

**Study on Legislation against
Discrimination on the Grounds of Sexual Orientation,
Gender Identity and Intersex Status**

**Meeting of Legislative Council
Panel on Constitutional Affairs
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~~ Submission from the Equal Opportunities Commission ~~

Purpose

This paper aims to present the objectives, major findings and recommendations of the “Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status” (the Study).

Background

2. The Equal Opportunities Commission (EOC) has commissioned the Gender Research Centre (GRC) of the Hong Kong Institute of Asia-Pacific Studies at the Chinese University of Hong Kong to conduct the Study.

3. The Study was a fact-finding exercise with specific objectives as follows:

- (a) To systematically understand discrimination encountered by people of different sexual orientation, gender identity (SOGI) and intersex status, including lesbian, gay, bisexual, transgender and intersex (LGBTI) people from all walks of life in Hong Kong, and to solicit their views on how such experiences of discrimination may be redressed through legislation or other means.

- (b) To solicit public views on: their awareness (including their contact with and understanding of) LGBTI people, their acceptance of LGBTI people in various aspects of life, their perception of the discrimination encountered by LGBTI people, and their views towards possible legislation against discrimination on the grounds of SOGI and intersex status.
- (c) To conduct an extensive literature review to evaluate laws relating to discrimination on the grounds of SOGI and intersex status in other jurisdictions.
- (d) To evaluate and make recommendations on the feasibility of legislating against discrimination on the grounds of SOGI and intersex status, the scope of fields where the legislation could apply, possible exemptions and situations in which they may be justified, and strategies of rolling out the legislation.

4. The Study is the most comprehensive of its kind in Hong Kong in the following ways:

- (a) it provides a thorough understanding of the perspectives about discrimination encountered by LGBTI groups and viewpoints of legislating against discrimination on the grounds of SOGI and intersex status from both LGBTI people as well as the general public;
- (b) it 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. In view of this comprehensive investigation, it provides not only figures of those supporting and opposing legislating against discrimination on the grounds of SOGI and intersex status but, more importantly, the reasons and nuances behind the support and opposition;

- (c) it analyses a number of jurisdictions around the world with either similar legal systems, or jurisdictions that are also influenced by Chinese and Asian cultures that have developed various forms of LGBTI anti-discrimination legislation. The analysis considers different elements of this legislation, as well as what lessons can be learnt from the experience of the legislation's development and implementation;
- (d) previous studies in Hong Kong on discrimination of LGBTI people tended to overlook the experiences of transgender and intersex people, who might be subject to further misunderstanding and marginalization in Hong Kong society. In addition to reaching lesbian, gay and bisexual groups, this Study explicitly paid attention to seeking the viewpoints of transgender and intersex groups so as to include their voices in Hong Kong, and their suggestions on ways of redressing the discrimination they face.

Major Findings of the Study

Discrimination self-reported by LGBTI people in Hong Kong and LGBTI people's views on legislation

5. The Study's findings show 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.

6. Means of redress were also reported to be minimal or non-existent. It has been reported that LGBTI people experienced problems when accessing supporting professionals such as teachers, counsellors, social workers and healthcare personnel, caused by problematic attitudes of these professionals, as well as outdated approaches to homosexuality and transgenderism. 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.

7. It was reported that intersex people faced social difficulties as their gender expression may not fit into the male/female binary in society. In some extreme cases, sexual harassment was experienced. However, the most suffering-inducing aspect of their lives was when medical treatment and decisions were applied to them at an early age without their consent. As it is generally practised presently, a sex is assigned to an intersex baby by the doctor in consultation with the parents who are usually little informed of the possible consequences and other options. Such operations are known to result in the dysfunction of sex organs and the excretory system and sterilization.

8. The intersex community is asking for the return of the right of consent to medical treatment, and sufficient social support to be provided for them in the meantime. In relation to legislation, there was also discussion about whether intersex people should be protected under the existing Disability Discrimination Ordinance (DDO) or Sex Discrimination Ordinance (SDO), or whether appropriate clauses should be included as a part of a separate LGBTI anti-discrimination ordinance, if it was to be developed.

Public attitudes towards legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status

9. In this Study, public opinion was gathered by two methods: a territory-wide telephone survey of more than 1,000 respondents and qualitative findings collected from public forums, focus groups, online and postal submissions.

10. The Study's findings demonstrate that there are clear objections by some members of the public to the prospect of legislation. They raised a number of considerations including:

- (a) they disagreed that discrimination towards LGBTI people is prevalent;
- (b) they were particularly concerned that legislation could create a conflict with their 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;
- (c) they did not believe that legislation would be effective in addressing discrimination experienced by LGBTI people;
- (d) they believed that legislation could create further division in society and that education and guidance would be more effective.

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

- (a) the evidence of widespread discrimination against LGBTI people;
- (b) 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.

12. The above concerns must be contextualized in the wider society. The representative survey of this study noted a significant increase of public support for legislation in the past 10 years from 28.7% (MVAHK, 2006) to 55.7% in this Study (March 2015) who “somewhat/completely” agreed that there should be legal protection against discrimination on the grounds of sexual orientation, gender identity and intersex status as a whole. In this Study, it was found that only 34.8% of the public objected to

legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status.

13. It is noteworthy that respondents aged 18–24 are especially supportive of legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status in Hong Kong – 91.8% of them agreed that there should be legal protection against discrimination on the grounds of sexual orientation, gender identity and intersex status.

14. 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 sexual orientation, gender identity 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.

A comparative review on legislations against discrimination on the grounds of sexual orientation, gender identity and intersex status

15. This Study provides a detailed comparative legal review and analysis of how several jurisdictions have legislated against discrimination on the grounds of sexual orientation, gender identity and intersex status. Their experiences are of particular relevance to Hong Kong because they have similar common law or European Union anti-discrimination legislation (Australia, Great Britain, Canada, and the Netherlands), or they are also influenced by Chinese culture (Taiwan and Macau). The cases of Taiwan and Macau demonstrate that influences of Chinese culture and the introduction of anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status are not necessarily incompatible.

16. Furthermore, this Study provides an analysis of what lessons can be learnt from the experience of the development and implementation of LGBTI anti-discrimination legislation in other jurisdictions. In particular, it considers the concerns raised in Hong Kong during the study in relation to

balancing of various rights, and other concerns relating to legal, political and social factors. The analysis highlighted that there are workable solutions to those concerns based on the practices in other jurisdictions, the human rights legislation in Hong Kong, the structure of provisions in the existing anti-discrimination Ordinances, how possible LGBTI legislation could be structured (for example with practicable exemptions), and by having effective means to promote understanding of the legislation.

17. In terms of possible ways forward for legislation, several concerns based on the practices in other jurisdictions should be considered. They include which characteristics to cover, the format of legislation, definitions of protected characteristics, prohibited conduct, domains of protection, and exemptions.

- (a) Which characteristics to cover: Most jurisdictions reviewed currently cover sexual orientation and gender identity, with several also covering intersex status. Intersex status has been protected more recently, reflecting the recent and increasing awareness among international and national human rights bodies which are beginning to consider extending protection against discrimination on the ground of intersex status.
- (b) Format of legislation: There are different options for the structure of the anti-discrimination legislation with consolidated, characteristic-specific or field-specific models. Each has its advantages and disadvantages.
- (c) Definitions of protected characteristics: The definitions of sexual orientation, gender identity and intersex status could be drawn from definitions in the other similar jurisdictions as reviewed in Chapter 6 of the report of the Study, and from international human rights instruments such as the Yogyakarta Principles. Serious consideration should be given as to whether discrimination by perception and association should be covered in ways similar to existing provisions in Hong Kong for discrimination on the grounds of disability and race.

In some jurisdictions it has been deemed important to protect people who are perceived to be, or associated with LGBTI people.

- (d) Prohibited conducts: The main forms of prohibited conduct in other jurisdictions are direct and indirect discrimination, harassment, victimization and, to a more limited extent, vilification. All of these are also forms of prohibited conduct in Hong Kong under the existing anti-discrimination Ordinances and therefore could be considered for Hong Kong. There would, however, be a need to carefully consider balancing rights to freedom of expression, for example, in relation to possible vilification provisions.
- (e) Domains of protection: In other jurisdictions protection from discrimination in terms of domains on the grounds of sexual orientation, gender identity or intersex status, is similar to those under the existing four anti-discrimination Ordinances in Hong Kong.
- (f) Exemptions: Based on the experiences in other jurisdictions and the existing anti-discrimination Ordinances in Hong Kong, consideration to exemptions could be given in fields such as employment, education, provision of goods and services, disposal and management of premises, government functions, special measures, and other areas such as sporting activities in the case of gender identity. As in other jurisdictions and under Hong Kong's existing four anti-discrimination Ordinances, exemptions could be considered where they serve a legitimate aim and are proportionate.
- (g) Role of an equality body: In most of the jurisdictions examined, the equality or human rights bodies have a vital role in promoting equality and eliminating discrimination of people on the grounds of sexual orientation, gender identity or intersex status. In order to fulfil those duties they also have

wide-ranging powers from enforcing the anti-discrimination legislation to producing guidance and educating the public. Consideration could be given as to whether the EOC's existing duties and powers under the existing four anti-discrimination Ordinances should be extended to the grounds of sexual orientation, gender identity and intersex status.

Recommendations

18. Based on integrative findings covering discrimination experienced by LGBTI people in Hong Kong, public opinions on legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status, and a comparative legal review of how other jurisdictions provide legal protection for LGBTI people against discrimination, the following recommendations are made on possible viable ways to redress discrimination on the grounds of sexual orientation, gender identity and intersex status in Hong Kong:

- (a) The Government should consider conducting 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 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.
- (b) The Government should give further consideration to explore claims about possible discrimination on the grounds of religion or belief. First, a number of religious groups in Hong Kong expressed concerns about possible discrimination

against them in the context of the possibility of introducing anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status. Second in Hong Kong, unlike many of the other jurisdictions examined, there is protection only in relation to the actions of the Government and public authorities under Article 32 of the Basic Law and Article 15 of the Bill of Rights, which provide for Hong Kong residents' fundamental rights to freedom of conscience and freedom of religious beliefs. So far, there have been very few studies about the extent of discrimination on the grounds of religion or belief in Hong Kong.

- (c) Forums, workshops and training sessions be developed to increase dialogue and better understanding between different groups in society on issues relating to LGBTI equality. This would be important, for example, in relation to LGBTI groups and religious groups so as to develop greater understanding, mutual respect and ways forward to balance each other's rights and concerns. It could also monitor the receptiveness of the general public on legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status.
- (d) Other recommendations including the establishment of comprehensive guidelines and training for frontline government officials and staff working in public authorities; regarding the facilitation of further public education and awareness programmes for the general public about LGBTI people and the issues they face, in order to reduce misconceptions and stereotypes; regarding the formulation of new educational curriculums in consultation with key stakeholders to improve understanding of LGBTI people in schools; regarding provision of LGBTI-friendly facilities; regarding the collection and publication of data on LGBTI people; and regarding provision of funding for support services for LGBTI people.

Way Forward

19. EOC believes that this Study can serve as an evidence-based foundation and provide useful reference for the Government and related parties towards advancing equality and considering legislation on this front.

20. Given this Study's findings show that there is clear majority public support for legislation against discrimination on the grounds of sexual orientation, gender identity and particularly intersex status, EOC recommends that the Government should consider launching a public consultation with a view to legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status. It is crucially important for the consultation exercise to contain as many concrete details as possible to minimize misunderstandings and unnecessary anxieties. In consulting the public, the Government should provide clear definitions of the coverage of any possible legislation, including possible domains to be covered, as well as exemptions that can potentially be considered. It would, for example, be important to explain aspects that are outside the scope of anti-discrimination legislation, such as the legalization or not of same-sex marriage or civil unions.

21. EOC considers that it is the opportune moment for the Government to decide how to take this receptiveness forward in order to create a friendly environment for people of different sexual orientation, gender identity and intersex status to work and live in. By taking steps to introduce comprehensive anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status, there is an opportunity for Hong Kong to become the leading jurisdiction on LGBTI equality in Asia.

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