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Panel on Home Affairs

Final report of the Subcommittee to study discrimination on the ground of sexual orientation

Purpose

This paper summarizes the deliberations of the Subcommittee to study discrimination on the ground of sexual orientation since its formation.

The Subcommittee

2. The Panel on Home Affairs discussed discrimination on the ground of sexual orientation with concern organizations and the Administration at its meeting on 12 December 2000. Members of the Panel decided at the meeting to set up a subcommittee to follow up the issue of discrimination on the ground of sexual orientation.

3. The Subcommittee comprises four members of the Panel and Hon Cyd HO Sau-lan was elected Chairman. The membership of the Subcommittee is in **Appendix I**. The Subcommittee has submitted its first report on its deliberation to the Panel on Home Affairs for the Panel meeting held on 10 July 2001.

Deliberations of the Subcommittee

Meetings of the Subcommittee

4. The Subcommittee has held seven meetings to discuss discrimination on the ground of sexual orientation in various areas with the Administration and met deputations at two of these meetings. A list of organizations and individuals which/who have submitted their views to the Subcommittee is in **Appendix II**. The Subcommittee's deliberations are summarized in the following paragraphs.

Blood donation

5. Members note that the Hong Kong Red Cross Blood Transfusion Service (BTS) will preclude persons of certain behaviours which carry a relatively higher risk of transmitting infectious viruses from donating blood. A prospective male donor will be advised in the guidelines for blood donation

not to donate blood if he has sex with another man. Some homosexual groups consider that BTS is prejudiced against male homosexuals and the guidelines contain discriminatory element against male homosexuals.

6. BTS has explained that whilst it respects the rights of individuals in the community, it has the responsibility to ensure the safety of blood products in order to prevent the transmission of communicable diseases through blood transfusion. In line with international practices, BTS requests blood donors to undergo a health enquiry screening procedure so that persons of certain behaviours which carry a relatively higher risk of transmitting infectious viruses will be deferred from giving blood. Such “high-risk” behaviours include having sex by a man with another man, injecting oneself with drugs and engaging in commercial sex activities. In fact, the necessity to preclude persons with these “high-risk” behaviours from blood donation has been re-confirmed at the two international conferences of the International Federation of Red Cross held in June 1999 and July 2000 respectively. BTS has stressed that the screening procedure is not intended to discriminate against certain groups of persons, be they are heterosexual, bisexual or homosexual.

7. Members note that it is the recommendation of the Equal Opportunities Commission (EOC) that donor screening should be based on objectively described “high-risk” sexual behaviours and not perceived “high-risk” groups. EOC has also informed members that there is a rising trend in human immunodeficiency virus (HIV) infection from heterosexual exposure. In Hong Kong, the cumulative total of HIV/AIDS cases from heterosexual contact had increased from 46.1% in 1996 to 58.9% in 2000. Correspondingly, transmission through homosexual contact had decreased from 28.3% in 1996 to 19.5% in 2000, and transmission through bisexual contact had reduced from 9.3% in 1996 to about 5% in 2000. The screening procedure which targets it a group of persons engaging in certain activities instead of the behaviours does not secure blood safety. It is because the screening procedure does not call for the awareness that heterosexuals who have been practising unprotected sex may also have a high risk of contracting infectious viruses.

8. Members have suggested BTS to consider carrying out donor screening with emphasis on “high-risk” sexual behaviours rather than on “high-risk” groups. BTS has pointed out that they have considered various alternatives including the EOC’s recommendation. However, it is difficult for potential donors to be certain whether they have unprotected sex during the past 12 months or a longer period. The Administration has assured that the Hospital Authority will continue to monitor international trends, changes and scientific developments in blood safety and will review the health enquiry screening procedure and deferral criteria regularly with a view to ensuring the supply of safe blood to patients in Hong Kong.

9. Members note that BTS has designed a new blood donation registration form to review the suitability of a prospective donor to donate blood. Questions such as “Have you had male-to-male sexual activity?”, “Have you

had a history of drug abuse or ever injected yourself with drugs?” and “Have you ever been given money for sex?” are still included in the registration form. BTS has explained that it is clearly stated in the new blood donation registration form that a “yes” answer to any of the questions will not necessarily result in “deferment of blood donation” i.e. the potential donor being asked not to donate blood for the time being. The nursing staff will decide whether the potential donor can donate blood.

10. Members have expressed concern as to whether the new blood donation registration form is consistent with the Hong Kong Bill of Rights Ordinance (BORO). BTS has confirmed that according to the legal opinion obtained by the Hospital Authority, the new registration form is consistent with BORO. The Department of Justice has also confirmed that the new registration form is consistent with BORO. Members also note that it is the Administration’s view that if the registration form, including all the questions therein, has been designed on objective considerations to elicit information from prospective donors with a view to ensuring the safety of blood products, it will not be inconsistent with BORO.

11. Members appreciate that BTS has the responsibility to ensure the safety of blood products. However, members consider that BTS should strive to refine the wording used in the new blood donation registration form to eliminate any possible discriminatory element against male homosexuals.

Film censorship

12. Some members have queried whether the Film Censorship Authority has applied discriminative criteria in considering advertising materials for films on homosexual relationship submitted for approval. They have pointed out that the poster for the film on lesbian “Better than chocolate” which depicts two naked embracing females was not approved, but those for the films “Lady in heat”, “Conspiracy”, “Love in the river” and “Naked killer 3” which depict same degree of, if not more, nudity were approved.

13. The Administration has explained that section 15K of the Film Censorship Ordinance as amended in 1995 requires advertising materials of Category III films to be submitted to the Film Censorship Authority for approval. As the film “Better than chocolate” and “Lady in heat” are Category III films, their posters are subject to the control of the amended Ordinance. The Administration has stressed that the Film Censorship Authority does not prejudice against homosexuality as it has approved the poster for the Category III film “Lady in heat” for display in public places even though the film is about homosexuality. As regards the films “Conspiracy”, “Love in the river” and “Naked Killer 3”, as they are Category IIB films, there is no need for the relevant advertising materials to be submitted to the Film Censorship Authority for approval. It may be possible that there are more nudity and violence in poster for Category II films, but the Authority would not take action until and unless a complaint is filed from the public.

14. Members note with concern that only advertising materials of Category III films are subject to the regulation of the Film Censorship Ordinance. They consider that there is a loophole in the legislation, i.e., posters for a Category II film can be displayed to the public regardless of its obscenity and indecency. Members also take the view that there is apparently disparity between the standard of the Film Censorship Authority and that of the public.

Medical services

15. The Subcommittee received a submission informing members that medical practitioners had used electro-convulsive treatment (ECT) to cure homosexuality. Noting that ECT is a dangerous treatment which is used for patients with certain severe psychiatric illnesses, members have expressed concern as to whether there is any mechanism to regulate the practice of medical practitioners to provide such treatment or therapy.

16. The Hospital Authority has explained that it is the position of the Administration and the Hospital Authority that homosexuality by itself is not a medical disorder and therefore does not require medical treatment. It is also the view of the Hospital Authority that homosexuality is an orientation that cannot be changed with treatment. Since homosexuality is not an illness, medical practitioners of the Hospital Authority will not use ECT or any other method to treat homosexuality. However, individuals who are disturbed by their sexual orientation may request counselling and require treatment.

17. Members have asked whether the Hospital Authority will recognize prior consent of a homosexual couple authorizing their partner to give consent on his/her behalf for undergoing emergency medical treatment when either one of them is unconscious.

18. The Hospital Authority has explained that as a general rule, medical treatment should not proceed without a patient's consent. Medical staff will seek support for the treatment from the patient's family or persons close to an unconscious patient as appropriate. Although it will be difficult to determine the relative closeness of different persons to the patient, in practice hospitals will ask the patient to register the closest person as next of kin upon admission. The Hospital Authority has suggested that homosexuals should produce evidence of any prior indication of their partners, be it in the form of a power of attorney or a declaration, to the medical staff on duty in case their partners are in need of urgent medical treatment.

19. Members have expressed concern whether educational work to prevent discriminatory attitudes toward homosexual patients among medical staff is adequate. The Hospital Authority has assured members that apart from the established complaints mechanism, it will continue to reinforce education and make use of its patient's feedback system to enhance interpersonal and communication skills of frontline medical staff. The Hospital Authority has

informed the Subcommittee that it conducts various types of workshops and training programmes to enhance the awareness of staff to respect patients' rights and feelings. One of the workshops attended by doctors is the Patient-centred Communication Skills Workshop, which emphasizes on respect, empathy and two-way communication between doctors and patients.

20. Members express appreciation that the positive efforts have been made to prevent discrimination on the ground of sexual orientation in the medical sector. They suggest that the Hospital Authority should continue to heighten the awareness of the need to respect patients' rights and feelings among its staff.

Education

21. Members have expressed concern whether the principle of equal opportunities among people of different sexual orientations has been implemented in education. They have discussed with the Administration the implementation of concepts and values against any discrimination on the ground of sexual orientation in schools and the role of school social workers in handling the issues of homosexuality at schools.

22. Members have queried whether students in all schools will be taught on correct values and attitudes towards schoolmates with a different sexual orientation. The Administration has explained that sexual orientation is part of the sex education curriculum and non-discrimination was a guiding principle in curriculum development. In line with the spirit of school-based management, schools enjoy a high level of flexibility in the selection and planning of curriculum on sex education. They should select topics of sex education based on the interest and needs of their students with reference to a set of syllabus and guidelines on sex education prepared by the Curriculum Development Council. The overall emphasis should be on the cultivation of positive values for students and respect for others. The Education Department (ED) will ensure that teaching on sex education, including topics about sexual orientation, is adequately taught at schools through school inspections.

23. Members note with concern that many secondary schools do not organize classes and discussions on the topic of homosexuality. They have expressed dissatisfaction that as schools enjoy high flexibility in the selection and planning of curriculum, they may not follow the Guidelines on Sex Education in Schools. Members point out that although curriculum reform is introduced and the Guidelines on Sex Education in Schools have been issued, the inertia of schools to teach topics on sexual orientation remains unchanged over the past thirty years. They consider that the role of teachers and principals is crucial in developing human rights and equal opportunities concepts among students. Apart from providing adequate training on sex education for serving teachers and pre-service teachers, the Administration should strive to foster a cultural change among teachers and principals about

teaching topics on sexual orientation. Members stress that the Administration should ensure that the concepts and topics on sexual orientation are taught in every school.

24. At members' request, the Administration has undertaken to conduct a survey on the implementation of values education, including sex education, in 2002-03 school year. The survey will reveal information about the situation in schools and the problems they encounter in promoting these values related curriculum. The Administration has pointed out that the cultivation for respect for others is a core value to be promoted under the current curriculum reform which will be conducive to achieving the aim for eliminating discrimination of any nature. Teacher enhancement programmes and teaching resources will be provided to schools to strengthen its promotion.

Application of the offences of homosexual and heterosexual buggery

25. Members note that sections 118C and 118D of the Crimes Ordinance stipulate that the legal age of consent to homosexual and heterosexual buggery is 21. Under existing legislative provisions, if a man commits buggery with another man under the age of 21, both persons are guilty of the offence of buggery. On the other hand, if a man commits buggery with a girl under the age of 21, only the man is held liable, but not the girl. Members have expressed concern whether the different treatment constitutes discrimination against male homosexuals.

26. Members also note that EOC is of the view that the difference in treatment between the sexes cannot be justified in terms of the objective of the legislation i.e. to discourage blackmail. Sections 118C and 118D of the Crimes Ordinance are therefore incompatible with BORO, as the rights recognized under BORO shall be rights for all without any distinction of any kind or status.

27. Members have requested the Administration to seek legal advice on whether sections 118C and 118D of the Crimes Ordinance are consistent with BORO. The Administration has responded that the provisions are consistent with BORO, and that the differences between the two sections do not contravene the non-discrimination principle under Article 22 of the Hong Kong Bill of Rights, as the difference is justified because a man under 21 who commits consensual buggery with another man is more likely to blackmail the other partner than a female under 21 who commits consensual buggery with a man.

28. Based on the information provided by the Security Bureau, members note that the database system of the Police does not maintain a specific breakdown of statistics on prosecution cases against a man who committed buggery with another man at the age between 16 to 21. However, according to separate records kept, there were two convicted cases of homosexual buggery with a man under 21 under section 118C(a) since 1996, but the victims

in these two cases were below 16.

29. Members are of the view that the principle of non-discrimination on the ground of sexual orientation should not be compromised for the sake of creating a deterrent effect on possible blackmail against male homosexuals by their homosexual partners. In particular, there is no empirical evidence to substantiate the Administration's argument to retain section 118C for the sake of guarding against the possibility of blackmail against the other male partner in consensual buggery. They consider that as the provisions contain a discriminatory element against male homosexuals, the Administration should have consulted the homosexual community as to whether homosexuals want to have such a safeguard in legislation.

Housing

30. Members note that under the existing policy, a person can apply for public housing schemes either on his own, or with his family members, such as spouse, parents, children and siblings. However, family applicants for public housing are required to produce relevant documentary proofs on the family relationships among household members, such as marriage certificate, birth certificate or other legal documents. Members have expressed concern that the existing policy has deprived the rights of homosexual couples to apply for public housing.

31. The Administration has explained that since a homosexual couple cannot get married in accordance with the existing Marriage Ordinance, they will not be able to produce a marriage certificate to prove their marital relationship. The Housing Department will not be able to accord them with family status for the provision of public housing. The Administration has also stressed that such arrangement applies to all applicants including cohabitants who cannot prove their marital status or claim family relationship.

32. Members understand that the Administration's policy in allocation of public housing is not intended or designed to discriminate against anybody including homosexuals. However, in recognition of the fact that there are homosexuals living together as "de facto spouse", the Administration's policy will have the effect of discriminating against homosexuals if they are not provided with an access to public housing. Members urge the Administration to review its public housing policy with a view to addressing the needs of homosexual couples.

33. The Administration has explained that recognizing "de facto marriage" may create loopholes for abuse and administrative problems in ascertaining such claimed relationship. The existing policy which requires applicants for public housing applying with his spouse, parents, children or siblings to produce legal documentation for the verification of their claimed family relationship is designed for the effective use of limited public housing resources. The Administration has stressed that public housing is subsidized

by public funds and priority should be given to family applications in view of a stronger need for family members to live together. If homosexual couples living together for a certain period of time are eligible for public housing, cohabitants and any pair of persons with a similar history will make the same claim.

34. Members are of the view that administrative measures can prevent possible abuses of public housing resources envisaged by the Administration if “de facto spouse” relationship of a homosexual couple is recognized for the purpose of public housing applications. Members consider that the considerations against recognizing de facto marriage should not apply to homosexual couples because they do not have a choice to get married for the purpose of getting a marriage certificate. Without a change in public housing policy or a major amendment to the Marriage Ordinance, “de facto spouse” relationship of a homosexual couple, including those obtaining a marriage certificate issued by a foreign country, will not be eligible for public housing. Members are of the view that it is unfair to homosexuals who should have met the eligibility criteria but their “de facto spouse” relationship is not recognized for the purpose of public housing applications.

Civil service medical benefits

35. Members have expressed concern that de facto spouse of a homosexual civil servant is not entitled to civil service medical benefits. The Administration has explained that the existing eligibility criteria for civil service medical benefits is in line with the monogamous and heterosexual marriage system in Hong Kong which reflects the socio-moral values and family ethics of the community. The Administration has pointed out that if de facto spouses of homosexuals are entitled to the benefits, the Administration would have to extend the same benefits to heterosexual cohabitants. As it is technically not feasible to objectively verify the de-facto spouse relationship of homosexual partners and heterosexual cohabitants, the Administration will encounter immense difficulties to prove the validity of any claim of such a de-facto relationship.

36. Members have suggested that the Administration should make reference to some private organizations which allow employees to nominate beneficiaries who are not their spouses for entitlement to certain benefits under specific conditions. The Administration has responded that under such a system, any persons unrelated to the civil servants may be nominated. Such approach would, however, deviate from the current policy that civil service medical and dental benefits are only extended to nuclear family members. The current policy is necessary to ensure effective use of limited public resources. The Administration does not see sufficient justification, from the perspective of prudent financial management, to extend the scope of the existing eligibility criteria which will continue to be guided by the prevailing marriage system in Hong Kong.

37. Members understand that it is a complex issue if civil service medical benefits are to be extended to homosexual partners of civil servants. They consider that the crux of the matter is whether the Administration will recognize an authentic marriage certificate issued by an overseas jurisdiction for a homosexual couple as documentary proof of the marital status to claim entitlement to civil service medical benefits.

38. The Administration has responded that a monogamous marriage is defined as a marriage which was (if it took place outside Hong Kong) celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed and recognized by such law as involving the voluntary union for life of one man and one woman to the exclusion of all others. It is the legal advice that same sex marriage certificates contracted in overseas countries are not recognized in a Hong Kong court for the purpose of matrimonial proceedings under the Matrimonial Causes Ordinance i.e. the pronouncement of a decree of divorce, nullity, judicial separation or presumption of death and dissolution of marriage or any other order thereunder. The power of a Hong Kong court to make such decree or order is limited to those which relate to a monogamous marriage.

39. Members agree that public resources should be used in a prudent manner. They understand that the current policies relating to civil service medical benefits and eligibility for public housing are formulated on the basis of the prevailing marriage system in Hong Kong which recognizes only monogamous and heterosexual marriages. Any fundamental change to the current policies will require amendment to relevant marriage legislation.

Employment

40. Members note that some homosexual groups have commented that the Employment Ordinance does not provide sufficient protection for employees of a different sexual orientation. The Administration has responded that the Government's policy is that all employees should enjoy equal employment protection under the Employment Ordinance. The Administration has published a "Code of Practice against discrimination in employment on the ground of sexual orientation" to promote self-regulation by employers and employees in workplaces. Employees, regardless of their sexual orientation, may seek redress if they are deprived of their benefits and protection under the Employment Ordinance or the employment contract. Aggrieved employees can approach and lodge their claims at the Labour Department which will provide free conciliation service to assist the employees and their employers in resolving their disputes and reaching a mutually acceptable settlement. Should reconciliation fail, the employees concerned can seek adjudication at the Labour Tribunal or the Minor Employment Claims Adjudication Board depending on the amount of the claim.

Legislation against discrimination on the ground of sexual orientation

41. The Subcommittee met a total of 27 deputations at its meeting on 20 August and 29 November 2001 respectively to discuss various issues of discrimination on the ground of sexual orientation.

42. Some deputations, mostly religious bodies, have expressed objection to legislating against discrimination on the ground of sexual orientation. These deputations have stressed that while they support human rights and equal opportunities principles, individuals should not be deprived of the right to adopt different attitudes towards people with a different sexual orientation, be they based on traditions or religious beliefs. They are of the view that homosexual orientation is probably more a personal preference in sexual life, and existing legislation has already provided adequate protection of the rights of homosexuals. These deputations consider that administrative measures and public education should be implemented to eliminate discrimination against homosexuals in the community.

43. Other deputations, mostly homosexual groups, have expressed support for legislating against discrimination on the ground of sexual orientation. They have stressed that the homosexual community is only seeking equal opportunities and equal treatment, and not special privileges. They consider that the Government should provide adequate educational facilities and venues for homosexual organizations to conduct more programmes and activities for homosexuals. These deputations have stressed that legislation and education are equally important in eliminating discrimination on the ground of sexual orientation. A deputation has suggested that the Government should incorporate the concept of domestic partnership in relevant legislation to protect the rights of people with a different sexual orientation. This deputation considers that incorporation of the concept of domestic partnership in legislation can help Government eliminate the discriminatory elements in various policy areas and legislation.

44. Members note that the Government has conducted studies and consultation on discrimination on the ground of sexual orientation in June 1996. Although over 80% of respondents were opposed to anti-discrimination legislation, members consider that the Government should not make its decision on the basis of majority views. Members have pointed out that many homosexual groups are willing to come forward to express their views and it reflects that society is making progress. They are of the view that it is opportune for the Government to conduct another comprehensive consultation on the issue and specifically solicit views from homosexual groups about the need to legislate against discrimination on the ground of sexual orientation.

Advice sought

45. Members of the Panel are invited to note the deliberations of the Subcommittee as summarized above and follow up the issues raised with the Administration at a future Panel meeting.

Council Business Division 2
Legislative Council Secretariat
17 December 2003

Panel on Home Affairs

**Subcommittee to study
discrimination on the ground of sexual orientation**

Membership list

Chairman	Hon Cyd HO Sau-lan
Members	Hon Emily LAU Wai-hing, JP Hon CHOY So-yuk (up to 20.10.2001 and since 19.10.2003) Hon Michael MAK Kwok-fung (since 21.10.2001 and up to 18.10.2003) Hon Albert CHAN Wai-yip (Total : 4 Members)
Clerk	Miss Flora TAI Yin-ping
Legal Adviser	Mr Stephen LAM Ping-man
Date	19 October 2003

Appendix II

Subcommittee to study discrimination on the ground of sexual orientation

List of organizations/individuals who have made oral representations/submissions to the Subcommittee

(I) *Organizations/individuals who have made representations to the Subcommittee in person*

<u>Organizations</u>	<u>Number of submission(s)</u>
1. Association for the Advancement of Feminism	1
2. Bishop of the Roman Catholic Church of Hong Kong	-
3. Chi Heng Foundation	8
4. Christian & Missionary Alliance Church Union of Hong Kong	1
5. Civil Rights for Sexual Diversities	2
6. Hong Kong Association of Sponsoring Bodies of Schools	-
7. Hong Kong Blessed Minority Christian Fellowship	-
8. Hong Kong Christian Industrial Committee	1
9. Hong Kong Christian Institute	1
10. Hong Kong Church Renewal Movement	1
11. Hong Kong Federation of Catholic Students	1
12. Hong Kong Federation of Education Workers Limited	1
13. Hong Kong Ten Percent Club	1
14. Hong Kong Women Christian Council	1
15. Hung Hom Rhenish Church	1
16. Kau Yan Church, Tsung Tsin Mission of Hong Kong	1
17. Movement Against Discrimination	1
18. Rainbow Action	5
19. Rainbow Fellowship	1
20. Rainbow of Hong Kong	-

<u>Organizations</u>	<u>Number of submission(s)</u>
21. Sterling Light Alliance Church	-
22. Student Christian Movement of Hong Kong	1
23. The Society for Truth and Light Limited	1
24. Tongzhi Culture Society, The Chinese University of Hong Kong	2

Individuals

25. Dr Andy CHIU, Assistant Professor, School of Law, City University of Hong Kong	2
26. Rev FUNG Chi-wood	1
27. Dr Katherine KOT Lam-kat	1

(II) *Organizations/individuals who have made submission to the Subcommittee*

<u>Organizations</u>	<u>No. of submission(s)</u>
28. Equal Opportunities Commission	1
29. Hong Kong Human Rights Monitor	1
30. Hong Kong Sex Education Association	1
31. Hong Kong Women Workers' Association	1
32. Horizons	2
33. Mongkok Baptist Church	1
34. Queer Sisters	1
35. 同志佛教組織 – 同修平台	1

Individuals

A total of 1305 submissions are received by fax or electronic transmission.