HONG KONG'S FIRST ANTI-DISCRIMINATION LAWS AND THEIR POTENTIAL IMPACT ON THE EMPLOYMENT MARKET

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Introduction

Hong Kong has long been regarded as the classic example of a laissez-faire economy. Anxious to promote trade and attract foreign capital, the Hong Kong government has pursued a policy known as 'positive non-interventionism.' In essence this means that the government provides an impartial legal system and the infrastructure necessary for industry and commerce, but avoids enacting legislation that would be viewed as unduly burdensome to business. Although this philosophy has been modified somewhat in recent decades, the government still endeavours to maintain Hong Kong as a 'basically free-enterprise, market-disciplined system,' with 'minimal government intervention in the private sector.'[1]

Hong Kong's adherence to laissez-faire principles is considered an essential element of its economic success.[2] Even the Chinese government purports to accept that a capitalist economic system should be preserved in Hong Kong. The Hong Kong Basic Law (which was enacted by China's National People's Congress and serves as Hong Kong's constitution from 1 July 1997) promises that the 'socialist system and policies will not be practised in Hong Kong' and that the 'previous capitalist system' shall be practised for at least fifty years.[3] The Basic Law also includes several specific articles promising economic autonomy from China and the continuation of Hong Kong's legal system, laws, and free market policies.[4] Of course, in the political sphere, China has already been accused of deviating from the Basic Law (for example by weakening Hong Kong's Bill of Rights Ordinance and by establishing an entirely appointed

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1 *Hong Kong 1994* (Hong Kong: Hong Kong Government Information Services, 1994), p 58. Similar statements can be found in the Economy chapter of the other issues of this annual publication. The image of Hong Kong as the last bastion of pure capitalism is somewhat exaggerated. For example, in 1996 more than one-half of the population was living in public housing: *Hong Kong 1996* (Hong Kong: Hong Kong Government Information Services, 1996), p 184. For a history of the developments that led the government to operate one of the most extensive public housing programmes in the world, see L C Chau, 'Public Housing' in H C Y Ho and L C Chau (eds), *The Economic System of Hong Kong* (Hong Kong: Asian Research Services, 1989), pp 242–56.

2 Sung Yun-wing, in Y C Jao (ed), *Economic Development and Chinese Societies* (Hong Kong: Hong Kong University Press, 1989), p 155.

3 Preamble and Art 5 (BL5).

4 Ibid, especially BL8 and 105-119.

'provisional' legislature). However, in the area of economic policy, it appears more committed to maintaining the status quo.

Hong Kong's labour market clearly reflects the influence of this laissez-faire ideology and is considered an important element in the 'favourable business climate' that the government seeks to provide. The labour movement has traditionally been very weak and the absence of representative democracy has made it difficult for workers to lobby for law reform. Although legislation enacted since 1968 gives employees certain basic rights, the Hong Kong labour market continues to be far less regulated than other jurisdictions at comparable stages of development. As one local economist has observed:

> Human resources and a system of free enterprise are generally considered to be the main impetuses to Hong Kong's economic success ... It is in the labour market that we can best observe the operation of these two factors ... In most other labour markets, the price mechanism is constrained by strong unions and collective bargaining, monopolies, business regulations, labour legislations, high taxes, and transfer payments. All these impediments to market forces are practically absent in Hong Kong.[5]

Until very recently, employment discrimination legislation was one of the 'impediments' that was noticeably absent from Hong Kong statute book.[6] The business community was firmly opposed to such laws, viewing them as interventionist, costly to enforce, and unnecessary. The Hong Kong government was happy to echo that sentiment, declining to propose any anti-discrimination legislation that would apply to the private sector.[7]

Nonetheless, in mid-1995 Hong Kong's first anti-discrimination laws were enacted: the Sex Discrimination Ordinance[8] (which prohibits discrimination on the grounds of sex, pregnancy, and marital status, as well as sexual harassment) and the Disability Discrimination Ordinance (which prohibits discrimination, harassment, and vilification on the ground of disability).[9] An

5 L C Chau, 'Labour and the Labour Market' in Ho and Chau (note 1 above), p 169.

6 Previously, legal protection against discrimination in the private sector was limited to provisions in the Employment Ordinance making it a criminal offence to discriminate against trade union members and pregnant employees. See Joe England, *Industrial Relations and the Law in Hong Kong* (Hong Kong: Oxford University Press, 2nd ed 1989), pp 176 and 237. See also Andrew Byrnes, 'Equality and Non-Discrimination' in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), ch 6. For a discussion of the ineffectiveness of the Employment Ordinance in preventing discrimination against pregnant employees, see discussion in the second part below.

7 As recently as December 1992, the government took the position that sex discrimination legislation was unnecessary and would have an 'adverse impact' on the economy. See Hong Kong government, 'Findings of Working Group on Sex Discrimination in Employment' (December 1992) on file with the author. The government formed this inter-departmental working group in response to complaints by women's organisations.

8 Ordinance No 67 of 1995.

9 Ordinance No 86 of 1995.

additional law (prohibiting discrimination on the ground of family responsibility) was enacted in June 1996.[10] The new laws apply to a wide range of activities, including employment, education, housing, and the provision of goods and services. However, the employment provisions are expected to have the greatest impact. The laws are enforceable in the courts and also by the Equal Opportunities Commission, which was established in 1996. The enactment of this legislation and the creation of the Equal Opportunities Commission represent a significant departure from the economic ideology of the Hong Kong government.

The second part of this article considers the factors that forced the government to abandon its 'laissez-faire' approach to the problem of discrimination and the progress that has been made in implementing the employment-related provisions of the new laws. The following three parts analyse the main duties created by the new laws and their likely impact on employment practices. The final part discusses the remedies available to victims and the enforcement powers of the Equal Opportunities Commission.

The development of Hong Kong's first anti-discrimination laws

The campaign for anti-discrimination legislation was led primarily by the women's movement,[11] in part because sex discrimination has been particularly blatant in Hong Kong.[12] Until the employment provisions of the Sex Discrimination Ordinance came into force in December 1996, newspapers regularly published job advertisements specifying the sex required for a position. Advertisements also often made it clear that a hierarchy existed in the company, seeking, for example, a 'male accounts supervisor' and a 'female clerk.'[13] Studies of these advertisements have confirmed that the Hong Kong employment market has been both horizontally and vertically segregated (meaning that even those industries that tend to employ more women than men reserve more

10 Family Status Discrimination Ordinance.

11 For a general history of the women's movement in Hong Kong, see Tsang Gar-yin, 'The Women's Movement at the Crossroads' in Veronica Pearson and Benjamin K P Leung (eds), *Women in Hong Kong* (Hong Kong: Oxford University Press, 1995).

12 This article is limited to the issue of discrimination by employers in the private sector. For a discussion of laws and government policies that have discriminated against women in Hong Kong, see Carole J Petersen, 'Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong' (1996) 34 Columbia Journal of Transnational Law 335 (hereinafter 'Equality as a Human Right'), especially at pp 338-48.

13 For examples of sexist advertisements, see Carole J Petersen, 'Failure of the Hong Kong Government to Enact Legislation Prohibiting Discrimination in Employment' in Howarth, Jones, Petersen, and Samuels, *Report by the Hong Kong Council of Women on the Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights* (March 1991), p 2 (hereinafter, *Hong Kong Council of Women Report*); and Carole J Petersen, 'Women at Work: Government Green Paper,' Vol 1 *The Employment Report* No 6 (Asian Law Journal), p 3.

managerial positions for men).[14] There is also strong evidence of pay discrimination in Hong Kong, even where male and female employees hold the same, quite specific, job titles (such as 'button sewer' or 'head teller') and are working the same hours per month.[15]

It is also well-known that Hong Kong employers are loath to pay maternity leave and will often fire women when they become pregnant.[16] In recognition of this fact, the Employment Ordinance has made it an offence to do so.[17] However, the law initially applied only after the woman gave official notice of her pregnancy, which she could not do until twelve weeks before the expected date of birth. As a result, an employer could simply fire a woman as soon as it became apparent that she was pregnant, before she could give notice of her pregnancy and enjoy protection from termination. This practice was so widespread that the government introduced, in 1987, an amendment to permit the woman to give notice of the pregnancy at any time after it had been medically certified.[18] Unfortunately, the fine (HK$10,000, roughly equivalent to US$1,300)[19] was so low that many employers continued to fire pregnant women (concluding, quite rationally, that the fine would be less expensive than maternity leave).[20] Indeed, many employers escaped the fine altogether by treating the pregnant employee so badly that she finally resigned.[21] In the absence of a civil remedy there was little incentive for the victims of such discrimination to complain.

Although women's organisations lobbied for years for anti-discrimination legislation, by the end of the 1980s they had made very little headway. It was easy for the Hong Kong government to resist women's demands because its executive and legislative branches were entirely appointed and therefore largely unaccountable to the public. The Executive and Legislative Councils

14 See eg Ho Suk-ching, 'The Position of Women in the Labour Market in Hong Kong: A Content Analysis of the Recruitment Advertisements' (1985) 10 Labour and Society 334; Chan Kam-wah and Ng Chun-hung, 'Gender, Class and Employment Segregation in Hong Kong' in Lau Siu-kai et al (eds), *Inequalities and Development: Social Stratification in Chinese Societies* (Hong Kong: Hong Kong Institute of Asian-Pacific Studies, Chinese University of Hong Kong, 1994), ch 5; and Thomas W P Wong, 'Women and Work: Opportunities and Experiences' in Pearson and Leung (note 11 above), pp 47–66.

15 For an analysis of government reports showing pay discrimination within specific job titles, see Petersen, *Hong Kong Council of Women Report* (note 13 above), pp 3–4 and 'Women at Work' (note 13 above), pp 2–3. Wong (note 14 above), pp 62–3 has observed income disparities even when differences in education and age (as a proxy for experience) are controlled.

16 William K M Lee, 'Women Employment in Hong Kong' in Nyaw Mee-kau and Li Si-ming (eds), *The Other Hong Kong Report 1996* (Hong Kong: Chinese University Press, 1996), pp 283–4.

17 s 15.

18 See England (note 6 above), pp 175–6.

19 Employment Ordinance, s 15.

20 See South China Morning Post, 5 March 1997. In recognition of the failure of the law to curtail such practices, the penalty was recently increased: Employment (Amendment) Ordinance (No 73 of 1997).

21 The extent to which employers try to avoid the obligation to pay maternity leave is evidenced by a recent survey showing that a substantial percentage of pregnant employees report that they have been ill-treated by their employers, transferred to difficult posts, or not paid the full amount of their maternity leave. See Lee (note 16 above), pp 283–4.

were also heavily representative of the business community. As one commentator has noted, there is an 'element of truth in the old jibe that Hong Kong is run by the Jockey Club, Jardine Matheson, the Hong Kong Shanghai Bank, and the Governor — in that order.'[22]

However, in the 1990s, the equality movement was strengthened by a number of developments. As space limitations do not permit a detailed discussion of these factors, they will only be summarised here.[23]

The impact of the Bill of Rights

First, the anti-discrimination movement received some support (albeit mostly symbolic) from the enactment of the Hong Kong Bill of Rights Ordinance (Bill of Rights).[24] The government proposed a bill of rights (in late 1989) as part of its effort to restore public confidence after the massacre in Beijing's Tiananmen Square.[25] The Bill of Rights was essentially copied from the International Covenant on Civil and Political Rights (ICCPR). The ICCPR contains three articles prohibiting discrimination. The widest, Art 26 (which was copied into Art 22 of the Hong Kong Bill of Rights Ordinance), states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this regard, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Hong Kong women's movement initially viewed the Bill of Rights as a potentially powerful weapon against discrimination. They were particularly encouraged by the fact that the initial draft of the Bill of Rights applied not only to the government, but also to private persons. Thus, women hoped that it could be used as a weapon against discrimination in the private sector. However, the business community lobbied hard against such a broad application and when the Bill of Rights Ordinance was enacted in July 1991 it was amended so as to bind only the government and public authorities.[26]

22 Norman Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 5th ed 1991), p 47, quoting from R Hughes, *Hong Kong: Borrowed Place, Borrowed Time* (London: Deutsch, 2nd ed 1976), p 17.

23 For a more detailed analysis of these developments and their relationship to 1997, see Petersen, 'Equality as a Human Right' (note 12 above), especially at pp 348–86.

24 Ordinance No 59 of 1991.

25 Miners (note 22 above), p 27. For a discussion of the campaign for a bill of rights in Hong Kong prior to 1989, see Nihal Jayawickrama, 'Hong Kong and the International Protection of Human Rights' in Wacks (note 6 above).

26 See the Legislative Council's debate on the Bill of Rights Bill in *LegCo Proc*, 5 June 1991, pp 2307–39. See also Andrew Byrnes, 'The Hong Kong Bill of Rights and Relations Between Private Individuals' in Johannes Chan and Yash Ghai (eds), *The Hong Kong Bill of Rights: a Comparative Approach* (Hong Kong: Butterworths, 1993), especially at pp 83–8.

In the end, even in the area of public discrimination the Bill of Rights proved far less effective than women had hoped.[27] However, the debate surrounding the Bill of Rights (particularly the question of whether it should apply to private parties) publicised the extent of discrimination in Hong Kong and helped to identify the right to equality as a 'human right,' worthy of legal protection. In particular, the debate served to educate members of the Legislative Council, many of whom became strong supporters of the women's movement.

Support from the Legislative Council

The second significant development was the fundamental change in the role of the Hong Kong Legislative Council. In preparation for 1997, the Legislative Council became more democratic, with the first directly elected seats introduced in 1991. The legislature thus became more accountable to the general public, less beholden to the business community, and more willing to challenge the government.[28] As a result, in the early 1990s legislators frequently criticised the government's failure to address sex discrimination in Hong Kong. For example, in December 1992 the Legislative Council voted unanimously in favour of a motion calling upon the Hong Kong government to request the United Kingdom to extend the Convention on the Elimination of all Forms of Discrimination Against Women (Women's Convention) to Hong Kong.[29] This motion represented a clear challenge to the Hong Kong government, not only because it had long opposed the Women's Convention, but also because it would require Hong Kong to enact anti-discrimination legislation. Although the government was not obligated to change its position on the Women's Convention (and, indeed, did not do so for some time), it could not simply ignore the unanimous vote of the Legislative Council. The government thus promised to conduct its first formal consultation of the public on sex discrimination, by issuing a 'Green Paper' on the issue.[30] The government took more than a year to complete the process and used a very biased consultative document.[31] Nonetheless, at the conclusion of the consultation period it was

27 For a discussion of the reasons why the Bill of Rights has proven largely ineffective, even against discriminatory laws and government policies, see Carole J Petersen, 'The Hong Kong Bill of Rights and Women: A Bait and Switch?' in Fong, Byrnes, and Edwards (eds), *Hong Kong Bill of Rights: Two Years On* (Hong Kong: Faculty of Law, University of Hong Kong, 1993), pp 95–113. See also Petersen, 'Equality as a Human Right' (note 12 above), pp 357–61.

28 See Kathleen Cheek-Milby, *A Legislature Comes of Age: Hong Kong's Search for Influence and Identity* (Hong Kong: Oxford University Press, 1995), especially ch 7.

29 *LegCo Proc*, 16 December 1992, p 1451. All members present voted in favour of the motion except for the three ex officio members (government officers), who spoke against the motion but abstained from voting in the face of certain defeat.

30 *Green Paper on Equal Opportunities for Women and Men* (Hong Kong: Hong Kong Government, August 1993) (hereinafter the *Green Paper*).

31 For an analysis of several misleading and biased statements in the *Green Paper*, see Carole J Petersen, 'The Green Paper on Equal Opportunities for Women and Men: An Exercise in Consultation or Evasion?' (1994) 24 HKLJ 8, 11–13.

forced to admit that the majority of responses were in favour of the Women's Convention and the enactment of anti-discrimination legislation.[32]

Meanwhile, in September 1993 (while the Green Paper consultation exercise was still ongoing), a member of the Legislative Council directly challenged the government's 'laissez-faire' policy towards discrimination. Anna Wu began drafting her own private member's bills, the Equal Opportunities Bill[33] and the Human Rights and Equal Opportunities Commission Bill (the Commission Bill).[34] The Equal Opportunities Bill was intended to prohibit discrimination on a wide range of grounds (including sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political and religious conviction, and spent convictions[35]) in a broad range of activities (including employment, education, housing, the provision of goods and services, and the administration of laws and government programmes). The Commission Bill would have created an independent public body to enforce the rights created by the Equal Opportunities Bill, as well as other internationally recognised human rights.[36]

By drafting these bills on her own, Wu took the initiative away from the executive branch. In the past, the government had proposed and drafted almost all new laws. The role of the Legislative Council was to study the government's bill, propose amendments, and debate and vote upon it. Prior to 1991, private members' bills were rare and used only to incorporate or regulate the affairs of a charity or other private institution.[37] However, as the Legislative Council became more democratic and assertive, non-government members began to draft and introduce public bills. Wu's Equal Opportunities Bill was the most ambitious of these bills, in that it covered an entire area of law.[38]

Wu faced one important legal constraint. Under Hong Kong's colonial constitution, a member of the Legislative Council was required to obtain express permission from the Governor before she could introduce any bill that would require the expenditure of public revenue.[39] Fearing a refusal, Wu drafted

32 See Statement of the Secretary for Home Affairs, South China Morning Post, 31 December 1993. See also *Green Paper on Equal Opportunities for Women and Men: Compendium of Submissions* (Hong Kong: Hong Kong Government, May 1994).

33 Hong Kong Government Gazette, Legal Supplement No 3, 1 July 1994, pp C991–1275.

34 Human Rights and Equal Opportunities Commission Bill 1994, draft distributed for public consultation, March 1994. Unlike the Equal Opportunities Bill, the Commission Bill was not published in the Government Gazette because Governor Patten refused permission for it to be introduced into the Legislative Council (see discussion below). However, it was published as an appendix to an article by Anna Wu. See Edwards and Byrnes, *Hong Kong Bill of Rights: 1991-1994 and Beyond* (Hong Kong: Faculty of Law, University of Hong Kong, 1995), appendix.

35 A person has a 'spent conviction' if he has been convicted of at most one offence, was not sentenced to death, imprisonment, or a fine exceeding $5,000, and has had a 'clean' record for at least three years: Equal Opportunities Bill, cl 188.

36 Commission Bill, cls 62–101.

37 See Miners (note 22 above), p 121.

38 Cheek-Milby (note 28 above), p 243.

39 Royal Instructions, cl XXIV(2)(c), reprinted in Andrew Byrnes and Johannes Chan (eds), *Public Law and Human Rights: A Hong Kong Sourcebook* (Hong Kong: Butterworths, 1993), pp 27–37.

the Equal Opportunities Bill so that it would not require any funding (and therefore could be introduced without the Governor's permission).[40] However, it was impossible to draft the Commission Bill so as not to require public revenue and the Governor did, indeed, refuse Wu permission to introduce it.[41]

The Equal Opportunities Bill was introduced into the legislature in July 1994. A Bills Committee (to study the bill and receive public submissions) was formed and began meeting in August 1994, with a view to putting the bill to a vote by July 1995. The introduction of Wu's bill put the Hong Kong government in a difficult position. The women's movement had acquired significant support in the legislature and in the general public (as demonstrated by the Green Paper consultation exercise). Public sympathy for the disabled was also at a high point, following several well-publicised incidents of discrimination against them (including violent demonstrations against the establishment of centres for the mentally disabled in residential areas). Other groups who stood to benefit from Wu's bill — racial minorities, trade unions, and gay rights groups — were also lobbying in support of Wu, in the hope that she could seize the momentum and enact a truly comprehensive anti-discrimination law.

Given the widespread public demand for action against discrimination, even the pro-business legislators would have had difficulties voting against Wu's bill — unless they could be presented with a more conservative alternative bill. The government thus reluctantly announced that it would introduce bills prohibiting the two areas of discrimination that had generated the most public support — sex discrimination and disability discrimination. It quickly drafted a Sex Discrimination Bill (essentially copying the UK's Sex Discrimination Act and adding several exemptions) and introduced it in October 1994.[42] The government's Disability Discrimination Bill followed in April 1995. The Sex Discrimination Bill was significantly more conservative than the relevant provisions of the Equal Opportunities Bill, containing more exemptions and provisions designed to delay the bill's implementation.[43]

But despite these weaknesses, the government's proposal had one thing that the women's movement and the disabled groups wanted, and which Anna

40 The Equal Opportunities Bill was drafted so as to be enforceable through the existing court system. Had both bills been enacted, the Commission Bill would have amended the Equal Opportunities Bill to provide for enforcement through the Commission and an Equal Opportunities Tribunal: Commission Bill, cl 103.

41 See Sally Blyth, 'Exco Rejects Wu's Rights Commission,' Eastern Express, 22 June 1994. As a result of the Governor's refusal, the Legislative Council was not permitted to study or debate Wu's Commission Bill. Although opposition from China was certainly a factor in the Governor's decision, Wu has argued that Hong Kong's colonial government also did not want an independent human rights commission monitoring its compliance with international norms. See Anna Wu, 'Human Rights: Rumour Campaigns, Surveillance and Dirty Tricks, and the Need for a Human Rights Commission' in George Edwards and Andrew Byrnes (eds), *Hong Kong's Bill of Rights: 1991–1994 and Beyond* (Hong Kong: Faculty of Law, University of Hong Kong, 1995), pp 73–80.

42 Hong Kong Government Gazette, Legal Supplement No 3, 14 October 1994, pp C1382–535.

43 For example the Sex Discrimination Bill included a provision giving the Secretary unlimited discretion as to when it would come into force and a five year exemption for small businesses.

Wu's bill could not give them — an Equal Opportunities Commission. Although the Governor had refused to permit Wu to introduce her own Commission Bill, the government wisely provided for an Equal Opportunities Commission in its own proposal. The ambit of the government's proposed commission was narrower than the one proposed by Wu (as it would not address general human rights concerns or the implementation of international conventions). But it could assist victims and attempt to conciliate complaints of discrimination[44] (an approach that appealed to the business community as well as to victims, as it could avoid costly litigation).

Recognising the value of an Equal Opportunities Commission, Wu announced (in the spring of 1995) that she would withdraw the provisions of her bill relating to sex and disability discrimination and support the government's Sex Discrimination Bill and Disability Discrimination Bill. She then tried to amend the government's bills (so as to reduce the number of exemptions and expand the functions of the Equal Opportunities Commission).

Several of Wu's proposed amendments to the government's bills were accepted by the government and therefore easily enacted. Her remaining amendments were debated in the Legislative Council, where the government succeeded in defending most of its exemptions. Wu also continued to lobby for the enactment of the parts of her Equal Opportunities Bill that were not addressed by the government's bills.[45] The remaining grounds of discrimination covered by Wu's Equal Opportunities Bills (including age, sexuality, race, political and religious belief, and family status) came to a vote in late July 1995. These bills were supported by the majority of the members of the Bills Committee and by the Democratic Party (which held the largest number of directly elected seats in the Legislative Council). However, the government lobbied hard against her, arguing that Hong Kong should gain experience with the Sex Discrimination Ordinance and the Disability Discrimination Ordinance before adopting broader legislation. This argument provided legislators with an acceptable explanation for rejecting more comprehensive legislation. In the end, the combined forces of the government's ex-officio members, appointed members, and pro-business legislators provided enough votes to defeat Wu's bills.

Implementation of the new laws

Given that the Hong Kong government was essentially pushed into introducing anti-discrimination laws, it is not surprising that it drafted the bills so as to

[44] See Sex Discrimination Bill, cls 56 and 75–7.

[45] Wu reintroduced these provisions as three separate bills: the Equal Opportunities (Family Responsibility, Sexuality, and Age) Bill; the Equal Opportunities (Race) Bill; and the Equal Opportunities (Religious or Political Conviction, Trade Union Activities, and Spent Conviction) Bill: Hong Kong Government Gazette, Legal Supplement No 3, 30 June 1995, pp C1660–1971 (the Equal Opportunities Bills).

provide for fairly slow implementation. Both laws gave the government complete discretion as to when to bring them into force[46] and it refused to implement either law until the Equal Opportunities Commission was created and fully operational. (This was not strictly necessary, as victims could enforce the laws in the courts as well as through the Commission.) The government was then quite slow to establish the Commission: it did not advertise the key position of Chairman of the Commission until March 1996, a full eight months after the two ordinances were enacted.[47] As a result, the Chairman (Dr Fanny Cheung) did not take up the position until May 1996. She devoted much of the summer of 1996 to the recruitment of other staff and the Commission did not become fully operational until September 1996.

The *non-employment* provisions of the Sex Discrimination and Disability Discrimination Ordinances were brought into force in September 1996, shortly after the Equal Opportunities Commission became fully operational. The *employment* provisions were delayed even further, until 20 December 1996. This was because the Secretary for Home Affairs refused to bring the employment provisions into force until detailed 'Codes of Practice' could be issued to guide employers on their obligations under the new laws. Women's and disability groups objected to this plan, as they feared that it could potentially delay enforcement of the employment provisions by an additional year or more (because the Codes of Practice had to be drafted in consultation with employer and employee groups and then be tabled for approval by the Legislative Council). However, the Commission's staff actually worked very quickly (putting in many late nights). It conducted two rounds of public consultations, and managed to table the Codes before the Legislative Council by 20 November 1996. The Legislative Council formed a subcommittee to study the Codes and approved them (with some revisions). The Codes and the employment provisions of the two ordinances thus came into force on 20 December 1996. Small businesses (those employing five or fewer employees) continue to enjoy a three-year exemption (from the date of enactment) from the duty not to discriminate,[48] but this exemption will expire in mid-1998.

Two additional bills were passed in June 1997. Christine Loh's Sex and Disability Discrimination (Miscellaneous Provisions) Bill was passed on 11 June 1996 (despite objections from the government and the business community), significantly improving the remedies for discrimination and harassment.[49] In

46 Sex Discrimination Ordinance, s 1; Disability Discrimination Ordinance, s 1. An amendment proposed by Wu and the Bills Committee that would have brought them into operation no later than 1 January 1996 was defeated.

47 See South China Morning Post, 3 March 1996.

48 See Sex Discrimination Ordinance, ss 11(3)–(7); Disability Discrimination Ordinance, s 11(3)–(5). The exemption applies only to the provisions prohibiting *discrimination* and not to provisions prohibiting sexual harassment or 'victimisation' (discrimination against applicants and employees on the ground that they have taken actions to enforce the ordinance).

49 The impact of this ordinance is discussed further below.

addition, a government bill to prohibit discrimination on the grounds of family responsibility was also enacted.[50]

Compliance with the new laws will require some important changes to the advertising, hiring, and management practices of many Hong Kong companies. The legislation makes the employer vicariously liable for actions by employees in the course of their employment — even if the employee acted without the consent or knowledge of the employer.[51] The only defence to such liability is for the employer to show that it took 'such steps as were reasonably practicable' to prevent the unlawful behaviour.[52] Thus employers should be proactive and design policies to prevent discrimination and harassment.

In deciding what steps to take, employers should pay close attention to the two Codes of Practice on Employment. Technically, the Codes do not create any additional legal duties. However, a failure to follow the recommendations in the Codes can be used as evidence in court (for example, to show that a person intended to discriminate or to show that the employer failed to take 'reasonably practicable' steps to prevent unlawful acts).[53] Thus, while not technically enforceable, the Codes will have the practical effect of imposing duties on employers — duties which reflect the Commission's application of the laws to specific facts and which therefore are often more specific and detailed than the general duties stated in the actual laws.

The following discussion is divided into three broad areas. The first deals with discrimination on the grounds of sex, marital status, pregnancy, and family status. The second examines the question of sexual harassment. The third considers disability discrimination.

Discrimination on the grounds of sex, marital status, pregnancy, and family status

Sex discrimination

Section 11 of the Sex Discrimination Ordinance states the basic obligation not to discriminate on the basis of sex against applicants for jobs and existing employees.[54] It provides:

50 Family Status Discrimination Ordinance.

51 Sex Discrimination Ordinance, s 46; Disability Discrimination Ordinance, s 48; Family Status Discrimination Ordinance, s 34.

52 Ibid.

53 Sex Discrimination Ordinance, s 69(14); Disability Discrimination Ordinance, s 65(13). At present there is no code of practice on family status discrimination, but the Commission has issued a draft for public consultation. See Family Status Discrimination Ordinance, s 47.

54 Although s 11 protects only applicants and employees, the ordinance contains several provisions designed to protect those who do not fall within the legal definition of 'employee' (such as contract workers and partners in partnerships of at least six persons) and the legal principles discussed in this section are thus applicable to those relationships as well. See Sex Discrimination Ordinance, ss 13 and 15. Several additional areas related to employment (such as trade unions, qualifying bodies, employment agencies, and providers of vocational training) are also covered by the ordinance but are outside the scope of this article: ibid, ss 17–19.

(1) It shall be unlawful for a person, in relation to employment by him at an establishment in Hong Kong, to discriminate against a woman —
   (a) in the arrangements he makes for the purpose of determining who should be offered that employment;
   (b) in the terms on which he offers her that employment; or
   (c) by refusing or deliberately omitting to offer her that employment.
(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Hong Kong, to discriminate against her —
   (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them;
   (b) in the terms of employment he affords her;
   (c) by dismissing her, or subjecting her to any other detriment.[55]

Of course, none of these actions are prohibited unless the woman can demonstrate that they constitute 'discrimination' against her. Section 5 defines discrimination against women, providing in relevant part:

(1) A person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Ordinance if —
   (a) on the ground of her sex he treats her less favourably than he treats or would treat a man; or
   (b) he applies to her a requirement or condition which he applies or would apply equally to a man but —
      (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
      (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
      (iii) which is to her detriment because she cannot comply with it.

Part (a) of this definition is commonly referred to as 'direct discrimination,' because it requires proof that the victim was treated less favourably on the

[55] Although s 11 does not expressly mention 'equal pay for equal work,' this is clearly required by the references to the 'terms of employment.' Whether the Sex Discrimination Ordinance also requires equal pay for work of equal *value* is more controversial. The Sex Discrimination Code of Practice on Employment states that 'employers are encouraged to progressively implement equal pay for equal value.' However, it is certainly arguable that the Sex Discrimination Ordinance already *requires* equal pay for work of equal value and the Code of Practice cannot lessen the obligations imposed by the ordinance. For a discussion of the concept of equal pay for work of equal value in the context of Hong Kong, see Anne Cheung, 'Pay Equity for Hong Kong: A Preliminary Exploration' (1995) 25 HKLJ 383.

ground of her sex. However, it should be noted that s 4 of the ordinance provides that if an act is done for two or more reasons and one of the reasons is the sex (or marital status or pregnancy) of a person, then for the purposes of the ordinance the act shall be taken to have been done because of the sex (or marital status or pregnancy) of the person. This section did not appear in the government's original draft of the Sex Discrimination Bill, but the government agreed to borrow it from Wu's Equal Opportunities Bill.[56]

The impact of s 4 is best demonstrated by an example: suppose a company gives speed and accuracy tests to all of its word processors and five (two women and three men) fail the test. If the company decides to fire only the two women who failed the test, its decision could be considered direct discrimination. The company might argue that it fired these two women because they failed the test, noting that the women who *passed* the test were not fired. In fact, the two women were fired for two reasons — because they failed the test and because they were women. However, under s 4 of the ordinance, the act would be taken to have been done because they were women and it would thus constitute direct sex discrimination. Another way of analysing the example is to ask: did the women who were fired receive less favourable treatment than the men in like circumstances? Clearly they did — the *men* who failed the test were not fired.

The Sex Discrimination Ordinance does not expressly prohibit employers from asking the sex or marital status of the applicant or from requesting a photograph with the application. However the Sex Discrimination Code of Practice on Employment clearly states that employers should avoid this as it 'may indicate an intention to discriminate on the ground of sex.'[57] The Code of Practice also instructs employers to avoid questions on the application form which could lead to discrimination against women (such as questions relating to their marital status, number of children, and child-care arrangements).[58] Employers are instructed to ask in interviews only those questions 'that relate directly to the essential requirements of the job.' Perhaps most important, employers are advised to:

> [E]nsure that personnel staff, line managers, and all other employees who may be involved in staff recruitment receive training on lawful, non-discriminatory practice. It should also be brought to their attention that it is unlawful to instruct or put pressure on others to discriminate ...[59]

56 The clause in the Equal Opportunities Bill that ultimately became s 4 of the Sex Discrimination Ordinance was borrowed from Australian legislation. See, for example, the Western Australia Equal Opportunity Act reprinted in *Australian and New Zealand Equal Opportunity Law and Practice* (Sydney: CCH Australia Limited), s 5.

57 Sex Discrimination Code of Practice on Employment, para 11.5.3.

58 Ibid, para 11.7.1.

59 Ibid, para 11.8.1.

In jurisdictions with years of experience with anti-discrimination laws, these recommendations may seem quite reasonable. However, in Hong Kong the relationship between employers and employees has been largely unregulated and discrimination in the private sector has been entirely legal. Thus, it is quite significant for the Equal Opportunities Commission to issue a Code of Practice that essentially tells employers to spend time (and money) to train their managers about non-discriminatory employment practices and to persuade them to abandon ingrained sexist notions. If an employer (particularly a large one with sufficient resources to comply with the Code) does not undertake such training and discrimination occurs, this could be deemed a failure to take 'such steps as were reasonably practicable' to prevent the unlawful act. The employer could then be held vicariously liable for direct discrimination by his employees, despite the fact that they may have been committed without his knowledge or consent.

The second part of the definition of discrimination quoted above (s 5(1)(b)) is commonly known as 'indirect' discrimination. This provides that it is also discrimination if an employer applies to a woman a *requirement or condition* that also applies to men, but which affects women disproportionately and which cannot be justified by the employer. Indirect sex discrimination arises from rules or requirements which on their face are neutral, but in fact put women applicants or employees at a disadvantage. Unnecessary height and weight requirements are the classic examples of 'indirect' sex discrimination. However, there are many less obvious practices that could be affected by the legislation. For example, although there still is no law expressly prohibiting age discrimination in Hong Kong, an upper age limitation might constitute indirect sex discrimination (because women who have children tend to start their careers later than men).[60]

Similarly, a requirement that an employee work for five years' 'continuous' service (with no breaks beyond normal vacation time and sick days) in order to be eligible for promotion could arguably be indirect discrimination. The requirement might be *applied* equally to male and female employees. However, because many female employees take maternity leave the 'proportion of women who can comply with it' would be 'considerably smaller than the proportion of men who can comply with it.' In Western Australia, this argument was used by a female teacher to challenge promotion guidelines in state schools. The complainant had originally been appointed (on the basis of merit) to the position of Acting Deputy Principal. However a male teacher who had more years of service complained (relying upon guidelines for promotion that were based upon length of service and seniority) and had subsequently been given the position. The Equal Opportunities Tribunal decided that the guidelines

[60] See *Price v Civil Service Commissioners* [1978] ICR 27.

imposed a 'requirement or condition' that the applicant be a senior teacher with a substantial period of uninterrupted full-time service and that this constituted indirect discrimination against the complainant.[61]

The extent to which the Sex Discrimination Ordinance will be effective against such practices in Hong Kong depends to a large degree on how courts interpret the definition of indirect discrimination. The definition used in the Sex Discrimination Ordinance is fairly traditional and, if narrowly interpreted by the courts, could exclude many discriminatory hiring and promotion practices. For example, courts in the United Kingdom have held that the complainant alleging indirect discrimination must identify a requirement or condition that acted as an 'absolute bar' to her hiring or promotion.[62] As hiring and promotion decisions are normally based upon a balance of criteria, this is very difficult to establish. Fearing that Hong Kong courts would follow the UK courts' interpretation of 'requirement or condition,' Legislative Councillor Christine Loh proposed (in her Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996) a broader definition of indirect discrimination. However this clause of Loh's bill was vigorously opposed by the government and pro-business legislators and was defeated.[63]

The definitions of direct and indirect discrimination make no reference to intentions and it is not necessary for the complainant to show that the alleged discriminator intended to discriminate against her. Thus, the *motive* behind the discriminatory action will generally be irrelevant to determining whether unlawful discrimination has occurred. For example, in a case of direct discrimination it would not be a defence for the employer to claim that he refused to promote a woman for a job requiring frequent travel to China because he felt that the travel would damage her relationship with her children. Similarly, in cases of indirect discrimination the fact that the employer may have been unaware that a requirement for promotion (such as five years of continuous service) put women at a disadvantage is irrelevant to the question of whether the requirement constitutes indirect discrimination.

However, motive is relevant to the issue of *damages* for indirect discrimination. This is because the Sex Discrimination Ordinance expressly states that no damages shall be awarded for indirect discrimination if the employer proves that the requirement or condition concerned was not applied with the *intention* of treating the claimant unfavourably on the ground of her sex, marital status or pregnancy.[64] Of course, if the employer had been made aware (for example by the Equal Opportunities Commission or by a prior court decision) that a particular requirement constituted indirect discrimination, then continued

61 *Kemp v Minister for Education* [1991] EOC para 92-340.
62 See *Perera v Civil Service Commission and Department of Customs & Excise (No 2)* [1983] IRLR 141 and *Meer v London Borough of Tower Hamlets* [1988] IRLR 399.
63 See *Draft of Official Record of Proceedings of Hong Kong Legislative Council*, 11 June 1997, pp 201–4.
64 Sex Discrimination Ordinance, s 76(5).

application of that requirement could be considered intentional discrimination and thus warrant an award of damages.

On its face, s 11 appears to prohibit only sex discrimination against a *woman* (as defined in s 5). However, s 6 states that 'Section 5, and the provisions of Parts III and IV relating to sex discrimination against women, shall be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as necessary.' Thus, in cases in which a man alleges sex discrimination, the court would have to substitute 'man' for 'woman' and 'his sex' for 'her sex' in s 5, and make similar modifications to numerous other relevant provisions of the ordinance.

This situation is the result of a decision on the part of the Hong Kong government to copy much of the UK Sex Discrimination Act. Women's organisations objected to this approach, arguing that the UK Act was outdated and that the government should adopt a gender neutral drafting style.[65] Moreover, the language used is simply confusing — a non-lawyer could easily miss s 6 and incorrectly assume that s 11 and the many other similarly worded provisions in the ordinance prohibit only discrimination against women. Gender neutral language, such as that used in Wu's Equal Opportunities Bill (which referred, for example, to discrimination 'against a *person* on the grounds of that person's sex') would have avoided these problems. However, the government refused to make any amendments of this nature. It is unlikely that any legislator will now try to amend the ordinance to adopt gender neutral language, as this would require rewriting many provisions.

Marital status, pregnancy, and family status discrimination

In addition to discrimination on the ground of sex, the Sex Discrimination Ordinance also prohibits discrimination on the grounds of marital status and pregnancy. This is accomplished in ss 7–8, which essentially expand the definition of discrimination to include discrimination on the ground of a person's marital status or pregnancy. The definitions of these types of discrimination are substantially similar to the definition of sex discrimination, adopting the same two-part (direct and indirect) structure and thus the principles discussed above are applicable.

The prohibition of pregnancy discrimination may well cause employers more concern than the sex discrimination provisions. Now that women will be able to initiate a civil action and obtain damages, they will have far more incentive to complain about employers who fire or mistreat them when they become pregnant. From the perspective of the business community, the pregnancy provision probably constitutes one of the most 'interventionist'

[65] See *Submission of the Coalition of Women's Organisations to the Bills Committee to Study the Sex Discrimination Bill* (signed by thirteen women's organisations and circulated to the Bills Committee in January 1995), para 5.

parts of the Sex Discrimination Ordinance. As the obligation to pay maternity leave clearly costs employers money, many employers may view the decision to fire a pregnant worker as a perfectly 'rational' business practice.

Discrimination on the ground of family responsibility (or 'family status') occurs when an employer treats an employee or applicant less favourably because of her family responsibilities. For example, an employer who refuses to hire a mother of young children (because he assumes that she will not want to work overtime) has discriminated against her on the ground of her family status. Family status was one of the areas of discrimination that was included in Anna Wu's Equal Opportunities Bill but excluded from the government's Sex Discrimination Bill. However, in the course of the government's last minute lobbying against Wu's bill, it promised to conduct formal public consultation on the additional areas of discrimination covered by her bill. Thus, after Wu's bill was defeated the government was obligated to consult the public on the topics of age, family status, race, and sexuality discrimination.[66] At the end of these consultation exercises, the government concluded that only family status discrimination legislation enjoyed sufficient public support (and was sufficiently non-controversial).[67] The government thus proposed a bill which was enacted in June 1997.[68] The new law is almost identical in structure and language to the Sex Discrimination Ordinance and thus the principles discussed above are applicable to it.

Exceptions from the duty not to discriminate

Both the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance set forth certain situations in which the prohibition against discrimination in employment will not apply.[69] For example, although affirmative action is never required by the ordinance, there is an express exception for

[66] See *Equal Opportunities: A Study on Discrimination in Employment on the Ground of Age — A Consultation Paper* (1996); *Equal Opportunities: A Study on Discrimination on the Ground of Family Status — A Consultation Paper* (1996); *Equal Opportunities: A Study on Discrimination on the Ground of Race — A Consultation Paper* (1997); and *Equal Opportunities: A Study on Discrimination on the Ground of Sexual Orientation — A Consultation Paper* (1996) (all published by Hong Kong government, 1996). For a critique of the sexuality consultation exercise and its significance to the gay and lesbian rights movement in Hong Kong, see Carole J Petersen, 'Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong' (1997) 19 Loyola of Los Angeles International & Comparative Law Journal 337, 358–62.

[67] See Home Affairs Branch, 'Equal Opportunities: Family Status and Sexual Orientation' (Hong Kong: Legislative Council Brief).

[68] Family Status Discrimination Ordinance.

[69] One exemption that is not addressed in this article is the temporary exemption (s 57) for the 'protective laws' that restrict the nature and hours of women's work. The government has been compelled to review these laws and gradually reform them (either to eliminate regulations that are clearly discriminatory or to apply them to both sexes). Thus this exemption is becoming increasingly less significant and should eventually apply only to regulations that protect women from risks that are truly specific to them. For examples of the protective regulations, see Petersen, 'Equality as a Human Right' (note 12 above), pp 345-6 and England (note 6 above), pp 179-81. For a discussion of how protective legislation was reformed in the United Kingdom (as part of its implementation of the European Commission's Equal Treatment Directive), see Simon Deakin and Gillian S. Morris, *Labour Law* (London: Butterworths, 1995), pp 544–5.

voluntary affirmative action.[70] Thus if an engineering firm has never employed a female engineer and wishes to make up for past discrimination against women applicants by only advertising for female engineers for a period of time, this should not be considered unlawful discrimination against men.

The other important exemption for the private employment market is s 12(1) of the Sex Discrimination Ordinance, which permits employers to refuse to hire a woman where 'being a man is a genuine occupational qualification for the job.' This section (which also applies to decisions to hire only women, by operation of s 6) provides a list of the situations in which being a particular sex will be considered a 'genuine occupational qualification' (for example, jobs involving a state of undress). However, the list is quite specific and narrowly defined. Moreover, it expressly prohibits employers from making the stereotypical judgment that jobs requiring 'physical strength or stamina' must be performed by men.[71] Thus, employers may not claim that a man must be hired as a security guard on the assumption that only a man would have sufficient strength and presence for the job. Rather the employer must specify the qualifications (eg physical strength or the ability to confront an unwelcome visitor) and allow women as well as men to apply for the job. If enforced, this would require a significant change in recruitment policies for many jobs traditionally viewed as being unsuitable for women. Indeed, when the issue was discussed in one of the meetings of the Bills Committee, one legislator (who has actually supported the women's movement in many other contexts) admitted that he found the very idea of women security guards to be 'mind boggling.'

It is too soon to assess the extent to which employers are actually changing their practices in order to comply with the new law. In a recent Legislative Council debate on Christine Loh's bill to amend the ordinance, James Tien (a conservative pro-business legislator) claimed that employers have been working hard to understand the law and comply with it. But Mr Tien's comments may reveal something about the meaning of 'compliance' in the minds of employers. In describing the new 'personnel policy and administrative procedures' that have been developed by employers to 'deal with' the new laws, Mr Tien stated:

> we have learnt not to specify female in advertising for a female secretary. We will simply advertise for a secretary, even though at the end we will only offer a secretary job to a female. For example, we have learnt that when we decided not to promote a female employee but a male employee, we should

70 Sex Discrimination Ordinance, s 48; Family Status Discrimination Ordinance, s 36. This section did not appear in the Sex Discrimination Bill, as originally drafted by the government. However, the government agreed to borrow the provision from cl 37 of Anna Wu's Equal Opportunities Bill. See also the Sex Discrimination Ordinance Code of Practice, para 8.1.

71 Sex Discrimination Ordinance, s 12(2)(a).

not tell the female employee that she is not promoted because she is a female, just tell her she is less qualified.[72]

Clearly, such cynical tactics (while admittedly making it more difficult to prove discrimination) do not constitute 'such steps as were reasonably practicable' to prevent unlawful discrimination. One hopes that employers will be more sincere in their efforts to implement the new laws.

Sexual harassment

Sexual harassment of working women has been a serious threat to women from the time they entered the workforce. In addition to harming the victim, sexual harassment hurts the entire organisation, as it creates a stressful work environment and may cause victims to be absent from work or to quit their jobs.[73] Nonetheless, until the Sex Discrimination Ordinance came into force, women who suffered harassment had little or no legal recourse.[74] As a result, most Hong Kong employers ignored the issue and failed to introduce company policies condemning it.[75]

In many jurisdictions, the law relating to sexual harassment has arisen from judicial interpretation of statutes prohibiting sex discrimination. For example, in *Strathclyde Regional Council v Porcelli*,[76] the court held that if the harassment constituted less favourable treatment on the ground of sex it could be considered discrimination within the meaning of the UK Sex Discrimination Act. Similarly, in *Meritor Savings Bank, FSB v Vinson*,[77] the US Supreme Court endorsed guidelines of the Equal Employment Opportunities Commission that characterised sexual harassment as a form of unlawful sex discrimination. In New South Wales, Australia, the Equal Opportunity Tribunal also held that sexual harassment can amount to a 'term or condition of employment' or a 'detriment' and therefore can constitute sex discrimination.[78]

72 Speech by James Tien, *Draft Proceedings of the Legislative Council*, 11 June 1887, p 163.

73 For the first comprehensive study of the problem of sexual harassment at work (in the context of the American legal system), see Catharine A MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979). See also Hazel Houghton-James, *Sexual Harassment* (London: Cavendish Publishing Limited, 1995).

74 Previously, sexual harassment was only unlawful if it amounted to a criminal offence (such as sexual assault). Of course, since any employee who made a complaint of sexual assault against her employer was certain to lose her job, this provided no real remedy.

75 See Harriet Samuels, 'Upholding the Dignity of Hong Kong Women: Legal Responses to Sexual Harassment' (Winter 1995) 4 Asia Pacific Law Review, No 2, pp 92–3.

76 [1986] IRLR 134 CS.

77 477 US 57, 106 S Ct 2999 (1986).

78 *O'Callaghan v Loder* [1984] EOC para 92-023. New South Wales has since amended its legislation to expressly prohibit sexual harassment.

Increasingly, however, legislatures are enacting laws which expressly prohibit sexual harassment.[79] Hong Kong wisely followed this example, providing a statutory definition of sexual harassment and prohibiting it in several protected spheres (including employment, education, and the provision of goods and services). This approach provides more certainty and avoids the need for argument in court on the issue of whether the harassment constituted sex discrimination.

The Sex Discrimination Ordinance prohibits sexual harassment in a wide range of working relationships. For example, s 23 makes it unlawful for an employer to sexually harass an employee or a person who is seeking to become an employee. It is also unlawful for one employee to harass a fellow employee or a person who is seeking to become a fellow employee. Workers who are outside the strict definition of an employee (such as contract workers, commission agents, and partners in a firm) are similarly protected. The prohibition on sexual harassment is actually more 'interventionist' than the provisions relating to sex discrimination in that there is no temporary exemption for small businesses and no exemption for partnerships with fewer than six partners. Thus all employers should be taking steps to prevent sexual harassment in the workplace — or risk vicarious liability for harassment by their employees, partners, and agents.[80]

Section 2(5) of the ordinance defines sexual harassment as follows:

> For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if —
>
> (a) the person —
>
> (i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or
>
> (ii) engages in other unwelcome conduct of a sexual nature in relation to her,
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated, or intimidated; or
>
> (b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for her.[81]

79 For example in Australia, federal, Victorian, New South Welsh, South Australian, Western Australian, Australian Capital Territory, and Northern Territory legislation all contain specific provisions prohibiting sexual harassment. See *Australian and New Zealand Equal Opportunities Law and Practice* (Sydney: CCH Australia Limited), para 59-500.

80 The ordinance also prohibits sexual harassment in several areas that are outside the workplace but related to employment. For example, it is unlawful for a member of the staff of an employment agency, trade union, or qualifying body to sexually harass a person. It is also unlawful for a person who makes arrangements for women to undergo training in connection with employment to sexually harass a woman seeking or undergoing such training. See Sex Discrimination Ordinance, s 24.

81 Section 2(8) provides that this definition and the various sections prohibiting sexual harassment are to be 'treated as applying equally to the treatment of men.'

Subsection (a) is often described as quid pro quo harassment. The unwelcome advance, request, or conduct must have been made 'to her' or 'in relation to her.' Subsection (a) also imposes a partly 'objective test,' by requiring that the request, advance, or conduct occurred in circumstances in which *a reasonable person* would have anticipated that the victim would be offended, humiliated, or intimidated. To a large extent, the court's decision on whether conduct was unlawful will depend on how the court defines the 'reasonable person.' Is it the average Hong Kong male supervisor? The average Hong Kong female secretary? There is likely to be substantial difference in their views as to what could cause a person to feel offended, humiliated, or intimidated.[82] For example, in a case in the United States a trial court dismissed love letters and persistent requests for dates as 'trivial.' However, the appellate court disagreed and expressly adopted a 'reasonable woman' standard for assessing whether conduct constituted unlawful harassment.[83]

Subsection (b) of the definition is significantly broader than sub-s (a), in that it covers situations in which the sexual conduct may not have been directed specifically at the victim, but nonetheless created a 'sexually hostile or intimidating working environment for her.' The government agreed to add this provision to its initial draft of the bill at the request of Anna Wu and women's organisations.

The effect of sub-s (b) can best be demonstrated by an example: assume that a male employee plasters the walls of the coffee room with sexually explicit posters. A woman employee might be very offended and intimidated by such posters. But she might have difficulty taking action under the definition of quid pro quo sexual harassment, as the defendant would argue that the posters did not constitute an unwelcome sexual advance or a request for sexual favours *to her*, or 'conduct of a sexual nature *in relation to her*' (unless the posters happened to make some reference to her). However, the woman employee could make a complaint of sexual harassment based upon sub-s (b), providing that she can show that the posters create a 'sexually hostile or intimidating work environment.'[84]

82 For example, a recent survey of students at Chinese University found that a far greater percentage of female students than male students thought that sexual harassment was prevalent on campus. See Thomas Siu-kin Wong, 'The Subjectivities of Sexual Harassment Among University Students,' paper presented at the International Conference on Violence Against Women: Chinese and American Experiences, November 1994.

83 *Ellison v Brady*, 934 F 2d 872, 878-81 (9th Cir 1991). For further discussion of male and female perspectives on sexual harassment, see Jane L Dolkart, 'Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards' (1994) 43 Emory Law Journal 151; Susan Estrich, 'Sex at Work' (1991) 43 Stanford Law Review 813; and Nancy Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99 Yale Law Journal 1177.

84 Sex Discrimination Ordinance, s 2(6). This part of the definition of sexual harassment is restricted to the area of employment and does not apply to the areas of education, housing, or the supply of goods and services: ibid, s 2(7).

As noted earlier, the Sex Discrimination Ordinance imposes vicarious liability on the employer unless he can show that he took 'such steps as were reasonably practicable' to prevent his employee or agent from committing the unlawful act. What is 'reasonably practicable' will, of course, vary according to the size and sophistication of the organisation. A shop-owner with just three employees might not be expected to do much more than make it clear that sexual harassment is not permitted. However, large companies are clearly capable of more and the Sex Discrimination Ordinance Code of Practice on Employment provides very detailed recommendations on what they should do to prevent and address harassment.

For example, the Code states that employers should formulate a policy statement against sexual harassment, which should include a 'clear statement that sexual harassment will not be tolerated,'[85] the 'legal definition of sexual harassment,'[86] and examples of prohibited conduct.[87] The policy should be widely circulated through distribution of the written policy statement, posting of notices, discussion at staff meetings, and 'training and refresher courses.'[88] The employer should also designate a 'co-ordinator, preferably with special training' to establish and administer both informal and formal complaints procedures.[89] The procedures must assure potential complainants that 'no one will be victimized or penalized for coming forward with a complaint.'[90] The co-ordinator and all other staff members involved in the complaints procedure should receive adequate training to ensure 'sensitive treatment of cases,' including training on what is sexual harassment, how to prevent it, and how to deal with it.[91]

Clearly, the recommendations cited above (which are only a partial list) will require a certain amount of managerial time (and therefore money) to design and implement. Moreover, they will require Hong Kong employers to actively delve into a sensitive area of employee relations — one which many employers would probably prefer to ignore. Employers may also encounter significant resistance from senior staff members who are not particularly interested in curtailing (or 'sensitising') their behaviour. However, if an employer does not take the initiative and make a reasonable attempt to follow these recommendations, it could be vicariously liable for sexual harassment, despite the fact that it may have occurred without its consent or knowledge.

85 Sex Discrimination Ordinance Code of Practice on Employment, para 20.2.2.
86 Ibid, para 20.2.3.
87 Ibid, para 20.2.4.
88 Ibid, para 21.3.
89 Ibid, para 21.1.
90 Ibid, para 20.2.7.
91 Ibid, para 21.4.

Disability discrimination

The motivating force behind the enactment of the Disability Discrimination Ordinance was a series of protests (against the establishment of centres for the mentally disabled in residential neighbourhoods) in which disabled patients and their carers were harassed, both verbally and physically. These incidents of harassment were well-publicised in Hong Kong and drew attention to the plight of mentally and physically disabled people in Hong Kong. However, as this article is confined to the employment-related aspects of the new laws, the discussion here is limited to disability discrimination (rather than harassment)[92] and focuses on the provisions most relevant to employers.

People with disabilities face significant attitudinal prejudice when they apply for jobs in Hong Kong. In addition, they are greatly disadvantaged by the very nature of Hong Kong's environment. Anyone who has ever tried to navigate Hong Kong in a wheelchair (or even with a child's pushchair) will know that it is far from being 'barrier free.' Many buildings lack elevators or ramps and have narrow doors and hallways. Offices tend to be very crowded, with desks placed close together, leaving little room for people (or wheelchairs) to manoeuvre. Indeed, the seemingly constant construction in Hong Kong makes even the pavements virtual obstacle courses. Thus, it is extremely difficult for physically challenged people to get to work and to function in the workplace.

Of course, no law can change attitudes (or buildings) overnight. And there are limits to the changes that employers can be required to make to accommodate employees with disabilities. Thus, the Disability Discrimination Ordinance seeks to strike a balance between the goal of equal opportunities for the disabled and other legitimate concerns.

The definition of discrimination under the Disability Discrimination Ordinance is similar to that under the Sex Discrimination Ordinance in that it employs the same basic two-part (direct and indirect) structure.[93] However, the ordinance also includes within the definition certain grounds of discrimination that are especially relevant to the disabled, such as discrimination on the ground that a person uses a particular auxiliary aid or is accompanied by a reader or carer.[94]

In the area of employment, the ordinance prohibits discrimination against applicants and employees, in language that is similar to s 11 of the Sex Discrimination Ordinance.[95] Small employers (those with fewer than six

92 Of course, disability harassment could also be a problem in the workplace. The fact that there have not been many complaints of it thus far may be simply because disability *discrimination* has kept most people with disabilities out of the employment market.

93 Disability Discrimination Ordinance, s 6.

94 Ibid, s 9.

95 Ibid, s 11.

employees) are exempt from the duty not to discriminate until the summer of 1998.[96] Like the Sex Discrimination Ordinance, the Disability Discrimination Ordinance has special provisions to protect workers who are outside the legal definition of employee, such as existing or prospective contract workers and partners (where the partnership consists of at least six partners).[97] The ordinance also prohibits discrimination by organisations that can impact upon people's employment opportunities (such as trade unions, employment agencies, or qualifying bodies).[98]

However, in other areas the Disability Ordinance differs significantly from the Sex Discrimination Ordinance. A good example is s 12, which defines where the *absence* of a disability is deemed a genuine occupational qualification, permitting the employer to refuse to hire a person with a disability. While the Sex Discrimination Ordinance provides a fairly specific list of situations in which sex is a 'genuine occupational qualification,' the Disability Discrimination Ordinance sets forth a more general standard, one that takes into account the ability of the employer to make accommodations required by the disabled employee or applicant. For example, s 12(2) provides that the obligation not to discriminate in the hiring and firing process shall not apply if, taking into account all relevant factors:

> the person, because of the person's disability —
> (i) would be unable to carry out the inherent requirements of the particular employment; or
> (ii) would, in order to carry out those requirements, require services or facilities that are not required by persons without a disability and the provision of which would impose an unjustifiable hardship on the employer.

While s 12 provides certain other exceptions, the 'unjustifiable hardship' clause will be the one relied upon most often by employers who do not wish to employ someone with a disability. Fortunately, the ordinance provides some guidance as to the meaning of this term. Section 4 states that in determining what constitutes 'unjustifiable hardship,' all relevant circumstances of the particular case are to be taken into account including:

> (a) the reasonableness of any accommodation to be made available to a person with a disability;

96 Ibid, ss 11(3)–11(5). The exemption does not apply to 'victimisation' (discrimination on the ground that the employee or applicant has taken action to enforce the ordinance): ibid, s 11(3) and s 7.
97 Ibid, ss 13, 15, and 20.
98 Ibid, ss 16–19.

(b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
(c) the effect of the disability of a person concerned;
(d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.

Thus the concept of 'unjustifiable hardship' requires the court to balance the needs of the disabled worker against those of the employer. It makes it clear that the mere fact that an employer may have to spend some money to accommodate the needs of the disabled job applicant (for example, to install a ramp or widen the doors for a wheelchair) *will not* automatically excuse an employer for refusing to hire that person.

Both the ordinance and the Disability Discrimination Ordinance Code of Practice on Employment make it clear that large companies in particular will be expected to spend money to accommodate disabled applicants and employees.[99] For example, the Code of Practice notes that the 'reasonable' accommodations that could be required of employers might include: 'changes or adjustments to recruitment and selection procedures'; 'modifications to work premises to ensure that work areas and facilities are accessible and can meet the special needs of employees with a disability'; 'changes to job design, work schedules or other work practices ... such as job-sharing and flexi-hours'; and 'provision and modification of equipment to enable ease of use by employees with a disability.'[100] The Code of Practice also makes it clear that the fact that a company may fear that customers or clients will object to the presence of a disabled employee is *not* an acceptable excuse for failing to employ that person.[101]

In many countries, it would not be viewed as particularly radical to expect employers (particularly large companies) to make such adjustments. But in Hong Kong (where the very concept of anti-discrimination legislation is considered quite radical by many employers) it may be viewed as an enormous interference in their business decisions. At the 'bottom line,' an applicant who has the same qualifications as the disabled applicant and does not require any special accommodations will cost the employer less money. Therefore, employers may argue that it should not be considered 'discrimination,' but rather a rational business decision, to decline to hire the disabled applicant or to pay him a lower salary (to cover the cost of the accommodation).

99 See Disability Discrimination Ordinance Code of Practice on Employment, para 11.
100 Ibid, para 11.12.
101 See Disability Discrimination Code of Practice, para 3.1.2, citing (as an example of direct discrimination) the hypothetical situation in which a company refuses to hire a blind person because it feared he would hurt their 'corporate image.'

The Disability Discrimination Ordinance was enacted at a time when there was strong public support for the disabled. It was also a time when the government and the business community were anxious to agree to a compromise — the enactment of two specific bills, rather than Anna Wu's much broader bill. As a result of these political pressures (and simple time constraints),[102] the specific terms of the Disability Discrimination Ordinance received far less scrutiny in the Bills Committee and in the public than the Sex Discrimination Ordinance. It is too early to predict how many disabled persons will try to take advantage of the legislation and apply for jobs that might require some accommodation by the employer. If a significant number of disabled persons do so, the Disability Discrimination Ordinance could turn out to have an even greater impact on employers than the anti-discrimination provisions of the Sex Discrimination Ordinance.

Remedies and enforcement

Of course the impact of the new laws depends to a large extent on the remedies available to victims and the extent to which the laws can be effectively implemented. This section thus considers: (1) the remedies available to victims who commence civil actions, and (2) the powers of the Equal Opportunities Commission (both in assisting individual complainants and in initiating its own enforcement actions).

Remedies available to individual complainants

One important remedy is that of reinstatement — the power of the court to order that the respondent hire or rehire a person who was either not hired or was fired as a result of discrimination. This remedy did not appear in the original bills as drafted by the government. However it was added to the Disability Discrimination Ordinance (in the process of enactment) by means of an amendment proposed by Anna Wu and the Bills Committee.[103] When Wu and the Bills Committee proposed the same amendment to the government's Sex Discrimination Bill (one month earlier) it was defeated. However, women's organisations continued to lobby for the remedy of reinstatement and it was difficult for the legislature to justify maintaining unequal remedies under the two laws. The remedy was finally added to the Sex Discrimination Ordinance in 1997, when Christine Loh's bill was enacted.[104] If ordered by the courts, the remedy likely will be regarded by employers as the height of intervention in

[102] The government's Disability Discrimination Ordinance was not introduced into the Legislative Council until April 1995. However, the government was anxious that it be put to a vote by July 1995. Otherwise it could not be offered as a realistic alternative to the disability discrimination provisions of Anna Wu's Equal Opportunities Bill.

[103] Disability Discrimination Ordinance, s 72(4)(c).

[104] Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance, s 7.

their business decisions. Of course, it is within the discretion of the court to decide not to order it and in many cases the court will find that it is simply not appropriate (for example where hostility would make it difficult for the victim to work for the respondent). However, reinstatement can be an effective and workable remedy against large institutional employers (where the complainant might get along quite well with his or her co-workers).

The other main remedy available to plaintiffs is that of money damages. As originally enacted (in 1995), the ordinances provided for very limited damages. The legislature approved a last-minute amendment to the Sex Discrimination Ordinance (proposed by a conservative pro-business legislator and supported by the government) limiting damages for sex discrimination and sexual harassment to a maximum of HK$150,000 (less than US$20,000).[105] The amendment was not supported by the Bills Committee that studied the bill and it took many women's organisations by surprise. The limitation on damages applied *regardless* of the amount of losses the victim had suffered. This was particularly severe given the high legal fees charged in Hong Kong and the fact that the ordinances do not normally permit the court to award legal costs of the action to the winner (the opposite of the standard procedure in Hong Kong).[106] Thus, a woman who successfully sued under the Sex Discrimination Ordinance might not only have failed to recover her actual damages, she might not even have recovered enough to pay her legal expenses.

The limitation on damages created an uproar among women's organisations when it was added to the Sex Discrimination Ordinance. As a result of their objections (and of lobbying by disability rights groups, Anna Wu, and other legislators), no express limitation was proposed when the Disability Discrimination Ordinance was debated, just one month later. Nonetheless, a cap on damages apparently worked its way into that ordinance, albeit inadvertently. This occurred because, in the course of amending the remedies language of the Disability Discrimination Ordinance (ironically, in an effort to strengthen the remedies), the government and Legislative Council inadvertently left out language (which was in the Sex Discrimination Ordinance) expanding the power of the District Court (where claims under both ordinances are to be brought) to award damages beyond the normal limit of $120,000. This accidental limit on damages in the Disability Discrimination Ordinance was even lower than the limitation expressly provided in the Sex Discrimination Ordinance and would rarely be enough to compensate a disabled employee who was either denied a job or fired as a result of discrimination.

[105] Sex Discrimination Ordinance, s 76(7).

[106] Sex Discrimination Ordinance, Schedule 8 (consequential amendments), para 15, adding a new s 73B(3) to the District Court Ordinance, which provides: 'Each party to any proceedings ... under the Sex Discrimination Ordinance shall bear its own costs unless the Court otherwise orders on the ground that — (a) the proceedings were brought maliciously or frivolously; or (b) there are special circumstances which warrant an award of costs.' A similar provision appears in Schedule 6 (consequential amendments), para 4 of the Disability Discrimination Ordinance (adding a new s 73C to the District Court Ordinance).

It was quite clear from the legislative history that legislators did not intend this result. Nonetheless, when the error became known, the government made no proposal to amend the Disability Discrimination Ordinance so as to repeal the implied limitation on damages. The government also refused to support any move to repeal the express limitation on damages in the Sex Discrimination Ordinance. This was not surprising — the business community was very happy with the damages limitations and, once the immediate threat of Wu's Equal Opportunities Bill was gone (Wu left the legislature in 1995 to return to her law practice), the government had little incentive to make any more concessions departing from its traditional 'pro-business' policies.

The issue was finally addressed by a private member's bill. Christine Loh introduced the Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, which was enacted in July 1997 (despite opposition from government and the pro-business legislators). Although many of the clauses in her bill were defeated, Loh did succeed in adding the remedy of reinstatement to the Sex Discrimination Ordinance and in repealing the limitations on damages in both ordinances. Victims of discrimination can be thankful that her bill was enacted before the elected Legislative Council was dissolved by China (on 1 July 1997). For it is clear that the entirely appointed 'provisional' legislature would not have approved any legislation to strengthen the remedies available for discrimination.

Enforcement powers of the Equal Opportunities Commission

Given the high cost of litigating in Hong Kong and the fact that Hong Kong lawyers are not permitted to work for contingency fees, it was always anticipated that complainants would rely heavily on the Equal Opportunities Commission to enforce their new rights under the ordinances. This section provides a brief overview of the powers of the Commission that could affect the employment field.

When the Commission receives a complaint of discrimination or harassment, there are several ways in which it can assist the victim. For example, it has the power to investigate the complaint and to attempt to conciliate it.[107] If the attempt to conciliate fails, the Commission also has the power to give assistance (including free legal assistance) to complainants who wish to initiate civil proceedings.[108] Legal assistance would greatly increase the likelihood of a lawsuit — particularly as the Commission would only make such an offer if it thought that the plaintiff had a viable complaint. The fact that the Commission can assist complainants with their civil actions should encourage

[107] Sex Discrimination Ordinance, s 84; Disability Discrimination Ordinance, s 80. As a result of amendments made by Christine Loh's bill, time spent in conciliation will no longer be counted against the complainant for purposes of determining whether the claim is time barred. See Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance, ss 8 and 13. This will encourage victims to continue to conciliate their claims.

[108] Sex Discrimination Ordinance, ss 83 and 85; Disability Discrimination Ordinance, ss 70 and 81.

employers to participate in good faith in efforts to conciliate the complaint. Indeed a refusal by the respondent to participate in conciliation might later be considered by the court as a reason to make an exceptional order that the respondent pay costs.

If the complainant does not wish to pursue the action by herself the Commission has the power to bring proceedings in its own name and to apply for any of the remedies that would ordinarily be available to the claimant. The Commission may exercise this power so long as the case raises a question of principle, it is in the interests of justice to bring the proceedings, and the claim appears to be well-founded.[109]

The Commission need not necessarily wait for a formal complaint in order to act. Rather, it may conduct formal investigations of its own.[110] For example, if two years after the employment provisions of the Sex Discrimination Ordinance have been brought into force the Commission discovers that a large accounting firm still has not hired a female accountant, it might decide to launch a formal investigation — despite the fact that no women are prepared to file a complaint. The Commission can conduct a *general investigation* (where it believes an investigation is warranted in the public interest, but has not yet formed a belief that a particular person or entity has committed an unlawful act) or a *belief investigation* (where it believes that the person named in its terms of reference may have committed an unlawful act). If the investigation satisfies the Commission that a person has committed an unlawful act, it has the power to issue enforcement notices.[111] Such notices may require a person to cease committing the act in question, to change his practices, or to avoid committing the act again. If it appears that the person served with such a notice is nonetheless likely to commit an unlawful act, the Commission may apply to the District Court for an injunction to restrain the person from doing so.[112]

However, it should be noted that the procedures that the Commission must follow when conducting a formal investigation[113] are based upon those of the UK Equal Opportunities Commission and have been widely criticised as unduly complex and cumbersome. The result has been that few formal investigations have been commenced in the UK and even fewer have been completed.[114] Nonetheless, the Hong Kong government seems wedded to the UK procedures and has steadfastly opposed amendments to improve them

[109] Sex Discrimination (Proceeding by Equal Opportunities Commission) Regulations, LN 539 of 1996, reg 2.

[110] Sex Discrimination Ordinance, ss 70-1; Disability Discrimination Ordinance, ss 66-7. See also the Sex Discrimination (Formal Investigations) Rules, LN No 472 of 1996, and the Disability Discrimination (Formal Investigations) Rules, LN No 474 of 1996.

[111] Sex Discrimination Ordinance, s 77; Disability Discrimination Ordinance, s 73.

[112] Sex Discrimination Ordinance, s 81; Disability Discrimination Ordinance, s 77.

[113] Sex Discrimination Ordinance, ss 70-74; Disability Discrimination Ordinance, ss 66–70.

[114] See George Applebey and Evelyn Ellis, 'Formal Investigations: the Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies' [1984] Public Law 236.

(including amendments that have been recommended by the UK Commission itself).[115] Thus, victims of discrimination in Hong Kong should not expect much from the Commission in the area of formal investigations.

The Commission has also been given special enforcement powers with respect to the publication of discriminatory job advertisements. Such advertisements are prohibited by both the Sex Discrimination Ordinance and the Disability Discrimination Ordinance.[116] However, an individual would be unlikely to file a complaint about a particular advertisement (as it would be difficult to prove that he or she suffered any damage as a result of its publication). Thus both ordinances give the Commission the power to apply to the District Court for an order imposing a financial penalty on the publisher of an unlawful advertisement.[117] The Commission may also apply for an injunction restraining a person from publishing such advertisements in the future.[118] When the employment provisions came into force, the Commission sent out letters to Hong Kong newspapers warning them of these consequences. Since the Commission sent out these letters it has noted a substantial decrease in the incidence of sex-specific and other discriminatory job advertisements.[119] The Commission can also make complaints to the police to initiate prosecution of certain acts that constitute statutory offences under the ordinance (such as the offence of making a false statement to a publisher to cause him to publish a discriminatory advertisement).

The effectiveness of the laws will depend to a great extent on how proactive the Commission is with respect to aiding complainants and investigating employers. Local women's organisations have already complained that the Commission is too conservative and that it has tended to focus too much on technical issues of 'gender equality' rather than on the real problem of discrimination against women.[120] However, it is too soon to draw any firm conclusions regarding the Commission. Its approach to the Codes of Practice indicates that it is not afraid to confront employers and challenge their existing practices. The Codes are not law and a failure to follow them does not itself create an unlawful act. Yet the Codes constitute strong persuasive authority on the nature of the acts that employers must avoid and the 'practical steps' that they must take to avoid vicarious liability for acts of their employees or agents. The Commission has demonstrated that it is willing to use this 'persuasive' power to challenge employers to reform their practices in very specific ways. It

115 See Equal Opportunities Commission, *Equal Opportunity for Men and Women: Strengthening the Acts — Formal Proposals* (March 1988).
116 Sex Discrimination Ordinance, s 43; Disability Discrimination Ordinance, s 43.
117 Sex Discrimination Ordinance, s 82; Disability Discrimination Ordinance, s 78.
118 Ibid.
119 Equal Opportunities Commission, *EOC News*, Issue No 2 (April 1997), p 2.
120 See Hong Kong Coalition on Equal Opportunities, 'Biannual Supervision Report on the Equal Opportunities Commission' (original Chinese report and summary English translation circulated to the Hong Kong Legislative Council as Paper No CB(2)2349/96-97(02)).

remains to be seen whether it will make equally effective use of its more 'coercive' enforcement powers.

Conclusion

Many books and articles have been written praising Hong Kong's 'free market' ideology and its economic achievements. However, these commentaries sometimes overlook the fact that there have been real costs to society of the government's reluctance to regulate the business community.[121] Supporters of Hong Kong's economic policies have also tended to down-play the main reason that these economic policies could be maintained for so long — Hong Kong was ruled by a colonial government, one that catered mainly to business interests and included no elected representatives in the executive or legislative branches.

The transition period between the signing of the Joint Declaration in 1984 and the return of Hong Kong to China in 1997 demonstrated that the economic ideology for which Hong Kong was so widely known could not be completely maintained in a democratic system. With the introduction of the Bill of Rights and an elected legislature, Hong Kong people found their political voice. They began to demand greater legal protection of their human rights — not only rights such as freedom of speech and movement, but also the right to be treated equally and with a certain degree of respect. And they have asked that such rights be enforceable not only against the government, but also against those who hold economic power over them — their employers.

It will be interesting to see how post-1997 Hong Kong approaches the issues of discrimination, workers' rights, and the regulation of business generally. Despite the promise that Hong Kong would have an 'elected legislature,' China dissolved the legislature that was elected in 1995 and replaced it with an entirely appointed 'provisional' legislature. China has promised that the provisional legislature will serve for only one year, after which new elections will be held. However, the provisional legislature will enact a new election law and will return to the system of élitist 'functional constituencies' preferred by China,[122] restoring the business community's dominance of the functional

[121] For a discussion of some of these social costs, including poor labour conditions, environmental destruction, and inadequate social welfare, see David Campbell, 'Economic Ideology and Hong Kong's Governance Structure After 1997' in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), especially pp 116–20.

[122] The Basic Law provides that Hong Kong's first legislature shall consist of sixty members, with thirty chosen by direct elections from geographic constituencies, ten chosen by an Election Committee, and twenty chosen by functional constituencies. The functional constituencies in Hong Kong were originally quite small and élitist. Governor Patten (Hong Kong's last colonial governor) successfully proposed amendments to the election law that made the functional constituencies for the 1995 elections significantly more democratic (widening them so as to permit every working person in Hong Kong to vote in a functional constituency). China objected strongly and it dissolved the Legislative Council elected in 1995, replacing it with the appointed provisional legislature. For further discussion, see Yash Ghai, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997), pp 271–80.

constituency seats. This is very significant, because under the Basic Law the legislators chosen by the functional constituencies can effectively veto proposals made by the directly elected legislators.[123]

Thus although the transition period leading to 1997 has facilitated a significant expansion in legislation to protect employees, it is unlikely that this expansion will continue under the first government of the Hong Kong Special Administrative Region of China. At the same time, it is also unlikely that the existing anti-discrimination legislation will be repealed. China and the provisional legislature are already committed to a number of unpopular legislative acts that China believes are necessary to maintain control in Hong Kong. Neither China nor the Hong Kong SAR government will wish to invite further unpopularity by repealing the new anti-discrimination laws. These laws appear to have broad support in the community and, unlike some recent law reform, cannot be said to interfere with the government's ability to maintain social order.

It is too soon to assess whether the rights created by the new anti-discrimination laws can be effectively enforced or whether they will actually deter discrimination and harassment.[124] If they are effective, then it will be interesting to see whether the new laws unduly burden employers and damage Hong Kong's economy (in the way that the government was once so certain they would). The hope is that the Equal Opportunities Commission can persuade most employers to adopt proactive policies to prevent discrimination and harassment. Such measures can avoid litigation (which is costly and traumatic for both parties) and improve working conditions. Implementation of the laws clearly will require a certain amount of time and money. But the absence of discrimination and sexual harassment in a company can also improve worker satisfaction and productivity. In any event, it would appear that Hong Kong has now accepted that these are real problems and that they no longer can be left entirely to the free market.

[123] Annex II to the Basic Law states that 'the passage of motions, bills, or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographic constituencies through direct elections and by the Election Committee.' Thus, the functional constituencies will have a veto power over proposals made by the directly elected members.

[124] The issue of how effective legislation is in preventing discrimination is highly controversial. See, for example, the debate between Richard A Posner, 'An Economic Analysis of Sex Discrimination Laws' (1989) 56 University of Chicago Law Review 1311, and John J Donohue, 'Prohibiting Sex Discrimination in the Workplace: An Economic Perspective' (1989) 56 University of Chicago Law Review 1337. See also the various contributions to the 'Symposium on the Gender Gap in Compensation' (1993) 82 Georgetown Law Journal 27-158, and Richard A Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass: Harvard University Press, 1992). Epstein argues that '[c]ompetitive markets with free entry offer better and more certain protection against invidious discrimination than any antidiscrimination law': ibid, p 9.