

# **Reports of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity at the 72nd Session of the General Assembly**

## **~ Submission from the Equal Opportunities Commission ~**

The Equal Opportunities Commission (EOC) is a statutory body tasked with implementing four anti-discrimination ordinances in Hong Kong, namely the Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO), Family Status Discrimination Ordinance (FSDO) and Race Discrimination Ordinance (RDO). Our vision is to create a pluralistic and inclusive society free of discrimination where there is no barrier to equal opportunities.<sup>1</sup>

The EOC welcomes the appointment of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. This paper aims to provide research findings, statistics and legal cases of the current legal and social situation of lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Hong Kong. This paper will particularly focus on the following aspects out of the six underpinning areas: (1) socio-cultural inclusion; (2) legal recognition of gender identity; and (3) effective anti-discrimination measures.

## **Background**

In Hong Kong, there is currently no comprehensive anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status to ensuring legal protection against discrimination for the LGBTI people. Means of the redress were reported to be minimal.

The EOC believes that it is very important to protect everyone including LGBTI people from discrimination and harassment. The EOC works closely with all sectors of the community to widen awareness and facilitate redress for discrimination. We have conducted researches or commissioned research studies to address this issue and provide

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<sup>1</sup> The EOC is not currently recognised as a National Human Rights Institution (NHRI) under the United Nations Paris Principles, but its duties and powers in relation to issues of equality are similar in a number of respects to NHRIs.

recommendations which are relevant to promote equality and eliminating discrimination and harassment against LGBTI people in Hong Kong.

In 2014, the EOC has commissioned a multi-disciplinary research team at the Gender Research Centre of the Chinese University of Hong Kong, to conduct a Study on legislation against discrimination on the grounds of sexual orientation, gender identity, and intersex status (the SOGI Study)<sup>2</sup>. The SOGI Study is a comprehensive investigation that employs various research methods, including both quantitative method in the form of telephone survey and qualitative approaches such as focus groups, interviews and opinion collection via online and postal channels. It systematically reviewed discrimination encountered by LGBTI people from all walks of life in Hong Kong, and solicit their views on how such experiences of discrimination may be redressed through legislation or other means.

It has also solicited the views of public regarding their acceptance of LGBTI people, their perception of the discrimination encountered by LGBTI people, and their views towards possible legislation against discrimination on the grounds of sexual orientation and gender identity (SOGI) and intersex status.

## **(1) Socio-cultural inclusion - social and legal situation of LGBTI in Hong Kong**

### **Discrimination faced by LGBTI people**

A number of studies conducted by different scholars and non-governmental organisations over the past 10 years consistently reported that LGBT people in Hong Kong experiencing considerable levels of discrimination, particularly in the fields of employment and education. The studies also indicated that the discrimination experiences had significant effects on LGBT people's lives in the forms of emotional stress and other psychological impacts such as feeling the need to conceal sexual orientation and even to contemplate suicide. For example:

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<sup>2</sup> Suen, Y.T., Wong, A.W.C, Barrow, A., Wong, M.Y., Mak, W.S., Choi, P.K., Lam, C.M., Lau, T.F. (2016). *Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status*.  
<http://www.eoc.org.hk/eoc/upload/ResearchReport/20161251750293418312.pdf>

- 19% of the self-identified lesbians or bisexual women reported discrimination on the ground of their sexual orientation in workplace (Women Coalition, 2005)<sup>3</sup>;
- 29% reported that they had experienced discrimination due to sexual orientation in employment in the last five years (Lau & Stotzer, 2011)<sup>4</sup>;
- 60% of LGBT employees were not open to colleagues about their sexuality and gender identity due to concerning of being stereotype or discriminated (Community Business, 2012)<sup>5</sup>;
- 49% transgender people reported that they had experienced discrimination in terms of denial of employment, contract termination, and harassment and vilification in the working environment (Tongzhi and Transgender Equality Report, 2014)<sup>6</sup>.

Findings from the SOGI Study also showed that experiences of discrimination reported by the LGBTI people were extensive, in the areas of employment, education, provision of services, disposal and management of premises, and government functions. The prevalence of discrimination was notable, regardless of places of occurrence, life stages of the victims and demographic characteristics of the perpetrators. Transgender people and intersex people also faced difficulties in their social life as their gender expression may not fit into the male/female binary in society. In some extreme cases, LGBTI people also experienced sexual harassment.

Some LGBTI people in Hong Kong not only experienced discrimination by losing out on equal education and employment

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<sup>3</sup> The Women Coalition conducted a research entitled “Hong Kong Women’s Discrimination cases based on sexual orientation: Phase 1” in 2005. Of the 693 respondents surveyed, 98% of them self-identified as lesbian or bisexual women, and 2% self-identified as men. They did a similar survey “Hong Kong Women’s Discrimination cases based on sexual orientation: Phase 2” in 2009, which covered 510 female respondents.

<sup>4</sup> “Employment Discrimination Based on Sexual Orientation: A Hong Kong Study” was conducted by Holning Lau and Rebecca L. Stotzer in 2010. The data was collected by conducting an online survey recruiting 792 people who self-reported as belonging to sexual minority using the snowball sampling method.

<sup>5</sup> Community Business Limited commissioned an online survey “Hong Kong LGBT Climate Study 2011-12: Attitudes to and experiences of lesbian, gay, bisexual and transgender employees”. There were two parts in the research: one on public attitudes, and another one on LGBT employees. The LGBT employee online survey recruited 626 self-reported sexual minorities by snowball sampling, which means that recruited individuals were asked to further recruit their contacts who they thought would fit the study criteria.

<sup>6</sup> “Tongzhi and Transgender Equality Report” (2014) is a published work, conducted by Hong Kong Christian Institute, Leslovestudy, OutandVote and Queer Theology Academy (Collaborative) in 2014. The research collected 30 self-reported LGBT discrimination cases and provided suggestions on anti-discrimination Ordinance on the grounds of sexual orientation and gender identity. This project was funded by Equal Opportunities (Sexual Orientation) Funding Scheme of the HKSAR Government.

opportunities, but also encountered problems when accessing supporting professionals such as counsellors, social workers and healthcare personnel, caused by problematic attitudes of these professionals, unfriendly or hostile environment, as well as, outdated approaches to homosexuality and transgenderism. Some evidences showed that Conversion Therapy is still practiced by some social workers and helping professions in Hong Kong. Some “post-gay” individuals claim that they successfully sought non-medical treatment or counselling converting them to heterosexuality or to remain homosexual but are able to stop practicing same-sex sexual conduct.

Some members of the public who are strongly against the introduction of legislation to protect LGBTI people believed that that LGBTI people were still viewed as socially and culturally unacceptable because they violated “Chinese traditional family values”. They believe that legislating against discrimination on the ground of SOGI would lead to adverse social consequence such as the deterioration of morality and family value.

A recent court case in *Leung Chun Kwong v Secretary for the Civil Service and another*<sup>7</sup> has also demonstrated that employees' spousal benefits policy of the Government of the Hong Kong Special Administrative Region (the HKSAR Government) held to be unlawful discrimination against homosexual civil servants based on sexual orientation. According to the judgment, the Court could find nothing illegal or unlawful to accord the same spousal benefits to homosexual couples who are legally married under foreign laws. The Judge also could not see how the denial of spousal benefits to homosexual couples would serve the purpose of protecting the institution of the tradition family.

After the ruling was announced, over 27,000 individuals, 80 civil groups and five lawmakers have urged the Government to protect “traditional family values” and appeal the High Court decision that grants the spousal welfare benefits to the homosexual civil servant. They stated that the High Court decision might set a bad precedent and lead to the collapse of the current marriage system as some foreign countries recognise polygamy.<sup>8</sup> On 25 May 2017, the Government applied to appeal against the High Court decision.<sup>9</sup>

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<sup>7</sup> *Leung Chun Kwong v Secretary for the Civil Service and another* (HCAL 258/2015) <http://www.doj.gov.hk/eng/public/significant.html>

<sup>8</sup> Hong Kong Free Press, 24 May 2017, *Protect family values': Hong Kong Gov't urged to appeal ruling on marriage benefits for gay couple*. <https://www.hongkongfp.com/2017/05/24/protect-family-values-hong-kong-govt-urged-appeal-ruling-marriage-benefits-gay-couple/>

<sup>9</sup> South China Morning Post, 26 May, 2017, *Hong Kong government appeals gay rights spouse ruling*. <http://www.scmp.com/news/hong-kong/education-community/article/2095731/hong-kong-government->

## **(2) Legal recognition of gender identity**

### **Lack of comprehensive legislation relating to issues of gender recognition**

In Hong Kong, if transgender people wish to legally change their gender on their identity documents (e.g., Identity Card and passport), the Government requires that transgender people to undergo full genital sex reassignment surgery. A new ID card and passport will be then issued with their affirmed gender. However, the requirement for genital surgery and resultant sterilization is not compliant with international human rights obligations regarding people's right to be free from inhuman and degrading treatment, and the rights to privacy, family life and non-discrimination.

In May 2013, The Court of Final Appeal (CFA) made an order on a case, in *W v Registrar of Marriages*, particularly significant development regarding transgender people's rights.<sup>10</sup> The CFA decided that the Marriage Ordinance and the Matrimonial Causes Ordinance were in breach of the right to marriage of a post operative transsexual woman who wished to marry her male partner. The Court further recommended that the Government should develop comprehensive gender recognition legislation to set out the process for changing gender, and other relevant provisions on their rights. CFA decided at the same time to suspend the order for 12 months to allow the Government and this Council sufficient time for discussion and carrying out work to amend legislation. The orders of the Court took effect on 17 July 2014.

In response, the Government introduced the Marriage (Amendment) Bill 2014 into this Council on March 19, 2014, but the bill was negatived by this Council. In tandem with introducing the Marriage (Amendment) Bill, the Government has established an Inter-departmental Working Group on Gender Recognition (IWG) in January 2014 to consider legislation and administrative measures that was required to protect the rights of transsexuals in all legal contexts, and to make reform recommendations. However, the Government did not set any time table for introducing gender recognition legislation to implement the proposals

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[appeals-gay-rights-spouse](#)

<sup>10</sup> *W v Registrar for Marriages (FACV 4/2012)*. The applicant W who was born a man and underwent sex reassignment surgery to become a woman. After the surgery, she wished to marry her male partner but was refused by the Registrar of Marriages. The Court of Final Appeal decided that her right to marry under Article 37 of the Basic Law and Article 19 of the Bill of Rights had been breached and that a transsexual person who has legally changed gender must be allowed to marry in their affirmed gender.

to be put forward by the IWG. To date, the IWG is yet to launch any formal public consultation or recommendations for the introduction of gender recognition legislation.

The EOC has submitted our views on the issue to the Government, the Legislative Council of Hong Kong and the IWG calling for the reform of requirements for transgender people to undergo surgery to change gender, and to introduce comprehensive gender recognition legislation.<sup>11</sup>

### **(3) Effective anti-discrimination measures**

#### **Public attitudes towards legislating against discrimination on the grounds of SOGI**

The HKSAR Government considered that sexuality is a very controversial and highly sensitive issue and preferred taking non-legislative measures, in particular public education, to enhance equal opportunities for LGBTI people. Many LGBTI people found that using public education alone as a strategy in eliminating discrimination on the grounds of sexual orientation and gender identity is inadequate and ineffective. Many LGBTI people saw legislating to protect them from discrimination as an important and necessary first step to protect their basic human rights.

The SOGI Study found that the respondents held polarized views and were either strongly supportive or strongly against the legislation. Some respondents who are strongly against the legislation believed that introducing such legislation conveyed a message of public acceptance of homosexuality or transgender identity and it was unacceptable. The non-supportive respondents raised a number of concerns including:

- disagreed that discrimination towards LGBTI people is prevalent;
- legislation could create a conflict with other rights such as freedom of expression, freedom of thought, conscience and religion, and the right to privacy. Some members of the public used the term “reverse discrimination” to describe such concerns;
- they did not believe that legislation would be effective in addressing discrimination experienced by LGBTI people;

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<sup>11</sup> Promoting transgender people’s right to equality with a Gender Recognition Ordinance. Submission from the Equal Opportunities Commission to the Meeting of Legislative Council Bills Committee held on 23 April 2014. <http://www.eoc.org.hk/eoc/upload/2014424105611969728.pdf>

- they believed that legislation could create further division in society and that education and guidance would be more effective.

On the other hand, those who support the legislation believed that it was important to introduce legislation for a number of reasons including:

- the evidence of widespread discrimination against LGBTI people;
- the need to protect the human rights of LGBTI people; and to provide them with access to justice and the benefits that legislation bring in changing public attitudes towards LGBTI people and in sending a clear signal that discrimination of LGBTI people is unacceptable.

In relation to public attitudes towards legislating against discrimination on the grounds of sexual orientation, the SOGI studies indicated that there appear to be signs of a shift in attitudes among the Hong Kong public during the last 10 years with increasing support for legislation.

- In 2006, 29% of those surveyed strongly disagreed/disagreed that “the Government should not introduce legislation to outlaw discrimination on the grounds of sexual orientation at this stage” (MVAHK, 2006)<sup>12</sup>;
- In 2013, about 60% of the respondents thought that it was very/quite important to introduce the legislation against discrimination on the grounds of sexual orientation (Loper, Lau & Lau, 2014)<sup>13</sup>;

In 2016, the SOGI Study found that 55.7% the respondents “somewhat/completely” agreed that there should be legal protection against discrimination on the grounds of SOGI and intersex status. And only 34.8% of the public objected to legislating against discrimination on the grounds of SOGI and intersex status

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<sup>12</sup> In the “Survey on Public Attitudes towards Homosexuals” (MVAHK, 2006), conducted by MVA Hong Kong Limited, commissioned by the Home Affairs Bureau of the Hong Kong Government, a total of 2,040 Hong Kong residents, including domestic helpers, aged between 18 and 64 were interviewed through residential landline.

<sup>13</sup> Loper, K. A., Lau, H., and Lau, C. (2014). Research Shows a Majority of People in Hong Kong Support Gay and Lesbian Couples’ Rights, Not Necessarily Marriage. Briefing Paper, Centre for Comparative and Public Law, The University of Hong Kong.

It is noteworthy that 91.8% of respondents aged 18–24 are especially supportive of legislating against discrimination on the grounds of SOGI and intersex status in Hong Kong and agreed that there should be legal protection against discrimination for LGBTI people.

It shall also be noted that of those respondents with religious beliefs, 48.9% agreed that, overall there should be legal protection against discrimination on the grounds of SOGI and intersex status. This indicates that among people with religious beliefs there is a diverse range of views regarding whether there should be legal protection against discrimination on the grounds of sexual orientation, gender identity and intersex status.

### **Government's response on the ways to eliminate discrimination on the ground of SOGI**

After one year of the SOGI Study was released, the Government set out policy agenda to promote diversity, inclusiveness and mutual respect in the community for the LGBTI people. However, the follow-up measures are mostly focusing on sensitivity training, public education and publicity. Follow-up measures stated in the Government Policy Address 2017 are as follows:<sup>14</sup>

- providing training and resources for personnel in specific fields to enhance their knowledge of and sensitivity towards sexual minorities;
- drawing up a charter on non-discrimination of sexual minorities for voluntary adoption by relevant organizations and individuals;
- enhancing public education and publicity to promote the message of non-discrimination;
- reviewing and reinforcing the relevant support services; and
- conducting further study on the experience of other jurisdictions in implementing anti-discrimination measures to provide a basis for future consultations.

### **Conclusion and Recommendations**

The EOC recognises that there are divergent views on the issue of legislating against discrimination on the grounds of SOGI and intersex status. Making reference to overseas experience, EOC believes that it

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<sup>14</sup> The Government of the Hong Kong Special Administrative Region of the People's Republic of China, Policy Address 2017. <http://www.policyaddress.gov.hk/2017/eng/agenda.html>

would be possible to balance the need to protect LGBTI people from discrimination with such concerns and rights of other groups to freedoms of expression and religion, and the right to privacy. Indeed, Hong Kong's human rights legislation, such as the Bill of Rights Ordinance, as well as existing anti-discrimination Ordinances, already strike a balance of such rights in their provisions and day-to-day implementation. In addition, some jurisdictions, which were examined in the SOGI Study, have done this in various ways, such as by introducing relevant exemptions in the SOGI legislation.

In considering the way forward, the Government should conduct a public consultation on introducing anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status. Given the evidence of widespread discrimination against LGBTI people, it is recommended that the consultation should focus on the scope and possible content of the legislation, rather than whether there should be legislation. It is recommended that this consultation cover all the key elements of possible anti-discrimination legislation: - which protected characteristics to cover, the format of the legislation, definitions of the protected characteristics, prohibited conduct, domains of protection, possible exemptions, and the role of an equality body.

*Equal Opportunities Commission*  
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