

Chapter 1 - Introduction

1.1 The Advisory Group on Eliminating Discrimination against Sexual Minorities (“Advisory Group”) was set up in June 2013 by the Government to advise on matters relating to concerns about discrimination faced by sexual minorities in Hong Kong, notably to advise on the aspects and extent of discrimination faced by sexual minorities in Hong Kong; and on the basis of that, to advise on the strategies and measures to tackle the issues identified with a view to eliminating discrimination and nurturing a culture of diversity, tolerance and mutual respect in the community. The Advisory Group believes that discrimination is wrong and endeavours to identify measures to eliminate discrimination that address the needs and concerns of the community as a whole.

Background

1.2 Issues relating to sexual orientation and gender identity often attract public debates. This has happened not only in Hong Kong, but in other parts of the world as well.

1.3 Some people consider sexual orientation and gender identity purely personal matters that should be left to the persons concerned; some however consider that there are social, moral and religious implications to society. Such different viewpoints lead to further debates including whether consensual homosexual behaviours should be viewed as equal to heterosexual behaviours, and whether persons with different sexual orientation or gender identity should be accorded the same treatment across different social institutions, including religion and marriage.

1.4 Different jurisdictions adopt different approaches to deal with the issues, having regard to their local circumstances, and such approaches evolve over time.

1.5 At present, some jurisdictions have enacted legislation that prohibits discrimination on grounds of sexual orientation and gender identity, with the scope of such legislation varying significantly across jurisdictions; some other jurisdictions do not offer such legal assurance of equal treatment of persons with different sexual orientation or gender identity though same-sex sexual behaviour is not an offence; other jurisdictions outlaw same-sex sexual activities¹.

¹ More details can be found at Appendix D.

1.6 In the case of Hong Kong, whether persons of different sexual orientation and gender identity are discriminated against and, if so, whether and what measures should be taken to address this phenomenon has been a subject of public debate for some time.

1.7 As background, the following provisions in the Basic Law, the Hong Kong Bill of Rights Ordinance (“HKBORO”) (Cap. 383), the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) are worth noting:

(a) Basic Law

- (i) Article 25: “All Hong Kong residents shall be equal before the law.”;
- (ii) Article 32: “Hong Kong residents shall have freedom of conscience. Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public.”; and
- (iii) Article 39: “The provisions of the ICCPR, the ICESCR, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region (“HKSAR”).

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

(b) HKBORO² - Part II, Hong Kong Bill of Rights (“HKBOR”)

- (i) Article 1(1): “The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”;
- (ii) Article 15

² HKBORO is the domestic law that provides for the incorporation of the provisions of the ICCPR as applied to Hong Kong into the laws of the HKSAR. It only binds the Government and all public authorities, and any person acting on behalf of the Government or a public authority. The term “person” includes any body of persons, corporate or unincorporated.

- (1) “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”;
 - (2) “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”;
 - (3) “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”;
 - (4) “The liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions shall be respected.”; and
- (iii) Article 22: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

(c) ICCPR

(i) Article 2

- (1) “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status³.”;

³ Article 2(1) of the ICCPR corresponds with Article 1(1) of the HKBOR in Part II of the HKBORO.

- (2) “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.”;
- (ii) Article 18⁴
- (1) “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”;
- (2) “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”;
- (3) “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”;
- (4) “The State parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”; and
- (iii) Article 26⁵: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or

⁴ Article 18 of the ICCPR corresponds with Article 15 of the HKBOR in Part II of the HKBORO.

⁵ Article 26 of the ICCPR corresponds with Article 22 of the HKBOR in Part II of the HKBORO.

other status.”⁶

(d) ICESCR

(i) Article 2

- (1) “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”; and
- (2) “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷

1.8 There is currently no specific anti-discrimination ordinance that prohibits discrimination on grounds of sexual orientation or gender identity.

⁶ In the context of the Third Report of the HKSAR of the People's Republic of China (PRC) in the light of the ICCPR, issues concerning sexual minorities were considered. In March 2013, the Government issued a response to the list of issues presented by the Human Rights Committee of the United Nations (HRC) on 16 November 2012 (accessible at http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/response_to_list_of_issues_mar_2013.pdf), the HRC issued the concluding observations on the Third Report (http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/Advance_Version_2013_ICCPR_e.pdf), and the Government issued a press release in response to the concluding observations (http://www.cmab.gov.hk/en/press/press_3146.htm).

⁷ In the context of the Third Report of the HKSAR of the PRC under the ICESCR, issues concerning sexual minorities were considered. In March 2014, the Government issued a response to the list of issues presented by the Committee on Economic, Social and Cultural Rights of the United Nations (CESCR) on 13 June 2013 (accessible at [http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Response_to_LOI-ICESCR\(Eng\)\(3_3_14\).pdf](http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Response_to_LOI-ICESCR(Eng)(3_3_14).pdf)). In May 2014, the CESCR issued the concluding observations on the Third Report (http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/ICESCR_Concluding_Observation.pdf), and the Government issued a press release in response to the concluding observations (http://www.cmab.gov.hk/en/press/press_3405.htm).

The Sex Discrimination Ordinance (Cap. 480) enacted in Hong Kong in 1995 does not cover the ground of sexual orientation⁸. Some people argue that the Disability Discrimination Ordinance (Cap. 487), enacted in 1995, covers persons suffering from gender identity disorder (“GID”) which is arguably a form of disability recognised under the Ordinance; however this view is thus far not tested in a court of law in Hong Kong, and it is understood that persons with GID do not necessarily subscribe to such a view either.

1.9 In the last few years, there have been increased calls for the enactment of legislation to protect persons of different sexual orientation and gender identity from discrimination. In November 2012, the Legislative Council (“LegCo”) held a motion debate on equal rights for people of different sexual orientations, which urged the Government to expeditiously launch public consultation on enacting legislation to safeguard equal opportunities for and the basic rights of people of different sexual orientations.

1.10 The motion was voted down in LegCo⁹. As evidenced by the speeches of LegCo Members during that motion debate, as well as the public opinions and commentaries expressed around that time through the media¹⁰, society is deeply divided over this issue. As mentioned in the 2013 Policy

⁸ Although “sexual orientation” and “gender identity” are not specific grounds, the Ordinance prohibits sexual harassment against any man or woman regardless of their sexual orientation and gender identity.

⁹ For functional constituency Members, 10 voted in favour of the motion, 17 against, and 8 abstained; for geographical constituency Members, 21 voted in favour of the motion, 8 against, and 4 abstained.

¹⁰ Opinions by supporters of the motion include: (a) discrimination against sexual minorities was a serious problem in Hong Kong; (b) the existing protection and resources for public education were inadequate; (c) legislative approach was a global trend as well as an effective approach to address discrimination; and (d) concerns over the implications of the legislation could be addressed through consultation with stakeholders.

On the other hand, those who opposed were of the view that: (a) the issues were controversial and touched on traditional family values and religious belief; (b) there was no consensus in the community on enacting anti-discrimination legislation on ground of sexual orientation and gender identity; (c) such legislation would have far reaching restrictions on freedom of speech and religious belief in different aspects including employment and provision of services, as well as the liberty of parents to ensure the religious and moral education of their children; freedom of speech and religious belief were fundamental rights protected by laws in Hong Kong; and (d) the legislative approach was not the only solution to the problem of discrimination; publicity and public education could be enhanced and other administrative measures could be considered.

Address¹¹, the Government took the view that this was a highly controversial issue which must be tackled cautiously.

Establishment of the Advisory Group on Eliminating Discrimination against Sexual Minorities

1.11 To better address the issue of discrimination faced by sexual minorities and provide a platform for informed discussion, the Government set up the Advisory Group in June 2013. The Advisory Group comprises a chairperson and 13 members. They are non-officials from the academic and business sectors, the sexual minority community and the LegCo, and represent divergent views from stakeholders. The membership list and terms of reference of the Advisory Group are at **Appendix A**. The Advisory Group held 14 meetings in total from June 2013 to December 2015¹².

Definition of “sexual minorities”

1.12 There is no single authoritative definition of “sexual minorities” according to different sources of information. Some define the term to broadly cover a group whose gender identity and sexual orientation differ from the majority of the population concerned. Some refer the term specifically to lesbian¹³, gay¹⁴, bisexual¹⁵, and transgender¹⁶ (“LGBT”) or those outside of the mainstream of sexual expression or orientation in a given culture. Some consider that other forms of sexual expression / orientation / gender identity should also be covered (e.g., intersex¹⁷, post-gay¹⁸, queer¹⁹,

¹¹ Paragraph 131 of the 2013 Policy Address

¹² The term of appointment of the Advisory Group was extended from 10 June 2015 to 31 December 2015.

¹³ A woman who is sexually attracted to other women (source: Oxford Advanced Learner’s Dictionary 8th Edition)

¹⁴ A person who is homosexual (usually a man, who is sexually attracted to people of the same sex) (source: ditto)

¹⁵ A person who is sexually attracted to both men and women (source: ditto)

¹⁶ The term describes a diverse group of individuals who cross or transcend culturally defined categories of gender (source: Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7, issued by World Professional Association for Transgender Health)

¹⁷ A variation in sex characteristics including chromosomes, gonads, and/or genitals that do not allow an individual to be distinctly identified as male or female

¹⁸ Persons with same sex attraction who chose not to lead a homosexual lifestyle

etc.).

1.13 The Advisory Group has considered the scope of sexual minorities for the purpose of the work of the Advisory Group and decided to focus its scope of work on discrimination on the basis of sexual orientation and gender identity^{20 21}.

¹⁹ An umbrella term for sexual and gender minorities

²⁰ Gender identity reflects a deeply felt and experienced sense of one's own gender. A person's gender identity is typically consistent with the sex assigned to them at birth. For transgender people, there is an inconsistency between their sense of their own gender and the sex they were assigned at birth (source: "Fact sheet: LGBT Rights: Frequently Asked Questions" issued by the United Nations Office of the High Commissioner for Human Rights).

²¹ The study on discrimination experienced by sexual minorities in Hong Kong, as conducted under the auspices of the Advisory Group (to be discussed in paragraphs 2.14 to 2.20 of this report), covers lesbians, gays, bisexuals, transgender people, post-gays and intersex persons.