

立法會
Legislative Council

LC Paper No. CB(2)645/20-21(05)

Ref : CB2/BC/2/20

Bills Committee on Sex Discrimination (Amendment) Bill 2020

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the Sex Discrimination (Amendment) Bill 2020 ("the Bill") and summarizes the relevant discussion of the former Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 ("the Bills Committee") on the subject.

Background

Discrimination Law Review by the Equal Opportunities Commission

2. Established under the Sex Discrimination Ordinance (Cap. 480) ("SDO") in 1996, 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 existing discrimination ordinances and where necessary, make recommendations for amendments.

3. In March 2013, EOC launched the Discrimination Law Review ("DLR") to review comprehensively the four anti-discrimination Ordinances. In March 2016, EOC submitted its submissions on DLR to the Government. EOC's submissions contained a total of 73 recommendations, including 27 recommendations which were considered by EOC to be of higher priority.¹

¹ According to EOC, the 27 recommendations of higher priority can be divided into two parts, with 22 recommendation 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 would require "further consultation and research" by the Government. However, the issues in both Parts I and II are "of equal importance and should be promptly tackled by the Government".

4. At the meeting of the Panel on Constitutional Affairs ("the Panel") on 20 March 2017, the Administration briefed members on the Government's initial assessment of the recommendations in EOC's submissions on DLR and consulted members on nine prioritized recommendations (see **Appendix I**) that the Administration considered to be capable of forging consensus among stakeholders and the society. The Administration explained that among the 27 recommendations that were of higher priority, the Administration intended to focus on those that were relatively less complex or controversial at the present juncture. For the rest of the recommendations, the Administration needed more time to carefully consider them.

Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018

5. The Discrimination Legislation (Miscellaneous Amendments) Bill 2018 ("the 2018 Bill"), which sought to amend SDO, DDO, FSDO and RDO to take forward eight of the aforesaid nine prioritized recommendations,² was introduced into the Legislative Council ("LegCo") on 12 December 2018. After scrutiny by the Bills Committee, the 2018 Bill was passed by LegCo on 11 June 2020.

6. During the scrutiny of the proposed introduction of a new section to SDO in the 2018 Bill to prohibit direct and indirect discrimination on the ground of breastfeeding, members of the Bills Committee in general expressed strong views that express provisions should also be introduced to prohibit harassment on the ground of breastfeeding so as to provide more comprehensive protection for breastfeeding women. In light of the Bills Committee's request, the Administration undertook to introduce a separate bill for such purpose.

The Sex Discrimination (Amendment) Bill 2020

7. According to the LegCo Brief (File Ref: CMAB CR 1/19/1) issued by the Constitutional and Mainland Affairs Bureau ("CMAB") on 24 January 2020, the Bill seeks to set out under SDO that a person would harass a woman if, on the ground that the woman is breastfeeding,

² When the Panel was consulted on the legislative proposals in the 2018 Bill on 22 June 2018, the Administration informed members that amongst the nine prioritized recommendations of EOC, the proposal to provide protection from sexual, disability and racial harassment between tenants and/or sub-tenants occupying the same premise (DLR recommendation 18) would need to be further considered. The Administration planned to first proceed with the remaining eight prioritized recommendations.

- (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.³

Details of the legislative proposals are set out in paragraphs 8 to 10 of the LegCo Brief under reference.

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

Enhancing protection from harassment on the ground of breastfeeding

8. A number of members considered that the proposal to introduce a new section to SDO to prohibit direct and indirect discrimination on the ground of breastfeeding in the 2018 Bill would not afford sufficient protection to breastfeeding women from being harassed or vilified. These members 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.

9. The Administration explained that at present, acts of harassment, vilification and offensive behaviour towards women were handled by various legal means. For example, SDO prohibited sexual harassment such that a breastfeeding woman might make a claim if any person engaged 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 created a hostile or intimidating environment for the breastfeeding woman in any of the prescribed areas covered by SDO. Besides, legal sanctions might also be imposed on a person who harassed, vilified or offended a breastfeeding woman under the criminal law. Depending on the circumstances of the case, a person who harassed, vilified or offended a

³ According to the LegCo Brief, in line with relevant provisions, "conduct" includes making a statement, orally or in writing, to a woman or in her presence. 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.

breastfeeding woman in a public place might 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.

10. Notwithstanding the Administration's explanation, some members maintained the view that the Administration should consider amending SDO to expressly outlaw acts of harassment, vilification and offensive behaviour towards breastfeeding women. The Administration acknowledged that currently, protection from harassment afforded by SDO only applied to "sexual harassment". The Administration advised that if protection from "harassment on the ground of breastfeeding" was to be introduced under SDO, alteration to the overall concept of "harassment" (including the concept of "sexual harassment") under SDO would be inevitable. The Administration further advised that "discrimination" and "harassment" were two distinct legal concepts referring to two different types of conduct under the four existing anti-discrimination ordinances. It followed that "discrimination on the ground of breastfeeding" was distinct from "harassment on the ground of breastfeeding". In the context of SDO, only "sexual harassment" was referred to and that was not a general reference to harassment in any form. The existing concept of "sexual harassment" covered acts of harassment that involved "conduct of a sexual nature". If reference was 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 created a hostile or intimidating environment for a breastfeeding woman, where such conduct was not necessarily "conduct of a sexual nature". "Harassment on the ground of breastfeeding" could not be taken as a sub-set of "sexual harassment".

11. That said, the Administration advised that from a policy perspective, it supported the provision of protection from harassment on the ground of breastfeeding. To take forward members' suggestions, the Administration considered it necessary to have a holistic review of (i) the coverage and applicable circumstances of the concept of "sexual harassment" under SDO as well as (ii) the existing policy against sexual harassment. The Administration further advised that any amendments proposed to the 2018 Bill to introduce protection against "harassment on the ground of breastfeeding" would not be relevant to the subject matters of the 2018 Bill relating to SDO amendments. After careful consideration of members' views and concerns, the Administration agreed to introduce a separate bill for the purpose of prohibiting harassment on the ground of breastfeeding.

Taking forward the recommendations under the Discrimination Law Review

12. Some members enquired about the Administration's plan and timetable for taking forward the remaining recommendations of EOC under DLR, other than the eight prioritized recommendations pursued under the 2018 Bill. The Administration advised that in respect of the 27 recommendations considered by EOC to be of higher priority, the Administration intended to focus on issues that were relatively less complex and controversial, with a view to taking forward necessary legislative amendments in a step-by-step manner. On top of the 2018 Bill which sought to implement eight recommendations of higher priority, CMAB would continue to study the remaining 19 recommendations of priority and follow up as appropriate.

Relevant papers

13. A list of relevant papers which are available on LegCo's website is in **Appendix II**.

Council Business Division 2
Legislative Council Secretariat
14 January 2021

**Summary of nine recommendations in the 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

**Relevant documents on
Sex Discrimination (Amendment) Bill 2020**

Committee	Date of meeting	Paper
Panel on Constitutional Affairs	20.3.2017 (Item IV)	Agenda Minutes
	22.6.2018 (Item III)	Agenda Minutes
House Committee	8.5.2020	Report of the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018