

Submission to LegCo Bills Committee on

Discrimination Legislation (Miscellaneous Amendments) Bill 2018

向《2018年歧視法例(雜項修訂)條例草案》委員會呈交意見書

Chong Yiu Kwong, Solicitor 莊耀洸律師

Senior Lecturer, The Education University of Hong Kong 香港教育大學高級講師

For the Public Hearing on 25th February 2019

Abstract in Chinese 中文摘要

a. 現行條例草案所建議的**共同工作間騷擾**，並不涵蓋義工和實習生，可參考澳洲新南威爾斯的法令，**應將保障範圍擴及義工**。

b. 就**餵哺母乳歧視**方面，政府表明不會對任何人施加正面的責任，要求他們為授乳婦女

提供合理遷就(例如提供授乳時段或設施)，這令反歧視效用大打折扣，**立法應施加正面責任**。

c. 現行法律只將同校學生之間的騷擾訂為違法行為，**被別校學生騷擾則毫無法律保障**，政府宜修訂法例以堵塞如此明顯的漏洞。

d. 早於 2001 年，政府已同意修訂法例以**保障租戶或分租戶免受其他租戶或分租戶騷擾**，2017 年 3 月再次確認此立場，惟 2017 年 6 月當局表示要再研究，**有關修訂不應再拖延**。

e. 平機會於 2016 年 3 月提出 73 項建議，現時政府只就 8 項立法，當局可否告知**處理其他建議的時間表**？

Common Workplace Harassment (共同工作場所騷擾)

1. In Clause 19 of the Bill, workplace participant (場所使用者) means an employee, an employer, a contract worker, a commission agent, the principal of a contract worker or a commission agent, or a partner in a firm. In other words, it does not explicitly cover a volunteer (義工), an intern nor a trainee(實習生). However, the Equal Opportunities Commission (EOC) clearly proposed the same in the Consultation Document in July 2014¹ and its Submission to the Government in March 2016.² Both the above documents cited the legislation of the New South Wales, Australia, the definition of workplace participants explicitly includes volunteers and unpaid trainees (無薪見習生).³ Volunteer service and unpaid trainee or internship are very common in Hong Kong. It is necessary to include volunteers and unpaid trainees into the definition of workplace participants.

Breastfeeding discrimination (餵哺母乳歧視)

2. Clause 7 of the Bill proposed to prohibit breastfeeding discrimination.

¹ Consultation Question 39 of the EOC, *Discrimination Law Review for Public Consultation*, July 2014 (EOC's DLR) stated, "Do you think that new harassment provisions should be introduced for all the protected characteristics which provide: ...(2) common workplace liability on the person harassing but there is no employer/employee relationship (e.g. **volunteers** harassed by another **volunteer**);...(my emphasis) Date of access: 11th February 2019:

<https://www.gov.hk/en/residents/government/publication/consultation/docs/2014/DLR.pdf>

² At page 70 of the EOC Submission, Recommendation 15 stated, "It is recommended that the Government amend the provisions for sexual, racial and disability harassment under the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance, to provide protection from harassment to persons in a common workplace such as consignment workers and **volunteers**." (my emphasis)

³ Section 22B(9) of the Anti-Discrimination Act 1977 (NSW) cited in paragraph 4.57 of the EOC's DLR, and paragraph 3.169 (page 69) of the EOC's Submission to the Government in March 2016.

However, in the LegCo Brief dated 28th November 2018, it emphasized that “no positive obligation would be imposed on any person to provide reasonable accommodation (such as lactation breaks or facilities) to breastfeeding women.”⁴ If the law does not impose any positive duty, little improvement will be expected. Hence, a positive duty should be imposed for taking action to eliminate breastfeeding discrimination.⁵

Harassment between students of different schools (不同學校的學生之間的騷擾)

3. On 21st January 2019, EOC published the findings of its study on sexual harassment of local university students, almost one in four students (23 per cent) were reportedly sexually harassed within a year. 7.2% of students were sexually by students of other universities⁶. However, there is no protection by

⁴ Paragraph 9 of the LegCo Brief Discrimination Legislation (Miscellaneous Amendments) Bill 2018.

⁵ 胡穗珊《倡母乳餵哺友善社區 修法訂明正面責任 油尖旺母乳餵哺設施實測報告》5 August 2018. A general positive duty provision, section 149 of the Equality Act of the Great Britain can be a reference as follows:

Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1)...

Date of access: 11th February 2019: <https://www.legislation.gov.uk/ukpga/2010/15/section/149>

⁶ Paragraph 4.3.17, Chart 4-15, page 65, EOC, “Break the Silence: Territory-wide Study on Sexual Harassment of University Students in Hong Kong (Full Report)” January 2019. I involved in this study as a deputy convenor of the EOC’s Working Group on Anti-Sexual Harassment Campaign. Date of access: 12 February 2019:

http://www.eoc.org.hk/eoc/Upload/ResearchReport/SH2018/ENG/SH%20University%20Report_ENG_Full%20Report.pdf

the Sex Discrimination Ordinance, Cap 480 (SDO) if the perpetrators are not their schoolmates.⁷ This is obviously a loophole in our law⁸ as there are many inter-schools activities nowadays and the court advised to consider law reform on this matter.⁹ The unwelcome act of the perpetrators who are from another educational establishment should also render unlawful by legal amendment.¹⁰

Harassment between tenants of sub-divided Flats (租戶或分租戶免之間的騷擾)

4. The Government agreed in principle to amend the law to extend the protection to tenants and sub-tenants from harassment by other tenants and sub-tenants in March 2017.¹¹ However, in June 2017, CMAB withholds this proposal and stated that more time is needed to consider some issues in collaboration with

⁷ Section 39(3) of SDO “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.**” (my emphasis)

⁸ I raised this point and recommended legal amendment in my submission to EOC dated 26th October 2014, pages 1, 2.

⁹ Paragraph 22 of the judgment of *Ng Hoi Sze v. Yuen Sha Sha and another* [1999] 3 HKLRD 890, CACV93/1999 dated 1999.12.10: “For these reasons, I agree that the judge was right to conclude that the plaintiff’s action against these two defendants ought to proceed no further and I would dismiss her appeal. I would add only that, so far as the room-mate’s boy friend is concerned, he would escape liability for sexual harassment anyway, for the legislation, which may require reform in this respect, only affords a remedy in a case like this as between students of the same university, and the room-mate’s boy friend came from a different university.” Please note that there will have common workplace harassment without common learning place harassment.

¹⁰ Section 39(3) of SDO can be revised as: “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 **or another educational establishment.**”

¹¹ “We have identified nine recommendations that we consider to be capable of driving consensus among stakeholders and society, and may be taken forward at this juncture, , as follows –... (c) to expand the scope of protection from sexual, disability and racial harassment, such as... between tenants/sub-tenants occupying the same premises”. Paragraph 5 of CMAB, “An initial assessment of the recommendations in the Discrimination Law Review submitted by the Equal Opportunities Commission” LC Paper No. CB(2)981/16-17(02), March 2017.

the EOC.¹² However, this proposal has been raised by EOC in 1999¹³ and the Government agreed in principle in 2001.¹⁴ It is very disappointing that the Government delayed the protective measure for nearly two decades. A survey conducted by the Concerning Grassroots' Housing Rights Alliance shows that sexual harassment is serious in sub-divided flats.¹⁵ It is proposed to revise section 40 of SDO to provide protection for sexual harassment of tenants and sub-tenants by other tenants and sub-tenants.¹⁶

¹² CMAB, LegCo Panel on Constitutional Affairs Discrimination Legislation (Miscellaneous Amendments) Bill, June 2017, LC Paper No. CB(2)1599/17-18(01), paragraph 18. CMAB further explained that "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." (my emphasis) In this rights protection legislation, "catching" more people implies better protection. It should not be viewed as a problem. Date of access: 1th February 2019:

<https://www.legco.gov.hk/yr17-18/english/panels/ca/papers/ca20180622cb2-1599-1-e.pdf>

¹³ EOC's DLR, paragraph 4.3.9, EOC proposed to amend section 40 "to provide protection for sexual harassment of tenants and sub-tenants by other tenants and sub-tenants." See also last paragraph of the EOC Submission to LegCo Panel on Home Affairs on Review of the SDO and the DDO, CB(2)1613/98-99(03), dated 12 April 1999. Date of access: 12th February 2019:

https://www.legco.gov.hk/yr98-99/english/panels/ha/papers/ha1204_5.htm

¹⁴ Home Affairs Bureau and Health and Welfare Bureau, "Response to Equal Opportunities Commission's Proposals for Amendment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance", October 2000, Paper No. CB(2)247/00-01(01). At paragraph 3, it stated "we have no objection in principle to the following (i)... (d) to amend section 40 to protect tenants and sub-tenants from sexual harassment by other tenants and sub-tenants". Date of access: 12th February 2019:

<https://www.legco.gov.hk/yr00-01/english/panels/ha/papers/b247e01.pdf>

¹⁵ 關注基層住屋聯席 《女性於劏房內受到性騷擾情況》，19 August 2018. 21% of the female tenants or sub-tenants were sexually harassed in sub-divided flats. Date of access: 12th February 2019:

<https://www.facebook.com/grassrootshousing/>

¹⁶ As a starting point for discussion, section 40 of SDO can be amended to the effect that: it is unlawful for a person residing in any premises to sexually harass a woman residing in those premises or other premises in the same building.

Timeline for other recommendations (其他建議的時間表)

5. In March 2016, EOC proposed 73 recommendations in its submission to the Government. It is disappointing that the Government is taking forward eight recommendations only. Would the Government inform the timeline of how to deal with other recommendations?

13th Feb 2019

By email to bc_52_18@legco.gov.hk