

立法會
Legislative Council

LC Paper No. CB(2)516/01-02
(These minutes have been seen
by the Administration)

Ref : CB2/PS/1/00

LegCo Panel on Home Affairs

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

**Minutes of meeting
held on Monday, 8 October 2001 at 10:45 pm
in Conference Room B of the Legislative Council Building**

- Members Present** : Hon Cyd HO Sau-lan (Chairman)
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Albert CHAN Wai-yip
- Member Attending** : Hon Michael MAK Kwok-fung
- Public Officers Attending** : Mr Charles CHAN
Principal Assistant Secretary for Home Affairs (3)
- Mr WONG Hiu-kwan
Assistant Secretary for Home Affairs (3)2
- Miss Eliza YAU
Principal Assistant Secretary for Security (E)
- Mrs Alice CHEUNG
Principal Assistant Secretary for the Civil Service (3)

Mr CHEUNG Wing-hung
Chief Curriculum Development Officer (PSHE)
Education Department

Clerk in Attendance : Miss Flora TAI
Chief Assistant Secretary (2)2

Staff in Attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Mr Stanley MA
Senior Assistant Secretary (2)6

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I. Confirmation of minutes of meeting

[LC Paper No. CB(2)2189/00-01]

The minutes of the meeting held on 5 July 2001 were confirmed.

II. Consistency of sections 118C and 118D of the Crimes Ordinance with the Hong Kong Bill of Rights Ordinance (BORO)

[Paper Nos. CB(2)2000/00-01(01), CB(2)2185/00-01(01) and CB(2)2386/00-01(01)]

2. At the invitation of the Chairman, Principal Assistant Secretary for Security(E) (PAS(S)E) briefed members on the salient points of the Administration's paper on the subject [Paper No.CB(2)2000/00-01(01)].

Consistency of the Crimes Ordinance with BORO

3. With reference to the extract of the case report on *The Queen v Man Wai-keung* [Paper No. CB(2)2386/00-01(01)], Assistant Legal Adviser 4 (ALA4) advised members that the court held the opinion that a departure from literal equality would be justified on three considerations i.e.; (a) sensible and fair-minded people would recognise a genuine need for some difference of treatment; (b) the difference embodied in the particular departure selected to meet the need was itself rational; and (c) such departure was proportionate to such need. ALA4 suggested that members might make reference to these considerations in their

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interpretation as to whether sections 118C and 118D of the Crimes Ordinance were consistent with BORO.

4. Citing the court case of *LEE Miu-ling and another v Attorney General* as an example, the Chairman remarked that the meaning of "sensible and fair-minded people" would be subject to different interpretations of the judges.

5. Ms Emily LAU said that sections 118C and 118D had been added to the Crimes Ordinance in 1991, when it was sought to decriminalise homosexual acts between consenting adults in private. She considered that the Administration should review the need to amend relevant provisions in the light of changing social circumstances and values particularly because of the fact that the principle of human rights was at issue.

6. PAS(S)E responded that the need for sections 118C and 118D of the Crimes Ordinance was set out in the Legislative Council (LegCo) Brief on the Crimes (Amendment) Bill 1991 which was attached to the Administration's paper. The Department of Justice had advised that the two sections were consistent with the Hong Kong Bill of Rights Ordinance (BORO) and that the difference between the two sections did not contravene the non-discrimination principle under Article 22 of BORO. She stressed that the difference in treatment under sections 118C and 118D were fully considered by the Administration and the then LegCo in 1991. In line with the purpose of section 118C which was to protect the party under the age of 21, it was unlikely that under normal circumstances proceedings would be taken against a male homosexual under 21 where there were no other aggravating circumstances.

7. PAS(S)E further said that the justifications for allowing a difference in treatment in making the male partner under 21 also criminally liable in a consensual buggery was to protect the interest of the other partner, by guarding him against possible blackmail by the underaged partner. She pointed out that safeguarding the interest of the other male partner was a legitimate purpose which would not constitute contravention of BORO. PAS(S)E pointed out that homosexuality was still a sensitive and controversial subject within the community, which would still give rise to potential for blackmail. The Administration therefore considered that section 118C continued to provide a deterrent effect on possible blackmail against the homosexual partner by the other homosexual and should be retained. However, the Administration would adopt an open mind and keep the situation under review.

8. Ms Emily LAU asked how the Administration would respond to the comments of the Equal Opportunities Commission (EOC) [Paper No.CB(2) 2185/00-01(01)] on the Administration's paper. She cited that EOC took the view

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that sections 118C and 118D were incompatible with BORO in that the difference in treatment between the sexes was more than what was necessary to accomplish the stated objective of discouraging blackmail, and was therefore not proportional and not justified.

9. PAS(S)E responded to the main points made in the EOC's paper. On its paragraph 4, she acknowledged that the Administration did not have the relevant figures concerning prosecutions under sections 118C and 118D which might be referred to in considering whether males under 21 were more likely to blackmail their partners than females under 21 who committed consensual buggery. She clarified that section 118C applied to a male under 21 who committed consensual buggery with another man. Its purpose was to create a deterrent effect on possible blackmail against the other partner. It had a much narrower scope than the scenario covered in the last sentence of paragraph 5 of EOC's paper. With reference to paragraph 6 of EOC's paper on the existing offence provisions against blackmail, PAS(S)E added that so far there had not been feedback that the provisions were insufficient or ineffective for the protection of victims against blackmail.

10. Mr Albert CHAN expressed disappointment with the response of the Administration. He stressed that non-discrimination of homosexuality should not be compromised for the sake of creating a deterrent effect on possible blackmail against male homosexuals by their homosexual partners. He considered that the Home Affairs Bureau which was the policy bureau for discrimination issues should proactively collaborate with the Security Bureau to remove any discriminatory elements. He was of the view that as an international city, Hong Kong should make reference to relevant legislation in China and Taiwan and amend section 118C accordingly.

11. In response, Principal Assistant Secretary for Home Affairs (3) (PAS(HA)3) said that as explained by PAS(S)E, the Administration considered that section 118C served a legitimate purpose and D of J had confirmed that the provision would not contravene the non-discrimination principle under BORO. He added that the Administration would make references to overseas legislation as appropriate and give due regard to the prevailing social values and circumstances in Hong Kong in reviewing the legislation.

12. Ms Emily LAU requested the Administration to provide relevant statistics to substantiate its argument to retain section 118C. Mr Albert CHAN stressed that in line with the context of section 118C, the statistics provided should target at cases involving male homosexuals within the age bracket of 16 to 21.

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13. PAS(S)E responded that the Security Bureau had requested the Police to provide relevant statistics but the Police had explained that it had kept case files on blackmails in general without further breakdown. She added that given the deterrent effect of section 118C on possible blackmail, there should not be many cases of blackmails arising from consensual buggery between male homosexuals.

14. Ms Emily LAU considered that if the Police was unable to provide relevant statistics, the community as a whole would not be convinced that it was justified to retain section 118C in order to guard against the possibility of blackmail against the other partner in consensual buggery. She added that discrimination against homosexuality was the more fundamental reason making homosexuals vulnerable to blackmail.

15. The Chairman said that the Administration had all along insisted that it was justified to retain the differences between sections 118C and 118D of the Crimes Ordinance in order to guard against the possibility of blackmail against the other partner in consensual buggery. She was of the view that the provision contained a discriminatory element on the basis of sexual orientation against male homosexuals. The Administration should have consulted the homosexual community as to whether homosexuals wanted to have such a safeguard in legislation.

Way forward

16. The Chairman requested the Administration to consider members' strong views on the need for statistics to justify the difference in treatment between men and women in sections 118C and 118D of the Crimes Ordinance. PAS(S)E undertook to ascertain from the Police relevant prosecution statistics instituted under sections 118C and 118D of the Crimes Ordinance involving a partner in consensual buggery within the age-bracket of 16 to 21. Ms Emily LAU suggested that the Police should be invited for future discussion if necessary.

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17. Ms Emily LAU said that although EOC had clearly stated its position that sections 118C and 118D of the Crimes Ordinance were incompatible with BORO, it would not be able to take any follow-up action since operation of BORO was not under the EOC's purview. She asked whether LegCo could take any follow-up actions on the matter if the Administration refused to amend the Ordinance. ALA4 agreed to advise in writing.

ALA4

III. Provision of civil service medical benefits

18. At the Chairman's invitation, Principal Assistant Secretary for the Civil Service (3) (PAS(CS)3) highlighted the main points of the Administration's paper on the subject [Paper No. CB(2)2374/00-01(01)].

19. Members asked whether the Administration would consider extending the eligibility for civil service medical benefits to de facto spouses of homosexuals who could not get married under the existing marriage system in Hong Kong.

20. PAS(CS)3 responded that the existing eligibility criteria for civil service medical benefits was in line with the monogamous and heterosexual marriage system in Hong Kong which reflected the socio-moral values and family ethics of the community. She pointed out that if de facto spouses of homosexuals were entitled to the benefits, the Administration has to extend the same benefits to heterosexual cohabitants. It would not be possible for the Administration to prove the validity of any claim of such a de-facto relationship. Moreover, questions like whether the duration of such a relationship was relevant in determining eligibility would arise. In short, the Administration would encounter immense difficulties in monitoring and implementation.

21. The Chairman suggested that the Administration should make reference to some private organisations which allowed employees to nominate beneficiaries who were not their spouses for entitlement to certain benefits under specific conditions.

22. PAS(CS)3 responded that there were suggestions that the Government should allow civil servants to nominate certain specified persons who would be eligible for medical and dental benefits provided by the Government. Under such a system, a civil servant might choose any persons other than his or her spouse or dependant children as the beneficiaries, for instance, a friend. However, such arrangement would deviate from the current policy that civil service medical and dental benefits were only extended to nuclear family members. The current policy was necessary to ensure effective use of limited public resources. The Administration did not see any justification, from the perspective of prudent financial management, to extend the scope of the existing eligibility criteria to de facto spouses. However, it would continue to be guided by the prevailing views of the community at large on who should be recognised as a legal spouse.

23. Mr Albert CHAN said that he appreciated that it was a complex issue if civil service medical benefits were extended to homosexual partners of civil servants. He asked whether an authentic marriage certificate issued by an overseas jurisdiction for a homosexual couple could be recognised as documentary

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proof on the marital status to claim entitlement to civil service medical benefits. PAS(CS)3 responded that this point did not only affect civil service medical benefit but also other areas. The Home Affairs Bureau was seeking a legal advice on the issue and would revert to the Subcommittee in due course.

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24. Mr Albert CHAN asked whether the court would deal with an application for divorce lodged by a homosexual couple legally registered in an overseas jurisdiction. PAS(CS)3 referred members to the Matrimonial Causes Ordinance where a "monogamous marriage" was defined as the voluntary union involving one man and one woman to the exclusion of all others. The Chairman remarked that the courts might have jurisdiction under other legislation to deal with divorce and estate cases involving homosexual marriage. However, there was no precedent to her knowledge that the court had declined to deal with an application for divorce involving homosexual marriage. At Mr CHAN's suggestion, the Chairman asked and PAS(HA)3 agreed that the Administration would ascertain from the Judiciary as a matter of policy and legal power whether the courts would deal with divorce and estate cases relating to homosexual marriages and the number of relevant cases if available.

25. Ms Emily LAU said that she agreed that public resources should be used in a prudent manner. She also understood that the current policies relating to civil service medical benefits and eligibility for public housing were formulated on the basis of the prevailing marriage system in Hong Kong which recognised only monogamous and heterosexual marriage. Any fundamental change to the current policies would require amendment to relevant marriage legislation. Ms LAU considered that homosexual community should be consulted whether they would support amending relevant marriage legislation to provide for homosexual marriage in law.

26. Mr Albert CHAN agreed with the view. He said that it would not constitute a discrimination on the ground of sexual orientation if the policies were equally applied to "de facto spouse" relationship of homosexual as well as heterosexual couples. In this connection, the Chairman pointed out that the point at issue was that heterosexual couples could opt to get married in order to be eligible for medical benefits and public housing whereas homosexual couples were deprived of such an option. She was of the view that the Subcommittee should follow up the issue so that homosexual couples should be given the option to get married in law if they wished to do so.

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IV. Sexual orientation discrimination in the area of education

27. At the invitation of the Chairman, Chief Curriculum Development Officer of the Education Department (CCDO(ED)) briefed members on the civil education courses and training programmes for teachers and principals to develop concepts and values in relation to non-discrimination on the ground of sexual orientation in school education [Paper No. CB(2)2374/00-01(02)].

Subject syllabus

28. Ms Emily LAU asked whether non-discrimination on the ground of sexual orientation was actually included as part of the syllabus for the subjects such as Social Studies, Civic Education, Economic and Public Affairs, Government and Public Affairs in school curriculum as listed in the Annex to the Administration's paper.

29. CCDO(ED) responded that under the existing school curriculum, students were provided with ample opportunities to develop concepts and values in relation to non-discrimination on the ground of sexual orientation. The subjects listed in the Annex incorporated the teaching of concepts and values such as anti-discrimination, human rights, values and ways of life at primary and secondary levels. He stressed that the recent reforms in school curriculum emphasised the importance of values education, with the aim of developing students with an attitude to respect other people's habits, standards, values, etc. He pointed out that one of the prime objectives of school education was to foster the concepts of human rights and equal opportunities among students.

The role of teachers and principals

30. Ms Emily LAU pointed out that it was reported that a school had taken strong measures against students who distributed leaflets on matters related to discrimination on the ground of sexual orientation. Ms LAU considered that the role of teachers and principals was crucial in developing human rights and equal opportunities concepts among students. While she agreed that teachers and principals would support the principles of human rights and equal opportunities, she expressed reservations about implementation of non-discrimination on the ground of sexual orientation in school environment.

31. CCDO(ED) responded that ED had arranged appropriate training for teachers and principals from time to time to enhance their competence in promoting the concepts of human rights and equal opportunities to students. In addition, ED organised different seminars and workshops to reinforce teachers' and principals' understanding of their role in ensuring equal opportunities in

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school education. He stressed that on human rights and non-discrimination issues, the importance of school education was to foster a set of correct values and attitudes towards other people.

32. The Chairman pointed out that most opponents of homosexuality also said that they supported the principles of human rights and equal opportunities. She expressed concern that teachers and principals might exert undue influence on students' development of attitudes towards people with a different sexual orientation.

33. CCDO(ED) responded that teachers should be well trained to guide students in development of values and beliefs in an open manner. He acknowledged that some principals and teachers might use their own standards and values to teach students in relation to non-discrimination on the ground of sexual orientation.

34. Mr Albert CHAN said that non-discrimination on the ground of sexual orientation in education should involve more than the design of an appropriate school curriculum. Members agreed that the Subcommittee should invite representatives from Education and Manpower Bureau, Education Department, Social Welfare Department, School Sponsoring Bodies, teachers and school administrators to the next meeting for further discussion on the issue.

Clerk

V. Any other business

Date of next meeting

35. Members agreed to hold the next meeting on Monday, 29 October 2001 at 2:30 pm to continue discussion of non-discrimination on the ground of sexual orientation in education.

[*Post meeting note* : The next meeting was subsequently re-scheduled for Thursday, 29 November 2001.]

36. There being no further business, the meeting ended at 12:35 pm.