

Sexual Orientation, Gender Identity, and Equality in Hong Kong: Rights, Resistance, and Possibilities for Reform

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Abstract

This article explores the implications of an absence of anti-discrimination legislation on the grounds of sexual orientation and gender identity (SOGI) in Hong Kong. Strategic litigation has played an important role in securing legal protections for the Lesbian, Gay, Bisexual, and Transgender (LGBT) community in the face of resistance from the Hong Kong Special Administrative Region (HKSAR) government, as well as religious and parental concern groups. Despite a growing body of evidence which outlines the self-reported daily discrimination experienced by LGBT individuals, the HKSAR government has resisted calls to adopt anti-discrimination legislation on the grounds of SOGI, focusing instead on self-regulation and education. Grounded in qualitative research interviews examining the feasibility of adopting anti-discrimination legislation on the grounds of SOGI in Hong Kong, this article explores the current legal landscape for LGBT rights, resistance, and possibilities for reform.

Compared with the regulation of sexuality in other former British colonies across South and Southeast Asia which retain colonial-era penal laws,¹ Hong Kong, a former British colony in East Asia, has inched towards equality for the Lesbian, Gay,

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1. See Dinusha Panditaratne, 'Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Law Reform' (2016) 31 American University International Law Review 171, 172; Alok Gupta, *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (Human Rights Watch, 2008) <https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf> accessed 16 Nov 2019; see also the Hong Kong Law Journal special edition on the regulation of sexuality in post-colonial contexts in Asia: (2006) 46(1) Hong Kong Law Journal.

Bisexual, and Transgender (LGBT) communities.² Prior to the 1997 handover of Hong Kong to the People's Republic of China (PRC), in 1991 the British colonial government took steps to decriminalize consensual sexual relations between gay partners, echoing the European Court of Human Rights' landmark ruling in *Dudgeon v United Kingdom*.³ Using the courts as a vehicle for law reform, strategic litigation has levelled the age of consent between same-sex, heterosexual, and lesbian couples,⁴ and recognized the right of a post-operative transgender woman to marry her male partner.⁵ More recently, the Court of Final Appeal has recognized same-sex marriages legalized in overseas jurisdictions. In *QT v Director of Immigration*, the Court held that a British national in a same-sex civil partnership should be granted a dependent visa to join her partner, who had secured an employment visa to work in Hong Kong.⁶ Further, in *Leung Chun Kwong v Secretary for Civil Service (Angus Leung)*, Justice Ma determined that granting a same-sex couple access to employee benefits comparable to that of heterosexual married couples, did not in effect weaken the institution of marriage.⁷ Despite these landmark judgments, which have gone some way to advance equality for LGBT minorities, there remains deep-seated social conservatism around gender roles and gender-variant sexual identities.⁸

A growing body of research has indicated that LGBT minorities experience discrimination in the fields of education and employment, as well as in access to goods and services.⁹ Despite this evidence, the Hong Kong Special Administrative

2. In addition to the term sexual orientation and gender identity (SOGI), I use the term LGBT throughout the article as a widely used umbrella term identifying the Lesbian, Gay, Bisexual, and Transgender community. However, I recognize that not all sexual minorities identify with the term LGBT, and other terms may describe gender fluidity more accurately. For further consideration of sexual orientation, gender identity, and appropriate terminology, see Holning Lau, 'Sexual Orientation and Gender Identity Discrimination' (2018) 2(2) Brill Research Perspectives in Comparative Discrimination Law 1, 4–5. This article does not engage specifically with case law or policy on intersex status, although this was explored by the 'Feasibility Study on Legisating against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status.' For the full report, see YT Suen et al, 'Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status' (Hong Kong Equal Opportunities Commission, Jan 2016) (SOGI study).
3. The Court established that the criminalization of private, consensual sex between gay men was a violation of art 8 of the European Convention of Human Rights on respect for private and family life. See *Dudgeon v United Kingdom* (1982) 4 EHRR 149.
4. *Leung TC William Roy v Secretary for Justice* [2006] 4 HKLRD 211 (Court of Appeal).
5. *W v Registrar of Marriages* [2013] HKCFA 39, [2013] 3 HKLRD 90.
6. *QT v Director of Immigration* [2017] HKCA 489, [2017] 5 HKLRD 166, affirmed in *QT v Director of Immigration* [2018] HKCFA 28, [2018] HKEC 1792.
7. *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127.
8. Amy Barrow & Sealing Cheng, 'Gender Equality and the Limits of Law in Securing Social Change in Hong Kong', in Mehrangiz Najafizadeh & Linda L Lindsey (eds), *Women of Asia: Globalization, Development, and Gender Equity* (Routledge 2019) 83, 84.
9. Holning Lau & Rebecca L Stotzer, 'Employment Discrimination Based on Sexual Orientation: A Hong Kong Study' (2011) 23 Employee Responsibilities and Rights Journal 17; Yiu Tung Suen, Randolph Chun Ho Chan & Eliz Miu Yin Wong, 'Mental Health of Transgender People in Hong Kong: A Community-Driven, Large-Scale Quantitative Study Documenting Demographics and Correlates of Quality of Life and Suicidality' (2018) 65 Journal of Homosexuality 1093; Yiu Tung Suen & Miu Yin Wong, 'Male Homosexuality in Hong Kong: A 20-Year Review of Public Attitudes Towards Homosexuality and Experiences of Discrimination Self-Reported by Men', in Xiaodong Lin, Chris Haywood & Mairtin Mac an Ghaill (eds), *East Asian Men: Masculinity, Sexuality and Desire* (Palgrave Macmillan 2017).

Region (HKSAR) government has resisted calls to develop anti-discrimination legislation on the grounds of sexual orientation and gender identity (SOGI), demonstrating instead a preference for education and policy initiatives. However, the HKSAR government's adoption of the Code of Practice against Discrimination on the Ground of Sexual Orientation in Employment 1998 (Code of Practice)¹⁰ is reliant on organizations voluntarily pledging their commitment to its principles, and has had, to date, limited traction with employers.

This article draws on the author's experience as part of a multi-disciplinary research team at the Chinese University of Hong Kong's Gender Research Centre, which conducted a large-scale empirical study, commissioned by the Equal Opportunities Commission (EOC), on the feasibility of adopting anti-discrimination legislation on the grounds of sexual orientation and gender identity (SOGI study).¹¹ As part of the study, a series of focus groups were held with members of the public from different age groups, socio-economic backgrounds, and religious affiliations, in addition to separate focus groups with LGBT people from different socio-economic backgrounds. A representative telephone survey of over 1,000 persons was conducted to explore attitudes towards SOGI minorities. Further, a series of educational public forums was held to allow for the open exchange of views and recruitment of focus group participants. This article is grounded in the SOGI study's in-depth, semi-structured interviews conducted with fifteen legal experts including human rights advocates, legal academics, and legal practitioners (including a former High Court judge) from a range of jurisdictions including Australia, HKSAR, the Netherlands, Taiwan, the United Kingdom, and the United States. The interviews explored the development of anti-discrimination laws on SOGI and the scope of any exemptions in each respective interviewee's jurisdiction. The current legal and social status of SOGI minorities in Hong Kong was also explored.

The SOGI study proposed several potential anti-discrimination models (consolidated legislation, field-specific legislation, and stand-alone legislation) for consideration by the HKSAR government.¹² Parallel to the SOGI study, the EOC initiated a large-scale public consultation to review existing anti-discrimination legislation on the grounds of sex, disability, family status, and race, and made seventy-three recommendations for reform, some of which extended to SOGI issues.¹³ Despite calls for vigorous reform of the current set of anti-discrimination laws, there remains significant resistance to any attempt to introduce anti-discrimination legislation on the

10. Constitutional and Mainland Affairs Bureau Hong Kong, 'Code of Practice against Discrimination on the Ground of Sexual Orientation' (Code of Practice) <https://www.cmab.gov.hk/en/issues/full_code_of_practice.htm> accessed 11 Nov 2019.

11. Further information about the SOGI study and the research methods adopted can also be found in the SOGI study (n 2).

12. SOGI study (n 2) 198.

13. EOC, 'Discrimination Law Review, Submissions to the Government' (EOC, Mar 2016) <<https://www.eoc.org.hk/eoc/upload/DLR/2016/30179502227490.pdf>> accessed 22 Jan 2020.

grounds of SOGI, particularly from religious as well as parental concern groups,¹⁴ but also from within the HKSAR government.

Legislative reform in a number of areas pertaining to human rights and social justice has also been overshadowed by Hong Kong's democratic reform process, as the Special Administrative Region grapples with sustaining the principle of 'One Country, Two Systems'¹⁵ in the face of growing political pressure from the central government in Beijing.¹⁶ There remains limited legal redress for the daily discrimination experienced by LGBT people in employment, education, access to goods and services, and other domains. Political inertia has prevented legislative reform recognizing SOGI-based discrimination. Given the HKSAR government's inaction, how can human rights advocates and SOGI activists navigate these tensions to secure legislative reform, and which model of anti-discrimination legislation would be preferable given Hong Kong's socio-political context?

Drawing on literature exploring the role of legal mobilization in social movements, this article will first explore the LGBT rights landscape in Hong Kong, evaluating how strategic litigation has helped to secure some legal protections for SOGI minorities. In the second part of this article, the HKSAR government's preference for educational measures rather than legislation will be scrutinized. Although in comparison with other former British colonies there is now some recognition of LGBT rights within the law, this has not curbed the daily discrimination experienced by SOGI minorities. Part III of this article will outline the multiple ways in which LGBT individuals experience discrimination, whether in educational settings, at the workplace, or in access to goods and services. Given the high level of self-reported discrimination experienced, Part IV focuses on possibilities for reform by examining anti-discrimination law models proffered by the SOGI study to evaluate which legislative model would be feasible in the case of Hong Kong. Part V will briefly consider Hong Kong's continuing socio-political challenges for legislative reform and their implications for the LGBT rights movement. This article will conclude that although legal mobilization through the courts has played an important role in social change, it does not go far enough to secure equality for all of Hong Kong's LGBT community. The adoption of anti-discrimination legislation on the grounds of SOGI would strengthen access to justice for all LGBT people irrespective of socio-economic class.

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14. Several parental concern groups oppose the adoption of anti-discrimination laws on the grounds of sexual orientation and gender identity. For example, Roger Wong Wai-ming, who is also the father of pro-democracy activist Joshua Wong, is Convener of the Family School Sexual Orientation Discrimination Ordinance Concern Group. See Cannix Yau, 'Family Concern Groups to Protest after Hong Kong Equalities Chief Claims Consensus on Law to Protect Sexual Minorities', *South China Morning Post* (28 Jun 2016), <<https://www.scmp.com/news/hong-kong/health-environment/article/1982360/family-concern-groups-protest-after-hong-kong>> accessed 11 Nov 2019.
 15. The principle of 'One Country, Two Systems' was established by the Sino-British Joint Declaration and formalized in law under the Basic Law, art 12.
 16. In 2016, China's legislative body interpreted the Basic Law's provisions on oath-taking to the effect that localist policymakers were disqualified. Legal professionals in Hong Kong were particularly concerned by the ruling and silently marched in protest. See Joyce Ng & Raymond Yeung, 'Hundreds of Hong Kong lawyers in silent march against Hong Kong oath ruling', *South China Morning Post* (8 Nov 2016) <<https://www.scmp.com/news/hong-kong/politics/article/2044122/hundreds-hong-kong-lawyers-silent-march-against-beijing-oath>> accessed 11 Nov 2019.

I. THE LGBT RIGHTS LANDSCAPE IN HONG KONG

Hong Kong's *Bill of Rights Ordinance* (BORO), enacted in 1991, prohibits discrimination by the government and public authorities on several grounds, including 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'¹⁷ The *Basic Law of Hong Kong* (Basic Law) also creates a constitutional right to equality under Article 25, which states that 'All Hong Kong residents shall be equal before the law.'¹⁸ The Court of Final Appeal has interpreted 'other status' in Article 25 of the Basic Law and Article 22 of BORO to include sexual orientation¹⁹ in line with international human rights jurisprudence.²⁰ Further, the Court of Final Appeal has stated that 'equality before the law is a fundamental human right' and that 'the constitutional right to equality is in essence the right not to be discriminated against.'²¹ However, both BORO and the Basic Law are only legally binding on the HKSAR government and other public actors. The absence of legislation governing private actors, including employers, creates a significant gap in legal protection for the LGBT community.

Several scholars have explored the landscape of LGBT rights in Hong Kong, tracing the abolition of colonial-era sodomy laws through to the emergence of the contemporary LGBT rights movement.²² The decriminalization of consensual sexual activity between men has not automatically led to broader legislative reform in the area of LGBT rights, however. Other than the reforms triggered by the courts, the HKSAR government has largely resisted the adoption of any positive equality protections. In 1993, an early attempt to secure further legal protection for the LGBT community by then legislator Anna Wu was opposed by the British colonial government. Wu's broad *Equal Opportunities Bill* included sexual orientation and religion, amongst several other grounds.²³ Instead, the British colonial government responded by adopting two stand-alone ordinances,²⁴ one on the ground of sex²⁵ and another on

17. Bill of Rights Ordinance (c 383) 1991 (BORO), art 22, which mirrors the International Covenant on Civil and Political Rights (ICCPR), art 26.

18. Basic Law, art 25.

19. *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335 (Court of Final Appeal) para 11. The Court did not however engage with the question of whether sexual orientation can be recognized as implicit within the grounds of 'sex'.

20. *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992.

21. *Secretary for Justice v Yau Yuk Lung Zigo* (n 19) para 1.

22. For accounts of the political and social contexts leading to the abolition of colonial-era sodomy laws, see Carole J Petersen, 'Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong' (1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 337; Phil CW Chan, 'The Lack of Sexual Orientation Anti-Discrimination Legislation in Hong Kong: Breach of International and Domestic Legal Obligations' (2005) 9 *The International Journal of Human Rights* 69; Day Wong, 'Hybridization and the Emergence of "Gay" Identities in Hong Kong and in China' (2011) 24 *Visual Anthropology* 152; Joy L Chia & Amy Barrow, 'Inching Towards Equality: LGBT Rights and the Limitations of Law in Hong Kong' (2015–2016) 22 *William & Mary Journal of Women and the Law* 303; Amy Barrow & Joy L Chia, 'Pride or Prejudice? Sexual Orientation, Gender Identity and Religion in Post-Colonial Hong Kong' (2016) 46 *Hong Kong Law Journal* 89.

23. Carole J Petersen, 'Stuck on Formalities? A Critique of Hong Kong's Legal Framework for Gender Equality', in Fanny M Cheung & Eleanor Holroyd (eds), *Mainstreaming Gender in Hong Kong Society* (Chinese University Press 2009) 407.

24. Petersen (n 23) 407–408.

25. Sex Discrimination Ordinance (c 480) 1995 (SDO).

the ground of disability,²⁶ in 1995. Subsequent stand-alone ordinances were adopted on family status²⁷ in 1997 and, after much stalling by the HKSAR government,²⁸ on the ground of race²⁹ in 2008. The EOC, an independent statutory body,³⁰ is responsible for administering the existing anti-discrimination ordinances. Although the scope of the *Disability Discrimination Ordinance* (DDO) has been interpreted by the courts as prohibiting discrimination on the ground of gender dysphoria,³¹ there is currently no anti-discrimination legislation on the grounds of SOGI. This absence of legal protection for SOGI minorities significantly undermines Hong Kong's constitutional equality guarantee.³²

After a protracted and contentious debate,³³ the *Domestic and Cohabitation Relationships Violence Ordinance* (DCRVO)³⁴ was extended to same-sex couples in 2009. While the law now acknowledges same-sex relationships – at least those relationships that turn violent – government officials have clearly indicated that this does not amount to formal recognition of same-sex partnerships.³⁵ Particularly since the handover of Hong Kong to the PRC in 1997, Hong Kong's rights-based legal framework has allowed for cause lawyering,³⁶ securing some recognition of LGBT relationships within the law, although not without limitations such as the privileging of privacy rights over equality.³⁷ While incremental constitutional protections have been secured for the LGBT community, there remains a pressing need for anti-discrimination legislation on the grounds of SOGI to regulate private relationships in other domains, including employment and educational settings.

A. *The Role of Legal Mobilization in Social Movements*

Scholars diverge in their perspectives on how legal mobilization influences social change. On the one hand, strategic litigation is perceived as symbolically important,

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26. Disability Discrimination Ordinance (c 487) 1995 (DDO).
 27. Family Status Discrimination Ordinance (c 527) 1997 (FSDO).
 28. Carole J Petersen, 'The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong' (2002) 32 *Hong Kong Law Journal* 103, 134.
 29. Race Discrimination Ordinance (c 602) 2008 (RDO).
 30. SDO (n 25) s 63.
 31. *The Church of Jesus Christ of Latter-Day Saints Hong Kong v Stewart JC Park AKA Jessica Park* [2001] HKEC 1456 (Court of First Instance).
 32. Basic Law, art 25.
 33. Puja Kapai, 'The Same Difference: Protecting Same-Sex Couples Under the Domestic Violence Ordinance' (2009) 4 *Asian Journal of Comparative Law* 1, 7.
 34. Domestic and Cohabitation Relationships Violence Ordinance (c 189) 2009.
 35. The extension of the Domestic Violence Ordinance to same-sex cohabitation relationships was only 'introduced in response to the distinct and unique context of domestic violence.' See Legislative Council (LEGCO) Panel on Welfare Services, 'Proposed Amendments to the Domestic Violence Ordinance (Cap 189)' (LC Paper No CB(2)341/08-09(03), LEGCO, 8 Dec 2018), para 8 <<http://www.legco.gov.hk/yr08-09/english/panels/ws/papers/ws1208cb2-341-3-e.pdf>> accessed 11 Nov 2019; Joy L Chia & Amy Barrow (n 22) 323–324.
 36. Waikeung Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge University Press 2013), 18–20.
 37. Joy L Chia & Amy Barrow (n 22) 305.

raising awareness about causes and mobilizing social movements.³⁸ Strategic litigation is also an important educational tool raising public consciousness about specific causes.³⁹ However, courts have no capacity to enforce their own judgments, meaning that law reform triggered by strategic litigation is often incremental, and may not be as effective as other engagement strategies.⁴⁰ Albiston suggests that the use of strategic litigation as a strategy affects social movements both internally and externally. Negative internal effects of strategic litigation may include the undermining of a collective identity or demobilization of the movement, particularly in response to litigation loss.⁴¹ A good illustration of this demobilization can be found in Chua's analysis of collective litigation in Singapore, a non-liberal political regime, which retains section 377A of the *Penal Code*, a colonial-era provision criminalizing 'gross indecency' between gay men.⁴² Chua explores how the gay rights movement was fractured by divergent strategic interests.⁴³ Rather than engaging with the state through tried and tested means, activists felt compelled to pursue a legal mobilization strategy challenging the constitutionality of section 377A.⁴⁴

NeJaime critiques the existing body of literature on legal mobilization, which largely focuses on winning, for failing to scrutinize and observe that not all victories will deliver an adequate remedy.⁴⁵ Externally, there is no guarantee that winning a case will lead to meaningful social change on the ground, and winning may also lead to the mobilization of counter-movements.⁴⁶ Further, the message of the movement may be fundamentally reshaped by the engagement of elite actors including lawyers, resulting in a misalignment with the goals of movement participants.⁴⁷ Conversely, litigation loss may help to generate sympathy for the cause more broadly, if the verdict is perceived to be unjust.⁴⁸ Hong Kong's LGBT rights movement has been punctuated by both litigation losses and wins, initially driven by privacy concerns and more recently in relation to questions of equality.

B. *The Promise and Limitations of Using Strategic Litigation to Secure Privacy and Equality Protections in Hong Kong*

Michael Vidler, a prominent cause lawyer in Hong Kong, has pursued several landmark cases through the courts, making some inroads for LGBT equality including

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38. Catherine Albiston, 'The Dark Side of Litigation as a Social Movement Strategy' (2010–2011) 96 *Iowa Law Review Bulletin* 61, 63.
 39. Carole J Petersen, 'Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong' (2004) 34 *Hong Kong Law Journal* 459, 477.
 40. Albiston (n 38) 63.
 41. *ibid.*
 42. Lynette J Chua, 'Collective Litigation and the Constitutional Challenges to Decriminalizing Homosexuality in Singapore' (2017) 44 *Journal of Law and Society* 433.
 43. *ibid* 454.
 44. *ibid.*
 45. Douglas NeJaime, 'Winning through Losing' (2010) 96 *Iowa Law Review* 941, 943.
 46. Albiston (n 38) 63.
 47. *ibid* 74.
 48. Douglas NeJaime (n 45) 984.

levelling the age of consent between gay couples and straight couples.⁴⁹ However, the courts are powerless to direct law reform, as illustrated by the 2012 case of *W v Registrar of Marriages (W)*.⁵⁰ Beyond directing the HKSAR government to consider the United Kingdom's *Gender Recognition Act 2004*⁵¹ (GRA), the Court could not enforce its own judgment. Pan-democrat and pro-establishment political parties were polarized in their views on the *Marriage (Amendment) Bill 2014*, which required transgender individuals to undergo full sex reassignment surgery in order to marry in their acquired gender,⁵² clearly disregarding the scope of the GRA's recognition of transgender individuals.⁵³ Instead, the HKSAR government launched a public consultation paper in June 2017 on gender recognition.⁵⁴

The absence of legislative reform following the Court of Final Appeal's earlier *W* ruling has created a legal vacuum leaving transgender individuals' status uncertain in law and open to contestation. Other strategic legal challenges on transgender rights have not garnered the same symbolic success. In January 2019, Hong Kong's High Court ruled⁵⁵ that three transgender individuals could not change their gender identity on their Hong Kong identification cards without going through full sex reassignment surgery, a requirement that the applicants argued infringed their right not to be subjected to cruel, inhuman, and degrading treatment.⁵⁶

While strategic litigation has secured some equality protections and established important precedents, the HKSAR government's slow response to direct legislative amendments at the Legislative Council (LEGCO) undermines the transformative effect of landmark rulings such as *W*, which have the potential to educate society and foster greater understanding of the inequality experienced by Hong Kong's LGBT community. More recently, the courts have scrutinized which rights and privileges are unique to marital status.

1. *Recognition of sexual orientation as a 'suspect ground'*

In the *QT* case, the Court of Final Appeal rejected the Director of Immigration's argument that the determination of who should be granted entry to Hong Kong involved socio-economic policies, and that therefore the HKSAR Executive had a wide margin of discretion. Citing Chief Justice Ma's judgment in *Fok Chun Wa v Hospital*

49. *Leung TC William Roy v Secretary for Justice* (n 4) reduced the age of consent for consensual sex between gay men from 21 to 16 years of age.

50. *W v Registrar of Marriages* (n 5).

51. Gender Recognition Act 2004.

52. Marriage (Amendment) Bill 2014, para 3.

53. Applicants are not strictly required to have undergone full sex reassignment surgery. Rather, evidence must be provided that applicants have been living in the acquired gender. See Gender Recognition Act 2004 (n 51) s 2(1)(b).

54. William Hallatt & Howard Chan, 'Rights of LGBT People under Hong Kong Law: QT v Director of Immigration and Beyond' *Hong Kong Lawyer* (11 Feb 2017) <<http://www.hk-lawyer.org/content/rights-lgbt-people-under-hong-kong-law-qt-v-director-immigration-and-beyond>> accessed 29 Jan 2020.

55. *Q v Commissioner of Registration; R v Commissioner of Registration; Tse Henry Edward v Commissioner of Registration* (heard together) HCAL189/2017 (Court of First Instance).

56. *ibid* para 10(2).

Authority,⁵⁷ the Court of Final Appeal noted that irrespective of whether socio-economic issues arise, the courts are the final arbiters of whether an act is unconstitutional, particularly if there has been disregard for ‘core values’ such as those ‘suspect’ or prohibited grounds contained within Article 22 of BORO, on non-discrimination. Within Article 22, ‘other status’ has been interpreted to include discrimination on the grounds of sexual orientation.⁵⁸ Significantly, any differential treatment on a ‘suspect ground’ would be subjected to ‘particularly severe scrutiny’, and the HKSAR government’s margin of appreciation accordingly narrowed.⁵⁹

Critically, in recognizing sexual orientation as a ‘suspect ground’, the judgment further develops the concept of equality in the Basic Law. Echoing the Court of Final Appeal’s earlier judgment in *Secretary for Justice v Yau Yuk Lung Zigo*,⁶⁰ which ruled that differential treatment on the grounds of sexual orientation must be subjected to higher levels of scrutiny, the *QT* ruling further strengthens the constitutionalization of non-discrimination on the grounds of sexual orientation and recognizes same-sex civil partnerships legalized overseas. Recognition of sexual orientation as a ‘suspect ground’ goes further than other jurisdictions where LGBT persons are recognized only as a quasi-suspect class requiring a heightened but intermediate level of scrutiny.⁶¹ Significantly, the Court of Final Appeal did not accept that differential treatment requires no justification if based on marital status,⁶² which suggests that any attempt to ring-fence core rights associated with marital status will not prevent judicial review, opening up the possibility of scrutinizing the right to marry.

2. Diverse vulnerabilities in equality protections

The *QT* ruling is significant in that it effectively obligates the HKSAR government to take into consideration other jurisdictions’ recognition of same-sex marriages or civil partnerships, which are in direct opposition to local laws. Yet the ruling also reinforces diverse vulnerabilities in equality protections for Hong Kong’s LGBT community, stratifying same-sex relationships in accordance with the level of recognition afforded to those relationships by law. In practice, the Court of Final Appeal’s ruling recognizes same-sex partnerships for the purposes of immigration policy, but primarily for an elite sector – the expatriate community – whose employment often includes significant privileges and fringe benefits such as housing, end-of-contract gratuity, and other allowances.

When the *QT* case was initially rejected by the High Court, several global financial institutions and law firms sought to be a party to the Court of Appeal case of *QT v*

57. *Fok Chun Wa v Hospital Authority* [2012] HKCFA 34, (2012) 15 HKCFAR 409, cited in *QT v Director of Immigration* [2018] (n 6) para 82.

58. *QT v Director of Immigration* [2018] (n 6) para 106.

59. *ibid* para 108.

60. *Secretary for Justice v Yau Yuk Lung Zigo* (n 19) para 21.

61. The United States Court of Appeals for the Second Circuit has recognized LGBT persons to be a quasi-suspect class under the Equal Protection Clause, 14th Amendment to the US Constitution. The basis of review is substantially less stringent than the suspect class of race. See *Windsor v United States*, No 12-2335 (2d Cir 2012) 34.

62. *QT v Director of Immigration* [2018] (n 6) para 110(b).

Director of Immigration,⁶³ arguing that the denial of dependent visas to same-sex partners undermined Hong Kong's ability to attract global, diverse, top talent, which is detrimental to Hong Kong's global reputation as a leading legal services centre.⁶⁴ This reinforces NeJaime's argument that litigation losses may raise consciousness, similar to litigation wins.⁶⁵ The ruling galvanized support from within the banking and legal sector for QT, the partner of an expatriate employee.

Some of these international banks and law firms have developed internal diversity and equality policies.⁶⁶ The incongruence between these companies' internal diversity policies and local laws that fail to recognize same-sex marriage or civil partnerships is evidently a barrier to LGBT employees and may affect their career trajectory and progression. However, the existence of these internal equality and diversity policies provides some level of protection to LGBT employees and their families as they circumnavigate the globe.

Several legal experts interviewed during the course of the SOGI study recognized the privileged position of LGBT expatriates as opposed to the local LGBT community in Hong Kong, pointing to the HKSAR government's failure to provide domestic legislative protections on the grounds of SOGI. As one interviewee stated, 'expats, for example, who work for international organizations – those organizations are more likely to have their internally adopted policies that are very LGBT-friendly.'⁶⁷ Similarly, another interviewee distinguished the lived experiences of the expatriate LGBT community from that of the local LGBT community in Hong Kong, drawing on the example of diversity policies in large global firms such as Goldman Sachs:

The problem is that ... it's in elite workplaces, and it tends to protect elite individuals, so they can become these cosmopolitan figures who move around from Hong Kong to New York and they live in this anti-discrimination bubble. But as soon as they move out of that, if money can't protect them, then it becomes a problem. And what about the poor lesbian on a poor estate in Hong Kong whose neighbours scream at her every day or gets abuse in the workplace because she's quite masculine? That's who I think the law potentially can protect.⁶⁸

Anti-discrimination legislation would provide a means of redress for all Hong Kong citizens and permanent residents, irrespective of socio-economic class. This interviewee acknowledged however that the adoption of anti-discrimination law alone is not a panacea for discriminatory behaviours, recognizing that wider systemic changes

63. *QT v Director of Immigration* [2017] (n 6).

64. David Tweed & Bruce Einhorn, 'Law Firms Join Goldman in Fight for Gay Spouse Visas in Hong Kong' *Bloomberg News* (12 Apr 2018) <<https://www.bloomberg.com/news/articles/2018-04-12/law-firms-join-goldman-in-fight-for-hong-kong-gay-spouse-visas>> accessed 11 Nov 2019.

65. Douglas NeJaime (n 45) 985.

66. For example, Goldman Sachs has created a Global Diversity Committee: Goldman Sachs, 'Email to Goldman Sachs People from David Solomon, John Waldron and Stephen Scherr on Advancing Diversity and Inclusion at Goldman Sachs' (Goldman Sachs Press Release, 18 Mar 2019) <<https://www.goldmansachs.com/media-relations/press-releases/current/announcement-18-march-2019.html>> accessed 11 Nov 2019.

67. Joy L Chia, Interview with legal scholar D (Hong Kong, 30 Aug 2014) (on file with author).

68. Suen Yiu Tung, Interview with legal scholar C (London, 10 Jul 2014) (on file with author).

are critical in fostering a culture of non-discrimination. While the *QT* judgment paves the way for the recognition of same-sex dependents for the purposes of employment-based immigration, the case reinforces the limitations of strategic litigation in securing wider recognition of same-sex relationships for Hong Kong's LGBT community.

Another recent legal challenge⁶⁹ against the differential treatment in law of same-sex partnerships illustrates the HKSAR government's continued resistance towards any perceived attempt to alter local laws and practices to reflect marriage equality. In *Angus Leung*, the Court of Final Appeal held that the prevailing views of marriage within society, even if they could be determined, were not relevant to the question of whether differential treatment in access to employment and tax benefits was justified.⁷⁰ Finding no rational connection between the policy which denied employment and tax benefits to Angus Leung and the legitimate aim of protecting the institution of marriage, the Court stated:

How is it said that allowing Mr Adams medical and dental benefits weakens the institution of marriage in Hong Kong? Similarly, how does permitting the appellant to elect for joint assessment of his income tax liability under the IRO impinge on the institution of marriage in Hong Kong?⁷¹

In its ruling on access to employment and tax benefits, the Court did not engage with the question of whether Article 37, which makes no reference to a particular sexual orientation, could be interpreted remedially to include recognition of same-sex marriage.⁷² The judgment is important symbolically and affirms the dignity of Angus Leung and his husband. However, similar to the *QT* judgment, given that marriage equality is yet to be recognized within Hong Kong law, only gay civil servants married in jurisdictions overseas will directly benefit from the ruling. This demonstrates the limitations of strategic litigation in securing the recognition of same-sex relationships more broadly in the law.

3. *The pursuit of same-sex marriage recognition through strategic litigation*

LGBT activists are increasingly emboldened to use the courts as a vehicle to secure legal protections including the recognition of same-sex civil partnerships and marriage in Hong Kong, suggesting that legal mobilization strategies have galvanized the LGBT rights movement.⁷³ It remains to be seen, however, whether it is premature to table the highly contested issue of marriage equality in Hong Kong. In the United Kingdom, legal mobilization strategies initially focused on the decriminalization of offences premised on 'gross indecency' between men and challenged the unequal

69. *Leung Chun Kwong v Secretary for the Civil Service* (n 7).

70. *ibid* para 57.

71. *ibid* para 67.

72. The Court of Final Appeal has determined that all references in the Inland Revenue Ordinance (c 112) to 'husband and wife' shall be read as 'a married person and his or her spouse': *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 34, para 8(3)(b)(i).

73. In 2019, three applications for judicial review came before the High Court, which raised the issue of same-sex civil partnerships and marriage in Hong Kong: *MK v Government of HKSAR* HCAL 1077/2018; *TF v Secretary for Justice* HCAL 2648/2018; *STK v Secretary for Justice* HCAL 2682/2018 (heard together) [2019] HKCFI 55.

age of consent.⁷⁴ Pointing to the incremental development of precedents across Europe, a strategy which has similarly been adopted in Hong Kong, Michael Vidler, QT's solicitor, has expressed concern that recent judicial review applications centred on marriage equality may 'set a bad precedent'.⁷⁵ Similarly, Karon Monaghan, the QC who represented Angus Leung, has also cautioned LGBT rights activists that the process of legal mobilization needs to take place incrementally rather than risk pushing the courts' role in law-making too far.⁷⁶ Hong Kong's only openly gay legislator, Raymond Chan Chi-chuen, has indicated that legal mobilization through the courts is necessary, given the political inertia around legislating LGBT rights.⁷⁷ There remains steadfast resistance to the adoption of anti-discrimination legislation on the grounds of SOGI in employment, educational, and other settings.

Litigation strategies focused on marriage equality may not reflect the priorities of all constituents within the LGBT rights movement.⁷⁸ Several interviewees in the SOGI study suggested that the majority of individuals who experience discrimination are primarily concerned about their employment rights, *not* the right to marry. Loss of employment, despite having negative effects for all LGBT individuals, proves to be particularly detrimental to transgender individuals, for example. As one interviewee stated:

If you couldn't keep your job, and in particular for the trans community, it had [several] knock-on effects ... you had no money to pay for the basic treatments, you still need to pay for all the hair removal, you lost all social contact because you were going to lose your family in most cases, at least for a few years, so people became very isolated ... having that job was key to having any form of social contact, as well as having personal wellbeing.⁷⁹

Thus, while strategic litigation has helped to secure important, incremental advances in the recognition of constitutional rights to privacy and equality for the LGBT community, there remains a gap in legal protections for private relationships, given that BORO and the Basic Law only regulate the HKSAR Government and public authorities. Further, the legal vacuum created by the HKSAR government's inaction has also

74. Lisa Vanhala, 'Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics' (2009) 16 *Journal of European Public Policy* 738, 750.

75. Chris Lau & Kimmy Chung, 'Woman takes unprecedented step to advance LGBT cause in Hong Kong and sues government over civil partnerships ban', *South China Morning Post* (24 Aug 2018) <<https://www.scmp.com/news/hong-kong/community/article/2161287/woman-takes-unprecedented-step-advance-lgbt-cause-hong-kong>> accessed 11 Nov 2019.

76. Chris Lau, 'Karon Monaghan, lawyer in landmark Hong Kong LGBT case over gay civil servant's benefits, says city activists well placed to fight for equality in the courts', *South China Morning Post* (11 May 2019) <<https://www.scmp.com/news/hong-kong/law-and-crime/article/3009841/karon-monaghan-lawyer-landmark-hong-kong-lgbt-case>> accessed 11 Nov 2019.

77. *ibid.*

78. Albiston (n 38) 75.

79. Amy Barrow & Suen Yiu Tung, Interview with legal scholar B (Hong Kong, 2 Jul 2014) (on file with author).

been seized upon by counter-movements, including religious opposition and parental concern groups.⁸⁰

II. EDUCATION, NOT LEGISLATION

Similar to earlier debates regarding the introduction of anti-discrimination on the ground of race,⁸¹ the HKSAR government has indicated its preference for education and policy initiatives rather than anti-discrimination legislation on the ground of SOGI. The HKSAR government has promoted its Code of Practice, adopted in 1998,⁸² as a tool to 'facilitate self-regulation on the part of employers and employees in eliminating discriminatory practices in employment.'⁸³ To date, more than 300 public and private sector organizations have voluntarily pledged their support. However, the majority of these signatories are large-scale multinational companies, as well as public sector organizations such as universities across Hong Kong. As a policy instrument, the Code of Practice's language does not carry the same precision as anti-discrimination legislation, nor does it delegate authority to any independent body to oversee the implementation of the Code of Practice's provisions.

Instead, the Code of Practice recommends that employers establish internal grievance procedures to 'deal' with complaints of discrimination and harassment.⁸⁴ This recommendation is grossly inadequate for several reasons. First, it fails to address the potential power imbalance between employers and employees. Second, there is no oversight by any independent body of the methods adopted by employers to 'deal' with complaints of discrimination and harassment, thus stripping away any premise of impartial and unbiased decision-making. In contrast, the EOC has the authority to receive, investigate, and conciliate complaints of discrimination under Hong Kong's existing anti-discrimination laws on sex, disability, family status, and race.⁸⁵ In a limited number of cases, the EOC also provides legal assistance to complainants.⁸⁶ As an independent statutory body, the EOC is able to maintain some level of impartiality.

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80. Cannix Yau, 'Family concern groups to protest after Hong Kong's equalities chief claims consensus on law to protect sexual minorities', *South China Morning Post* (28 Jun 2016) <<https://www.scmp.com/news/hong-kong/health-environment/article/1982360/family-concern-groups-protest-after-hong-kongs>> accessed 11 Nov 2019.
 81. Home Affairs Bureau, 'Paper for the information of the Legislative Council Panel on Home Affairs, Promotion of equal opportunities on race issues' (LC Paper No CB(2)1548/01-02(01), LEGCO, 12 Apr 2002), para 7 <<https://www.legco.gov.hk/yr01-02/english/panels/ha/papers/ha0410cb2-1548-1e.pdf>> accessed 11 Nov 2019.
 82. LEGCO Panel on Home Affairs, 'Survey on Public Attitudes towards Homosexuals' (LC Paper No CB(2)595/04-05(04), LEGCO, Jan 2005), para 5 <<https://www.legco.gov.hk/yr04-05/english/panels/ha/papers/ha0114cb2-595-4e.pdf>> accessed 11 Nov 2019.
 83. Code of Practice (n 10) para 1.1.
 84. *ibid* para 8.1(a).
 85. SDO (n 25) s 64(d).
 86. Complainants can only apply for legal assistance after they have first attempted conciliation unsuccessfully. However, the decision about which cases the EOC should proceed with at the courts is often a strategic one due to budgetary constraints, as the EOC receives limited funding. See Katherine Lynch, 'Private Conciliation of Discrimination Disputes: Confidentiality, Informalism

It would of course be misleading to suggest that the complaint investigation and conciliation processes operated by the EOC are not also affected by power imbalances between employers and employees, particularly during conciliation, where the majority of cases are settled. Very few cases reach the courts, and scholars have questioned the effectiveness of the EOC as an institutional mechanism.⁸⁷ Despite these limitations, however, it is important to have independent oversight of complaints by an external body such as the EOC, rather than by private employers whose dispute resolution processes could vary significantly. Further, employees may not feel comfortable raising their head above the parapet, particularly if they have not formally ‘come out’ to colleagues and their superiors.⁸⁸

Given that several international corporations have already adopted internal diversity and equality policies, it is difficult to evaluate whether the Code of Practice has had any transformative effect on the internal work culture and practice of some of its signatories. Rather, the Code of Practice may complement existing internal diversity and equality policies. Given the large number of small and medium enterprises in Hong Kong which are not signatories, the reach of the Code of Practice is limited. On 19 August 2014, the HKSAR government ran a newspaper advertisement campaign actively promoting the Code of Practice.⁸⁹ The advert pre-empted Hong Kong’s first major international conference on LGBT rights titled ‘Working Together for an Inclusive Society: LGBT Rights in Comparative Perspective’, co-organized by Hong Kong’s EOC, the European Union Office to Hong Kong and Macao, and the Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies at the Chinese University of Hong Kong, on 28–30 August 2014.

The number of signatories to the Code of Practice doubled from around 90 organizations in 2014 to more than 180 organizations in 2017, in part due to the HKSAR government writing to public and private sector organizations to pledge their support. Given that the Code of Practice was adopted in 1998, the initiative has been particularly slow to gain traction. In recent years, several prominent pan-democrat LEGCO members, as well as the Democratic Party, have also signed the Code of Practice. The recent surge in signatories may be due to growing awareness and acceptance of LGBT rights within society, particularly after a series of high-profile public forums, conferences, and workshops on LGBT rights held in 2014.⁹⁰ As explored by Altman and Symons, the participation of high-profile figures in society at PRIDE and other events

and Power’ (2014) 22 *Willamette Journal of International Law and Dispute Resolution* 49, 53. See also Petersen, ‘The Right to Equality in the Public Sector’ (n 28) 109–110.

87. See Petersen, ‘The Right to Equality in the Public Sector’ (n 28); Puja Kapai, ‘The Hong Kong Equal Opportunities Commission: Calling for a New Avatar’ (2009) 39 *Hong Kong Law Journal* 339.
88. Victor Ting, ‘While Taiwan has legalised same-sex marriage, Hong Kong is still struggling with workplace discrimination against LGBT staff – is the city ready for change?’, *South China Morning Post* (1 Jun 2019) <<https://www.scmp.com/news/hong-kong/society/article/3012632/while-taiwan-has-legalised-same-sex-marriage-hong-kong-still>> accessed 11 Nov 2019.
89. 2014 advertising campaign promoting the Code of Practice against Discrimination on the Grounds of Sexual Orientation in *The Standard*, a free English language tabloid: ‘Increasing support from the public and private sectors for anti-discrimination on the ground of sexual orientation in the employment field’, *The Standard* (19 Aug 2014) <http://www.cmab.gov.hk/doc/issues/newspaper_supplement_e.pdf> accessed 11 Nov 2019.
90. SOGI Study (n 2).

is important for the morale of the LGBT community.⁹¹ Dr York Chow, the former Chairperson of the EOC from 2013 to 2016, took significant steps to foster equality of opportunity for the LGBT community. Chow was the first EOC Chair to participate in a Hong Kong PRIDE parade,⁹² and he prioritized educational and research initiatives examining the implications of an absence of anti-discrimination legislation on the grounds of SOGI.

The HKSAR government ran a second newspaper advertisement campaign promoting the Code of Practice on 6 October 2017,⁹³ shortly after the 25 September 2017 ruling in *QT*. In its 2017 campaign, the HKSAR government pointed to the growing number of organizations that had pledged their support to the Code of Practice. Again in 2018, shortly before the Court of Appeal's ruling in the *Angus Leung* case, the HKSAR government released a sponsored feature on the Code of Practice indicating that more than 300 public and private organizations had pledged their support.⁹⁴ The timing of the HKSAR government's advertisement campaigns promoting the Code of Practice promulgates a counter-narrative to claims-making by LGBT activists and human rights advocates who are currently pushing for anti-discrimination legislation and other legal protections. Through this counter-narrative, the HKSAR government attempts to avoid any potentially critical or damaging publicity regarding the absence of anti-discrimination on the grounds of SOGI, while maintaining its position that education and policy initiatives, such as the Code of Practice, are sufficient in an employment context.

Ironically, in *Angus Leung*, the Court of Final Appeal held that the government had failed to engage with the provisions of its own Code of Practice, paragraph 5.1 of which states:

Government is committed to the principle of equal pay for equal work and encourages all employers to share that commitment. ... [This] means that – in principle – all employees are entitled to the terms and conditions of employment or access to employment or access to benefits, facilities or services commensurate with their rank, duties, seniority and experience and any other special circumstances of their employment, irrespective of their sexual orientation.⁹⁵

Significantly, the judgment indicates that the government cannot pay lip service to equal opportunities, an important symbolic victory for the LGBT community, but

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91. Dennis Altman & Jonathan Symons, *Queer Wars: The New Global Polarization over Gay Rights* (Polity Press 2016) 154.
 92. Christy Choi, 'Turnout doubles for gay pride march', *South China Morning Post* (10 Nov 2013) <<http://www.scmp.com/news/hong-kong/article/1351673/turnout-doubles-gay-pride-march>> accessed 11 Nov 2019.
 93. Constitutional and Mainland Affairs Bureau, 'Eliminating discrimination on the ground of sexual orientation. Dedicating efforts to promoting equal opportunities in employment', *South China Morning Post* (6 Oct 2017) <http://www.cmab.gov.hk/doc/issues/newspaper_supplement_2017_e.pdf> accessed 11 Nov 2019.
 94. Constitutional and Mainland Affairs Bureau, 'Eliminating discrimination on the ground of sexual orientation. Joining hands to build working environment with equal opportunities', *South China Morning Post* (18 May 2018) <https://www.cmab.gov.hk/doc/issues/newspaper_supplement_20180518_e.pdf> accessed 11 Nov 2019.
 95. *Leung Chun Kwong v Secretary for the Civil Service* (n 7) para 73.

also for society more broadly. Although the Code of Practice is not legally binding, the judgment gives weight to its principles in practice, which may pressure signatories to demonstrate their adherence to the Code of Practice. The ruling may, however, have a chilling effect and discourage non-signatories from voluntarily pledging their commitment to the Code of Practice's principles, particularly if organizations are concerned about potential legal ramifications.

III. DISCRIMINATION AGAINST LGBT MINORITIES

Compared with SOGI rights movements in several other Asian jurisdictions where sexuality is strictly regulated,⁹⁶ Hong Kong's LGBT community is able to organize freely.⁹⁷ In recent years, events including Pink Dot⁹⁸ and PRIDE have increased the visibility of the LGBT community. In 2017, it was announced that Hong Kong had been selected to host the 2022 Gay Games, a sporting event which promotes 'diversity, inclusion and tolerance'.⁹⁹ Despite the increased visibility of the LGBT community in Hong Kong and legal mobilization around LGBT rights, a growing body of evidence explores the myriad ways in which LGBT minorities experience discrimination in their daily lives irrespective of socio-economic class.¹⁰⁰ From foreign domestic helpers¹⁰¹ to high-income earners, all LGBT people surveyed in the SOGI study had experienced discrimination, although the forms of discrimination differed.¹⁰² Significantly, the SOGI study revealed that LGBT people experience discrimination at all life stages, from primary school through to tertiary level educational settings, in the workplace, and in accessing goods and services including at hotels, restaurants, and shops.¹⁰³ On an individual level, discrimination may be experienced from peers, employers, and professionals, as well as at an institutional level by government bodies.¹⁰⁴ Some LGBT groups experience greater levels of discrimination including individuals who are openly gay and transgender females.¹⁰⁵

Several focus group participants in the SOGI study discussed how derogatory language and 'anti-gay jokes' in the workplace and at school negatively impacted on their self-esteem.¹⁰⁶ For example, a lesbian employee with a more masculine appearance eventually left the company where she worked due to disparaging comments made

96. See generally Panditaratne (n 1).

97. Joy L Chia & Amy Barrow (n 22) 306.

98. Pink Dot <<http://pinkdot.hk/>> accessed 11 Nov 2019.

99. Jayson Albano, 'Gay Games is Hong Kong's chance to show the city's inclusivity – will it recognise same-sex unions and legislate to protect LGBT rights?' *South China Morning Post* (26 Apr 2018) <<https://www.scmp.com/lifestyle/article/2143252/gay-games-hong-kongs-chance-show-citys-inclusivity-will-it-recognise-same>> accessed 11 Nov 2019.

100. SOGI Study (n 2) para 4.5.1.

101. *ibid* 67.

102. *ibid* 90–91.

103. *ibid* para 4.5.1.

104. *ibid* 90.

105. *ibid*.

106. *ibid* 63.

by her employer.¹⁰⁷ Similarly, a gay teacher eventually left the school where he worked after being requested to sign a pledge against anal sex and other behaviours deemed to be ‘immoral’.¹⁰⁸ The SOGI study findings indicate that similar to other minority groups’ experience of hostility in the workplace and other settings,¹⁰⁹ LGBT individuals may either quit their job or feel compelled to modify their behaviour in order not to be outed.

Several other research studies have also explored the impact of discrimination against LGBT people. In a survey of the quality of life and suicidality of Hong Kong’s transgender community, for example, Suen et al found that relative to high levels of educational achievement, transgender people’s income was low, with 43.4 per cent of transgender people surveyed earning less than HK\$6,000 (approximately US\$775) per month.¹¹⁰ It is important to contextualize these figures in the light of Hong Kong’s poverty line, which stood at HK\$4,000 (approximately US\$510) per month for single people, as of November 2018.¹¹¹ Further, Suen et al’s survey revealed that a high number of respondents had either contemplated (87.1 per cent of those surveyed who were between 15 and 24 years of age) or attempted suicide (35.5 per cent of that age group).¹¹²

Perceived experiences of discrimination have also been reported in domestic violence cases. In the absence of anti-discrimination legislation on the grounds of SOGI, the extension of the DCRVO to same-sex cohabiting couples demonstrates the inadequacy of enacting legal protections in a vacuum. Non-governmental organizations working with sexual minorities have indicated that there is a lack of understanding about violence specific to LGBT people, including ‘coming out’ violence perpetrated by parents and families.¹¹³ Frontline domestic violence shelter staff have allegedly turned away LGBT individuals who sought refuge, incorrectly assessing that a mother’s violent behaviour towards her daughter upon ‘coming out’ did not amount to domestic violence.¹¹⁴ Without adequate training, service providers are ill-equipped to understand how LGBT people experience domestic violence or how to respond appropriately. Suen et al’s research on the lived experiences of transgender people in Hong Kong also indicates that LGBT people experience discrimination when accessing support from social workers, calling for policymakers and

107. *ibid.*

108. *ibid.* 65.

109. Mari J Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Michigan Law Review* 2320, 2337.

110. Suen, Chan & Wong (n 9) 1109.

111. Peace Chiu, ‘Record 1.37 million people living below poverty line in Hong Kong as government blames rise on ageing population and city’s improving economy’, *South China Morning Post* (19 Nov 2018) <<https://www.scmp.com/news/hong-kong/society/article/2174006/record-13-million-people-living-below-poverty-line-hong-kong>> accessed 29 Jan 2020.

112. Suen, Chan & Wong (n 9) 1109.

113. Amy Barrow & Anne Scully-Hill, ‘Failing to Implement CEDAW in Hong Kong: Why Isn’t Anyone Using the Domestic and Cohabitation Relationships Violence Ordinance?’ (2016) 30 *International Journal of Law, Policy and the Family* 50, 67.

114. *ibid.*

service providers to have greater sensitivity to the mental health needs of transgender people.¹¹⁵

Interviewees in the SOGI study also suggested that people are not fully aware of the implications of the daily discrimination experienced by LGBT individuals. As one interviewee stated:

Maybe people don't fully realize the consequences of discrimination, the types of discrimination that are typically covered by Hong Kong's [existing] discrimination ordinances, like access to health-care, housing, losing your job, and not having money to pay your bills.¹¹⁶

The absence of any anti-discrimination legislation on the grounds of SOGI, comparable with the existing ordinances on sex, disability, family status, and race, leaves SOGI minorities at a considerable disadvantage in employment and educational settings, as well as in access to goods and services, undermining Hong Kong's constitutional equality guarantee. Research has indicated that the general public is not opposed to the adoption of anti-discrimination legislation on the grounds of SOGI.¹¹⁷ Loper et al found that 60 per cent of respondents surveyed either completely or somewhat agreed with the adoption of anti-discrimination legislation on the ground of sexual orientation.¹¹⁸ Similarly, more than 50 per cent of respondents surveyed in the SOGI study 'somewhat/completely' agreed that there should be legal protection for LGBT people in different domains including employment, education and training, and the provision of goods and services.¹¹⁹ Further, Lau et al found that from 2013 to 2017, support had grown for same-sex couples' rights.¹²⁰ Yet ironically, as Lau suggests, the HKSAR government appears poised to 'remedy discrimination' by recognizing same-sex relationships before redressing discrimination in private settings.¹²¹

115. Suen, Chan & Wong (n 9) 1109.

116. Joy L Chia, Interview with legal scholar D (n 67).

117. Holning Lau, Charles Q Lau & Kelley Loper, 'Public Opinion in Hong Kong about Gays and Lesbians: The Impact of Interpersonal and Imagined Contact' (2014) 26 *International Journal of Public Opinion Research* 301.

118. Kelley Loper, Holning Lau & Charles Lau, 'Public Attitudes Towards Gays and Lesbians and Towards Sexual Orientation Anti-Discrimination Legislation' (Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, 6 Nov 2014) <<https://ssrn.com/abstract=2520312>> accessed 29 Jan 2020.

119. SOGI study (n 2) para 5.1.5(5).

120. Holning Lau et al, 'Support in Hong Kong for Same-sex Couples' Rights Grew Over Four Years (2013–2017) Over Half of People in Hong Kong Now Support Same-Sex Marriage' (Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, Executive Summary, Jul 2018) <[http://www.law.hku.hk/ccpl/wp-content/uploads/2018/07/Change%20Over%20Time%20Paper%20English%20\(3%20July%20Final%20for%20Distribution\).pdf](http://www.law.hku.hk/ccpl/wp-content/uploads/2018/07/Change%20Over%20Time%20Paper%20English%20(3%20July%20Final%20for%20Distribution).pdf)> accessed 29 Jan 2020.

121. Lau (n 2) 28.

IV. *HOW* RATHER THAN *WHETHER* TO LEGISLATE: ANTI-DISCRIMINATION MODELS

Several jurisdictions including the United Kingdom, Australia, and the Netherlands have adopted anti-discrimination legislation on the grounds of sexual orientation and gender identity, and to a lesser extent, intersex status.¹²² The passage of legislation in many jurisdictions has been complicated by a range of factors including religious opposition towards LGBT rights, and the receptiveness of political leaders, and their political will to implement legislation. The majority of interviewees in the SOGI study suggested that the law has an important role to play in securing the protection of LGBT individuals' rights, while also helping to strengthen awareness of equality and fairness within society more broadly. However, many interviewees recognized that the law's role is limited. Even if legislation is adopted, discrimination will continue, and it is equally important to foster understanding more broadly about equality and non-discrimination. As an interviewee in the SOGI study explained:

Legislation is important in its own right to establish parity in the legal framework, but also very important because it helps you know motivate and change public consciousness, so when we have hearts and minds on our side then legislators are much less hesitant about changing the law.¹²³

While some interviewees recognized that over time, the existence of legislative protections can lead to complacency in addressing discriminatory behaviour, anti-discrimination legislation was nevertheless perceived to play an important role: 'Law is a necessary and useful step in anti-discrimination, but it isn't a solution to the problem of discrimination ... law has a part to play and law can set standards. Law can become an educator.'¹²⁴

Hong Kong's obligations under the *International Covenant on Civil and Political Rights* also require that such legislation is enacted, as indicated by the UN Human Rights Committee in its concluding comments on Hong Kong's third periodic report in 2013.¹²⁵

122. In Australia, for example, the Sex Discrimination Act 1984 (Australia) (Cth) was amended to include the grounds of sexual orientation, gender identity, and intersex status: Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013. In the Netherlands, the Equal Treatment Act 1994 s 1(1) prohibits discrimination on the ground of heterosexual and homosexual orientation or civil status. In the United Kingdom, the Equality Act 2010 lists several protected characteristics, including s 7 on gender reassignment and s 12 on sexual orientation.

123. Suen Yiu Tung, Interview with LGBT rights advocate (London, 9 Jul 2014) (on file with author).

124. Amy Barrow & Suen Yiu Tung, Interview with former High Court judge (Hong Kong, 3 Oct 2014) (on file with author).

125. In its Concluding Comments on the Third Periodic Report of Hong Kong (China) adopted in 2013, the United Nations Human Rights Committee (UNHRC) voiced its concern regarding the lack of anti-discrimination legislation prohibiting discrimination on the ground of sexual orientation in the private sector, and called for Hong Kong to consider enacting legislation prohibiting discrimination on the grounds of sexual orientation and gender identity. See UNHRC, 'Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013)' (UNHRC, CCPR/C/CHN-HKG/CO/3, 29 Apr 2013), para 23.

It's also as a matter of principle something that is embedded in the legal culture of Hong Kong, in the Basic Law ... and then as a matter of justice taking equality as a principle philosophically, seriously, I think that this is necessary.¹²⁶

Discrimination is often very difficult to prove in practice, and in reality, only a limited number of high profile cases are brought to court, although those cases that are litigated have the added benefit of instilling the public with an understanding of the types of behaviour that constitute discrimination. Case law brought under the existing anti-discrimination ordinances in Hong Kong has played an important role in this regard, raising awareness about what constitutes discrimination, particularly in relation to sex.¹²⁷ Further, as explored in Gaze and Hunter's study of how human rights are enforced, it is in the public interest to clarify principles of anti-discrimination law through the courts.¹²⁸

A. *Does anti-discrimination law make a difference?*

To date, there has been some analysis of perceived workplace discrimination against LGBT employees,¹²⁹ as well as quantitative analysis of discrimination complaints investigated and conciliated.¹³⁰ However, across jurisdictions there has been limited empirical analysis measuring the degree to which anti-discrimination legislation has shifted public attitudes or reduced discrimination over time. While it is inherently difficult to measure the efficacy of such legislation and its impact on personal and societal attitudes towards sexual orientation and gender identity, some scholars have attempted to evaluate the effects of anti-discrimination laws on sexual orientation discrimination in the domain of employment. In an empirical study, Barron considered the way Human Resource (HR) managers evaluated gay and non-gay applicants in areas of the US, which had adopted anti-discrimination legislation in comparison with how HR managers evaluated job applicants in areas without any legal protections.¹³¹ Barron's findings suggest that the existence of anti-discrimination laws are directly related to reduced prejudice amongst employers, and help to promote toler-

126. Joy L Chia, Interview with legal scholar D (n 67).

127. See the landmark case of *Equal Opportunities Commission v Director of Education* HCAL 1555/2000, [2001] 2 HKLRD 690, an action brought by the EOC against the Director of Education that challenged the systemic sex discrimination embedded in the secondary school placement allocation system.

128. Beth Gaze & Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press 2010) 244.

129. BR Ragins & JM Cornwell, 'Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees' (2001) 86 *Journal of Applied Psychology* 1244.

130. Carole J Petersen, Janice Fong & Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong 2003); Gaze and Hunter (n 128) 244.

131. Laura G Barron, 'Promoting the Underlying Principle of Acceptance: The Effectiveness of Sexual Orientation Employment Antidiscrimination Legislation' (2009) 14 *Journal of Workplace Rights* 251, 253.

ance that extends beyond the formal role of the law in regulating unlawful behaviours.¹³²

In a further study, Barron and Hebl found that the impact of anti-discrimination law is more pronounced in reducing what they refer to as interpersonal discrimination behaviours – including being rude or dismissive – which are not captured by formal legal provisions on direct and indirect discrimination.¹³³ These findings are significant because they suggest that the adoption of anti-discrimination legislation, while targeted at redressing formal discrimination in employment, education, and other domains, is instrumental in fostering a culture of non-discrimination more broadly in society.

The number of cases proceeding to court is not necessarily an effective measure of whether anti-discrimination legislation has reduced discrimination on the grounds of sexual orientation. In Hong Kong, the EOC has a statutory duty to attempt conciliation, and as conciliation is a confidential process, it is particularly difficult to evaluate whether anti-discrimination laws have reduced discrimination over time.¹³⁴ Hong Kong's EOC compiles statistical analysis of complaints, investigations, and legal assistance under its existing set of anti-discrimination laws. Since established, the EOC has received 919 applications for legal assistance under the SDO, DDO, FSDO, and RDO, and granted legal assistance in 419 cases.¹³⁵ As of 31 October 2019, there have been 107 concluded cases which were granted legal assistance under the SDO, DDO, and FSDO.¹³⁶ This would suggest that where efforts to conciliate have failed, even cases that are granted legal assistance are often settled before they reach the courts.

The EOC receives thousands of enquiries every year, including enquiries about sexual orientation discrimination, which currently falls outside the jurisdiction of the EOC. From January to October 2019, twenty-nine enquiries on sexual orientation were received by the EOC.¹³⁷ The number of enquiries has fluctuated, but in 2014, the EOC received 734 enquiries about sexual orientation,¹³⁸ which may correlate with heightened publicity and awareness campaigns on SOGI-based discrimination in 2014, as previously discussed. While the efficacy of legislation is important, the

132. *ibid* 253, 264.

133. Laura G Barron & Michelle Hebl, 'The Force of the Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment' (2013) 19 *Psychology, Public Policy, and Law* 191, 194.

134. Carole J Petersen, 'A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong's Disability Law' (2005) 25(4) *Disability Studies Quarterly* <<http://dsq-sds.org/article/view/625/802>> accessed 29 Jan 2020.

135. EOC, 'Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2019 to 31 October 2019' (Part D(1): Statistics on Application for Legal Assistance and Legal Actions (cumulative figures since 20 September 1996) – Application for Legal Assistance) <<https://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Papers/StatisticContent.aspx?ItemID=16363>> accessed 22 Jan 2020.

136. *ibid* Part D(2): Legal Actions taken for Cases granted with Legal Assistance.

137. *ibid*.

138. EOC, 'Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2014 to 31 December 2014' <<https://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Papers/StatisticContent.aspx?ItemID=13436>> accessed 29 Jan 2020.

impact of anti-discrimination legislation is more nuanced. The existence of legislation has not completely eradicated discrimination against minority groups,¹³⁹ but such laws have an important educational role. The importance of education more broadly was emphasized by interviewees: ‘Children are not born bigoted, they become bigoted and so if we can counteract that by early education, that’s a very important thing because that will translate into future generations.’¹⁴⁰

Several interviewees suggested that the adoption of anti-discrimination legislation would not require the commitment of substantial resources on the part of the HKSAR government. Taking into account the existing anti-discrimination ordinances in Hong Kong, as discussed, in practice limited cases receive legal assistance and the majority of complaints are dealt with through a process of investigation and conciliation.¹⁴¹

B. *How should SOGI protections be legislated?*

Given the high levels of daily discrimination experienced by LGBT people in Hong Kong, the question should be *how* rather than *whether* to legislate. Drawing on comparative analysis of anti-discrimination legislation across a range of jurisdictions, the SOGI study proposed three potential models, for consideration by the HKSAR government including consolidated legislation, field-specific legislation, and stand-alone legislation.¹⁴²

Consolidated legislation has been introduced in several jurisdictions.¹⁴³ In the United Kingdom for example, the development of anti-discrimination law has been incremental and has taken place over several decades since the 1960s, when the *Race Relations Act 1965* was first legislated.¹⁴⁴ The protection from discrimination on the basis of sexual orientation was initially covered by secondary legislation, the *Equality Act (Sexual Orientation) Regulations 2007*, enacted under the *Equality Act 2006*.¹⁴⁵ In 2010 the UK adopted the *Equality Act 2010*,¹⁴⁶ which consolidated multiple primary and secondary legislative provisions on non-discrimination within one statute.¹⁴⁷ The *Equality Act 2010* allows for intersectional claims based on

139. SOGI study (n 2), 187.

140. Suen Yiu Tung, Interview with LGBT rights advocate (n 123).

141. From 1 Jan 2018 to 31 Dec 2018, the EOC received 1,018 complaints. Only 63 applications for legal assistance were made during the same period. See EOC, ‘Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2018 to 31 December 2018’ <<https://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Papers/StatisticContent.aspx?ItemID=15994>> accessed 11 Nov 2019.

142. SOGI study (n 2) 140.

143. The Netherlands included protections against discrimination on the ground of sexual orientation in its Equal Treatment Act 1994 (n 122) s 1(1).

144. UK Race Relations Act 1965.

145. UK Equality Act 2006, s 81; see also Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, s 82.

146. UK Equality Act 2010 (n 122).

147. Prior to consolidation, the United Kingdom had the same model of anti-discrimination legislation as Australia. See SOGI study (n 2) para 6.1.2.

dual characteristics to be brought, although individual complainants would need to prove discrimination on each ground.¹⁴⁸ The statute includes wider protections against discrimination by perception¹⁴⁹ and association,¹⁵⁰ and positive equality duties, which create a general duty on public authorities to proactively eliminate discrimination.¹⁵¹ Currently, Hong Kong's existing anti-discrimination ordinances are based on negative equality duties, focused on redressing direct and indirect discrimination after it has already occurred. There is no impetus for the HKSAR government to pre-empt any risk of inequality before it occurs in the implementation of legislation, policies, or programs.

In other jurisdictions, the scope of legal protections is limited. In Taiwan, for example, protections against discrimination based on gender identity or sexual orientation have only been legislated in educational¹⁵² and employment¹⁵³ settings. In contrast with other jurisdictions where LGBT rights have been heavily contested, religious opposition toward LGBT rights has been less pronounced. An interviewee in the SOGI study explained that the failure to draft anti-discrimination law in 2003 was largely due to political tensions between the Democratic Progressive Party (DPP) and the *Kuomintang* [Chinese Nationalist Party], which frustrated the bill's passage through the Legislative Yuan.¹⁵⁴ This interviewee suggested that the development of legal protections on sexual orientation and gender identity in Taiwan had originated organically and was closely linked to local demand for legislation.¹⁵⁵ The adoption of field-specific legislation on the grounds of SOGI would be inconsistent with Hong Kong's existing anti-discrimination ordinances, which provide legal redress for direct and indirect discrimination in the workplace, educational settings, and in access to goods and services.¹⁵⁶

The development of a new piece of anti-discrimination legislation, whether consolidated, stand-alone, or field-specific is not necessarily required, and the HKSAR government can look to the Australian context, on which Hong Kong's existing identity-specific, stand-alone ordinances are based. In 2013, Australia's federal-level

148. UK Equality Act 2010 (n 122) s 14.

149. When a person is wrongly perceived to have a certain protected characteristic, this is discrimination by perception. For example, a transvestite (cross-dresser) who experiences discriminatory behaviour because someone mistakenly believes that he/she is undergoing gender reassignment surgery, would be considered as having encountered discrimination by perception: SOGI study (n 2) 137.

150. UK Equality Act 2010 (n 122) s 13.

151. *ibid* s 149.

152. 性别平等教育法 [Gender Equity Education Act 2004] (Taiwan).

153. 性别工作平等法 [Gender Equality in Employment Act 2002] (Taiwan), art 8. Sexual orientation-based discrimination in employment has been prohibited since 2007.

154. Suen Yiu Tung & Wong Wai Ching, Interview with legal scholar A (Hong Kong, 27 Jun 2014) (on file with author).

155. *ibid*.

156. The UN Committee on the Elimination of Racial Discrimination (UN CERD) has expressed concern that the scope of the RDO does not extend to activities related to law enforcement. Committee on the Elimination of Racial Discrimination, UN CERD, 'Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)' (UN CERD, CERD/C/CHN/CO/14-17, 30 Aug 2018), para 7.

*Sex Discrimination Act 1984*¹⁵⁷ was amended to include protections from discrimination based on sexual orientation, gender identity and intersex status. In line with the Human Rights Committee's finding in *Toonen v Australia*, sexual orientation could be implicitly construed within 'sex', although this framing may not be feasible in light of conservatism around gender roles and identity in Hong Kong.¹⁵⁸ Interviewees in the SOGI study suggested that gender identity discrimination could be effectively construed under the auspices of the SDO, which would be more acceptable to transgender individuals than having to rely on the DDO. The interpretation of the DDO to include discrimination on the ground of gender dysphoria,¹⁵⁹ requires framing gender dysphoria as a disability, which may be perceived as pejorative. Further, one interviewee explained that any protections on the basis of sexual orientation would protect all sexuality identity groups: 'Sexual orientation is not about lesbians and gays, it's about any sexual orientation.'¹⁶⁰

Hong Kong's existing set of anti-discrimination ordinances prohibit direct and indirect discrimination, harassment, victimization, and vilification, and it would be appropriate for any SOGI ordinance adopted to include similar provisions. Barron and Hebl highlighted that the efficacy of legislation is dependent on a number of factors including legal awareness as well as identification of gay and lesbian employees, in that 'employers cannot discriminate based on group membership that they do not know.'¹⁶¹ Compared with gender, an employee's sexual orientation is not visible and often hidden in an employment context.¹⁶² Even if indirect and direct discrimination on the grounds of sexual orientation are legislated by the LEGCO, for any ordinance on the grounds of SOGI to be effective it should also include provisions on discrimination by perception and association¹⁶³ to help prevent bullying and hostile behaviour towards those perceived to be gay or lesbian.

The Code of Practice, while non-binding, already defines sexual orientation, discrimination (including discrimination based on perceived sexual orientation), harassment, and vilification.¹⁶⁴ Further, the Code of Practice's definition of sexual orientation includes all sexual orientations whether towards the same sex, the opposite sex, or either sex.¹⁶⁵ The Code of Practice provides a useful foundation for the development of anti-discrimination law, but without the force of law it is not an effective instrument to regulate SOGI-based discrimination. Legislators may draw on definitions of protected characteristics from other jurisdictions for reference in

157. Sex Discrimination Act 1984 (Australia) (Cth), amended by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (n 122), s 5A, s 5B, and s 5C.

158. *Toonen v Australia* (n 20) para 8.7.

159. As confirmed in the case of *The Church of Jesus Christ of Latter-Day Saints Hong Kong Ltd v Stewart JC Park AKA Jessica Park* (n 31).

160. Amy Barrow & Suen Yiu Tung, Interview with human rights advocate, formerly a parliamentarian (Hong Kong, 29 Aug 2014) (on file with author).

161. Barron & Hebl (n 133) 194.

162. *ibid.*

163. SOGI study (n 2) 195.

164. Code of Practice (n 10) s 2.1(a).

165. *ibid.*

the design of any legislation. Further, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity¹⁶⁶ also define sexual orientation, gender identity, and intersex status.

Hong Kong's EOC presented the SOGI study's findings to LEGCO on 15 February 2016.¹⁶⁷ Yet, more than three years later, the report has had limited traction with policymakers. The HKSAR Government's failure to engage with the question of how to legislate may in part be due to major political debates regarding Hong Kong's democratic deficit, which creates several challenges for the adoption of an anti-discrimination ordinance on the grounds of SOGI.

V. CHALLENGES TO THE ADOPTION OF AN ANTI-DISCRIMINATION ORDINANCE

In recent years, Hong Kong has experienced significant political tensions in relation to the pursuit of universal suffrage, the progressive realization of which is recognized in the Basic Law.¹⁶⁸ The Umbrella Movement that spanned seventy-nine days from 28 September to 15 December 2014, and more recent protests in opposition to the HKSAR government's proposals to allow extradition of criminal suspects to China,¹⁶⁹ have focused renewed international attention on Hong Kong's political relationship with China and the principle of 'One Country, Two Systems'. Following the Umbrella Movement, a number of political incidents including the disappearance of five Causeway Bay booksellers¹⁷⁰ have caused grave concern regarding the rule of law and shrinking civic spaces in Hong Kong. What implications, if any, does this have for the LGBT rights movement? LGBT rights advocates, similar to other human rights advocates, have to navigate a changing political landscape in advancing their claims. This landscape is increasingly characterized by distrust on the part of Chinese and Hong Kong officials of what they perceive to be 'foreign forces' at play in Hong Kong's political affairs.¹⁷¹ While LGBT rights activism may

166. Yogyakarta Principles (2006) <<https://yogyakartaprinciples.org/>> accessed 11 Nov 2019. A further set of principles was developed in 2017, Yogyakarta Principles plus 10 (2017) <<http://yogyakarta-principles.org/principles-en/yp10/>> accessed 11 Nov 2019.

167. EOC, 'Meeting of Legislative Council Panel on Constitutional Affairs, Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status' (LC Paper No CB(2)822/15-16(05), 15 Feb 2016) <<https://www.legco.gov.hk/yr15-16/english/panels/ca/papers/ca20160215cb2-822-5-e.pdf>> accessed 11 Nov 2019.

168. Swati Jhaveri, 'Reconstitutionalizing Politics in the Hong Kong Special Administrative Region of China' (2018) 13 *Asian Journal of Comparative Law* 27, 27.

169. Mike Ives, 'Extradition Protestors in Hong Kong Face Tear Gas and Rubber Bullets' *New York Times* (12 Jun 2019) <<https://www.nytimes.com/2019/06/12/world/asia/hong-kong-extradition-protest.html>> accessed 11 Nov 2019.

170. Alex W Palmer, 'The Case of Hong Kong's Missing Booksellers' *The New York Times Magazine* (3 Apr 2018) <<https://www.nytimes.com/2018/04/03/magazine/the-case-of-hong-kongs-missing-booksellers.html>> accessed 11 Nov 2019.

171. Agence France-Presse, 'Hong Kong Leader blames 'foreign forces' for pro-democracy protests' *The Australian* (20 Oct 2014) <<https://www.theaustralian.com.au/news/world/hong-kong-leader-blames-foreign-forces-for-prodemocracy-protests/news-story/dced2a6e3423da467d3177007f0637a6>> accessed 25 Feb 2019.

be less contentious than democratic reform-related issues, the appointment of a British judge, Baroness Brenda Hale, and a Canadian judge, Beverly McLachlin, as non-permanent judges of the Court of Final Appeal in 2018, while perceived to be progressive in terms of gender equality, was not without tensions. Some pro-Beijing lawmakers expressed concern over the ‘foreign’ judges’ support for LGBT rights.¹⁷²

Despite Hong Kong’s rights-based legal framework, which has allowed for cause lawyering, this type of rhetoric has implications for the legal mobilization of LGBT, as well as other rights-based movements, in Hong Kong. Laws that foster non-discrimination are integral not only to the realization of the constitutional equality guarantee under the Basic Law, but also to the rule of law and democracy. As stated by one interviewee:

It’s a good thing to value citizens no matter what their sexual orientation, colour of the skin, you know these are equalities that are at the heart of a democracy, a liberal democracy, so if Hong Kong has aspirations to maintain that self-image, then sexual orientation anti-discrimination provisions are something that they have to embrace, and it will be a positive thing, and it won’t destroy the culture.¹⁷³

Hong Kong, however, is not a liberal democracy, and Hong Kong citizens are largely excluded from the political arena. Therefore the courts play an integral role in protecting ‘minorities from the excesses of the majority’.¹⁷⁴

Exploring the strategic organizing of the *Tongzhi* (literally ‘comrade’, but used in reference to the LGBT community) movement in Hong Kong,¹⁷⁵ Travis Kong speculates that Hong Kong’s LGBT movement will increasingly be grounded in a broader democratic and social justice movement, shifting away from its roots as an identity-based rights movement.¹⁷⁶ Anthony Wong, an artist and founder of Big Love Alliance¹⁷⁷ – a not-for-profit charitable organization that advocates LGBT equality – recognizes that without true democracy, it is difficult to advance LGBT rights: ‘If the legislative structure is broken, none of the anti-discrimination bills or amendments that we suggest would ever make it past the conservative groups.’¹⁷⁸

Significantly, the mobilization of gay liberation movements in Western liberal democracies coincided with other rights-based movements including the push for gender

172. Alvin Lum, ‘Pro-Beijing lawmakers voice concern over foreign judges’ support for gay rights’, *South China Morning Post* (28 Apr 2018) <<https://www.scmp.com/news/hong-kong/politics/article/2143767/pro-beijing-lawmakers-speak-out-against-two-female-foreign>> accessed 11 Nov 2019.

173. Suen Yiu Tung, Interview with legal scholar C (n 68).

174. *Leung TC William Roy v Secretary for Justice* (n 4) para 53.

175. In the early years of Hong Kong’s transition, scholars speculated that in the longer term, minority groups in Hong Kong including the LGBT community may be persecuted, similar to LGBT individuals in China, particularly if they allied themselves with pro-democracy legislators. Petersen, ‘Values in Transition’ (n 22) 362.

176. Travis SK Kong, Sky HL Lau & Eva CY Li, ‘The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong’, in Mark McLelland & Vera Mackie (eds), *Routledge Handbook of Sexuality Studies in East Asia* (Routledge 2015) 199.

177. Big Love Alliance <<http://biglovealliance.org/>> accessed 11 Nov 2019.

178. Arthur Tam, ‘Denise Ho and Anthony Wong talk democracy, mainland backlash and LGBT rights’ (TimeOut, 7 Jan 2015) <<https://www.timeout.com/hong-kong/music/denise-ho-and-anthony-wong-talk-democracy-mainland-backlash-and-lgbt-rights>> accessed 29 Jan 2020.

equality.¹⁷⁹ The Female Inheritance Movement¹⁸⁰ of the early nineties raised wider questions around gender equality in Hong Kong influencing the development of the SDO. Although the women's movement has supported wider equality in society, post-handover the strengthening of pro-establishment, pro-Beijing women's groups which are conservative in outlook¹⁸¹ may weaken the political opportunity structure for collective action. However, Altman and Symons suggest that queer activists may 'seize similar moments of social awakening', pointing to Hong Kong's 2014 PRIDE parade during the Umbrella Revolution, when members of the LGBT community carried umbrellas, the movement's symbol of resistance.¹⁸² Participating in the parade, Alex Chow Yong-kang and Lester Shum, who were prominent student leaders involved in the Umbrella Movement, linked the LGBT rights movement with Hong Kong's wider pro-democracy movement, which was vehemently opposed by the 'Family School Sexual Orientation Discrimination Ordinance Concern Group'.¹⁸³

While the HKSAR government has been keen to market Hong Kong as a global, cosmopolitan society, traditional Chinese cultural values strongly infuse private and family life, influencing attitudes towards gender and sexuality.¹⁸⁴ Bottom-up politics play an important role in the push for anti-discrimination legislation. The importance of storytelling – profiling the lives and experiences of members of LGBT individuals in newspapers and on the television – was also discussed by interviewees as a way of increasing the visibility of the LGBT community. Both interpersonal contact and exposure to the LGBT community through the media are perceived to play an important role in shifting societal attitudes in support of LGBT rights.¹⁸⁵ In recent years, the coming out of celebrities including actor Anthony Wong and Cantopop singer Denise Ho,¹⁸⁶ also a founder of the Big Love Alliance, has helped to raise awareness of LGBT equality.

The SOGI study found that there is limited understanding of the lived experiences and service needs of the LGBT community and vital data is lacking, which could inform public policy.¹⁸⁷ Scholars as well as non-governmental organizations working with the LGBT community have an important role to play in this regard by gathering evidence-based research on perceived experiences of discrimination in employment,

179. Altman and Symons (n 91) 147.

180. In the early nineties, rural women in Hong Kong's New Territories' indigenous villages challenged Chinese customary laws preventing them from inheriting land. See Sally Engle Merry & Rachel E Stern, 'The Female Inheritance Movement in Hong Kong: Theorizing the Local/Global Interface' (2005) 46 *Current Anthropology* 387.

181. Wai-man Lam & Irene LK Tong, 'Political Change and the Women's Movement in Hong Kong and Macau' (2006) 12(1) *Asian Journal of Women's Studies* 7, 28.

182. Altman and Symons (n 91) 147.

183. Fanny WY Fung, 'Gay pride parade and Occupy movements promote equal rights in society', *South China Morning Post* (8 Nov 2014) <<https://www.scmp.com/news/hong-kong/article/1635132/gay-pride-parade-and-occupy-movement-promote-equal-rights-society>> accessed 11 Nov 2019.

184. Amy Barrow & Anne Scully-Hill (n 113) 58–60.

185. Jeremiah J Garretson, 'Exposure to the Lives of Lesbians and Gays and the Origin of Young People's Greater Support for Gay Rights' (2015) 27 *International Journal of Public Opinion Research* 277, 277.

186. Arthur Tam (n 178).

187. SOGI study (n 2) 203.

education and access to goods and services. Interviewees in the SOGI study also discussed the importance of building alliances, with a former parliamentarian stating:

I always argue that the best advocates for LGBT rights are heterosexual mothers ... when a mother says: 'I want all my children to be treated equally and so when my daughter is a lesbian she should have the same rights as everybody else,' everybody understands that. When you are a gay man or a lesbian woman and you advocate for these rights, there are always people saying – 'well he actually wants to get married himself and he is doing it for himself or his group.'¹⁸⁸

This interviewee suggested that in building alliances with different stakeholders it is particularly important to reach out to members of religious communities. In the Hong Kong context, the potential conflict between freedom of religious belief and anti-discrimination legislation has infused discourses around LGBT equality.

A. *Freedom of religious belief and its implications for the development of anti-discrimination legislation*

A lasting legacy of British colonial rule is the pervasiveness of Christian ethos within public institutions, with a significant proportion of religiously-affiliated schools across Hong Kong.¹⁸⁹ In their claims-making, LGBT activists and human rights advocates must counter a small but highly vocal opposition in the form of religious and parental concern groups, who claim that anti-discrimination legislation on the grounds of SOGI would undermine their freedom of religious belief and freedom of expression.¹⁹⁰ Although Article 32 of the Basic Law recognizes that 'Hong Kong residents shall have freedom of religious belief',¹⁹¹ there is also no anti-discrimination legislation on the ground of religion. The HKSAR government has been reluctant to engage with the question of how to balance freedom of religious belief with the right not to be discriminated against on the basis of SOGI, yet the scope of religious exemptions is an issue that also has to be grappled with if anti-discrimination legislation on the grounds of SOGI is to be successfully adopted.¹⁹²

For example, several broad exemptions are incorporated into Australia's Federal *Sex Discrimination Act 1984*, including section 38(3) which relates to educational institutions established for religious purposes.¹⁹³ In the context of Hong Kong, one

188. Amy Barrow & Suen Yiu Tung, Interview with human rights advocate (n 160).

189. Amy Barrow & Joy L Chia (n 22) 101.

190. Johnny Tam, 'Christians in Prayer Rally to Fight Gay Law Proposal', *South China Morning Post* (14 Jan 2013) <<https://www.scmp.com/news/hong-kong/article/1127407/christians-prayer-rally-fight-gay-law-proposal>> accessed 11 Nov 2019.

191. Basic Law, art 32.

192. Amy Barrow & Joy L Chia (n 22) 97.

193. Sex Discrimination Act 1984 (Australia) (Cth) (n 122) s 38(3) states: 'Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'

interviewee suggested that religiously affiliated schools have autonomy and pointed to Article 141 of the Basic Law, which states that:

Religious organisations may, *according to their previous practice*, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.¹⁹⁴

The notion of ‘previous practice’ is ambiguous, however. In *Catholic Diocese of Hong Kong v Secretary for Justice*,¹⁹⁵ the Court of Final Appeal determined that the phrase ‘according to their past practice’ applied insofar as it involves the exercise of their right to freedom of religious belief and religious activity, but not in relation to educational policies which have no religious content.¹⁹⁶ Another interviewee drew a clear distinction between religious practice and educational practice, calling for careful consideration in the design of any exemption provisions.¹⁹⁷ Raising concerns that the current exemptions in Australia are too broad and potentially allow for the teaching of discriminatory attitudes, this interviewee believed that freedom of expression should apply within the confines of places of religious worship, but questioned how much further such rights should extend:

Freedom of expression must be protected in the temple and around the temple, the places where the people of this religious conviction meet and where they wish to express themselves in religion, but how much further beyond the temple the anti-discrimination law protects religion and expression of religion, is a matter for legitimate debate and will depend a bit on the attitudes, and the extent of secularism within society.¹⁹⁸

The scope of any exemptions, particularly in relation to the parameters of freedom of expression and the risk of vilification as a result of abusive speech, will need to be carefully weighed prior to the adoption of anti-discrimination legislation in Hong Kong, particularly because once broad-based exemptions are entrenched in law, it may be challenging to secure political support to narrow them down.

CONCLUSION

In Hong Kong, strategic litigation has played an important role in fostering awareness of LGBT rights by asserting privacy and equality rights under BORO and the Basic Law. However, the role of the courts as a site of legal mobilization is not without limitations, given that the boundaries of judicial law-making are constrained, and the courts are unable to enforce their own judgments. It remains to be seen whether the recent series of applications for leave to apply for judicial review, *MK v Government of HKSAR*, *TF v Secretary for Justice*, and *STK v Secretary for Justice*, will prove to advance or set back

194. Basic Law, art 141(3) (emphasis added).

195. *Catholic Diocese v Secretary for Justice* [2011] 14 HKCFAR 754 (Court of Final Appeal) para 78.

196. *ibid* para 79.

197. Amy Barrow & Suen Yiu Tung, Interview with former High Court judge (n 124).

198. *ibid*.

LGBT rights in Hong Kong.¹⁹⁹ Similar to other jurisdictions including the United Kingdom, where LGBT rights have been heavily contested, it has been necessary to address discrimination within the law before protections against discrimination can be effectively legislated.²⁰⁰ The decriminalization of same-sex relations between men and the levelling of the age of consent have been successfully litigated. While LGBT and human rights advocates should cultivate the constitutional right to non-discrimination on the grounds of SOGI, it is critical that strategic litigation does not detract from the pursuit of anti-discrimination legislation in private settings, including in the domains of employment, education, and the provision of goods and services.

A growing body of empirical evidence indicates that LGBT people experience significant levels of discrimination in their daily life – this is self-reported, given the absence of an ordinance to counter SOGI-based discrimination. Further, empirical evidence suggests that the general public in Hong Kong is not only supportive of the adoption of anti-discrimination legislation on the grounds of SOGI, but that there is also growing support for the formal recognition of same-sex relationships in law. The Code of Practice, adopted in 1998, has had limited traction in securing the voluntary commitment of employers across the territory and has been flagrantly violated by the HKSAR government itself. In light of this evidence, the question should not be *whether* to legislate anti-discrimination legislation, but rather *how* to legislate. The incorporation of the grounds of SOGI into the existing SDO may be the most feasible method of providing legal redress to LGBT individuals who experience discrimination in the workplace, educational settings, and in access to goods and services, rather than the adoption of new stand-alone or consolidated legislation.

However, there remains steadfast and vocal resistance on the part of both Hong Kong officials, religious groups, and parental concern groups to any perceived extension of LGBT rights, thus making advocacy challenging for LGBT rights activists. The shrinking of civic spaces also has implications for how LGBT rights advocates frame their claims, and may have negative repercussions for the mobilization of human rights movements more generally in Hong Kong, particularly given the rhetoric of ‘foreign forces at play’, which increasingly infuses political discourse. Despite these challenges, it is imperative that the LGBT rights movement continues to counter these adverse narratives. Looking to experiences of how other jurisdictions have legislated protections against discrimination demonstrates that there are many different routes which could be followed by the HKSAR government in legislating protections for the LGBT community. Whichever path the LEGCO takes, it is critical that legal protections against discrimination on the grounds of SOGI reach all corners of the LGBT community to strengthen substantive equality for all LGBT individuals, irrespective of socio-economic class or background.

199. See n 73 above. On 18 Oct 2019, the Court of First Instance dismissed MK’s application for judicial review. The court was unable to find that the government had a positive legal obligation to provide an alternative legal framework recognizing same-sex relationships such as civil partnerships. However, the court did suggest that a comprehensive review on the matter should be undertaken by the government as ‘The failure to do so will inevitably lead to specific legislations, or policies or decisions of the Government or other public bodies, being challenged in the court on the ground of discrimination (and possibly other grounds) on an *ad-hoc* basis, resulting in an incoherent state of the law at different times as well as much time and costs being incurred or wasted in the process’: *MK v Government of HKSAR* [2019] HKCFI 2518, para 57.

200. Lisa Vanhala (n 74) 748.