

LEGISLATIVE COUNCIL BRIEF

**DISCRIMINATION LEGISLATION
(MISCELLANEOUS AMENDMENTS) BILL 2018**

INTRODUCTION

At the meeting of the Executive Council on 20 November 2018, the Council **ADVISED** and the Chief Executive **ORDERED** that the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (“the Bill”), at **Annex**, should be introduced into the Legislative Council (“LegCo”).

2. The Bill seeks to amend the four anti-discrimination ordinances, namely the Sex Discrimination Ordinance (Cap. 480) (“SDO”), the Disability Discrimination Ordinance (Cap. 487) (“DDO”), the Family Status Discrimination Ordinance (Cap. 527) (“FSDO”) and the Race Discrimination Ordinance (Cap. 602) (“RDO”), to take forward eight recommendations of priority in the Equal Opportunities Commission (“EOC”)’s Submissions to the Government on the Discrimination Law Review (“DLR”).

JUSTIFICATIONS

3. We note that the submissions in the DLR contained some relatively complex and sensitive issues, on which the public have expressed strong and divergent views. The EOC has also suggested further consultation, research and education on some of the issues. In this connection, we discussed the EOC’s recommendations with the LegCo Panel on Constitutional Affairs (“CA Panel”) at its meeting on 20 March 2017. Among the recommendations that are of higher priority, we indicated our intention to focus on the following nine recommendations that are relatively less complex or controversial:

- (a) *to introduce express provisions in the SDO prohibiting direct and indirect discrimination on the ground of breastfeeding, and to include expression of milk in the definition of breastfeeding (recommendation 5 of the DLR);*

- (b) *to replace the references to “near relative”¹ in the RDO with references to “associate” (recommendation 7 of the DLR);*
- (c) *to provide protection from direct and indirect racial discrimination and racial harassment by imputation in the RDO (recommendation 8 of the DLR);*
- (d) *to expand the scope of protection from sexual, disability and racial harassment between persons working in a common workplace (e.g. consignment workers) under the SDO, DDO and RDO (recommendation 15 of the DLR);*
- (e) *to protect service providers from disability and racial harassment by customers under the DDO and RDO (recommendation 16 of the DLR);*
- (f) *to provide 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 DDO and RDO (recommendation 17 of the DLR);*
- (g) *to provide protection from sexual, disability and racial harassment between tenants and/or sub-tenants occupying the same premises in SDO, DDO and RDO (recommendation 18 of the DLR);*
- (h) *to protect members and applicants for membership of a club from sexual and disability harassment by the management of the club under the SDO and DDO (recommendation 19 of the DLR); and*

¹ Under section 2(1) of the RDO, near relative (近親), in relation to a person, means -

- (a) the person’s spouse;
- (b) a parent of the person or of the spouse;
- (c) a child of the person or the spouse of such a child;
- (d) a brother or sister (whether of full blood or half blood) of the person or of the spouse or the spouse of such a brother or sister;
- (e) a grandparent of the person or of the spouse; or
- (f) a grandchild of the person or the spouse of such a grandchild,

and, in determining the above relationships, children born out of wedlock are to be included, an adopted child is to be regarded as a child of both the natural parents and the adoptive parent or parents and a step child as the child of both the natural parents and any step parent.

- (i) *to repeal provisions in the SDO, FSDO and RDO 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 (recommendation 22 of the DLR).*

4. With the support of the CA Panel, we also consulted the Labour Advisory Board (“LAB”) on five employment-related recommendations, namely recommendations 5, 7, 8, 15 and 22 of the DLR. At the meeting on 11 October 2017, the LAB in principle supported the Government to take forward those recommendations.

5. At the CA Panel meeting on 22 June 2018, we proposed that eight out of the nine recommendations would be implemented through the Bill at **Annex**. We also indicated that there are some issues that need to be further considered in collaboration with the EOC before we can take forward the legislative proposal for recommendation 18, given the variety of leases, premises and persons living in the same premises in Hong Kong. In parallel, we have already invited the EOC to explore other measures to abate acts of sexual, disability and racial harassment between tenants and/or sub-tenants.

THE EIGHT RECOMMENDATIONS TO BE TAKEN FORWARD

6. The eight recommendations amending the SDO, DDO, FSDO and RDO that are considered to be capable of driving consensus among stakeholders and society, and may be taken forward at this juncture, are as follows:

- (a) *to introduce express provisions in the SDO prohibiting direct and indirect discrimination on the ground of breastfeeding, and to include expression of milk in the definition of breastfeeding (recommendation 5 of the DLR)*

7. Taking into consideration that all breastfeeding mothers are women and breastfeeding is a gender-specific condition analogous to the

protected characteristic of pregnancy under section 8 of the SDO², we propose to render direct and indirect discrimination against a woman on the ground of her breastfeeding unlawful. This prohibition would apply to all fields governed 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 to all breastfeeding women, the proposed definition of breastfeeding does not only cover the act of breastfeeding but will also include the expression of milk and the status of being a breastfeeding mother.

8. We propose that a person shall be liable for direct discrimination on the ground of breastfeeding if the person treats a breastfeeding woman less favourably than a person who is not breastfeeding where the relevant circumstances in the one case are the same, or not materially different, in the other. We also propose that a person could be liable for indirect discrimination on the ground of breastfeeding if the person applies a blanket requirement or condition to all persons but the requirement or condition has a disparate effect on breastfeeding women. The person would be held liable for indirect discrimination against a breastfeeding woman if she cannot comply with the requirement or condition and suffers a detriment as a result, and the requirement or condition cannot be shown to be justifiable.

9. Similar to the existing provisions on indirect discrimination in the four anti-discrimination ordinances, no positive obligation would be imposed on any person to provide reasonable accommodation (such as lactation breaks or facilities) to breastfeeding women. However, to avoid liability for indirect breastfeeding discrimination, the respondent would have the burden of showing that the application of the blanket requirement or condition to all persons irrespective of whether or not they are breastfeeding is justifiable in all the circumstances.

² Section 8 of the SDO reads “A person discriminates against a woman in any circumstances . . . if—

- (a) on the ground of her pregnancy he treats her less favourably than he treats or would treat a person who is not pregnant; or
- (b) he applies to her a requirement or condition which he applies or would apply to a person who is not pregnant but—
 - (i) which is such that the proportion of persons who are pregnant who can comply with it is considerably smaller than the proportion of persons who are not pregnant who can comply with it;
 - (ii) which he cannot show to be justifiable irrespective of whether or not the person to whom it is applied is pregnant; and
 - (iii) which is to her detriment because she cannot comply with it.”

(b) to replace the references to “near relative”³ in the RDO with references to “associate” (recommendation 7 of the DLR)

10. With reference to the protection afforded to a person who is discriminated against on the ground of the disability of the person’s “associate” under the 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 RDO.

11. An “associate”, in relation to a person, would be defined in the RDO as including –

- (i) a spouse of the person;
- (ii) another person who is living with the person on a genuine domestic basis;
- (iii) a relative of the person;
- (iv) a carer of the person; and
- (v) another person who is in a business, sporting or recreational relationship with the person.

12. It would thus be unlawful for a person to discriminate against or harass another person because of the race of the latter’s “associate” in all specified fields, such as employment, education, the provision of goods, facilities and services, access to clubs, etc.

13. Nevertheless, it would still be necessary to retain the definition of “near relative” in the RDO. Sections 10(7), 29(2)(a) and 30(1)(a) of the RDO currently provide for an exception in relation to shared accommodation with the discriminator or the discriminator’s “near relative”. For example, under section 10(7) of the RDO, an employer may choose to recruit a domestic helper of Indonesian origin to work at the home of the employer or the employer’s “near relative”, and declines to recruit a domestic helper of Thai origin on the ground of the latter’s race. We consider that no change should be made to these exceptions as the replacement of “near relative” with “associate” would widen the scope of the exceptions considerably and hence afford less protection to job applicants and the employees concerned.

(c) to provide protection from direct and indirect racial discrimination and racial harassment by imputation in the RDO (recommendation 8 of the DLR)

³ See Footnote 1.

14. Modelled on the existing definition of “disability” in section 2(1) of the DDO which includes a disability that is “imputed to a person”, the above proposal seeks to widen the scope of protection in the fields specified by the RDO to cover direct and indirect racial discrimination and racial harassment by imputation that a person is of a particular race or is a member of a particular racial group. Hence, a person who discriminates against or harasses another person on the basis of a mistaken perception of the race of the other person would be held liable for racial discrimination or racial harassment, as the case may be, under the proposal.

(d) to expand the scope of protection from sexual, disability and racial harassment between persons working in a common workplace (e.g. consignment workers) under the SDO, DDO and RDO (recommendation 15 of the DLR)

15. The existing provisions of the SDO, DDO and RDO provide for limited protection from sexual, disability and racial harassment in situations where the harasser and the victim are working in a common workplace⁴ but there is no employment or employment-like relationship between them. Our proposal seeks to render sexual, disability and racial harassment between workplace participants unlawful under the SDO, DDO and RDO, even where there is no employment or employment-like relationship between them. In this respect, we propose “workplace participants” to cover parties in close connection with a workplace, namely, an employer, an employee, a contract worker, a principal, a commission agent and a partner, and “workplace” to mean a place at which a workplace participant works or attends as a workplace participant.

16. By virtue of section 46 of the SDO, section 48 of the DDO and section 47 of the RDO, a victim of harassment may also bring a claim against the harasser’s employer or principal, though an employer or a principal has a defence if he or she took reasonably practicable steps to prevent his or her employees from committing the unlawful act.

⁴ The existing protection from harassment under the SDO, DDO and RDO in instances where parties have no employment or employment-like relationship covers: (a) an employer harassing a person seeking to be employed and vice versa; (b) an employee harassing a person seeking to be employed; (c) a partner harassing persons seeking to be a partner; (d) a contract worker harassing a fellow contract worker, or a commission agent harassing a fellow commission agent; and (e) a person residing in any premises harassing a person (A) employed by another person who carries out in those premises all or part of A’s work in relation to A’s employment.

- (e) *to protect service providers from disability and racial harassment by customers under the DDO and RDO (recommendation 16 of the DLR)*

17. Currently, section 38(1) of the DDO and section 39(1) of the RDO protect a customer from disability and racial harassment by a person providing goods, facilities or services, but not vice versa. We propose to align the harassment provisions in the DDO and RDO with those in section 40(1) and (1A) of the SDO⁵ which make it unlawful for a person to sexually harass another person: (i) in the course of offering to provide, or providing, good, facilities or services to that other person (i.e., a service provider sexually harassing a customer); or (ii) in the course of obtaining or using any goods, facilities or services provided by the other person (i.e., a customer sexually harassing a service provider). We also propose that the scope of protection from harassment under the DDO shall be aligned with that under the SDO and RDO so that a customer would be protected from harassment under the DDO not only where he wants to acquire the goods or services or to make use of the facilities, but also where he is acquiring the goods or services or making use of the facilities.

- (f) *to provide 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 DDO and RDO (recommendation 17 of the DLR)*

18. We propose to align the provisions in the DDO and RDO with those in section 41(6) and (7) of the SDO⁶ which concerns the territorial extent of the harassment provisions in section 40(1) and (1A) of the SDO. With the proposed amendments to the DDO and RDO, service providers would be protected from disability and racial harassment by customers (and customers would also be protected from

⁵ Under section 40(1) of the SDO, it is unlawful for a person to sexually harass a woman in the course of offering to provide, or providing, goods, facilities or services to her. Under section 40(1A) of the SDO, it is unlawful for a person to sexually harass a women in the course of: (a) seeking to be provided with goods, facilities or services by her; or (b) being provided with goods, facilities or services by her.

⁶ Section 41(6) and (7) of the SDO (read with section 41(3)) renders it unlawful for any person concerned with the provision of goods, facilities or services to the public to sexually harass a woman who seeks to obtain or use those goods, facilities or services on the following ship, aircraft or dynamically supported craft even if it is outside Hong Kong: (a) any ship registered in Hong Kong; (b) any aircraft or dynamically supported craft registered in Hong Kong and operated by a person who has his principal place of business, or is ordinarily resident, in Hong Kong; or (c) any ship, aircraft or dynamically supported craft belonging to or possessed by the Government.

such harassment by service providers) where the harassment takes place outside Hong Kong but on Hong Kong registered aircraft or ships.

- (g) *to protect members and applicants for membership of a club from sexual and disability harassment by the management of the club under the SDO and DDO (recommendation 19 of the DLR)*

19. We propose to add provisions in the SDO and DDO similar to section 39(10) of the RDO which renders 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.

- (h) *to repeal provisions in the SDO, FSDO and RDO 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 (recommendation 22 of the DLR)*

20. Currently, under the DDO, a victim of unlawful indirect discrimination may still apply for an award of damages even though the respondent can prove that the requirement or condition was not applied with the intention to treat the victim unfavourably. We propose to align the position in the SDO, FSDO and RDO with the DDO by disapplying section 76(5) of the SDO, section 54(6) of the FSDO and section 70(6) of the RDO⁷ to an unlawful act of indirect discrimination committed on or after the commencement of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018.

OTHER OPTIONS

21. The proposed amendments can only be effected by legislative means. There is no alternative option.

THE DISCRIMINATION LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 2018

22. The main provisions are summarised below—

⁷ Under section 76(5) of the SDO, section 54(6) of the FSDO and section 70(6) of the RDO, no award of damages shall be made if the respondent proves that the requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of the claimant's sex, marital status, pregnancy, family status or race, as the case may be.

- (a) Part 1 sets out the short title of the Bill and provides for its commencement;
- (b) Part 2 amends the SDO so that it is unlawful for a person to discriminate a woman on the ground that the woman is breastfeeding;
- (c) Part 3 replaces the references to “near relative” in certain provisions of the RDO with references to “associate” so that it is unlawful to discriminate or harass a person the ground of the race of an associate of the person;
- (d) Part 4 expands the meanings of “race” and “racial group” under the RDO to include a race, colour, descent or national or ethnic origin that is imputed to a person;
- (e) Part 5 amends the SDO, DDO and RDO so that it is unlawful for a person to harass another person (both being workplace participants) at a workplace of them both;
- (f) Part 6 amends the DDO and RDO to broaden the protection of harassment in relation to the provision of goods, services or facilities;
- (g) Part 7 amends the DDO and RDO so that provisions relating to harassment in relation to the provision of goods, services or facilities extend to harassment committed on local ships or aircraft outside Hong Kong;
- (h) Part 8 amends the SDO and DDO to protect a member or an applicant for membership of a club from harassment; and
- (i) Part 9 amends the SDO, FSDO and RDO to remove the intention requirement for an award of damages in claims in respect of an act of indirect discrimination committed on or after the commencement of Part 9 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018.

LEGISLATIVE TIMETABLE

23. The legislative timetable will be –

Publication in the Gazette	30 November 2018
First Reading and commencement of Second Reading Debate	12 December 2018
Resumption of Second Reading Debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

24. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no financial, civil service or environmental implications. With positive sustainability implications, the gender, family, productivity and economic implications of the proposed amendments are set out in the ensuing paragraphs.

25. For gender implications, the proposed amendments prohibiting direct and indirect discrimination on the ground of breastfeeding would provide legal protections and facilitate breastfeeding women to breastfeed their children in all fields governed by the SDO. It would also be 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 while breastfeeding. The other proposed amendments, namely extending the scope of protection from sexual harassment under the SDO to persons working in a common workplace, as well as to protecting members or applicants for membership of a club from sexual harassment by the management of the club, would also have positive effects on women.⁸

26. For family implications, the proposed amendments prohibiting discrimination on the ground of breastfeeding not only seeks to promote closer and intimate relationship between breastfeeding mothers and their children but also enables breastfeeding mothers to fulfill parental obligations while staying in the work force, which in turn could relieve pressure on the family. Besides, with reduced societal barriers and a supportive work and social environment for persons with disabilities, the ability for the family to care for family members with disabilities will be strengthened. The enhancement of protection from

⁸ The protection from sexual harassment applies to both men and women. See section 2(8) of the SDO.

racial discrimination and harassment also promotes racial diversity and harmony, thereby creating a cohesive social network for families of different racial groups or ethnic origins.

27. On productivity implications, the proposed amendments prohibiting discrimination on the ground of breastfeeding will help encourage breastfeeding women to join the work force and is able to reduce the turnovers of female employees including the experienced ones.

28. As for economic implications, the proposed employment-related amendments would help create a more inclusive working environment for people of different socio-economic background. The new provisions in the SDO against direct and indirect discrimination on the ground of breastfeeding, coupled with breastfeeding-friendly measures which might be voluntarily provided by some employers, would be conducive to encouraging females to stay in or re-enter the labour force to the benefit of sustaining Hong Kong's economic vitality.

29. To facilitate the smooth implementation of the proposed legislative measures on breastfeeding, the amendments concerned will commence after 12 months upon the gazettal of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018. The remaining parts shall come into operation upon the gazettal of the Ordinance.

30. All proposed amendments will not affect the current binding effect of the SDO, DDO, FSDO and RDO. Any additional work arising from the implementation of the proposal will be absorbed by the Constitutional and Mainland Affairs Bureau and the EOC within their existing resources.

PUBLIC CONSULTATION

31. We consulted the CA Panel on 20 March 2017 and 22 June 2018 and the LegCo CA Panel supported such legislative amendments. The LAB also supported in principle that the five employment-related recommendations be pursued. We expect the public will welcome our proposal to extend the scope of protection under the four anti-discrimination ordinances.

PUBLICITY

32. A press release will be issued on 30 November 2018, and a spokesperson will be made available to address enquiries.

ENQUIRIES

33. Any enquiry on this brief can be addressed to Ms Judy CHUNG, Principal Assistant Secretary for Constitutional and Mainland Affairs, at 2810 2159.

Constitutional and Mainland Affairs Bureau
28 November 2018

Discrimination Legislation (Miscellaneous Amendments) Bill 2018

Contents

Clause	Page
Part 1	
Preliminary	
1. Short title and commencement	1
2. Enactments amended	2
Part 2	
Amendments to Sex Discrimination Ordinance (Cap. 480) Relating to Discrimination on the Ground of Breastfeeding	
3. Long title amended	3
4. Section 2 amended (interpretation).....	3
5. Section 4 amended (act done because of sex, etc. and for other reason)	3
6. Section 6 amended (sex discrimination against men).....	4
7. Section 8A added.....	4
8A. Discrimination against breastfeeding women.....	4
8. Section 10A added.....	5
10A. Comparison of cases under section 8A.....	5
9. Section 42 amended (discriminatory practices).....	6

Clause	Page
10. Section 48 amended (special measures)	6
11. Section 57 amended (acts done for purposes of protection of women).....	7

Part 3

**Amendments to Race Discrimination Ordinance (Cap. 602) Relating to
Discrimination and Harassment on the Ground of Race of Associate**

12. Section 2 amended (interpretation).....	8
13. Section 5 substituted.....	8
5. Discrimination on the ground of race of associate.....	9
14. Section 7 amended (racial harassment).....	9
15. Section 8 amended (meaning of <i>race</i> , <i>on the ground of race</i> , <i>racial group</i> and comparison of cases of persons or different racial groups)	9
16. Section 84 amended (amendment of Schedules 1, 2, 3, 4 and 5).....	10
17. Schedule 6 added.....	10
Schedule 6 Persons Specified as Carers	10

Part 4

**Amendments to Race Discrimination Ordinance (Cap. 602) Relating to
Discrimination by Imputation**

18. Section 8 amended (meaning of <i>race</i> , <i>on the ground of race</i> , <i>racial group</i> and comparison of cases of persons or different	
-------------------------------------------------------------------------------------------------------------------------------------------------------	--

Clause	Page
racial groups).....	12
Part 5	
Amendments Relating to Harassment at Workplace	
Division 1—Sex Discrimination Ordinance (Cap. 480)	
19. Section 23A added.....	13
23A. Sexual harassment at workplace.....	13
Division 2—Disability Discrimination Ordinance (Cap. 487)	
20. Section 2 amended (interpretation).....	14
21. Section 22A added.....	14
22A. Harassment at workplace.....	14
Division 3—Race Discrimination Ordinance (Cap. 602)	
22. Section 24A added.....	15
24A. Harassment at workplace.....	15
23. Section 39 amended (other harassment).....	16
Part 6	
Amendments Relating to Harassment in Relation to Provision of Goods etc.	
Division 1—Disability Discrimination Ordinance (Cap. 487)	
24. Section 38 amended (harassment in relation to the provision of goods, services and facilities).....	17
Division 2—Race Discrimination Ordinance (Cap. 602)	
25. Section 39 amended (other harassment).....	18

Clause	Page
Part 7	
Amendments Relating to Harassment Committed outside Hong Kong	
Division 1—Disability Discrimination Ordinance (Cap. 487)	
26. Section 40 amended (extent of Part 4).....	19
Division 2—Race Discrimination Ordinance (Cap. 602)	
27. Section 40 amended (extent of Part 4).....	19
Part 8	
Amendments Relating to Harassment by Clubs	
Division 1—Sex Discrimination Ordinance (Cap. 480)	
28. Section 39A added.....	21
39A. Sexual harassment by clubs.....	21
Division 2—Disability Discrimination Ordinance (Cap. 487)	
29. Section 2 amended (interpretation).....	21
30. Section 38A added.....	21
38A. Harassment by clubs.....	21
Part 9	
Amendments Relating to Award of Damages	
Division 1—Sex Discrimination Ordinance (Cap. 480)	
31. Section 76 amended (claims under Part 3 or 4).....	23
Division 2—Family Status Discrimination Ordinance (Cap. 527)	

Clause	Page
32. Section 54 amended (claims under Part III or IV).....	23
Division 3—Race Discrimination Ordinance (Cap. 602)	
33. Section 70 amended (claims in respect of discrimination, harassment and vilification).....	24

A BILL

To

Amend the Sex Discrimination Ordinance (*SDO*) to make breastfeeding discrimination unlawful; to amend the Race Discrimination Ordinance (*RDO*) to protect an associate of a person from harassment and direct racial discrimination; to expand the meaning of *race* and *racial group* in the RDO to include a race that is imputed to a person; to amend the SDO, the Disability Discrimination Ordinance (*DDO*) and the RDO to make harassment at a workplace unlawful; to amend the DDO and RDO to strengthen the protection against harassment in relation to the provision of goods etc.; to amend the DDO and RDO to make certain acts of harassment committed outside Hong Kong unlawful; to amend the SDO and DDO to make harassment against a member or an applicant for membership of a club unlawful; and to remove the intention requirement for an award of damages for certain acts of indirect discrimination under the SDO, the Family Status Discrimination Ordinance and the RDO.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018.

- (2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.
- (3) Part 2 comes into operation on the expiry of 12 months beginning on the day on which this Ordinance is published in the Gazette.

2. Enactments amended

The enactments specified in Parts 2 to 9 are amended as set out in those Parts.

Part 2

Amendments to Sex Discrimination Ordinance (Cap. 480) Relating to Discrimination on the Ground of Breastfeeding

3. Long title amended

Long title—

Repeal

“status or pregnancy,”

Substitute

“status, pregnancy or 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 section 8A(2);”.

5. Section 4 amended (act done because of sex, etc. and for other reason)

Section 4—

Repeal paragraph (b)

Substitute

- “(b) one of the reasons is—
- (i) a person’s sex;
 - (ii) a person’s marital status;
 - (iii) a woman’s pregnancy; or
 - (iv) that a woman is breastfeeding, whether or not it is the dominant or a substantial reason.”.

6. Section 6 amended (sex discrimination against men)

Section 6(2)—

Repeal

“pregnancy or childbirth”

Substitute

“pregnancy, childbirth or 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 child or expressing breast milk to feed her child; or
 - (ii) is a person who feeds her child with her breast milk; and
- (b) a person who is not breastfeeding is to be construed accordingly.”.

8. Section 10A added

Part 2, after section 10—

Add

“10A. Comparison of cases under section 8A

A comparison of the cases under section 8A of—

- (a) a woman who is breastfeeding; and
- (b) a person who is not breastfeeding,

must be such that the relevant circumstances in the one case are the same as, or not materially different from, those in the other.”.

9. Section 42 amended (discriminatory practices)

Section 42—

Repeal subsection (1)

Substitute

“(1) In this section—

discriminatory practice (歧视性的做法) means the application of a requirement or condition—

- (a) that results in an act of discrimination which is unlawful by virtue of any provision of Part 3 or 4 as read with section 5(1)(b), 7(1)(b), 8(b) or 8A(1)(b); or
- (b) that would be likely to result in such an act of discrimination if the persons to whom it is applied were not all of the same sex.”.

10. Section 48 amended (special measures)

Section 48(a), (b) and (c)—

Repeal

“who are pregnant”

Substitute

“women who are pregnant or breastfeeding”.

11. Section 57 amended (acts done for purposes of protection of women)

(1) Section 57(2)(a)(i)—

Repeal

“maternity; or”

Substitute

“maternity;”.

(2) After section 57(2)(a)(i)—

Add

“(ia) breastfeeding; or”.

Part 3

Amendments to Race Discrimination Ordinance (Cap. 602) Relating to Discrimination and Harassment on the Ground of Race of Associate

12. Section 2 amended (interpretation)

Section 2(1)—

Add in alphabetical order

“*associate* (有聯繫者), in relation to a person, includes—

- (a) a spouse of the person;
- (b) another person who is living with the person on a genuine domestic basis;
- (c) a relative of the person;
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person;

carer (照料者) includes—

- (a) the Director of Social Welfare;
- (b) any officer of the Social Welfare Department authorized in writing by the Director of Social Welfare;
- (c) any person specified in Schedule 6;”.

13. Section 5 substituted

Section 5—

Repeal the section

Substitute

“5. Discrimination on the ground of race of associate

In any circumstances relevant for the purposes of any provision of this Ordinance, a person (*the discriminator*) discriminates against another person (*the relevant person*) if, on the ground of the race of an associate of the relevant person, the discriminator treats the relevant person less favourably than the discriminator treats or would treat another person not having an associate of the same racial group as the associate of the relevant person.”.

14. Section 7 amended (racial harassment)

(1) Section 7(1)—

Repeal

“a near relative”

Substitute

“an associate”.

(2) Section 7(2)—

Repeal

“near relative”

Substitute

“associate”.

15. Section 8 amended (meaning of race, on the ground of race, racial group and comparison of cases of persons or different racial groups)

Section 8—

Repeal subsection (6)

Substitute

“(6) A comparison of the cases under section 5 of—

- (a) a person having an associate who is of a particular racial group; and
 - (b) a person not having an associate who is of that group,
- must be such that the relevant circumstances in the one case are the same as, or not materially different from, those in the other.”.

16. Section 84 amended (amendment of Schedules 1, 2, 3, 4 and 5)

- (1) Section 84, heading—

Repeal

“1, 2, 3, 4 and 5”.

- (2) Section 84—

Renumber the section as section 84(1).

- (3) After section 84(1)—

Add

“(2) The Secretary for Constitutional and Mainland Affairs may, by notice published in the Gazette, amend Schedule 6.”.

17. Schedule 6 added

After Schedule 5—

Add

“Schedule 6

[ss. 2 & 84]

Persons Specified as Carers”.

Part 4**Amendments to Race Discrimination Ordinance (Cap. 602) Relating to Discrimination by Imputation****18. Section 8 amended (meaning of *race*, on the ground of race, racial group and comparison of cases of persons or different racial groups)****(1) Section 8(1)(a)—****Repeal**

“the person”

Substitute

“the person, and includes a race, colour, descent or national or ethnic origin that is imputed to the person”.

(2) Section 8(1)(b)—**Repeal**

“of the race, colour, descent or national or ethnic origin of the person;”

Substitute

“of—

(i) the race, colour, descent or national or ethnic origin of the person; or

(ii) the race, colour, descent or national or ethnic origin that is imputed to the person;”.

(3) Section 8(1)(d), after “falls”—**Add**

“ or is imputed to fall”.

Part 5**Amendments Relating to Harassment at Workplace****Division 1—Sex Discrimination Ordinance (Cap. 480)****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—

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.”.

Division 2—Disability Discrimination Ordinance (Cap. 487)

20. Section 2 amended (interpretation)

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—

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.”.

Division 3—Race Discrimination Ordinance (Cap. 602)

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—

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.”.

23. Section 39 amended (other harassment)

Section 39(5), after “24,”—

Add

“24A,”.

Part 6

Amendments Relating to Harassment in Relation to Provision of Goods etc.

Division 1—Disability Discrimination Ordinance (Cap. 487)

24. Section 38 amended (harassment in relation to the provision of goods, services and facilities)

(1) Section 38(1)—

Repeal

everything after “disability”

Substitute

“who—

- (a) wants to acquire the goods or services;
- (b) is in the course of acquiring the goods or services;
- (c) wants to make use of the facilities; or
- (d) is in the course of making use of the facilities.”.

(2) After section 38(1)—

Add

“(1A) It is unlawful for a person who—

- (a) wants to acquire goods or services;
- (b) is in the course of acquiring goods or services;
- (c) wants to make use of facilities; or
- (d) is in the course of making use of facilities,

to harass another person with a disability who, whether for payment or not, provides the goods, services or facilities.”.

Division 2—Race Discrimination Ordinance (Cap. 602)

25. Section 39 amended (other harassment)

(1) After section 39(1)—

Add

“(1A) It is unlawful for a person who—

(a) seeks to obtain or use goods, facilities or services;
or

(b) is provided with goods, facilities or services,
to harass another person who is concerned with the provision of the goods, facilities or services.”.

(2) Section 39(5), after “(1),”—

Add

“(1A),”.

Part 7

Amendments Relating to Harassment Committed outside Hong Kong

Division 1—Disability Discrimination Ordinance (Cap. 487)

26. Section 40 amended (extent of Part 4)

After section 40(5)—

Add

“(6) Section 38(1) and (1A) does not apply to an act of harassment that is committed outside Hong Kong except as provided in subsection (7).

(7) Section 38(1) and (1A) applies to an act of harassment that is committed on a ship, aircraft or dynamically supported craft referred to in subsection (3)(a), (b) or (c) even if it is outside Hong Kong when the act is committed.”.

Division 2—Race Discrimination Ordinance (Cap. 602)

27. Section 40 amended (extent of Part 4)

After section 40(5)—

Add

“(6) Section 39(1) and (1A) does not apply to an act of harassment that is committed outside Hong Kong except as provided in subsection (7).

(7) Section 39(1) and (1A) applies to an act of harassment that is committed on a ship, aircraft or dynamically supported craft referred to in subsection (3)(a), (b) or (c)

even if it is outside Hong Kong when the act is committed.”.

Part 8

Amendments Relating to Harassment by Clubs

Division 1—Sex Discrimination Ordinance (Cap. 480)

28. Section 39A added

After section 39—

Add

“39A. Sexual harassment by clubs

It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to sexually harass a woman who is, or has applied to be, a member of the club.”.

Division 2—Disability Discrimination Ordinance (Cap. 487)

29. Section 2 amended (interpretation)

Section 2(8), after “38,”—

Add

“38A,”.

30. Section 38A added

After section 38—

Add

“38A. Harassment by clubs

It is 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 with a disability who is, or has applied to be, a member of the club.”.

Part 9

Amendments Relating to Award of Damages

Division 1—Sex Discrimination Ordinance (Cap. 480)

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

After section 76(5)—

Add

“(5A) Subsection (5) does not apply in relation to an unlawful act of discrimination falling within section 5(1)(b), 7(1)(b) or 8(b) that is committed on or after the commencement date of Part 9 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018 (of 2018).”.

Division 2—Family Status Discrimination Ordinance (Cap. 527)

32. Section 54 amended (claims under Part III or IV)

After section 54(6)—

Add

“(6A) Subsection (6) does not apply in relation to an unlawful act of discrimination falling within section 5(b) that is committed on or after the commencement date of Part 9 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018 (of 2018).”.

Division 3—Race Discrimination Ordinance (Cap. 602)

33. **Section 70 amended (claims in respect of discrimination, harassment and vilification)**

After section 70(6)—

Add

“(6A) Subsection (6) does not apply in relation to an unlawful act of discrimination falling within section 4(1)(b) that is committed on or after the commencement date of Part 9 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018 (of 2018).”

Explanatory Memorandum

This Bill amends various provisions of anti-discrimination legislation for the purposes set out in the long title of the Bill.

2. The Bill is divided into 9 Parts.

Part 1 of the Bill

3. Part 1 sets out the short title and provides for commencement.

Part 2 of the Bill

4. Part 2 amends the Sex Discrimination Ordinance (Cap. 480) (*SDO*) so that it is unlawful for a person to discriminate against a woman on the ground that the woman is breastfeeding. In particular—
- (a) clause 7 adds a new section 8A to the SDO. The new section 8A(1) covers both direct and indirect discrimination on the ground that a woman is breastfeeding. The new section 8A(2) sets out the meaning of a woman who is breastfeeding;
 - (b) clause 8 adds a new section 10A to the SDO which requires the comparison of the cases under the new section 8A to be such that the relevant circumstances in the one case are the same as, or not materially different from, those in the other; and
 - (c) clauses 3 to 6 and 9 to 11 make certain consequential amendments to the SDO.

Part 3 of the Bill

5. Currently, it is unlawful under the Race Discrimination Ordinance (Cap. 602) (*RDO*) to directly discriminate or harass a person on the ground of the race of that person’s near relative.

6. Part 3 replaces the references to “near relative” in certain provisions of the RDO with references to “associate” so that it is unlawful to directly discriminate or harass a person on the ground of the race of that person’s associate. In particular—
- (a) clause 12 adds the definitions of *associate* and *carer* to section 2(1) of the RDO;
 - (b) clauses 13, 14 and 15 respectively replace the references to “near relative” in sections 5, 7 and 8 of the RDO with references to “associate”;
 - (c) clause 16 adds a new provision to section 84 of the RDO which empowers the Secretary for Constitutional and Mainland Affairs to amend the new Schedule 6 to the RDO; and
 - (d) clause 17 adds a new Schedule 6 to the RDO for persons specified as carers.

Part 4 of the Bill

7. Part 4 (clause 18) expands the meaning of *race* and *racial group* in the RDO to include a race, colour, descent or national or ethnic origin that is imputed to a person.

Part 5 of the Bill

8. Part 5 contains amendments to the SDO, the Disability Discrimination Ordinance (Cap. 487) (*DDO*) and the RDO to make harassment at a workplace unlawful.
9. Clause 19 adds a new section 23A to the SDO so that 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. *Workplace* and *workplace participant* are defined in the new section 23A(2).

10. Clauses 21 and 22 respectively add a new section to the DDO and RDO similar to the new section 23A of the SDO for disability harassment and racial harassment at a workplace. Clauses 20 and 23 make certain consequential amendments.

Part 6 of the Bill

11. Part 6 contains amendments to the DDO and RDO to strengthen the protection against harassment in relation to the provision of goods, services or facilities.
12. Clause 24(1) amends section 38(1) of the DDO to protect a recipient or user, or prospective recipient or user, of goods, services or facilities from disability harassment.
13. Clause 24(2) adds a new section 38(1A) to the DDO to protect a provider or prospective provider of goods, services or facilities from disability harassment.
14. Similar to the new section 38(1A) of the DDO, clause 25(1) adds a new section 39(1A) to the RDO to protect a provider or prospective provider of goods, facilities or services from racial harassment. Clause 25(2) makes a consequential amendment.

Part 7 of the Bill

15. Part 7 contains amendments to the DDO and RDO so that the provisions relating to harassment in relation to the provision of goods, services or facilities extend to acts of harassment committed on local ships or aircraft outside Hong Kong.

Part 8 of the Bill

16. Part 8 contains amendments to the SDO and DDO to protect a member or an applicant for membership of a club from sexual harassment and disability harassment.

Part 9 of the Bill

17. Part 9 contains amendments to the SDO, the Family Status Discrimination Ordinance (Cap. 527) and the RDO to remove the intention requirement for an award of damages in claims in respect of an act of indirect discrimination committed on or after the commencement date of Part 9 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2018.