

立法會

Legislative Council

LC Paper No. CB(2)918/19-20

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Paper for the special House Committee meeting on 8 May 2020

Report of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018

Purpose

This paper reports on the deliberations of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 ("the Bills Committee").

Background

Discrimination Law Review by the Equal Opportunities Commission

2. Established in 1996 under the Sex Discrimination Ordinance (Cap. 480) ("SDO"), the Equal Opportunities Commission ("EOC") is a statutory body responsible for the implementation of SDO, the Disability Discrimination Ordinance (Cap. 487) ("DDO"), the Family Status Discrimination Ordinance (Cap. 527) ("FSDO") and the Race Discrimination Ordinance (Cap. 602) ("RDO"). EOC has a statutory duty to review the functioning of the four existing anti-discrimination ordinances and where necessary, make recommendations for amendments.

3. EOC launched the Discrimination Law Review to review comprehensively the four existing anti-discrimination ordinances and published the "Discrimination Law Review Submissions to the Government" ("EOC's Submissions") in March 2016. EOC's Submissions contained a total of 73 recommendations, including 27 recommendations which were considered to be of higher priority.¹

¹ According to EOC, the 27 recommendations of higher priority can be divided into two parts, with 22 recommendations belonging to Part I and five belonging to Part II. The 22 recommendations in Part I are "generally easier to implement and less complex in application", whereas those in Part II require "further consultation and research" by the Government. The issues in both Parts I and II are, however, "of equal importance and should be promptly tackled by the Government".

4. At the meeting of the Panel on Constitutional Affairs ("the CA Panel") on 20 March 2017, the Administration briefed members on its initial assessment of the recommendations in EOC's Submissions and consulted members on nine prioritized recommendations (see **Appendix I**) which the Administration considered to be capable of forging consensus among stakeholders and society. Among the 27 recommendations considered by EOC to be of higher priority, the Administration intended to first focus on those relatively less complex or controversial since more time was needed to carefully consider the rest.

5. At the CA Panel meeting on 22 June 2018, the Administration informed members that among the nine prioritized recommendations, Recommendation 18 which sought to provide protection from sexual, disability and racial harassment between tenants and/or sub-tenants occupying the same premises needed to be further examined. The Administration would proceed with the legislative exercise with a view to implementing the other eight prioritized recommendations first.

The Bill

6. The Discrimination Legislation (Miscellaneous Amendments) Bill 2018 ("the Bill"), published in the Gazette on 30 November 2018, received First Reading at the Legislative Council ("LegCo") meeting of 12 December 2018. The Bill seeks to:

- (a) amend various provisions of SDO, DDO and RDO 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 SDO, RDO and FSDO.

The Bills Committee

7. At the House Committee meeting on 14 December 2018, a Bills Committee was formed to study the Bill. The membership list of the Bills Committee is in **Appendix II**.

8. Under the chairmanship of Hon Alice MAK, the Bills Committee has held five meetings to discuss the Bill with the Administration, at one of which the Bills Committee received views from 24 deputations and individuals. A list of the organizations and individuals which/who have given views to the Bills Committee is in **Appendix III**.

Deliberations of the Bills Committee

Prohibiting discrimination on the ground of breastfeeding

9. Part 2 of the Bill (clause 7) proposes to introduce a new section 8A to SDO, prohibiting direct and indirect discrimination against a woman on the ground of breastfeeding. Under the proposed new section 8A(2)(a), a woman would be breastfeeding if she is engaged in the act of breastfeeding her child or expressing breast milk to feed her child; or is a person who feeds her child with her breast milk. Some members, including Ms Claudia MO, Mr KWOK Wai-keung, Ms Elizabeth QUAT, Ms YUNG Hoi-yan and Dr CHENG Chung-tai, have raised concerns as to whether the legislative intent of the proposed new section 8A is to protect breastfeeding women in general or only breastfeeding mothers. Apart from seeking explanation for imposing the condition of "her child" in the proposed new section 8A, the Legal Adviser to the Bills Committee has, in relation to the operation of the new provisions, expressed concern on how a member of the public could tell whether a breastfeeding woman is a mother breastfeeding her own child (rather than any child), if the legislative intent is to protect breastfeeding mothers only. In his view, it would cause anomaly if two women are expressing breast milk at the same time at the same place but one is protected because she is expressing breast milk for "her child" but the other one is not.

10. The Administration has advised that the prohibition under the proposed new section 8A of SDO would apply to prescribed areas covered by SDO, such as employment, education, the provision of goods, services or facilities, disposal or management of premises, and activities of the Government. In order to afford comprehensive protection, the new section 8A(2) would cover the act of breastfeeding, expression of breast milk, and the status of being a woman who feeds her child with her breast milk. The policy intent behind this proposed new section is that a woman who chooses to discharge her responsibility as a mother by way of feeding her child with her breast milk should be protected. This is conducive to creating a more enabling environment for breastfeeding women to continue their full and equal social and economic participation, including staying in or re-joining the workforce while breastfeeding. The Administration has further explained that the Bill would not impose an obligation on employers or service providers to make reasonable accommodation for employees or service users who breastfeed. The failure to make reasonable accommodation would not constitute indirect discrimination as long as the employer or service provider concerned can prove that it is, among other things, justifiable for the same requirement to be applied to all employees or service users. The court would take into account relevant factors

in determining whether indirect discrimination against a breastfeeding female employee in a workplace is substantiated.

11. In light of members' views that the scope of protection for breastfeeding women against discrimination should not be limited to women who feed their own children with their breast milk, the Administration has reviewed the proposed definition of "breastfeeding" and agreed to propose amendments to clause 7 of the Bill by removing the reference to "her child" and substituting the reference with "a child".

Enhancing protection from harassment on the ground of breastfeeding

12. There is a further view that Part 2 of the Bill would not afford sufficient protection to breastfeeding women from being harassed or vilified. Quite a number of members, including Mr CHAN Chi-chuen, Ms Elizabeth QUAT, Ms YUNG Hoi-yan and Mr HUI Chi-fung, have strongly suggested that the Administration should draw reference from similar legislation of overseas jurisdictions (e.g. Australia and the United Kingdom) and consider expanding the scope of protection under the proposed SDO amendments so as to also cover the acts of harassment, vilification and offensive behaviour towards breastfeeding women in general.

13. The Administration has explained that at present, acts of harassment, vilification and offensive behaviour towards women are handled by various legal means. For example, SDO prohibits sexual harassment such that a breastfeeding woman may make a claim if any person engages in unwelcome conduct of a sexual nature in relation to her, in circumstances under which a reasonable person, having regard to all the circumstances, would have anticipated that the breastfeeding woman would be offended, humiliated or intimidated; or where conduct of a sexual nature creates a hostile or intimidating environment for the breastfeeding woman in any of the prescribed areas covered by SDO. Besides, legal sanctions may also be imposed on a person who harasses, vilifies or offends a breastfeeding woman under the criminal law. Depending on the circumstances of the case, a person who harasses, vilifies or offends a breastfeeding woman in a public place may be liable to the offences of "loitering" under section 160 of the Crimes Ordinance (Cap. 200), "disorder in public places" under section 17B of the Public Order Ordinance (Cap. 245) or "outraging public decency" under the common law.

14. Notwithstanding the Administration's above explanation, some members, including Mr HUI Chi-fung and Ms YUNG Hoi-yan, maintain the view that the Administration should consider amending SDO to expressly outlaw acts of harassment, vilification and offensive behaviour towards breastfeeding women. The Administration has reiterated that currently, protection from harassment

afforded by SDO only applies to "sexual harassment". If protection from "harassment on the ground of breastfeeding" is to be introduced under SDO, alteration to the overall concept of "harassment" (including the concept of "sexual harassment") under SDO would be inevitable. Also, the Administration has emphasized that "discrimination" and "harassment" are two distinct legal concepts referring to two different types of conduct under the four existing anti-discrimination ordinances. It follows that "discrimination on the ground of breastfeeding" is distinct from "harassment on the ground of breastfeeding". In the context of SDO, only "sexual harassment" is referred to and that is not a general reference to harassment in any form. The existing concept of "sexual harassment" covers acts of harassment that involve "conduct of a sexual nature". Should reference be taken from relevant definitions of harassment under DDO and RDO, the concept of "harassment on the ground of breastfeeding" would cover (a) unwelcome conduct which would reasonably be anticipated to offend, humiliate or intimidate a breastfeeding woman or (b) conduct that creates a hostile or intimidating environment for a breastfeeding woman, where such conduct is not necessarily "conduct of a sexual nature". "Harassment on the ground of breastfeeding" cannot be taken as a sub-set of "sexual harassment".

15. Yet, the Administration has advised that from a policy perspective, it supports the provision of protection from harassment on the ground of breastfeeding. With regard to members' suggestions, the Administration considers a holistic review of the coverage and applicable circumstances of the concept of "sexual harassment" under SDO as well as the existing policy against sexual harassment to be the preferred approach for addressing members' concerns over the issues of harassment on the ground of breastfeeding and sexual harassment. As pointed out by the Administration, the Bill does not seek to amend any provision in relation to the interpretation of "sexual harassment" under SDO. Amendments proposed to the Bill to introduce protection against "harassment on the ground of breastfeeding" would not be relevant to the subject matters of the Bill relating to SDO amendments which concern "discrimination on the ground of breastfeeding", "sexual harassment at workplace" and "sexual harassment by clubs" as contemplated by the long title and other provisions of the Bill. The Administration therefore takes the view that any such amendments would fall outside the scope of the Bill for the purposes of Rule 57(4)(a) of the Rules of Procedure of LegCo.

16. After careful consideration of members' views and concerns, the Administration agrees to introduce a separate bill for the purpose of prohibiting harassment on the ground of breastfeeding ("the separate bill"). According to the Administration, in formulating the scope of protection against harassment of breastfeeding women, it has made reference to Part 2 of the Bill as well as provisions in relation to sexual harassment in SDO, harassment of persons with a disability in DDO and harassment on the ground of race in RDO. The

Administration proposes to further amend SDO so that a person would harass 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 section 2(7) of SDO, "conduct" includes making a statement to a woman, or in her presence, whether the statement is made orally or in writing. Consequentially, the term "harass" would be defined to comprise both sexual harassment and harassment of breastfeeding women. References to "sexual harassment" and "sexually harass" in certain provisions of SDO would be replaced by "harassment" and "harass" to make the provisions currently applicable to sexual harassment under SDO also applicable to harassment of breastfeeding women. It is the Administration's policy intent that the protection of harassment of breastfeeding women would also apply in the areas to be introduced through Parts 5 and 8 of the Bill, namely harassment between persons working in or attending a common workplace and harassment by the committee (or a member of the committee) of management of a club.

17. Regarding the timetable for introducing the separate bill, the Administration has pledged to take forward the legislative exercise in an expeditious manner with a view to presenting the separate bill to LegCo for First Reading and scrutiny within the 2019-2020 legislative session. Members welcome the Administration's acceptance of their suggestion and support its proposal to introduce the separate bill, including the proposed wording of its key provisions as set out in paragraph 16 above, to prohibit harassment on the ground of breastfeeding.

Prohibiting harassment against participants of the same workplace

18. The existing provisions of 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 workplace but do not have any employment or employment-like relationship with each other. For example, it is unlawful for an employer to harass his/her employee on the ground of the employee's sex, disability or race; but there is no provision to deal with harassment by a person against a contract worker (who is not employed by the person) providing services at the person's establishment on the instruction of

the contract worker's principal. Part 5 of the Bill (clauses 19 to 23) seeks to amend SDO, DDO and RDO to make it unlawful for a person who is a workplace participant to harass another person who is also a workplace participant in a common workplace, even in the absence of employment or employment-like relationship between the two participants. Under the proposed new provisions, "workplace participant" would be defined to mean an employee, an employer, a contract worker or his principal, a commission agent or his principal, or a partner in a firm.

19. The majority of the Bills Committee members support the proposed prohibition of sexual, disability and racial harassment in a common workplace. Dr Helena WONG and Ms Elizabeth QUAT have sought clarification as to whether the definition of "workplace participant" covers volunteers, unpaid trainees, interns, freelancers, self-employed persons and outsourced service workers. Enquiries have been made with the Administration on whether the expanded protection under the Bill from sexual, disability and racial harassment would apply in situations where the harasser and the victim are working/present in a common workplace but do not have any employment or employment-like relationship with each other, e.g. (a) harassment between a staff member employed by a LegCo Member (such as personal assistants) and a member of the public seeking assistance/service from another LegCo Member or (b) harassment between a client/student and a fitness/swimming coach.

20. According to the Administration, protection from harassment in a common workplace would apply among "workplace participants" within the meaning of the relevant provisions in Part 5 of the Bill, but not to all persons present in the workplace premises. As set out in Part 5 of the Bill, "workplace participant" would include certain workplace roles, namely employer, employee, contract worker and principal, commission agent and principal as well as partner in a firm, all of which are already being used under the four existing anti-discrimination ordinances. The capacities referred to by Dr Helena WONG, which are not expressly mentioned in the Bill, may be protected by relevant provisions of Part 5 of the Bill if they fall within any of the categories of persons within the proposed definition of "workplace participant" in their given circumstances as elaborated below:

- (a) in terms of outsourced service workers, existing anti-discrimination legislation construes "contract worker" as a person employed by a contractor or sub-contractor of the principal to work for the principal. Therefore, under general circumstances, an outsourced service worker would satisfy the definition of a "contract worker" and qualify as a "workplace participant" protected by relevant provisions in Part 5 of the Bill;

- (b) as for self-employed persons, "employment" means employment under a contract of service or of apprenticeship, or a contract personally to execute any work or labour in the context of existing anti-discrimination legislation. Given that a contract satisfying the above definition has been made (whether verbally or in writing) for the relevant work, a self-employed person would be protected by the provisions in Part 5 of the Bill. For example, a self-employed musician makes a contract with a bar owner to personally perform at the bar and while working at the bar, he is, on the ground of his race, harassed by a cleaner employed by an outsourced service contractor. Since the musician and the cleaner are working at the bar respectively as an "employee" and a "contract worker", the cleaner's act constitutes racial harassment by a workplace participant against another workplace participant in a common workplace, which would contravene RDO as amended by the Bill;
- (c) likewise, whether "interns" or "unpaid trainees" would be covered by Part 5 of the Bill depends on whether the intern/trainee concerned qualifies as an "employee" under "employment" (i.e. whether a contract of service or of apprenticeship, or a contract personally to execute any work or labour, has been made), and cannot be determined solely on the basis of whether the person receives remuneration. If the person meets the definition of "employee" under the existing anti-discrimination legislation, they would be protected by relevant provisions in Part 5 of the Bill from harassment by another workplace participant in a common workplace; and
- (d) in terms of volunteers, the Administration considered that inserting "volunteers" under the proposed definition of "workplace participant" in Part 5 of the Bill could give rise to more complicated and controversial issues. Firstly, section 46 of SDO, section 48 of DDO and section 47 of RDO currently provide for the vicarious liability of employers and principals. Introducing the concept of "volunteers" to the anti-discrimination legislation may lead to problems such as whether an organization/organizer that recruits volunteers to participate in various services would be considered as the volunteers' "employer" or "principal" and whether the organization/organizer would have to bear vicarious liability for the volunteers' acts. Compared with the categories of persons covered in the proposed definition of "workplace participant" in Part 5 of the Bill, the term "volunteer" is not easy to define from the legal perspective; and its scope and the precise concepts require further

clarification. In terms of practical operation, since volunteers generally come and go at their will without much control from the organizer in the course of service and are not likely to sign any written contract with the organizations or beneficiaries they serve, it would be difficult to ascertain the identity of a volunteer.

21. Notwithstanding the above, the Administration appreciates members' concern that there may still be persons working in or attending a workplace as interns or volunteers, whose provision of service or labour may not satisfy the definition of employment and thus fall outside of the scope of the proposed protection. The Administration, therefore, has proposed to move amendments to the Bill to expressly include intern and volunteer in the proposed definition of "workplace participant" in Part 5 of the Bill (under the proposed new section 23A of SDO, new section 22A of DDO and new section 24A of RDO), so as to provide more comprehensive protection from harassment in the workplace.

Proposed amendments to define "volunteer"

22. The Administration proposes moving amendments to Part 5 of the Bill to define "volunteer" as "a person who performs volunteer work other than in the capacity of an employer or employee". This proposed definition aims to describe the capacity of a volunteer and to exclude employers and employees from such definition, such that the concept of employment under the four existing anti-discrimination ordinances is not affected. In response to an enquiry made by Mr CHAN Chi-chuen and the Legal Adviser to the Bills Committee about the reasons for using the expression "volunteer work" rather than "voluntary work" in the proposed definition, the Administration has explained that compared with "voluntary work", the expression "volunteer work" places emphasis on the identity of a volunteer and can give a wider interpretation for the protection of persons who perform work in the capacity of a volunteer other than in the capacity of an employer or employee. The Administration has further advised that under the four anti-discrimination ordinances, "employment" is defined as "employment under a contract of service or of apprenticeship, or a contract personally to execute any work or labour"; and cannot be determined merely on the basis of whether remuneration is involved.

Proposed amendments to define "intern"/"internship"

23. Regarding the proposed definition of "internship", some members opine that the initial version of the phrasing as proposed by the Administration,

particularly that of the Chinese text, is rather convoluted.² To address members' concerns and in order to more clearly express the definition, the Administration has suggested revising the Chinese text such that "internship" would mean:

- (a) 在一段期間從事的工作，而在該期間完成該等工作，是取得某專業或學術資格所必需的，並包括見習職位；或
- (b) 通常稱為實習的任何其他工作。

and to correspondingly revise the English text of "internship" to read:

- (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 work that is usually described as an internship.

According to the Administration, the above revision helps improve the clarity of the proposed definitions, while keeping to the original policy intent to cover both specifically any work arrangement that must be completed for attaining a professional or academic qualification (e.g. fieldwork placement for social work students, pupillage for pupils of barristers, or professional practicum for education students), and generally any other work that is usually described as an internship. Meanwhile, the wording of the proposed definition of "intern" would not be affected.

Prohibiting harassment by clubs

24. Concern has been raised as to whether the definition of "club" in the four anti-discrimination ordinances (i.e. "an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association") covers churches and religious facilities; and whether the proposed protection relating to harassment by clubs (i.e. the proposed new section 39A of SDO and section 38A of DDO) would extend to cover pastoral staff and congregation participating in religious activities in churches and religious facilities such that they would have legal protection against sexual or disability harassment.

² Initially, the Administration has suggested that "internship" shall mean: (a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage ("一段期間的工作，而在該期間完成該等工作，是取得某專業或學術資格所必需的，並包括見習職位"); or (b) any other period of work that is usually described as an internship ("通常稱為實習的任何其他期間的工作").

25. According to the Administration, Part 8 of the Bill proposes to amend SDO and DDO by introducing provisions similar to section 39(10) of RDO, rendering it unlawful for a club, the committee of management of a club or a member of the committee of management of a club to harass a person who is, or has applied to be, a member of the club ("relevant person"). If an organization formed for religious purposes satisfies the definition of "club", it would be unlawful for any member of the group or body of persons responsible for managing the affairs of that organization to sexually harass a relevant person or to harass a relevant person with a disability. Depending on the actual circumstances of each case, SDO already protects persons from sexual harassment committed by pastoral staff and congregation of a religious body in the existing prescribed areas (e.g. provision of goods, facilities and services). The same applies to DDO which similarly protects persons with a disability from harassment by pastoral staff and congregation of a religious body in the prescribed areas.

Other issues

Applicability of the anti-discrimination ordinances in the West Kowloon Station Mainland Port Area

26. Dr CHENG Chung-tai has expressed concern as to whether proceedings against any persons on the grounds of sexual, disability and racial harassment/discrimination in a common workplace under SDO, DDO and RDO would fall within the scope of "matters pertaining to the contractual or other legal relationships of a civil nature" among the bodies or individuals as particularized in Article 7(5) of the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement ("the Co-operation Arrangement"), and thus would be regarded as "reserved matters" under the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632) to which the laws of the Hong Kong Special Administrative Region apply in the West Kowloon Station Mainland Port Area ("MPA") and over which Hong Kong exercises jurisdiction.

27. The Administration has explained that under Article 7(5) of the Co-operation Arrangement, "reserved matters" include those pertaining to the contractual or other legal relationships of a civil nature among the following bodies or individuals in MPA: the Hong Kong operator of the Guangzhou-Shenzhen-Hong Kong Express Rail Link ("XRL"), contractor(s) of construction works of the West Kowloon Station, material or service provider(s), staff member(s) of the above bodies, and passenger(s) of XRL, unless the parties by agreement indicate otherwise (whether such agreement is made in writing, orally or by conduct). The gist of the issue is whether an act of

discrimination or harassment giving rise to a claim under any of the four anti-discrimination ordinances would fall within the scope of "matters pertaining to the contractual or other legal relationships of a civil nature" among the bodies or individuals as particularized in Article 7(5) of the Co-operation Arrangement. Section 76(1) of SDO sets out the circumstances under which a claim may be made the subject of civil proceedings in like manner as any other claim in tort, including an act of discrimination or sexual harassment that is unlawful by virtue of Part 3 or 4 of SDO. Section 72(1) of DDO, section 54(1) of FSDO and section 70(1) of RDO are similar provisions that cover disability discrimination and harassment, family status discrimination, and racial discrimination and harassment respectively. In the Administration's view, depending on the circumstances of each case, claims under the four anti-discrimination ordinances are "matters pertaining to the contractual or other legal relationships of a civil nature" under Article 7(5) of the Co-operation Arrangement. Upon passage of the Bill, the legal protection afforded by relevant proposed amendments therein would likewise apply to the bodies or individuals as particularized in Article 7(5) of the Co-operation Arrangement.

28. In response to a further question from Dr CHENG Chung-tai, the Administration has advised that the above principle is similarly applicable to legal proceedings that involve foreigners/foreign nationals. In determining whether a civil claim arising from contravention of the four anti-discrimination ordinances falls within the scope of "reserved matter" to which the laws of Hong Kong apply and over which Hong Kong exercises jurisdiction, one of the conditions that would need to be satisfied is whether the parties involved are bodies or individuals as particularized in Article 7(5) of the Co-operation Arrangement. In this respect, the nationality of the individuals or bodies concerned is not a relevant consideration for the purpose of determining whether a discriminatory act/harassment is a "reserved matter" within the meaning of Cap. 632.

Suggestion to further expand the scope of protection under SDO

29. Dr Helena WONG has enquired whether consideration would be given to strengthening the scope of protection under SDO to cover sexual harassment between students from different schools/universities/institutions/educational establishments who are, for example, attending some activities at the same educational premises. According to the Administration, it is necessary to examine the coverage and applicable circumstances of the concept of "sexual harassment" under SDO in a holistic and comprehensive manner. It therefore plans to invite EOC to conduct relevant studies.

Taking forward other recommendations in EOC's Submissions

30. Mrs Regina IP, Ms Claudia MO, Mr CHAN Chi-chuen, Dr Fernando CHEUNG and Dr Helena WONG have enquired about the Administration's plan and timetable for taking forward the remaining recommendations in EOC's Submissions, other than the eight prioritized recommendations pursued under the Bill, for example, (a) amending RDO to prohibit racial discrimination by the Government in performing its functions and exercising its powers; (b) amending DDO to require the making of reasonable accommodation for persons with disabilities in all relevant fields; and (c) providing protection for tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises.

31. The Administration has advised that in respect of the 27 recommendations considered by EOC to be of priority, the Administration intends to focus on issues that are relatively less complex and controversial, with a view to taking forward necessary legislative amendments in a step-by-step manner. The Bill under study seeks to implement eight recommendations of higher priority. The Constitutional and Mainland Affairs Bureau will continue to study the remaining 19 recommendations of priority and follow up (e.g. conducting further research/consultation and maintaining communication with EOC) as appropriate.

Amendments to the Bill

32. The proposed amendments to be moved by the Administration to the Bill as mentioned in paragraphs 11 and 21 above are in **Appendix IV**. Members raise no objection to these proposed amendments.

33. The Bills Committee will not propose any amendments to the Bill.

Resumption of Second Reading debate

34. Subject to the Administration moving the proposed amendments to the Bill, the Bills Committee supports the resumption of the Second Reading debate on the Bill at a Council meeting to be advised by the Administration after consultation with the chairman of the House Committee under Rule 54(5) of the Rules of Procedure.

Advice sought

35. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
7 May 2020

**Summary of nine recommendations in EOC's Submissions
prioritized by the Government**

Recommendation	
5	It is recommended that the Government introduce express provisions prohibiting direct and indirect discrimination on grounds of breastfeeding. These provisions could be included by an amendment to the Sex Discrimination Ordinance as a form of sex discrimination, a separate category of discrimination, or alternatively as an amendment to the Family Status Discrimination Ordinance. The definition of breastfeeding should also include expressing milk.
7	It is recommended that the Government amend the Race Discrimination Ordinance provisions prohibiting direct discrimination and harassment by association by repealing the provisions regarding near relatives, and replacing it with a definition of an associate to include: <ul style="list-style-type: none"> (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.
8	It is recommended that the Government amend the Race Discrimination Ordinance to include protection from direct discrimination and harassment by perception or imputation that a person is of a particular racial group.
15	It is recommended that the Government amend the provisions of the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment to persons in a common workplace such as consignment workers and volunteers.
16	It is recommended that the Government amend the provisions of Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users.

Recommendation	
17	It is recommended that the Government amend the provisions of the Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from racial and disability harassment of service providers by service users, where such harassment takes place outside Hong Kong, but on Hong Kong registered aircraft and ships.
18	It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection of tenants or sub-tenants from sexual, racial or disability harassment by another tenant or sub-tenant occupying the same premises.
19	It is recommended that the Government amend the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance to provide protection from sexual, racial and disability harassment by management of clubs of members or prospective members.
22	It is recommended that the Government repeal the provisions under the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance which require proof of intention to discriminate in order to award damages for indirect discrimination claims.

**CMAB
March 2017**

Source: Extracted from the Administration's paper entitled "An initial assessment of the recommendations in the Discrimination Law Review submitted by the Equal Opportunities Commission" provided for the meeting of the Panel on Constitutional Affairs held on 20 March 2017 (Annex B to LC Paper No. CB(2)981/16-17(02))

**Bills Committee on
Discrimination Legislation (Miscellaneous Amendments) Bill 2018**

Membership list*

Chairman Hon Alice MAK Mei-kuen, BBS, JP

Deputy Chairman Hon Elizabeth QUAT, BBS, JP

Members Hon Tommy CHEUNG Yu-yan, GBS, JP
Hon WONG Ting-kwong, GBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Claudia MO
Hon Frankie YICK Chi-ming, SBS, JP
Hon YIU Si-wing, BBS
Hon Charles Peter MOK, JP
Hon CHAN Chi-chuen
Hon Kenneth LEUNG
Hon KWOK Wai-keung, JP
Hon Dennis KWOK Wing-hang
Hon Christopher CHEUNG Wah-fung, SBS, JP
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Helena WONG Pik-wan
Hon POON Siu-ping, BBS, MH
Dr Hon CHIANG Lai-wan, SBS, JP
Hon Alvin YEUNG
Hon CHU Hoi-dick
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHAN Chun-ying, JP
Hon CHEUNG Kwok-kwan, JP
Hon HUI Chi-fung
Hon LUK Chung-hung, JP
Dr Hon CHENG Chung-tai
Hon Vincent CHENG Wing-shun, MH, JP

(Total : 29 members)

Clerk Miss Josephine SO

Legal Adviser Mr Bonny LOO

Date 17 December 2019

* Changes in membership are shown in Annex to Appendix II.

**Bills Committee on
Discrimination Legislation (Miscellaneous Amendments) Bill 2018**

Changes in membership

Member	Relevant date
Hon Vincent CHENG Wing-shun, MH, JP	Since 7 May 2019
Hon SHIU Ka-chun	Up to 5 June 2019
Hon AU Nok-hin*	Up to 16 December 2019

- * According to the Judgment of the Court of First Instance of the High Court handed down on 2 September 2019, AU Nok-hin was not duly elected as a member of the Legislative Council ("LegCo") at the LegCo by-election held on 11 March 2018 and no other person was duly elected instead. According to the decision of the Appeal Committee of the Court of Final Appeal of 17 December 2019 refusing Mr AU's application for leave to appeal, AU Nok-hin, by virtue of section 72(5)(b) of the Legislative Council Ordinance (Cap. 542), has ceased to be a member of LegCo since 17 December 2019.

**Bills Committee on
Discrimination Legislation (Miscellaneous Amendments) Bill 2018**

List of organizations and individuals which/who have given views to
the Bills Committee

1. Civic Party
2. Community March
- *3. Concerning Grassroots Housing Rights Alliance
4. Democratic Alliance for the Betterment and Progress of Hong Kong
5. Dr Calvin KWOK
6. Equal Opportunities Commission
7. Hong Kong Ample Love Society
8. Hong Kong Unison
9. Liberal Party
10. Liberal Party Youth Committee
11. Miss ASLAM Rabia
12. Miss ASLAM Umme Habiba
- *13. Miss CHAU Wai-ki
14. Miss RAHMAN Lamia Sreya
15. Miss SHRESTHA Bidhya
16. Miss YAU Tze-wei
17. Mr BATCHA Mohammad Sikkander
18. Mr CHONG Yiu-kwong
19. Mr DING Wesley Shanley
20. Mr LUK Wai-yip
21. Society for Community Organization
22. Society for Cultural Integration
23. The Federation of Hong Kong and Kowloon Labour Unions
24. The Hong Kong Federation of Trade Unions Women Affairs Committee
25. The Hong Kong Society for the Blind
26. Voices of Diversity

* Organization and individual which/who has given written views only.

Discrimination Legislation (Miscellaneous Amendments) Bill 2018

Committee Stage

Amendments to be moved by the Secretary for Constitutional and Mainland Affairs

<u>Clause</u>	<u>Amendment Proposed</u>
4(2)	In the proposed definition of <i>breastfeeding</i> , by deleting “—see section 8A(2);” and substituting “means breastfeeding within the meaning of section 8A(2)(a);”.
7	In the proposed section 8A(2)(a)(i), by deleting “her child or expressing breast milk to feed her child” and substituting “a child or expressing breast milk”.
7	In the proposed section 8A(2)(a)(ii), by deleting “her child” and substituting “a child”.
New	In Part 5, in Division 1, by adding— <p style="margin-left: 40px;">“18A. Section 2 amended (interpretation)</p> <p style="margin-left: 80px;">Section 2(1)—</p> <p style="margin-left: 120px;">Add in alphabetical order</p> <p style="margin-left: 120px;"><i>“intern</i> (實習人員)—see section 23A(2);</p> <p style="margin-left: 120px;"><i>internship</i> (實習)—see section 23A(2);</p> <p style="margin-left: 120px;"><i>pupillage</i> (見習職位)—see section 36(4);</p> <p style="margin-left: 120px;"><i>volunteer</i> (義工)—see section 23A(2);”.</p>
19	In the proposed section 23A(2), in the definition of <i>workplace participant</i> , by deleting paragraphs (f) and (g) and substituting— <p style="margin-left: 40px;">“(f) the principal, within the meaning of section 20(1), of a commission agent;</p> <p style="margin-left: 40px;">(g) a partner in a firm;</p> <p style="margin-left: 40px;">(h) an intern; or</p> <p style="margin-left: 40px;">(i) a volunteer.”.</p>

19

In the proposed section 23A(2), by adding in alphabetical order to the proposed definitions—

“*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 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;”.

New

In Part 5, in Division 1, by adding—

“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”.”.

20 By renumbering the clause as clause 20(3).

20 By adding—

“(1) Section 2(1), English text, definition of *unjustifiable hardship*—

Repeal the full stop

Substitute a semicolon.

(2) 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).”.”.

21 In the proposed section 22A(2), in the definition of *workplace participant*, by deleting paragraphs (f) and (g) and substituting—

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

(g) a partner in a firm;

(h) an intern; or

(i) a volunteer.”.

21

In the proposed section 22A(2), by adding in alphabetical order to the proposed definitions—

“*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 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;”.

New

In Part 5, in Division 2, by adding—

“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”.”.

New

In Part 5, in Division 3, by adding—

“21D. Section 2 amended (interpretation)

(1) Section 2(1), English text, definition of *training*—

Repeal the full stop

Substitute a semicolon.

(2) 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

In the proposed section 24A(2), in the definition of *workplace participant*, by deleting paragraphs (f) and (g) and substituting—

“(f) the principal, within the meaning of section 22(1), of a commission agent;

(g) a partner in a firm;

(h) an intern; or

(i) a volunteer.”.

22

In the proposed section 24A(2), by adding in alphabetical order to the proposed definitions—

“*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 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;”.

New

In Part 5, in Division 3, by adding—

“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”.”.