

立法會
Legislative Council

LC Paper No. LS18/20-21

**Paper for the House Committee Meeting
on 11 December 2020**

**Legal Service Division Report on
Sex Discrimination (Amendment) Bill 2020**

I. SUMMARY

- 1. The Bill** The Bill seeks to amend the Sex Discrimination Ordinance (Cap. 480):

 - (a) to render it unlawful for a person to harass a breastfeeding woman; and
 - (b) to make related amendments.

- 2. Public Consultation** According to the Administration, the Equal Opportunities Commission has indicated its support for the Government to provide protection of breastfeeding women from harassment by taking forward amendments to Cap. 480 through the Bill. The Administration also expects that the public will welcome its proposal to strengthen legal protection for breastfeeding women.

- 3. Consultation with LegCo Panel** As advised by the Clerk to the Panel on Constitutional Affairs, the Panel has not been consulted on the Bill. However, the Bills Committee on Discrimination Legislation (Miscellaneous Amendments) Bill 2018 discussed the Administration's proposal to introduce the Bill to prohibit harassment on the ground of breastfeeding. Members of the Bills Committee welcomed and supported the proposal.

- 4. Conclusion** No difficulties have been identified in relation to the legal or drafting aspects of the Bill. Subject to Members' views, the Bill is ready for resumption of Second Reading debate.

II. REPORT

The date of First Reading of the Bill is 9 December 2020. Members may refer to the Legislative Council ("LegCo") Brief (File Ref: CMAB CR 1/19/1) issued by the Constitutional and Mainland Affairs Bureau ("CMAB") on 24 January 2020 for further details.

Object of the Bill

2. The Bill seeks to amend the Sex Discrimination Ordinance (Cap. 480) to: (a) render it unlawful for a person to harass a breastfeeding woman; and (b) make related amendments.

Background

3. The Discrimination Legislation (Miscellaneous Amendments) Bill 2018 ("the 2018 Bill") was introduced into LegCo at the Council meeting of 12 December 2018. Part 2 of the 2018 Bill seeks to prohibit direct and indirect discrimination against a woman on the ground of breastfeeding.¹ A Bills Committee ("BC") was formed to study the 2018 Bill. Upon completion of scrutiny by BC, the 2018 Bill was passed by LegCo on 11 June 2020 and the enacted Ordinance (Ord. No. 8 of 2020) was published in the Gazette on 19 June 2020.

4. During the course of scrutinizing the 2018 Bill, some BC members expressed concerns about:

- (a) the 2018 Bill prohibiting only discrimination, but not harassment, on the ground of breastfeeding; and
- (b) the current definition of "sexual harassment" under section 2(5) of Cap. 480,² which refers to "conduct of a sexual nature", not being broad enough to cover breastfeeding harassment because the relevant conduct complained of might not necessarily be of a sexual nature.

The BC members strongly requested the Administration to consider, among others, enhancing the protection of breastfeeding women from being harassed. To address these views, CMAB has agreed to introduce another bill to amend Cap. 480 to prohibit acts of harassment and offensive behaviour towards breastfeeding women.

¹ The new section 8A(2)(a) of Cap. 480 (as amended) defines a woman as breastfeeding if she is engaged in the act of breastfeeding a child or expressing breast milk to feed a child, or feeding a child with her breast milk.

² The current definition relevantly prohibits an unwelcome sexual advance, an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature, in circumstances in which a reasonable person, having regard to all the circumstances, would have expected that the woman would be offended, humiliated or intimidated; or conduct of a sexual nature which creates a hostile or intimidating environment for a woman.

Provisions of the Bill

5. The primary purpose of the Bill is to amend Cap. 480 to render it unlawful for a person to harass a breastfeeding woman. The salient amendments proposed by the Bill are set out below.

Breastfeeding harassment

6. Under the proposed new section 2A of Cap. 480 sought to be added by clause 5 of the Bill, a person would harass a woman on the ground that the woman is breastfeeding if the person: (a) 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) alone or together with other persons, engages in conduct that creates a hostile or intimidating environment for the woman. For the purposes of the proposed new section 2A, "conduct" would include making an oral or written statement to a woman or in her presence.

7. Under clauses 9 and 10 of the Bill, the proposed sanctions against breastfeeding harassment would be the same as those currently available against sexual harassment under Cap. 480 including:

- (a) civil claims in the District Court ("DC") which may award damages (including compensation for injury to feelings) under section 76;
- (b) enforcement notices issued by the Equal Opportunities Commission ("EOC") under section 77; and
- (c) EOC's application to DC for an injunction under section 81.

Related amendments

8. Clause 4(2) of the Bill seeks to amend section 2 of Cap. 480 to add a new definition of "harass" which would mean: (a) sexually harass within the meaning of the existing section 2(5), or (b) harass within the meaning of the proposed new section 2A (i.e. harass on the ground of breastfeeding); and "harassment" would be construed accordingly. Consequentially, clauses 6 to 11 propose replacing various references to "sexual harassment" and "sexually harass" in Cap. 480 with "harassment" and "harass" respectively so that the expressions, as amended, would cover both sexual harassment and harassment on the ground of breastfeeding. For example, the proposed section 41(7) of Cap. 480, as amended by clause 10(2) of the Bill, would apply to both sexual and breastfeeding harassment that occurs on a ship, aircraft or dynamically supported craft outside Hong Kong if it is registered in Hong Kong, is operated by a Hong Kong resident, or belongs to or is possessed by the Hong Kong Government.

9. Sections 2(8) and 9(3) of Cap. 480 currently provide that a provision of Part 3 or 4 (discrimination and sexual harassment in employment or other fields) of Cap. 480 framed with reference to discrimination against, or sexual harassment of, women shall be treated as applying equally to the treatment of men. While clauses 4(3) and 6(1) of the Bill seek to repeal "sexual" from sections 2(8) and 9(3) so that those sections, as amended, would cover both sexual harassment and breastfeeding harassment, clauses 4(4) and 6(2) propose adding new sections 2(8A) and 9(4) to Cap. 480 to the effect that a provision of Part 3 or 4 framed with reference to harassment of women would not apply to the treatment of men vis-à-vis breastfeeding harassment within the meaning of the proposed new section 2A.

10. Upon enquiry by the Legal Service Division ("LSD"), the Administration has confirmed that:

- (a) the proposed new provisions of Cap. 480 to prohibit harassment against breastfeeding women would only be applicable to the woman subject to harassment herself, but would not protect a breastfeeding child from harassment or bullying; however, the legal protection from harassment afforded to breastfeeding women after passage of the Bill would naturally be beneficial to breastfed children as well; and
- (b) the Administration will propose amendments to the Bill to further amend Cap. 480 to change references to "sexual harassment" and "sexually harass" in new provisions (such as sections 23A (sexual harassment among workplace participants including interns and volunteers) and 39A (sexual harassment by clubs)) added by Ord. No. 8 of 2020 so that those provisions would apply to both sexual harassment and harassment of breastfeeding women.

Commencement

11. The Bill, if passed, would come into operation on the commencement date of Part 2 of Ord. No. 8 of 2020 (i.e. 19 June 2021). According to paragraph 18 of the LegCo Brief, this is to facilitate smooth implementation and to allow time for promotion and institution of breastfeeding-friendly measures.

Public Consultation

12. According to paragraph 22 of the LegCo Brief, EOC has indicated its support for the Government to provide protection of breastfeeding women from harassment by taking forward amendments to Cap. 480 through the Bill. CMAB also expects that the public will welcome its proposal to strengthen legal protection for breastfeeding women. Upon enquiry by LSD, CMAB has advised that the Bill

is formulated on the basis of views expressed by BC on the 2018 Bill, and received support of BC which had also invited deputations to collect public views.

Consultation with LegCo Panel

13. As advised by the Clerk to the Panel on Constitutional Affairs, the Panel has not been consulted on the Bill. However, BC on the 2018 Bill discussed the Administration's proposal to introduce the Bill to prohibit harassment on the ground of breastfeeding. BC members welcomed and supported the proposal.

Conclusion

14. No difficulties have been identified in relation to the legal or drafting aspects of the Bill. Subject to Members' views on the matters discussed in paragraph 10 above, the Bill is ready for resumption of Second Reading debate.

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