* [2006] 4 HKLRD 211, [2006] HKCU 1585 (CA) which widened the concept of 'sex' to include 'sexual orientation' in the European human rights concept.

The Sex Discrimination Ordinance (Cap 480) is limited further in that it does not apply to the New Territories Ordinance (Cap 97) or the New Territories Leases (Extension) Ordinance (Cap 150) (see s 61 below), leading to the perpetuation of inheritance rights which are not only binding on the indigenous population but on all residents of the New Territories who are not entitled to specific exemption. This section has caused much public criticism in the region: see the *Green Paper on Equal Opportunities for Women and Men: Compendium of Submissions* (Hong Kong Government Printer, 1994).

### *The work of the Equal Opportunities Commission*

It is through the work of the Equal Opportunities Commission that the legislation envisages the promotion and enforcement of equal opportunities for women. The aims of the Commission are as follows:

- (1) to promote equality of opportunity between men and women;
- (2) to eliminate gender based discrimination through legislative provisions, administrative measures and public education;
- (3) to eliminate sexual harassment.

Its strategies for addressing these issues are as follows:

- (1) securing compliance and reform through legislative means;
- (2) promoting education to raise awareness and achieve change;
- (3) strengthening communication with community organisations to promote participation;
- (4) building corporate partnership to encourage practices and prevention;
- (5) conducting research.

The EOC had been subject to much criticism on the grounds of ineffectuality and procrastination in 1997. This was refuted by the Commission who pointed to the fact that it had been in operation for a mere matter of months, and that despite its campaigns to enlighten the public to their rights, many people are still ignorant of the legislation. There is some truth in this argument, as whilst the traditional aversion to litigation in Hong Kong had been overcome in areas of business and trade, the Confucian belief that 'to enter a court of law is to enter a tiger's mouth' persists, and nowhere could this be more true than in a sensitive area such as sex discrimination, where other factors such as the fear of vilification (in cases of harassment) and of reprisals (in discriminatory conduct by an employer) also come into play.

The success of the Sex Discrimination Ordinance (Cap 480) depends very much upon the public's intention of using it. Between 1 April 2017 and 31 March 2018, the EOC had received 12,497 enquiries, consisting of 7,912 general and 4,585

claims. The first question concentrates upon the effect of what the employer has done upon the alleged victim. The second question focuses upon how the employer treats other people. The third question focuses upon the employers' reasons for their behaviour. The employer is entitled to take steps to protect his own interests, but he must not seriously jeopardise the employee's right to pursue her claim. It is the employee's interest in pursuing the claim that provides a test of what is and what is not 'reasonable'. In sending the letters, the respondent had gone further than was reasonable in protecting its interests and the letters would not have been sent by a reasonable employer in the circumstances and that the employees had suffered a detriment.

Unreasonable manner accorded to the employer may also lead to dismissal of the victimisation claims. In *Martin v Devonshires Solicitors* [2011] ICR 352 (EAT), Ms Martin began employment with Devonshires Solicitors in 2006. She raised a grievance in 2008 alleging that various partners at Devonshires were aware of her previous sex discrimination claim against her former employer and that she had been subjected to harassment and victimisation as a result. Devonshires dismissed the grievance and its appeal, concluding that it had been made in bad faith, with malevolent intent and with no basis in fact. Soon after she raised her grievance, Ms Martin went on sick leave for stress, during which period she raised seven similar further grievances. Devonshires obtained two medical reports, one from a consultant psychiatrist and another from an occupational health consultant. These disclosed that Ms Martin had a history of mental illness and suffered from a persistent depressive disorder, experiencing paranoid hallucinations during psychotic spells. Having been notified that her employment may be terminated due to the breakdown of mutual trust and confidence, Ms Martin claimed for victimisation. The EAT upheld the Tribunal's decision, finding that the circumstances surrounding the manner in which the complaint was made meant that it was 'properly and genuinely separable' from the fact that Ms Martin's allegations related to discrimination. The particular unreasonable features of her complaint are the real reason which led to the decision to dismiss her: falseness and seriousness of the allegations, the number and frequency of the allegations, the risk of repetition and further disruptive and unmanageable conduct as a result of her mental illness. Therefore, her claims of victimisation was dismissed.

Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The court will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did. See also *Panayiotou v Kernaghan* [2014] UKEAT 0436/13/1604.

#### *Burden of proof*

In respect of the burden of proof in discrimination and victimisation cases, it is unusual to find direct evidence of discrimination, and discrimination usually depends upon what inferences it is proper to draw from the primary facts, see *King v GB-China Centre* [1992] ICR 516, [1991] IRLR 513 (CA, Eng), at 528, cited with approval in *Sit Ka Yin Priscilla v Equal Opportunities Commission & Ors* [2010] HKCU 370 (unreported, DCEO 11/1999, 11 February 2010) (DC), per Judge Lok, *Tan Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd*

victimisation under s 9 SDO must establish that one at least of the four acts set out in s 9(1)(a)–(d) was within the knowledge of the defendant at the time he carried out the acts of which the plaintiff complains. Once that has been established, in the absence of an adequate or satisfactory explanation, a plaintiff will have established, on the balance of probabilities that there has been victimisation. The burden of establishing that there has been no adequate or satisfactory explanation of the conduct lies upon the plaintiff.

Without any comment and justification on her poor performance, she was demoted and refused salary increase after her complaint to EOC and it was held that this was an act of victimisation.

The practical application of the above test is enunciated in *Lam Wing Lai v YT Cheng (Chingtai) Ltd* [2006] 1 HKC 323, [2006] 1 HKLRD 639 (DC), at 339I; and *Chan Choi Yin Janice v Toppan Forms (HK) Ltd* [2006] 3 HKC 143 (DC), at 162F. In the latter case, the plaintiff, after telling the defendant's human resources staff of her intention of filing a complaint to the EOC, the plaintiff was told that she would be made redundant due to the closure of the department which she was working with. The plaintiff was further told to withdraw her complaint at the EOC or she would be dismissed. Citing *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 (CA, Eng) with approval, it was held that the burden was on the plaintiff to show discrimination on a balance of probabilities. Once the court was satisfied that the plaintiff had shown a possibility of discrimination, the court would look to the employer for an explanation failing which the court would draw an inference of discrimination as a matter of common sense. The judge found that there was no reasonable and adequate explanation from the defendant to justify the defendant's treatment to the plaintiff and thus the defendant was liable to victimisation.

A union can also be held liable for unlawful victimisation under this section: see *Vahramian v ACTSS* (unreported, IT 304422/90).

If victimisation was only a very small factor, not a significant influence in the decision to remove the claimant from the post, victimisation did not amount to anything more than trivial, the claimant's case would be dismissed: see *Villalba v Merrill Lynch & Co Inc & Ors* [2007] ICR 469, [2006] IRLR 437 (EAT).

In contrast to discrimination which falls within the categories under ss 5, 7–8 above, this section is not subject to the exemption of liability for firms where the number of employees does not exceed five: see s 11(3) below.

### [9.03] Person

As to meaning, see [2.15] above.

### [9.04] Subsection (1): Circumstances relevant for the purposes ... of this Sex Discrimination Ordinance (Cap 480)

As to meaning, see [5.06] above.

**[9.11] Definitions**

For 'act', 'discrimination', 'man' and 'woman', see s 2(1) above; for 'sexual harassment', see s 2(5) above.

**10. Comparison of cases under sections 5(1), 7(1) and 8**

A comparison of the cases of persons—

- (a) of different sex under section 5(1);
- (b) of different marital status under section 7(1);
- (c) who are pregnant and not pregnant under section 8,

shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

**[10.01] England**

The wording of this section is based on s 5(3) of the Sex Discrimination Act 1975 (UK) (repealed).

**[10.02] General note**

Direct discrimination requires evidence of less favourable treatment on the grounds of gender, marital status, etc. It involves a comparison of the person's different gender, marital status or condition of pregnancy, and these must be the same or not materially different from one another. The question for the court in the case of gender-based discrimination will be, 'Would a man in the same or similar circumstances be treated in the same way as the applicant?'

One issue that this section raises is whether the different treatment afforded to men and women in terms of grooming codes, is unlawful. In one recent English case, a male delicatessen worker's claim that a requirement to cut his hair was discriminatory, was dismissed. See also *Schmidt v Austicks Bookshops* [1978] ICR 85, [1977] IRLR 360 (EAT) where it was held that the circumstances for men and women were different and that men would not be asked to wear skirts. It was further held that the requirement that women wear dresses was too trivial to amount to a detriment. This decision is arguably wrong, particularly in light of *Gill v El Vino Co Ltd* [1983] QB 425, [1983] 1 All ER 398, [1983] IRLR 206 (CA, Eng), as the issue is not that women were required to wear skirts but that they should have the choice. Arguably, since much female attire is less practical than male attire, this is a detriment in itself. This becomes even clearer when considering the argument that to wear a dress may conflict with a woman's cultural background. Although there is no legislation governing racial equality in Hong Kong, a woman may reinforce her claim that the requirement to wear a dress does amount to a serious detriment when it conflicts with her culture. In *McConomy v Crofts Inns Ltd* [1992] IRLR 561, the court held that a bar's refusal to permit entry to a man wearing earrings did not amount to unlawful sex discrimination since the different inherent physical characteristics rendered it impossible to apply the same rules to

court was asked to consider if the policy of the Commissioner of Correctional Services was in breach of the Sex Discrimination Ordinance (Cap 480) by having different hair cut requirements for male and female inmates. The Court of Appeal applied *Smith v Safeway Plc* (above) and held that the adoption of conventional standards of appearance for inmates is not a discriminatory practice.

There was no change even after the introduction of human rights law. In *Fuller v Mastercare Service and Distribution* (2001) EAT/0707/00, [2001] Lexis Citation 2396, [2001] All ER (D) 189 (Nov), Mr Fuller's case was that a requirement as to hair length was imposed upon him which was not, or would not have been, imposed upon a woman and that a requirement that he should remove his 'ponytail' was discriminatory against him. Mr Fuller was eventually dismissed when he refused to have it cut. The Employment Tribunal ruled that the dress code and his dismissal were not discriminatory. It further stated that even if the European Human Rights Convention had been incorporated into English law at the time of hearing there would not have been any breach of it. This decision was upheld by the EAT, which concluded that:

In looking at a dress standard it must ask first of all whether or not there is a contractual requirement for the standard. Secondly, it must ask, so far as discrimination on the grounds of sex is concerned, whether taken as a whole the dress code is discriminatory in that the treatment accorded to male employees is less favourable than the treatment accorded to female employees or the reverse. As part of that question it must inevitably examine the particular constituent elements of the dress code. This is not to say that men and women must be treated identically if there is to be no discrimination.

The *Schmidt v Austicks Bookshops* [1978] ICR 85, [1977] IRLR 360 (EAT) case was still followed in *Cootes v John Lewis plc* (2001) EAT/1414/00, [2001] Lexis Citation 1797, [2001] All ER (D) 395 (Feb), the EAT upheld the Employment Tribunal's judgment that it was not unlawful to require a female selling partner to wear a uniform. Again, it was followed in the latest relevant case *Department for Work and Pensions v Thompson* [2004] IRLR 348 where the dress code that all staff were required to dress 'in a professional and businesslike way', men were required to 'wear a collar and tie' was not discriminatory, although there was no such restriction in women, once it was proved that it reached the same level of smartness as that of women.

The following cases seemed to not be in line with the *Schmidt* authority. In *Hutcheson v Graham & Morton Ltd* (unreported, S/626/83), a senior female employee was required to wear a nylon overall while men wore lounge suits. The Employment Tribunal ruled that the detriment was that the uniform was uncomfortable and indicated a lower status than a male employee. This decision was distinguished in *Burrett v West Birmingham Health Authority* [1994] IRLR 7.

In *Rewcastle v Safeway Plc* (unreported, ET/22482/89), female staff were required to wear clip back shoulder-length hair while men were required to keep their hair short and well groomed. The applicant refused to cut his hairs short and was dismissed. The Employment Tribunal questioned the compatibility of the policy which reflected the conventional values between men and women with the Sex Discrimination Act 1975 (UK) (repealed). This case was considered by Phillips

**[10.03] Relevant circumstances**

In relation to employment, the requirement that the relevant circumstances of the persons compared should be the same, refers to the entire body of staff, whatever the nature of their employment, as opposed to a particular 'section' of staff: see *Bullock v Alice Ottley School* (1991) 89 LGR 967 (EAT). See also *Bain v Bowles* (1991) IRLR 356 where it was held that the relevant circumstances were not different in the case of young women working in male households or working in female households.

In England, perpetrators of unlawful discrimination have frequently sought to rely upon s 5(3) of the Sex Discrimination Act 1975 (UK) (repealed), which is almost identical to s 10 of the Sex Discrimination Ordinance (Cap 480). In *Re Equal Opportunities Commission for Northern Ireland's Application* [1989] IRLR 64 (HC, NI), the tribunal dismissed a board's argument that the relevant circumstances could be held to differ materially when the difference was itself caused by sex discrimination, whilst in *Greig v Community Industry* [1979] ICR 356, [1979] IRLR 158 (EAT), the applicant was refused a job as a painter and decorator since she would be the only female member of an all-male team. The employer sought to rely on s 5(3) of the Sex Discrimination Act 1975 (UK) by arguing that if a man applied for a job on an all-woman team his application would be unsuccessful. However, it was held that the relevant comparison is not concerned with the hypothetical employment of different personnel, but with the specific employment for which the applicant applied.

**[10.04] Or not materially different**

Following the minority view of *Turley v Alders Department Stores Ltd* [1980] ICR 66, [1980] IRLR 4 (EAT), it was held in *Hayes v Malleable Working Men's Club and Institute* [1985] ICR 703, [1985] IRLR 367 (EAT) that under this section, the circumstances of a pregnant woman and a sick male employee could be seen as not being materially different. This approach was adopted in *Webb v Emo Air Cargo (UK) Ltd* [1990] ICR 442, [1990] IRLR 124 (EAT), where it was held that absence due to pregnancy is directly comparable to a similar period of absence required due to a medical condition: see [8.02] above. In a later case, *Chang Ying Kwan v Wyeth (HK) Ltd* [2001] 2 HKC 129 (DC), applying *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, [2001] 4 All ER 834, [2001] 1 WLR 1947 (HL), the court held that the comparator is not another pregnant employee but a person who is a normal employee.

The provision of goods or services at a different price for men and women may sometimes be justified, in that the nature of the service may be different for men and women: see *Waldock v Whitney & Prosser* (unreported, 25 January 1984) (Hereford County Court).

**[10.05] Definition**

For 'marital status', see s 2(1) above and [7.04] above.

liable or to which they may have contributed ... though apportionment between the tortfeasors themselves has no impact on the liability to the claimant;

- (3) if there is a rational basis for distinguishing the damage caused by tortfeasors the position is different and the court can hold that a tortfeasor is only liable for the damages attributable to him.

Apportionment of compensation in discrimination cases is also possible. Where an employee's psychiatric ill-health has been caused by a combination of factors, some of which amount to unlawful discrimination for which the employer is liable, but others which were not the legal responsibility of the employer, it is open to the court to discount the employee's compensation by such percentage as reflects its apportionment of that responsibility: see *Thaine v London School of Economics* [2010] ICR 1422 (EAT).

In *London Borough of Hackney v Sivanandan & Ors (Rev 1)* [2013] EWCA Civ 22 [2013] IRLR 408, [2013] 2 All ER 940, [2013] ICR 672 (CA, Eng), the court was required to consider whether the court has power to apportion, as between the two tortfeasors, liability to the claimant. The lower court held that there was no power to conduct an apportionment as between joint tortfeasors. Unlawful discrimination is a statutory tort under the Sex Discrimination Act 1975 (UK) (repealed) and the Race Relations Act 1976 (UK) (repealed). General principles of tort law applied. Where the same indivisible damage is done to a claimant by concurrent tortfeasors, each is liable to the claimant for the whole of that damage and no question of apportionment arises. Apportionment could only take place where there was a rational basis for distinguishing between the damage caused by one tortfeasor from another, so that the tortfeasors were liable to the claimant for part only of the damage, which was attributable to each of them. The Court of Appeal upheld the decision of the lower court and held that the claimant certainly did not intend to forego any claims for damages that she had against the other joint tortfeasors. The error made by the lower court in making an apportionment as regards the liability of one tortfeasor to the claimant did not prevent her from pursuing her claims against other joint tortfeasors.

No cause of action can be inferred to if there is no such legislative intent: see *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2010] EWHC 774 (Ch); *Dah Sing Insurance Services Ltd v Gill Gurbux Singh* [2014] 4 HKC 179, [2014] 1 HKLRD 691 (CA), at 198.

#### [76.10] Subsection (2): Under section 17(1)

ie direct discrimination by qualifying bodies.

#### [76.11] Appeal

As to meaning, see s 78.

#### [76.12] Enactment

As to meaning, see [11.26] above.

outrageous conduct, to mark the court's disapproval of such conduct and to deter him from repeating it. Sexual harassment exploits and abuses the victim, who is generally vulnerable because of the power imbalance. Sexual harassment is also a tort which is easy to commit and difficult to redress. A sum of HK\$ 20,000 was awarded to the claimant as exemplary damages.

In *Allan v Ng & Co & Anor* [2012] 2 HKC 266, [2012] 2 HKLRD 160 (CA), the Court of Appeal reiterated that the rationale for exemplary damages is not to compensate, but to punish. They are additional to an award which is intended to compensate a plaintiff fully for the loss she has suffered, both pecuniary and non-pecuniary. If the wrongdoer's conducts are so outrageous that an order for payment of compensation is not an adequate response, he may be ordered to make a further payment, by way of condemnation and punishment, to demonstrate that his wrongful conduct is altogether unacceptable to society.

The test of outrageousness usually involves intentional wrongdoing with, additionally an element of flagrancy or cynicism or oppression or the like, something additional, rendering the wrongdoing or the manner or circumstances in which the defendant's conduct outrageous: *Yiu Shui Kong v Legend World Asia Group Ltd* [2017] 1 HKC 118 (DC).

In *C v Hau Kar Kit* [2023] HKCU 3225, [2023] HKDC 974, an award of HK\$ 10,000 for exemplary damages as claimed by the claimant was allowed because:

- (1) the respondent was not deterred from his persistent sexual harassment acts against the claimant despite being cautioned not to make physical contact with the claimant;
- (2) the respondent continued to sexually harass her until her resignation even after the claimant had filed a subsequent written complaint;
- (3) during the investigation conducted by EOC, the respondent simply refuted most of the claimant's allegations without providing any reasonable explanation or justification.

#### [76.15] Subsection (4): Any law

As to meaning, see [17.08] above.

#### [76.16] Powers

As to meaning, see [21.09] above.

#### [76.17] Subsection (5): Unlawful act of discrimination falling within section 5(1)(b), 7(1)(b) or 8(b)

ie, indirect discrimination based on gender, marital status or pregnancy. See further [8.04], [7.02] and [8.02] above.

(DC), the defendant officer. The defendant terminated the plaintiff's employment because the plaintiff informed the defendant of her pregnancy. The court considered that there is no medical evidence linking the subsequent miscarriage to the wrongful act of the defendant. The plaintiff is not suggesting that the discriminatory act of the defendant, which appears to be a one-off incident, had anything to do with the miscarriage. The plaintiff in this case has suffered much anxiety for losing her job as she is the sole breadwinner of her family. Taking everything into consideration, the court held that this case falls into the lowest bracket in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318, [2003] IRLR 102 (CA, Eng) and award the plaintiff HK\$ 60,000 for her injured feelings.

In *Da'Bell v NSPCC* [2010] IRLR 19 (EAT), the Employment Appeal Tribunal updated the quantum under the *Vento* guideline in line with inflation:

- (1) £18,000 to £30,000 for lengthy campaign of discriminatory harassment;
- (2) £6,000 to £18,000 for serious cases which do not merit an award in (1); and
- (3) £500 to £6,000 for an isolated or one-off act of discrimination.

After *Da'Bell v NSPCC* (above) to update the *Vento* guideline, the first case considered by the local court in assessing the damages for sexual harassment is *L Hurton* [2010] 6 HKC 463, [2010] 5 HKLRD 397 (DC). In that case, the defendant was the plaintiff's boss. The defendant asked for sexual advances many times during the plaintiff's employment. The plaintiff immediately refused and she was increasingly upset with the defendant's sexual advances. Her relationship with the defendant began to deteriorate. One day, the defendant laid her off and called the security guard to escort the plaintiff to leave in front of all the colleagues in the office. The plaintiff felt insulted and the experience had gravely hurt her self-esteem. The judge awarded HK\$ 100,000 as damages for injury to feelings, HK\$ 20,000 as exemplary damages.

The award for injury to feelings was also exercised in a disability discrimination case in Hong Kong. In *Ma Bik Yung v Ko Chuen* [1999] 1 HKC 714, [1999] 2 HKLRD 263 (DC), the District Judge awarded compensation for injury to feelings with its aggravating features, namely the particularly unpleasant nature of the taxi driver conduct, a global sum of HK\$ 15,000. The award for injury to feelings was restitutionary in nature, that was to compensate the passenger who was a paraplegic for the humiliation, insult and ordeal suffered. The judge made a comment that the award should not be minimal as it would trivialise or diminish respect for the public policy and the spirit on which the Sex Discrimination Ordinance (Cap 480) was based. A further HK\$ 5,000 was awarded as punitive damages due to the particularly oppressive and insulting circumstances the taxi driver had subjected the plaintiff to. On appeal to the Court of Appeal *Ma Bik Yung v Ko Chuen* [2000] 1 HKC 745, [2000] 1 HKLRD 514 (CA), the appeal against the finding of discrimination was allowed but the appeal against the finding of harassment was dismissed and the award was reduced from HK\$ 20,000 to HK\$ 10,000. The case was further appealed to the Court of Final Appeal in *Ma Bik Yung v Ko Chuen* [2001] 4 HKC 119, (2006) 9 HKCFAR 888, [2002] 2 HKLRD 1 (CFA), on the quashing of apology order point, the Court of Final Appeal commented that the Court of Appeal's halving of the judge's award so that HK\$ 10,000 was awarded

**[SCH5.06] Fire Services Department**

the Fire Services Department established under s 3 of the Fire Services Ordinance (Cap 95).

**[SCH5.07] Correctional Services Department**

the Correctional Services Department within the meaning of the Prisons Ordinance (Cap 234).

**[SCH5.08] Customs and Excise Service**

the Customs and Excise Service established under s 3 of the Customs and Excise Service Ordinance (Cap 342).

**[SCH5.09] Government**

As to meaning, see [3.03] above.

**[SCH5.10] Land**

This is defined in s 2 of the New Territories Ordinance (Cap 97) to include land covered by water or within the flow of the sea and houses and other buildings and any undivided share in land and every estate and interest in land and also includes any rent or profit issuing out of land and any easement affecting land and also any market-building or portion of such building and any rent or profit issuing out of any market-building or portion of such building.

**[SCH5.11] New Territories**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the area specified or referred to in Sch 5A of that Ordinance, which states that 'all of Hong Kong except the land and sea comprised within the boundary of Hong Kong immediately before 9 June 1898'.

**[SCH5.12] Infant**

This is defined in s 2 of the Adoption Ordinance (Cap 290) to mean a person under 18 years of age, but does not include a person who is or has been married.

**[SCH5.13] Small House Policy**

The beneficiaries of the Policy are 'indigenous villagers' of the New Territories. This means adult males descended through the male line from a resident in 1898 of a recognised village. Recognised villages are villages included in a list approved by the Director of Lands. There are currently 642 recognised villages. The Policy relates to land in the village or its immediate environs which are not affected by any impending development or future planning or development proposals. Its

PROVISIONS WITH RESPECT TO THE COMMISSION AND COMMITTEES AND THEIR MEMBERS

**Members and Procedure of Commission**

**Terms and conditions of appointment of Chairperson, etc.**

1. Subject to subsection (2), the Chief Executive shall determine the remuneration and the terms and conditions of appointment of the Chairperson. (*Amended 66 of 1999 s. 3*)
- (1) The Chairperson shall not, without the specific approval of the Chief Executive— (*Amended 66 of 1999 s. 3*)
  - (a) hold any office of profit other than his office as Chairperson; or
  - (b) engage in any occupation for reward outside the functions of his office.
- (3) This section shall apply to any other member of the Commission who is appointed on a full-time basis as it applies to the Chairperson.

**Terms of appointment of members of Commission**

2. Subject to sections 1 and 5 and subsection (2), a member of the Commission shall hold and vacate his office in accordance with the terms of his appointment and shall, on ceasing to be a member, be eligible for reappointment.
- (1) A member of the Commission shall be appointed for a term not exceeding 5 years.
- (2) A member of the Commission may at any time by notice in writing to the Chief Executive resign his office. (*Amended 66 of 1999 s. 3*)

**Members of Commission to disclose interests in respect of certain contracts**

3. A member of the Commission who is in any way directly or indirectly interested in a contract made or proposed to be made by—
  - (1) the Commission;
  - (a) a committee; or
  - (b) an employee or agent of the Commission,

(d) is otherwise unable or unfit to discharge the functions of a member,

the Chief Executive may declare his office as a member of the Commission to be vacant, and shall notify the fact in such manner as the Chief Executive thinks fit; and upon such declaration the office shall become vacant.

*(Amended 66 of 1999 s. 3)*

### **Quorum of Commission, etc.**

(1) The quorum of the Commission shall be not less than half the members thereof for the time being and, while a member is disqualified from taking part in a decision or deliberation of the Commission in respect of a matter, he shall be disregarded for the purpose of constituting a quorum of the Commission for deciding, or deliberating on, that matter.

(2) All matters for determination at a meeting of the Commission shall be decided by a majority of votes of the members present and voting and where there is an equality of votes the Chairperson or other member presiding shall have a casting vote in addition to his original vote.

### **7. Fixing of seal of Commission**

The fixing of the seal of the Commission shall be—

- (a) authorized by the Commission; and
- (b) authenticated by the signatures of—
  - (i) the Chairperson; and
  - (ii) any other member of the Commission authorized by the Commission, either generally or specifically, to act for that purpose.

### **8. Documents of Commission**

(1) The Commission may make and execute any document in the performance of its functions or the exercise of its powers or in connection with any matter reasonably incidental to or consequential upon the performance of its functions or the exercise of its powers.

(2) Any document purporting to be executed under the seal of the Commission shall be admitted in evidence and shall, in the absence of evidence to the contrary, be deemed to have been duly executed.

### **9. Certain documents not required to be sealed**

- (2) The Secretary for Financial Services and the Treasury may give directions in writing of a general or specific character to the Commission in relation to the amount of money which may be expended by the Commission in any financial year and the Commission shall comply with those directions. (Amended L.N. 106 of 2002)

### **Borrowing powers**

16. Subject to subsection (2), the Commission may borrow by way of overdraft such money as it may require for meeting its obligations or performing its functions under this Ordinance.
- (1) The Secretary for Constitutional and Mainland Affairs may, after consulting with the Secretary for Financial Services and the Treasury, give directions in writing of a general or specific character to the Commission in relation to the amount of money which may be borrowed under subsection (1) and the Commission shall comply with those directions. (Amended L.N. 106 of 2002; L.N. 130 of 2007)
- (2) The Commission may with the approval of the Secretary for Constitutional and Mainland Affairs given after the Secretary has consulted with the Secretary for Financial Services and the Treasury borrow, otherwise than by way of overdraft, such money as it may require for meeting its obligations or performing its functions under this Ordinance. (Amended L.N. 106 of 2002; L.N. 130 of 2007)
- (3) A person lending money to the Commission shall not be concerned to inquire whether the borrowing of the money is legal or regular or whether the money raised has been properly applied and shall not be prejudiced by any illegality or irregularity or by misapplication or non-application of the money.

### **17. Investment of surplus funds**

- (1) Subject to subsection (2), the Commission may invest money that is not immediately required to be expended.
- (2) The Commission shall not invest money pursuant to subsection (1) except in such forms of investment as the Secretary for Constitutional and Mainland Affairs, after consulting with the Secretary for Financial Services and the Treasury, approves. (Amended L.N. 106 of 2002; L.N. 130 of 2007)

## DISABILITY DISCRIMINATION ORDINANCE

### (CAP 487)

#### Introduction

Hong Kong has long been famous for its *laissez-faire* economy. The government of Hong Kong SAR has adopted the positive non-interventionism or so-called 'big market small government' policy. The heritage has been inherited from the colonial government prior to 1997. This is agreed not just by the colonial British-Hong Kong government, but also the Chinese government. Article 5 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the 'Basic Law') guaranteed the continuity of the capitalist economic system until 2047.

The positive non-interventionism ideology has also been applied in the labour market. Weak labour unions, no collective bargaining rights, monopolies, lax business regulations, absence of anti-trust law and tax-incentive scheme are all the ingredients for the recipe for free-market policy. However, minority in the labour market has usually been ignored and segregated. Historically disempowered and marginalised, people with a disability still face insidious and trenchant discriminatory barriers, fed by unfavourable attitudes and stereotypes from within the mainstream society.

In the 1960s and 1970s, the colonial government ratified four very important conventions:

- (1) the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') in 1969;
- (2) the International Covenant on Civil and Political Rights ('ICCPR') in 1976; and
- (3) International Covenant on Economic, Social and Cultural Rights ('ICESCR') in 1976;
- (4) the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') in 1981 (extended to Hong Kong in 1996). However, these international conventions are not directly enforceable in Hong Kong courts based on our common law tradition.

The Chinese political turmoil in June 1989 made the colonial government to enact the Hong Kong Bill of Rights Ordinance (Cap 383) to assuage the brain drain problem in 1991. However, the Hong Kong Bill of Rights Ordinance only governs the government's policy and has little impact in the private sector.

The then Legislative Councilor, Ms Anna Wu, presented the private Equal Opportunities Bill 1994 on 1 July 1994 in the Legislative Council. The democratic

tion (with some revisions). The Code and the employment related provisions, ie, Pt 4 (ss 11–23), ss 33(1), (2) and (4), 39(4), 48(1) and (3), 48(2) (in so far as that subsection relates to an agent who is also an employee of his principal), s 49(2) (in so far as that subsection relates to an employee or employer) and s 84, Sch 3 and any other provision of the Disability Discrimination Ordinance (Cap 487) in so far as that provision makes reference to: (1) Part 3 or any or provision contained within that Part; and (2) any or Schedule mentioned above, were brought into operation on 20 December 1996.

Another important enactment is the subsequent Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997 (71 of 1997) to expand the normal limit of HK\$ 120,000 in the then District Court which was accidentally left out in s 72.

The major amendment comes from the consequential amendments attached to the enactment of the Race Discrimination Ordinance (Cap 602) (originally 29 of 2008) with a view to paraphrasing some definitions in this Ordinance so that the definitions tallied with the definitions in other discrimination ordinances. The consequential amendments came into operation on 3 October 2008 pursuant to the Race Discrimination Ordinance (Commencement) Notice 2008 (LN 222 of 2008).

## 2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—  
**access** (獲得、享用) means access as construed in accordance with section 56;

**act** (作為) includes a deliberate omission;

**advertisement** (廣告) includes every form of advertisement, whether to the public or not, and whether—

- (a) in a newspaper or other publication;
- (b) by television or radio;
- (c) by display of notices, signs, labels, showcards or goods;
- (d) by distribution of samples, circulars, catalogues, price lists or other material;
- (e) by exhibition of pictures, models or films; or
- (f) in any other way,

and references to the publishing of advertisements shall be construed accordingly;

**associate** (有聯繫人士), in relation to a person, includes—

- (a) a spouse of the person;
- (b) another person who is living with the person on a genuine domestic basis;

- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour,

and includes a disability that—

- (i) presently exists;
- (ii) previously existed but no longer exists;
- (iii) may exist in the future; or
- (iv) is imputed to a person;

**discrimination** (歧視) means any discrimination falling within sections 6, 7, 9 or 10, and related expressions shall be construed accordingly;

**discriminator** (歧視者) includes a prospective discriminator;

**dispose** (處置), in relation to premises, includes granting a right to occupy the premises, and any reference to acquiring premises shall be construed accordingly;

**dynamically supported craft** (動力承托的航行器) has the same meaning as in the Shipping and Port Control Ordinance (Cap. 313);

**education** (教育) includes any form of training or instruction;

**educational establishment** (教育機構) has the same meaning as in the relevant Ordinance;

**employment** (僱用) means employment under—

- (a) a contract of service or of apprenticeship; or
  - (b) a contract personally to execute any work or labour,
- and related expressions shall be construed accordingly;

**employment agency** (職業介紹所) means a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers;

**enforcement notice** (執行通知) means a notice under section 73(2);

**estate agent** (地產代理) has the same meaning as in the Estate Agents Ordinance (Cap. 511); (*Replaced 29 of 2008 s. 97*)

**prescribed** (訂明) means prescribed in rules made under section 85;

**profession** (專業) includes any vocation or occupation;

**pupillage** (見習職位)—see section 33(4); (Added 8 of 2020 s. 24)

**registered** (註冊) includes licensed;

**relevant Ordinance** (《性別歧視條例》) means the Sex Discrimination Ordinance (Cap. 480);

**responsible body** (負責組織) has the same meaning as in the relevant Ordinance;

**trade** (行業) includes any business;

**training** (訓練) includes any form of education or instruction;

**unjustifiable hardship** (不合情理的困難) means unjustifiable hardship as construed in accordance with section 4; (Amended 8 of 2020 s. 24)

**volunteer** (義工)—see section 22A(2). (Added 8 of 2020 s. 24)

(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

- (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] Enactment history

The definition for 'club' was extended to those which do not provide liquor in its premises pursuant to s 97 of the Race Discrimination Ordinance (Cap 602) (originally 29 of 2008). The definition for 'estate agent' was repeated and adopted the meaning laid down in the Estate Agents Ordinance (Cap 511) pursuant to s 97 of the Race Discrimination Ordinance. Subsection (5) was repealed and a new definition of 'near relative' was inserted in sub-s (1). The amended section came into operation on 3 October 2008 pursuant to the Race Discrimination Ordinance (Commencement) Notice 2008 (LN 222 of 2008). The Chinese term for 'conciliator' was amended (from '調解人' to '調停人') pursuant to s 11 of the Mediation Ordinance (Cap 620) (originally 15 of 2012).

### [2.02] England

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

### [2.03] 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.

### [2.04] 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.

### [2.05] Advertisement: Newspaper

This term is not defined in the Disability Discrimination Ordinance (Cap 487). 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 public which:

defines 'material' to mean any book, document or other record in any form whatsoever, and any article or substance. 'Material' is also defined in s 2(1) of the Broadcasting Ordinance (Cap 562) to include pictures (whether moving or not), words, music and other sounds, whether produced, spoken or made simultaneously or otherwise.

### [2.09] Advertisement: Exhibition

This term is not defined in the Disability Discrimination Ordinance (Cap 487). However, s 2 of the Film Censorship Ordinance (Cap 392) defines 'exhibition' to mean, in relation to a film, the screening of the film in Hong Kong:

- (1) at any place of public entertainment within the meaning of s 2 of the Places of Public Entertainment Ordinance (Cap 172);
- (2) at any public place within the meaning of s 3 of the Interpretation and General Clauses Ordinance (Cap 1) which is not a place of public entertainment referred to in para (a); or
- (3) at any place to which a person has access by reason of the fact of being a member of a club, society, company, partnership or association of persons, incorporated or unincorporated, but does not include any such screening to:
  - (a) the persons who made the film or who arranged or organized the making of the film;
  - (b) a person who distributes, or intends to distribute, the film in or outside Hong Kong;
  - (c) a person who exhibits, or intends to exhibit, the film in or outside Hong Kong;
  - (d) the projectionist of the film; or
  - (e) any combination of the persons referred to in paras (a), (b), (c) and (d), where no other person is present at such screening.

### [2.10] Advertisement: Film

This term is not defined in the Disability Discrimination Ordinance (Cap 487). However, s 2 of the Film Censorship Ordinance (Cap 392) defines 'film' to mean:

- (1) a cinematograph film and includes any soundtrack associated with such film;
- (2) a videotape or laserdisc and includes any soundtrack associated with such videotape or laserdisc;
- (3) a still film and includes any soundtrack associated with such film;
- (4) any other record of visual moving images that is capable of being used for the subsequent screening of those images and includes any soundtrack associated with such record;
- (5) any combination of the films referred to in paras (1), (2), (3) and (4); or
- (6) an excerpt or part of a film referred to in paras (1), (2), (3), (4) or (5).

'disability' used in the Disability Discrimination Act 1995 (UK) is not of much assistance since UK regime is different while HK definition of disability is very close to that contained in the Anti-Discrimination Act 1977 (NSW), it is virtually the same as the definition in the Commonwealth Disability Discrimination Act 1992 (Australia), thus Australian cases are of more assistance: at [42]–[43].

The judge also said that the definition of disability is very wide. Just about anything will do. The loss of function or the effect of the disorder on thought processes or emotions need not be substantial or long-term. The way is open for claims based on minor and temporary disability which a really disabled person, such as a paraplegic, would no doubt find ludicrous; but that is the way the legislation is drawn.

Further, the definition is largely descriptive, it does not require identification of the disability as a disability. For instance, if an employee suffers from dyslexia (a difficulty with reading and writing) and was dismissed for that reason, then it does not matter whether the employer was not aware that the employee suffers from that problem, nor that the employee himself was unaware of that fact. In *M v S-J* [2009] 2 HKLRD 298, [2008] HKCU 1747 (CA), the Court of Appeal adopted what was stated in *X v McHugh, Auditor-General for the State of Tasmania* [1994] 100 C 92-623 that 'it is not necessary that an employer know of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability', considering that the 'manifestation of a disability' comes within the definition of disability itself.

### [2.16] Total or partial loss of the person's bodily or mental functions

In *Chen Raymond v Lo San & Ors* [2007] HKCU 1384 (unreported, DCEO 1/2003, 11 July 2007) (DC), it was held that pain suffered from degeneration in L4 and L5 discs would not by itself have caused any partial loss of bodily function unless it is serious enough. In contrast, serious neck and shoulder pain for four months was classified as disability in *Siu Ka Yin Priscilla v Equal Opportunities Commission & Ors* [2010] HKCU 370 (unreported, DCEO 11/1999, 11 February 2010) (DC).

Visual short-term memory deficit and specific weakness in cognitive functioning is the kind of deficit which may cause partial loss of body or mental function and may be classified as disability: see *M v S-J* [2007] HKCU 1192 (unreported, DCEO 8/2004, 16 July 2007) (DC).

### [2.17] The malfunction, malformation or disfigurement of a part of the person's body

A person who has rectum cancer is a person with a disability under this paragraph: *Siu Kai Yuen v Maria College* [2005] 2 HKC 115, [2005] 2 HKLRD 775 (DC). The *New Shorter Oxford English Dictionary* (6th Edn, Oxford University Press, 2007 Reissue) explains the word 'cancer' as 'a malignant tumour or growth of body tissue that tends to spread and may recur if removed; disease in which such a growth occurs'.

In *K & Ors v S-J* [2000] 3 HKC 796, [2000] 3 HKLRD 777 (DC), the judge

There was no indirect discrimination found in *White v Crown Ltd* (above), because the need for the Casino to comply with the Liquor Act made reasonable a requirement to be sober, and for entry by a person who did not appear sober to be subject to further examination rather than being immediate and automatic. The Casino was found to have applied its requirements reasonably in the circumstances.

In *M v S-J* [2007] HKCU 1192 (unreported, DCEO 8/2004, 16 July 2007) (DC), it was held that obsessive and compulsive personality traits, with symptoms such as a tendency towards perfectionism, excessive suppression of emotion, obsession with details and excessive devotion to work, are only the reflection of the personality, the weakness of the personality, but not illness. See also *M v S-J* [2009] HKLRD 298, [2008] HKCU 1747 (CA).

### [2.19] Affects a person's thought processes, perception of reality, emotions or judgment

In *Oreb v Discovery Clothing Co Pty Ltd* [2001] NSWADT 48, it was held that a tribunal would need expert evidence of the effect on a person of panic disorder and psychiatric distress, in order to decide whether the symptoms complained of amounted to a disability which 'affects a person's thought processes, perception of reality, emotions or judgment'. This case was cited with approval in *L v Equal Opportunities Commission and Ors* [2003] HKCU 723 (unreported, DCEO 1/1999, 23 June 2003) (CFI), where Muttrie J said that the definition of disability is very wide. Just about anything will do. The loss of function or the effect of the disorder on thought processes or emotions need not be substantial or long-term. The way is open for claims based on minor and temporary disability which a really disabled person, such as a paraplegic, would no doubt find ludicrous; but that is the way the legislation is drawn. The judge accepted that the mild situation of disability in the initial stage satisfied this definition of disability. See also: 李佩霞 v 黃蘇記運輸有限公司 [2014] 4 HKLRD 254, [2014] HKCU 1523 (DC), at [11]. In *Chan Man Ka Vicky v Thomson Reuters Hong Kong Ltd* [2020] HKCU 3276, [2020] HKDC 771, at [23], it was held that depression 'could well fall within the definition of disability' under the Disability Discrimination Ordinance (Cap 487).

### [2.20] Person

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include any public body and any body or persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word 'person' occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.

### [2.21] Dynamically supported craft

This expression is not defined in the Disability Discrimination Ordinance (Cap 487). However, s 2 of the Shipping and Port Control Ordinance (Cap 313) defines 'dynamically supported craft' to mean a craft that is operable on or above water and the weight of which, or a significant part thereof, is balanced in one mode of operation by other than hydrostatic forces.

incorporated in Pt VII of the Family Status Discrimination Ordinance (Cap 527).

### [2.06] Conciliator

The definition of 'conciliator' in the Sex Discrimination Ordinance (Cap 480) is incorporated by reference in s 2(1). It means the conciliator engaged by the Commission pursuant to that Ordinance and shall be responsible for conducting conciliation as provided in the Family Status Discrimination Ordinance (Cap 527) insofar as family status discrimination is concerned.

### [2.07] Dynamically supported craft

The definition of this term in the Shipping and Port Control Ordinance (Cap 313) is incorporated by reference, which means a craft that is operable on or above water and the weight of which, or a significant part thereof, is balanced in one mode of operation by other than hydrostatic forces. See ss 10(2), 29(2) and 29(3) *in fine*.

### [2.08] Estate agent

The definition of this term in the Estate Agents Ordinance (Cap 511) was incorporated by reference, to have the same meaning as in s 2(1) of the Estate Agents Ordinance, which means a person who in the course of a business (whether or not he carries on that or any other business) does estate agency work.

In s 2(1) of the Sex Discrimination Ordinance (Cap 480), the term 'estate agent' has the same meaning as in the Estate Agents Ordinance as replaced by the Race Discrimination Ordinance 2008 (29 of 2008).

### [2.09] Family status

This is defined to mean the status of a person having responsibility for the care of an immediate family member.

It was held in *Wong Lai Wan Avril v The Prudential Assurance Co Ltd & Anor* [2009] 5 HKC 494, [2010] 5 HKLRD 39 (DC) that the definition of the term 'family status' should be given a wide and broad interpretation, thus the term covers a person's status of being married to a particular person. This approach of interpretation is consistent with that of the Court of Final Appeal in interpreting legislation relating to the fundamental rights and freedoms of the individual in *Ng Ka Ling (An Infant) & Anor v Director of Immigration* [1999] 1 HKC 425, (1999) 2 HKCFAR 141, [1999] 1 HKLRD 577 (CFA), as well as that of the Canadian Supreme Court in interpreting the Canadian Human Rights Code of 'marital status' and 'family status' in the case of *B v Ontario (Human Rights Commission)* [2002] 3 SCR 403 (SC, Canada).

It was stated in *B v Ontario (Human Rights Commission)* (above), at 418 that:

The word 'status' is equally capable of encompassing both the absolute definition and the relative definition. Moreover, the terms 'marital status' and 'family status' are in themselves relative. That is, they require the

**2.13] Subsection (3): Finality of an enforcement notice or decision of the District Court**

See also ss 56(1), 58 and 59.

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**3. Application**  
This Ordinance binds the Government.

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**[3.01] General note**

See specifically s 17 in Pt III in relation to discrimination in employment field, and s 28 in Pt IV in relation to discrimination in other fields.

**[3.02] Corresponding provisions in related ordinances**

See s 3 of the Sex Discrimination Ordinance (Cap 480), s 5 of the Disability Discrimination Ordinance (Cap 487) and s 3 of the Race Discrimination Ordinance (Cap 602).

**[3.03] Government**

'Government' is defined under s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Government of the Hong Kong Special Administrative Region.

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**4. Act done for 2 or more reasons**

If an act is done for 2 or more reasons and one of the reasons is the family status of a person (whether or not it is the dominant or a substantial reason for doing the act), then for the purposes of this Ordinance, the act shall be taken to be done for the reason of the person's family status.

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**[4.01] Not necessarily the only or dominant reason**

It is sufficient to fall within the scope of the Family Status Discrimination Ordinance (Cap 527) if one of the reasons for the act done is the family status of a person. It does not have to be the only or dominant or substantial reason for doing this act. This can assist a plaintiff in overcoming the difficulty to discharge the burden of proof.

**[5.04] Intention or motive to discriminate not necessary**

An objective test for causation is to apply. The intention or motive to discriminate was not a necessary condition of liability. It is actionable under the Family Status Discrimination Ordinance (Cap 527) if the discriminator had no intention to discriminate, and yet did in fact discriminate the complainant on ground of family status. See *R v Birmingham City Council ex p Equal Opportunity Commission* [1989] AC 1155, [1989] 1 All ER 769, [1989] IRLR 173 (CA, Eng); *James v Eastleigh Borough Council* [1990] 2 AC 751, [1990] 2 All ER 607 (HL); *Nagarajan v London Regional Transport* [2000] 1 AC 501, [1999] 4 All ER 65, [1999] IRLR 572 (HL); *S-J & Ors v Chan Wah & Ors* [2000] 4 HKC 428, (2000) HKCFAR 459, [2000] 3 HKLRD 641 (CFA); *Yuen Wai Han v South Elderly Affairs Ltd* [2003] 3 HKC 666 (DC); *Lam Wing Lai v YT Cheng (Chingtai) Ltd* [2006] 1 HKC 323, [2006] 1 HKLRD 639 (DC); *M v S-J* [2009] 2 HKLRD 298, [2008] HKCU 1747 (CA).

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 the Family Status Discrimination Ordinance.

**[5.05] Paragraph (b): Indirect discrimination**

Indirect discrimination is although the discriminator treats the complainant by:

- (1) 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;
- (2) there is no objective justification to the condition or requirement; and
- (3) the complainant is thereby subject to detriment because he cannot comply with it.

The words 'requirement or condition' should be construed broadly 'so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision': *Waters v Public Transport Corporation* (1991) 173 CLR 349, at 393 and 406-407.

The requirement or condition applied must be proven by an employer to be necessary and not merely convenient in order to be justifiable: *Steel v Union of Post Office Workers* [1978] 2 All ER 504, [1978] ICR 288, (1978) 121 Sol Jo 575, [1977] IRLR 288, [1978] 1 WLR 64 (EAT), at 70E.

Likewise, the term 'detriment' should be given its broad and ordinary meaning: *L v Equal Opportunities Commission* [2002] HKCU 1396 (unreported, DCEO 1/1999, 13 November 2002) (DC), per Muttrie.

The 'but for' test does not apply in indirect discrimination under s 5(b): *James v Eastleigh Borough Council* [1990] 2 AC 751, [1990] 2 All ER 607 (HL) (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*

- (i) in the way the firm affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
- (ii) by expelling him from that position or subjecting him to any other detriment.

(2) Subsection (1) shall apply in relation to persons proposing to form themselves into a partnership as it applies in relation to a firm.

(3) In the case of a limited partnership references in subsection (1) to a partner shall be construed as references to a general partner within the meaning of section 2 of the Limited Partnerships Ordinance (Cap. 37).

(4) The Chief Executive in Council may, by notice in the Gazette, amend subsection (1) by— (*Amended 66 of 1999 s. 3*)

- (a) substituting another number for the number appearing in that subsection; or
- (b) repealing the words and number appearing after “for a firm” and before “, in relation to”.

#### [11.01] General note

This section applies to a firm consisting of not less than six partners: see s 11(1). Small partnership is exempted. It also applies to limited partnership and persons proposing to form themselves into a partnership: see s 11(2) and (3).

#### [11.02] General partner

According to ss 2–3 of the Limited Partnerships Ordinance (Cap 37), a general partner is the person who shall be liable for all debts and obligations of the limited partnership firm.

#### [11.03] Corresponding provisions in related ordinances

See s 15 of the Sex Discrimination Ordinance (Cap 480), s 15 of the Disability Discrimination Ordinance (Cap 487) and s 17 of Race Discrimination Ordinance (Cap 602).

#### [11.04] Definitions

For the meaning of ‘firm’, see s 2(1) which incorporated by reference the meaning of the same in the Partnership Ordinance (Cap 38). For the meaning of ‘discriminate’, see s 2(1). For the meaning of expulsion of a person from the position of a partner, see s 2(2).

The following are examples of the facilities and services referred to in subsection (1)—

- (a) access to and use of any place which members of the public or a section of the public are permitted to enter;
- (b) accommodation in a hotel, guesthouse or other similar establishment;
- (c) facilities by way of banking or insurance or for grants, loans, credit or finance;
- (d) facilities for education;
- (e) facilities for entertainment, recreation or refreshment;
- (f) facilities for transport or travel;
- (g) the services of any profession or trade;
- (h) the services of—
  - (i)–(ii) (*Repealed 78 of 1999 s. 7*)
  - (iii) any department of the Government; or
  - (iv) any undertaking by or of the Government.

#### [19.01] General note

Like discrimination in employment, discrimination in the provision of goods, facilities, services or premises is also generally more evident. Payment for the goods, facilities, services or premises is not a relevant factor in determining whether or not the discrimination is unlawful under this section. Examples of facilities and services referred to in this section are set out in sub-s (2).

#### [19.02] Exceptions

For exception for small dwellings, see s 22.

For exception for voluntary bodies, see s 23. See also, s 24 for further exceptions.

For territorial limitation applicable to s 19(1), see s 29(1)–(4) below.

#### [19.03] Goods, facilities, services

For ‘goods’, ‘facilities and services’, see *The Butterworths Hong Kong Discrimination Law Handbook, Disability Discrimination Ordinance (Cap 487)* (2019 Reissue), at [26.02] and [26.04].

The Hong Kong courts have only considered a limited number of claims based on the provision of services and facilities. The only three cases are:

would be obtainable in the Court of First Instance. (*Amended 25 of 1998 s. 2*)

Without limiting the generality of the power conferred by subsection (3), the District Court may—

- (a) make a declaration that the respondent has engaged in conduct, or committed an act, that is unlawful under this Ordinance, and order that the respondent shall not repeat or continue such unlawful conduct or act;
- (b) order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant;
- (c) order that the respondent shall employ or re-employ the claimant;
- (d) order that the respondent shall promote the claimant;
- (e) order that the respondent pay to the claimant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct or act;
- (f) order that the respondent shall pay to the claimant punitive or exemplary damages; or
- (g) make an order declaring void in whole or part and either ab initio or from such date as may be specified in the order, any contract or agreement made in contravention of this Ordinance.

(5) By virtue of this subsection and notwithstanding any law, the District Court shall have jurisdiction to hear and determine any proceedings under subsection (1) and shall have all such powers as are necessary or expedient for it to have in order to provide, grant or make any remedy, injunction or order mentioned in this Ordinance.

(6) In respect of an unlawful act of discrimination falling within section 5(b), no award of damages shall be made if the respondent proves that the requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of the claimant's family status.

(6A) Subsection (6) does not apply in relation to an unlawful act of discrimination falling within section 5(b) that is committed on or after the commencement date\* of Part 9 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 (8 of 2020). (*Added 8 of 2020 s. 43*)

(7) For the avoidance of doubt, it is hereby declared that damages