

ALLEN & OVERY

The Recognition and Treatment of Relationships under Hong Kong law

*Report for the Equal Opportunities Commission by Allen & Overy
– Executive Summary*

June 2019



Introduction

Allen & Overy's report identifies widespread – yet inconsistently applied – instances of differential treatment according to relationship status across 21 separate areas of Hong Kong law and government policy. Differential treatment extends beyond individuals in alternative relationships, such as cohabiting couples, civil partnerships and same-sex marriages, hampering effective law enforcement as well as Hong Kong's broader society. These findings are the result of an unprecedented review of legislation in Hong Kong, across 537 Ordinances.

As social views change in Hong Kong, people increasingly accept the legitimacy of relationships other than opposite-sex marriage. There is greater acceptance of couples who choose to live together without being married. Support is also growing for anti-discrimination protections for lesbian, gay, bisexual, transgender, and intersex (LGBTI+) people.

Yet opposite-sex marriage remains the only broadly legally recognised voluntary personal relationship in Hong Kong. Couples in alternative relationships such as civil partnerships or cohabitation relationships – whether opposite-sex or same-sex – as well as couples in same-sex marriages formed in other jurisdictions, do not enjoy many of the same rights and benefits as similarly situated people in opposite-sex marriages. And despite sharing the same emotional, financial, and social bonds as opposite-sex spouses, they are not subject to the same obligations.

Against this backdrop, Hong Kong's Equal Opportunities Commission (EOC) engaged Allen & Overy to identify and analyse areas of Hong Kong legislation and policy in which an individual's relationship status impacts their legal rights and obligations. Allen & Overy's findings are documented in 'The Recognition and Treatment of Relationships under Hong Kong law', a report released in June 2019.

The report details the serious impact differential treatment based on relationship status can have on individuals, the Government, and the public in Hong Kong. At the individual level, couples in non-marital cohabiting relationships cannot access reproductive technology. Neither cohabiting couples nor couples in same-sex marriages can apply for public rental housing as an ordinary family. If a person dies without a will, their cohabitee, unlike an opposite-sex spouse, has no automatic right to the deceased's estate.

But while differential treatment impinges on the rights of individuals in alternative relationships, its repercussions do not end there.

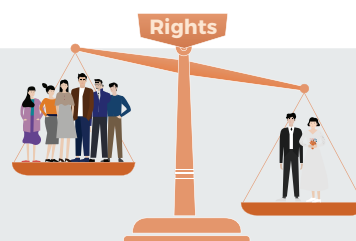
The Government's failure to recognise and codify alternative relationships also limits the reach of policy and hampers effective law enforcement. Market misconduct laws, to give one example, categorise the disclosure of certain prohibited information for the benefit of one's opposite-sex spouse as illegal. Identical behaviour – with identical consequences – may be more difficult to punish when the would-be criminals are in a same-sex marriage. Allen & Overy's report catalogues these and other ways differential treatment affects individuals, the Government, and the public.

To compile the report, Allen & Overy's international team of lawyers acted pro bono, supported by a team from Morgan Stanley and specialist advisors.

We hope the report will allow local stakeholder groups and other institutions to engage in discussions about whether particular areas of the law may benefit from reform and, if so, how such reforms may be pursued.

Please visit www.allenoverly.com/EOC for the full report.

Join the conversation
#Equality4Couples



The emotional, financial and social bonds between individuals in alternative relationships are often identical to those between opposite-sex spouses



Background

THE DISCRIMINATION LAW REVIEW

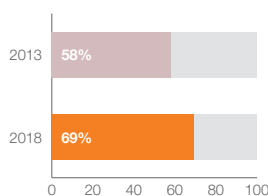
In 2016, the EOC Discrimination Law Review examined all anti-discrimination laws relating to marital status. It found that protections from discrimination on the grounds of marital status and family status only apply to individuals in opposite-sex marriages. No comparable safeguards protect those in alternative relationships.

The review highlighted other areas of policy and law that discriminate on the grounds of relationship status. The lack of legal recognition for alternative relationships, it concluded, enables that discrimination.

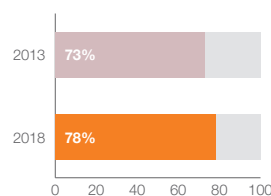
CHANGING SOCIAL ATTITUDES

With some exceptions, Hong Kong law does not recognise same- or opposite-sex civil partnerships, cohabitation relationships, or same-sex marriages formed in foreign jurisdictions. Increasingly, however, Hong Kong's society does.

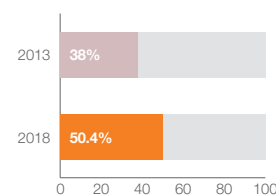
- As early as 2008, 51 per cent of respondents to a survey conducted by the Department of Social Work and Social Administration at The University of Hong Kong accepted the legitimacy of long-term, non-marital unions. The department concluded that in Hong Kong, where the number of people who have never married has increased significantly over the past 25 years, people “are ready to accept more diverse definitions of family”.
- More recently, the Family Council's 2017 Family Survey indicated that 49.1 per cent of people aged 15–34 and 47 per cent of those aged 35–54 accepted the legitimacy of cohabiting unions.
- A similar trend is evident in society's changing view of LGBTI+ relationships. A 2018 survey by the Centre for Comparative and Public Law at The University of Hong Kong indicated growing public support for anti-discrimination measures for LGBTI+ people. Where 58 per cent of respondents favoured legislating against sexual orientation discrimination in 2013, that number rose to 69 per cent in 2018. Nearly four-fifths – 78 per cent – agreed same-sex couples should enjoy at least some of the rights of opposite-sex couples, a 5 per cent increase since 2013. And where just 38 per cent supported same-sex marriage in 2013, this figure climbed to 50.4 per cent in 2018.



Favoured legislating against sexual orientation discrimination



Agreed same-sex couples should enjoy rights of opposite-sex couples



Supported same-sex marriage

Survey by the Centre for Comparative and Public Law at The University of Hong Kong



CURRENT ACTIONS

In recent years, individuals in alternative relationships have launched a series of legal challenges against differential legal treatment. In November 2018, one applicant filed a judicial review to quash the Hong Kong Housing Authority's decision that the applicant and his same-sex spouse were ineligible to apply for public rental housing as an ordinary family. Earlier that year, a woman launched a judicial review into the unavailability of marriage and civil partnerships for same-sex couples. In November 2018, two men launched separate legal challenges against Hong Kong's restriction of marriage to opposite-sex couples and its refusal to recognise same-sex marriages from overseas.

Some challengers have met success. In July 2018, the Court of Final Appeal ruled the Director of Immigration had acted unlawfully in declaring the same-sex civil partner of an eligible sponsor ineligible for a dependant visa. Civil partners and same-sex couples who have married outside Hong Kong now have the right to apply for dependant visas.

More recently, in June 2019, the Court of Final Appeal ruled in favour of a civil servant challenging the Secretary for the Civil Service's decision not to provide medical and dental benefits to the petitioner's same-sex spouse, and the Commissioner of Inland Revenue's decision that the couple were not entitled to elect for joint assessment for salaries tax. Directions arising from the ruling are yet to be given, but in the future, same-sex spouses of civil servants should enjoy the same medical and dental benefits as their opposite-sex counterparts while taxpayers will be eligible for joint assessment with their same-sex spouses.



ALLEN & OVERY'S REPORT

Against this background, the EOC commissioned Allen & Overy to produce a report on the recognition and treatment of relationships under Hong Kong law.

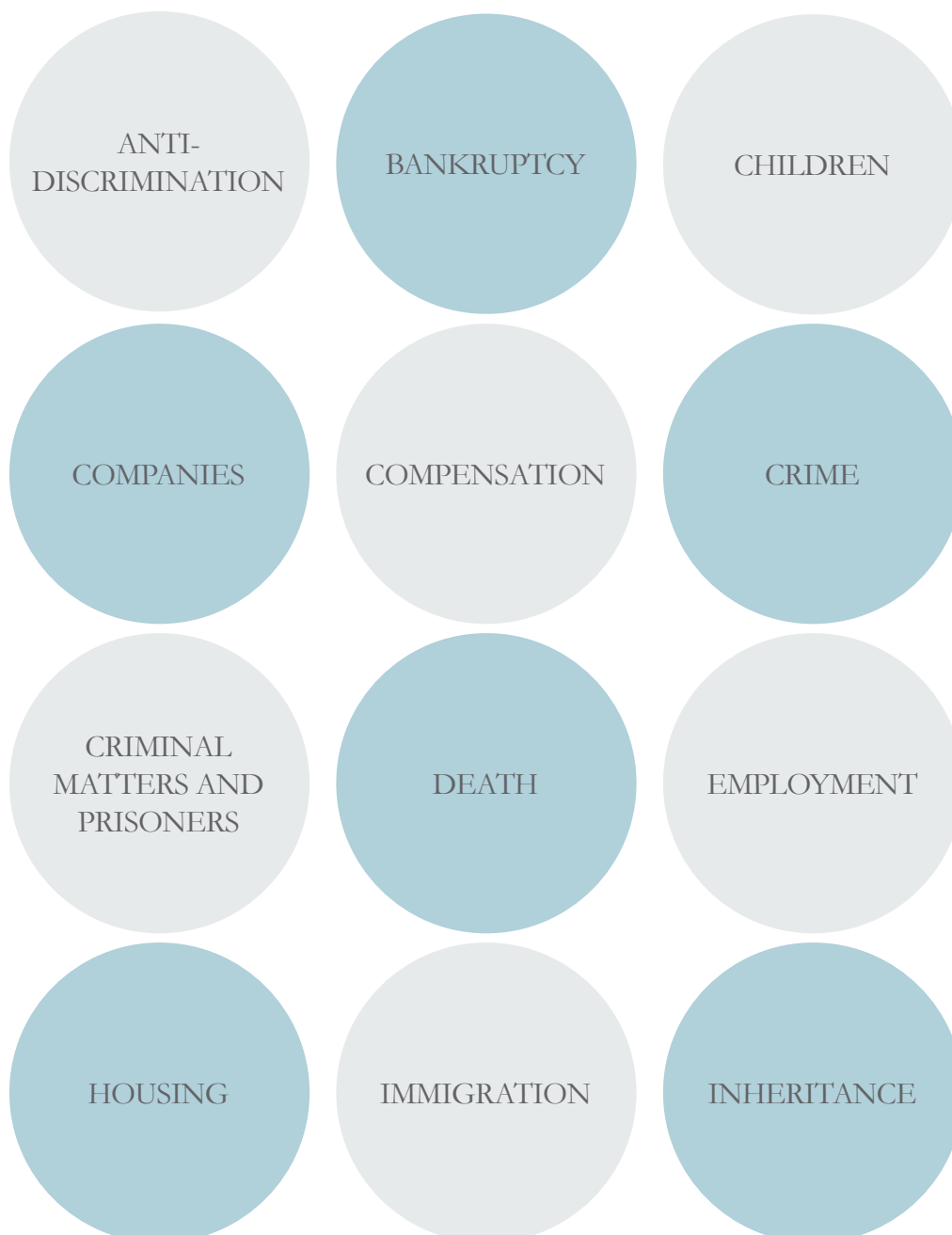
Allen & Overy conducted a keyword search of eLegislation, the official database of Hong Kong legislation, using terms such as "related persons", "marital", and "family". Those search terms identified more than 1,700 provisions across 537 Ordinances and pieces of subsidiary legislation. The team of lawyers also conducted a keyword search across the contents of public forms and related content retrieved from the websites of selected government departments to identify policies relevant to the report.

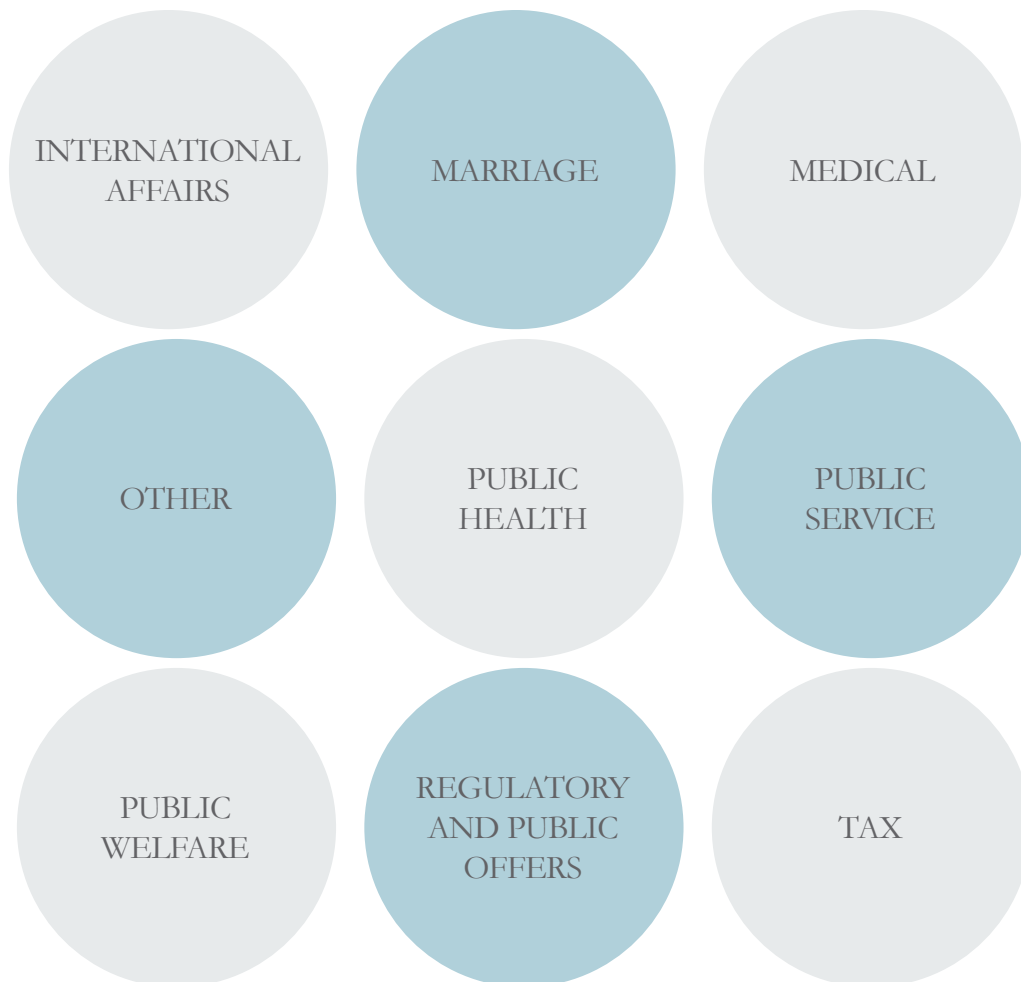
Allen & Overy analysed these provisions and policies to understand how individuals are treated according to whether they are in:

- an opposite-sex marriage
- a same-sex marriage formed outside Hong Kong
- an opposite-sex or same-sex civil partnership formed outside Hong Kong
- an opposite-sex or same-sex cohabitation relationship.

Findings

Allen & Overy uncovered widespread – yet inconsistently applied – instances of differential treatment according to relationship status across Hong Kong legislation and government policy. In particular, the report identified 21 areas in which a person receives differential treatment depending on their relationship status.





Allen & Overy found that the impact of differential treatment extends beyond individuals in alternative relationships. In addition, by minimising the reach of government policy and hampering effective law enforcement, it affects Hong Kong's broader society as well.

Limited and differential recognition of relationships

With some exceptions, Hong Kong legislation and government policies exclude cohabitation relationships, civil partnerships, and same-sex marriages formed outside Hong Kong from the rights, benefits, and obligations of opposite-sex married couples. This is notwithstanding that the emotional, financial, and social bonds between individuals in alternative relationships are often identical to those between opposite-sex spouses.

The research also identified multiple inconsistencies in Hong Kong's legal recognition of alternative relationships. Some of the provisions analysed do acknowledge cohabitation relationships. For instance, in anti-domestic violence safeguards and in company laws around fair dealing, the law considers cohabitation relationships – regardless of partners' genders – equivalent to opposite-sex marriages. In other cases where the law recognises cohabitation, it stipulates that the partners involved must be of opposite sexes. The Mandatory Provident Fund Schemes Authority, for example, can grant benefits to cohabiting partners only where they live as “man and wife”.

Even within specific areas such as anti-discrimination, recognition of alternative relationships is uneven. Following

the EOC's recommendations, the Government is expanding anti-racial discrimination legislation to protect cohabiting individuals from discrimination motivated by their partner's race. Yet, protection from discrimination based on family status is only available to individuals in opposite-sex marriages. While cohabittees are protected from discrimination and harassment caused by a partner's disability, they have no legal recourse against discrimination resulting from their caring for a terminally ill partner.

Complicating matters further, Hong Kong's legislation contains no standard definition of a cohabitation relationship. Even where these relationships are acknowledged, this is not done in a consistent manner. For instance, the eligibility of a deceased person's cohabitee for compensation under different schemes can differ depending on how long the couple lived together, the manner which they lived together and their respective genders.

By adopting a universal definition of a cohabitation relationship, Hong Kong would eliminate these discrepancies.



Impact

Allen & Overy outline many instances where differential treatment according to relationship status may negatively impact individuals' lives, and negatively impact society, by limiting the Government's ability to implement policy and diminishing the power of law enforcers to identify and prosecute criminal activity.

The impact on individuals

In many cases, the law prevents civil partners and cohabittees – regardless of the parties' genders – as well as those in same-sex marriages, from accessing the rights opposite-sex spouses enjoy. Despite the emotional, financial, and social similarities between marital and non-marital unions, couples in alternative relationships are denied the right to:

- jointly adopt children
- access reproductive technology
- receive immediate notification if a partner dies in prison
- succeed to a deceased partner's estate if that partner dies without a will
- object to the removal of a deceased partner's body parts for medical research or education
- apply for, and live together in, public rental housing as an "ordinary family"
- apply for certain allowances and deductions that can lower a couple's tax burden.



An individual's relationship status can also affect their rights in the workplace in several ways:

- Unlike a married employee, an individual in an alternative relationship has no legal protections if they are treated less favourably by their employer as a result of caring for their terminally ill partner.
- If a permanent resident's dependants accompany that resident to work outside Hong Kong, they are entitled to certain benefits. But where opposite-sex spouses are categorised as dependants, civil partners, cohabittees, and same-sex spouses may not be.
- The Employment Ordinance also compels employers to make long service payments to the opposite-sex spouses of deceased employees, where the deceased was employed under a continuous contract for at least five years prior to their death. Dependant partners who were not married enjoy no such entitlement.
- Where an individual employed by their opposite-sex spouse's business cannot seek payment from the Protection of Wages on Insolvency Fund in the event the business becomes insolvent and cannot pay the wages it owes, no such exclusion applies to a business owner's civil partner, cohabitee, or same-sex spouse.
- Where an employer providing accommodation for an employee in an opposite-sex marriage and their family can lawfully deduct the value of the rent from that employee's wages, they have no such right when the accommodation is used solely by the employee's civil partner, cohabitee, or same-sex spouse.

The impact on the Government and the public

Differential treatment according to relationship status affects broader society as well as individuals. Because legislation regularly neglects to consider relationships other than opposite-sex marriage, the Governments cannot administer certain policies to their fullest extent, and law enforcers may have greater difficulty prosecuting crimes than they would if the criminal parties were legally married. Several examples of the harm this oversight may cause the Government, creditors, victims of crime, and the general public are outlined below.

- The law recognises it as rape where a man induces a married woman to have sexual intercourse with him by impersonating her husband. Because the law does not recognise alternative relationships, this offence does not apply if a man induces a woman to have sexual intercourse with him by impersonating her cohabiting partner. This may make it more difficult for the law to prosecute men who commit objectionable acts against women in alternative relationships.
- Bigamy committed by a married person is a punishable offence, but prosecution is impossible where the original or subsequent partnerships are not opposite-sex marriages.
- The creditors of a bankrupt have less protection against unfair preferences where the debtor is in an alternative relationship. The statutory presumption that a gift to a spouse is an unfair preference, and the extension of the period ending in bankruptcy in which unfair preferences can be given, do not apply where the gift was made to a non-marital partner.
- Market misconduct laws criminalise the disclosure of certain types of prohibited information for the benefit of a person's close associates. Because these laws only recognise opposite-sex spouses and cohabitantes as close associates, it is more difficult to prosecute illegal conduct where an informant is in a same-sex relationship.
- Individuals with an interest in 5 per cent of the voting shares of a listed corporation in Hong Kong are not required to publicly announce a non-marital partner's interests and short positions in those shares. Likewise, directors and chief executive officers of listed corporations need not publicly disclose a non-marital partner's interests and short positions in those corporations' shares and debentures. In both cases, the law – working on the assumption of shared finances, a principle often equally operational in non-marital unions – would compel these parties to disclose a spouse's interests. The public therefore risks being less informed about shareholders', directors', and chief executive officers' interests in listed corporations, when those individuals are in alternative relationships.



Please visit
www.allenoverly.com/EOC
 for the full report.

Acknowledgements

Allen & Overy would like to acknowledge **Morgan Stanley** for their support and assistance in undertaking the analysis for the report. Special thanks to Wally Suphap, Su-Ling Voon, Sharon Nye, Wee-Ling Chuan, Wenxian Chen, Kylie Richardson, Lucy Lee, Claire Baillie, Nikolett Szeplaki, Bonnie Luk, Lawrance Liu, and Kam Tso.

Allen & Overy would also like to thank the following firms for lending their time and expertise:

- **Bryan Cave Leighton Paisner LLP**, with special thanks to Marcus Dearle, Partner and Head of Family Asset Protection, Private Client
- **Chow Ruskin Brown**, with special thanks to Winnie Chow, Partner
- **Hugill & Ip**, with special thanks to Alfred Ip MCI Arb, TEP, Partner
- **Seyfarth Shaw Hong Kong** in Association with **Wong, Wan & Partners**
- **Simon Reid-Kay & Associates**, with special thanks to Simon Reid-Kay, Partner and Deseré Attard, Registered Foreign Lawyer
- **PwC**, with special thanks to Robert Keys, Partner and Lawrence Lui, Senior Manager.

Contact us

For further information on the report, or on Allen & Overy's approach to diversity, inclusion, and pro bono matters please contact:



Vicki Liu

Managing Partner, Hong Kong
Tel +852 2974 7027
vicki.liu@allenoverly.com



Matt Bower

Partner, Hong Kong
Tel +852 2974 7131
matt.bower@allenoverly.com



Catherine Husted

Head of Pro Bono and Community Investment, Hong Kong
Tel +852 2974 7327
catherine.husted@allenoverly.com

FOR MORE INFORMATION, PLEASE CONTACT:

Hong Kong

Allen & Overy (Hong Kong)

9th Floor

Three Exchange Square

Central, Hong Kong

China and Hong Kong

Tel +852 2974 7000

This report was prepared by Allen & Overy in June 2019 for the Equal Opportunities Commission for general information purposes only. Nothing contained in this report provides or is intended to provide legal or other professional advice. No reliance should be placed on the content of this report. Allen & Overy does not accept any responsibility or liability whatsoever for any loss which may arise directly or indirectly from the use of this report. No liability whatsoever is accepted as to any errors, omissions or misstatements contained in this report. Allen & Overy is not responsible or liable for any matter relating to any third parties accessing or using the report or its content. The relevant laws discussed may have changed since publication. Allen & Overy is under no obligation to update or revise this report.

allenoverly.com

In this document, Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings.

Allen & Overy LLP or an affiliated undertaking has an office in each of: Abu Dhabi, Amsterdam, Antwerp, Bangkok, Barcelona, Beijing, Belfast, Bratislava, Brussels, Bucharest (associated office), Budapest, Casablanca, Doha, Dubai, Düsseldorf, Frankfurt, Hamburg, Hanoi, Ho Chi Minh City, Hong Kong, Istanbul, Jakarta (associated office), Johannesburg, London, Luxembourg, Madrid, Milan, Moscow, Munich, New York, Paris, Perth, Prague, Riyadh (cooperation office), Rome, São Paulo, Shanghai, Singapore, Seoul, Sydney, Tokyo, Warsaw, Washington, D.C. and Yangon.

© Allen & Overy LLP 2019 | CA1906018

allenoverly.com