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**Legislative Council**

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**Bills Committee on Sex Discrimination (Amendment) Bill 2014**

**Background brief prepared by the Legislative Council Secretariat**

**Purpose**

This paper provides background information on the Sex Discrimination (Amendment) Bill 2014 ("the Bill"). It also gives a brief account of the discussion of the Panel on Constitutional Affairs ("the Panel") on the legislative proposal to extend the protection under the Sex Discrimination Ordinance (Cap. 480) ("SDO") to cover also sexual harassment of service providers by customers.

**Background**

Sexual harassment

2. Section 2(5) of 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>.

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<sup>1</sup> Section 2(8) of SDO provides that a provision of Part 3 or 4 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.

3. The scope of protection mentioned in paragraph 2(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 other sexual harassment covered by sections 39 and 40 respectively. Section 2(5) of SDO was amended in 2008 (via ord. No. 29 of 2008) to remove these restrictions.

#### Sexual harassment in specified contexts under SDO

4. At present, SDO provides protection against sexual harassment in specified fields. For example, section 23 of 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 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 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 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 SDO are reproduced at **Appendix I**.

#### Role of the Equal Opportunities Commission ("EOC") in handling sexual harassment cases

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

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<sup>2</sup> The reasons specified in section 84(4) include: (a) EOC is satisfied that the act is not unlawful by reason of a provision of SDO; (b) 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, EOC determines, in accordance with the rules made under section 88, that the complaint should not be a representative complaint; or (e) EOC is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

## EOC's proposal

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

7. Sexual harassment by customers against service providers at present is not covered by SDO. EOC has 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 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.

8. According to the Administration, from November 2012 to May 2013, two relevant cases were received by 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.

Notwithstanding that EOC has not received a substantial number of enquiries and complaints on this front, EOC believes that there could be more victims of such harassment who did not make enquiries or lodge complaints to EOC as this is not covered by SDO.

9. Members may also wish to note that paragraph 3 of the Legislative Council ("LegCo") Brief issued by the Constitutional and Mainland Affairs Bureau on 18 June 2014 (no file reference provided) has set out survey results which may shed light on which service industries are particularly prone to sexual harassment by customers and on the situation in the airline industry.

## **The Bill**

10. The Bill seeks to amend SDO to render unlawful any sexual harassment against providers or prospective providers of goods, facilities, or services<sup>3</sup>; and to apply the provisions relating to sexual harassment occurring in offering to

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<sup>3</sup> The provisions are applicable to sexual harassment of both men and women, by virtue of section 2(8) of SDO (see Footnote 1).

provide, seeking to provide or providing goods, facilities or services to sexual harassment of this kind occurring on local ships or aircraft outside Hong Kong.

## **Major concerns raised by the Panel**

### *Concerns on the legislative proposal*

11. The Panel was consulted on the proposal to expand the scope of protection against sexual harassment under SDO to cover customers harassing service providers at its meeting on 17 June 2013. Members in general expressed support for the proposal and requested the Administration to implement the proposed amendment as soon as possible in order to afford better protection to employees of different industries.

12. Some members expressed concern as to how flight attendants would be protected under the legislative proposal, e.g. whether the new provisions would only cover flight attendants employed by airline companies registered in Hong Kong. Members are invited to note that as set out in paragraph 6 of the LegCo Brief, the Administration proposes, after discussion with EOC, to expand the territorial scope of the proposal to cover sexual harassment of service providers by customers, and of customers by service providers, that takes place on board a Hong Kong registered ship or aircraft while such a ship or aircraft is outside Hong Kong. These are not covered by the current provisions under SDO. The proposal seeks to render sexual harassment both ways unlawful on a Hong Kong registered ship or aircraft outside Hong Kong.

### *Administration's follow-up on other proposals of EOC to amend the anti-discrimination ordinances*

13. Members noted that EOC had also submitted to the Administration other proposals to amend the four anti-discrimination ordinances, and enquired about the progress of the Administration's follow-up on those proposals. The Administration reverted to the Panel in August 2013 and advised that in 2011, EOC submitted to the Administration 11 legislative proposals. The status of these 11 proposals was as follows –

- (a) one had been implemented on 10 May 2013<sup>4</sup>;

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<sup>4</sup> The Legislation Publication (Revision) Order 2013 amended the headings of SDO sections 7 and 8 to more accurately reflect the nature of these two provisions.

- (b) five would be taken forward by the Statute Law (Miscellaneous Provisions) Bill, tentatively scheduled for introduction into the LegCo in the 2013-2014 legislative session<sup>5</sup>;
- (c) one was the above proposed amendment to SDO discussed by the Panel, which would be taken forward by an amendment bill tentatively scheduled for introduction into LegCo in the 2013-2014 legislative session;
- (d) one had been considered by the Department of Justice ("DoJ") as unnecessary from the legal point of view<sup>6</sup>; and
- (e) three proposals needed to be further considered because of their complexity and potential far-reaching implications<sup>7</sup>.

### **Relevant documents**

14. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix II**.

Council Business Division 2  
Legislative Council Secretariat  
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<sup>5</sup> The five amendments are technical ones relating to the repeal of certain exceptions under Part 2 of Schedule 5 to SDO; issuance of enforcement notice under the Disability Discrimination Ordinance (Cap. 487) ("DDO"); protection of EOC staff against liability in implementing the four anti-discrimination ordinances; and refining the Chinese text of the four anti-discrimination ordinances. The Statute Law (Miscellaneous Provisions) Bill was introduced into LegCo on 17 April 2014 and is currently under scrutiny by a bills committee.

<sup>6</sup> EOC's proposal is to clarify that the District Court is not barred from granting more than one statutory remedy under the four anti-discrimination ordinances. DoJ considers that this is unnecessary as the current provisions do not have the effect of barring the District Court from awarding more than one statutory remedy.

<sup>7</sup> The three proposals relate to recovery of costs and expenses by EOC in civil proceedings; the concept of "direct disability discrimination" under section 6(a) of DDO; and the availability of damages for indirect discrimination where intent cannot be proved.

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  
Number:  
Section: 24 Heading: **Other sexual harassment** 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 Ordinance** Gazette E.R. 1 of 2013  
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)

**Relevant documents on Bills Committee on  
Sex Discrimination (Amendment) Bill 2014**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Home Affairs	13 February 2001 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Legislative Council	28 June 2006	<a href="#">Official Record of Proceedings</a> <a href="#">Page 81 - 83 (Written question raised by Hon Emily LAU)</a>
	21 November 2007	<a href="#">Official Record of Proceedings</a> <a href="#">Page 24 - 31 (Oral question raised by Hon Emily LAU)</a>
	26 May 2010	<a href="#">Official Record of Proceedings</a> <a href="#">Page 85 - 89 (Written question raised by Hon CHEUNG Man-kwong)</a>
	9 November 2011	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 116 - 118 (Written question raised by Hon Emily LAU)</a>
	11 January 2012	<a href="#">Official Record of Proceedings</a> <a href="#">Pages 122 - 127 (Written question raised by Hon Emily LAU)</a>
Panel on Constitutional Affairs	17 June 2013 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
	23 April 2014 (Item IV)	<a href="#">Agenda</a>