

政制及內地事務局
政府總部

香港添馬添美道2號
政府總部東翼



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CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU
GOVERNMENT SECRETARIAT

EAST WING
CENTRAL GOVERNMENT OFFICES
2 TIM MEI AVENUE, TAMAR
HONG KONG

本局檔號 OUR REF. : CMAB/CR 1/19/1
來函檔號 YOUR REF. : LS/B/5/18-19
電話號碼 TEL NO. : 2810 2159
圖文傳真 FAXLINE : 2840 0657

22 February 2019

Ms Josephine SO
Clerk to Bills Committee
Council Business Division 2
Legislative Council Secretariat
The Legislative Council Complex
1 Legislative Council Road,
Central, Hong Kong

Dear Ms SO,

Discrimination Legislation (Miscellaneous Amendments) Bill 2018

Thank you for your letters dated 22 and 24 January 2019 on the concerns raised by members of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (the Bill) at the meeting on 14 January 2019 and enquiries submitted by Hon HUI Chi-fung to the Chairman of the Bills Committee. This letter serves to provide a composite response to the issues therein, as well as relevant observations of the Legal Adviser to the Bills Committee in his letter dated 7 January 2019.

Response to issues on the scope of protection under the proposed new Section 8A of the Sex Discrimination Ordinance

Taking into consideration that all persons who need to breastfeed are women and breastfeeding is a gender-specific condition analogous to the protected characteristic of pregnancy under section 8 of the Sex Discrimination Ordinance (Cap. 480) (SDO), Clause 7 of the Bill proposes to introduce a new section 8A to the SDO, rendering direct and

indirect discrimination against a woman on the ground that she is breastfeeding unlawful. This prohibition would apply to prescribed areas covered 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, the proposed section 8A(2) covers the act of breastfeeding, the expression of milk, and the status of being a woman who feeds her child with her breast milk.

It is our policy intent that a woman who chooses to discharge her responsibility as a mother by way of feeding her child with her breast milk should be protected. This is conducive to creating a more enabling environment for them to continue their full and equal social and economic participation, including staying in or rejoining the workforce while breastfeeding.

Meanwhile, acts of harassment, vilification and offensive behaviour towards women are handled by various legal means. The SDO prohibits sexual harassment towards women (including breastfeeding women) such that a breastfeeding woman may make a claim if any person engages in 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 the breastfeeding woman would be offended, humiliated or intimidated; or where such conduct of a sexual nature creates a hostile or intimidating work environment for the breastfeeding woman in any of the prescribed areas covered by the SDO.

In addition, legal sanctions may also be imposed on a person who harasses, vilifies or offends a breastfeeding woman under the criminal law. Depending on the circumstances of the case, a person who harasses, vilifies or offends a breastfeeding woman in a public place 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.

We have also consulted Department of Health (DH) in relation to Hon HUI’s enquiry. DH’s view is that the Government has endeavoured to promote, protect and support breastfeeding. The Committee on Promotion of Breastfeeding, set up in April 2014 under the Chairmanship of the Under Secretary for Food and Health, provides

recommendations on strategies and action plans to strengthen the efforts in promoting breastfeeding. Its objectives are to enhance the sustainability of breastfeeding and promote breastfeeding as a norm for baby care widely accepted by the general public.

The Food and Health Bureau and DH have been promoting breastfeeding through a multi-pronged approach, including strengthening publicity and education on breastfeeding, encouraging the adoption of “Breastfeeding Friendly Workplace” policy; encouraging public places to become “Breastfeeding Friendly Premises”; imposing mandatory requirement for the provision of baby care rooms and lactation rooms in the sale conditions of government land sale sites for new commercial premises; and providing baby care rooms and lactation rooms in suitable new government premises, etc.

While DH in-principle supports efforts and measures to promote, protect and support breastfeeding, it considers that it would be more appropriate for the Constitutional and Mainland Affairs Bureau, as the policy holder of anti-discrimination matters, to formulate the Government’s overall position on the proposed expansion of the scope of protection under the four anti-discrimination ordinances to cover harassment behaviour against breastfeeding women taking into account all relevant factors including read-across implications of such a proposal.

We will study carefully members’ suggestions regarding the scope of protection under the proposed section 8A and consider the next step taking into account relevant public views obtained from depositions.

Response to the issue of applicability of the anti-discrimination ordinances in the West Kowloon Station Mainland Port Area

Section 3(1)(a) of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632) stipulates that a “reserved matter” is a matter to which the laws of Hong Kong apply, and over which Hong Kong exercises jurisdiction, under Article 3 or 7 of the Co-operation Arrangement. Under Article 7(5) of the Co-operation Arrangement, “reserved matters” include those pertaining to the contractual or other legal relationships of a civil nature among the following bodies or individuals in the Mainland Port Area (MPA): the Hong Kong operator of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (XRL), contractor(s) of construction works of the West Kowloon Station, material or service provider(s), staff member(s) of the

above bodies, and passenger(s) of the XRL, unless the parties by agreement indicate otherwise (whether such agreement is made in writing, orally or by conduct).

The gist of the issue is whether an act of discrimination or harassment giving rise to a claim under any of the four anti-discrimination ordinances, namely, the SDO, the Disability Discrimination Ordinance (Cap. 487) (DDO), the Family Status Discrimination Ordinance (Cap. 527) (FSDO) and the Race Discrimination Ordinance (Cap. 602) (RDO), falls within the scope of “matters pertaining to the contractual or other legal relationships of a civil nature” among the bodies or individuals as particularised in Article 7(5) of the Co-operation Arrangement.

Section 76(1) of the SDO sets out the circumstances under which a claim may be made the subject of civil proceedings in like manner as any other claim in tort, including an act of discrimination or sexual harassment that is unlawful by virtue of Part 3 or 4 of the SDO. Section 72(1) of the DDO, Section 54(1) of the FSDO and Section 70(1) of the RDO are similar provisions that cover disability discrimination and harassment, family status discrimination and racial discrimination and harassment respectively. We consider that, depending on the circumstances of each case, claims under the four anti-discrimination ordinances are “matters pertaining to the contractual or other legal relationships of a civil nature” under Article 7(5) of the Co-operation Arrangement.

Upon passage of the Bill, the legal protections effected by relevant proposed amendments therein, such as expanding the scope of SDO to cover discrimination on the ground of breastfeeding and expanding the scope of SDO, DDO and RDO to cover disability, racial and sexual harassment between workplace participants in a common workplace, would likewise apply to the bodies or individuals as particularised in Article 7(5) of the Co-operation Arrangement.

Response to the observations in relation to Part 3 of the Bill

With reference to the Disability Discrimination Ordinance (Cap. 487) (DDO), we propose to protect a person from direct racial discrimination and racial harassment on the ground of the race of the person’s “associate” in the Race Discrimination Ordinance (Cap. 602) (RDO). This will help promote racial diversity and harmony, thereby

create a cohesive social network for families of different racial groups or ethnic origins. Hong Kong is a multi-cultural city and it is common for Hong Kong people to establish connections with people of different ethnic origins, which makes it necessary to afford protection against discrimination and harassment on the ground of the race of a person's "associate".

The enhanced protection is not only beneficial to ethnic minorities but also people who are of Chinese ethnic origin. Such benefits are illustrated with the following hypothetical scenarios. For instance, Mr X is a Chinese staff member of a youth services centre that provides community services to non-Chinese youths. Mr Y is a restaurant owner who refuses to provide catering service to Mr X as she despises the fact that Mr X is serving non-Chinese people. With the enhanced protection, Mr X will be protected from direct discrimination on the ground of the race of his "associates" in a business relationship.

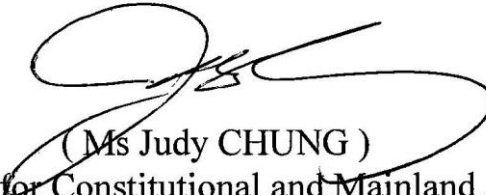
Another scenario is about discrimination on the ground of the race of "associates" in a sporting relationship. Mr A is a Chinese member of a football team who would like to reserve a venue for team training and Mr B is the person-in-charge of that venue. Through further enquiries, Mr B realised that there are several non-Chinese players of a particular racial group in Mr A's football team. Eventually Mr B rejects Mr A's request because Mr B believes that people belonging to the racial group of those non-Chinese players are disrespectful towards Chinese people. With the enhanced protection, Mr A will be protected from direct discrimination on the ground of the race of his "associates" in a sporting relationship.

Aside from enhancing protection, it is equally important for us to ensure that any proposed amendments are clearly defined, including the definition of "associate", so as to avoid abuse, confusion and unnecessary disputes which may follow. The DDO has come into effect since 1996 and the EOC is well equipped to handle complaints with regard to "associates". In light of the experience of implementing the DDO, we consider it appropriate to adopt the definition of "associate" in the DDO for the RDO for the sake of clarity and consistency.

In determining whether a claimant is an "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 in the same home, house, household or family, to ascertain whether the claimant is protected by the provisions. There are no reported court cases on the exact meaning and scope of “associate” in DDO but the duration and nature of their relationship, the degree of financial dependence or interdependence, and the extent of their common residence may be relevant in determining whether a person is “living on a genuine domestic basis” with another person.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Judy Chung', written in a cursive style. The signature is positioned above the printed name and title.

(Ms Judy CHUNG)

for Secretary for Constitutional and Mainland Affairs