

立法會
Legislative Council

LC Paper No. LS28/18-19

**Paper for the House Committee Meeting
on 14 December 2018**

**Legal Service Division Report on
Discrimination Legislation (Miscellaneous Amendments) Bill 2018**

I. SUMMARY

1. The Bill

The Bill seeks to:

- (a) amend various provisions of the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487) and the Race Discrimination Ordinance (Cap. 602) to widen the scope of protection under these Ordinances; and
- (b) remove the requirement of the intention to discriminate for making an award of damages for certain acts of indirect discrimination under Cap. 480, Cap. 602 and the Family Status Discrimination Ordinance (Cap. 527).

2. Public Consultation

The Administration has consulted the Panel on Constitutional Affairs ("the CA Panel") and the Labour Advisory Board. There is no information as to whether the Administration has conducted any public consultation.

3. Consultation with LegCo Panel

The CA Panel was consulted on 20 March 2017 and 22 June 2018. Members raised no objection to the legislative proposals in general but expressed various concerns.

4. Conclusion

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns of members of the CA Panel, Members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 12 December 2018. Members may refer to the Legislative Council ("LegCo") Brief (with no file reference) issued by the Constitutional and Mainland Affairs Bureau on 28 November 2018 for further details.

Object of the Bill

2. The Bill seeks to:
 - (a) amend various provisions of the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487) and the Race Discrimination Ordinance (Cap. 602) to widen the scope of protection under these Ordinances; and
 - (b) remove the requirement of the intention to discriminate for making an award of damages for certain acts of indirect discrimination under Cap. 480, Cap. 602 and the Family Status Discrimination Ordinance (Cap. 527).

Background

3. The Equal Opportunities Commission ("EOC") oversees the implementation of existing four anti-discrimination ordinances, i.e., Cap. 480, Cap. 487, Cap. 527 and Cap. 602. In March 2013, EOC Launched the Discrimination Law Review ("DLR") to review all the existing anti-discrimination legislation with a view to making recommendations to the Government to modernise the above legislation. As part of the DLR, EOC conducted a public consultation exercise which took place from 8 July 2014 to 3 October 2014. In March 2016, EOC published the "Discrimination Law Review Submissions to the Government" ("the EOC's Submissions"). In the EOC's Submissions, EOC identified several high priority issues which raised more serious or urgent attention for the Government to implement legislative reforms.¹

Provisions of the Bill

4. The Bill seeks to implement eight recommendations of priority in the EOC's Submissions. The key provisions are summarized in the following paragraphs.

¹ See Introduction of the EOC's Submissions, which is available at (accessed on 7 December 2018) <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>

Prohibiting discrimination on the ground of breastfeeding under Cap. 480 (Part 2 of the Bill)

5. At present, under Cap. 480, sex discrimination against a person includes direct or indirect discrimination that is based on the person's sex, marital status, or pregnancy.

6. The Bill seeks to introduce provisions in Cap. 480 prohibiting direct and indirect discrimination against a woman on the ground of breastfeeding. Under the Bill, a woman is breastfeeding if she is engaged in the act of breastfeeding her child or expressing breast milk to feed her child, or if she feeds her child with her breast milk.

Prohibiting race discrimination on the ground of the race of an associate under Cap. 602 (Part 3 of the Bill)

7. Under section 5 of Cap. 602, a person discriminates against another person ("relevant person") on the ground of the race of a near relative of the relevant person. "Near relative", as defined in section 2(1) of Cap. 602, includes the relevant person's spouse, a parent of the relevant person or of the relevant person's spouse, a child of the relevant person or the spouse of such child.

8. The Bill seeks to replace discrimination on the ground of the race of the relevant person's near relative with that on the ground of the race of the relevant person's associate. Under the Bill, "associate" includes the relevant person's spouse, carer and another person who is in a business, sporting or recreational relationship with the relevant person. It is noted that the proposed definition of "associate" is the same as that in section 2(1) of Cap. 487.

Amending the meaning of "race" in Cap. 602 (Part 4 of the Bill)

9. Under section 8(1)(a) of Cap. 602, "race", in relation to a person, means the race, colour, descent or national or ethnic origin of the person.

10. The Bill seeks to amend the meaning of race to include a race, colour, descent or national or ethnic origin that is imputed to a person. The references of "race" and "racial group" in section 8(1)(b) and (d) are similarly amended. The effect of these amendments, if passed, is that the scope of protection in the fields specified by Cap. 602 would be widened to cover direct and indirect discrimination and racial harassment by imputation that a person is of a particular race or is a member of a particular racial group. It is noted that the proposed discrimination by imputation is also provided in Cap. 487.

Prohibiting harassment against participants of the same workplace (Part 5 of the Bill)

11. At present, under Cap. 480, Cap. 487 and Cap. 602, it is unlawful for a person, for example, an employer, to harass the person's employee on the ground of the employee's sex, disability or race. However, there is no provision to deal with harassment by the employer against a contract worker who is not employed by the employer and is providing services at the employer's establishment on the instruction of the contract worker's principal.

12. The Bill seeks to amend Cap. 480, Cap. 487 and Cap. 602 to make 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. Under the proposed amendments, "workplace participant" means an employee, an employer, a contract worker, the principal of a contract worker, a commission agent or his principal, or a partner in a firm.

Prohibiting harassment in relation to provision of goods, services or facilities (Parts 6 and 7 of the Bill)

13. Under section 38(1) of Cap. 487 and section 39(1) of Cap. 602, it is unlawful for a person who provides goods, services or facilities ("service provider") to harass another person who wants to acquire the goods or services or wants to make use of the facilities ("customer") on the ground of the customer's disability or race but not vice versa.

14. The Bill seeks to amend Cap. 487 and Cap. 602 to make it unlawful for a customer to harass a service provider on the ground of the service provider's disability or race.

15. The Bill also proposes that the existing harassment provisions and the proposed provisions referred to in paragraphs 13 and 14 above would not apply to acts of harassment that are committed outside Hong Kong, except where the acts of harassment are committed on certain ships, aircraft or dynamically supported craft registered in Hong Kong or belonging to or possessed by the Government.

16. Parts 6 and 7, if passed, would make the harassment provisions in Cap. 487 and Cap. 602 consistent with those in Cap. 480.

Prohibiting harassment by clubs under Cap. 480 and Cap. 487 (Part 8 of the Bill)

17. Under section 39(10) of Cap. 602, it is unlawful for a club, committee of management of a club or a member thereof, to harass a person who is, or has applied to be a member of the club. There is no corresponding provision in Cap. 480 or Cap. 487.

18. The Bill proposes to add to Cap. 480 and Cap. 487 a provision similar to section 39(10) of Cap. 602.

Removing the requirement of the intention to discriminate for making an award of damages for certain acts of indirect discrimination under Cap. 480, Cap. 527 and Cap. 602 (Part 9 of the Bill)

19. At present, in claims in respect of certain acts of indirect discrimination under Cap. 480, Cap. 527 and Cap. 602, no award of damages shall be made if the respondent proves that the discriminatory requirement or condition concerned was not applied with the intention of treating the claimant unfavourably on the ground of the claimant's sex, race or family status. There is, however, no such provision in Cap. 487.

20. The Bill seeks to amend Cap. 480, Cap. 527 and Cap. 602 to remove the above intention requirement for making an award of damages in respect of an act of indirect discrimination committed on or after the commencement date of Part 9 of the Bill after its enactment. This amendment, if passed, would align the provisions in Cap. 480, Cap. 527 and Cap. 602 with Cap. 487.

Commencement

21. Except Part 2 (amendments to Cap. 480 relating to discrimination on the ground of breastfeeding), the Bill, if passed, would come into operation on the day on which the enacted Ordinance is published in the Gazette.

22. Part 2 would come into operation on the expiry of 12 months beginning on the day on which the enacted Ordinance is published in the Gazette.

Public Consultation

23. According to paragraph 31 of the LegCo Brief, the Administration consulted the CA Panel on 20 March 2017 and 22 June 2018. The Administration also consulted the Labour Advisory Board on five employment-related recommendations (i.e. those set out in paragraphs 6, 8, 10, 12, and 20 above). There is no information as to whether the Administration has conducted any public consultation on the Bill.

Consultation with LegCo Panel

24. According to the Clerk to the CA Panel, the Administration consulted the CA Panel on the relevant legislative proposals on 20 March 2017 and 22 June 2018. While members were generally supportive of the proposals, some members expressed concerns on various issues including the need to make provisions to render harassment and vilification of breastfeeding women unlawful in the Cap. 480, what constituted "indirect discrimination" on grounds of breastfeeding, and the definition of "associate" under the proposal to replace the references to "near relative" in Cap. 602 with references to "associate".

Conclusion

25. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns raised by members of the CA Panel, Members may wish to form a Bills Committee to study the Bill in detail.

Prepared by

Kelvin Ka-yun LEE
Senior Assistant Legal Adviser
Legislative Council Secretariat
13 December 2018