
Beyond Fairness

A legal framework for
anti-discrimination
in the workplace

EXECUTIVE SUMMARY

At the 2021 National Day Rally, Prime Minister Lee Hsien Loong announced that the Government would enact a new legislation to prohibit workplace discrimination based on sex, age, race, religion, disability and nationality.¹

While the Tripartite Guidelines on Fair Employment Practices (TGFE) have been somewhat helpful in addressing workplace discrimination in Singapore thus far, there remain significant gaps in coverage and implementation. Given these limitations, we are concerned that the forthcoming anti-discrimination legislation will enshrine the TGFE in law without any significant revision. Instead, the legislation must go further to meaningfully address the discrimination faced by women, persons with disabilities and lesbian, gay, bisexual, transgender and queer (LGBTQ+) people.

This position paper sets out the current legal and policy framework to address workplace discrimination, and highlights some key lessons and areas for improvement that should be addressed in the new legislation. Our recommendations represent a culmination of AWARE's research and advocacy, as well as our experience working directly with victim-survivors at AWARE's Workplace Harassment and Discrimination Advisory (WHDA) over the years. In this paper, we adopt an explicitly intersectional approach to highlight the ways in which workers may face gendered and other forms of intersecting barriers.

Lessons Learnt and Key Areas for Improvement

(a) Limitations of the business-case approach

To date, the Singapore Government has relied on the business-case approach to address workplace discrimination by encouraging—rather than mandating—employers to adopt fair employment practices through education and moral suasion.

However, research has found that the business-case approach downplays systemic discrimination and may instead have negative effects on employees from marginalised backgrounds. Moreover, recent surveys conducted in Singapore have shown that the Government's non-legislative approach might not have been effective in tackling the issue to date, with more than half of respondents reporting having experienced workplace discrimination.²

¹ Lee Hsien Loong, "National Day Rally 2021", Prime Minister's Office (Alvin Chong, 31 August 2021), <https://www.pmo.gov.sg/Newsroom/National-Day-Rally-2021-English>

² "Workplace Discrimination: How Harmonious Are We?", Blackbox Research, 8 July 2022, <https://blackbox.com.sg/everyone/discrimination-in-singapore-how-harmonious-are-we>; "1 in 2 experienced workplace discrimination in Singapore over the past five years, with race, age and gender discrimination most common", AWARE, AWARE, 20 September 2022, <https://www.aware.org.sg/2022/09/1-in-2-experienced-workplace-discrimination-aware-milieu-survey>

(b) Definition of discrimination

Though the TGFEP sets out five principles of fair employment practices, it does not explicitly define “discrimination”. Further, while the existing list of dos and don’ts guides employers in implementing employment policies and practices, it offers limited guidance when employers encounter new factual situations that are not addressed in the TGFEP.

The lack of a clear and explicit definition of discrimination may also lead to disputes. Employers and employees may have different understandings of what is considered to be discriminatory.

At the same time, the lack of clarity may dissuade employees from filing reports after experiencing discrimination, because they are unsure if what they have faced constitutes proscribed conduct under the TGFEP.

(c) Prohibited grounds of discrimination

As mentioned, the new legislation will prohibit discrimination based on sex, age, race, religion, disability and nationality. We are concerned that these grounds will not comprehensively protect all workers from discrimination. At the same time, it is unclear how some of these grounds will be defined. For example, if the new legislation relies on the current definition of disability under the Enabling Masterplan, it may exclude persons with mental health conditions.

(d) Remedies and penalties

Discriminatory employers currently face statutory penalties for pregnancy and age discrimination, and administrative penalties for other forms of discrimination, under the Fair Consideration Framework. However, existing administrative penalties (in terms of an employer’s ability to apply for or renew work passes for its foreign employees) are not adequate to deter discriminatory employment practices.

In terms of civil remedies, an employee who has been wrongfully dismissed because of discrimination is able to seek reinstatement or compensation. However, the current cap on the amount of compensation that an employer is required to pay may not be sufficiently high to deter discriminatory employment practices. Also, the compensation may fail to fully account for the harm suffered by victim-survivors of discrimination.

(e) Dispute resolution process

At present, there are multiple ways by which a victim-survivor of workplace discrimination or harassment can seek recourse. However, according to a joint survey conducted by AWARE and Milieu Insight in 2022, more than half of the respondents who had experienced workplace

discrimination (54%) did not report it to anyone.³ A third of these respondents said that they did not trust the internal and/or external authorities to act on their reports.

Of those who did report, most only did so internally, to their managers or other senior persons within their department (22%) or the human resource department (15%). Only a minority made reports to TAFEP (5%) or MOM (6%). This suggests that more needs to be done to encourage victim-survivors to report discriminatory workplace practices to official channels.

Elements of an Effective Anti-Discrimination Legislation

An effective anti-discrimination legislation is one that will:

- i. protect every worker against all forms of discrimination;
- ii. provide victims of discrimination fair and timely recourse and remedies against their employers; and
- iii. prevent workplace discrimination through preventive and deterrent measures.

In developing these recommendations, we studied the experiences of other countries with workplace discrimination laws, including but not limited to Hong Kong, the United Kingdom (UK), Ireland, Australia, New Zealand and the United States.

(a) Coverage of the legislation

The new legislation should extend protection to all employees (including officers and employees of the government, domestic workers and seafarers), gig workers, independent contractors and contract workers.

(b) Protected characteristics

To ensure that the legislation is comprehensive, we recommend that the definition of “protected characteristics” include gender, pregnancy, family status and sexual orientation in addition to the previously stated characteristics, namely sex, age, race, religion, disability and nationality. This will send a strong signal that discrimination based on any personal attribute of a worker is unacceptable in Singapore.

For clarity, “disability” should be expansively defined under the legislation to include mental health conditions, HIV/AIDS and a person’s general health status.

(c) Types of prohibited conduct

An expansive approach to tackling discrimination is required to ensure that the new legislation will achieve not only *formal* equality (equality of treatment) but also *substantive* equality (equality of opportunity).

³ “1 in 2 experienced workplace discrimination”.

To do so, the following types of conduct should be prohibited under the upcoming legislation:

- I. Direct discrimination: being treated less favourably than another because of a protected characteristic.
- II. Indirect discrimination: being disadvantaged by company policy or organisational practice when compared with others without the same characteristic.
- III. Combined discrimination: being discriminated against because of a combination of two or more protected characteristics, e.g. gender and race.
- IV. Denial of reasonable accommodation⁴: when an employer fails, neglects and/or refuses to offer reasonable accommodations to an employee or job applicant that would enable them to be considered for a job opening or perform their role.
- V. Harassment: being subjected to unwanted conduct that creates an intimidating, hostile, degrading, humiliating or offensive environment.
- VI. Victimisation: being subjected to retaliation because one reports their experience of discrimination.

At the same time, employers should be empowered to take measures to help those with a protected characteristic (who tend to be under-represented or vulnerable) overcome disadvantages in a workplace setting. It should be made clear under the new legislation that positive actions are not prohibited if they are taken by an employer to compensate for disadvantages that it reasonably believes are faced by persons who share a particular protected characteristic.

(d) Employer duty to ensure a safe and inclusive work environment

It is not enough to simply punish errant employers or managers who engage in the prohibited conduct under the new legislation. The upcoming legislation should statutorily enshrine positive obligations on employers to foster a safe and inclusive work environment for all workers, especially those with protected characteristics. We propose imposing a general duty to prevent and address discrimination and harassment in the workplace, supplemented by a non-exhaustive list of measures that employers should implement. This can include enacting clear and well-defined policies and grievance-handling procedures and educating employees accordingly.

Recommendation: Establishment of Commission for Workplace Discrimination and Harassment (CWDH)

We recommend that TAFEP be statutorily enshrined as the Commission for Workplace Discrimination and Harassment (CWDH) responsible for carrying out the key functions to ensure

⁴ “Reasonable accommodation” means any change to (i) the application or hiring process, (ii) the job, (iii) the way the job is done or (iv) the work environment that enables a person with a protected characteristic to enjoy equal employment opportunities. An accommodation is reasonable if it does not fundamentally alter the nature or operation of the business or require significant difficulty or expense.

compliance with the new legislation. The Commission should be legislatively established as a statutory body under the Ministry of Manpower so that it can possess the necessary powers to enforce the new legislation.

Similar bodies in countries such as the UK, Hong Kong, South Korea and Canada have been given such statutory powers under their discrimination laws.

On top of taking a victim-centric approach to workplace discrimination and harassment as per the United Nations' best practices, the CWDH should:

- I. be diverse in its composition and include representatives with lived experiences of one or more protected characteristics;
- II. have the power to receive and investigate complaints and issue orders to employers;
- III. offer free and confidential services to inform, support and empower victim-survivors;
- IV. punish and deter errant employers through statutory penalties;
- V. serve research and education functions such as collecting data to inform policy reforms; and
- VI. provide guidelines, frameworks, sample policies and other support for small and medium-sized enterprises (SMEs).

Recommendation: Private Enforcement by Victim-Survivors

Besides filing a complaint with the CWDH, victim-survivors of workplace discrimination and harassment should have the right to seek recourse against their employers, or persons who have engaged in prohibited conduct against them. This will emphasise their agency and autonomy, and empower them to seek justice.

(a) Exemption of discrimination and harassment claims from procedural requirements under the Employment Claims Act

Part of respecting victim-survivor autonomy is letting them choose whether to pursue mediation. Discrimination and harassment claims should not have to go through mediation before being submitted to the CWDH. If a mandatory mediation-first model is adopted, victim-survivors should be able to apply for an exemption when their circumstances justify it, such as when they have experienced severe emotional distress or sexual harassment.

In addition, discrimination and harassment claims brought to the ECT should not be subject to the claim limit of \$20,000 for non-union members and \$30,000 for union members. This cap artificially limits the amount a victim-survivor may claim based on whether they are able to pursue their claim in the courts instead. Moreover, the effort and time required to go through the proceedings may outweigh the compensation they expect to receive. Instead, compensation should be determined based on the loss of income and harm done to the claimant.

Currently, victims of wrongful dismissal have to file their claims within one month of their last day of employment, or within two months of the birth of their child if they were dismissed during

pregnancy. Victim-survivors of workplace discrimination and harassment should be allowed more time to process what happened to them and access the support they need before filing a claim. The limitation period should be extended to six months for those still employed, and one year for those who have left employment.

(b) Burden of proof

According to the AWARE-Milieu anti-discrimination survey, 1 in 3 respondents did not report the workplace discrimination they had experienced because they did not think they had enough evidence⁵. It is crucial for the new legislation to empower victim-survivors to not feel deterred based on the perception that they lack sufficient proof.

Victim-survivors should only be required to present a prima facie case of discrimination, establishing (i) the primary facts upon which they rely and (ii) that those facts are sufficient to raise an inference of discrimination. Upon making out this prima facie case, the burden shifts to the alleged perpetrator to rebut the presumption of discrimination.

(c) Invalidation of contractual terms contrary to legislation

The legislation should also include a provision stating that any contractual terms in an employment agreement will be considered void if they limit the employer's liability under the new legislation. Any provision to the effect that the employee consents to a particular practice or policy in their employment agreement that is otherwise discriminatory would also be void.

Recommendations on the Effective Implementation of the New Legislation

Effective implementation of the new legislation will ensure strong public awareness of the law and community diffusion of the legislation's underlying principles of equality and non-discrimination.

In developing the draft legislation, active public consultation can promote buy-in and socialise the public to the legislation's importance.

Through the CWDH and other channels, the Government should (i) engage with the public on the implementation of this legislation and (ii) educate the public on the legislation's key aspects and how one may seek recourse if they experience any prohibited conduct at the workplace. It would also be important for the Government to work closely with community organisations that serve and/or represent marginalised groups vulnerable to workplace discrimination and harassment, to raise awareness among these groups about the new legislation.

After the enactment of this legislation, the Government should provide training workshops to employers to help them understand their obligations and the practical steps they can take to prevent and address discrimination and harassment at their workplaces.

⁵ "1 in 2 experienced workplace discrimination".