



Sexual Orientation Discrimination Legislation – A Position Paper

by Civil Rights for Sexual Diversities

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Introduction

The government has set up a Gender Identity and Sexual Orientation Unit (GISOU) under the Home Affairs Bureau (HAB) to handle complaints of discrimination based on the two grounds and commissioned a 3-person committee to oversee a survey to be conducted in the latter part of 2005 on the public attitudes towards anti-discrimination law for sexual minorities. It is likely that an anti-discrimination bill will be underway should the survey results be positive.

The Sexual Orientation Discrimination (SOD) Bill, if it will ever be drafted, will be based on the existing

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discrimination ordinances, i.e. to cover areas of employment, education, provision of goods, facilities and services. The bill will prohibit direct discrimination, indirect discrimination, harassment, victimization, vilification and serious vilification based on one's sexual orientation. The bill if passed will bind both the private and public sectors. Victims of discrimination may take their complaint to the enforcement body of the law which is likely to be the Equal Opportunities Commission (EOC), a conciliation-based body, or to the court for legal recourse.

Although one cannot tell what will be in the bill, it is envisaged that the structure and contents of the bill will be largely based on existing discrimination ordinances. Due to the uncertainty of the bill, a lot of speculation and fear-mongering has been going on. This paper attempts to answer some of the worries and delineate what is and what is not the consequence of the bill, in light of the model laid down by existing discrimination ordinances and the current mechanism of enforcement. This paper states the position of Civil Rights for Sexual Diversities towards the legislation of the Sexual Orientation Discrimination Bill.

On same-sex marriage

Sexual Orientation Discrimination (SOD) legislation does not seek for and will not result in the legalization of same-sex marriage. A separate reform on marriage law is needed.

Equal Access

SOD legislation only aims at ensuring equal access for everyone regardless of their sexual orientations

(heterosexuals and all sexual minorities) to employment and education opportunities, to facilities, services, professional and social institutions.

Morality is not a basis for legislation

It does not seek and is not based on a uniform opinion in our society towards different sexual orientations. Members of the society hold diverse views towards sexual minorities as much as they hold diverse views on divorce, pre-marital pregnancy, re-marriage and single parenting. However, our existing anti-discrimination laws protect people of different marital, pregnancy and family statuses from being discriminated against, irrespective of community's approval or disapproval of those statuses on moral grounds. It has to be emphasized that morality is not the ground for or against anti-discrimination legislation, rather the prevalence of discrimination is.

Freedom of opinion not proscribed

Members of the society are free to hold on to whatever moral views they may have on sexual minorities as much as people of other statuses. The legislation will not proscribe the freedom of opinion as long as no harm is done to targets of their criticism.

Homosexuality cannot be promoted

Passing of the SDO legislation cannot promote homosexuality as sexual orientation cannot be chosen at will. The enactment of the law is to provide an equal playing field, not to endorse a set of moral values.

International and constitutional obligations

By legislating against sexual orientation discrimination, the government fulfils its obligations to enforce a policy of non-discrimination stipulated under the Basic Law and international human rights conventions to which Hong Kong as part of China is a signatory.

Equal rights, not special rights

The law is to ensure equal rights for sexual minorities, not special rights. It does not aim to implement special measures in the form of "quota-based" mechanism, such as "affirmative action" for sexual minorities. Thus, there is not an issue of "reverse discrimination" as suggested by some of the opponents of the law. It is misleading that some opponents called perpetrators of discrimination the "victims of reverse discrimination". In fact, the narrative of "reverse discrimination" is not a legal concept and has never been upheld in any jurisdiction as a valid ground of objection to anti-discrimination protections. It is nothing but an excuse to justify bigotry. Furthermore, the law will protect people from discrimination of all different sexual orientations, including heterosexuals. People of the dominant sexual orientation are equally protected, which means there will be no "reverse discrimination".

Protection is not based on socio-economic status

Opponents called for protection only for the "under-privileged", not those "privileged" in terms of socio-economic status, suggesting homosexuals as having a higher disposable income, by statistics. First, any statistics collected based on the classification of sexual orientation is

questionable in the extent to which survey subjects are willing to disclose their genuine sexual orientations. Second, even if homosexuals collectively were the well-off members of the society, they should not be excluded from protection. While statistics may have it that men have a higher disposable income than women and single persons than married persons, the anti-discrimination law does not privilege one classification over another. Protection by anti-discrimination laws is not a matter of "charity" but rather one of "equity".

SOD law not vulnerable to abuse

Lastly, there is fear that SOD legislation might be abused because anybody could claim to be homosexual and be immune from dismissal. Although sexual orientation is not patently visible from a person, as much as early-stage pregnancy and single motherhood is not patently clear from appearance, it is the claimant's responsibility to prove that the dismissal was due to his/her sexual orientation, whether the perceived sexual orientation is genuine or not. An analogy will be that a person thought to be HIV+ who was dismissed on such perception is covered by the law irrespective of whether he does carry the virus, although he has to prove the dismissal was caused by his perceived HIV status.

Our Position

Civil Rights for Sexual Diversities are against fear-mongering behind opposition campaigns to sexual orientation discrimination legislation. We believe legislation and education have to be both in place to effectively eliminate discrimination. We believe Hong Kong citizens are by the majority fair and reasonable people and that discrimination exists only in the minority. However, the number of discrimination cases received by NGOs and the EOC amounted to 71 in 2003-04, exceeding total cases received by the EOC and the RRU in the areas of family status and race discrimination respectively. The prevalence of discrimination is not to be overlooked.

NGOs and the government together have put in considerable effort in educating the public on equal treatment of sexual minorities. The result is yet to be seen. Sexual minorities are still faced with discrimination without legal recourse. It is important the government strive to put a stop to it. We believe the enactment of a Sexual Orientation Discrimination Bill is of importance to both the sexual minority community and Hong Kong society as a diverse and tolerant society. The United Nations Human Rights Committee and the Committee for Economic, Social and Cultural Rights have both in their concluding observations urged the HKSAR government to enact laws against discrimination based on sexual orientation. 10 years have passed since the HKSAR government last considered the introduction of such a law. The public has become more aware of the sexual minority community and their rights to equal treatment. It is envisaged that public support to the enactment of the law is on the rise.

However, the government shall not base its decision to legislate on public opinion but rather the prevalence of discrimination. It is high time the government proposed a Sexual Orientation Discrimination Bill to protect equality for all. It is until everybody is welcomed to full citizenship of Hong Kong that it may claim to be a world-class international city.

We understand, though do not agree to, the reservations of the opposition against such a law. However, we trust the law will be introduced without inhibiting the exercise of freedom of expression and religion. The law intends to proscribe discriminatory acts not expression of views. The only grey area is where freedom of expression ends and vilification begins. The delineation of it needs to be debated on a fair and rational basis. Nonetheless, vilification is only a small part of a legislation primarily intended to deal with direct, indirect discrimination, harassment and victimization. We welcome an open and fair debate of the contents of the legislation, but not the inducement of fear based on inaccurate facts.

Summary

- ◆ *SOD legislation does not warrant legalization of same-sex marriage*
- ◆ *SOD law is about equal access to employment, education, facilities and services*
- ◆ *SOD legislation does not mean nor require moral approval of homosexuals from the society*
- ◆ *Freedom of opinion will not be proscribed by the law*
- ◆ *Neither SOD law or the absence of it can encourage a particular sexual orientation*
- ◆ *SOD is to fulfil international and constitutional obligations to eliminate discrimination*
- ◆ *Equal rights, not special rights*
- ◆ *Reverse discrimination is not an issue with the SOD law*
- ◆ *SOD law is about "equity", not "charity"*
- ◆ *SOD law cannot be abused by anyone claiming to be homosexuals*
- ◆ *Effective elimination of discrimination requires both education and legislation*
- ◆ *Discrimination based on sexual orientation is prevalent in Hong Kong*
- ◆ *Public opinion shall be sought but not as a pre-requisite to legislation*