Comments by EOC to the Response
of the Administration to LegCo Panel on Home Affairs Subcommittee

Discrimination on the Ground of Sexual Orientation

At the meeting of the LegCo Panel on Home Affairs Subcommittee to study discrimination on the ground of sexual orientation, held on 19 April 2001, members queried whether sections 118C and 118D of the Crimes Ordinance were consistent with the Hong Kong Bill of Rights Ordinance (BORO). The Administration undertook to provide a response, including advice from the Department of Justice whether these provisions were justified under the BORO.

2. The Administration has stated in its response that the relevant provisions in the Crimes Ordinance were added in 1991, when it was sought to decriminalize homosexual acts between consenting adults in private. The Administration has also stated that the Department of Justice has advised that sections 118C and 118D of the Crimes Act are consistent with the BORO, and that the differences between the two sections do not contravene the non-discrimination principle under Article 22 of the BORO, as the difference is justified because a male 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.

3. The Equal Opportunities Commission (EOC) does not agree that this difference in treatment between men and women is justified.

4. First of all, there is no empirical data offered to support the premise that males under 21 who commit consensual buggery are more likely to blackmail their partners than females under 21 who commit consensual buggery. At best, this premise is based on anecdotal evidence; at worst, it exemplifies the stereotypical assumptions made of the homosexual community.

5. Secondly, these sections in the Crimes Ordinance were added ten years ago, at a time when homosexuality was criminal and unlawful. This caused homosexuals to hide their activities, thereby making themselves

vulnerable to blackmail.   Given that homosexuality was decriminalized 10 years ago, the situation should be changing.   Even if it were not, and the Administration's claim that *"homosexuality is still a sensitive and controversial subject within the community, which in turn still gives rise to potential for blackmail"* is correct, it is difficult to see how making a male homosexual under 21 criminally liable for the act of buggery is going to in itself act as a deterrent for blackmail in the homosexual community generally.

6.   Thirdly, the difference in treatment of males under 21 compared to females under 21 in sections 118C and 118D of the Crimes Ordinance must be rational and proportional in terms of the objective of the legislation.   If the objective is to safeguard the interest of the male partner (who is taking part in consensual buggery with a male under 21), surely the male partner's interest is safeguarded by those criminal provisions which deal with blackmail per se.   If the provisions which make blackmail a criminal offence are not a sufficient deterrent, it is perhaps these provisions which need to be strengthened by the Administration, and not the perpetuation of discriminatory treatment based on stereotypical and outmoded assumptions.

7.   When a legislative provision restricts a fundamental right (such as the right not to be discriminated against, which is found in Article 22 of the BORO and enshrined in Article 25 of the Basic Law), the burden rests on the person employing that provision to justify its use.   In invoking justification, the Government must be able to provide "cogent and persuasive" reasons for doing so.   (See: R v Sin Yau-ming [1992] 1 HK CLR 127).

8.   The EOC takes the view that this difference in treatment between the sexes is more than what is necessary to accomplish the stated objective of discouraging blackmail, and is therefore not proportional and not justified. Accordingly, the EOC is of the view that sections 118C and 118D of the Crimes Ordinance are incompatible with the BORO.

Equal Opportunities Commission

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