

Minutes of Tenth Meeting of the Advisory Group on Eliminating Discrimination against Sexual Minorities

Date : 22 July 2015
Time : 4:30 p.m.
Venue : Conference Room 6, G/F, Central Government Offices
2 Tim Mei Avenue, Tamar

Members Present

Professor Fanny CHEUNG, JP (Chairperson)
Hon. CHAN Chi-chuen
Mr Tommy CHEN
Dr Andy CHIU
Dr Joseph CHO
Professor KWAN Kai-man
Professor KUNG Lap-yan
Ms Lavinia LAU
Dr Hon. Priscilla LEUNG, SBS, JP
Ms Joanne LEUNG
Hon. James TO
Ms YEUNG Wai-wai

Members Absent

Ms Shirley HA
Mr Reggie HO

In Attendance

Representatives from Constitutional and Mainland Affairs Bureau (“CMAB”)
Mr Gordon Leung, JP Deputy Secretary for Constitutional and
Mainland Affairs
Ms Phidias TAM Principal Assistant Secretary for
Constitutional and Mainland Affairs
 (“PAS(CMA)”)
Mr Eric LEE Assistant Secretary for Constitutional and
Mainland Affairs (“AS(CMA)”)
Ms Elaine IP Assistant Secretary for Constitutional and
Mainland Affairs (Secretary)
Mr LAI Wing-yiu Unit Manager, Gender Identity and Sexual
Orientation Unit (“UM/GISOU”)

Agenda Item 1: Confirmation of minutes of meeting held on 27 April 2015

Since there were no proposed amendments, the minutes of the meeting held on 27 April 2015 were confirmed.

2. With regard to the publication of the Advisory Group's minutes of meeting, members noted that the minutes of the first to sixth meetings had been published on the CMAB website. As the Advisory Group had proceeded to discuss the study report on discrimination experienced by sexual minorities since the seventh meeting held on 18 November 2014 and had yet to complete deliberating on the Advisory Group's recommendations to the Government with reference to the study report, the Secretariat proposed withholding publishing the minutes from that meeting onwards until the study report was released together with the Advisory Group's recommendations, in order to avoid premature disclosure of the study findings which might lead to speculation on the Group's recommendations. Members agreed.

Agenda Item 2: Matters arising

3. With reference to paragraph 8 of the minutes of the last meeting, AS(CMA) reported that subsequent to the last meeting, a member made a further suggestion to present the demographic data of intersex and post-gay participants separately in the study report. After consulting the consultant, the Secretariat had revised paragraphs 3.2 – 3.3 and Appendix 3, which set out the demographic data of each sexual minority sub-group, in both the English and Chinese versions of the report. The proposed changes segregated the sub-groups of intersex and post-gay participants while preventing exposure of the data of the only one intersex participant; the changes did not affect the other parts of the report concerning experience of discrimination. The revised bilingual report with the proposed changes highlighted had been circulated to members on 17 July 2015.

4. Members agreed with the proposed changes and had no further views. The Chairperson concluded that the bilingual study report was finalised.

Agenda Item 3: Recommendation to conduct further studies **[Paper No. 5/2015]**

5. The Chairperson recapitulated that at the last meeting, the

Advisory Group had agreed on the five areas of recommendations to be made to the Government. On this basis, it was also agreed that at this meeting the Advisory Group would review the findings of the desktop research on overseas experience in tackling discrimination on the grounds of sexual orientation and gender identity, with a view to fine-tuning the recommendation on further studies; and the next meeting (in September 2015) would discuss the other four areas of recommendations, with a view to finalising the Advisory Group's recommendations by October/November 2015. AS(CMA) then presented the paper.

6. The Chairperson invited members to offer views on the paper. A member indicated support to include the specific topics proposed in the paper under the Advisory Group's recommendation for more in-depth studies to be conducted, in particular the evolving case law and any established or emerging criteria adopted by courts in balancing the rights of the sexual minorities to protection from discrimination and the freedom of speech and religion of others including religious groups. He opined that any such criteria adopted by the court would be of great reference value if a legislative approach was to be discussed in Hong Kong in future.

7. Another member said that he noted a tendency for the courts to make decisions on relevant cases in favour of the rights to equal treatment even when specific exemptions were provided in the anti-discrimination legislation of some jurisdictions to protect the freedom of religious organisations to conduct their activities in accordance with their beliefs and doctrines. Such a tendency was particularly noticeable when the activities concerned were of a secular nature.

8. One other member expressed that there might be such an emerging trend but no universally recognised criteria could yet be established in the jurisprudence on reconciliation of the competing rights. He cited two recent judicial review cases in Canada where the Trinity Western University ("TWU"), an evangelical Christian university, sued the Nova Scotia Barristers' Society¹ and the Law Society of Upper Canada² respectively for their denial of accreditation of its law school due to TWU's policy on student conduct, which prohibited sexual intimacy outside marriage between a man and a woman, in order to safeguard its freedom of religion, and the two court cases concerned had been ruled differently. He emphasized the need to look into the

¹ Trinity Western University v. Nova Scotia Barristers' Society, 2015 NSSC 25

² Trinity Western University v. The Law Society of Upper Canada, 2015 ONSC 4250

controversies in other jurisdictions in legislating against discrimination on the grounds of sexual orientation and gender identity in the further studies to be conducted, and registered his concern about the implications on freedom of speech brought by such legislation, such as the laws against hate speech and vilification. It was thus important to examine legislative and administrative measures adopted in other jurisdictions to tackle discrimination against the sexual minorities and analyse empirical data on their implementation. The Chairperson advised that the controversies should be studied from the perspectives of different parties, including the legislature, enforcement authority and stakeholders, in order to better inform future discussions on formulating proposals for legislation in Hong Kong.

9. Another member shared with the meeting that the U.S. Equal Employment Opportunity Commission had concluded in a recent case that sexual orientation was inherently a sex-based consideration. In light of this conclusion, he considered that the extension of the definition of sex under the Sex Discrimination Ordinance to cover sexual orientation might be a legislative approach to be studied. He also recommended the further studies to look into the overseas cases of “reverse discrimination” which, according to his understanding, was generally ascribed to “positive action” policies intended to assist disadvantaged groups, instead of anti-discrimination legislation per se.

10. Some members suggested that the jurisdictions to be covered in the further studies should not only include those in which a self-contained piece of anti-discrimination legislation on the grounds of sexual orientation and gender identity had been put in place, but also those where such legislation had not been enacted, such as Mainland China, Macau and Singapore. Members also agreed that those jurisdictions in which homosexual acts were still illegal should be excluded from the further studies.

11. A member recapitulated that some people in the community, particularly the religious groups, were strongly opposed to enacting legislation against sexual orientation discrimination as the matter was concerned with moral values and carried risks of interference with individual freedom. She opined that even with religious exemptions in anti-discrimination legislation, it was still a very complicated matter to define the scope of application of the exemptions; and public education should be the best measure to tackle discrimination in this regard. The Government should try to explore more non-legislative approaches to address the problem before taking a legislative one. She suggested

including the feasibility of adopting the approach of conciliation to resolve disputes, which was very common in Mainland China, to the scope of the further studies as well.

12. Another member asked if Gender Identity and Sexual Orientation Unit (“GISOU”) of CMAB was already providing conciliation service for complaints relating to discrimination against sexual orientation and gender identity. UM/GISOU explained how GISOU handled complaints received. He said that upon receipt of a complaint, GISOU would study the substance of the complaint and seek clarification from the complainant as needed. GISOU would then send a letter, setting out the details of the complaint, to the person or organisation being complained and invite him/it to give a reply. Where possible, GISOU might also arrange for the concerned parties to meet, on a voluntary basis, to facilitate a resolution. UM/GISOU said that GISOU had handled about 50 complaint cases since its establishment in 2005 and there had been cases where the complainants were satisfied with the outcome. The member who made the suggestion in paragraph 11 above considered the above-mentioned mechanism a good initiative for which more publicity might be given.

13. One member suggested the Government to review the effectiveness of the administrative measures undertaken to tackle discrimination against people of different sexual orientation and transgenders in the past. He also supported conducting more in-depth studies on administrative measures adopted in other jurisdictions and suggested studying the effectiveness of those administrative measures as well, in particular in those jurisdictions where anti-discrimination legislation was not put in place, in order to learn from any successful experience.

14. One other member opined that the Advisory Group should in its recommendations remind the Government of the United Nations Human Rights Committee’s recommendation in its Concluding Observations on the third periodic report of the Hong Kong Special Administrative Region of the People’s Republic of China in the light of the International Covenant on Civil and Political Rights, that Hong Kong should consider enacting legislation that specifically prohibited discrimination on the ground of sexual orientation and gender identity. Another member thought that the Government should be recommended to conduct public consultation on its anti-discrimination policy concerning sexual minorities.

15. A member suggested the Advisory Group to make recommendations on the scope of religious exemptions to be provided if legislation against discrimination on the grounds of sexual orientation and gender identity was to be enacted in Hong Kong. Another member commented that given clearly divergent views in the Advisory Group as to whether the legislative route should be pursued to eliminate discrimination against sexual minorities, a recommendation on the scope of religious exemptions might lead the public to misunderstand that the Advisory Group was recommending the enactment of legislation and that exemptions were recommended on religious grounds only. While there might not be consensus among members on whether the Advisory Group should recommend enacting legislation, the Chairperson recapitulated that, insofar as strategies and measures relating to legislation were concerned, the Advisory Group had agreed at the last meeting on a recommendation to conduct more in-depth studies on the experience of other jurisdictions in tackling discrimination on the grounds of sexual orientation and gender identity, with a view to informing further discussions on the proposal to enact legislation. Members agreed that the Advisory Group should focus discussions on what issues should be further studied with a view to providing the community with more comprehensive and in-depth information to further consider legislative proposals in future.

16. In response to members' questions, PAS(CMA) advised that on receipt of the Advisory Group's recommendation to conduct further studies, the Government would carefully consider how the recommendation should be followed up, including identification of suitable parties with the relevant expertise to conduct the studies, and working out the methodology and timeframe for implementation. She also said that the Government would report the Advisory Group's recommendations to the Legislative Council as appropriate. A member hoped that the Secretariat could furnish the Advisory Group with information about the implementation plan of conducting further studies at a subsequent meeting if possible. The Chairperson said that the role of the Advisory Group was to make recommendations to the Government, and it would be for the Government to consider how to follow up with the recommendations.

17. After deliberation, the meeting agreed to include the specific topics proposed in the paper under the recommendation for more in-depth studies to be conducted. The Secretariat would amend the proposed scope of studies taking into account views raised by members and submit it to the next meeting, when the Advisory Group would also discuss its

recommendations in the other four areas, namely (i) training and resources for personnel in specific fields; (ii) code or guidelines for service providers in both public and private sectors; (iii) public education; and (iv) support services for sexual minorities. The Chairperson also informed members in advance that the meeting following the next one, which would likely be held in late October, was intended for consideration of the draft report of the Advisory Group so that the final report could be concluded in good time for submission to the Government before the end of the extended term of the Advisory Group.

Agenda Item 4: Any other business

18. The discussion ended at 7:15 p.m. The next meeting will be held at 4:30 p.m. on 2 September 2015.

**Constitutional and Mainland Affairs Bureau
August 2015**