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2009/11/10 PM 06:28 Tolwlmf <lwlmf@cityu.edu.hk>

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SubjectRe: queries on the Amendment Bill of Domestic Violence OrdinanceLink

Dear Dr. Leung,

Thank you for your email.

In response to your questions on whether more than two persons may claim to fall under the proposed definition of a "cohabitation relationship" as "couples" by making different applications to the court for injunction under section 3B proposed in the Domestic Violence (Amendment) Bill 2009 (the 2009 Bill) and whether an amendment to the definition of "cohabitation relationship" is needed so as to minimize the ambiguity in future, upon consultation of the Legal Adviser and the Senior Assistant Legal Adviser 1, I set out our views and observations on the issues as follows -

1. When a person makes an application to the court for an injunction under the proposed section 3B of the Domestic Violence Ordinance (Cap. 189) (DVO), the first issue that the Court would look into is whether the applicant and the respondent are respectively a party to a cohabitation relationship. The new section 3B(1) of DVO proposed in the 2009 Bill provides that "on application by a party to a cohabitation relationship (the applicant), the District Court, if it is satisfied that the applicant or a specific minor has been molested by the other party to the cohabitation relationship and subject to section 6, may grant a injunction..." (emphasis added). It can be seen from the proposed section 3B(1) that the District Court would have jurisdiction to hear an application under the proposed section 3B only if the application is made by a party to a cohabitation relationship as defined in the 2009 Bill against the other party to the relationship.
2. Instead of providing for a definition of "couple", the 2009 Bill provides for a definition of "cohabitation relationship" which is proposed to be added in section 2(1)

of DVO. Under the 2009 Bill, "cohabitation relationship (a) means a relationship between 2 persons who live together as a couple in an intimate relationship; and (b) includes such a relationship that has come to an end". To answer the first question above, one should first ascertain whether the proposed definition could also be applicable to a cohabitation relationship between more than 2 persons who live together as (multiple) couples in intimate relationships. It may be helpful if we start with the plain meaning of the proposed definition in the proper context of DVO and then look at the relevant policy intent of the 2009 Bill.

3. It appears that a "couple" is an important component of the proposed definition. As the word is not defined in DVO or in the 2009 Bill, it would be helpful to look at the ordinary meaning of the word. According to the Compact Oxford English Dictionary (2009 edition), "couple" means "two individuals of the same sort considered together" or "two people who are married or otherwise closely associated romantically or sexually". Similarly, according to the Oxford Advanced Learner's Dictionary (2005 edition), "couple" means "two people or things" or "two people who are seen together, especially if they are married or in a romantic or sexual relationship." The proposed definition itself also expressly refers to "2 persons" not "2 or more persons". By making reference to the ordinary meaning of "couple" and the plain meaning of the wording of the proposed definition, there are two important features for the definition of "cohabitation relationship" in the 2009 Bill:-

(a) It is a relationship of one person with another person; there would not be any room to imply a multilateral relationship among more than 2 persons;

(b) by the ordinary and the dictionary's meaning of "couple", a couple in an intimate relationship referred to in the proposed definition should be analogous or akin to a marriage.

4. The aforesaid two features of the cohabitation relationship" are also congruent with the existing section 2(2) of DVO which provides that "this Ordinance shall apply to the cohabitation of a man and a woman as it applies to marriage..." (emphasis added). The heterosexual cohabitation relationship provided in the existing section 2(2) of the DVO suggests that the policy intent of DVO is that the application of the provisions of DVO is confined to a relationship which is (a) between two persons only (a man and a woman) and (b) analogous or akin to a marriage. In this regard, we are not aware of any change of the policy intent which would remove or vary these two important features in the cohabitation relationship (whether of the opposite sex or the

same sex) by the amendments introduced in the 2009 Bill (the issues about the policy intent will be discussed in details in the next part).

5. Furthermore, since the existing section 2(2) of the DVO makes reference to "marriage", it is useful to review the meaning of "marriage" in the Marriage Ordinance (Cap. 181) (MO). Under section 40 of MO, marriage means "the voluntary union for life of one man and one woman to the exclusion of others" (emphasis added). Since a cohabitation relationship as defined in the 2009 Bill is intended to be analogues or akin to a marriage and both kinds of relationship could share a common feature in excluding others, it could be reasonably inferred that a cohabitation relationship as defined in the 2009 Bill is a relationship between two persons to the exclusion of others. The Administration has explained in the LegCo Brief of the 2009 Bill dated 3 June 2009 (File Ref.: LW/CR 1/3281/01) that the reason why the proposed definition of "cohabitation relationship" is devoid of any references to "marriage" and "spouse" is to avoid any impact on the current definition or meaning of marriage in Hong Kong. But that does not mean that the "cohabitation relationship" as proposed in the 2009 Bill could not be analogous or akin to marriage. By the aforesaid reasons, the proposed definition of "cohabitation relationship" could not be construed as being able to cover a cohabitation relationship between more than 2 persons who live together as (multiple) couples in intimate relationships.

6. Going back to the question of whether the 2009 Bill would allow a party to a cohabitation relationship involving more than two persons who live together as multiple "couples" to apply to the District Court for injunction(s) under the proposed section 3B of DVO, we are of the view that by virtue of the proposed definition of "cohabitation relationship" and the proposed section 3B(1), the court may not have a basis to entertain such an application because the intended applicant would not be "a party to a cohabitation relationship". However, procedurally, the 2009 Bill would not prohibit such a party from making an application under the proposed section 3B to the court.

7. On the other hand, in a different scenario, if three persons live together not as multiple couples in intimate relationship, but among them only two persons live together as a couple in an intimate relationship and this couple live with another person only as a common friend who has no intimate relationship with other two persons, the court may proceed to hear the application for injunction made by a party of the couple (living together in an intimate relationship) against another party under the proposed section 3B after it is satisfied that the applicant and the respondent are

the parties to a cohabitation relationship as defined in the proposed section 2(1) of DVO.

8. But if the said common friend living in the same household molests one of the said couple, the molested party would not be in the position to invoke the proposed section 3B, because as between the molested party and the said common friend, there does not exist a cohabitation relationship as defined in the 2009 Bill even though they are living together in the same household.

9. However, under the proposed definition, a cohabitation relationship also means such a relationship that has come to an end. There is a possible scenario that two persons, say, person A and person B, live together as a couple in an intimate relationship, while this couple also live with another person, say, person C who is party to a former cohabitation relationship with person A. But person C has not moved out the former common residence for some other reasons. If person A is molested by person B and person C, person A may apply for injunctions against both person B and person C at the same time under the proposed section 3B of DVO, because under the proposed definition person A and person B are parties to a (current) cohabitation relationship, while person A and person C are parties to a cohabitation relationship that has come to an end. Hence, unlike the previous scenario, the court may entertain both applications in this scenario.

10. If one still worries about any possible ambiguity in the proposed definition, it is worth making further reference to the policy intent of the Administration in the 2009 Bill. In paragraph 27 of the LegCo Brief dated 3 June 2009, the Administration reiterates that the policy intent of the DVO "is premised on the consideration of the special power interface, dynamics and risk factors arising from the intimate relationships between such spouses or between a man and a woman in cohabitation, whose intricate emotional and sexual relationships, concerns for their children's feeling/well being or fear of losing family's financial support may render the victims reluctant to report to the Police the abuser's acts of violence and to seek redress under the criminal legislative framework... the DVO serves to provide additional civil remedies for these victims on top of the current criminal legislative framework...". Obviously, the original policy intent of DVO is to provide protection to spouses in marriage and the heterosexual couple (a man and a woman) in cohabitation.

11. According to paragraph 10 of the LegCo Brief dated 3 June 2009, the policy intent

of the 2009 Bill is to extend the scope of DVO to cover same-sex cohabitants in order to render "the same level of protection against molestation to both heterosexual and same-sex cohabitants" (emphasis added). As the Bill is aimed at offering the same level of protection to heterosexual and same-sex cohabitants under DVO, same-sex cohabitants could only enjoy the same level (or same scope) of protection under DVO. Nowhere in the LegCo Brief or any relevant policy paper states that the policy intent of the 2009 Bill is to expand the protection of DVO to a cohabitation relationship involving more than 2 persons (or more than one couple).

12. Further, in giving response to comments of members of the Bills Committee made on 29 June 2009 on the proposed definition of "cohabitation relationship" (LC Paper No. CB(2)2414/08-09(01), the Administration has explained that a relationship between a man and a woman living together as husband and wife is the eligibility threshold for injunction applications under DVO by applicants falling under the category of the cohabitation of a man and woman" and this eligibility threshold will continue to underpin the Administration's legislative proposal to extend the scope of DVO from covering only a man and a woman in cohabitation to also persons in same sex cohabitation.

13. In the light of the above, it is clear that multi-parties/multi-couples cohabitation in intimate relationships is not intended to be protected under DVO.

14. Moreover, the Labour and Welfare Bureau stated in the Administration's Response to the Views and Suggestions made by Deputations and Members issued to the Bills Committee of the 2009 Bill in September 2009 (LC Paper No. CB(2)2444/08-09(01) under item (1) that "the policy intent and legislative intent of the DVO all along is that injunction protection shall be applied to parties to a marriage or relationships akin to a marriage. Relationships involving more than 2 parties can hardly be described as relationships akin to a marriage. The policy intent and legislative intent of the DVO remains intact in the current amendment exercise. Express provisions in the definition of "cohabitation relationship" specify a relationship between "2 persons" serves to affirm such intents and is consistent with the existing provision of the DVO." and that "neither the policy and legislative intent, nor any decided court case indicates that a cohabitation relationship involving more than two partners would fall within the ambit of the DVO..." (emphasis added). By these clear official statements, we are of the view that there is no ambiguity in the policy intent in meaning of "cohabitation relationship" under the 2009 Bill.

15. Should you may have a concern that there might be an ambiguity in the oral explanations on the relevant policy intent given by the Administration's representative(s) at the Bills Committee's meeting(s), we are of the view that such ambiguity in the oral explanations, if any, might not adversely affect the above-mentioned clear official statements on the relevant policy intent which shall prevail over the oral explanations that could be improvised on spot in an ad hoc manner.

16. Having regard to policy intent of DVO and the 2009 Bill, as well as the drafting of the definition of "cohabitation relationship" in the 2009 Bill set out above, we consider that an amendment to the proposed definition by adding "to the exclusion of others" after "a couple" (the said amendment) may not be necessary. Should you consider such an amendment may be proposed for the avoidance of doubt, we do not see that the said amendment would have any adverse effect or impact on the meaning of the proposed definition of the "cohabitation relationship" as intended by the drafter.

I hope that the above analysis and observations are helpful to you in your consideration of a need to make an amendment to the Bill. Should our division can be of further assistance, please let us know.

Regards,

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Legal Service Division  
LegCo Secretariat