

立法會
Legislative Council

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**Report of the Bills Committee on Sex Discrimination
(Amendment) Bill 2014**

Purpose

1. This paper reports on the deliberations of the Bills Committee on Sex Discrimination (Amendment) Bill 2014.

Background

2. Under section 40(1) of the Sex Discrimination Ordinance (Cap. 480) ("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. a service provider sexually harasses a customer). However, SDO does not render unlawful any sexual harassment of a service provider by a customer.

3. According to the Equal Opportunities Commission ("EOC")¹, sexual harassment of service providers by customers especially in certain service industries is not uncommon². EOC has received a few complaints about sexual harassment of service providers by customers over the past few years, but was unable to take any action because of a lack of provisions outlawing such harassment under the existing SDO. 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 harassments who did not make enquiries or lodge complaints to EOC as this is not covered by SDO. EOC has therefore proposed amending SDO to provide protection to providers of goods, facilities or services against sexual harassment by customers.

¹ EOC is an independent statutory body responsible for implementing the four anti-discrimination ordinances including SDO.

² As set out in paragraph 3 of the Legislative Council ("LegCo") Brief issued by the Constitutional and Mainland Affairs Bureau on 18 June 2014 (no file reference), studies conducted by the Association for the Advancement of Feminism in 2011 and 2013 found that women in certain service industries (such as nurses, airline hostesses, waitresses, beer promoters, and saleswomen) were particularly prone to sexual harassment by customers.

4. Furthermore, in view of the situation in the airline industry³, the Administration, after discussion with EOC, has proposed to expand the territorial scope of the EOC's proposal to cover sexual harassment of service providers by customers, and of customers by service providers⁴, 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 existing provisions of SDO. The proposal seeks to render sexual harassment both ways unlawful on a Hong Kong registered ship or aircraft outside Hong Kong.

5. Under the current legislation, the protection afforded by section 40(1) of SDO is available only where an act of sexual harassment takes place in Hong Kong. Section 41 of SDO⁵ provides that the prohibition of sex discrimination relating to the provision of goods, facilities or services under section 28(1) of SDO applies to a Hong Kong registered ship or aircraft and a Hong Kong Government ship or aircraft, even if the ship or aircraft is outside Hong Kong. The Administration has proposed to adopt the same approach to expanding the territorial scope in respect of sexual harassment relating to the provision of goods, facilities or services.

The Sex Discrimination (Amendment) Bill 2014 ("the Bill")

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

³ According to paragraph 3 of the LegCo Brief, in a survey conducted by EOC with the Hong Kong Flight Attendants Alliance in November 2013, 27% of the respondents (or 106 out of 392) indicated that they had been sexually harassed in the previous year when they were on duty in flight. Out of 239 counts of allegation as reported by the 106 respondents, the most common alleged harassers were customers (59%).

⁴ According to the LegCo Brief, despite that EOC has not received any sexual harassment complaints from customers against flight attendants, such a two-way approach is in line with sexual harassment laws overseas, such as Australia.

⁵ Section 41(3) of SDO states:

"Section 28(1) applies on and in relation to –

- (a) any ship registered in Hong Kong;
- (b) any aircraft or dynamically supported craft registered in Hong Kong and operated by a person who has his principal place of business, or is ordinarily resident, in Hong Kong;
- (c) any ship, aircraft or dynamically supported craft belonging to or possessed by the Government,

even if the ship, aircraft or dynamically supported craft is outside Hong Kong."

7. The Bill amends SDO by adding –

- (a) a new subsection (1A) to section 40 of SDO to extend the protection against sexual harassment to providers or prospective providers of goods, facilities or services⁶; and
- (b) new subsections (6) and (7) to section 41 of SDO to apply section 40(1) and (1A) to sexual harassment that occurs on local ships or aircraft outside Hong Kong.

8. The Bill contains no commencement provision. By virtue of section 20(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the Bill, if passed, would come into operation on the day of gazettal.

The Bills Committee

9. At the House Committee meeting on 27 June 2014, a Bills Committee was formed to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**.

10. Under the chairmanship of Dr CHIANG Lai-wan, the Bills Committee has held two meetings with the Administration and received views from the public and organizations concerned at one of the meetings. A list of the organizations and individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

11. Members in general have expressed support for the Bill and its early commencement so as to plug the loophole that the prohibition of sexual harassment under section 40 of SDO does not cover a customer harassing a service provider. In the course of scrutiny of the Bill, members have expressed concerns about the proposal of extending protection to cover sexual harassment that takes place on board Hong Kong registered ships and aircraft while outside Hong Kong, employer's liability, and use of gender neutral references in SDO.

⁶ By virtue of section 2(8) of SDO, the provisions are applicable to sexual harassment of both men and women. Section 2(8) 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."

Application to sexual harassment that occurs on Hong Kong registered ships and aircraft while outside Hong Kong

12. With regard to the proposal of expanding the territorial scope of the EOC's proposal (see paragraphs 4 and 5), the Administration has explained that the purpose is to enable a victim of sexual harassment which occurs on a local ship while sailing in the open sea or on a local aircraft flying in the international airspace governed by no jurisdiction, or while the ship/aircraft is in another jurisdiction, could lodge a complaint with EOC after returning to Hong Kong and act in accordance with the law. In this connection, members have enquired about the avenues of redress available to a victim of sexual harassment that takes place on a Hong Kong registered ship or aircraft while such a ship or aircraft is outside Hong Kong, and the civil proceedings involved.

13. The Administration has advised that in cases of sexual harassment that takes place on a Hong Kong registered ship or aircraft in the above circumstances, victims of sexual harassment may seek redress with the local authorities where local legislation against sexual harassment is in place, or consider seeking assistance from EOC upon returning to Hong Kong. The Administration has also advised that insofar as the mutual legal assistance perspective in relation to such redresses is concerned, in any cause or matter before the Court (e.g. civil proceedings instituted under section 76(1) of SDO, or an application for injunction under section 81 of SDO), if it appears necessary for the purpose of justice, the Court may issue a letter of request to the judicial authorities of a place outside Hong Kong (including Mainland China) to take evidence in that place.

14. Members have asked about the application of the Bill to ships or aircraft which are not registered in Hong Kong. The Administration has explained that Hong Kong people working on such a ship or aircraft would still be protected against sexual harassment while the ship or aircraft is within the Hong Kong jurisdiction, but not after it has left Hong Kong. The harassment could be dealt with in accordance with the relevant law of the jurisdiction where the ship/aircraft is registered.

15. Some members including Dr Helena WONG and Mr TANG Ka-piu have asked whether sexual harassment of service providers by customers that occurs on Hong Kong registered land-based transport means (e.g. trains/coaches) while operating outside Hong Kong is covered by the Bill. These members have expressed particular concern about the protection rendered to employees of the tourism industry (such as tour guides). They consider that these employees should also be protected under the Bill while working outside Hong Kong.

16. The Administration has explained that as sexual harassment that occurs on land-based transport would either be covered by SDO if it takes place in Hong Kong, or by the relevant law of the Mainland if it takes place on the Mainland, there would be no issue of jurisdictional vacuum. Therefore, the Bill does not propose to amend SDO to explicitly extend coverage to Hong Kong registered land-based transport means when it is operating outside Hong Kong. In this connection, members have requested information on the relevant legislation of the Mainland. To address members' concern, the Administration has provided a detailed information paper (Annex to LC Paper No. CB(2)2359/13-14(02)) on the protection rendered by the relevant laws of the Mainland against sexual harassment.

Employers' liability in cases where employees are sexually harassed by customers in their workplace

17. Some members of the Bills Committee have expressed concern that employers are not required to take up legal responsibility if it is proven that the employer has failed to take reasonably practicable steps to prevent sexual harassment by a customer against an employee in the workplace. Specifically, members have enquired whether the employer would be held liable in situations where the employer has been notified of such harassment but does not take any action to prevent its recurrence.

18. The Administration has advised that the aforementioned issue has already been included in the Discrimination Law Review ("DLR") currently conducted by EOC⁷. According to the Administration, EOC is expected to submit recommendations to the Government in the latter half of 2015. The Administration has advised that it would consider how to follow up upon receipt of EOC's recommendations and may conduct public consultation as and when necessary.

19. Some members including Mr LEE Cheuk-yan, Mr KWOK Wai-keung and Dr Elizabeth QUAT consider that employers have the responsibility to provide a working environment free of sexual harassment. They have suggested that before the next legislative amendment exercise for SDO, consideration should be given to strengthening publicity targeting employers to promote their awareness of their obligation to implement appropriate preventive measures against sexual harassment in the workplace. They have further suggested that a code of practice on preventing sexual harassment should be

⁷ Chapter 4 of the DLR consultation document looks at issues including employer's liability for harassment of employees by customers in the situation where employers become aware that their employees are being harassed by customers, but do not take action to prevent it.

issued by EOC for employers' reference. EOC has expressed concurrence that employers should have an obligation to take reasonable steps to provide a working environment free of sexual harassment. EOC has further advised that consideration would be given to issuing concrete guidelines on good practices to employers. Upon passage of the Bill, EOC will enhance its publicity and organize a series of territory-wide promotional activities to educate the public on the new provisions.

Use of gender neutral references in SDO

20. Some members including Ms Cyd HO, Mr Gary FAN and Mr CHAN Chi-chuen have expressed the view that clause 3⁸ of the Bill, which proposes to amend section 40 of SDO by adding a new subsection "(1A) It is unlawful for a person to sexually harass a woman in the course of ...", should be revised to avoid being gender specific. While noting that by virtue of section 2(8) of SDO, "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...", these members have expressed concern that this only ensures that the proposed new subsection provides equal protection to men and women, but not to persons of the third gender, which is already legally recognized in some overseas jurisdictions. They have cited the example of Australia where, in addition to the two genders (male and female), a gender "X" is provided in the law representing the transgender and intersex people so that they are also entitled to legal protection. These members have queried whether a victim, whose gender is shown as "X" in the passport held by that person, would fall outside the coverage of the Bill. Ms Cyd HO has therefore proposed using gender neutral references in the Bill to cater for situations involving persons of different gender identities. Mr CHAN Chi-chuen has suggested that the proposed new subsection (1A) might be worded along this line e.g. "it is unlawful for a person to sexually harass another person in the course of ..." so that persons of different gender identities would also be covered by the Bill.

21. The Administration has explained that SDO is enacted on the premise that all persons are categorized into either men or women, and the new section 40(1A), when read with the existing section 2(8), would protect all persons

⁸ Clause 3 reads –

' Section 40 amended (other sexual harassment)

After section 40(1)—

Add

"(1A) It is unlawful for a person to sexually harass a woman in the course of—

(a) seeking to be provided with goods, facilities or services by her; or

(b) being provided with goods, facilities or services by her."

from sexual harassment in the specified circumstances irrespective of whether the victim is a man or a woman under Hong Kong law. It is open to a gender "X" person in Hong Kong to invoke the protection under section 40(1A) by making a claim under section 76. The Court will consider the facts, circumstances and evidence in each individual case (including the case of a person holding a passport showing gender as "X"), apply the law, and decide whether or not remedy should be granted to the claimant.

22. EOC has advised that, regarding handling potential complaints from gender "X" persons, its view is that protection from sexual harassment (under section 40 of SDO) is available to everyone regardless of gender identity. The fact that a person is gender "X" (a gender identity not formally recognized under Hong Kong law) is not a material issue that would affect the person from receiving the protection. EOC will deal with sexual harassment complaints lodged by gender "X" persons under section 40 of SDO in the same way as it does with complaints by other men or women. EOC will apply section 84 of SDO and conduct investigation and endeavour to effect a settlement by conciliation. In cases where there is no settlement, the complainant may apply for legal assistance to take legal action.

23. As regards the suggestion that gender neutral references should be used in the Bill, the Administration has explained that the drafting of the proposed amendments under the Bill should be consistent with the drafting approach of the existing provisions of SDO. The Administration has advised that the suggestion touches on the issue of gender recognition. In a separate exercise, a high level inter-departmental working group ("IWG"), chaired by the Secretary for Justice, has been formed to undertake a detailed study on gender recognition in the context of considering legislation and incidental administrative measures that may be required to protect the rights of transsexual persons. The extent to which gender recognition of third gender persons may be an issue to be addressed by IWG, if at all, has yet to be determined.

24. EOC has pointed out that while it is desirable to use gender neutral references in SDO, the use of gender neutral references solely for the proposed new subsection (1A) (which only concerns sexual harassment by customers of service providers) would create inconsistency in the drafting approach of the provisions of SDO. EOC has also advised that the current DLR will examine whether gender neutral language should be used for certain provisions of SDO, and EOC is in the process of consolidating the views received from the public.

Resumption of Second Reading debate

25. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 3 December 2014.

Committee stage amendments

26. The Administration and the Bills Committee have not proposed any Committee stage amendment to the Bill.

Consultation with the House Committee

27. The Bills Committee reported its deliberations to the House Committee on 21 November 2014.

Council Business Division 2
Legislative Council Secretariat
26 November 2014

Bills Committee on Sex Discrimination (Amendment) Bill 2014

Membership list

Chairman	Dr Hon CHIANG Lai-wan, JP
Members	Hon LEE Cheuk-yan Hon Tommy CHEUNG Yu-yan, SBS, JP Prof Hon Joseph LEE Kok-long, SBS, JP, PhD, RN Hon Cyd HO Sau-lan, JP Dr Hon Priscilla LEUNG Mei-fun, SBS, JP Hon Paul TSE Wai-chun, JP Hon LEUNG Kwok-hung Hon Gary FAN Kwok-wai Hon CHAN Chi-chuen Dr Hon Kenneth CHAN Ka-lok Hon LEUNG Che-cheung, BBS, MH, JP Hon Alice MAK Mei-kuen, JP Hon KWOK Wai-keung Dr Hon Helena WONG Pik-wan Dr Hon Elizabeth QUAT, JP Hon POON Siu-ping, BBS, MH Hon TANG Ka-piu, JP Hon CHUNG Kwok-pan Hon Christopher CHUNG Shu-kun, BBS, MH, JP Total : 20 Members
Clerk	Ms Joanne MAK
Legal Adviser	Miss Mimi CHANG
Date	23 July 2014

《2014年性別歧視(修訂)條例草案》委員會
Bills Committee on Sex Discrimination (Amendment) Bill 2014

曾向法案委員會表達意見的團體/個別人士名單
List of organizations/individuals which/who have
submitted views to the Bills Committee

<u>名稱</u>	<u>Name</u>
1. 人手比例不符最低工資關注組	人手比例不符最低工資關注組
* 2. 公民黨	The Civic Party
3. 反對同性婚姻大聯盟	Ban Gay Marriage Hong Kong
4. 平等機會委員會	The Equal Opportunities Commission
5. 平等機會婦女聯席	Hong Kong Women's Coalition on Equal Opportunities
6. 自由黨青年團	Liberal Party Youth Committee
7. 性別歧視條例關注組	性別歧視條例關注組
* 8. 東區區議會議員楊位醒先生	Mr YEUNG Wai-sing, member of Eastern District Council
9. 香港工會聯合會婦女事務委員會	The Hong Kong Federation of Trade Unions Women Affairs Committee
* 10. 香港中華總商會	The Chinese General Chamber of Commerce
* 11. 香港律師會	The Law Society of Hong Kong
12. 香港婦女勞工協會	Hong Kong Women Workers' Association
* 13. 香港專業導遊總工會	Hong Kong Professional Tourist Guides General Union
* 14. 香港飲食業聯合總會	Hong Kong Catering Industry Association
15. 香港賽馬會職工總會	Hong Kong Jockey Club Workers General Union

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| 16. 香港職工會聯盟婦女事務委員會 | Women's Affairs Committee, Hong Kong Confederation of Trade Unions |
| 17. 國際特赦組織香港分會 | Amnesty International Hong Kong |
| 18. 港九勞工社團聯會 | The Federation of Hong Kong and Kowloon Labour Unions |
| 19. 飲食業關注性別歧視條例大聯盟 | 飲食業關注性別歧視條例大聯盟 |
| 20. 新婦女協進會 | The Association for the Advancement of Feminism |

* 只提交意見書
provided submissions only