

**立法會**  
**Legislative Council**

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**Bills Committee on Discrimination Legislation  
(Miscellaneous Amendments) Bill 2018**

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

**Purpose**

This paper provides background information on the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 ("the Bill") and summarizes the previous discussion of the Panel on Constitutional Affairs ("the Panel") on related issues.

**Background**

Discrimination Law Review by the Equal Opportunities Commission

2. Established under the Sex Discrimination Ordinance (Cap. 480) ("SDO") in 1996, the Equal Opportunities Commission ("EOC") is a statutory body responsible for the implementation of SDO, the Disability Discrimination Ordinance (Cap. 487) ("DDO"), the Family Status Discrimination Ordinance (Cap. 527) ("FSDO"), and the Race Discrimination Ordinance (Cap. 602) ("RDO"). EOC has a statutory duty to review the functioning of the existing discrimination ordinances and where necessary, make recommendations for amendments.

3. In March 2013, EOC launched the Discrimination Law Review ("DLR") to review comprehensively the four anti-discrimination Ordinances. In March 2016, EOC submitted its submissions on DLR to the Government. EOC's submissions contained a total of 73 recommendations, including 27 recommendations which were considered by EOC to be of higher priority.<sup>1</sup>

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<sup>1</sup> According to EOC, the 27 recommendations of higher priority can be divided into two parts, with 22 recommendation belonging to Part I and five belonging to Part II. The 22 recommendations in Part I are "generally easier to implement and less complex in application", whereas those in Part II would require "further consultation and research" by the Government. However, the issues in both Parts I and II are "of equal importance and should be promptly tackled by the Government".

4. At the Panel meeting on 20 March 2017, the Administration briefed members on the Government's initial assessment of the recommendations in EOC's submissions on DLR and consulted members on nine prioritized recommendations (see **Appendix I**) that the Administration considered to be capable of forging consensus among stakeholders and the society. The Administration explained that among the 27 recommendations that were of higher priority, the Administration intended to focus on those that were relatively less complex or controversial at the present juncture. For the rest of the recommendations, the Administration needed more time to carefully consider them.

5. At the meeting on 22 June 2018, the Administration informed the Panel that amongst the nine prioritized recommendations, the proposal to provide protection from sexual, disability and racial harassment between tenants and/or sub-tenants occupying the same premise (DLR recommendation 18) would need to be further considered. The Administration planned to first proceed with the remaining eight prioritized recommendations. At the same meeting, members were consulted on the legislative proposals to implement the eight prioritized recommendations.

### **The Discrimination Legislation (Miscellaneous Amendments) Bill 2018**

6. According to the Legislative Council ("LegCo") Brief (with no file reference) issued by the Administration on 28 November 2018, the Bill seeks to amend SDO, DDO, FSDO and RDO to take forward eight recommendations of priority in EOC's submissions to the Government on DLR. Details of the legislative proposals are set out in paragraphs 6 to 20 of the aforementioned LegCo Brief.

### **Discussion of the Panel on Constitutional Affairs**

#### Views on some of the recommendations to be taken forward

#### *Prohibiting direct and indirect discrimination on ground of breastfeeding and including expression of milk in the definition of breastfeeding*

7. Some members expressed concern that it might not be clear to members of the public as to what kinds of behaviour constituted "indirect discrimination" on ground of breastfeeding. In order to avoid unnecessary controversy, it was suggested that the Administration might consider taking forward the proposal to prohibit only direct discrimination on ground of breastfeeding first. The Administration briefed members of the notion of "indirect discrimination", which was also provided for under the existing anti-discrimination Ordinances. The Administration undertook that it would promote public understanding of the meaning of indirect discrimination in the future.

8. Some members urged the Administration to include specific provisions in the relevant legislative proposal to render harassment, vilification and offensive behaviour towards breastfeeding women unlawful, with a view to offering sufficient protection to breastfeeding women and further encouraging breastfeeding. At the meeting on 22 June 2018, the Panel passed a motion for this purpose. The Administration advised that depending on the circumstances, specific types of behaviour which amounted to harassment, vilification and offensive behaviour towards breastfeeding women could be dealt with under the existing legislation. The Administration's response to the relevant motion is in **Appendix II**.

9. Another concern was raised that under the current legislative proposal, no positive obligation would be imposed on any person (e.g. employers) to provide reasonable accommodation (e.g. lactation breaks or facilities) to breastfeeding women. Members enquired whether there were measures to further promote and support breastfeeding following the legislative amendments, such as requiring premises owners to set aside breastfeeding/babycare rooms in public and/or commercial premises. Some members considered that babycare facilities and lactation rooms should be provided in new Government and private premises.

10. The Administration advised that the Government had been proactively promoting the provision of babycare facilities in Government premises and public venues. To provide more babycare facilities and lactation rooms for the public, the Government was working to include a mandatory requirement for the provision of lactation rooms and babycare facilities in the sale conditions of Government land sale sites for new commercial developments comprising office premises and/or retail outlets, eating places, etc. The Government would also take corresponding measures to mandate the provision of babycare facilities and lactation rooms in new Government premises.

11. The Administration further advised that the Committee on Promotion of Breastfeeding had promulgated work plans to enhance publicity and education on breastfeeding, and to encourage the adoption of a breastfeeding friendly workplace policy and promote Breastfeeding Friendly Premises. The Administration undertook that it would work in close collaboration with the business sector in supporting breastfeeding in the workplace.

*Replacing the references to "near relative" in the Race Discrimination Ordinance with references to "associate"*

12. Some members considered that the proposed definition of an "associate", which included "another person who is in a business, sporting or recreational

relationship with the person", was so broad that it might cover all acquaintances of the person concerned. They expressed concern that many people could breach the law inadvertently given such a broad coverage. Some members enquired whether "business relationship" would include the persons working in a non-governmental organization as a service provider and its service users, and whether same-sex couples in cohabitation would be covered under the definition of an "associate". At the Panel's request, the Administration has provided a written response (**Appendix III**).

*Providing 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 or ships in the Disability Discrimination Ordinance and the Race Discrimination Ordinance*

13. Some members enquired whether under the above proposal, racial/disability harassment between service providers and customers that occurred on cross-border land-based transport means (e.g. trains on the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link ("XRL")) while operating outside Hong Kong would not be covered.

14. The Administration explained that the proposal aimed to afford protection to victims of disability and racial harassment which occurred on a Hong Kong registered ship while sailing in the open sea, or on a Hong Kong registered aircraft flying in the international airspace governed by no jurisdiction. The policy intent was the same as that behind the amendments previously made to SDO by virtue of the Sex Discrimination (Amendment) Ordinance 2014 regarding protection from sexual harassment of service providers on Hong Kong registered aircraft and ships. The Administration further advised that the compartments of XRL, which were regarded as part of the Mainland Port Area, were subject to the jurisdiction of the Mainland. At members' request, the Administration has provided supplementary information on the legal protection against disability and racial harassment in the Mainland (also in Appendix III).

*Repealing provisions in the Sex Discrimination Ordinance, the Family Status Discrimination Ordinance and the Race Discrimination Ordinance 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*

15. Some members expressed concern that by repealing the provisions under SDO, FSDO and RDO which required proof of intention to discriminate in order to award damages for indirect discrimination claims, many people might breach the law unintentionally if the threshold was set too low. They also questioned

whether an alleged act of indirect discrimination without any proof of intention to discriminate could be established. The Administration explained that the proposal only aimed to align provisions in SDO, FSDO and RDO with DDO in protection and so far only two claims (which also involved direct discrimination) had been lodged under the relevant provision of DDO. While a complainant could make claims for damages, it was for the respondent to defend and the court to decide whether the case violated the law based on evidence. Nevertheless, the Administration undertook to look at the relevant issue and consider members' concerns.

### Recommendation required to be further examined

#### *Proposal to provide protection from sexual, disability and racial harassment between tenants and/or sub-tenants occupying the same premises<sup>2</sup>*

16. At the meeting on 22 June 2018, members enquired about the reasons for taking out the above proposal from the current the legislative amendment exercise. They expressed concern that many tenants and sub-tenants living in inadequate housing conditions (such as subdivided flats, bedspace apartments) were vulnerable to the above-mentioned harassment and these tenants could not afford to move to another place easily. They urged the Administration to sort out the definitions of tenants and/or sub-tenants and provide a timetable for implementing the proposal.

17. The Administration explained that a number of issues had to be considered at greater length in collaboration with EOC before taking forward the above proposal in the light of the variety of leases, premises and persons living in the same premises in Hong Kong. It was necessary to ensure that any proposed wrongful acts were clearly defined, so as to avoid confusion and unnecessary disputes which might follow. Apart from legislative measures, the Administration would invite EOC to explore whether there were other measures that could be introduced to abate acts of sexual, disability and racial harassment. Furthermore, EOC would 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. The Administration would first proceed with the eight prioritized recommendations in order not to hold up the legislative amendment exercise.

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<sup>2</sup> The proposal (DLR recommendation 18) was originally included amongst the nine prioritized recommendations (please see paragraphs 4 and 5 above).

### Other recommendations under the Discrimination Law Review

18. At the meeting on 20 March 2017, some members expressed grave concern as to how the Administration would follow up on the rest of EOC's recommendations other than the nine (now eight) prioritized recommendations. The Administration explained that the rest of EOC's recommendations would likely have impact across multiple domains and policy areas. Hence, more time was needed for consideration. Some members requested the Administration to provide a timetable for implementation of EOC's recommendations, particularly those considered by EOC to be of higher priority. The Administration advised that it would conduct further study in conjunction with relevant bureaux and departments and would revert as early as practicable.

19. At its meeting on 22 June 2018, the Panel further passed a motion urging the Government to expeditiously formulate a timetable for implementing the prioritized recommendations with respect to RDO; and study as soon as possible the inclusion of government functions and powers in the next phase of amendments to RDO, so as to address the inadequacies of the existing legislation and help promote racial equality.<sup>3</sup> The Administration's response to the motion is in **Appendix IV**.

### **Relevant papers**

20. A list of relevant papers which are available on LegCo's website is in **Appendix V**.

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<sup>3</sup> EOC recommends that the Government should make an amendment to RDO by providing that it is unlawful for the Government to discriminate in performing its functions or exercising its powers (i.e., DLR recommendation 6).

**Summary of nine recommendations in the EOC's submissions  
prioritised by the Government**

<b>Recommendation</b>	
<b>5</b>	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 as a form of sex discrimination, a separate category of discrimination, or alternatively as an amendment to the Family Status Discrimination Ordinance. The definition of breastfeeding should also include expressing milk.
<b>7</b>	It is recommended that the Government amend the Race Discrimination Ordinance 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: <ul style="list-style-type: none"> <li>(a) a spouse of the person;</li> <li>(b) another person who is living with the person on a genuine domestic basis;</li> <li>(c) a relative of the person;</li> <li>(d) a carer of the person; and</li> <li>(e) another person who is in a business, sporting or recreational relationship with the person.</li> </ul>
<b>8</b>	It is recommended that the Government amend the Race Discrimination Ordinance to include protection from direct discrimination and harassment by perception or imputation that a person is of a particular racial group.
<b>15</b>	It is recommended that the Government amend the provisions of the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment to persons in a common workplace such as consignment workers and volunteers.
<b>16</b>	It is recommended that the Government amend the provisions of Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users.

<b>Recommendation</b>	
<b>17</b>	It is recommended that the Government amend the provisions of the Race Discrimination Ordinance and Disability Discrimination Ordinance 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.
<b>18</b>	It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection of tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises.
<b>19</b>	It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment by management of clubs of members or prospective members.
<b>22</b>	It is recommended that the Government repeal the provisions under the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance which require proof of intention to discriminate in order to award damages for indirect discrimination claims.

**CMAB**  
**March 2017**

**Panel on Constitutional Affairs**  
**Motion passed under agenda item III**  
**“Discrimination Legislation (Miscellaneous Amendments) Bill”**  
**at the meeting on 22 June 2018**

This Panel requests the Government, in the course of amending the Sex Discrimination Ordinance, to cover the acts of harassment, vilification and offensive behavior towards breastfeeding in the Ordinance, as well as to classify such acts as unlawful, with a view to further encouraging breastfeeding.

Moved by: Hon HUI Chi-fung

**Response from the HKSAR Government**

The Government has all along endeavoured to protect, promote and support breastfeeding. Multi-pronged strategies are adopted to promote breastfeeding. In this connection, the Food and Health Bureau (FHB) set up the Committee on Promotion of Breastfeeding in 2014 under the chairmanship of the Under Secretary for Food and Health, with the objective of enhancing the sustainability of breastfeeding and promoting breastfeeding as the norm for baby care widely accepted by the general public. To provide support for lactating mothers and promote an inclusive culture for breastfeeding in the workplace, the FHB has issued recommendations on public health to individual government bureaux and departments, encouraging them to implement the Breastfeeding Friendly Workplace policy by putting in place measures to facilitate lactating staff to continue breastfeeding after returning to work. In addition, the Government has also been promoting Breastfeeding Friendly Premises in public places of the community, where breastfeeding mothers and their families feel welcomed and are supported to breastfeed anytime anywhere.

2. At present, acts of harassment, vilification and offensive behaviour towards breastfeeding women are handled by various legal means. The Sex Discrimination Ordinance (Cap. 480) (SDO) prohibits sexual harassment towards women (including breastfeeding women) in prescribed areas (such as employment; education; the provision of goods, services or facilities; and disposal of premises etc.). As such, a breastfeeding woman may make a claim under the SDO if any person engages in an unwelcome conduct of a sexual

nature in relation to her in circumstances in which a reasonable person, having regard to all circumstances, would have anticipated that the breastfeeding woman would be offended, humiliated or intimidated; or such conduct of a sexual nature creates a sexually hostile or intimidating work environment for the breastfeeding woman in any of the prescribed areas.

3. Besides, depending on the circumstances of the case, legal sanctions can also be imposed on a person who harasses, vilifies or offends a breastfeeding woman under the criminal law. For instance, a person taking clandestine photographs of a breastfeeding woman in public places may be liable to the offences of “loitering” under section 160 of the Crimes Ordinance (Cap. 200), “disorder in public places” under section 17B of the Public Order Ordinance (Cap. 245), or “outraging public decency” under the common law.

4. In short, by implementing the recommendation in the Equal Opportunities Commission’s Submissions to the Government on the Discrimination Law Review to introduce express provisions to prohibit direct and indirect discrimination on the ground of breastfeeding through amending the SDO, we expect to remove the uncertainty in the existing legislation and enhance public awareness of the rights of breastfeeding women. To ensure that the legislation is clear and accurate, we must be mindful of whether relevant amendments to be introduced will create difficulties in law enforcement and overlap with any other existing legislation which is applicable to the same factual circumstances in order to avoid misunderstanding and unnecessary litigations. Therefore, we have no plans to render the acts of harassment, vilification and offensive behaviour towards breastfeeding women unlawful in the SDO.

**Constitutional and Mainland Affairs Bureau**  
**July 2018**

**Panel on Constitutional Affairs**

**Written response to issues raised under agenda item III  
“Discrimination Legislation (Miscellaneous Amendments) Bill”  
at the meeting on 22 June 2018**

At the meeting on 22 June 2018, the LegCo Panel on Constitutional Affairs requested the Government to provide supplementary information on the definition of “associate” in the proposed amendment to the Race Discrimination Ordinance (Cap. 602) (RDO) and whether there are any relevant Mainland laws which protect customers and service providers from sex, racial and disability harassment in public transport. The response of the HKSAR Government is set out below.

Definition of associate

2. According to the current RDO, it is unlawful to discriminate on the ground of race in prescribed areas, such as employment, education, provision of goods, facilities, services and premises, election and appointment matters of public bodies, arrangements in relation to barristers, and membership of clubs. It is also unlawful to harass another person on the ground of race (i.e. engaging in an unwelcome conduct, in circumstances in which a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated by that conduct) in these areas.

3. The Equal Opportunities Commission (EOC) recommends that the Government should amend the RDO by repealing the provisions prohibiting direct discrimination and harassment by association with a “near relative”, and replacing them with provisions prohibiting direct discrimination and harassment by association with an “associate” (i.e. Recommendation 7). This recommendation aims to extend the scope of protection from direct discrimination and harassment under the RDO from a person’s “near relative” to his/her “associate”, which includes a spouse of the person, another person who is living with the person on a genuine domestic basis, a relative of the person, a carer of the person; and another person who is in a business, sporting or recreational relationship with the person, so as to align with the Disability Discrimination Ordinance (Cap. 487).

4. In determining whether a claimant is the “associate” of another person, e.g. whether they are “living on a genuine domestic basis”, the Court would consider the actual circumstances of each case having regard to the text and purpose of the Ordinance, and interpret the relevant provisions by applying

their literal and ordinary meaning, e.g. whether they are living under the same roof, to ascertain whether the claimant is protected by the provisions. The gender and sexual orientation of the claimant are not relevant considerations. By the same token, the Court will consider and examine whether the claimant is in a business, sporting or recreational relationship with another person with reference to the ordinary meaning of the provisions and the text and purpose of the Ordinance. In this connection, depending on the actual circumstances, the relevant provisions may also protect service providers serving in non-governmental organisations from direct discrimination or harassment on the ground that they are associated with ethnic minorities in their business dealings in the prescribed areas, such as employment, education, provision of goods, facilities, services and premises, election and appointment matters of public bodies, arrangements in relation to barristers, and membership of clubs.

#### Legal protection against harassment within Mainland jurisdiction

5. Having consulted the Department of Justice (DoJ), we understand that different laws and regulations in the Mainland currently afford protection to individuals against harassment and offensive behaviours, including those taking place on public transport. Under Article 38 of the Constitution of the People's Republic of China (PRC), the personal dignity of PRC citizens is inviolable, and insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited. The legitimate rights and interests of foreigners in the PRC are also protected. Moreover, depending on the circumstances of the case concerned, an aggrieved person is also protected by provisions in the Law of the PRC on Protection of Women's Rights and Interests (Revised), the Law of the PRC on the Protection of Disabled Persons, the Law of the PRC on Penalties for Administration of Public Security or the PRC Criminal Law, which safeguard the legitimate rights of women, disabled persons and individuals respectively, including protection from indecent or insulting acts, and prohibition of incitement of ethnic hatred and discrimination etc. Local laws and regulations may also apply depending on location and circumstances. Generally speaking, the aggrieved person may bring a civil suit to a people's court according to laws (e.g. the General Principles of the Civil Law of the PRC and the General Rules of the Civil Law of the PRC). If the acts concerned constitute an offence, the relevant departments may then impose administrative punishments or pursue criminal charges in accordance with laws (e.g. the Law of the PRC on Penalties for Administration of Public Security or the PRC Criminal Law).

**Constitutional and Mainland Affairs Bureau  
July 2018**

**Panel on Constitutional Affairs**  
**Motion passed under agenda item III**  
**“Discrimination Legislation (Miscellaneous Amendments) Bill”**  
**at the meeting on 22 June 2018**

This Panel urges the Government to expeditiously formulate a timetable for implementing the prioritised recommendations with respect to the Race Discrimination Ordinance ("RDO"); and study as soon as possible the inclusion of government functions and powers in the next phase of amendments to RDO, so as to address the inadequacies of the existing Ordinance and help promote racial equality.

Moved by: Hon Claudia MO

**Response from the HKSAR Government**

The Government has been committed to eliminating racial discrimination and promoting equal opportunities for ethnic minorities. The Race Discrimination Ordinance (Cap. 602) (RDO), which came into full operation in July 2009, purports to protect all people against discrimination, harassment and vilification on the ground of race. According to the RDO, it is unlawful to discriminate in prescribed areas, including employment; education; provision of goods, facilities, services and premises; election and appointment matters of public bodies; arrangements in relation to barristers and membership of clubs etc. It is also unlawful to racially harass another person (i.e. engaging in an unwelcome conduct, in circumstances in which a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated by that conduct) in these areas.

2. Currently, the RDO binds the Government and specifically prohibits discriminatory acts and practices of the Government in all areas prescribed in the RDO, such as employment; education; the provision of goods, facilities or services; and the disposal or management of premises. Section 27 of the RDO renders it unlawful for any person who provides goods, facilities or services to discriminate against another person in the provision of such goods, facilities or services.

3. In the case of *Arjun Singh v Secretary for Justice* (DCEO 9/2011) decided in May 2016, the District Court held that the prohibition against discrimination in the provision of “services” in section 27 of the RDO includes the activity of the Police in responding to requests for assistance. The District Court could not find any evidence of racial profiling or institutional racism by the Police in that case. On the contrary, the evidence showed that the Police had responded to the plaintiff’s needs as appropriate in the circumstances. Although the District Court held that a person who alleges to have been subject to a racially motivated arrest would not be able to bring a civil claim under section 27 of the RDO, such person would have an effective remedy in the form of a public law challenge that the arrest contravenes the right to equality before the law guaranteed by Article 25 of the Basic Law and Articles 1 and 22 of the Hong Kong Bill of Rights, and may claim damages for trespass or false imprisonment in a civil action.

4. It should be emphasised that the Government has always been prohibited from practising racially discriminatory behaviours under the HKSAR’s legal framework. The Hong Kong Bill of Rights Ordinance prohibits the HKSAR Government and public authorities from practising discrimination on the ground of race. Avenues are also available to address complaints against the Government and public authorities through, for example, the Ombudsman, complaint channels within bureaux and departments, and the Legislative Council, etc.

5. Among the 27 prioritised recommendations in the Submissions to the Government on Discrimination Law Review by the Equal Opportunities Commission, we will first take forward eight recommendations which are less complex and controversial, out of which six are related to the RDO. We plan to introduce the Discrimination Legislation (Miscellaneous Amendments) Bill to the Legislative Council for scrutiny by end-2018.

**Constitutional and Mainland Affairs Bureau**  
**July 2018**

**Relevant documents on Bills Committee on  
Discrimination Legislation (Miscellaneous Amendments) Bill 2018**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Constitutional Affairs	20.3.2017 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	22.6.2018 (Item III)	<u>Agenda</u> <u>Minutes</u>

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