Source: *The Straits Times,* pB3
Date: 16 January 2025

The new Workplace Fairness Act has five categories of protected characteristics: age; nationality; sex, marital status, pregnancy status, and caregiving responsibilities; race, religion, and language; and disability and mental health conditions. An employer cannot discriminate against workers based on any of these characteristics when hiring. PHOTO: LIANHE ZAOBAO

The Workplace Fairness Act must go further if discrimination is to be stamped out

Aware is concerned over gaps in the legislation to do with LGBTQ and disabled workers, and omission of salary decisions.

Sugidha Nithiananthan and Rayner Tan

Protection for workers has taken another major step forward in the new year. After months of hard work from the Government and its tripartite partners, stakeholders and various MPs, the new Workplace Fairness Act (WFA) was passed on Jan 8 in Parliament.

The WFA has five categories of protected characteristics: age; nationality; sex, marital status, pregnancy status, and caregiving responsibilities; race, religion, and language; and disability and mental health conditions.

An employer cannot discriminate against workers based on any of these characteristics when making employment decisions.

While Aware is happy to see this landmark anti-discrimination legislation finally passed, it does not go far enough to protect all workers. This is something many MPs also raised during the debate on the Bill which was tabled in November 2024.

The definitions of these protected characteristics leave out some groups of vulnerable workers. For example, the definition of "disability" does not include learning disabilities such as dyslexia or attention deficit hyperactivity disorder (ADHD), or chronic medical conditions such as cancer or long Covid.

This contrasts with the functional approach of other jurisdictions. For example, "disability" is defined as a physical or mental impairment that substantially limits one or more major life activities under the Americans with Disabilities Act.

Protecting such vulnerable workers will not further burden employers because the law provides exceptions where the genuine requirements of the job require certain hiring decisions to be taken.

Another troubling exclusion arises from the definition of "sex" in the WFA, which explicitly excludes sexual orientation and gender identity. Minister for Manpower Tan See Leng assured Parliament: "Let me state clearly that we do not tolerate workplace discrimination, including towards LGBT individuals. We currently handle such cases under the TGFEP (Tripartite Guidelines on Fair Employment Practices) and will continue to do so."

While this is comforting, the fact that the WFA expressly excludes sexual orientation and gender identity may send the wrong signal to society. According to a 2021 study, when people learn that the law tolerates discrimination against a certain group, it can foster more prejudicial attitudes. At the very least, it may indicate to society that the rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) workers are not as important as the rights of workers protected under the WFA.

In a forum letter in November 2024, a Ministry of Manpower (MOM) representative explained that the protected characteristics covered almost all complaints reported to the Tripartite Alliance for Fair and Progressive Employment Practices (Tafep) from 2018 to 2022.

However, during this period, sex between consenting male adults was still a crime under section 377A of the Penal Code – it was repealed as at Jan 3, 2023 – and this fed a general lack of acceptance of LGBTQ people in society, too. Given that situation, it can easily explain why there were very few or no complaints by LGBTQ workers to Tafep during this period.

The reality on the ground reveals that discrimination against LGBTQ workers is prevalent. A recent study found that over half of 400 LGBTQ survey respondents had experienced some form of workplace discrimination and harassment. Yet, only about one in 10 reported their experiences to their companies, Tafep or MOM. Most chose not to do so because they feared retaliation, or believed that they would not receive support.

Several MPs raised this issue during the debate on the Bill and three referred to surveys on the prevalence of such discrimination, including the 2022 Aware-Milieu survey on workplace discrimination. MP Louis Ng also pointed out that there was likely to have been significant under-reporting of such cases.

Despite the Minister's reassurance, it is worrying that the LGBTQ community has been singled out as the only group whose characteristics have been explicitly excluded from the WFA. The Minister's unwillingness to accede to Mr Ng's proposal to update the Tafep website to expressly include sexual orientation and gender identity as characteristics protected under the TGFEP adds to this concern. This sends a mixed signal about the status of LGBTQ people in society.

TROUBLING TWO-TIERED APPROACH

According to the Minister, workers who are not covered under the WFA will still be protected from workplace discrimination under the TGFEP, which prohibit all forms of workplace discrimination. This would purportedly include LGBTQ workers, workers with criminal records, physical and medical conditions and discrimination by association. The Minister also said that the guidelines will be updated to provide protection for platform workers and outsourced workers.

This begs the question: Why choose to legislate the WFA if the TGFEP is able to protect all workers? Clearly, the TGFEP and Tafep have been unable to provide sufficient protection to workers, necessitating the enactment of the WFA. It is cold comfort to those vulnerable groups not protected under the WFA to be told the protected characteristics in the WFA cover 95 per cent of all discrimination complaints reported to Tafep. Why stop at 95 per cent?

Ironically, in legislating against discrimination, the WFA paves the way for its own two-tier, discriminatory approach to workplace discrimination. On the one hand, some workers enjoy formal legal protection under the WFA. On the other hand, those who are not covered under the WFA may only make a complaint to Tafep, which has no power to compel an errant employer to compensate or reinstate the worker.

These workers would also not be protected from retaliation by their employers if they make a complaint to Tafep. Under the WFA, the protection from retaliation applies only to actions taken by workers under the Act, such as commencing an action against an employer. This issue was also raised in Parliament and the Minister acknowledged that workers not protected by the WFA will also not be protected against retaliation by their employers.

As a result, excluded groups, such as LGBTQ workers or those with chronic medical conditions, may well choose not to report their cases to Tafep for fear of retaliation. The under-reporting would then reinforce misplaced perceptions of low rates of discrimination faced by these groups and contribute to flawed assumptions about workplace discrimination.

DISCRIMINATION BY ASSOCIATION

Another gap in the Bill involves this scenario: a non-Chinese worker marries a Chinese person, and is then fired by their employer purely because the employer is against interracial relationships.

Is that discrimination against the worker on the basis of race? The answer, oddly, is no – under the WFA it is not discrimination to fire that worker on the basis that they married outside their race.

The WFA explicitly excludes discrimination based only on the protected characteristic of another person related to or associated with them. In this example, the non-Chinese worker would not be protected under the WFA as the dismissal is not because of their own race but the race of their spouse.

This exclusion is troubling, given that such attitudes are not uncommon. In 2021, a polytechnic lecturer was jailed for harassing an interracial couple with remarks like "such a disgrace, Indian man with a Chinese girl" and "you're preying on Chinese girl".

Some MPs questioned this exclusion. The Minister said it was difficult to draw the line on what constituted association.

Why not simply define association in the legislation? Hong Kong's laws define an "associate" as a spouse, domestic partner, relative, carer or a person in a business, sporting or recreational relationship. At a minimum, the WFA could have adopted a narrower definition of "associate" that covers family members, which is a defined term in the Women's Charter.

NARROW FOCUS OF THE ACT

The WFA has been drafted narrowly to prohibit direct discrimination only in relation to formal employment decisions, such as whether to hire a candidate or to promote or dismiss an employee.

However, discrimination can occur at the workplace in other ways, too. For example, a non-Chinese employee may be unable to perform their duties effectively because their colleagues prefer to communicate in Chinese during meetings. Under the WFA, this would not be discrimination unless it relates in some way to an employment decision.

Salary decisions are also not included in the definition of "employment decisions", even though MOM's Fair Employment Practices report shows that salary discrimination is the most prevalent form of unfair treatment at work (43.4 per cent of those who reported unfair treatment in 2023).

This is also a missed opportunity for the WFA to address the gender pay gap, an area of discrimination we should all be concerned about. According to MOM, the adjusted gender pay gap in 2023 between men and women was 6 per cent for the same job, in the same industry, at the same age and education level. That is unacceptable.

WHERE DO WE GO FROM HERE?

The Minister's assurances in Parliament that all forms of discrimination are not condoned and that workers can approach Tafep for help, whether under the WFA or the TGFEP, is important.

We are also pleased that Tafep will be tracking, analysing and sharing information on the complaints it receives and which it resolves under the WFA and TGFEP. But this data should be shared publicly to enable all stakeholders to contribute to the discussions. It would be good if its data includes cases where the complainant chose not to follow through.

It does make us wonder, though: Is Tafep sufficiently resourced and its officers trained to fulfil the promise of meaningful protection for all workers? How will workers who raise complaints to Tafep be protected against retaliation from employers?

And when will the TGFEP be revised to include platform workers and other types of workers?

We'd like to see the Tafep website updated to expressly include sexual orientation and gender identity as the characteristics protected under the TGFEP.

Businesses with fewer than 25 workers will be excluded until MOM reviews this point (which is expected to be five years after the legislation comes into effect) – but MOM does not need to wait till then for a review. That is a long time for the 25 per cent of the workforce affected by this.

And when the WFA is reviewed, the relevant committee should include civil society organisations representing the different vulnerable groups. After all, the WFA is an important step in Singapore's journey towards a more equal and inclusive society.

We are also pleased that Tafep will be tracking, analysing and sharing information on the complaints it receives and which it resolves under the Workplace Fairness Act and Tripartite Guidelines on Fair Employment Practices. But this data should be shared publicly to enable all stakeholders to contribute to the discussions. It would be good if its data includes cases where the complainant chose not to follow through. It does make us wonder, though: Is Tafep sufficiently resourced and its officers trained to fulfil the promise of meaningful protection for all workers? How will workers who raise complaints to Tafep be protected against retaliation from employers?

• Ms Sugidha Nithiananthan is director of advocacy and research at the Association of Women for Action and Research (Aware). Dr Rayner Tan is assistant professor at the Saw Swee Hock School of Public Health at the National University of Singapore.

Source: The Straits Times © SPH Media Limited. Permission required for reproduction.