

## LEGISLATIVE COUNCIL BRIEF

### Sex Discrimination (Amendment) Bill 2020

#### INTRODUCTION

At the meeting of the Executive Council on 21 January 2020, the Council **ADVISED** and the Acting Chief Executive **ORDERED** that the Sex Discrimination (Amendment) Bill 2020 (“the Bill”) at **Annex**, should be introduced into the Legislative Council (“LegCo”).

2. The Bill seeks to amend the Sex Discrimination Ordinance (Cap. 480) (“SDO”) to outlaw harassment of breastfeeding women.

#### JUSTIFICATIONS

3. The Government introduced the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (“DL(MA)B”) in December 2018 to amend the existing anti-discrimination ordinances<sup>1</sup> for taking forward eight less complex and controversial recommendations among those identified by the Equal Opportunities Commission (“EOC”) in its March 2016 submission on the DLR to be of higher priority, in order to enhance protection from discrimination and harassment under the existing anti-discrimination ordinances.

4. One of the recommendations taken forward in the DL(MA)B concerns the introduction of express provisions in the SDO prohibiting direct and indirect discrimination against breastfeeding women. This is in line with the Government’s policy of promoting, protecting and supporting breastfeeding, and has the support of the LegCo Panel on Constitutional Affairs as well as the Labour Advisory Board. Protection from harassment on the ground of breastfeeding is beyond the range of issues considered in the EOC’s DLR, and was not part of the Government’s proposals at that stage.

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<sup>1</sup> The four existing anti-discrimination ordinances are the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487) (“DDO”), the Family Status Discrimination Ordinance (Cap. 527) and the Race Discrimination Ordinance (Cap. 602) (“RDO”).

5. In the process of scrutinising the DL(MA)B, members of the relevant Bills Committee (“BC Members”) urged that express provisions prohibiting harassment on the ground of breastfeeding were necessary for comprehensive protection of breastfeeding women. BC Members suggested that protection should be provided for breastfeeding women in broad settings, so as to cover general encounters between any persons in a public place the likes of a park or a restaurant, which would go beyond the existing prescribed areas<sup>2</sup>. We explained that making such amendments to the SDO could affect the fundamental construction of the existing anti-discrimination ordinances, and that more time would be required for the Government to study the feasibility of deviating from the current framework of protection from unlawful harassment.

6. Noting complications involved in the above initial proposal, BC members instead suggested providing legal protection from harassment on the ground of breastfeeding within relevant prescribed areas in the SDO, such that the legislative exercise may be pursued expediently. The Government considered that amendment to the DL(MA)B introducing this new form of harassment under the SDO<sup>3</sup> would be inconsistent with Rule 57(4)(a) of the LegCo Rules of Procedure (“RoP”), which stipulates that “an amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates” (“the scope rule”). This is because the subject matters of the DL(MA)B relating to SDO amendments, as reflected in its long title and Explanatory Memorandum, concern introduction of “breastfeeding discrimination” as a new form of discrimination, and amendment on certain matters relating to “sexual harassment”, both of which are concepts distinct from harassment on the ground of breastfeeding. Any amendment to the effect of introducing this distinct form of harassment on ground of breastfeeding would fall outside the scope of the DL(MA)B and would be inadmissible under RoP 57(4)(a).

7. We have however no in-principle objection to BC Members’ suggestion and are supportive of outlawing harassment of breastfeeding women as a matter of policy. Our preferred approach was to invite the EOC to conduct a comprehensive study on expanding the scope of protection

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<sup>2</sup> The four anti-discrimination ordinances currently provide for protection from discrimination and harassment in certain prescribed areas, such as employment, education, the provision of goods, services or facilities, and the disposal or management of premises.

<sup>3</sup> Currently, the SDO only outlaws sexual harassment, where (i) a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to a woman; or engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or (ii) the person alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her. (see SDO section 2(5))

from harassment under the SDO, such that we may consider holistically BC Members' suggestions concerning both harassment on the ground of breastfeeding and existing protection from sexual harassment in certain prescribed areas. Having considered BC Members' strong views that the Government should take quicker action specifically to outlaw harassment on the ground of breastfeeding, we proposed the approach of introducing a separate bill to address this issue, pending EOC's comprehensive study.

## **PROPOSED AMENDMENTS TO THE SDO**

8. With reference to Part 2 of the DL(MA)B on discrimination against breastfeeding<sup>4</sup> women as well as provisions outlawing 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 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, orally or in writing, to a woman or in her presence.

9. An interpretation of *harass* will be added to incorporate both the existing concept of sexual harassment and the proposed concept of harassment of breastfeeding women. References to "sexual harassment" and "sexually harass" in certain provisions of the SDO will be replaced with "harassment" and "harass", such that protection from harassment of breastfeeding women is provided in the prescribed areas where sexual harassment is currently prohibited.

10. It is our policy intent that the protection from harassment of breastfeeding women also applies in the prescribed areas to be introduced through the DL(MA)B, namely harassment between persons working in a common workplace and harassment by the management of a club. Subject to passage of the DL(MA)B, we will propose CSAs to the Bill such that relevant provisions of the amended SDO would apply to both sexual harassment and harassment of breastfeeding women.

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<sup>4</sup> Part 2 of the DL(MA)B provides for amendments to the SDO relating to discrimination on the ground of breastfeeding. With the Government's CSA to amend the proposed definition of breastfeeding taking into account BC Members' views, the new section 8A(2)(a) will provide 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.

## **OTHER OPTIONS**

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

## **THE SEX DISCRIMINATION (AMENDMENT) BILL 2020**

12. The main provisions of the Bill are summarised below—
- (a) Clause 1 sets out the short title of the Bill and provides for its commencement;
  - (b) Clause 3 expands the long title of the SDO to cover harassment of breastfeeding women;
  - (c) Clause 4(2) adds the definition of *harass* which comprises both sexual harassment and harassment of breastfeeding women;
  - (d) Clause 5 adds a new section to set out the meaning of harassment of a woman on the ground that the woman is breastfeeding; and
  - (e) Clauses 4(3), 6(1) and 7 to 11 replace certain references to “sexual harassment” and “sexually harass” with “harassment” and “harass” so that relevant provisions of the SDO apply to both sexual harassment and harassment on the ground that a woman is breastfeeding, while clauses 4(1) and (4) and 6(2) provide for other related amendments.

## **LEGISLATIVE TIMETABLE**

13. The legislative timetable will be –

Publication in the Gazette	31 January 2020
First Reading and commencement of Second Reading Debate	12 February 2020
Resumption of Second Reading Debate, Committee Stage and Third Reading	To be notified

## **IMPLICATIONS OF THE PROPOSAL**

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

15. For gender implications, the proposed amendments prohibiting harassment on the ground of breastfeeding would enhance legal protection and facilitate women to breastfeed. This 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.

16. For family implications, enhancing legal protection to facilitate breastfeeding would promote closer and more intimate relationship between breastfeeding mothers and their children. It further safeguards mothers who fulfill parental obligations by breastfeeding while staying in the work force, which could encourage their commitment to work and in turn relieve pressure on the family.

17. As for economic implications, the proposed amendments would help create a more inclusive workplace and an enabling environment in general for breastfeeding women. This in turn 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.

18. To facilitate the smooth implementation, the proposed legislative amendments will commence simultaneously with Part 2 of the DL(MA)B on discrimination on the ground of breastfeeding, which will commence after 12 months upon the gazettal of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 to allow time for promotion and institution of breastfeeding-friendly measures.

19. The proposed amendments will not affect the current binding effect of the SDO. The Constitutional and Mainland Affairs Bureau and the EOC will absorb any additional work arising from the implementation of the proposal with existing resources.

## **PUBLIC CONSULTATION**

20. Consultation on the DL(MA)B in the LegCo Panel on Constitutional Affairs (20 March 2017 and 22 June 2018) and the Labour Advisory Board indicated support for legislative amendments to provide protection from discrimination on the ground of breastfeeding.

21. Since the Bill arises directly from the discussion and agreement reached in the Bills Committee on DL(MA)B in response to BC Members' requests, we have consulted the Bills Committee at its meeting on 9 December 2019 on our proposed approach of amending the SDO to outlaw harassment of breastfeeding women. BC Members supported the approach including the proposed wording for the meaning of breastfeeding harassment and urged the Government to proceed with the introduction of the Bill as soon as practicable.

22. The EOC has also indicated its support for the Government to provide protection from harassment of breastfeeding women by taking forward amendments to the SDO through the Bill. We expect that the public will welcome our proposal to strengthen legal protection for breastfeeding women.

## **PUBLICITY**

23. A press release will be issued on 31 January 2020, and a spokesperson will be made available to address enquiries.

## **ENQUIRIES**

24. Any enquiry on this brief should be directed to Ms Judy CHUNG, Principal Assistant Secretary for Constitutional and Mainland Affairs, at 2810 2159.

**Constitutional and Mainland Affairs Bureau**  
**24 January 2020**

# A BILL

## To

Amend the Sex Discrimination Ordinance to render it unlawful for a person to harass a breastfeeding woman; and to make related amendments.

Enacted by the Legislative Council.

### 1. Short title and commencement

- (1) This Ordinance may be cited as the Sex Discrimination (Amendment) Ordinance 2020.
- (2) This Ordinance comes into operation on the commencement date of Part 2 of the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020.

### 2. Sex Discrimination Ordinance amended

The Sex Discrimination Ordinance (Cap. 480) is amended as set out in sections 3 to 11.

### 3. Long title amended

The long title—

**Repeal**

“and sexual harassment”

**Substitute**

“sexual harassment and harassment of breastfeeding women”.

### 4. Section 2 amended (interpretation)

- (1) Section 2(1), Chinese text, definition of 職業介紹所—

**Repeal the full stop**

**Substitute a semicolon.**

- (2) Section 2(1)—

**Add in alphabetical order**

“*harass* (騷擾) means—

- (a) sexually harass within the meaning of subsection (5); or
- (b) harass within the meaning of section 2A, and *harassment* (騷擾) is to be construed accordingly;”.

- (3) Section 2(8)—

**Repeal**

“sexual”.

- (4) After section 2(8)—

**Add**

“(8A) Subsection (8) does not apply to a provision of Part 3 or 4 framed with reference to harassment of women if the harassment is harassment within the meaning of section 2A.”.

### 5. Section 2A added

After section 2—

**Add**

**“2A. Harassment of breastfeeding women**

- (1) For the purposes of this Ordinance (other than section 2(5)), 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.

- (2) In subsection (1)—

*conduct* (行徑) includes making a statement to a woman or in her presence, whether the statement is made orally or in writing.”.

**6. Section 9 amended (discrimination by way of victimisation)**

- (1) Section 9(3)—

**Repeal**

“sexual”.

- (2) After section 9(3)—

**Add**

“(4) Subsection (3) does not apply to a provision of Part 3 or 4 framed with reference to harassment of women if the harassment is harassment within the meaning of section 2A.”.

**7. Section 24 amended (other sexual harassment)**

- (1) Section 24, heading—

**Repeal**

“sexual”.

- (2) Section 24—

**Repeal**

“sexually” (wherever appearing).

**8. Section 40 amended (other sexual harassment)**

- (1) Section 40, heading—

**Repeal**

“sexual”.

- (2) Section 40—

**Repeal**

“sexually” (wherever appearing).

**9. Section 81 amended (persistent discrimination or sexual harassment)**

- (1) Section 81, heading—

**Repeal**

“sexual”.

- (2) Section 81(b)—

**Repeal**

“sexual”.

**10. The expression “sexual” repealed**

- (1) The following provisions—

- (a) Part 3, heading;
- (b) cross-heading before section 23;
- (c) Part 4, heading;
- (d) cross-heading before section 39;
- (e) cross-heading before section 83—

**Repeal**

“Sexual” (wherever appearing).

- (2) The following sections—



- (a) section 17(2)(b);
- (b) section 41(6) and (7);
- (c) section 58(2);
- (d) section 64(1)(c);
- (e) section 69(1)(c);
- (f) section 72(2)(b)(ii);
- (g) section 76(1)(c) and (d) and (6);
- (h) section 77(1)(b)—

**Repeal**

“sexual” (wherever appearing).

**11. The expression “sexually” repealed**

The following sections—

- (a) section 23;
- (b) section 39;
- (c) section 83(1)—

**Repeal**

“sexually” (wherever appearing).

**Explanatory Memorandum**

The object of this Bill is to amend the Sex Discrimination Ordinance (Cap. 480) (*Ordinance*) to render it unlawful for a person to harass a breastfeeding woman.

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 3 expands the long title of the Ordinance to cover harassment of breastfeeding women.
4. Clause 4(2) adds the definition of *harass* to section 2(1) of the Ordinance which comprises both sexual harassment and harassment of breastfeeding women.
5. Clause 5 adds a new section 2A to the Ordinance which sets out the meaning of harassment of a woman on the ground that the woman is breastfeeding.
6. Clauses 4(3), 6(1) and 7 to 11 replace the references to “sexual harassment” and “sexually harass” in certain provisions of the Ordinance with the references to “harassment” and “harass” so that those provisions apply in relation to both sexual harassment and harassment of breastfeeding women. Clauses 4(1) and (4) and 6(2) make related amendments.