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29 November 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 27 November 2019. This letter responds to the follow-up actions arising from the discussion at the meeting of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (the **Bill**) on 7 May 2019, as set out in your earlier letter of 9 May 2019.

Draft amendments to Part 5 of the Bill

2. Members suggested that interns and volunteers should be expressly included in the proposed definition of *workplace participant* in Part 5 of the Bill, under which harassment at a common workplace is rendered unlawful under the Sex Discrimination Ordinance (Cap. 480) (**SDO**), Disability Discrimination Ordinance (Cap. 487) (**DDO**) and Race Discrimination Ordinance (Cap. 602) (**RDO**). Under the current proposal, it is 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. In response to this suggestion, the Government intends to propose

committee stage amendments (CSAs) to the Bill and details are shown in the mark-up at **Annex A**.

3. As explained in our written responses to this Bills Committee dated 22 February and 29 April 2019, even in the absence of an express reference to certain persons, such as interns and volunteers, in the proposed definition of **workplace participants**, they may be protected from harassment in a common workplace as employees if the definition of employment is satisfied. Under the existing anti-discrimination ordinances, **employment** is defined as employment under a contract of service or of apprenticeship, or that under a contract personally to execute any work or labour.

4. Nevertheless, we understand members' concern that there may still be persons working at or attending a workplace as interns or volunteers, who may not satisfy the definition of **employment** and thus fall outside of the scope of protection. Therefore, we propose to include **intern** and **volunteer** in the definition of **workplace participant** (under the proposed new section 23A of the SDO, new section 22A of the DDO and new section 24A of the RDO), in addition to employers, employees, contract workers and their principals, commission agents and their principals, as well as partners in a firm, so as to provide a more comprehensive protection under the anti-discrimination ordinances.

Definition of intern and volunteer

5. In our proposed CSAs, **intern** means “a person who is engaged by another person for an internship but is not an employee of that other person”, where an **internship** means either “a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage”, or “any other period of work that is usually described as an internship”. This amendment seeks to provide protection for persons who are engaged by another person for an internship in the absence of an employment relationship.

6. The proposed definition of **internship** intends to cover both such period of work that is required for attaining a professional or academic qualification (for example: fieldwork placement for social work students, clinical attachment for medical students or professional practicum for education students), and generally any other period of work that is usually described as an internship, which may include any self-arranged internship or internship arranged through a third party. Specific reference to

“pupillage” is included in the light of existing definition of pupillage and the related protection under the SDO, DDO and RDO.

7. Under the proposed definition, *volunteer* means “a person who performs volunteer work other than in the capacity of an employer or employee”. The term is given a broad interpretation so as to protect persons who perform work in the capacity of a volunteer in general, in the absence of an employment relationship.

8. We believe by adding *intern* and *volunteer* in the definition of *workplace participant*, the scope of protection against harassment in the workplace would be enhanced.

Vicarious liability of persons engaging interns and volunteers

9. Under the existing anti-discrimination ordinances, employers may be vicariously liable for an employee’s act in the course of his or her employment (see section 46(1) of the SDO, section 48(1) of the DDO and section 47(1) of the RDO). Anything done by a person in the course of employment is to be treated for the purposes of the anti-discrimination ordinances as done by the employer as well, whether or not it was done with the employer’s knowledge or approval. Once Part 5 of the Bill comes into effect, employers will also be liable for their employees’ unlawful acts of harassment committed against other workplace participants in a common workplace in the course of their employment. However, the existing anti-discrimination ordinances also provides a defence, where an employer will not be held vicariously liable for an act done by an employee if the employer could prove that “reasonably practicable steps” have been taken to prevent the employee from doing the unlawful act concerned.

10. According to information provided by the Equal Opportunities Commission, “reasonably practicable steps” may include formulating and promoting anti-harassment policy, enhancing awareness on harassment prevention through activities such as seminars and training workshops, as well as formulating preventive and remedial measures such as establishing complaint handling and supporting mechanism for harassment. In practice, non-governmental organisations, charities, hospitals, schools or religious bodies that engage volunteers may distribute to their volunteers the anti-harassment guidelines available to their employees, or invite their volunteers to attend seminars on the prevention of workplace harassment.

11. As detailed in paragraphs 2 to 8 above, we propose to supplement Part 5 of the Bill by adding interns and volunteers in the definition of *workplace participant*, to protect them against sexual, disability and racial harassment by other workplace participants. Similar to the existing vicarious liability of employers, we propose to introduce provisions relating to vicarious liability of, as well as corresponding defence for, persons who engaged an intern or volunteer.

Separate bill to introduce protection from harassment on the ground of breastfeeding

12. As indicated in our written reply to the Bills Committee dated 29 April 2019, the Government is preparing to introduce a separate bill to amend the SDO to provide for the protection of harassment on the ground of breastfeeding (the **new bill**). In order to take forward this legislative exercise in an expeditious manner, relevant protection will apply to prescribed areas covered by the existing anti-discrimination ordinances, such as employment, education, the provision of goods, services or facilities, disposal or management of premises and activities of the Government, as discussed in this Bills Committee on 7 May 2019.

13. Currently, SDO section 2(5) provides for protection against *sexual harassment*. A person sexually harasses a victim if they —

- (a) make “unwelcome sexual advance” or “unwelcome request for sexual favours” to the victim, or engages “unwelcome conduct of a sexual nature” in relation to the victim, which a reasonable person would have anticipated the victim would be offended, humiliated or intimidated; or
- (b) engage in “conduct of a sexual nature” which creates a hostile or intimidating environment for the victim.

It is our policy intent to provide for protection of breastfeeding women by rendering harassment of a woman on the ground that the woman is breastfeeding unlawful, where the relevant act is not necessarily “conduct of a sexual nature”, alongside the existing protection of sexual harassment under the SDO.

14. In formulating the scope of protection of harassment of a breastfeeding woman, reference has been made to Part 2 of the Bill¹ as well as provisions in relation to sexual harassment in the SDO, harassment of persons with a disability in the DDO and harassment on the ground of race in the RDO. We propose to set out under the SDO that a person harasses a woman if, on the ground that the woman is breastfeeding—

- (a) the person engages in unwelcome conduct, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the woman would be offended, humiliated or intimidated by that conduct; or
- (b) the person, alone or together with other persons, engages in conduct that creates a hostile or intimidating environment for the woman.

In line with relevant provisions, *conduct* includes making a statement to a woman or in her presence, whether the statement is made orally or in writing.

15. The term *harass* will be defined to comprise both sexual harassment and harassment of breastfeeding women. References to “sexual harassment” and “sexually harass” in certain provisions of the SDO would be replaced by “harassment” and “harass” to make the provisions currently applicable to sexual harassment under the SDO also applicable to harassment of breastfeeding women.

16. It is our policy intent that the protection of harassment of breastfeeding women also applies in the areas to be introduced through Parts 5 and 8 of the Bill, namely harassment between persons working in a common workplace and harassment by the management of a club. Subject to passage of the Bill, we will include relevant amendments in the

¹ Part 2 of the Bill provides for amendments to the SDO relating to discrimination on the ground of breastfeeding. As indicated in our written reply to the Bills Committee dated 29 April 2019 and discussed at the meeting of 7 May 2019, the Government will propose CSA to amend the proposed definition of breastfeeding such that protection from discrimination is not limited to women who feed their own child with their breast milk.

The amended Bill provides that a woman is breastfeeding if she (i) is engaged in the act of breastfeeding a child or expressing breast milk; or (ii) is a person who feeds a child with her breast milk. This definition would also apply to provisions relating to harassment of breastfeeding women. Details are shown in the mark-up at **Annex B**.

new bill so that the protection of harassment of breastfeeding women would also apply in these newly added areas.

17. As to the timetable on introducing the new bill, we plan to proceed with the legislative exercise as soon as practicable after consulting this Bills Committee at its fifth meeting. Meanwhile, we have initiated the drafting process along the aforementioned approach, with a view to presenting the new bill to the Legislative Council in time for this Bills Committee to take up its scrutiny.

18. We would be grateful for members' consideration of the proposed CSAs to extend protection from harassment in a common workplace to interns and volunteers, as well as any comments on our proposed approach to introduce protection against harassment of breastfeeding women under the SDO.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Judy Chung', written in a cursive style.

(Ms Judy CHUNG)

for Secretary for Constitutional and Mainland Affairs

CSAs to Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (marked up)

Amendments to Part 5—Division 1

Clause 18A

3

Amendments to Part 5

Amendments Relating to Harassment at Workplace

Division 1—Sex Discrimination Ordinance (Cap. 480)

18A. Section 2 amended (interpretation)

Section 2(1)—

Add in alphabetical order

“*intern* (實習人員)—see section 23A(2);

internship (實習)—see section 23A(2);

pupillage (見習職位)—see section 36(4);

volunteer (義工)—see section 23A(2);”.

19. Section 23A added

After section 23—

Add

“23A. Sexual harassment at workplace

(1) It is unlawful for a person who is a workplace participant to sexually harass a woman who is also a workplace participant at a workplace of them both.

(2) In this section—

intern (實習人員) means a person who is engaged by another person for an internship but is not an employee of that other person;

internship (實習) means—

(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or

(b) any other period of work that is usually described as an internship;

volunteer (義工) means a person who performs volunteer work other than in the capacity of an employer or employee;

workplace (工作場所), in relation to a person, means a place—

(a) at which the person works as a workplace participant; or

(b) that the person attends as a workplace participant;

workplace participant (場所使用者) means—

(a) an employee;

(b) an employer;

(c) a contract worker;

(d) the principal, within the meaning of section 13(1), of a contract worker;

(e) a commission agent;

(f) the principal, within the meaning of section 20(1), of a commission agent;~~or~~

(g) a partner in a firm;

(h) an intern; or

(i) a volunteer.”.

19A. Section 46A added

After section 46—

Add

“46A. Liability of persons engaging interns and volunteers

- (1) This section applies for the purposes of section 23A.
- (2) For the avoidance of doubt, this section does not apply for the purposes of any criminal proceedings.
- (3) An act done by an intern in the course of an internship is to be treated as an act done—
 - (a) by the intern; and
 - (b) by the person who engaged the intern for the internship, whether or not the act was done with the knowledge or approval of that person.
- (4) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by an intern engaged by the person, it is a defence for the person to prove that the person took reasonably practicable steps to prevent the intern—
 - (a) from doing that act; or
 - (b) from doing acts of that description in the course of the internship.
- (5) Subsections (6) and (7) apply if a volunteer is engaged by another person to perform volunteer work.
- (6) An act done by a volunteer in the course of performing volunteer work is to be treated as an act done—
 - (a) by the volunteer; and
 - (b) by the person who engaged the volunteer to perform the work, whether or not the act was done with the knowledge or approval of that person.

(7) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by a volunteer engaged by the person, it is a defence for the person to prove that the person took reasonably practicable steps to prevent the volunteer—

(a) from doing that act; or

(b) from doing acts of that description in the course of performing volunteer work.”.

19B. Section 47 amended (aiding unlawful acts)

After section 47(2)—

Add

“(2A) For the purposes of subsection (1), if a person who engaged an intern—

(a) is liable under section 46A for an act done by the intern; or

(b) would be liable under section 46A for the act but for section 46A(4),

the intern is deemed to aid the doing of the act by that person.

(2B) For the purposes of subsection (1), if a person who engaged a volunteer—

(a) is liable under section 46A for an act done by the volunteer; or

(b) would be liable under section 46A for the act but for section 46A(7),

the volunteer is deemed to aid the doing of the act by that person.”.

19C. Section 76 amended (claims under Part 3 or 4)

Section 76(1)(d)—

Repeal

“46”

Substitute

“46, 46A”.

Division 2—Disability Discrimination Ordinance (Cap. 487)

20. Section 2 amended (interpretation)

(1) Section 2(1)—

Add in alphabetical order

“intern (實習人員)—see section 22A(2);

internship (實習)—see section 22A(2);

pupillage (見習職位)—see section 33(4);

volunteer (義工)—see section 22A(2);”

(2) Section 2(8), after “22,”—

Add

“22A.”

21. Section 22A added

After section 22—

Add

“22A. Harassment at workplace

(1) It is unlawful for a person who is a workplace participant to harass a person with a disability who is also a workplace participant at a workplace of them both.

(2) In this section—

intern (實習人員) means a person who is engaged by another person for an internship but is not an employee of that other person;

internship (實習) means—

(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or

(b) any other period of work that is usually described as an internship;

volunteer (義工) means a person who performs volunteer work other than in the capacity of an employer or employee;

workplace (工作場所), in relation to a person, means a place—

(a) at which the person works as a workplace participant; or

(b) that the person attends as a workplace participant;

workplace participant (場所使用者) means—

(a) an employee;

(b) an employer;

(c) a contract worker;

(d) the principal, within the meaning of section 13(1), of a contract worker;

(e) a commission agent;

(f) the principal, within the meaning of section 20(1), of a commission agent;~~or~~

(g) a partner in a firm;~~;~~

(h) an intern; or

(i) a volunteer.”.

21A. Section 48A added

After section 48—

Add

“48A. Liability of persons engaging interns and volunteers

- (1) This section applies for the purposes of section 22A.
- (2) For the avoidance of doubt, this section does not apply for the purposes of any criminal proceedings.
- (3) An act done by an intern in the course of an internship is to be treated as an act done—
 - (a) by the intern; and
 - (b) by the person who engaged the intern for the internship, whether or not the act was done with the knowledge or approval of that person.
- (4) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by an intern engaged by the person, it is a defence for the person to prove that the person took reasonably practicable steps to prevent the intern—
 - (a) from doing that act; or
 - (b) from doing acts of that description in the course of the internship.
- (5) Subsections (6) and (7) apply if a volunteer is engaged by another person to perform volunteer work.
- (6) An act done by a volunteer in the course of performing volunteer work is to be treated as an act done—
 - (a) by the volunteer; and
 - (b) by the person who engaged the volunteer to perform the work, whether or not the act was done with the knowledge or approval of that person.

(7) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by a volunteer engaged by the person, it is a defence for the person to prove that the person took reasonably practicable steps to prevent the volunteer—

(a) from doing that act; or

(b) from doing acts of that description in the course of performing volunteer work.”.

21B. Section 49 amended (aiding unlawful acts)

After section 49(2)—

Add

“(2A) For the purposes of subsection (1), if a person who engaged an intern—

(a) is liable under section 48A for an act done by the intern; or

(b) would be liable under section 48A for the act but for section 48A(4),

the intern is deemed to aid the doing of the act by that person.

(2B) For the purposes of subsection (1), if a person who engaged a volunteer—

(a) is liable under section 48A for an act done by the volunteer; or

(b) would be liable under section 48A for the act but for section 48A(7),

the volunteer is deemed to aid the doing of the act by that person.”

21C. Section 72 amended (claims under Part 3 or 4)

Section 72(1)(d)—

Repeal

“48”

Substitute

“48, 48A”.

Division 3—Race Discrimination Ordinance (Cap. 602)

21D. Section 2 amended (interpretation)

Section 2(1)—

Add in alphabetical order

“*intern* (實習人員)—see section 24A(2);

internship (實習)—see section 24A(2);

pupillage (見習職位)—see section 35(4);

volunteer (義工)—see section 24A(2);”.

22. Section 24A added

After section 24—

Add

“24A. Harassment at workplace

(1) It is 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.

(2) In this section—

intern (實習人員) means a person who is engaged by another person for an internship but is not an employee of that other person;

internship (實習) means—

(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or

(b) any other period of work that is usually described as an internship;

volunteer (義工) means a person who performs volunteer work other than in the capacity of an employer or employee;

workplace (工作場所), in relation to a person, means a place—

- (a) at which the person works as a workplace participant; or
- (b) that the person attends as a workplace participant;

workplace participant (場所使用者) means—

- (a) an employee;
- (b) an employer;
- (c) a contract worker;
- (d) the principal, within the meaning of section 15(1), of a contract worker;
- (e) a commission agent;
- (f) the principal, within the meaning of section 22(1), of a commission agent;~~or~~
- (g) a partner in a firm;
- (h) an intern; or
- (i) a volunteer.”.

23. Section 39 amended (other harassment)

Section 39(5), after “24,”—

Add

“24A.”.

23A. Section 47A added

After section 47—

Add

“47A. Liability of persons engaging interns and volunteers

- (1) This section applies for the purposes of section 24A.
- (2) For the avoidance of doubt, this section does not apply for the purposes of any criminal proceedings.
- (3) An act done by an intern in the course of an internship is to be treated as an act done—
 - (a) by the intern; and
 - (b) by the person who engaged the intern for the internship, whether or not the act was done with the knowledge or approval of that person.
- (4) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by an intern engaged by the person, it is a defence for the person to prove that the person took reasonably practicable steps to prevent the intern—
 - (a) from doing that act; or
 - (b) from doing acts of that description in the course of the internship.
- (5) Subsections (6) and (7) apply if a volunteer is engaged by another person to perform volunteer work.
- (6) An act done by a volunteer in the course of performing volunteer work is to be treated as an act done—
 - (a) by the volunteer; and

- _____ (b) by the person who engaged the volunteer to perform the work, whether or not the act was done with the knowledge or approval of that person.
- _____ (7) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by a volunteer engaged by the person, it is a defence for the person to prove that the person took reasonably practicable steps to prevent the volunteer—
- _____ (a) from doing that act; or
- _____ (b) from doing acts of that description in the course of performing volunteer work.”.

23B. Section 48 amended (aiding unlawful acts)

After section 48(2)—

Add

- _____ “(2A) For the purposes of subsection (1), if a person who engaged an intern—
- _____ (a) is liable under section 47A for an act done by the intern; or
- _____ (b) would be liable under section 47A for the act but for section 47A(4),
the intern is deemed to aid the doing of the act by that person.
- _____ (2B) For the purposes of subsection (1), if a person who engaged a volunteer—
- _____ (a) is liable under section 47A for an act done by the volunteer; or
- _____ (b) would be liable under section 47A for the act but for section 47A(7),

the volunteer is deemed to aid the doing of the act by that person.”.

23C. Section 70 amended (claims in respect of discrimination, harassment and vilification)

Section 70(1)(d)—

Repeal

“47”

Substitute

“47, 47A”.

Amendments to Part 2

Amendments to SDO Relating to Discrimination on the Ground of Breastfeeding

4. Section 2 amended (interpretation)

- (1) Section 2(1), definition of *discrimination*—

Repeal

“8 or 9”

Substitute

“8, 8A or 9”.

- (2) Section 2(1)—

Add in alphabetical order

“*breastfeeding* (餵哺母乳)—see means breastfeeding within the meaning of section 8A(2)(a);”.

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~~^{her} child or expressing breast milk ~~to feed her~~^{her} ~~child~~; or
 - (ii) is a person who feeds ~~her~~^{her} child with her breast milk; and
 - (b) a person who is not breastfeeding is to be construed accordingly.”.
-