Latest patch-up to anti-discrimination laws is just the beginning of much-needed change

Amid all the rumpus around the national security law in Hong Kong, a refreshing yet little-known consensus emerged at the Legislative Council recently: on 11 June the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 was passed with a unanimous vote, followed by the Government's gazettal of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 on 19 June.

A rare show of solidarity? Perhaps, and it's a much-needed one: the passage of the bill came four years after the Equal Opportunities Commission (EOC) made 73 recommendations in a 2016 report to the Government that sought to strengthen and modernise the city's anti-discrimination laws, namely the Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO), Family Status Discrimination Ordinance (FSDO) and Race Discrimination Ordinance (RDO).

The freshly gazetted ordinance took forward eight of the EOC's recommendations – a modest step and one that is in the right direction of patching up a legal regime that has proven inadequate to address some of the latest trends of discrimination and harassment.

For one thing, the SDO has been amended to expressly prohibit discrimination against breastfeeding women in key domains of public life, including employment, education, provision of goods, services and facilities, and the exercise of Government functions and powers, among others.

Such discrimination can occur directly or indirectly. Imagine a woman returning to work after taking maternity leave. She tells her supervisor that she will have to spend an hour at the office every day expressing milk – which, under the amended SDO, falls within the definition of breastfeeding – and promises to finish her work before leaving the office.

She delivers that promise, only to find out at the end of the year that all employees have been awarded bonuses, except herself. The supervisor indicates that the decision was due to the fact that she has been expressing milk at work. As she has been treated less favourably on the ground of breastfeeding, this is likely to amount to direct discrimination.

Indirect discrimination, on the other hand, arises when a requirement or condition,

without any justifiable reason, is applied to everyone and, in practice, leads to the detriment of breastfeeding women because they are less likely to be able to comply than others.

An example: a shopping centre keeps its babycare room locked, and requires anyone who wants to use the facility to obtain the key from the management office, which is a long distance away. Although the requirement applies to every visitor, women who wish to breastfeed or express milk are more likely to use the room than their non-breastfeeding counterparts. Therefore, it is likely to have a disproportionate and detrimental effect on breastfeeding women and, in the absence of a justifiable reason, may constitute unlawful indirect discrimination.

Another major legislative change involves amendments to the SDO, DDO and RDO to provide for protection from sexual, racial and disability harassment in "common workplaces", even in cases where there is no employment or other similar work relationship.

The legalese can sound baffling, but the implications are significant and far-reaching. From promoters at supermarkets to interns at MNCs to volunteers at an NGO's hotline centre, they will be able to lodge a complaint with the EOC or file a civil lawsuit if they have been sexually harassed, or harassed on account of their race or disability, by a fellow "workplace participant", defined by the law to include employers, employees, interns, volunteers, partners in a firm, as well as contract workers, commission agents and their principals.

What is more, according to the new provisions, persons who engaged interns or volunteers will be held liable for any act of sexual, racial or disability harassment committed by an intern or volunteer in the course of the relevant internship or volunteer work, even when they had not been aware, or approved, of it, *unless* they can prove that they have taken "reasonably practicable steps" to prevent the transgression. Preventive measures may include formulating a written anti-harassment policy that includes a zero tolerance statement, communicating the policy to all workplace participants, and providing training.

The EOC will soon release a guidance note explaining the above and other legislative amendments which include, among others, providing protection for service providers from racial and disability harassment by customers, including cases that take place overseas but on a Hong Kong-registered aircraft or ship; outlawing racial discrimination

and harassment “by imputation”, where a person is believed or perceived to be of a particular race when they are not, in fact, of that race; and providing protection for members and prospective members of clubs from sexual and disability harassment by the management of the clubs.

Again, I am heartened to see that despite all the cynicism and tribalism that seem to have paralysed the city, lawmakers across the aisle have come together to stand behind a genuinely good cause, offering stronger legal safeguards for the fundamental rights of vulnerable communities and society at large.

But this is only the beginning of much-needed change – the report we submitted to the Government back in 2016 prioritised as many as 27 recommendations, 19 of which have yet to be adopted. While the EOC cannot make laws – we are not a legislative body, after all – we will continue to lobby our stakeholders, work closely with the legislature and the Government, and strive for progress that defines what Hong Kong should be: diverse, inclusive, and free from injustices.

Ricky CHU Man-kin
Chairperson, Equal Opportunities Commission

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