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21 March 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 letter dated 28 February 2019 on the views expressed by members of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (the Bill) and deputations/individuals at the meeting on 25 February 2019. This letter serves to provide response to the issues therein.

Response to issues relevant to Part 2 "Discrimination on the Ground of Breastfeeding" of the Bill

Part 2 of the Bill proposes to introduce a new section 8A to the Sex Discrimination Ordinance (Cap. 480) (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 definition of breastfeeding includes the act of breastfeeding, the expression of breast 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 breastfeeding women to continue their full and equal social and economic participation, including staying in or rejoining the workforce whilst breastfeeding. We understand some are of view that the scope of protection for breastfeeding women against discrimination should not be limited to women who feed their own children with their breast milk. We shall study relevant suggestions in detail and consider how the proposed definition of breastfeeding may be amended.

In order to promote, protect and support breastfeeding, the Department of Health (DH) recommends in the Employer's Guide to Establishing Breastfeeding Friendly Workplace that employers should allow employees to express breast milk during lactation breaks (two sessions in a day, total duration at about an hour) for at least one year after childbirth. It is also suggested that the lactation breaks should be counted as "paid hours". Employers should also provide appropriate space and storage facilities for breastfeeding employees. Furthermore, DH recommends in the Guide to Establishing Breastfeeding Friendly Premises that enterprises take various supportive measures to accommodate breastfeeding in their premises.

However, in terms of legal protection against indirect discrimination, the four existing anti-discrimination ordinances do not impose an obligation on employers or service providers to make reasonable accommodation for employees or service users bearing protected characteristics. It will not constitute indirect discrimination as long as the employer or service provider can show that it is justifiable for the same requirement to be applied to all employees or service users. In determining if a requirement is justified, the court will take into account all relevant factors, including the needs of the breastfeeding female employee or service user, the resources, scale of business and operational needs of the employer or service provider, any difficulties faced by the employer or service provider in allowing female employees or service users to breastfeed, the nature of the breastfeeding employee's work, size of the work space, etc.

To ensure effective promulgation of the legislative measures set out in Part 2 of the Bill, we have invited the Equal Opportunities Commission (EOC) to promulgate guidelines from the perspectives of operation and implementation to facilitate stakeholders in abiding by the relevant provisions. We will also invite the EOC to engage in public education and promotional activities for the purpose of informing Hong Kong citizens on the requirements of the law.

Response to suggestions on other amendments to the SDO

We note that members and deputation/individuals have raised two suggestions on protection against sexual harassment under the SDO which have not been addressed in the EOC's Submissions to the Government on the Discrimination Law Review (DLR), namely expanding the scope of protection under the SDO to cover harassment on the ground of breastfeeding and including sexual harassment between students from different schools within the scope of the SDO. Regarding these suggestions, we consider it necessary to examine the coverage and applicable circumstances of the concept of "sexual harassment" under the SDO in a holistic and comprehensive manner. We plan to invite the EOC to conduct relevant studies.

Response to issues relevant to Part 5 "Harassment at Workplace" of the Bill

Part 5 of the Bill proposes to amend the SDO, the Disability Discrimination Ordinance (Cap. 487) (DDO) and the Race Discrimination Ordinance (Cap. 602) (RDO), rendering it unlawful for a person who is a workplace participant to harass another person who is also a workplace participant at a workplace of them both. The legislative amendment is based on our principle of expanding the scope of protection to reduce harassment in the workplace as far as realistically practicable.

The proposed definition of "workplace participant" as set out in Part 5 of the Bill includes employer, employee, contract worker and principal, commission agent and principal, as well as partner in a firm, all of which are concepts currently in use under the existing four anti-discrimination ordinances. The persons listed in paragraph 2(a)(i) of the Annex "List of follow-up actions arising from the discussion at the meeting on 25 February 2019" to your letter, namely "outsourced service

workers", "free-lance/self-employed persons", "interns", "unpaid trainees" and "volunteers", which are not expressly mentioned in the Bill, may be protected by relevant sections of Part 5 of the Bill if they fall within any of the categories of persons within the proposed definition of "workplace participant" in their given circumstances.

In terms of outsourced service workers, existing anti-discrimination legislation construes "contract worker" as a person employed by a contractor or sub-contractor of the principal to work for the principal. Therefore, under general circumstances, an outsourced service worker should satisfy the definition of a "contract worker" and qualify as a "workplace participant" protected by relevant provisions in Part 5 of the Bill.

As for self-employed persons, "employment" means employment under a contract of service or of apprenticeship, or a contract personally to execute any work or labour in the context of existing anti-discrimination legislation. Given that a contract satisfying the above definition has been made for the relevant work, a self-employed person will be protected by the provisions of Part 5 of the Bill. For example, a self-employed musician made a contract with a bar owner to personally perform at his bar and while working at the bar, he was harassed by a cleaner employed by an outsourced service contractor on the ground of his race. Since the musician and the cleaner were working at the bar respectively as an "employee" and a "contract worker", the cleaner's act constitutes racial harassment by a workplace participant against another workplace participant in a common workplace, which would contravene the RDO as amended by the Bill.

Likewise, whether "interns" or "unpaid trainees" are covered in Part 5 of the Bill depends on whether the intern/trainee concerned qualifies as an "employee" under "employment" (i.e. whether a contract of service or of apprenticeship, or a contract personally to execute any work or labour, has been made), and cannot be determined on whether the person receives payment as the sole factor. If the person meets the definition of "employee" under existing anti-discrimination legislation, they will be protected by relevant provisions in Part 5 of the Bill from harassment by another workplace participant in a common workplace.

In terms of volunteers, inserting "volunteers" under the proposed definition of "workplace participant" in Part 5 of the Bill would give rise to more complicated and controversial issues. First of all, section 46 of the SDO, section 48 of the DDO and section 47 of the RDO currently provides for the vicarious liability of employers and principals. Introducing the concept of "volunteers" to anti-discrimination legislation may induce problems such as whether an organisation that recruits volunteers to participate in various services would be considered as the volunteers' "employer" or "principal", and would the organisation have to bear vicarious liability for the volunteers' actions.

Besides, compared with the categories of persons covered in the proposed definition of "workplace participant" in Part 5 of the Bill, the term "volunteer" is quite hard to define, its scope and the concrete concepts therein requires further clarification. In terms of practical operation, since volunteers are generally mobile in the course of service and not likely to sign any written contract with the organisations or beneficiaries they serve, it would be difficult to ascertain the identity of a volunteer.

It is important to note, however, that subject to the circumstance of each case, existing anti-discrimination legislation already protects volunteers against unlawful acts of discrimination or harassment in prescribed areas (including employment, education, the provision of goods, services or facilities, etc.). For example, a charity organisation as one source of income operates a retail store, which sells second-hand items collected from donors. A woman worked as a volunteer salesperson at the store and while presenting merchandise to a male customer, she was requested to give personal contact information and subjected to inappropriate body contact by the customer. Such acts by the customer may constitute sexual harassment against the woman in the course of seeking to be provided with goods, from which the woman is currently protected under section 40(1A) of the SDO.

Where there is no employment or employment-like relationship between harasser and victim, provisions in the existing SDO, DDO and RDO are not sufficient to cover acts of harassment between them. Part 5 of the Bill aims to expand the scope of protection in relation to workplace harassment, expressly outlawing acts of sexual harassment, disability harassment and racial harassment between workplace participants, even in the absence of employment or employment-like relationship. Therefore, the new provisions shall be

applicable to acts of harassment between persons belonging to different categories of "workplace participants" who may be in the employ of different employers. Take the scenario of harassment between two personal assistants of different Members working in the Legislative Council Complex as mentioned by a member at the meeting, the victim of harassment shall benefit from protection under the new provisions.

Response to suggestions on other amendments to anti-discrimination legislation

We take note of concern expressed by members and deputations/individuals over recommendations of priority in the DLR that have not been included in the Bill, namely amending the RDO to outlaw discrimination by the Government in performing its functions and exercising its powers, amending the DDO to require making of reasonable accommodation for persons with disabilities, and providing protection of tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises.

Regarding the DLR recommendations considered by the EOC to be of priority, the Government intends to focus on issues that are less complex and controversial, with a view to taking forward legislative amendments gradually. Therefore, we have presented the Bill to the Legislative Council for the implementation of eight recommendations of priority. This does not signify the conclusion of the work on reviewing anti-discrimination legislation. The Constitutional and Mainland Affairs Bureau will continue to study the remaining 19 recommendations of priority and follow-up as appropriate.

Moreover, we recognise that some of the suggestions raised by members and deputations/individuals are issues requiring further research, consultation and education as categorised in the DLR. These include providing protection from discrimination on the ground of citizenship and residency status in the RDO (to address discrimination against new immigrants and tourists from the Mainland China), as well as discrimination on the ground of cohabiting relationships. We believe that these issues call for careful deliberation and will maintain communication with the EOC in this regard.

Upon completing the legislative exercise of the Bill, we will promptly begin our work at the next stage, with the aim of informing the public of our decisions on the way forward within the term of this Government.

Yours sincerely,

(Ms Judy CHUNG)
for Secretary for Constitutional and Mainland Affairs