

**For discussion  
on 17 June 2013**

**Legislative Council Panel on Constitutional Affairs**

**Equal Opportunities Commission's proposal  
to expand the scope of protection against sexual harassment  
under the Sex Discrimination Ordinance (Cap. 480)**

**Purpose**

This paper informs Members of the present position on the Equal Opportunities Commission's (EOC) proposal to expand the scope of protection against sexual harassment under the Sex Discrimination Ordinance (SDO) (Cap. 480).

**Background**

2. Under the existing four anti-discrimination ordinances, one of the EOC's functions is to keep under review the working of the four ordinances and, either when required by the Chief Executive (CE) or as the EOC thinks it necessary, draw up and submit to the CE proposals for amending the ordinances. Pursuant to this statutory function, the EOC has submitted, amongst others, a proposal relating to the scope of protection against sexual harassment under the SDO.

**Sexual harassment**

3. Section 2(5) of the SDO provides that a person 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 hostile or intimidating

environment for her<sup>1</sup>.

4. The scope of protection mentioned in paragraph 3(b) above was originally restricted to conduct of a sexual nature which creates a sexually hostile or intimidating work environment for the victim and did not apply to cases involving educational establishments and sexual harassment covered by sections 39 and 40 respectively. Section 2(5) of the SDO was amended in 2008 (Ord. No. 29 of 2008) to remove these restrictions.

#### Sexual harassment in specified contexts under SDO

5. At present, the SDO provides protection against sexual harassment in specified fields. For example, section 23 of the SDO provides protection against sexual harassment in the employment field (e.g., sexual harassment by a potential employer against a job applicant). Section 39 of the SDO provides protection against sexual harassment in educational establishments (e.g., sexual harassment by a member of the staff of an educational establishment against a student). Section 40 of the SDO provides protection against sexual harassment in cases involving the provision of goods, facilities or services (e.g., sexual harassment by a service provider against a customer). Sections 24 and 40 of the SDO also provide protection against other kinds of sexual harassment (e.g. sexual harassment by a provider of training against a trainee, and sexual harassment by a manager of premises against an occupier of the premises). Sections 23, 24, 39 and 40 of the SDO are reproduced at Annex.

#### Role of the EOC in handling sexual harassment cases

6. Upon receipt of a written complaint of sexual harassment, and unless the EOC decides not to conduct, or to discontinue, an investigation for the reasons specified in section 84(4) of the SDO<sup>2</sup>, the EOC will investigate into the case and endeavour to effect a settlement by conciliation. Where the conciliation is not successful, the EOC may provide assistance to the complainant,

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<sup>1</sup> Section 2(8) of the SDO provides that a provision of Part III or IV framed with reference to sexual harassment of women shall be treated as applying equally to the treatment of men and for that purpose that provision, and subsections (5) and (7), shall have effect with such modifications as are necessary.

<sup>2</sup> The reasons specified in section 84(4) include: (a) the EOC is satisfied that the act is not unlawful by reason of a provision of the SDO; (b) the EOC is of the opinion that the person aggrieved by the act does not desire that the investigation be conducted or continued; (c) a period of more than 12 months has elapsed beginning when the act was done; (d) in a case where a representative complaint is lodged, the EOC determines, in accordance with the rules made under section 88, that the complaint should not be a representative complaint; or (e) the EOC is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

if it thinks fit to do so, in the form of giving advice, arranging for representation in court, or any other form of assistance which the EOC considers appropriate. Remedies which may be awarded by the court include declarations, damages by way of compensation, apologies, and other civil remedies which would be obtainable in the Court of First Instance.

### The EOC's proposal

7. In the context of the provision of goods, facilities or services, pursuant to sections 40(1) and 2(8) of the SDO, it is unlawful for a person to sexually harass another person in the course of offering to provide, or providing, good, facilities or services to that other person (i.e., it is unlawful for a service provider to sexually harass a customer).

8. Over the past five years, the EOC has received a total of 33 complaints relating to service providers harassing customers (6 cases in 2008, 12 cases in 2009, 3 cases in 2010, 4 cases in 2011, and 8 cases in 2012 under section 40 of the SDO). The majority of cases were female customers taking action against male service providers and their employers for vicarious liability. Most of the cases were discontinued as they involved the use of language which was not necessarily an act of sexual nature for the purpose of the SDO.

9. As seen from paragraph 7 above, sexual harassment by customers against service providers is not covered by the SDO at present. The EOC therefore proposed to amend section 40(1) of the SDO by adding 'or obtaining or using any goods, facilities or services provided by her' at the end of section 40(1) of the SDO, so that it becomes unlawful for a customer to sexually harass the service provider in the course of seeking, or receiving, goods, services or facilities from the latter.

### **Considerations**

#### Complaint cases received by the EOC

10. We understand from the EOC that since sexual harassment by customers against service providers is currently not covered by the SDO, the EOC does not maintain statistics on enquiries and complaints on this front and victims of such harassments may not have made enquiries or lodged complaints to the EOC for the same reason. Nevertheless, the EOC may have some information that may help shed some more light on the current situation.

11. Upon our enquiry, the EOC has indicated that from November 2012 till May 2013, two cases have been received by the EOC, namely -

- (a) an air hostess alleged to be sexually harassed by a passenger; and
- (b) a foreign domestic worker alleged to be sexually harassed by a person not residing in the premises in which the foreign domestic worker carried out her work.

Relevant issues to consider

12. The cases cited in paragraph 11 above suggest that there is a prima facie case to amend the SDO to expand the scope of the protection against sexual harassment to cover customers harassing service providers. To ensure that the legislative amendment to be introduced achieves the intended effects but does not give rise to any unintended problems, the formulation of the amendment needs to be carefully considered, including that proposed by the EOC as referred to in paragraph 9 above. We consider that to ensure that the proposed legislative amendment is workable, enforceable, and provides meaningful protection to the persons concerned, there are a number of issues that need to be considered in greater depth. These issues include, for example, the following -

- (a) whether the problem is particularly prevalent in certain specific service sectors and, if so, depending on the nature of these specific sectors, how the legislative provisions should be worded to afford pertinent and effective protection to the victims concerned
- (b) whether the same level and variety of legal remedies currently available under the SDO should be extended to the expanded scope of protection, if pursued;
- (c) in evaluating options for taking the legislative approach, whether there will be difficulties and challenges in terms of enforcement;
- (d) apart from legislative amendments, whether there are other measures that can be implemented to abate sexual harassment in the course of seeking, or receiving, goods, facilities or services (e.g., publicity and public education programmes);
- (e) whether the expanded scope of protection should apply to both types of sexual harassment provided in paragraphs (a) and (b) of section 2(5) of the SDO, and if so, the legal implications that may arise; and
- (f) whether there should be any form of duty or liability on the part of the owner / management of the premises where the harassment takes

place to effectively protect service providers from sexual harassment by customers.

13. In this connection, we note that section 28G of the Sex Discrimination Act 1984 in Australia states that it is unlawful for a person: (a) to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person; or (b) to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from that other person. This may be a useful reference for the purpose of the proposed amendment to section 40(1) of the SDO.

14. We will, in collaboration with the EOC, conduct a study to further examine the issues identified in paragraph 12 and the experience of overseas jurisdictions. Subject to the outcome of the study, we will further consider the best way to take forward the proposed legislative amendment.

**Constitutional and Mainland Affairs Bureau**  
**June 2013**

Chapter:	480	Title:	<b>Sex Discrimination Ordinance</b>	Gazette	E.R. 1 of 2013
				Number:	
Section:	23	Heading:	<b>Employees, etc.</b>	Version Date:	25/04/2013

### **Sexual Harassment**

- (1) It is unlawful for a person, in relation to employment by him at an establishment in Hong Kong, to sexually harass a woman who is seeking to be employed by the person.
- (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Hong Kong, to sexually harass her.
- (3) It is unlawful for a person who is employed by another person at an establishment in Hong Kong to sexually harass a woman who is seeking to be, or who is, employed by that second-mentioned person.
- (4) It is unlawful for the principal, in relation to work to which section 13 applies, to sexually harass a woman who is a contract worker.
- (5) It is unlawful for a contract worker to sexually harass a woman who is a fellow contract worker.
- (6) It is unlawful for a partner in a firm to sexually harass a woman who is seeking to be, or who is, a partner in the firm.
- (7) Subsection (6) shall apply in relation to persons proposing to form themselves into a partnership as it applies in relation to a firm.
- (8) Section 15(6) shall apply to subsection (6) as it applies to section 15(1).
- (9) It is unlawful for the principal, in relation to work to which section 20 applies, to sexually harass a woman who is a commission agent.
- (10) It is unlawful for a commission agent to sexually harass a woman who is a fellow commission agent.
- (11) It is unlawful for a person who is seeking to be, or who is, employed by a woman at an establishment in Hong Kong to sexually harass her.
- (12) It is unlawful for a person residing in any premises to sexually harass a woman-
  - (a) employed by another person at an establishment in Hong Kong (and whether or not that other person also resides in those premises or those premises are that establishment); and
  - (b) carrying out in those premises all or part of her work in relation to her employment (and whether or not she also resides in those premises).

(Enacted 1995)

Chapter: 480 Title: **Sex Discrimination Ordinance** Gazette E.R. 1 of 2013  
Section: 24 Heading: **Other sexual harassment** Number: Version Date: 25/04/2013

(1) It is unlawful for a member of an organization to which section 16 applies to sexually harass a woman who is seeking to be, or who is, a member of the organization.

(2) It is unlawful for a member of an authority or body referred to in section 17 to sexually harass a woman seeking an authorization or qualification (within the meaning of that section) which can be conferred by the authority or body, as the case may be.

(3) It is unlawful for a person to sexually harass a woman seeking or undergoing training which would help fit her for any employment if that person provides, or makes arrangements for the provision of, facilities for such training.

(4) It is unlawful for a person who-

(a) operates an employment agency; or

(b) is a member of the staff of an employment agency,

to sexually harass a woman in the course of offering to provide, or providing, any of the agency's services to her.

(Enacted 1995)

Chapter:	480	Title:	<b>Sex Discrimination Ordinance</b>	Gazette Number:	E.R. 1 of 2013
Section:	39	Heading:	<b>Educational establishments</b>	Version Date:	25/04/2013

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### **Sexual Harassment**

- (1) It is unlawful for a person who is, or is a member of, the responsible body for an educational establishment to sexually harass a woman who is seeking to be, or who is, a student of the establishment.
- (2) It is unlawful for a person who is a member of the staff of an educational establishment to sexually harass a woman who is seeking to be, or who is, a student of the establishment.
- (3) It is unlawful for a person who is a student of an educational establishment to sexually harass a woman who is seeking to be, or who is, a student of the establishment.
- (4) It is unlawful for a person who is seeking to be, or who is, a student of an educational establishment to sexually harass a woman-
- (a) who is, or is a member of, the responsible body for; or
  - (b) who is a member of the staff of,
- the establishment.

(Enacted 1995)



Chapter: 480 Title: **Sex Discrimination** Gazette E.R. 1 of 2013  
**Ordinance** Number:  
Section: 40 Heading: **Other sexual harassment** Version Date: 25/04/2013

(1) It is unlawful for a person to sexually harass a woman in the course of offering to provide, or providing, goods, facilities or services to her.

(2) It is unlawful for a person, in relation to premises in Hong Kong of which he has power to dispose, to sexually harass a woman in the course of offering to provide, or providing, those premises to her.

(3) It is unlawful for a person, in relation to premises managed by him, to sexually harass a woman occupying the premises.

(4) Where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises in Hong Kong comprised in a tenancy, it is unlawful for the landlord or other person to sexually harass a woman seeking the licence or consent for disposal of the premises to her.

(5) Section 30(4) shall apply to subsection (4) as it applies to section 30.

(6) It is unlawful for a barrister or barrister's clerk, in relation to any chambers, to sexually harass a woman-

(a) in the course of offering to provide to her pupillage or tenancy in the chambers; or

(b) who is a pupil or tenant in the chambers.

(7) It is unlawful for any person, in the course of the giving, withholding or acceptance of instructions to a barrister, to sexually harass a woman who is a barrister.

(8) Section 36(4) shall apply to subsections (6) and (7) as it applies to section 36.

(Enacted 1995)