Let reason drive COVID policy debates, not discrimination

Recently, a restaurant reportedly posted a notice saying that it would not serve customers who have participated in the Universal Community Testing Programme (UCTP).

Whether you are a UCTP skeptic or supporter, consider, for the moment, resisting the urge to toe your party's line and to base your position about the incident on an "us versus them" mindset.

Instead, why don't we break down the issues, see what the law says, and apply it as it is?

The facts: the notice claimed that UCTP participants were likely to have been infected with COVID-19, and that they have an "intelligence quotient lower than 65" and therefore would not be able to appreciate the "high quality" of the food served by the restaurant. Hence the policy to turn them away.

Can this lead to unlawful disability discrimination?

The underlying issues are: (i) whether infection with COVID-19 is a disability; (ii) whether having an "intelligence quotient lower than 65" is a disability; (iii) whether being *perceived* as COVID-19 carriers or people with the said intelligence level (even when this is not true) amounts to having a "disability" from the perspective of relevant laws; (iv) whether rejecting customers based on these perceptions constitutes unlawful disability discrimination; and (v) whether there is any exemption in relation to infectious diseases.

The answers to all these questions lie in the Disability Discrimination Ordinance (DDO).

The definition of "disability" under the DDO is perhaps wider than many would imagine. It includes the "presence in the body of organisms capable of causing disease or illness" (e.g. viruses like COVID-19), and the total or partial loss of a person's "mental functions" (e.g. a limited intellectual capacity, phrased in the notice as an "intelligence quotient lower than 65").

Notably, the definition not only covers disability that currently or actually exists, but also disability that is "imputed" to a person, i.e. thought or assumed to exist in that

person, as in the case of the said notice.

Under the DDO, it is unlawful for a restaurant, or any service provider for that matter, to treat its customers less favourably on the ground of disability, whether real or imputed. Although the law provides an exception for discrimination based on an infectious disease listed under the Prevention and Control of Disease Ordinance (e.g. COVID-19), it applies only where the discriminatory act is "reasonably necessary" to protect public health.

A decisive issue, then, is whether refusing to serve UCTP participants based on the assumption that they are likely to have been infected with COVID-19 constitutes a "reasonably necessary" measure for the purpose of protecting public health.

Notwithstanding the accusations among untrusting citizens about the UCTP's cost-effectiveness and data-handling procedures, there is no evidential proof supporting the assumption that UCTP participants are susceptible to contracting COVID-19 during the testing process. It follows that the exemption is unlikely to be applicable here.

As for assuming that certain customers have an "intelligence quotient below 65" and consequently turning them away, the exemption again does not apply for an all-too-obvious reason: a loss of mental functions is not an infectious disease. Plainly put, it is unlawful for a restaurant to reject customers because they are believed to be of a lesser intellectual level.

While no one has come forward to the EOC yet with a complaint about the notice, we earnestly hope that the public would not condone such a blatant encouragement of discriminatory attitudes and practices.

From calling COVID-19 the "Wuhan virus" and "Kung Flu" to ridiculing political opponents who have come down with the coronavirus (in one instance a patient was openly mocked by a news report as a "virus queen" after having contracted the virus and possibly transmitting it to family members), it is now apparent that many of the debates surrounding governments' responses to the pandemic, both in Hong Kong and globally, are conducted at times with needlessly divisive, discriminatory and stigmatising language.

While the threshold for the offence of "vilification" under the DDO and Race Discrimination Ordinance is high – it involves engaging in a public activity that incites

“hatred, serious contempt or severe ridicule” against a person on the grounds of disability or race, the spirit of the law is clear: the freedom of speech or opinion, though seen by many (misguidedly) as an absolute right, should not override the right to equality and non-discrimination.

Of course, there will always be debates about public policies, COVID-related or otherwise. They are invaluable insofar as they are accurately informed and help refine policymaking. But when we allow conversations to be coloured by discriminatory language, and reason to give way to recriminations, we inevitably lose focus, and along with it, potential allies.

We must do better than this.

Ricky CHU Man-kin
Chairperson, Equal Opportunities Commission

(A version of this article was published by *Hong Kong Free Press* on 15 September 2020.)