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29 April 2019

Ms Josephine SO
Clerk to Bills Committee
Council Business Division 2
Legislative Council Secretariat
The Legislative Council Complex
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Dear Ms SO,

Discrimination Legislation (Miscellaneous Amendments) Bill 2018

Thank you for your letter dated 2 April 2019 on the follow-up actions arising from discussion at the meeting of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (the **Bill**) on 26 March 2019. This letter provides response to the issues therein.

Response to suggestions on protection from harassment on the ground of breastfeeding

2. Having carefully considered members' suggestions and legal advice from the Department of Justice, the Government is of the view that proposing committee stage amendments (**CSAs**) to the Bill for outlawing harassment on the ground of breastfeeding shall contravene Rule 57(4)(a) of the Rules of Procedure of the Legislative Council (**RoP**), which stipulates that "[A]n amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates." (i.e. the "scope rule"). Therefore, we will not take the approach of proposing CSAs which fall outside of the scope of the Bill.

3. As reflected in the long title and Explanatory Memorandum of the Bill, the purposes of the proposed amendments to the Sex Discrimination Ordinance (Cap. 480) (**SDO**) are two-fold, namely (i) introduction of breastfeeding discrimination, a new form of discrimination; and (ii) amendments on certain matters concerning sexual harassment and indirect discrimination (viz. repeal of intention requirement for award of damages). The two aforementioned purposes (**Subject Matters Relating to SDO Amendments**) are to be regarded as, among others, the subject matters of the Bill. Any proposed CSAs to the Bill with a view to further amending the SDO must be relevant to Subject Matters Relating to SDO Amendments. We consider that the part of the Bill relating to "discrimination on the ground of breastfeeding", being a Subject Matter Relating to SDO Amendments, cannot encompass proposed CSAs to provide protection from harassment on the ground of breastfeeding. Moreover, harassment on the ground of breastfeeding cannot be taken as an amendment relevant to "sexual harassment". The proposed CSAs fall outside of the scope of the Bill, violate RoP 57(4)(a), and thus shall be inadmissible.

4. Firstly, "discrimination" and "harassment" are two distinct legal concepts referring to two different types of conduct under existing anti-discrimination legislation in Hong Kong. In terms of "sex discrimination" and "sexual harassment" under the SDO, a person discriminates against a woman if, on the ground of her sex, the person (**A**) treats her less favourably than A treats a man in the same or similar circumstances (i.e. "direct discrimination"); or if A applies to a woman a requirement or condition which A applies equally to a man but has a disparate effect on women, cannot be justified, and with which the woman cannot comply (i.e. "indirect discrimination") (see section 5(1)). On the other hand, "sexual harassment" is defined in the SDO as meaning: "unwelcome conduct of a sexual nature" in relation to the victim (including "unwelcome sexual advance" and "unwelcome request for sexual favours") which is offensive, humiliating or intimidating to the victim, or "conduct of a sexual nature" which creates a hostile or intimidating environment for the victim (see section 2(5)). It follows that "discrimination on the ground of breastfeeding" is distinct from "harassment on the ground of breastfeeding" from a legal perspective. It should be noted that reference to "harassment" in the long title of the Bill, in the context of the SDO, refers only to "sexual harassment", and is not a general reference to harassment in any form.

5. Secondly, "harassment on the ground of breastfeeding" and "sexual harassment" are also two distinct concepts from a legal perspective. The existing concept of "sexual harassment", with reference to its

above-mentioned definition under the SDO, covers acts of harassment that involve “conduct of a sexual nature”. Meanwhile, should reference be taken from relevant definitions of harassment under the Disability Discrimination Ordinance (Cap. 487) (**DDO**) and the Race Discrimination Ordinance (Cap. 602) (**RDO**), the concept of “harassment on the ground of breastfeeding” would then cover unwelcome conduct which offends, humiliates or intimidates a breastfeeding woman, or conduct that creates a hostile or intimidating environment for a breastfeeding woman, where such conduct is not necessarily “conduct of a sexual nature”. Thus, “harassment on the ground of breastfeeding” cannot be taken as a sub-set of “sexual harassment”.

6. Currently, protection from harassment afforded by the SDO only applies to “sexual harassment”. If protection from “harassment on the ground of breastfeeding” is to be introduced under the SDO, alteration to the overall concept of “harassment” (including the concept of “sexual harassment”) under the SDO would be inevitable. Since the Bill does not serve to amend any provision on the interpretation of “sexual harassment” under the SDO, any amendment to such effect will fall outside of the scope of the Bill.

7. Nevertheless, from a policy perspective, we support the provision of protection from harassment on the ground of breastfeeding. In fact, with regard to the various suggestions from members on expanding the scope of protection afforded by the SDO, we consider a holistic review of the coverage and applicable circumstances of the concept of “sexual harassment” under the SDO as well as existing policy against sexual harassment to be the preferable approach for addressing the society’s concerns over the issues of harassment on the ground of breastfeeding and sexual harassment.

8. That said, we understand members’ view on this matter and, after careful consideration, we now plan to introduce a separate bill for the purpose of outlawing harassment on the ground of breastfeeding, which we hope may be submitted for scrutiny by this Bills Committee in parallel. At present, we are studying the approach with which to introduce new provisions to the SDO such that acts of harassment on the ground of breastfeeding shall be unlawful. This involves detailed considerations such as whether the proposed new provisions should mirror the definitions of “harassment” under the DDO and the RDO, and whether protection from harassment on the ground of breastfeeding should apply equally to all the prescribed areas where protection against sexual harassment is currently afforded.

<u>Response to suggestions on protection for "intern" / "unpaid trainee" and "volunteer" from harassment in a common workplace</u>

9. Part 5 of the Bill proposes to amend the SDO, the DDO and the 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 amendment 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 in a common workplace, even in the absence of employment relationship. As such, the proposed definition of "workplace participant" includes certain workplace roles already found in existing anti-discrimination ordinances (including employee, employer, contract worker and principal, commission agent and principal, as well as partner in a firm), and acts of harassment between these "workplace participants" are prohibited.

10. We pose no objection in principle to members' suggestion of expressly including "intern" / "unpaid trainee" and "volunteer" in the proposed definition of "workplace participant", such that the relevant provisions cover certain workplace participants who do not meet the status of "employee". Since there is no reference to "intern" / "unpaid trainee" and "volunteer" in the existing four anti-discrimination ordinances, we are exploring the feasibility of referring to definitions of relevant roles in the laws of local and overseas jurisdictions. Also, as stated in our written reply dated 22 February 2019, categories of persons not expressly mentioned in relevant provisions may be protected by provisions applicable to "employee" (including the new provisions proposed in Part 5 of the Bill), if such persons fulfil the definition of "employment" under the existing anti-discrimination ordinances (i.e. employment under a contract of service or of apprenticeship, or a contract personally to execute any work or labour). Therefore, we are presently studying how to appropriately define "intern" / "unpaid trainee" and "volunteer", and, without affecting the interpretation of "employment" under the existing anti-discrimination ordinances, supplement these persons to the scope of "workplace participant" in Part 5 of the Bill.

11. Furthermore, we must give due consideration to the applicability of provisions relevant to "vicarious liability" under existing anti-discrimination ordinances to the new roles of "intern" / "unpaid trainee" and "volunteer". Currently, section 46 of the SDO, section 48 of the DDO and section 47 of the RDO provide for vicarious liability of employers and

principals. Should reference be made to vicarious liability applicable to employers, a person engaging "intern" / "unpaid trainee" or "volunteer", such as non-governmental organisations, charities, hospitals, schools, religious groups, etc. that recruit volunteers to perform various tasks, may bear legal consequences for harassment against other "workplace participants" by such "intern" / "unpaid trainee" or "volunteer" engaged by them, unless they have taken "steps as were reasonably practicable" to prevent relevant unlawful acts.

12. With regard to the proposed amendments in Part 5 of the Bill, we aim to expand the scope of protection as far as realistically practicable to more effectively combat harassment in the workplace. The Government will study the feasibility of proposing CSA for introducing "intern" / "unpaid trainee" and "volunteer" to the proposed definition of "workplace participant". We hope to submit relevant draft amendments for members' discussion by the next meeting of the Bills Committee.

Response to issues relevant to the definition of "club" under the existing anti-discrimination ordinances

13. Part 8 of the Bill proposes to amend the SDO and DDO by introducing provision similar to section 39(10) of the RDO, rendering 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.

14. Under the four existing anti-discrimination ordinances, a "club" means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association. Whilst "committee of management", in relation to a club, means the group or body of persons (howsoever described) that manages the affairs of the club.

15. The above-mentioned concept of "club" originates from Australian anti-discrimination legislation. The term was first adopted in the laws of Hong Kong through the Sex Discrimination Bill passed in 1996, and was subsequently adopted in the DDO and the Family Status Discrimination Ordinance (Cap. 527). The element of "not less than 30 persons" has all along been part of the definition of "club" in Hong Kong's anti-discrimination legislation, and the same condition of "not less than 30 persons" is also imposed on "club" defined under Australia's Federal Sex

Discrimination Act 1984 as well as anti-discrimination laws in Australian states (e.g. Victoria's Equal Opportunity Act 2010, the Northern Territory of Australia's Anti-Discrimination Act 1992, Tasmania's Anti-Discrimination Act 1998 and Western Australia's Equal Opportunity Act 1984). In 2009, the Legislative Council amended the definition of "club" under the anti-discrimination ordinances through the Race Discrimination Bill, removing the condition of "sells or supplies liquor for consumption on its premises" such that the scope of protection may extend to clubs that did not sell or supply liquor. However, it appears no in-depth discussion on the element of "not less than 30 persons" had taken place during the enactment and legislative amendments process of the anti-discrimination ordinances. Should the existing definition of "club" raise particular concern in the implementation of anti-discrimination laws, we may conduct review as necessary.

16. As for members' concern over sexual harassment within organisations such as churches, the Government and the Equal Opportunities Commission (EOC) has always been devoted to fostering a friendly environment free from sexual harassment through legislation, administrative measures as well as promotion and publicity work.

17. In terms of legislation, the Bill proposes the addition of section 39A in the SDO to protect members of a club, or persons who have applied for membership to a club, from sexual harassment by the management of the club. If an organisation formed for religious purposes satisfies the definition of "club", it shall be unlawful for any member of the group or body of persons responsible for managing the affairs of that organisation to harass a member of the organisation or a person who has applied to join the organisation. In addition, depending on the actual circumstances of each case, the existing SDO already offers to persons such as pastoral staff and congregation of a religious body protection from sexual harassment that takes place within in prescribed areas (e.g. provision of goods, facilities and services).

18. Furthermore, the EOC has implemented its Anti-Sexual Harassment Campaign for various sectors of the community since 2013 to foster a friendly environment free of sexual harassment. After a spate of claims of sexual harassment incidents taking place in religious organisations had come to light in recent years, the EOC invited a number of churches and denominations to a meeting to explore how to better prevent sexual harassment in churches, and co-organised seminars on the issue with the Divinity School of Chung Chi College, City University of Hong Kong last

year. In 2019-20, the EOC will place more focus on the religious sector in its Anti-Sexual Harassment Campaign, including organising a Seminar on Prevention of Sexual Harassment in Churches and relevant workshops, as well as working with religious bodies to provide more training on the prevention of sexual harassment and to assist churches in the formulation of anti-sexual harassment policies.

Response to the suggestion with regard to sexual harassment between students from different schools / educational establishments

19. We recognise that members have made suggestion on protection against sexual harassment under the SDO which has not been addressed in the EOC's Submissions to the Government on the Discrimination Law Review, i.e. to expand the scope of protection under the SDO to cover sexual harassment between student from different schools / educational establishments. Regarding this suggestion, 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 the issue of applicability of the anti-discrimination ordinances in the West Kowloon Station Mainland Port Area

20. As stated in our written reply dated 22 February 2019, claims arising from unlawful acts of discrimination or harassment under the SDO, the DDO, the RDO and the FSDO fall 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 between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (the **Co-operation Arrangement**). Such matters fall within the scope of "reserved matter" as stipulated under Section 3(1)(a) of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632) to which the laws of Hong Kong apply, and over which Hong Kong exercises jurisdiction.

21. We consider the above principle similarly applicable to legal proceedings that involve foreigners / foreign nationals. In determining whether a civil claim arising from contravention of the four anti-discrimination ordinances falls within the scope of "reserved matter", one of the conditions that would need to be satisfied is whether the parties

involved are bodies or individuals as particularised in Article 7(5) of the Co-operation Arrangement, i.e. 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. In this respect, the nationality of the persons concerned is not a relevant consideration.

22. The "Law of the People's Republic of China on the Application of Law to Civil Relations Involving Foreign Interests" (**PRC Law on Application of Law to Civil Relations Involving Foreign Interests**), which came into effect on 1 April 2011, is a piece of law in the Mainland which consolidates and sets out the conflict of laws principles for determining the laws applicable to certain civil relations involving foreign interests. This includes rules on the applicable laws governing matters such as inheritance, conditions of marriage, etc. where it involves foreign interests. The interpretation of the PRC Law on Application of Law to Civil Relations Involving Foreign Interests is supplemented by the "Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on the Application of Law to Civil Relations Involving Foreign Interests' (the **Interpretation**).

23. According to Article 18 of the Basic Law, "*[n]ational laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to [the Basic Law]. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.*" The PRC Law on Application of Law to Civil Relations Involving Foreign Interests is a national law adopted by the Standing Committee of the National People's Congress of the People's Republic of China, and is not listed in Annex III to the Basic Law. Therefore, the PRC Law on Application of Law to Civil Relations Involving Foreign Interests and, accordingly, the Interpretation does not form part of the laws of Hong Kong.

24. As mentioned above, civil claims arising from contravention of the four anti-discrimination ordinances are matters on which the laws of Hong Kong apply, and over which Hong Kong exercises jurisdiction. As the PRC Law on Application of Law to Civil Relations Involving Foreign Interests and the Interpretation do not form part of the laws of Hong Kong, they should generally not have any implications on the Hong Kong courts' handling of legal proceedings involving foreigners / foreign nationals for the relevant claims arising from the four anti-discrimination ordinances.

<u>Response to the issue of the proposed definition of breastfeeding</u>

25. Part 2 of the Bill proposes to amend 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 definition of breastfeeding includes the act of breastfeeding, the expression of breast milk, and the status of being a breastfeeding woman.

26. In light of members' views on the proposed definition of "breastfeeding" in Part 2 of the Bill, namely 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 are studying how to implement the suggestion by amending relevant provisions in the Bill. Our initial proposal is to amend Clause 7 of the Bill by substituting reference to "her child" with "a child". The proposed amendment is set out in **<u>Annex</u>** for members' scrutiny and advice.

Yours sincerely,

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

Annex

Discrimination Legislation (Miscellaneous Amendments) Bill 2018

Clause 7, Part 2

Amendments to Part 2

Amendments to SDO Relating to Discrimination on the Ground of Breastfeeding

7. Section 8A added

After section 8—

Add

"8A. Discrimination against breastfeeding women

(1) A person (***the discriminator***) discriminates against a woman in any circumstances relevant for the purposes of Part 3 or 4 if the discriminator—

(a) on the ground that the woman is breastfeeding, treats the woman less favourably than the discriminator treats or would treat a person who is not breastfeeding; or

(b) applies to the woman, who is breastfeeding, a requirement or condition that the discriminator applies or would apply to a person who is not breastfeeding and the requirement or condition—

(i) is such that the proportion of women who are breastfeeding and can comply with it is considerably smaller than the proportion of persons who are not breastfeeding and can comply with it;

(ii) is one that the discriminator cannot show to be justifiable, irrespective of whether the person to whom it is applied is a woman who is breastfeeding; and

(iii) is to the detriment of the woman who is breastfeeding because she cannot comply with it.

(2) For the purposes of this section—

(a) a woman is breastfeeding if she—

(i) is engaged in the act of breastfeeding ~~her~~ a child or expressing breast milk ~~to feed her child~~; or

(ii) is a person who feeds ~~her~~ a child with her breast milk; and

(b) a person who is not breastfeeding is to be construed accordingly.".