

Secretary for Justice v Yau Yuk Lung FACC 12/2006

◆ **Background**

This is a Court of Final Appeal case where the constitutionality of s.118F (1) of the Crimes Ordinance, which used to criminalise homosexual buggery committed otherwise than in private, was challenged. The main issue in this case is whether the section concerned amounts to sexual orientation discrimination. The EOC's participation in this case was to act as Amicus Curiae to provide assistance in respect of general principles of anti-discrimination law.

It should be noted that although there is no anti-discrimination ordinance to protect against sexual orientation discrimination in Hong Kong at present, sexual orientation discrimination is unconstitutional under art. 25 of the Basic Law and art. 22 of the Hong Kong Bill of Rights, in which the right to equality before the law is protected. Also, the principles elaborated by the Court as follows actually apply to differential treatments on all grounds in general.

✓ **The Court's Decision**

In this case, the Court viewed that the law should usually accord identical treatment to comparable situations in general. However, the guarantee of equality before the law does not invariably require exact equality. In order to determine whether differential treatments are justified, the test is to see whether the difference:

1. pursues a legitimate aim, which means there must be a genuine need for such a difference;
2. is rationally connected to the legitimate aim; and
3. is no more than is necessary to accomplish the legitimate aim.

The Court examined the difference in treatment in s. 118F (1) of the Crimes Ordinance, applied the above justification test and concluded that even step (1) of the above test could not be satisfied here because:

1. Only homosexuals, but not heterosexuals, were subject to the statutory offence, hence giving rise to differential treatments on the ground of sexual orientation; and
2. No genuine need for the differential treatments had been shown by the Government, meaning that no legitimate aim to be pursued by the differential treatments could be established.

Therefore, it was held by the Court that s. 118F (1) of the Crimes Ordinance was discriminatory and unconstitutional.