

**For discussion
on 22 June 2018**

Legislative Council Panel on Constitutional Affairs

Discrimination Legislation (Miscellaneous Amendments) Bill

Purpose

This paper informs Members of our approach for preparing the Discrimination Legislation (Miscellaneous Amendments) Bill which implements eight recommendations of priority in the Equal Opportunities Commission (EOC)'s Report on the Discrimination Law Review (DLR).

Background

2. In March 2013, the EOC launched the DLR to review comprehensively the four anti-discrimination Ordinances¹. As part of the DLR, the EOC conducted a public consultation exercise from 8 July to 31 October 2014, and received over 125 000 written submissions (288 responses from organisations and 124 753 responses from individuals). In March 2016, the EOC made its submissions to the Government on the DLR (<http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/dlr/default.aspx>). The submissions contained a total of 73 recommendations, including 27 which were considered by the EOC to be of higher priority.

3. The Constitutional and Mainland Affairs Bureau (CMAB), in consultation with relevant government bureaux and departments, initiated discussion with this Panel on nine recommendations that were considered to be capable of driving consensus among stakeholders and society on 20 March 2017. With this Panel's support, we also consulted the Labour Advisory Board (LAB) on five employment-related recommendations, such as introducing express provisions to prohibit direct and indirect discrimination on the ground of breastfeeding (including the expression of breastmilk) and expanding the scope of protection from sexual, disability and racial harassment to persons working in a common workplace. At the meeting on 11 October 2017, the LAB in

¹ The four anti-discrimination ordinances are: the Sex Discrimination Ordinance (Cap. 480) (SDO), the Disability Discrimination Ordinance (Cap. 487) (DDO), the Family Status Discrimination Ordinance (Cap. 527) (FSDO), and the Race Discrimination Ordinance (Cap. 602) (RDO).

principle supported the Government to take forward those recommendations. A summary of the latest position of the nine recommendations in the DLR is at [Annex](#) for reference.

Legislative Proposals

4. Upon considering the views of this Panel and the LAB, we are taking forward the following eight recommendations, with a view to implementing them as soon as practicable. We are working closely with DoJ on the drafting of the Discrimination Legislation (Miscellaneous Amendments) Bill. The outline of the Bill is set out in paragraphs 5 to 17 below–

(a) *to introduce express provisions in the SDO prohibiting direct and indirect discrimination on the ground of breastfeeding, and to include expression of milk in the definition of breastfeeding (recommendation 5 of the DLR)*

5. All breastfeeding mothers are women and breastfeeding is a gender-specific condition analogous to the protected characteristic of pregnancy under section 8 of the SDO². We propose to render direct and indirect discrimination against a woman on the ground of her breastfeeding unlawful by amending the SDO. This prohibition would apply to all fields governed by the SDO, such as employment, education, the provision of goods, services or facilities, disposal or management of premises, and activities of the Government. In order to afford comprehensive protection to all breastfeeding women, the proposed definition of breastfeeding does not only cover the act of breastfeeding but will also include the expression of milk and the status of being a breastfeeding mother.

6. We propose that a person should be liable for direct discrimination on the ground of breastfeeding if the person treats a breastfeeding woman less favourably than a person who is not breastfeeding where the relevant circumstances in the one case are the same, or not materially different, in the other. We also propose that a person could be liable for indirect discrimination

² Section 8 of the SDO reads “A person discriminates against a woman in any circumstances . . . if –

- (a) on the ground of her pregnancy he treats her less favourably than he treats or would treat a person who is not pregnant; or
- (b) he applies to her a requirement or condition which he applies or would apply to a person who is not pregnant but –
 - (i) which is such that the proportion of persons who are pregnant who can comply with it is considerably smaller than the proportion of persons who are not pregnant who can comply with it;
 - (ii) which he cannot show to be justifiable irrespective of whether or not the person to whom it is applied is pregnant; and
 - (iii) which is to her detriment because she cannot comply with it.”

on the ground of breastfeeding if the person applies a blanket requirement or condition to all persons but the requirement or condition has a disparate effect on breastfeeding women. The person would be held liable for indirect discrimination against a breastfeeding woman if she cannot comply with the requirement or condition and suffers a detriment as a result, and the requirement or condition cannot be shown to be justifiable.

7. Similar to the existing provisions on indirect discrimination in the four anti-discrimination ordinances, no positive obligation would be imposed on any person to provide reasonable accommodation (such as lactation breaks or facilities) to breastfeeding women. However, to avoid liability for indirect breastfeeding discrimination, the respondent would have the burden of showing that the application of the blanket requirement or condition to all persons irrespective of whether or not they are breastfeeding is justifiable in all the circumstances.

(b) *to replace the references to “near relative”³ in the RDO with references to “associate” (recommendation 7 of the DLR)*

8. “Associate” would be defined as follows –

- (i) a spouse of the person;
- (ii) another person who is living with the person on a genuine domestic basis;
- (iii) a relative of the person;
- (iv) a carer of the person; and
- (v) another person who is in a business, sporting or recreational relationship with the person.

9. With reference to the protection afforded to a person who is discriminated against on the ground of the disability of the person’s “associate” under the DDO, the proposal seeks to protect a person from direct racial discrimination and racial harassment on the ground of the race of the person’s

³ Under section 2(1) of the RDO, near relative (近親), in relation to a person, means –

- (a) the person’s spouse;
 - (b) a parent of the person or of the spouse;
 - (c) a child of the person or the spouse of such a child;
 - (d) a brother or sister (whether of full blood or half blood) of the person or of the spouse or the spouse of such a brother or sister;
 - (e) a grandparent of the person or of the spouse; or
 - (f) a grandchild of the person or the spouse of such a grandchild,
- and, in determining the above relationships, children born out of wedlock are to be included, an adopted child is to be regarded as a child of both the natural parents and the adoptive parent or parents and a step child as the child of both the natural parents and any step parent.

“associate” in the RDO. Thus, it would be unlawful for a person to discriminate against or harass another person because of the race of the latter’s “associate” in all specified fields, such as employment, education, the provision of goods, facilities and services, access to clubs, etc.

10. Nevertheless, it would still be necessary to retain the definition of “near relative” in the RDO. Sections 10(7), 29(2)(a) and 30(1)(a) of the RDO currently provide for an exception in relation to shared accommodation with the discriminator or the discriminator’s “near relative”. For example, under section 10(7) of the RDO, an employer may choose to recruit a domestic helper of Indonesian origin to work at the home of the employer or his “near relative” and declines to recruit a domestic helper of Thai origin on the ground of the difference in origin. We consider that no change should be made to these exceptions as the substitution of “near relative” with “associate” would widen the scope of the exceptions considerably and hence afford less protection to job applicants and the employees concerned.

(c) to provide protection from direct and indirect racial discrimination and racial harassment by imputation in the RDO (recommendation 8 of the DLR)

11. Modelled on the existing definition of “disability” in section 2(1) of the DDO which includes a disability that is “imputed to a person”, the above proposal seeks to widen the scope of protection in the fields specified by the RDO to cover direct and indirect racial discrimination and racial harassment by imputation that a person is of a particular race or a member of a particular racial group. Hence, a person who discriminates against or harasses another person on the basis of a mistaken perception of the race of the other person would be held liable for racial discrimination or racial harassment, as the case may be, under the proposal.

(d) to expand the scope of protection from sexual, disability and racial harassment between persons working in a common workplace (e.g. consignment workers) under the SDO, RDO and DDO (recommendation 15 of the DLR)

12. The existing provisions of the SDO, RDO and DDO provide for limited protection from sexual, racial and disability harassment in situations where the harasser and the victim are working in a common workplace⁴ but have no employment or employment-like relationship with each other. Our proposal seeks to render sexual, racial and disability harassment between workplace participants at a place that is a workplace of both workplace participants unlawful under the SDO, RDO and DDO, even where there is no working relationship between them. In this respect, we propose that “workplace participants” should cover parties in close connection with a workplace, including an employer, an employee, a contract worker, a principal, a commission agent and a partner, and “workplace” should mean a place at which a workplace participant works or otherwise attends in connection with being a workplace participant by drawing reference to relevant legislations in overseas jurisdictions.

13. By virtue of section 46 of the SDO, section 47 of the RDO and section 48 of the DDO, a victim of harassment may also bring a claim against the harasser’s employer or principal, though an employer has a defence if he took reasonably practicable steps to prevent his employees from committing the unlawful act.

(e) to protect service providers from racial and disability harassment by customers under the RDO and DDO (recommendation 16 of the DLR)

14. Currently, section 39(1) of the RDO and section 38(1) of the DDO protect a customer from racial and disability harassment by a person providing goods, facilities or services, but not *vice versa*. We propose to align the harassment provisions in the RDO and DDO with those in sections 40(1) and (1A) of the SDO⁵ which make it unlawful for a person to sexually harass another person: (i) in the course of offering to provide, or providing, good, facilities or services to that other person (i.e., a service provider sexually

⁴ The existing protection from harassment under the SDO, DDO and RDO in instances where parties have no employment or employment-like relationship covers: (a) an employer harassing a person seeking to be employed and *vice versa*; (b) an employee harassing a person seeking to be employed; (c) a partner harassing persons seeking to be a partner; (d) a contract worker harassing a fellow contract worker, or a commission agent harassing a fellow commission agent; and (e) a person residing in any premises harassing a person (A) employed by another person who carries out in those premises all or part of A’s work in relation to A’s employment.

⁵ Under section 40(1) of the SDO, 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. Under section 40(1A) of the SDO, it is unlawful for a person to sexually harass a women 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.

harassing a customer); or (ii) in the course of obtaining or using any goods, facilities or services provided by the other person (i.e., a customer sexually harassing a service provider). We also propose that the scope of protection from harassment under the DDO should be aligned with that under the SDO and RDO so that a customer would be protected from harassment under the DDO not only where he wants to acquire the goods or services or to make use of the facilities, but also where he is acquiring the goods or services or making use of the facilities.

(f) *to provide protection from disability and racial harassment between service providers and customers where the acts of harassment take place outside Hong Kong but on Hong Kong registered aircraft and ships in the RDO and DDO (recommendation 17 of the DLR)*

15. We propose to align the provisions in the RDO and DDO with those in sections 41(6) and (7) of the SDO⁶ which concern the territorial extent of the harassment provisions in sections 40(1) and (1A) of the SDO so that service providers would also be protected from racial and disability harassment by customers (and customers would also be protected from such harassment by service providers) where the harassment takes place outside Hong Kong but on Hong Kong registered aircraft and ships.

(g) *to protect members or prospective members of a club from sexual and disability harassment by the management of the club under the SDO and DDO (recommendation 19 of the DLR)*

16. We propose to add provisions in the SDO and DDO similar to section 39(10) of the RDO which renders it unlawful for a club, the committee of management of a club or a member of the committee of management of a club to harass a person who is, or has applied to be, a member of the club.

(h) *to repeal provisions in the SDO, FSDO and RDO which disallow the award of damages if the respondent in an indirect discrimination case can prove that the requirement or condition was not applied with intention to discriminate (recommendation 22 of the DLR)*

⁶ Sections 41(6) and (7) of the SDO render it unlawful for any person concerned with the provision of goods, facilities or services to the public to sexually harass a woman who seeks to obtain or use those goods, facilities or services on: (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; or (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.

17. We propose to repeal section 76(5) of the SDO, section 54(6) of the FSDO and section 70(6) of the RDO⁷ in alignment with the DDO so that a victim of unlawful indirect discrimination under any of the four anti-discrimination ordinances would be entitled to damages even though the respondent can prove that the requirement or condition was not applied with the intention to treat the victim unfavourably on a prohibited ground under the four anti-discrimination ordinances.

18. On further examination of recommendation 18 of the DLR which seeks to provide protection from sexual, disability and racial harassment between tenants and / or sub-tenants occupying the same premises, there are a number of issues that need to be considered at greater length in collaboration with the EOC before taking forward this recommendation in the light of the variety of leases, premises and persons living in the same premises in Hong Kong. For example, while the EOC's recommendation might not offer protection to people working or living in the same premises / building, it is possible to catch people of separate lettings in the same building if a landlord owns the whole premises / building and leases different units therein to different people. In this context, we need to ensure that any proposed wrongful acts are clearly defined, so as to avoid confusion and unnecessary disputes which may follow. Apart from legislative measures, we will also invite the EOC to explore whether there are other measures that can be introduced to abate acts of sexual, disability and racial harassment, say through publicity and public education programmes. Furthermore, the EOC will keep track of the details of enquiries and complaints received in order to provide a more in-depth analysis on protection from harassment between tenants and / or sub-tenants.

19. We plan to introduce the Discrimination Legislation (Miscellaneous Amendments) Bill to the Legislative Council by end-2018 and will first proceed with the eight prioritised recommendations. We will continue to study other recommendations of higher priority in the DLR submissions in consultation with relevant bureaux and departments.

20. Separately, at the meeting of this Panel on 20 March 2017, Members suggested that the Government should also take forward recommendation 2 of the DLR on protection of persons being accompanied by an assistance animal from discrimination. We have considered the suggestion with relevant bureaux and departments and the two local guide dog associations.

⁷ Under section 76(5) of the SDO, section 54(6) of the FSDO and section 70(6) of the RDO, no award of damages shall be made if the respondent proves that the requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of the claimant's sex, marital status, pregnancy, family status or race, as the case may be.

We have in principle decided to take forward the recommendation and are working on the details (such as how to handle the numerous legal prohibitions for dogs to enter specific premises and exemptions to these legal prohibitions). We will pursue this recommendation in a separate legislative amendment exercise.

Advice Sought

21. Members are welcome to give their views on the proposed approach of the Discrimination Legislation (Miscellaneous Amendments) Bill.

**Constitutional and Mainland Affairs Bureau
June 2018**

**Summary of the Latest Position of
the Discrimination Legislation (Miscellaneous Amendments) Bill**

Recommendation No.	Remarks
<p>5 It is recommended that the Government introduce express provisions prohibiting direct and indirect discrimination on grounds of breastfeeding. These provisions could be included by an amendment to the Sex Discrimination Ordinance (Cap. 480) (SDO) as a separate category of discrimination. The definition of breastfeeding should include expressing milk.</p>	<p>The Labour Advisory Board (LAB) in principle supported the Government to take forward the recommendation.</p>
<p>7 It is recommended that the Government amend the Race Discrimination Ordinance (Cap. 602) (RDO) provisions prohibiting direct discrimination and harassment by association by repealing the provisions regarding near relatives, and replacing it with a definition of an associate to include:</p> <ul style="list-style-type: none"> (a) a spouse of the person; (b) another person who is living with the person on a genuine domestic basis; (c) a relative of the person; (d) a carer of the person; and (e) another person who is in a business, sporting or recreational relationship with the person. 	<p>The LAB in principle supported the Government to take forward the recommendation.</p>
<p>8 It is recommended that the Government amend the RDO to include protection from direct and indirect discrimination and harassment by imputation that a person is of a particular racial group.</p>	<p>The LAB in principle supported the Government to take forward the recommendation.</p>
<p>15 It is recommended that the Government amend the provisions of the SDO, RDO and Disability Discrimination Ordinance (Cap. 487) (DDO) to provide protection from sexual, racial and disability harassment to persons in a common workplace.</p>	<p>The LAB in principle supported the Government to take forward the recommendation.</p>

16	It is recommended that the Government amend the provisions of RDO and DDO to provide protection from racial and disability harassment of service providers by service users.	
17	It is recommended that the Government amend the provisions of the RDO and DDO to provide protection from racial and disability harassment of service providers by service users, where such harassment takes place outside Hong Kong, but on Hong Kong registered aircraft and ships.	
18	It is recommended that the Government amend the SDO, RDO and DDO to provide protection of tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises.	May need further consultation, research and education.
19	It is recommended that the Government amend the SDO and DDO to provide protection from sexual and disability harassment by management of clubs of members or prospective members.	
22	It is recommended that the Government repeal the provisions under the SDO, Family Status Discrimination Ordinance (Cap. 527) and RDO which require proof of intention to discriminate in order to award damages for indirect discrimination claims.	The LAB in principle supported the Government to take forward the recommendation.

**Constitutional and Mainland Affairs Bureau
June 2018**