

USALI Perspectives

Assessing Proposed Changes to China's Women's Protection Law: Part II

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Shortcomings in the draft and suggestions for improvement

[Read Part I](#)

There is much to applaud in the draft revision of the Law of the People's Republic of China on the Protection of Women's Rights and Interests (Women's Protection Law) released for public comment in December 2021. It critically updates the law to reflect other recent legislation such as the 2021 Civil Code, and fills a number of significant legislative gaps. The enhanced detail of many of its provisions should facilitate implementation. However, there are still areas that need improvement.

Single-sex protection framework

First, the draft revision preserves the current law's single-sex protection framework, which could actually undermine women's interests. Some provisions are likely to reinforce gender stereotypes and traditional divisions of labor. For example, draft Article 70 says: "If a woman has shouldered relatively more duties because of raising children, caring for elders, assisting her husband in his work, and so on, when

divorcing she has the right to demand compensation from the man.” This gendered language is not necessary: a similar provision in the Civil Code is phrased to apply to husbands and wives equally (Article 1088). By singling out women for protection, the Women’s Protection Law tends to reinforce the stereotype that women should bear more family responsibilities and are economically weaker.

Another example is Article 51, which requires schools to ensure the personal safety and physical and mental development of female students. The Law on the Protection of Minors has a similar provision (Article 40) that applies to all minors, but the Women’s Protection Law only addresses the protection of girls by prohibiting sexual harassment against them and requiring sex education for them to “improve their awareness and ability to prevent sexual assault and harassment.” Language such as this could reinforce wrong assumptions that only girls and women are victims of sexual harassment, and that preventing sexual harassment is all about teaching girls and women to take precautions.

This method of law drafting also tends to create a misunderstanding among the public that women enjoy many privileges not granted to men. A better legislative approach would emphasize gender equality and incorporate the

equal rights of gender minorities into the scope of protection.

In other places, the wording tends to make men the standard-setters for rights. For example, Article 2 says that “women shall enjoy rights equal to those of men in political, economic, cultural, social, familial, and other respects.” A better formulation would be: “Men and women enjoy equal rights in all respects.”

Inconsistent conception of gender equality

Second, the underlying conception of gender equality is inconsistent across the draft revision. In places, the draft is consistent with international standards. For example, it adds in Article 2: “The State may take temporary special measures to achieve equality between men and women.” In the past, the Committee on the Elimination of Discrimination against Women has expressed regret that China has not sufficiently used temporary special measures to accelerate substantial equality for women with regard to all aspects of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (see [CEDAW/C/CHN/CO/7-8](#), para. 22, p5).

Yet in the chapter on women’s political rights, the draft revision retains its

current vague, declamatory language: “The State actively trains and selects female cadres, and attaches great importance to the training and selection of ethnic minority female cadres.” It says that people’s congresses at all levels as well as urban residential committees and village committees should include an “appropriate number” of women.

Workplace discrimination

In the chapter on labor rights, the draft revision adds several detailed provisions to the current declaration that men and women enjoy equal labor rights (Article 26). But it never clearly defines “equal labor rights” or explains what constitutes “gender discrimination in employment.” This has consequences. Since the Labor Law and Employment Promotion Law often use the term “employment” (“*jiu ye*”) in the narrow context of job choice and hiring, some courts have held that only discrimination at the recruitment and hiring stage constitutes a “dispute over the right to equal employment,” and refuse to consider claims over post-hiring discrimination as falling within this category.

In addition, while the new articles prohibit discrimination against women in hiring, remuneration, promotion, evaluation for professional and technical positions, professional training, and retirement and also forbid

employers to reduce the wages or benefits of women employees, dismiss them, or unilaterally terminate their employment due to marriage, pregnancy, maternity leave, or breastfeeding, nonetheless gaps remain. For example, the draft does not explicitly prohibit employers from treating women differently in job transfers or termination.

The scope of sexual harassment (Article 50) also remains relatively narrow. Common problems such as subjecting someone to unwanted pressure to go on dates, telling lies or spreading rumors about their personal sex life, and making sexual comments about their clothing, anatomy, or looks are not explicitly mentioned. Because the draft fails to cover many of the less obvious but most prevalent forms of sexual harassment, some persons may believe that what they have experienced (or done) is not sexual harassment. It also leaves courts with fewer guidelines for determining what to include within the vague catch-all of “other situations of sexual harassment.” Sexual harassment should be further defined as an unwanted action or comment of a sexual nature or with sexual overtones. Examples of sexual harassment should be provided in as much detail as possible. Finally, more detail is needed regarding employers’ obligations to prevent sexual harassment. Language should be added to Article 52 requiring employers to take

timely remedial measures for the victim and separate the parties if necessary during the investigation process.

Unclear legal responsibilities

Although the draft revision further clarifies legal responsibilities and remedies, we still find declarative clauses of responsibility that are missing any assignment of legal liability. For example, no liability is assigned when a company fails to fulfill its obligation to report on gender equality.

Legal responsibilities for some violations are unclear, incomplete, or too lenient. For example, Article 80 on the punishment of employment discrimination by the employer says: “The (local government) human resources and social security department shall order the employer to correct its behavior; if the employer refuses to make corrections or if the circumstances are serious, a fine of no less than 10,000 yuan (about \$1,570) and no more than 50,000 yuan (about \$7,855) shall be imposed.” Fines at this level are too lenient to deter employment discrimination, and should be raised.

Moreover, the civil remedies that plaintiffs can obtain in employment discrimination lawsuits based on violations of “general personality rights” or “the right to equal employment” are chiefly compensation for emotional damages and apologies.

Lost wages and reinstatement are considered available only in “labor disputes,” a different category of complaint. In several recent gender discrimination lawsuits that claimed violation of employees’ personality rights, even though the plaintiffs won, they received financial compensation of only 2,000 yuan (about \$315). In addition to raising the level of compensation for emotional damages and compensating employees for their actual financial losses caused by discriminatory behavior, indirect financial losses also should be considered. For example, losing a particular job or career development opportunity may cause subsequent lost income. The amount of punitive damages against employers should also be increased. Such measures will enhance the educational and deterrent functions of the law and reduce employment discrimination.

With respect to sexual harassment in the workplace, Article 83 of the draft revision partially fills a gap left by the Civil Code by adding language about the responsibility of employers to prevent such behavior. Civil Code Article 1010 says that government organs, enterprises, schools, and other institutions must prevent and stop sexual harassment, but does not set forth any legal consequences if they fail to do so. This makes Article 83 of the draft revision a welcome addition. But it

limits the consequences for the employer to administrative punishment (“*chu fen*”) of directly responsible management, and does not offer the victim the option of suing the employer for civil damages. This not only misses an opportunity for the victim to obtain financial compensation that she is unlikely to be able to obtain from the

individual harasser, but also undermines employers’ enthusiasm for preventing sexual harassment. It weakens the usefulness of the Women’s Protection Law as a basis for courts to issue judgments, which is even more detrimental to the implementation of the law.

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