

Chapter 2 – Stocktaking, Fact-finding and Collection of Views

Stocktaking of major developments in Hong Kong

2.1 The Advisory Group first took stock of major developments in Hong Kong on issues of concern to sexual minorities over the past 30 years.

2.2 In Hong Kong, a more prominent public debate on the issue of homosexuality began in the 1980s. At that time, the Law Reform Commission (“LRC”) conducted a study on the laws governing homosexual conduct. The LRC published a report in 1983 and the key recommendation of the report was to amend the law so that it would no longer be an offence for two consenting males of 21 years of age or above to engage in homosexual conduct in private. This proposal of “decriminalising” homosexual conduct sparked off a public debate. There were views that so long as homosexual acts were committed by mutual consent and not to the detriment of the interests of a third party or public affairs, the acts should be regarded as a matter of personal freedom. On the other hand, some considered that homosexual act was unnatural or abnormal, and that “decriminalisation” would encourage such act in the community. In 1990 when the LegCo debated the motion on “decriminalising” homosexual act²², some Members expressed strong reservation about homosexuality even though they were in favour of “decriminalisation”²³. The aforementioned LRC’s recommendation was eventually implemented by the Crimes (Amendment) Ordinance in 1991.

2.3 In 1994, a member of the LegCo introduced the Equal Opportunities Bill in the form of a Private Member’s Bill. That Bill contained provisions prohibiting discrimination on the ground of, inter alia, “sexuality”²⁴, and revived public debates on the issue of sexual orientation, with divergent views on whether legislation prohibiting sexual orientation discrimination should be enacted. The Bill was eventually voted down in the LegCo.

2.4 In 1995, the Government commissioned an opinion survey to

²² The wording of the motion reads: “That measures be presented to this Council - (a) to remove the criminal penalties relating to homosexual acts committed in private by consenting men who have reached the age of 21; and (b) to extend to men and boys, where appropriate, the protection from sexual exploitation afforded by the Crimes Ordinance to women and girls.”

²³ Hansard of the meeting of the LegCo on 11 July 1990

²⁴ Defined as “heterosexuality, homosexuality (including lesbianism) or bisexuality” in the Bill

gauge the public's perception of different forms of sexual orientations, and their views on the measures the Government should adopt in addressing the problem of discrimination on the ground of sexual orientation. The results of the survey, with a sample size of 1 500, indicated that the public had an ambivalent attitude towards homosexuality / bisexuality in a number of aspects, such as the impact of homosexual / bisexual behaviour on others, and contacts with homosexuals / bisexuals on social occasions²⁵. Moreover, a lower level of acceptance was clearly observed in some areas including same-sex marriage, adoption of children by homosexuals / bisexuals and contacts with homosexuals / bisexuals in private settings.

2.5 In 1996, the Government conducted a consultation exercise to consult the public on, inter alia, the legislative and non-legislative approaches to address the problems encountered by homosexuals in Hong Kong. A total of 10,014 submissions were received. An overwhelming majority (over 80% of respondents) strongly opposed legislation in respect of sexual orientation. Having regard to the outcome of the consultation exercise, the Government decided to adopt a non-legislative approach to address the issue of discrimination encountered by homosexuals and promote equal opportunities in respect of sexual orientation. The Equal Opportunities (Sexual Orientation) Funding Scheme was launched in 1998 and the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation (“the Code”)(text of the Code at **Appendix B**²⁶) was released in the same year. The Sexual Minorities Forum was established in 2004 to provide a forum for exchanges with sexual minorities groups²⁷ and the Gender Identity and Sexual Orientation Unit (“GISOU”) was set up in the then Home Affairs Bureau in 2005.

2.6 In 2005, the Government commissioned another survey to assess public attitudes towards homosexuals, including whether there was a need for introducing legislation to prohibit discrimination against people of different sexual orientation. The findings of the survey revealed, amongst others, that 34.5% of the respondents considered that the Government should not legislate at that stage, 28.7% considered that the Government should legislate and 33.7% stood neutral.

²⁵ Including shaking hands, watching movies, singing Karaoke, dining out and going swimming with homosexuals / bisexuals

²⁶ The Code is also accessible at the webpage of the Constitutional and Mainland Affairs Bureau: http://www.cmab.gov.hk/en/issues/code_of_practice.htm

²⁷ The Sexual Minorities Forum was established in September 2004 to provide a regular and formal channel for non-governmental organisations and the Government to exchange views on issues concerning sexual minorities in Hong Kong. The Forum was discontinued in June 2013, while the Advisory Group was set up at the same time.

2.7 In 2005, the Court of First Instance held in *Leung TC William Roy v Secretary for Justice*²⁸ that provisions in the Crimes Ordinance which prohibited buggery or an act of gross indecency involving two males if one or both were aged under 21 were discriminatory on the ground of sexual orientation and hence unconstitutional. The court held that section 118H²⁹ of the Ordinance was discriminatory because heterosexual and lesbian couples having reached the age of 16 were permitted by the law to engage in acts of sexual intimacy, but section 118H did not permit gay couples to engage in the same conduct until they were 21. The court also held that section 118C³⁰ of the Ordinance was discriminatory because when under-age homosexual buggery took place, both men were made criminally liable, whereas under section 118D which prohibited buggery with a woman aged under 21, only the man in under-age heterosexual buggery but not the woman was criminally liable. An appeal against the Court of First Instance's ruling on the constitutionality of section 118C³¹ was dismissed by the Court of Appeal for the reason that no evidence had been given to explain why the minimum age requirement for buggery was 21 whereas for sexual intercourse between a man and a woman, the age of consent was only 16.

2.8 In 2007, the Court of Final Appeal (“CFA”) held in *Secretary for Justice v Yau Yuk Lun*³² that the provision of the Crimes Ordinance against homosexual buggery committed not in private was discriminatory on the ground of sexual orientation and was unconstitutional. The CFA noted that all persons, irrespective of sexual orientation, were subject to the common law offence of committing an act outraging public decency. However, homosexuals alone were subject to the statutory offence in section 118F(1)³³, whilst heterosexuals were subject to no comparable criminal

²⁸ HCAL No. 160/2004

²⁹ At the time when the judgment was delivered by the Court of First Instance, section 118H provided: “A man who (a) commits an act of gross indecency with a man under the age of 21; or (b) being under the age of 21 commits an act of gross indecency with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.”

³⁰ At the time when the judgment was delivered by the Court of First Instance, section 118C provided: “A man who (a) commits buggery with a man under the age of 21; or (b) being under the age of 21 commits buggery with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.”

³¹ The respondent appealed to the Court of Appeal seeking to set aside the Judge's declarations only in relation to section 118C of the Ordinance.

³² FACC 12/2006, [2007] 3 HKLRD 903, 17 July 2007.

³³ At the time when the judgment was delivered by the CFA, section 118F(1) provided: “A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for five years.”

liability in relation to vaginal intercourse or buggery otherwise than in private. Secondly, there was no genuine need for the differential treatment³⁴.

2.9 In 2009, the Domestic Violence Ordinance was amended to become the Domestic and Cohabitation Relationship Violence Ordinance to provide protection for same-sex cohabitants as well.

2.10 In 2013, The Court of Final Appeal held in *W v The Registrar of Marriages*³⁵ that in addressing the question of whether an individual like the appellant qualifies as “a woman” so as to be entitled to marry a man, the Court ought in principle to consider all the circumstances – biological, psychological and social – relevant to assessing that individual’s sexual identity at the time of the proposed marriage. In that case, the Court held that a post-operative male-to-female transsexual person in the appellant’s situation, who has gone through full sex reassignment surgery and was issued with a new Hong Kong Identity Card and passport stating her sex as female, should be eligible to marry a man.

Fact-finding and Collection of Views

2.11 Having taken stock of the aforementioned major developments and the latest situation, the Advisory Group saw the need to identify in what specific aspects sexual minorities were discriminated against and the extent of such discrimination, before consideration could be given as to what targeted measures should be formulated. The Advisory Group therefore recommended that a study on these issues should be conducted, and rendered advice on how such a study should be conducted.

2.12 In parallel, the Advisory Group considered the findings of a desktop research on the experience of some other jurisdictions in tackling discrimination on grounds of sexual orientation and gender identity. The Advisory Group also rendered advice on a number of public education and publicity measures to promote non-discrimination. In addition, the Advisory Group met with different sexual minority groups, family values and religious groups as well as other concern groups to listen to their views and concerns on the subject.

2.13 The Advisory Group’s work in fact-finding and collection of views is explained in more detail in the ensuing paragraphs.

³⁴ Paras 23 to 30 of the judgment

³⁵ FACV No. 4 of 2012

I. Study on discrimination experienced by sexual minorities in Hong Kong

Objective, scope and methodology

2.14 The Advisory Group decided that a study should be carried out with a view to helping ascertain, inter alia, whether sexual minorities are discriminated against in Hong Kong and, if so, the discrimination they experience; specifically:

- (a) in what aspects or domains they experience discrimination;
- (b) in what ways, i.e., the forms of discrimination;
- (c) in what areas the respondents require support and/or redress , given these experiences; and
- (d) whether the respondents have attempted to seek redress and/or assistance from different bodies and, if not, the reasons for not doing so.

2.15 The Advisory Group rendered advice on how the study should be conducted, including the study objectives, methods to recruit participants, ways to obtain information from participants, and the discussion guide. Upon such advice, Policy 21 Limited (“the consultant”) was commissioned by the Constitutional and Mainland Affairs Bureau (“CMAB”) to conduct the study (“the Fact-finding Study”) after a tendering exercise.

2.16 Having regard to the Advisory Group’s advice, the consultant recruited a total of 214 sexual minority participants (including lesbian, gay, bisexual, transgender, post-gay and intersex participants) from diverse socio-economic backgrounds. The participants were recruited through sexual minority networks and communities, open recruitment, and referrals by participants (i.e., “snowball sampling”).

2.17 A qualitative method was adopted to provide in-depth understanding of the experiences of sexual minorities. The consultant met with the 214 participants between March 2014 and September 2014 and obtained information from them through either focus group discussions or one-to-one interviews.

Limitations

2.18 While the qualitative approach could provide ample scope for obtaining in-depth responses by participants on their experiences, the limitations of the approach were also acknowledged. The views from sexual minority participants were the single source of qualitative data of the

Fact-finding Study, and the experiences mentioned were cited based on their perceptions without a requirement to produce concrete evidence or verification with other relevant parties. In addition, the Fact-finding Study used a non-random sample comprising a limited number of participants, hence it was not meant to be a statistically representative sample to illustrate the extent of the experiences. The findings therefore cannot be extrapolated to wider populations or form the basis for any general conclusion to be drawn regarding the sexual minorities population at large in Hong Kong. Nevertheless, efforts have been made to collect views of the sexual minorities from diverse backgrounds as far as possible.

Key findings

2.19 The report of the Fact-finding Study is at **Appendix C**. Cases of discrimination³⁶ against the sexual minorities were reported in four public domains, namely, employment; education; provision of goods, facilities and services; and disposal and management of premises. The discrimination encountered took the form of harassment (unwelcome verbal conduct primarily, but acts of unwelcome physical conduct were also reported) and direct discrimination. The participants of the Fact-finding Study who encountered discrimination are commonly of the view that one of the major causes of discrimination is that the “discriminators” lacked sensitivity in relation to issues related to sexual orientation and gender identity. Relevant findings of the Fact-finding Study in respect of the different domains are summarised below:

- **Employment:** Slightly less than half of the participants (72 out of the 180 participants who had work experience in Hong Kong) indicated that they had encountered discrimination. Some participants (59) encountered unwelcome verbal conduct (a form of harassment) in the workplace. A few participants (6) suffered sexual harassment verbally or physically by their employers or co-workers. A few participants (10) reported

³⁶ The reported discrimination experiences, if any, were recorded by the consultant under the following categories of forms of discrimination: direct discrimination (i.e., a person is treated less favourably than another person with a different sexual orientation or gender identity); indirect discrimination (i.e., a condition or requirement is applied to everyone but in practice adversely affects persons of a particular sexual orientation or gender identity); harassment (i.e., a person is subjected to unwelcome verbal or physical conduct on grounds of their sexual orientation or gender identity); and vilification (any activity in public that incites hatred towards, serious contempt for, or severe ridicule of, a person or persons because of their sexual orientation or gender identity). Such a classification is largely in line with the definition of “direct discrimination”; “indirect discrimination”; “harassment” and “vilification” in the existing anti-discrimination ordinances.

experience of direct discrimination, which includes being asked to leave their jobs/denied job offers or being deprived of promotion and training opportunities once their sexual orientation / gender identity was discovered. On the other hand, about half of the participants (108) who had work experience in Hong Kong stated that they had not experienced discrimination in the workplace.

The majority of the participants (140 out of the 180 participants who had work experience in Hong Kong) opined that the major cause of discrimination in the workplace against sexual minorities was that their employers or colleagues lacked adequate and accurate knowledge about sexual orientation, gender identity and related issues.

- **Education:** some of the participants (69 out of 208 participants who had studied in Hong Kong) reported having encountered discrimination in the educational domain. Some of them (58) encountered unwelcome verbal conduct (a form of harassment) in school, while a few encountered unwelcome physical conduct (a form of harassment) (4) and sexual harassment (8). Two participants also reported that they were denied school place offers by theological college, which in their view might constitute direct discrimination³⁷. On the other hand, the majority of participants (139) who had studied in Hong Kong said that they had never encountered discrimination in school, but at the same time it should be noted that the majority of the participants (154) who had studied in Hong Kong chose to conceal their sexual orientations / gender identities in school.

The great majority of the participants who had experienced discrimination at school (61 out of the 69 participants) had not sought assistance from any party. The major reason cited was that they did not know any party that could provide assistance, and they felt that the teachers and social workers were not equipped with adequate knowledge and skills to handle cases of discrimination against sexual minority students. Besides, a small group of participants (21) opined that the lack of relevant knowledge led to misunderstandings or even discrimination. The participants considered that training courses for teachers and social workers should be provided;

³⁷ While there was less favourable treatment for a person with different sexual orientation or gender identity in these cases, the consultant noted that the anti-discrimination laws in some of the overseas jurisdictions provide exemptions for religious schools in relation to their decisions on admission of students.

- **Provision of goods, facilities and services:** some of the participants (85 out of 214 participants) indicated that they had encountered discrimination in this domain. Some of them (45) have encountered unwelcome verbal conduct by the providers of goods, facilities and services. Apart from this, some of the participants reported experience of direct discrimination, which included denial of goods, facilities or services requested (e.g., being denied Valentine's Day menus in restaurant and being denied entry to public toilets) (40) or differential treatment during the provision of goods, facilities or services (e.g., being charged additional deposit for rental in hotel/inn) (6). The remaining 129 participants who made up about half of all the participants expressed that they had not faced discrimination in relation to the use/purchase of goods, facilities and services.

There were two cases of transgender participants being refused provision of social services and medical services in private clinics where the services were specifically for persons of one sex. Such cases might reflect a lack of adequate knowledge about transgenderism among front-line workers. Some of the transgender participants (14 out of the total 37 transgender participants) indicated that doctors and medical staff often lacked good knowledge of transgenderism. There were also reported cases where the participants encountered discrimination by service providers in business sectors, when they were seeking catering services, rental of hotels/inns and retail services. A small group of participants (21) considered that more materials issued by the Government to promote the message of equal opportunities would help prevent discrimination under this domain.

- **Disposal and management of premises:** Many participants had no relevant experience in relation to this domain. Some of the participants (6 out of the 48 participants who had experience in disposal and management of premises) reported having encountered direct discrimination, which included being denied from renting premises (4), and being subjected to less favourable treatment in relation to the rental of premises (2). However, the remaining majority of participants (42) who had experience in disposal and management of premises in Hong Kong had not encountered discrimination in this domain.

The great majority of the participants who had experienced discrimination in relation to the disposal and management of

premises had not sought assistance from any party (5 out of 6 participants who experienced discrimination in relation to the disposal and management of premises). The main reason for not seeking assistance was that they did not know any party that could provide assistance.

- **Other domains:** A few participants reported that they encountered direct discrimination in church (4)³⁸: when their sexual minority identity was discovered in the churches they had joined, they were denied the opportunities to participate in the activities of the churches³⁹. One post-gay participant recalled that he was opposed by a sexual minority organisation when he attended a forum to share his experience where he was subjected to unwelcome verbal conduct.

2.20 To address discrimination against sexual minorities, the majority of participants proposed (a) education in schools and education for stakeholders in different domains; and (b) enacting legislation against discrimination on grounds of sexual orientation and gender identity. Some of the participants proposed the following supportive measures: (c) setting up unisex toilets and changing rooms; (d) enhancing employment resources and counselling services for sexual minorities; (e) providing temporary shelters for sexual minorities. Some of the transgender participants proposed: (f) allowing transgender persons to dress in accordance with their preferred gender at work or at school; and (g) protecting privacy in relation to sex/gender identity (in relation to the use of public services).

II. Desktop research on experience and legislation in other jurisdictions

Objective and scope

2.21 The Advisory Group looked into the findings from a desktop research on the experience in tackling discrimination on grounds of sexual orientation and gender identity in selected jurisdictions, namely, Australia,

³⁸ These experiences were reported during the open-ended session of the focus group discussion and/or in-depth interview on experiences in other domains. As the experiences do not belong to the major domains covered by the study, there was no statistic on how many participants in total participated in church activities.

³⁹ While there was apparently less favourable treatment for a person with different sexual orientation in these cases, the consultant noted that the anti-discrimination laws in some of the overseas jurisdictions provide exemptions for religious organisations in relation to participation in their activities.

Canada, New Zealand, Taiwan, the United Kingdom and the United States. These jurisdictions were selected after considering that they already have some form of legislation enacted, the relative ease of obtaining information about the jurisdiction, and the availability of information in English or Chinese. The desktop research covers the scope of the concerned legislation including the domains and conducts covered, the exceptions / exemptions, relevant litigation / complaint cases, and areas of concern, if these are readily accessible through the online search.

Limitations

2.22 As background, **Appendix D** sets out the statistics of countries / jurisdictions concerning whether they outlaw homosexual activities and whether they have anti-discrimination legislation. The desktop research is focusing on only six jurisdictions with legislation against discrimination on grounds of sexual orientation and gender identity, hence contains limited information about alternative approaches to anti-discrimination legislation, e.g., how jurisdictions without anti-discrimination legislation tackled discrimination against the sexual minorities by administrative measures.

Findings

2.23 The desktop research identified some common features of the legislative measures against discrimination in the jurisdictions studied, as well as a number of issues in their implementation which point to a need for more in-depth studies to inform discussions on formulating proposals for legislation in Hong Kong. The ensuing paragraphs provide an overview of the research findings and the issues identified.

Legislative approaches

2.24 All jurisdictions covered in the research except Taiwan enacted anti-discrimination law in a self-contained piece of legislation, containing some common elements of (a) a delineation of the grounds of discrimination, (b) a number of domains to which the anti-discrimination law is applicable and (c) a delineation of the prohibited conduct(s), with differences in terms of scope and form among the jurisdictions. In contrast, Taiwan does not have a self-contained anti-discrimination legislation: anti-discrimination provisions cover only the domains of education and employment, and are found in separate pieces of legislation, namely, the Act of Gender Equality in Employment, the Employment Services Act, and the Gender Equity Education Act.

Common elements of legislation

2.25 The Advisory Group recognises that the following features are the common elements found in the anti-discrimination legislation in the six jurisdictions:

(a) Grounds of discrimination

In the anti-discrimination legislation studied, it is unlawful to discriminate against someone because of certain personal characteristics. These characteristics are defined as prohibited grounds of discrimination. The anti-discrimination legislation in all the jurisdictions studied contains the ground of “sexual orientation”, with only some of the jurisdictions also covering the ground(s) for transgender people. For the latter, the different pieces of legislation adopt different terminology including “gender identity”⁴⁰, “gender reassignment”⁴¹, and “gender expression”⁴². It is also noteworthy that some jurisdictions do not specify any ground for transgender people⁴³.

⁴⁰ “Gender identity” has different definitions in respective legislation, e.g.,

Australia (Federal) Sex Discrimination Act 1984 (Part I – Section 4): gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth;

Australia (Victoria) Equal Opportunity Act 2010 (Part I – Section 4): (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such) - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such) - (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of that sex; and

Gender Equity Education Act in Taiwan (Article 2(6)): an individual's awareness and acceptance of his or her own gender.

⁴¹ In the UK, defined by the Equality Act 2010 (Part 2 – Section 7) as: a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex

⁴² Ontario (Canada) Human Rights Code. The Code also covers the ground of “gender identity”. Both terms are not defined in the Code.

⁴³ New Zealand Human Rights Act 1993, Canadian Human Rights Act (Federal) (the Canadian Human Rights Tribunal set a precedent in *Montreuil v. the Canadian Forces* in 2009 when it ruled that there is “no dispute that discrimination on the basis of

In the five jurisdictions with a self-contained piece of anti-discrimination legislation, the legislative regime is such that the same piece of legislation also covers other grounds including “age”, “disability”, “race”, “religion or belief”, “sex”, etc.

(b) Domains

The pieces of legislation covered in the research define the areas of public life (i.e., domains) in which discriminatory acts will be unlawful. The categories of domains vary among the jurisdictions, yet some are included by all of the self-contained anti-discrimination legislation covered in the research, namely, employment (or work); education; and premises (or accommodation). Other common domains include provision of goods, facilities and services⁴⁴; and public function^{45 46}.

(c) Prohibited conduct

Direct discrimination and indirect discrimination are prohibited in all of the five jurisdictions with self-contained anti-discrimination legislation⁴⁷. In some of the jurisdictions, the law also prohibits harassment in specified domains⁴⁸, sexual harassment⁴⁹, and victimisation⁵⁰. The anti-discrimination

Transsexualism constitutes sex discrimination as well as discrimination on the basis of a disability.”) and New York (US) Sexual Orientation Non-Discrimination Act

⁴⁴ UK Equality Act 2010; New Zealand Human Rights Act 1993; Australia (Federal) Sex Discrimination Act 1984; Victoria (Australia) Equal Opportunity Act 2010; Canadian Human Rights Act (Federal); and Ontario (Canada) Human Rights Code

⁴⁵ *Ditto*

⁴⁶ It refers to a public function which does not involve the provision of a service. Examples of such public functions include law enforcement and revenue raising and collection.

⁴⁷ In Taiwan, the Act of Gender Equality in Employment, the Employment Services Act, and the Gender Equity Education Act prohibit “discrimination”. “Direct” or “indirect” discrimination is not specified.

⁴⁸ UK Equality Act 2010; Canadian Human Rights Act (Federal); Ontario (Canada) Human Rights Code; and New York (US) Sexual Orientation Non-Discrimination Act

⁴⁹ UK Equality Act 2010; New Zealand Human Rights Act 1993; Australia (Federal) Sex Discrimination Act 1984; Victoria (Australia) Equal Opportunity Act 2010; Canadian Human Rights Act (Federal); Ontario (Canada) Human Rights Code; and the Act of Gender Equality in Employment and the Gender Equity Education Act in Taiwan

⁵⁰ UK Equality Act 2010; New Zealand Human Rights Act 1993; Australia (Federal) Sex

legislation in these jurisdictions does not prohibit vilification or hate crime on grounds of sexual orientation and gender identity. It is noted that such conduct is prohibited by separate criminal provisions in jurisdictions including the UK and Canada.

Exemptions

2.26 The self-contained anti-discrimination legislation in all jurisdictions covered in the research set out a range of specific circumstances where differential treatment on the basis of sexual orientation or gender identity is not unlawful. These are known as exemptions or exceptions. The Advisory Group recognises that exemptions in the following areas are commonly adopted by the jurisdictions which have enacted anti-discrimination legislation.

- (a) Religion: religious requirements in employment / appointment decisions⁵¹; religious solemnisation of marriages⁵²; and other acts by religious bodies^{53 54};

Discrimination Act 1984; Victoria (Australia) Equal Opportunity Act 2010; Canadian Human Rights Act (Federal); Ontario (Canada) Human Rights Code; and the Act of Gender Equality in Employment in Taiwan

⁵¹ UK Equality Act 2010 (Part 1 – Schedule 9 (Paragraph 2); New Zealand Human Rights Act 1993 (Part 2- Section 28); Australia (Federal) Sex Discrimination Act 1984 (Part II – Section 37) ; Victoria (Australia) Equal Opportunity Act 2010 (Part 5 – Section 82); Ontario (Canada) Human Rights Code (Section 24(1)); and New York (US) Sexual Orientation Non-Discrimination Act

⁵² UK Equality Act 2010 (Part 6 – Section 24); and Ontario (Canada) Human Rights Code (Section 18.1)

⁵³ The “other acts” covered in the legislation vary across the selected jurisdictions:

UK Equality Act 2010 (Schedule 23 – paragraph 2): restrictions on membership of the organisation; participation in its activities; the use of any goods, facilities or services that it provides; and the use of its premises;

Australia (Federal) Sex Discrimination Act 1984 (Part II – Section 37(1)(d)): any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.;

Victoria (Australia) Equal Opportunity Act 2010 (Part 5 – Section 82(2)): anything done on the basis of a person's sexual orientation or gender identity by a religious body that (a) conforms with the doctrines, beliefs or principles of the religion; or (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.; and

New York (US) Sexual Orientation Non-Discrimination Act: sales or rental of housing accommodations, and admission to persons of the same religion; giving preferences to

- (b) Employment: employment in relation to provision of domestic or personal services⁵⁵; and crucial or bona fide occupational requirement⁵⁶;
- (c) Premises: shared accommodation⁵⁷;
- (d) Provision of goods, facilities and services: differential treatment in insurance policy⁵⁸;
- (e) Sports: Restriction of participation of transgender people in

persons of the same religion or denomination; and taking "such action as is calculated by such organisation to promote the religious principles for which it is established or maintained."

⁵⁴ Definitions of "religious body" vary among the following jurisdictions, e.g.,

Victoria (Australia) Equal Opportunity Act 2010 (Part 5 – Section 81): (a) a body established for a religious purpose; or (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles;

UK Equality Act 2010 (Schedule 23 – Section 2): an organisation the purpose of which is (a) to practise a religion or belief; (b) to advance a religion or belief; (c) to teach the practice or principles of a religion or belief; (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief, or (e) to foster or maintain good relations between persons of different religions or beliefs. And it does not apply to an organisation whose sole or main purpose is commercial.

US: the definition varies among states, e.g. (i) New York Executive Law § 296(11): "any religious or denominational institution or organisation, or any organisation operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organisation"; and (ii) Wisconsin State Legislature § 111.32(12m) (2011): "an organisation [...] which operates under a creed."

⁵⁵ New Zealand Human Rights Act 1993 (Part 2 – Section 27); Victoria (Australia) Equal Opportunity Act 2010 (Part 4 – Section 24); and Ontario (Canada) Human Rights Code (Section 24(1)(c))

⁵⁶ UK Equality Act 2010 (Schedule 9 – Paragraph 1); and Canada (Federal) (Section 15)

⁵⁷ UK Equality Act 2010 (Schedule 5 – Paragraph 3); New Zealand Human Rights Act 1993 (Part 2 – Section 54); Victoria (Australia) Equal Opportunity Act 2010 Part 4 – Section 59); Ontario (Canada) Human Rights Code (Section 21(1)) ; and New York (US)

⁵⁸ UK Equality Act 2010 (Schedule 9 – Section 20); New Zealand Human Rights Act 1993 (Part 2 – Section 48); and Victoria (Australia) Equal Opportunity Act 2010 (Part 4 – Section 47)

sports activities⁵⁹; and

- (f) Charities: Charities are allowed to provide benefits only to people who share certain personal characteristics including sexual orientation if it is justified, e.g. charity services exclusive to homosexuals or heterosexuals⁶⁰.

Issues identified as requiring further study – (1) Definition of “gender identity”

2.27 “Gender identity” is a relatively new ground in the anti-discrimination legislation of jurisdictions covered in the desktop research. While “gender identity” is defined in the anti-discrimination legislation of some of the jurisdictions studied as discussed in paragraph 2.25 above, concerns have been raised over the subjectivity of definitions of “gender identity”. In 2013, when the Congress in the US introduced the Employment Non-discrimination Act (“ENDA”) which covered the ground of gender identity, defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth”, some expressed concern that the subjective definition could lead to abuse. Some commentators queried the creation of rights for individuals claiming to be transgender persons to act in ways in conflict with the interests of other people in the workplace, and the prohibition on employers from considering the consequences of the individuals’ behaviour⁶¹. In Canada, an attempt by a Member of Parliament to add “gender identity” and “gender expression” to the list of prohibited grounds of discrimination in the Canadian Human Rights Act was met with concerns that the bill would allow men access to women’s washroom facilities and open a door to sexual predators^{62 63}.

⁵⁹ UK Equality Act 2010 (Part 14 – Section 195); New Zealand Human Rights Act 1993 (Part 2 – Section 49); Australia (Federal) Sex Discrimination Act 1984 (Part II – Section 42); and Victoria (Australia) Equal Opportunity Act 2010 (Part 4 – Section 72)

⁶⁰ UK Equality Act 2010 (Part 14 – Section 193); New Zealand Human Rights Act 1993 (Part 7 – Section 150); Australia (Federal) Sex Discrimination Act 1984 (Part II – Section 36); and Victoria (Australia) Equal Opportunity Act 2010 (Part 5 – Section 80)

⁶¹ Source: (i) “ENDA, explained” published in the Washington Post on 4 November 2013; and (ii) “ENDA Threatens Fundamental Civil Liberties” issued by The Heritage Foundation 1 November 2013.

⁶² Source: “MP Rob Anders takes aim at transgender rights ‘bathroom bill’ proposal” published by the National Post in Canada on 4 October 2012

⁶³ The bill was passed by the House of Commons of Canada in 2013 and was being scrutinised by the Senate of Canada as of November 2015. The status of scrutinisation can be tracked from the website of the Parliament of Canada (<https://openparliament.ca/bills/41-1/C-279/>).

Issues identified as requiring further study – (2) Concerns surrounding the application of exemptions

2.28 The self-contained anti-discrimination legislation in all the jurisdictions covered by the desktop research provides exemptions for religious bodies (as summarised in paragraph 2.26(a) above), and the scope of the exemptions varies across the jurisdictions. For instance, while the religious requirements in employment / appointment decisions are commonly covered by the jurisdictions, the legislation studied in Australia also broadly cover “other acts” by a religious body that conform to and/or promote the religious doctrines⁶⁴.

2.29 Though specific exemptions are 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, concerns and uncertainties have arisen as to the application of these exemptions, as no commonly recognised criteria have emerged in the jurisprudence on reconciliation of competing rights when such conflicts arise. Court decisions on the scope of activities which can be undertaken following religious doctrines under the exemption provisions have been highly contextual, dependent on the specific circumstances of each case and do not readily lend themselves to generalisation. Examples of such cases are set out below. They are not exhaustive and aim to illustrate that exemptions applicable to religious bodies were upheld by the court in some instances but not so in others.

- A resort operated by an organisation with Christian background in Victoria, Australia refused a booking for a programme targeted at same-sex attracted young people. The court ruled that the organisation could not rely on the exemptions for bodies established for religious purposes, in consideration, inter alia, that it provided camping facilities to both secular and religious groups⁶⁵;
- The owner of a printing company in Ontario, Canada refused to provide services to a sexual minority organisation on the basis that the service would be in conflict with his religious beliefs. The court noted that the further an activity was from the core elements of the freedom, the more likely the activity was to impact on others and the less deserving the activity was of

⁶⁴ See Footnote 53

⁶⁵ *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* (2014)

protection. While the court ruled that the owner lost the case, the court acknowledged the possibility of a different result in a different context, for example where the content of the materials being printed might more directly conflict with the core elements of the owner's beliefs⁶⁶;

- In a case in New Zealand⁶⁷, the plaintiff brought proceedings on the basis of discrimination following the church's refusal to consider him for ordination as he was in an unmarried same-sex relationship which was against the doctrine of the Bishop of Auckland. The claim failed as it was ruled that the relevant exception of the law was to preserve the institutional autonomy of organised religions in relation to their decisions concerning the appointment of clergy;
- A Christian operator of a community living residence in Ontario, Canada was not allowed to require its workers to sign a Lifestyle and Morality Statement which identified homosexual relationships as inappropriate behaviour⁶⁸;
- In a case in British Columbia, Canada⁶⁹, the court considered whether graduates of a private Christian university, which required its students to abide by certain "community standards" which prohibited "homosexual activity", should be licensed by a college of teachers to teach in the public school system. The college of teachers argued that it was justifiably concerned about a risk that as teachers, graduates of the Christian university would discriminate on the basis of sexual orientation. The court found no concrete evidence that holding such beliefs in relation to "homosexuality" would result in actions by those graduates that would be discriminatory, and that the college of teachers was wrong in rejecting those graduates⁷⁰.

⁶⁶ *Brockie v Brillinger (2002)*; In this case, no relevant exception was provided in the legislation. The appellant (i.e., the owner) sought declarations by the court that the Ontario Human Rights Commission was unconstitutional "in failing to provide a defence of bona fide conscience or religious exemption..." This claim failed.

⁶⁷ *Gay and Lesbian Clergy Anti-Discrimination Society v Bishop of Auckland (2013)*

⁶⁸ *Ontario Human Rights Commission v Christian Horizons (2010)*; the court emphasises that "an employer who wants to rely on a bona fide occupational qualification exception in human rights legislation must prove a direct and substantial relationship between the job's qualifications and the abilities and qualities needed to satisfactorily perform the particular job."

⁶⁹ *Trinity Western University v British Columbia College of Teachers (2001)*

⁷⁰ The court opined that "...although the college was right to evaluate the impact of the

2.30 The desktop research also touched on controversies during the legislative process when exemption provisions were drawn up. In Australia, soon after the Victorian Government passed the Equal Opportunity Act 2010 to, inter alia, narrow the scope of the “religious bodies” exception⁷¹, such a change was reversed in 2011 by the government of the next term, which was of the view that the reduced scope of exceptions would undermine religious freedom, with adverse impact on faith-based schools and parents who wanted religious education for their children⁷².

III. Meetings with stakeholders groups

2.31 To ensure that different viewpoints and concerns of different sectors in the community are taken into account when considering and formulating recommendations to the Government, the Advisory Group has met stakeholder groups including the New Creation Association (“NCA”), Post Gay Alliance (“PGA”), Diocesan Committee for the Pastoral Care of Persons with Same Sex Attraction, Family School Sexual Orientation Discrimination Ordinance Concern Group (“Concern Group”), Kowloon Union Church (“KUC”) and Queer Theology Academy (“QTA”) and the Equal Opportunities Commission (“EOC”) to exchange views with them.

2.32 During these exchange sessions, some representatives shared with the Advisory Group the discrimination or difficulties faced by sexual minorities in Hong Kong and their views on support services they needed as well as legislating against discrimination on the grounds of sexual orientation and gender identity.

2.33 The Advisory Group noted in particular that stakeholder groups held divergent views over the issue of whether legislation should be enacted to prohibit discrimination on the ground of sexual orientation. The EOC, KUC and QTA support the enactment of legislation to protect sexual

Christian university’s admission policy on the public school environment, it should have considered more. The Human Rights Code, R.S.B.C. 1996, c. 210, specifically provides for exceptions in the case of religious institutions...”

⁷¹ I.e. discrimination in employment of religious bodies could only be justified if the possession of a particular attribute was an inherent requirement of a role.

⁷² Source: (i) “How Victoria's Equal Opportunity Act has changed over time” published by the Victorian Equal Opportunity and Human Rights Commission on its website, accessible (as at December 2015) at:

<http://www.humanrightscommission.vic.gov.au/index.php/about-us/item/572-howvictorias-equal-opportunity-act-has-changed-over-time>; and (ii) “Religious groups to regain bias rights” published by The Age Victoria on 13 February 2011

minorities on grounds of the principles of diversity, inclusion and equal opportunities. The KUC and QTA saw the need for legislation as they were aware that among their service users who are sexual minorities, some encountered struggles or discrimination (such as losing one's job upon disclosure of sexual orientation or gender identity; and being asked by the school that was run by a church to change one's sexual orientation). The KUC opined that while legislation could not resolve all problems in the private domain, it could serve as an educational tool and instill a value in society. KUC was also of the view that there were different views among Christian churches as to how the Bible should be interpreted regarding homosexuality and whether legislation should be enacted to prohibit discrimination on the ground of sexual orientation; while some Christians supported equal rights for sexual minorities, many churches were in general concerned about the impact of the legislation on religious freedom and freedom of education.

2.34 On the other hand, the other stakeholder groups (e.g., Concern Group, NCA and PGA) expressed concerns about the impact of enacting such legislation on different aspects of human rights including the freedom of religious beliefs and freedom of speech. The areas of concern raised include the following:

- (a) the anti-discrimination legislation would jeopardise the freedom to teach traditional family values in schools. Overseas experiences had revealed that tackling the problem through legislation was a disproportionately excessive move. Family values would be under attack and cases of “reverse discrimination”⁷³ would emerge;
- (b) there would also be implications on procreation and children's development, which might be sacrificed when the institution of marriage was undermined and homosexual couples would have a right of adoption to be allowed by the legislation ;
- (c) whether to enact legislation was a very sensitive and controversial issue. It was necessary to take into account the local culture and public sentiments; and
- (d) there would be a chilling effect on freedom of speech. Even without such legislation in place in Hong Kong, the current social atmosphere in Hong Kong was already hostile to people

⁷³ “Reverse discrimination” in this report refers to alleged unfair treatment to those who disapprove of homosexual behaviour or disagree with the agenda of homosexual movements in support of relevant anti-discrimination legislation or same sex marriage.

who spoke against homosexuality. On the social media, views were already biased against traditional family values.

2.35 The views of the different groups the Advisory Group has met are set out in detail at **Appendix E**.

IV. The Government's publicity measures

2.36 The Advisory Group was apprised that the Government had been implementing various publicity measures to promote equal opportunities on the grounds of sexual orientation and gender identity. These measures target at the general public and the employment field, including broadcasting Announcements in the Public Interest ("APIs"); launching poster campaigns at government venues and public areas, organising various competitions as well as briefings and seminars on the Code, etc.

2.37 To help enhance the Government's promotional effort, the Advisory Group rendered advice on (a) the key messages to be included in the first-ever series of API on television (and associated radio API and poster) to promote the message of non-discrimination against and equal opportunities for people of different sexual orientation and transgender people launched in end-2013; and (b) a campaign to appeal to employers in Hong Kong to adopt the Code.

2.38 For the series of API launched in end-2013, the Advisory Group has advised the following:

- (a) the API should deliver the messages (i) everyone is born equal, irrespective of his/her sexual orientation; and (ii) no person should discriminate against another person because that other person has a different sexual orientation or gender identity;
- (b) the API should avoid giving the impression that currently widespread discrimination against sexual minorities existed in Hong Kong;
- (c) the API should avoid persuading people to support homosexuality as there was a clear distinction between not discriminating against people who were homosexuals on the one hand, and supporting homosexuality on the other;
- (d) if possible, the API should help correct the misconception of equating a person who did not support homosexuality as one

who would discriminate against homosexuals; and

- (e) the concept of equal opportunities should be included in the messages for the API.

2.39 This was the first time a television API on this subject was produced. Other than on television and radio, the API has also been broadcast and the poster displayed on various other platforms, such as on the Internet, on public transport and in government venues. Pictures of the final products of the API and poster, which have incorporated the Advisory Group's views, are at **Appendix F**.

2.40 On the promotion of the Code, after incorporating the views of the Advisory Group, a campaign to promote the Code commenced in September 2013. The Government wrote to the top management of public sector bodies and leading private sector corporations/companies to appeal for their adoption of the Code, as well as to major chambers of commerce to enlist their assistance in promoting the Code to their members. The Advisory Group subsequently further advised to publish the list of organisations that have pledged to adopt the Code for public reference. The list was first made public in August 2014 with feature articles published in local newspapers (**Appendix G**). As at end November 2015, over 145 organisations in the public and private sector have pledged to adopt the Code; the list of these organisations is available at CMAB's website⁷⁴.

⁷⁴ http://www.cmab.gov.hk/doc/issues/Bilingual_List_of_Organisations.pdf