

立法會 *Legislative Council*

LC Paper No. LS15/07-08

Paper for the Bills Committee on the Domestic Violence (Amendment) Bill 2007

At the meeting of the Bills Committee on 16 October 2007, members expressed concern that certain provisions in the Bill might be discriminatory as they do not cover same sex relationships, and requested comments from the Administration, the Equal Opportunities Commission (“EOC”) and the Legal Service Division. This paper sets out the legal background and the view of the Legal Service Division.

Relevant statutory provisions

2. Equality of treatment, as a legal requirement, is provided for in the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383). Article 25 of the Basic Law provides that -

“All Hong Kong residents shall be equal before the law.”

In addition, article 22 of the Hong Kong Bill of Rights provides that -

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Members may recall that the EOC referred to a case *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903 in its letter to the Bills Committee. These provisions were also quoted by the Court of Final Appeal (“CFA”) in that case.

The Court of Final Appeal judgment

3. In *Secretary for Justice v Yau Yuk Lung*, the respondent and another man were charged with having committed buggery with each other otherwise than in private, contrary to section 118F(1) of the Crimes Ordinance (Cap. 200). The subsection provides that-

“A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.”

At the commencement of their trial before the Magistrate, Mr Yau challenged the constitutionality of the section and applied for a stay of the proceedings. The Magistrate upheld the constitutional challenge and dismissed the charges. The Secretary for Justice appealed to the Court of First Instance which ordered the appeal be heard by the Court of Appeal. The Court of Appeal dismissed the appeal and the Secretary for Justice appealed to the CFA. One of the questions of law before the CFA was whether section 118F(1) was discriminatory to the extent that it is inconsistent with the Basic Law and the Hong Kong Bill of Rights. The CFA held that discrimination on the ground of sexual orientation would plainly be unconstitutional under both article 25 of the Basic Law and article 22 of the Hong Kong Bill of Rights in which sexual orientation is within the phrase “other status”.

4. The legal principle relating to equality of treatment was summarized by the CFA as follows:-

“In general, the law should usually accord identical treatment to comparable situations. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:

- (a) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
- (b) The difference in treatment must be rationally connected to the legitimate aim.
- (c) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.”

5. Applying the legal principle stated above, the CFA said that section 118F(1), in criminalising only homosexual buggery otherwise than in private, plainly gives rise to differential treatment on the ground of sexual orientation which requires to be justified. Homosexuals alone were subject to the offence for committing buggery otherwise than in private. In contrast, heterosexuals are not subject to any comparable liability in relation to the same or comparable conduct, namely, vaginal intercourse or buggery otherwise than in private. Thus, as a result of section 118F(1), a dividing line is drawn on the basis of sexual orientation between homosexuals on the one hand and heterosexuals on the other in relation to the same or comparable conduct. The CFA found section 118F(1) gave rise to differential treatment on the ground of sexual orientation, and held that justification for the difference in treatment was required.

6. On the point of justification, counsel for the Secretary for Justice submitted to the CFA that in enacting section 118F(1), the Legislature must be taken to have considered that there was a genuine need. The CFA held that the submission did not address the critical question. The CFA said the genuine need for the differential treatment cannot be established from the mere act of legislative enactment. It must be identified and made out. As no genuine need for the differential treatment had been shown by the Government, the CFA held that it has not been established that the differential treatment in question pursues any legitimate aim. Accordingly, section 118F(1) was held to be discriminatory and infringes the right to equality, and was unconstitutional.

Applying the legal principle in the judgment to the context of the Bill

7. The Bill aims at enabling application for, and granting of, injunctions against molestation by former husbands, former wives or former partners in cohabitation relationships between persons of opposite sex. It does not cover cohabitation relationships between persons of the same sex. What should be noted from *Yau Yuk Lung* is that the CFA has made it clear that “where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified”. According to the court’s analysis in *Yau Yuk Lung*, covering heterosexual relationships but not homosexual ones may be argued as drawing a dividing line on the basis of sexual orientation in relation to the same or comparable circumstances for which justification is required.

8. In examining the constitutionality of the provisions in the light of the relevant legal principle, members would need more information on what the genuine need is to justify the differential treatment. In its response to views/suggestions given by depositions (LC Paper No. CB(2)330/07-08(01)), the Administration has only set out reasons for not including same sex relationship (page 6 of the paper), but not in the form of need or justifications. In summary, the reasons are -

- (a) The existing law, which reflects Government’s policy position, does not recognize same sex marriage, civil partnership, or any same sex relationship;
- (b) Persons in same sex relationship are afforded the same level of protection as with those in heterosexual relationship under existing criminal legislative framework; and
- (c) Those who fall outside the scope of the Domestic Violence Ordinance may continue to seek protection under the law of tort or inherent jurisdiction of the court. Persons in same sex relationship who suffer from violence perpetrated by their partners still have avenues to seek legal remedies.

It may be implicit in the reasons that there could be a need to uphold the value of the community about marriage or heterosexual relationship, but this is not explicitly stated. Should this point be raised in a legal challenge, whether the reasons given would be accepted by the court as amounting to a genuine need remains to be seen. It would turn on what evidence the Administration submits to support its case. On this issue, members may note that the EOC has raised in its letter that “it is not clear that maintaining a difference between same sex couples and other couples in the context of domestic violence protection is in itself a legitimate aim. It is difficult to see any genuine need to make such a difference in the context of domestic violence”, and that “even assuming that it may be legitimate to maintain a difference between same sex couples and other couples in some other contexts, it is questionable whether the denial of equal protection from domestic violence is rationally connected to such an aim”.

Conclusion

9. As sexual orientation is held by the CFA in *Yau Yuk Lung* to be within the expression “other status” in article 22 of the Hong Kong Bill of Rights, in the case of a legal challenge discrimination on the ground of sexual orientation is likely to be considered by the court to be inconsistent with the Basic Law and the Hong Kong Bill of Rights. Members may wish to ask the Administration to respond to the points raised by the EOC in order to consider whether they are able to support the passage of the Bill in its present form.

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21 November 2007