

Chapter 3 - Deliberations and Recommendations

3.1 In formulating strategies and measures to tackle discrimination against the sexual minorities, the Advisory Group has considered the information and views collected through its work as introduced in Chapter 2, namely the qualitative Fact-finding Study on the discrimination experienced by sexual minorities in Hong Kong; the desktop research on the experience of six other jurisdictions in tackling discrimination on grounds of sexual orientation and gender identity; the views and concerns expressed by stakeholder groups; and the Government's public education and publicity measures.

3.2 The Advisory Group acknowledges the experience of discrimination as reported in the Fact-finding Study, and supports introducing strategies and measures to tackle discrimination. Members however had divergent views on how the problem could be addressed, in particular, whether legislation should be enacted to prohibit discrimination on the ground of sexual orientation and gender identity.

3.3 Members who support legislation consider that legislation was necessary as a deterrent of discrimination and means of public education, since the Fact-finding Study reveals cases of discrimination in different domains. These members note the strong concerns over implications of legislation on freedom of religious beliefs and speech, and opine that this may be addressed by providing exemptions in legislation. Some are of the view that the Government has a responsibility to enact sexual orientation discrimination legislation under Article 39 of the Basic Law, as well as ICCPR and ICESCR.

3.4 Members who oppose legislation are of the view that such legislation may unreasonably restrict the freedom of religious belief and the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions, which are protected by Article 32 of the Basic Law and Article 18(4) of the ICCPR respectively. They are concerned that the exact scope of religious exemptions is hard to define, and the reliance on exemptions may imply that the exempted acts are wrong in principle though tolerated by the legislation. Some suggest that the legislative approach should be considered only after administrative measures have been implemented and proved ineffective.

3.5 The Advisory Group also acknowledges the polarised views of stakeholders on this matter, which have been raised at meetings of the Advisory Group with different stakeholder groups (reported in paragraphs 2.33 – 2.34 above).

3.6 Given the complexity and sensitivity of the issues involved, Members reached a consensus after deliberation that a further study on the experience of legislative and non-legislative measures in other jurisdictions should be conducted to inform future consultation regarding measures to eliminate discrimination on grounds of sexual orientation and gender identity, and in parallel, the Government should tackle discrimination by strengthening various administrative measures. The Advisory Group recommends the following five areas of strategies and measures:

- (a) training and resources for personnel in specific fields;
- (b) a charter on non-discrimination of sexual minorities;
- (c) enhanced publicity campaign;
- (d) review and reinforcement of support services to address the specific needs of sexual minorities; and
- (e) further study on the experience of legislative and non-legislative measures of other jurisdictions to inform future consultation regarding both legislative proposals and administrative measures to eliminate discrimination on grounds of sexual orientation and gender identity.

3.7 The recommended strategies and measures are explained in the ensuing paragraphs.

- (a) Training and resources for personnel in specific fields; and**
- (b) Charter on Non-discrimination of Sexual Minorities**

3.8 In the Fact-finding Study, cases of discrimination against the sexual minorities were reported in four public domains, namely, (i) employment; (ii) education; (iii) provision of goods, facilities and services; and (iv) disposal and management of premises. The discrimination encountered mainly took the form of harassment (unwelcome verbal conduct primarily, but isolated reports of unwelcome physical conduct were also collected) and direct discrimination. As mentioned in paragraph 2.19 in Chapter 2, the participants of the 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.

3.9 The Advisory Group acknowledges the need to raise the sensitivity of various service providers and professionals towards the sexual

minorities. After collecting preliminary views from groups of professionals concerned, the Advisory Group suggests introducing:

- (a) training resources with focus on sensitivity towards sexual minorities for teachers; medical practitioners, associated professionals and frontline workers in hospitals and clinics; social workers; and human resources professionals, who have been identified by the Fact-finding Study as the professional groups having more direct interactions with sexual minorities (as explained in paragraphs 3.10 to 3.17 below); and
- (b) a charter on non-discrimination of sexual minorities to be drawn up for voluntary adoption by employers; schools; providers of goods, facilities and services; and landlords / agents in charge of disposal and management of premises (“the Charter”), which aims at enhancing sensitivity and friendliness towards people with different sexual orientations and transgender people in the respective domains (as explained in paragraphs 3.18 to 3.27 below).

Training and resources for personnel in specific fields

Contents

3.10 The Advisory Group recommends that the following contents should be covered by the sensitivity training for teachers; medical practitioners, associated professionals and frontline workers in hospitals and clinics; social workers; and human resources professionals⁷⁵:

- (a) generic contents applicable to all aforementioned personnel:
 - (i) understanding of fundamental concepts about sexual orientation and gender identity; different categories of sexual orientation; and GID or gender dysphoria;
 - (ii) struggles and concerns of the sexual minorities in daily life, such as issues in “coming out” or disclosure of their sexual orientation or gender identity, healthcare and support services needed, risks and impact of homophobic bullying, and health concerns arising from homosexual behaviour and GID; and

⁷⁵ The Advisory Group has, through the Secretariat, gathered views from a number of teachers, healthcare professionals and social workers before formulating the recommendation.

- (iii) promotion of equal opportunities for people of different sexual orientation and transgender people, as well as the values of mutual respect between sexual minorities and other people (including those who disagree with homosexuality) and inclusiveness (e.g., the need for and benefits of maintaining a sexual minority-friendly environment).

(b) Domain-specific contents:

- (i) sharing of possible discrimination cases in respective domains;
- (ii) skills in handling service recipients who belong to the sexual minorities in the relevant contexts, such as counselling sexual minority students in schools; accommodating transgender employees undergoing real-life experience in the workplace; and providing service to transgender and intersex patients in hospitals/clinics; and
- (iii) sources of further information and advice one may consult if needed in the handling of complicated cases.

The Advisory Group considers that the above contents should be objective and informative, with the goal of enhancing the concerned personnel's understanding of the subject matter and facilitating their handling of cases that involve sexual minorities.

Development and implementation

3.11 As the proposed contents involve in-depth and cross-disciplinary knowledge, the Advisory Group recommends that the development of training resources should be commissioned to an institution with expertise in social service, gender / sexual orientation research, psychology and education. Members agreed that the deliverables should contain no stance on the issues of same-sex marriage and legislation against discrimination on grounds of sexual orientation and gender identity.

3.12 The Advisory Group also notes that the delivery mode of training (e.g., workshops or self-learning modules) should be tailor-made to match the needs of different professions. During the development stage of the training resources, representatives of the respective personnel should be consulted on the optimal and preferred delivery modes, notably in how the training may fit into the existing training frameworks of respective

professions⁷⁶.

3.13 The Advisory Group considers that it is important to ensure the utilisation and effectiveness of the sensitivity training. The training, when developed, should be promoted extensively to the target audience and be incorporated into the regular training programme (e.g., pre-qualification courses or induction training for new recruits and continuing education programmes) of the professions concerned. In addition to the aforementioned professional groups identified by the Fact-finding Study as having more direct interactions with sexual minorities, the sensitivity training should also be promoted and introduced to employees of the Government.

3.14 The training could also be publicised through the Government's public education programmes with a view to enhancing public awareness of the initiative.

Evaluation

3.15 Evaluation should be conducted on a regular basis to assess the effectiveness of the sensitivity training, i.e., whether the training goal of enhancing the concerned personnel's understanding of the subject matter and facilitating their handling of cases that involve sexual minorities could be met, and to identify any room for improvement. This could be achieved through surveys to collect users' opinions.

3.16 Utilisation of the training should also be reviewed on a regular basis. While the ultimate goal is to reach out to all personnel in the respective fields, practicable interim targets on the annual rate of participation in the training should be set taking into account the corresponding delivery mode of the training, as well as views from representatives of the respective professions. For instance, quantitative targets may be set for the percentage of practitioners reached or the number of training sessions organised per year.

3.17 The Advisory Group recommends regular review and publication of these quantitative targets with a view to ensuring the utilisation of the training resources.

⁷⁶ It has been suggested that training for teachers would best be delivered through voluntary workshops, whereas healthcare professionals may prefer written guidelines or information notes.

Charter on Non-discrimination of Sexual Minorities

3.18 The Advisory Group recommends that the Government should draw up a Charter for voluntary adoption by employers; schools; providers of goods, facilities and services; and landlords / agents in charge of disposal and management of premises, which aims at enhancing sensitivity and friendliness towards people with different sexual orientations and transgender people in the respective domains.

3.19 By pledging to adopt the Charter, the organisations concerned would commit to adopting non-discrimination policies (i.e., that discrimination, harassment and vilification of employees, students, customers, buyers / tenants of premises with different sexual orientation and gender identity are not permitted). Possible areas to which the non-discrimination policy would apply may include the following:

- (a) Employment: recruitment; terms and conditions of employment, benefits, facilities and services; appraisal, promotion, posting and training; and dismissal;
- (b) Education: admission; assessment of performance; and discipline and dismissal;
- (c) Provision of goods, facilities and services: staff behaviour; design of products and facilities (including toilets / changing rooms); and marketing and other communications; and
- (d) Disposal and management of premises: selling, letting or subletting a property; and the advertisements concerned.

3.20 Other commitments in the Charter may include:

- (a) To issue a clear policy statement that discrimination, harassment and vilification on grounds of sexual orientation and gender identity will not be permitted, and to assign responsibility for giving effect to the policies to a member of senior management;
- (b) To monitor implementation and review the policies regularly;
- (c) To provide training for their staff involved in relevant operations and human resources staff on the non-discrimination policies, including both existing staff and new recruits; and
- (d) To establish internal grievance procedures to deal with complaints.

3.21 The Charter should provide definitions on key concepts such as

sexual orientation, gender identity and discriminatory acts (including discrimination, harassment and vilification) and cover special circumstances where differential treatment could be justified⁷⁷.

3.22 The Charter, once launched, may replace the Code. Organisations which have already adopted the Code will be invited to pledge adoption of the Charter.

Development

3.23 The Charter could be drawn up by the Government with reference to similar charters or codes of practice already developed in other jurisdictions⁷⁸, taking into account the local context.

3.24 During the development stage, stakeholders of the domains concerned, as well as sexual minority service users should be consulted on what aspects should be covered by the Charter, and any concerns of employers; schools; providers of goods, facilities and services; and landlords / agents in charge of disposal and management of premises over the implementation of the Charter.

3.25 The Advisory Group notes the potential misperception that the adoption of the Charter is mandatory. The Advisory Group also acknowledges that the application of the Charter to the domain of education is relatively more sensitive among the domains, as schools with a religious background may have concerns about possible conflicts between the requirements of the Charter and their religious doctrines. The Advisory Group recognises that a very substantial proportion of school enrolments in Hong Kong are in schools with a religious background⁷⁹. In view of the above, the Advisory Group suggests that the Charter should emphasise that adoption is voluntary, and that the drafting of the Charter should make

⁷⁷ For example, two special circumstances are set out in the existing Code, i.e., “(a) employment in the domestic environment, particularly where the employee is required to live in the employer's home. The Government firmly upholds the principle of equal opportunities for all. But it considers that a balance must be struck between that right and the right of individuals to determine who may enter or live in their homes; or (b) the job entails the performance of duties entirely or substantially outside Hong Kong, particularly in countries where the laws or customs are such that the duties could not, or could not effectively, be performed by the applicant.”

⁷⁸ Such as the “Guidance for service providers about their duties under the Equality Act 2010” developed by the Equality and Human Rights Commission of the United Kingdom

⁷⁹ For example, around 33% of total enrolment of secondary schools is provided by Christian schools, and 18% by Catholic schools. (Source: Table 4.4 of Student Enrolment Statistics, 2014/15 issued by the Education Bureau.)

reference to existing charters promulgated by the Government for voluntary adoption in other policy areas⁸⁰. In addition, for the domain of education, the Charter should apply only to admission, assessment of performance, and discipline and dismissal, and not to the school curriculum.

3.26 The Advisory Group also acknowledges that, as evidenced by the desktop research on other jurisdictions, the inclusion of the ground of “gender identity” into the Charter would be a complicated matter given the difficulties of defining in different contexts which transgender people should be accorded the same treatment as persons of his/her preferred gender⁸¹ while not unreasonably jeopardising the rights to non-discrimination entitled to transgender people. The Advisory Group therefore suggests that the Government should carefully consider the extent to which the Charter could cover transgender people with reference to overseas experience, as well as the interpretation of definition(s) related to transgender people in *W v The Registrar of Marriages*.

Implementation

3.27 The implementation of the Charter should be complemented by public relations programmes, e.g., commendation for participating organisations (also see paragraph 3.31(c) below), as well as regular evaluation to assess the effectiveness and participation rate of the Charter.

(c) Enhanced publicity campaign

3.28 The Government has been pursuing publicity and public education to promote equal opportunities on the grounds of sexual orientation and gender identity, to nurture a culture of diversity, tolerance and mutual respect in the community. As part of the promotional efforts, the Government has produced and broadcast an API and launched advertising

⁸⁰ For example, the Talent-Wise Employment Charter and Inclusive Organisations Recognition Scheme promulgated by the Labour and Welfare Bureau, in collaboration with the Rehabilitation Advisory Committee, the Hong Kong Joint Council for People with Disabilities and the Hong Kong Council of Social Service

⁸¹ “Gender identity” has different definitions in the legislation of different jurisdictions (see Footnote 40) and it appears that the definitions commonly contain an element of subjectivity involving the individual’s own perception or preference.

In addition, “gender identity” is a relatively new ground in the anti-discrimination legislation of jurisdictions covered in the desktop research. The controversies that arose during legislative processes are illustrated in paragraph 2.27 above.

campaigns on different media platforms. The Government has also promulgated the Code and appeals to public and private sector organisations for their adoption of the Code on a voluntary basis.

3.29 In this connection, the Advisory Group has earlier rendered advice on the Government's publicity measures, including what key messages should be adopted since end-2013 for the API on television and radio as well as posters to promote the message of non-discrimination against and equal opportunities for people of different sexual orientation and transgender people. The Advisory Group has also rendered advice on the campaign to appeal to employers in Hong Kong to adopt the Code, as well as publishing the list of organisations that have pledged to adopt the Code.

3.30 Other sources of information considered by the Advisory Group echo the need for enhanced efforts in public education. 20 participants of the Fact-finding Study expressed that stereotypical portrayals of sexual minorities in the mass media had shaped negative attitudes towards sexual minorities in society. They believed that more media exposure of sexual minorities' real situation in Hong Kong could help the public understand them better, and mitigate prejudice towards them⁸²; some representatives of stakeholder groups that the Advisory Group has met also suggested, among other things, that the Government should provide additional resources for public education.

3.31 To further the promotional efforts in this regard, the Advisory Group recommends the Government to carry out an enhanced publicity campaign to promote the message of non-discrimination against and equal opportunities for sexual minorities in the community, to include the following initiatives:

- (a) a new series of API or filmlets targeting the general public to strengthen the promotion of the message on television, radio and other platforms, with emphasis on eliminating discrimination against sexual minorities;
- (b) television and/or radio programmes, such as docu-drama, in collaboration with television/radio broadcaster(s) to help the public understand the real situation of sexual minorities in Hong Kong and mitigate prejudice towards them, and to promote eliminating discrimination against sexual minorities. The production should make reference to real life cases encountered by sexual minorities;

⁸² Para. 4.7.7 of the Final Report at Appendix C

- (c) public relations programmes to commend best practices adopted by public and private sector organisations that have pledged to adopt the Charter as proposed in paragraphs 3.18 – 3.27 above, such as commendation ceremony coupled with press releases and feature articles in widely-circulated news media, in order to further enhance the public awareness of equal opportunities for people of different sexual orientation and gender identity, thereby appealing to more organisations to follow suit in eliminating discrimination; and
- (d) promotion of the GISOU’s hotline for enquiries and complaints relating to sexual orientation and gender identity through more publicity channels. Information on the complaint handling mechanism should be covered in the promotional materials.

3.32 The Advisory Group suggests that the Government should first evaluate the existing publicity measures (including the APIs and promotion of the GISOU) to identify areas for improvement before launching the above initiatives. The evaluation may be conducted in the form of audience research studies targeting members of the general public as well as different stakeholder groups, with a view to gauging public knowledge about and attitudes towards the sexual minorities and learning about their exposure to the current channels of publicity / promotion.

3.33 Based on the evaluation, the Government should draw up both short and long term strategies for future publicity measures targeting different audience groups. The content and channels of publicity should be coordinated to achieve maximum impact.

(d) Review and reinforcement of support services to address the needs of sexual minorities

3.34 Some Advisory Group members from the sexual minority community consider that there are shortcomings in the existing support services for sexual minorities. They comment that the services of some providers, in particular those with a religious background, are considered by some as not sexual minority-friendly and insensitive to the needs of sexual minority users. These Advisory Group members are of the view that sexual minorities have unique circumstances and needs which could not be effectively met by the existing support services in the areas of shelter, counselling and some other services.

Sensitivity of service providers

3.35 In order to address the concern about whether the service providers concerned are sexual minority-friendly, the Advisory Group recommends the provision of sensitivity training for social workers amongst others (see paragraphs 3.10 – 3.17). The service providers should also be encouraged to pledge to adopt the Code and the proposed Charter (see paragraphs 3.18 – 3.27) which will cover the domain of provision of goods, facilities and services. These measures aim at providing assurance that the support services run by different service providers are sexual minority-friendly and meet the clients' needs.

Effectiveness of existing support services

3.36 As regards the comment that the existing support services could not effectively meet the unique circumstances and needs of sexual minorities, the Advisory Group has taken note of the existing policies and services of the Social Welfare Department (SWD) and non-government organisations (“NGOs”) subvented by SWD, which include (a) procedural guidelines for handling domestic violence cases and sexual violence cases; (b) shelter service for individuals and families at risk of domestic violence, facing crisis or in distress; and (c) training for frontline social workers to enhance their understanding of sexual minorities, working skills and sensitivity. The Advisory Group also noted a submission at **Appendix H** from one member which sets out alongside a description of service gaps, proposals to provide a range of support services for sexual minorities through dedicated shelters and community centres.

3.37 The Advisory Group has not taken a position on the issues raised in Appendix H. Nevertheless, noting the views from Advisory Group members from the sexual minority community, the Advisory Group considered that an in-depth review should be taken by the Government in consultation with relevant service providers and sexual minorities with a view to delineating service gaps and improving the effectiveness of the existing support services. The Advisory Group particularly recommends that the existing provision of shelter services and other support services, as well as the need for dedicated shelters and community centres for sexual minorities should be reviewed to identify the services that could meet the needs of sexual minorities and the areas that might need improvement. On the basis of such a review, it could be further considered how support services for sexual minorities could be provided in a dual-track model, i.e., alongside the existing services provided through NGOs and government bureaux/departments, dedicated support services for sexual minorities could be introduced.

3.38 The Advisory Group also suggests that the availability of support services for sexual minorities should be promoted among the sexual minority communities. A comprehensive list of relevant support services can be drawn up in consultation with service providers, to inform potential users.

(e) **Further study on the experience of legislative and non-legislative measures of other jurisdictions to inform future consultation on both legislative proposals and administrative measures to eliminate discrimination on grounds of sexual orientation and gender identity**

3.39 In view of the issues identified and the limitations of the desktop research (as set out in paragraphs 2.22 and 2.27 – 2.30 above), as well as the divergent views among Members on how the discrimination problem should be addressed, i.e. whether through legislative and/or non-legislative measures (as set out in paragraphs 3.2 – 3.4 above), the Advisory Group recommends that a further study should be conducted on the experience of other jurisdictions in tackling discrimination through legislative and non-legislative measures. The findings of the study would form the basis for public consultation on both legislative proposals and administrative measures to eliminate discrimination on grounds of sexual orientation and gender identity.

3.40 The study should cover the following aspects:

- (a) Administrative measures adopted in other jurisdictions to tackle discrimination against the sexual minorities (including whether conciliation to resolve disputes should be the preferred approach), and any empirical data on their implementation, including utilisation of relevant services and facilities, the administrative infrastructure and public expenditure involved, any changes in public attitudes on relevant issues, etc.
- (b) Legislative measures adopted in other jurisdictions to tackle discrimination against the sexual minorities, including –
 - (i) empirical data on their implementation, including the number and nature of disputes settled by judicial or other processes;
 - (ii) definitions of “gender identity” and “sexual orientation” in the relevant legislation, and the threshold of evidence required to establish these grounds for claims;
 - (iii) 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. In particular, the scope and application of exemptions in anti-discrimination legislation should be examined in detail to provide insights on permissible activities under respective exemption provisions;

- (iv) comparative analyses of the different approaches of formulating anti-discrimination laws including those enacted as a self-contained piece of legislation, as separate pieces of legislation targeting different domains, and as specific provisions in various other legislation; and the legislative approach of extending the definition of “sex” under anti-discrimination legislation on the ground of sex to cover sexual orientation. The underlying factors to the adoption of different approaches, and stakeholders’ views on the adequacy of protection and accessibility of remedies should be covered; and
 - (v) controversial issues in other jurisdictions in relation to the legislative measures, including the implications of legislation on freedom of speech, freedom of conscience and freedom of religion; the concerns of different parties such as the legislature, enforcement authorities and stakeholder groups; and public discourse on “reverse discrimination”;
- (c) The study on the areas in (a) and (b) above should cover both jurisdictions which have adopted legislative measures and those which have not done so, as well as jurisdictions in different cultures including those in Asian countries; and
 - (d) The study should provide recommendations on how stakeholders with diverse views could facilitate and participate in public discussion in Hong Kong on both legislative proposals and administrative measures to eliminate discrimination on grounds of sexual orientation and gender identity.

Feasibility Study on Legislating against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status commissioned by the Equal Opportunities Commission

3.41 The Advisory Group notes that the Equal Opportunities

Commission has commissioned the Gender Research Centre of the Hong Kong Institute of Asia Pacific Studies, the Chinese University of Hong Kong, to conduct a feasibility study on legislating against discrimination on the grounds of sexual orientation, gender identity and intersex status, which aims to systematically identify the extent and forms of discrimination experienced by people with different sexual orientation, gender identity and intersex status, including lesbian, gay, bisexual, transgender and intersex people in Hong Kong. It is noted that the study also seeks to explore the feasibility of legislating against discrimination on grounds of sexual orientation, gender identity and intersex status, taking into account the perspectives of sexual minorities and other stakeholders in society.

3.42 The Advisory Group noted that study is in progress and suggests that the Government should take into account the findings of that study when available in taking forward measures to eliminate discrimination on grounds of sexual orientation and gender identity.