

Domestic Violence (Amendment) Bill 2009

The Proposed Definition of “Cohabitation Relationship” and the Expression in Relation to “Former Cohabitation Relationship”

Purpose

The Administration has proposed to introduce a definition of “cohabitation relationship”, as follows, under the Domestic Violence (Amendment) Bill 2009 (the Bill) :

"cohabitation relationship" (同居關係) –

- (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;" (emphasis added)

This note sets out our response to a suggestion made at the previous discussion of the Bills Committee for the Administration to review the proposed definition by considering an alternative drafting approach entailing the deletion of paragraph (b), viz the clause “includes such a relationship that has come to an end” from the proposed definition of “cohabitation relationship”, and the incorporation into the relevant provisions under the Bill suitable language to bring out our policy intent that protection under the amended Domestic Violence Ordinance (amended Ordinance) will be available also to persons in former cohabitation relationships.

The Administration’s Response

The Present Drafting Approach

The Test

2. Paragraph (a) of the proposed definition sets out the test of "cohabitation relationship" for the purpose of the Bill ("the Test"). The court is guided by the new section 3B(2) in its application of the Test,

which requires the court to have regard to all the circumstances of the relationship, including the factors listed in that section.

3. Section 3B(2)(a) to (h) spells out, in the present tense, factors that are relevant to a cohabitation relationship. So if a relationship satisfies the Test, it qualifies as a cohabitation relationship under the amended DVO.

Extended Meaning to Cover Past Cohabitation Relationships

4. Paragraph (b) of the proposed definition does not concern the Test. Its effect is to extend the meaning of "cohabitation relationship" so that the application of the amended Ordinance would extend to a cohabitation relationship that has come to an end.

5. By virtue of paragraph (b) of the proposed definition, the extended meaning of "cohabitation relationship" covers a past relationship. So if, during its existence, a relationship satisfies the Test, then even though it has come to an end, it qualifies as a cohabitation relationship for the purpose of the amended Ordinance.

Merits of the Present Approach

6. Under the present drafting approach, the test of "cohabitation relationship" is clearly presented, and the policy intent of extending the application of the amended Ordinance to former cohabitation relationships is achieved simply by including paragraph (b) in the proposed definition. This approach is clear and concise.

Alternative drafting approach suggested at the last Bills Committee meeting

7. There was a suggestion at the Bills Committee that paragraph (b) of the proposed definition of "cohabitation relationship" be deleted, and the new section 3B should model on section 3 of the Ordinance (which refers to "spouse" and "former spouse") to use separate references for existing and past relationships (i.e. "cohabitation relationship" and "former cohabitation relationship")

8. Members may wish to note that if this alternative approach were adopted, the changes would entail more than adding the reference of "former cohabitation relationship" to each reference of "cohabitation relationship" under section 3B. The relevant factors set out in section

3B(2) would need to be expressed in both the present and the past tenses in appropriate places in view of the use of both references in that section. Complexity and possible confusion aside, there could be misunderstanding that the Court will have to consider both the present and the past circumstances of the relationship of the parties as the factors are expressed in both tenses.

9. Alternatively, it was suggested adding a new provision in section 3B, to deal with the application of the Test in relation to a former cohabitation relationship. In either case i.e. expressing the relevant factors in section 3B(2) in both the present and the past tenses or adding a new provision in section 3B, the reference of “former cohabitation relationship” has to be added to the reference of “cohabitation relationship” twice in section 6(3). Having carefully considered the changes that would need to be made in the amended Ordinance if the alternative approach(es) were adopted, the Administration is of the view that the present drafting approach, i.e. to deal with former cohabitation relationships in the proposed definition of cohabitation relationship is clearer, more concise and is therefore preferred.

Conclusion

10. The Administration proposes to maintain the status quo and retain paragraph (b) in the definition of “cohabitation relationship” proposed in the Bill.

Labour and Welfare Bureau
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