

Separate but equal? Same-sex couples' unequal access to public housing in Hong Kong and its fiscal implications

Elizabeth Lui*

Introduction and Summary

In late November 2018, Nick Infinger, a Hong Kong permanent resident who married his same-sex partner overseas, filed a judicial review against the Housing Authority (HA) for denying him public housing under the category of “ordinary family” because same-sex partnership is not legally recognized in Hong Kong.¹ In its defense at court, the government insisted that for the purpose of granting subsidized housing benefits, a relationship must be either husband and wife, parent and child or grandparent and grandchild, citing a definition in the Oxford English Dictionary.² In the light of *Nick Infinger v Hong Kong Housing Authority*, this paper presents a series of quantitative analyses that reveals the fiscal impact of depriving lesbian, gay and bisexual (LGB) persons of their eligibility as married family applicants. Such impact, I argue, inflicts punitive effects upon the general public and same-sex couples alike. Key findings of this paper include:

- Due to the current discriminatory nature of the public housing policy, LGB individuals are subjected to an economic penalty of HKD233,539. Compared to their heterosexual counterparts, they have to wait for 12 years more before being allocated to a public rental housing (PRH) flat;
- Approximately 2,772 LGB individuals are affected by the current PRH policy;
- The impugned policy is counter-productive to distributing public housing fairly and efficiently because same-sex couples who can otherwise cohabit in one PRH flat are forced to file separate applications, lengthening the overall queuing time for individual applicants. It is also a wasteful arrangement considering that building a 1-person PRH flat is substantially more costly than a 2-person PRH flat per capita;
- The prohibition against LGB married couples is inconsistent with the overarching policy logic of public housing, which has long accorded priority to family and elderly applicants over individuals.

This paper draws on data mainly from the 2016 By-census, the annual Housing in Figures reports produced by the HA and other legislative papers. Unfortunately, due to the lack of LGB-specific statistics, studying the issue of sexual minorities' access to public housing has

* Assistant Research Officer, Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong (email: elihylui@hku.hk). The author is grateful for the valuable feedback from Cora Chan, Doriane Lau, Samantha Lau, Shelley Leung, Kelley Loper and Cathie So. The author also benefited tremendously from discussions with various members of SOGIESSC Adequate Housing Concern Group and Rainbow Action, whose insights contributed to the original idea of this paper.

¹ Chris Lau and Jasmine Siu, “Married gay man sues Hong Kong government over rejected public housing application”, South China Morning Post, 23 November 2018, at <https://www.scmp.com/news/hong-kong/law-and-crime/article/2174699/married-gay-man-sues-hong-kong-government-over-rejected>; *Infinger, Nick v Hong Kong Housing Authority* HCAL 2647/2018.

² *Ibid.*

proven to be a challenge. Notably, neither the Census and Statistics Department nor the HA collects data that pertains to sexual orientation, rendering LGB people largely invisible. Nonetheless, although this study relies upon imperfect datasets to make predictions, it is still the current best estimate and will hopefully inform public policy and legal debates meaningfully and constructively in several ways. First, it offers a snapshot of the difficulties facing same-sex couples in accessing public housing in monetary terms, which enables a better understanding of the fiscal impact on them given the discriminatory nature of the current policy. Second, it serves as a basis for us to explore the legality of the restriction impugned given its heteronormative understanding of marital status or relationship, which is of relevance to the ongoing judicial challenges in *Infinger v Housing Authority*.

In order to ensure consistency with the data provided by the most recent census carried out by the Hong Kong Government in 2016, this paper utilizes information using the year of 2016 as the basis, unless specific information in that year is not available, in which case reference is made to the closest year possible.

Current Public Housing Policy

Founded in 1973, the HA's objective is to provide public rental housing to low-income families who cannot afford private rental accommodation. PRH provides flats to general applicants (i.e. family and elderly one-person applicants) as well as non-elderly one-person applicants at heavily discounted rates. According to the By-census carried out in 2016, 30.2% of the Hong Kong population live in PRH, which is equivalent to approximately 764,000 residents.³ The HA has set a target of making first flat offers to the general applicants at around 3 years, which however has only been achieved remotely in recent years with the actual waiting time exceeding 4.5 years on average.⁴ On the other hand, the non-elderly one-person applicants are placed in a different queue through the Quota and Point Scheme (QPS). Introduced in 2005, the QPS has an annual allocation quota which is set at 10% of the total number of PRH flats, subject to a cap of 2,200 units.⁵ The points under the QPS are assigned to applicants based on the following three determining factors:⁶

- (a) age at the time of application: zero point will be given to applicants aged 18. Three points will be given to those aged 19, six points to those aged 20 and so forth;
- (b) PRH residency: for applicants currently living with their families in PRH, 30 points will be deducted; and
- (c) waiting time: one additional point will be given for each month the applicant has waited, i.e. applicants will be awarded 12 points per year of waiting.

³ Housing Characteristics of Hong Kong Population, Population By-census, Table 1, Census and Statistics Department, at <https://www.bycensus2016.gov.hk/en/Snapshot-05.html>

⁴ Housing in Figures, Transport and Housing Bureau, p 5, at <https://www.thb.gov.hk/eng/psp/publications/housing/HIF2017.pdf>.

⁵ LCQ9: Quota and Points System for public rental housing, Housing Authority, 22 April 2015, at <https://www.info.gov.hk/gia/general/201504/22/P201504220353.htm>.

⁶ Application Guide for Public Rental Housing, Housing Authority, Paragraph 2.7.2, at <https://www.housingauthority.gov.hk/tc/common/pdf/global-elements/forms/flat-application/HD274.pdf>

Table 1 explains the calculation of points under the QPS, assuming an individual submits the application at the age of 30. The By-census in 2016 finds that the median ages at first marriage in 2016 for men and women are 31.4 and 29.4 respectively.⁷ Since the discrepancy between heterosexual and LGB individuals, in the context of applying for PRH as a family, appears only when they get married, this paper takes the age of 30 as the basis for illustration. Given that the minimum point for being allocated public rental housing in 2016 was 426,⁸ the applicant would have to wait for 17 years when he/ she reaches the age of 47.

Table 1. Points allocated to the applicant under QPS

Age	9 points each year	Additional 1 point for month upon application (12 points each year)	Total (accumulative)
30	0	12	12
31	9	12	33
32	9	12	54
33	9	12	75
34	9	12	96
35	9	12	117
36	9	12	138
37	9	12	159
38	9	12	180
39	9	12	201
40	9	12	222
41	9	12	243
42	9	12	264
43	9	12	285
44	9	12	306
45	9	12	387
46	9	12	408
47	9	12	429

According to the report released by the Census and Statistics Department in December 2016, the housing expenditure of poor households living in public rental housing per household is HKD 1,600 per month, while that for private tenants is HKD 6,200.⁹ In other words, individuals

⁷ Marriage and Divorce Trends in Hong Kong, 1991 to 2016, Census and Statistics Department, January 2018, at <https://www.censtatd.gov.hk/hkstat/sub/sp160.jsp?productCode=FA100055>.

⁸ “單身者覆核公屋計分制 上樓最快要等 30 年？”, HKET, 14 November 2016, at <https://topick.hket.com/article/1538706/%E5%96%AE%E8%BA%AB%E8%80%85%E8%A6%86%E6%A0%B8%E5%85%AC%E5%B1%8B%E8%A8%88%E5%88%86%E5%88%B6%E3%80%80%E4%B8%8A%E6%A8%93%E6%9C%80%E5%BF%AB%E8%A6%81%E7%AD%8930%E5%B9%B4%EF%BC%9F> (Chinese only)

⁹ Supplementary Poverty Line Analysis: Expenditure Patterns of Poor Households in 2015 Information Paper, Census and Statistics Department, December 2016, p 13, Figure 7, at [https://www.povertyrelief.gov.hk/eng/pdf/Expenditure%20patterns%20of%20poor%20households%20in%202015%20\(30.12.2016\)_final.pdf](https://www.povertyrelief.gov.hk/eng/pdf/Expenditure%20patterns%20of%20poor%20households%20in%202015%20(30.12.2016)_final.pdf).

who are allocated a place in PRH spend HKD 19,461.62 less every year on housing than those who have to rely on private rental accommodation, which is substantially more expensive.¹⁰

The fiscal implications of such an imbalance for same-sex couples is enormous. Because gay and lesbian couples cannot marry each other in Hong Kong, and the current public housing policy excludes same-sex relationship in its definition of family, they have no choice but to apply for PRH as single individuals through the QPS. For a heterosexual individual, on the other hand, when she/he gets married, she/he has the choice of applying for PRH on the general track with her/his legal spouse as a family. This results in prohibitively higher living costs for same-sex couples when compared to their heterosexual counterparts. Take the year 2016 as an example. The average waiting time for family applicants that year was 5 years. It means that if a heterosexual married couple filed an application for PRH as a family in 2016, they should be allocated a PRH flat in 2021. In contrast, the 30-year-old LGB individual, even when married (overseas), is ineligible for a family application under the PRH policy. Hence, as a QPS applicant, she/he has to wait for at least 17 years (see Table 1 for detailed calculation) during which she/he pays an additional HKD 19,461.62¹¹ for private rental accommodation each year. In other words, a total economic penalty of HKD 233,539 is imposed on same-sex couples on the basis of their sexual orientation. Table 2 simulates the comparison between a heterosexual and LGB individual of the same age.¹²

Table 2. The comparison between the housing expenditure of a heterosexual and LGB individual of the same age

	30-year-old heterosexual individual on the general track (as family applicant)	30-year-old LGB individual on the QPS track	Economic penalty on LGB individual
Waiting time for public rental housing (years)	5	17	12
Addition housing expenditure while waiting for public rental housing per year (HKD)	19,461.62	19,461.62	19,461.62
Total	97,308.1	330,847.54	233,539.44

In the absence of a territory-wide census that collects demographics of sexual minorities in Hong Kong, it is difficult to obtain the exact number of LGB individuals adversely affected by the existing differential treatment against them. Nonetheless, an estimate is made possible

¹⁰ *Ibid.* The average household size for private tenants and public housing tenants are 2.9 and 3.1 respectively. For the year 2016, the annual expenditure on housing for private tenants per head was HKD $(6,200/2.9)*12 =$ HKD 25,655.17, while that for public housing tenants was HKD $(1,600/3.1)*12 =$ HKD 6,193.55.

¹¹ See footnotes 9 and 10.

¹² According to the latest census in 2016, the median ages at first marriage in 2016 for men and women are 31.4 and 29.4 respectively. This paper thus takes the age of 30 as an example. The census is available at: <https://www.censtatd.gov.hk/hkstat/sub/sp160.jsp?productCode=FA100055>.

by currently available data. Research conducted by the Gender Studies Centre at the Chinese University of Hong Kong shows that there are approximately 400,000 LGB persons in Hong Kong.¹³ On the other hand, the latest census carried out in 2016 finds that the current population of the city is 7,336,585.¹⁴ In other words, it is estimated that the LGB community is approximately 5.5% of the general population. Applying the 5.5% estimate to the total number of applications (129,000)¹⁵ under the QPS in 2016 produces an estimate of around 7,095 individual LGB applicants. These people would otherwise be able to apply for public housing through a much faster track (as a family applicant) when they get married should the scheme accept same-sex relationships as a recognized family unit. This is, however, likely to be an under-sampling of LGB applicants for at least two reasons. First, LGB persons in Hong Kong have continued to face prevalent discrimination in the realms of education, employment and provision of services.¹⁶ Therefore, it is expected that they are disproportionately poor and thus overrepresented among those applying for public housing and other social welfare. This notion is widely supported by an overwhelming amount of scholarly work overseas. For example, research carried out by the Williams Institute, University of California, Los Angeles finds that lesbian/ bisexual women are more vulnerable to being poor than their heterosexual counterparts.¹⁷ Also, for couple-headed households, gay and lesbian households are more likely to receive cash assistance from the government than heterosexual households.¹⁸ Second, when LGB individuals come out to their families as non-heterosexuals, they may meet with unwelcoming or even hostile reactions from their family members. Some may even face the risk of being kicked out and, as a result, become homeless. In fact, studies have found that homeless youth across the United States are disproportionately LGB and transgender.¹⁹ Factoring in such unique risks facing the LGB population, it is expected that they are more likely to move out from their parents' house and apply for public housing as individuals.

Currently, same-sex relationships are not legally recognized in Hong Kong, neither in the form of marriage nor civil unions. However, LGB persons continue to form stable, intimate and monogamous relationships with their partners. Therefore, it is fair to assume that should same-sex marriage be legalized in Hong Kong, at least some of these gay and lesbian couples would opt to institutionalize their relationships by getting married. In fact, such assumption

¹³ “性小眾歧視達臨界點 平機會促立法保障”, on.cc, 9 March 2017, at

https://hk.on.cc/hk/bkn/cnt/news/20170309/bkn-20170309171216431-0309_00822_001.html (Chinese only)

¹⁴ Hong Kong Population By-Census 2016, Population and Average Annual Growth Rate by Year, Table A102, at <https://www.byensus2016.gov.hk/en/bc-mt.html>.

¹⁵ Housing in Figures 2017, Transport and Housing Bureau, p 5, at <https://www.thb.gov.hk/eng/psp/publications/housing/HIF2017.pdf>.

¹⁶ Suen, Y.T., Wong, A.W.C, Barrow, A., Wong, M.Y., Mak, W.S., Choi, P.K., Lam, C.M., Lau, T.F. (2016). Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status, at <https://www.legco.gov.hk/yr15-16/english/panels/ca/papers/ca20160215-rpt201601-e.pdf>.

¹⁷ Randy Albelda, M.V. Lee Badgett, Gary J. Gates, Alyssa Schneebaum, “Poverty in the Lesbian, Gay and Bisexual Community”, Williams Institute, March 2009, at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

¹⁸ *Ibid.*

¹⁹ Durso, L.E., & Gates, G.J. (2012). Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or At Risk of Becoming Homeless. Los Angeles: The Williams Institute with True Colors Fund and The Palette Fund, at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

is to some extent supported by empirical evidence, as that is usually what happens in countries that legalize same-sex unions. For example, the same-sex marriage rate increased from 7.9% to 9.5% after *Obergefell v Hodges*, a Supreme Court's ruling that granted LGB persons the right to marry nationwide in the United States.²⁰

The data on PRH applicants provided by the HA does not contain any information about one's sexual orientation. Therefore, it is next to impossible to accurately predict exactly how many gay and lesbian couples would be eligible to switch to the general route if same-sex partnerships are recognized as families under the PRH policy. The method that comes closest to a statistically robust prediction is to apply the percentage of married people in the general population to the LGB persons among the QPS applicants (n=7,095²¹). This generates an estimate of 2,772 gay, lesbian and bisexual persons who may otherwise be married if they were allowed to do so.²²

Some may dispute this methodology on the basis that the percentage of LGB persons choosing to marry, even if same-sex relationships were legally recognized, would be less than marriage rates of the general population. The reason for such a possible discrepancy may be that the LGB community faces acute difficulties, such as mental health issues and widespread stigma and discrimination that may hinder them from committing to long-term, loving and stable relationships. However, such speculation is countered by an array of research conducted in countries where same-sex marriage or civil union has become a reality. Data shows that the rate of married gay and lesbian couples are in fact catching up with their heterosexual counterparts. For instance, data collected by Gallup in 2017 - two years after the Supreme Court ruled in *Obergefell v Hodges* that states could not prohibit same-sex marriages - shows that although LGBT Americans are still more likely to be married to an opposite-sex spouse (13.1%) than a same-sex spouse (10.2%), the gap is narrowing.²³

While the number of LGB persons being discriminated against by the current policy is recognizable, such discriminatory nature of the current policy does not only hit the sexual minorities alone. On the contrary, the policy at issue should concern all taxpayers in general and those in need for public housing in particular, regardless of their sexual orientation. The current restriction imposed on LGB couples force them to live in *separate* single PRH flats even they can otherwise cohabit in one 2-person flat. Due to the lack of detailed statistics about this sub-population, we are unable to determine exactly how many LGB couples are

²⁰ Jeffrey M. Jones, "Same-Sex Marriages Up One Year After Supreme Court Verdict", Gallup, 22 June 2016, at <https://news.gallup.com/poll/193055/sex-marriages-one-year-supreme-court-verdict.aspx>.

²¹ See footnote #14.

²² The data provided by the Housing Authority segregates the QPS applicants into 2 groups: aged below 30 (35%; n=71,300) and aged above 30 (48%; n=63,100). I therefore hand-calculated the percentage of people being married in the age group 18-30 (10.31%) and 30-59 (71.58%) by using the 2016 Population By-census. Extending the numbers to the LGB population among the QPS applicants (n=7,095) produces an estimate of 2,772 of gays and lesbians who would otherwise be married: $(7,095 * 35% * 10.31%) + (7,095 * 48% * 71.58%) = 2,772$. See Table 18, Memorandum for the Subsidised Housing Committee of the Hong Kong Housing Authority, Survey on Public Rental Housing Applicants 2016, Paper No. SHC 60/2016 at <https://www.housingauthority.gov.hk/en/common/pdf/about-us/housing-authority/ha-paper-library/SHC60-16.pdf>; Table A103a, Population, Population (Excluding Foreign Domestic Helpers) by Sex, Age and Year, 2016 Population By-census, at <https://www.bycensus2016.gov.hk/en/bc-mt.html?search=A103a>.

²³ Jeffrey M. Jones, "In U.S., 10.2% of LGBT Adults Now Married to Same-Sex Spouse", Gallup, 22 June 2017, at <https://news.gallup.com/poll/212702/lgbt-adults-married-sex-spouse.aspx>.

under such situation. However, we can at least draw upon available data and derive that it is very likely that the current policy is counter-productive to utilizing public resources cost-effectively. Table 3 shows that, for flats that are built after 1992, the average living space per head in 1-person flats is 17.81 square meters. On the other hand, with the shared toilet, kitchen and other co-living spaces, a 2-person flat occupies only 11.5 square meters per head. In other words, moving applicants from 1-person flats to 2-person flats would save space up to 6.31 square meters of space per person. According to the HA's own calculation, the cost of providing accommodation for one-person applicants (per capita cost of unit = HKD170,000) is substantially higher than for households comprising two (HKD120,000) or more persons.²⁴ Given that there are around 2,772 LGB applicants in the QPS queue who are likely to get married and can actually live together with their partners in a 2-person flat, allowing these applicants to apply for public housing as ordinary family applicants would spare more space which can in turn be used to construct more PRH units for the general public.

Table 3. Average living space per person in public rental flats²⁵

Household size/ Internal Floor Area (Square Metres)	Average living space ²⁶ per person in 1- person flats	Average living space per person in 2- person flats	Space spared by moving applicants from 1-person to 2-person flats
Flats built after 1992	17.81	11.5	6.31

If we consider the policy logic underpinning the overall subsidised housing policy in Hong Kong, which is to encourage applicants to cohabit with their family members as opposed to living alone, the current restriction against LGB couples becomes even less defensible. Since the introduction of the QPS, the Housing Authority capped the quota of PHR flats for QPS applicants at 2,000 units. The number was increased to 2,200 units in 2014.²⁷ However, 90% of the available PRH flats are still reserved for general applicants. In 2016, for instance, out of the total 15,116 flats available for rent, more than 13,000 units were held for the general queue, leaving the QPS track with only a little more than 1,500 units.²⁸ As a result, as shown in Table 4, the competition for a flat on the QPS track is much fiercer than that on the general

²⁴ Memorandum for Subsidised Housing Committee - Review of Allocation Policy for Non-elderly One-person Applicants, Housing Authority, Paper No. SHC 58/2005, p 4, at <https://www.housingauthority.gov.hk/en/common/pdf/about-us/housing-authority/ha-paper-library/SHC5805.pdf>

²⁵ Numbers in this table are calculated with reference to data provided in Legislative Council Panel on Housing Measures to tackle Under-occupation in Public Rental Housing Estates, Housing Authority, 2016, CB(1)1012/06-07(03), available at <https://www.legco.gov.hk/yr06-07/english/panels/hg/papers/hg0305cb1-1012-3-e.pdf>.

²⁶ According to the Housing Authority, average living space per person is calculated by taking the average of the living space per person of all PRH households. The living space per person of each PRH household is defined as the ratio of the internal floor area of the PRH flat occupied by the PRH household and the number of authorized persons in that household. See Explanatory Note 13, Housing in Figures, Housing Authority, 2018, available at <https://www.thb.gov.hk/eng/psp/publications/housing/HIF2018.pdf>.

²⁷ Rationalisation of public rental housing resources, Press Releases, Housing Authority, 14 October 2014, at <https://www.info.gov.hk/gia/general/201410/14/P201410140802.htm>.

²⁸ Rationalisation of public rental housing resources, Press Releases, Housing Authority, 14 October 2014, at <https://www.info.gov.hk/gia/general/201410/14/P201410140802.htm>.

route, with 85 applicants competing for 1 QPS flat. In other words, a person with a family member, either biological or chosen, is placed in a much more favorable position to acquire accommodation in public housing estates. In fact, the HA's priority has always been accorded to families and the elderly throughout the course of reforming the subsidized housing policy in 2005 and again in 2015. In its consultation paper in 2013, the HA's Long-term Housing Strategy Committee notes that, "it is the current policy of the Government and the HA to accord priority to families and the elderly (i.e. the general applicants) over non-elderly one-person applicants for PRH".²⁹ The crux of these reforms is that due to the increasingly scarce public housing relative to the soaring demands from 1-person applicants, the QPS should aim to remove incentives for single applicants to apply for PRH at an early age while at the same time improve the chance for those above the age of 45 to gain earlier access to PRH.³⁰ Such aims were accepted by the court in Hong Kong as legitimate in *Choi King Fung v Hong Kong Housing Authority*.³¹ If this policy logic is consistently followed, it is difficult to imagine why same-sex couples are not being considered families as they are not even essentially single, albeit considered so legally, and should not be competing for the severely finite QPS quotas with other single applicants in the first place. Hence, including LGB couples as eligible family applicants would alleviate the competition for QPS, which is much fiercer than that of the general track (see Table 3), freeing up spaces and shortening the waiting time for single individuals, including those above the age of 45, who face a pressing need for affordable housing.

Table 4. Comparison between the competition for PRH on general and QPS tracks

	Applicants/ flats available	Competition
General	151,134/13,604	1:10.8
QPS	124,866/1,512	1:85.3

Furthermore, under the Elderly Persons Priority Scheme put forward by the HA, two or even three persons are allowed to live in the same PRH unit when they reach the age of 60, regardless of their sexual orientation or whether they are related in any way either by blood or marriage.³² In other words, as long as they are old enough, people are allowed to share the same subsidized flat with each other, even though they are essentially strangers. This reveals that the benchmark used to allocate affordable housing in Hong Kong has never been coterminous, and a heteronormative understanding of marital status or relationship is just one of the many ways to administer the distribution of public resources of such kind. Especially in respect of the fact that public housing is highly sought after and has become increasingly scarce partly due to the skyrocketing housing prices in Hong Kong, the government would have to offer sufficiently cogent reasoning to justify its priority to safeguard a heterosexual definition of marriage in the face of a pressing need for more affordable housing made available to the general public.

²⁹ Long Term Housing Strategy: Building Consensus, Building Homes - Consultation Document, Housing Authority Long Term Housing Strategy Steering Committee, p 60, at https://www.thb.gov.hk/eng/policy/housing/policy/lths/lthb_consultation_doc_201309.pdf

³⁰ *Choi King Fung v Hong Kong Housing Authority* [2017] HKCFI 459; HCAL 191/2015 (17 March 2017), p 22.

³¹ *Ibid*, pp 69-73.

³² Elderly Persons Priority Scheme, Hong Kong Housing Authority, at <https://www.housingauthority.gov.hk/en/flat-application/application-guide/elderly-persons/elderly-persons-priority-scheme/index.html>

Sale of Home Ownership Scheme (HOS) Flats

In addition to the PRH scheme, the government has also introduced the Home Ownership Scheme (HOS) which allows residents to buy their own flats built by the Housing Authority at rates below the market price. This subsidized housing is sold to eligible PRH tenants through the Green Form (GF) track, while other low-income residents can apply on the White Form (WF) route. Quotas for GF and WF applicants are usually split in half. Since the applications go far beyond the number of flats available, HOS units are allocated through a lottery system.

In 2016, a total of 2,657 flats from two HOS developments were put up for sale, half of which were reserved for WF buyers.³³ A quota of 100 flats was set aside for one-person applicants.³⁴ Among the 48,497 WF applicants, 59% of them were 1-person applicants (n=28,613), and the rest (41%) were families (n=19,884).³⁵ Applying the 5.5% estimated LGB population in Hong Kong to the HOS applicants produces an estimate of 1,574 LGB persons among the WF 1-person buyers, among whom 407 would otherwise be eligible in the family queue should same-sex relationships become recognized.³⁶ Again, since same-sex relationships are not recognized as families under the HOS policy, same-sex couples would have no choice but to apply for HOS using the 1-person route, placing them in a severely unfavourable position in winning the HOS lottery. Table 5 shows a simulation of a comparison between 2 couples, one opposite-sex and the other, same-sex. The probability of the different-sex couple winning the HOS lottery is 6.25%, whilst that of the same-sex couple is only 0.35%. In other words, LGB individuals are almost 5% less likely to be able to buy a HOS flat, subjecting them to an economic penalty based on their sexual orientation as they will have to resort to buying a much more expensive flat in the private market.

³³ HA's Subsidised Housing Committee approves arrangements for Sale of Home Ownership Scheme Flats 2016, available at <https://www.info.gov.hk/gia/general/201512/09/P201512090338.htm>.

³⁴ *Ibid.*

³⁵ Memorandum for the Subsidised Housing Committee of the Hong Kong Housing Authority, Major findings of the Survey on Applicants of the Sale of Home Ownership Scheme Flats 2016, Paper No. SHC 66/2017, at <https://www.housingauthority.gov.hk/en/common/pdf/about-us/housing-authority/ha-paper-library/SHC66-17.pdf>

³⁶ The data provided by the Housing Authority segregates the 1-person WF applicants into 4 groups: aged below 29 (70%), aged 30-39 (24%), aged 40-49 (4%) and aged 50-59 (1%). Drawing upon these numbers, I hand-calculated the percentage of people being married in these age groups by using the 2016 Population By-census. Extending the numbers to the LGB population among the WF applicants (n=1,574) produces a weighted estimate of 407 gays and lesbians who would otherwise be married: $(1,574 * 70% * 10.31%) + (1,574 * 24% * 62.32%) + (1,574 * 4% * 74.64%) + (1,574 * 1% * 77.24%) = 407$. See Table 8, Memorandum for the Subsidised Housing Committee of the Hong Kong Housing Authority - Major findings of the Survey on Applicants of the Sale of Home Ownership Scheme Flats 2014, Housing Authority, Subsidised Housing Committee, Paper No. SHC 65/2016, at <https://www.housingauthority.gov.hk/en/common/pdf/about-us/housing-authority/ha-paper-library/SHC65-16.pdf>; Table A103a, Population, Population (Excluding Foreign Domestic Helpers) by Sex, Age and Year, 2016 Population By-census, at <https://www.bycensus2016.gov.hk/en/bc-mt.html?search=A103a>.

Table 5. Comparison between same-sex and different-sex couples under HOS

	Flats allocated	Number of applicants	Probability of success
Same-sex couple (on the 1-person queue)	100	28,613	1:286 (0.35%)
Different-sex couple	1,229	19,884	1:16 (6.25%)

Conclusion and Legal Implications

The data analysis in this paper demonstrates that low-income same-sex couples suffer an economic penalty against their LGB identities. Owing to the fact that their relationships are not legally recognized for the purpose of applying for public housing as families, they are subjected to a longer waiting time of 12 years, during which they have to pay an extra HKD233,539 for private rental accommodation, when compared to their heterosexual counterparts. This paper estimates that at least 2,772 LGB persons are adversely affected by the current policy. It is important to note that such a discriminatory policy does not only deny non-heterosexual couples' equal access to housing benefits but is also detrimental to economical and effective distribution of subsidized housing, adversely affecting the Hong Kong public in general and PRH applicants in particular.

Two possible scenarios may arise in the *Infinger* case. First, the government may proffer that protecting the traditional concept of marriage is a legitimate aim in justifying the decision not to allow same-sex couples to apply for public housing as ordinary family. Second, in order to adopt a bright-line rule which is based on marital status as defined by Hong Kong's matrimonial law, the Housing Authority may defend itself by declaring that excluding LGB persons from the ordinary family route to public housing is justified as it seeks to achieve the aims of stewarding precious public resources prudently and effectively.

Findings in this paper suggest that these arguments possibly put forward by the government are unlikely to hold. On the one hand, although the government may argue that there are benefits of preserving the status quo and continuing to exclude LGB persons from applying for public housing as ordinary family applicants, these benefits are theoretical and speculative. Such benefits would be further discounted if we take into consideration that the current policy adversely affects *both* heterosexual and LGB couples, as it hurts the public purse by forcing married same-sex couples to fill separate applications for PRH as single applicants, wasting more resources than in a situation whereas all married spouses are considered eligible family applicants, regardless of their sexual orientation. On the other hand, the harm inflicted upon same-sex couples is unduly harsh, deleterious and substantial, as shown in this study. All in all, it would be hard to argue that the impact of the inroads into LGB persons' right to equality under the current public housing policy can be outweighed by the potential benefits of protecting the traditional concept of marriage. The burden of proof falls on the government to submit weighty evidence to prove otherwise.