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Submission to the Panel of Welfare Service: Inclusion of same sex couples in the proposed amendment to the Domestic Violence Ordinance

At the Sixty-third United Nations General Assembly Plenary Meeting¹, a ground breaking statement supported by 66 countries reaffirmed the principle of the universality of the human rights established by the Universal Declaration of Human Rights. The General Statement read out by representative from Argentina states, "All human beings are born free and equal in dignity and rights and all individuals have the right to enjoy their rights without distinction. The principles of non-discrimination require that all human rights be applied to all human beings, regardless of their sexual orientation or gender identity."²

With this affirmation, we would like to remind the Government that singling out same sex couples to exclude them from the protection offered by the current Domestic Violence Ordinance would be a violation of International Law and the Basic Law.

According to Article 25 of the Basic Law, "All Hong Kong residents shall be equal before the law."³ After the amendment of the Domestic Violence Ordinance in the previous Legislative Council session, the current law now covers opposite sex cohabiting couples⁴ as well as persons falling within a list of relationships⁵. To cover only cohabiting or former cohabiting opposite sex couples and not same sex cohabiting couples would be a clear violation of Article 25 of the Basic Law.

According to the Administration's paper on the amendments proposed to the Domestic Violence Ordinance (DVO), the counterparts of the cohabiting opposite sex couples covered in the previous amendment are cohabiting or former cohabiting same sex couples, not married couples⁶. The inclusion of same sex couples in the DVO does not confer recognition of any status but merely acknowledges their existence. The issue of same sex marriage is a completely different topic unrelated to the need to protect victims of domestic violence in intimate relationships and is irrelevant to considerations of any amendment to the Domestic Violence Ordinance. Inclusion of same sex couples in the protections

¹ UN Doc GA/1080, UN General Assembly Plenary Meeting (70th & 71st Meetings) on 18 December 2008

² Ibid

³ Basic Law link: http://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html

⁴ Domestic Violence Ordinance Chapter 189, Section 2(2) : Subject to section 6(3) this Ordinance shall apply to the cohabitation of a man and a woman as it applies to marriage and references in this Ordinance to "marriage" (婚姻), "matrimonial home" (婚姻居所) and "spouse" (配偶) (except in section 3A(2)) shall be construed accordingly. (Amended 17 of 2008 s. 3)

⁵ Domestic Violence Ordinance Chapter 189, Section 3A(2)

⁶ CB(2)341/08-09(03) Administration's paper on the proposed amendment to the Domestic Violence Ordinance (Cap. 189)

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offered by the DVO would not affect the legal status of same sex couples; it would neither give recognition to any rights of partnership nor lead to same sex marriage. The Government should not be swayed by arguments based on these irrelevant issues from its stated intention of protecting the victims of domestic violence in same sex relationships by including them within the provisions of the DVO.

To exclude same sex couples from protection would violate international human rights law. Article 39 of the Basic Law mandates, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) apply in Hong Kong. These prohibit discrimination based on sexual orientation under the category of "other status".

The ICCPR has been implemented in Hong Kong as the Bill of Rights Ordinance (BORO) which binds the Government and all public authorities. Under Article of 22 of the BORO (which corresponds to Article 26 of the ICCPR): "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."^{7 8} The government is bound by the BORO not to discriminate against people based on their sexual orientation. Enacting any law that singles out same sex couples for omission from protection would very likely to be considered by the courts⁹ as a form of discrimination contrary to these laws.

We are concerned at the occurrence of domestic violence in same sex cohabiting or former cohabiting relationships. The Women Coalition submitted a survey completed in 2006/7 as part of its submission to the Bill Committee of the Domestic Violence Amendment Bill 2007. This revealed that over 30% of persons in same sex relationships have suffered from domestic violence¹⁰.

We are concerned that the Administration is wavering on its affirmation that same sex couples would be covered by a new amendment to the existing Domestic Violence Ordinance. According to the news reporting of the Legislative Council Panel of Welfare Services meeting on 8 December 2008, some

⁷ Bill of Rights Ordinance Chapter 383 Section 8 of the Bilingual Law Information System : <http://www.legislation.gov.hk/eng/home.htm>

⁸ Although the term "sexual orientation" is not explicitly stated in UN treaties, the UN Human Rights Committee has stated that "sexual orientation" is included by the ICCPR's jurisdiction on the basis of "sex". The UN Committee on Social, Economic and Cultural Rights has also suggested that "sexual orientation" is a ground for protection included by the ICCPR's ground of "other status".

⁹ *Leung v. Secretary for Justice* [2006] 4 HKLRD 211, *Cho Man Kit v Broadcasting Authority* (08/05/2008, HCAL69/2007)

¹⁰ Submission from the Women Coalition of HKSAR on the Administration's latest proposal regarding the coverage of cohabitation relationships in the Domestic Violence Ordinance (Chinese version only) [CB(2)2103/07-08(01)] (27 May 2008)

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legislators opposed the Administration's intention to protect same sex couples and advocated that the Government take the lead in discriminating against people according to their sexual orientation¹¹. This new development is a cause for alarm.

We are also against any suggestion to change the Chinese title of the DVO. We believe that this would counter the core purpose of the ordinance. Same sex relationships are as complicated as any opposite sex relationship. To suggest that "Domestic" is equivalent to "household"¹², a term commonly referring to inanimate objects like furniture in the home, is ludicrous and insulting.

The DVO is necessary because the police have found that handling violence between persons in an intimate relationship is highly complex and cannot be as readily dealt with as the violence between strangers. The Government has said as much: the Secretary for Labour and Welfare stressed in LegCo on 18 June 2008: "The proposed extension of the scope of the DVO in such a direction is only introduced in response to the distinct and unique context of domestic violence".¹³

The Government and Legislators should take a firm stand against discrimination based on sexual orientation. They should do so especially in the light of the fact that some groups have openly advocated discrimination based on sexual orientation even when that discrimination is exercised against victims of intimate violence.¹⁴ The Government and Legislators should take a firm stand in protecting victims of domestic violence in all circumstances and not single out same sex victims to exclude them from protection. The complexity of domestic violence is what has given rise to the need for a Domestic Violence Ordinance in addition to the provisions of the criminal code that deal with violence. To ignore the needs of victims of same sex domestic violence leaves many members of the public unprotected and violates the most basic human rights of individuals. We strongly urge the Government and Legislators to put into effect the promises made to the previous Legislative Council and to enact an amendment to the current Domestic Violence Ordinance to include same sex couples.

¹¹ Apple Daily titled "同性同居擬受家暴保障議員憂修例衝擊婚姻制度" on 9 December 2008, http://appledaily.atnext.com/template/apple/art_main.cfm?iss_id=20081209&sec_id=4104&subsec_id=11867&art_id=11946663

¹² 「家居」

¹³ LC Paper No CB(2)341/08-09(03) (issued on 2 December 2008)

¹⁴ Ming Pao, 25 December 2008: 斥家暴修例毀傳統家庭價值