

Submission of Observations of the Zonta Club of HK to the Panel on Welfare Services
via email to Ms. Betty Ma, Clerk to the Panel on Welfare Services (bma@legco.gov.hk)

9th January, 2009

Dear Sirs,

Re: Administration's Proposal to amend the Domestic Violence Ordinance (Cap. 189)
in the 2008-2009 legislative session

Background

The Domestic Violence Ordinance (Cap.189) (“**Ordinance**”) was amended in 2008 pursuant to the Domestic Violence (Amendment) Bill 2007 (“**2007 Amendment Bill**”). The Zonta Club of Hong Kong had prepared written comments on the 2007 Amendment Bill which were subsequently submitted in the joint submission on the 2007 Amendment Bill by the Zonta Clubs of Hong Kong to the LegCo Bills Committee in November 2007 (“**Submission**”).

The proposed amendments under the Administration's 2007 Amendment Bill were many but it had not proposed to extend the coverage of the Ordinance to cohabitating persons of the same sex (“**same sex cohabitants**”). The proposal to extend the coverage of the Ordinance to same sex cohabitants (“**Proposal**”) was raised by some Members of LegCo under the Bills Committee stage of the 2007 Amendment Bill. After further consideration, the Administration agreed on the Proposal and acknowledged that there was a need to extend the protection under the Ordinance to same sex cohabitants on the basis that “since lives may be at stake”¹. However, the Proposal could not be introduced in the 2007 Amendment Bill as it was outside the scope of the 2007 Amendment Bill and the Administration undertook to further amend the Ordinance in the 2008-09 legislative session to provide for the Proposal. Despite the Administration's undertaking to introduce the Proposal, the Administration maintained that it remained its clear policy *not* to recognize same sex relationships and that the proposed extension of the scope of the Ordinance was *only* to be introduced in response to the distinct and unique context of domestic violence².

Pursuant to its undertaking, the Administration has recently³ proposed to amend the Ordinance further to implement the Proposal, namely, to extend the coverage of the Ordinance to same sex cohabitants⁴.

As the 2007 Amendment Bill did not contain the Proposal, the Submission had not addressed the Proposal. The Zonta Club of Hong Kong has now been invited by the Panel to submit comments on the Proposal.

Overall Observations

1 The Proposal is a matter of both public policy and legal policy.

¹ Legco Paper, LCPaper No. CB(2)341/08-09(03), Paragraph 8

² Ibid.

³ 8th December, 2008, Legco

⁴ Legco Paper, *Proposed Amendments to the Domestic Violence Ordinance (Cap.189)*, LC Paper No. CB(2)341/08-09(03)

- 1.1 The proposed amendment to the Ordinance is currently being prepared by the Administration with its aim of introducing the amendment bill to LegCo within the first half of the current legislative session⁵. In concept, the Administration has stated that the proposed amendment intends to “enable a party to *a current or former same-sex cohabitation relationship* to obtain relief from molestation by applying to the court for an injunction” for a non-molestation order, an exclusion order and an entry order under the Ordinance⁶ (“**Proposed Amendment**”). The wordings of the proposed amendments are not yet available. Hence, observations are made on the concept of the Proposal based on the Administration’s aforesaid wordings on the Proposed Amendment.
- 1.2. It is appreciated that same sex cohabitants are just as susceptible to domestic violence as any spouses, former spouses and their relatives as provided under the Ordinance. However, categorising same sex relationships within the concept of “family relationship” for domestic violence under the Ordinance and not other purposes, *may*, firstly, raise confusion in the legal jurisprudence on same sex relationships in the laws of Hong Kong generally and secondly, arouse cultural, moral, ethical and public sensitivity on the topic of same sex relationship.
- 1.3. In this context, it is noted that the Administration itself, in the Bills Committee Report on the 2007 Amendment Bill, “pointed out that to enable same sex cohabitants to apply for an injunction under the DVO would be *incompatible with other legislation*. In Hong Kong, a marriage contracted under the Marriage Ordinance (Cap.181) is, in law, the voluntary union for life of one man and one woman to the exclusion of all others. The existing law, which reflects the Administration’s policy position, does not recognize same sex marriage, civil partnership, or any same sex relationship. *Recognising same sex relationship is an issue concerning ethics and morality of the society. Any change to this policy stance would have substantial implications on the society and should not be introduced unless consensus or a majority view is reached by the society*”⁷.
- 1.4 Two issues were raised in the Administration’s initial objection to the Proposal. Firstly, it raised the issue of *incompatibility* of the Proposal to other legislations which implements the Administration policy of not recognizing same sex relationships. The Administration has cited the Marriage Ordinance as its example of the *incompatibility* of providing coverage to same sex cohabitants under the Ordinance. Secondly, it raised the issue of public acceptance and consensus on providing legislative recognition to same sex relationships.
- 1.5 After further consideration, the Administration accepted the Proposal and currently proposes to introduce the Proposed Amendment on the basis that:

“in the context of domestic violence, incidents could quickly escalate into life-threatening situations or even fatality. Since lives may be at stake, the Administration accepted the need to extend the protection under the DVO to victims of domestic violence who are in the same sex cohabitation relationships.....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*

⁵ Ibid. Footnote 1: Paragraphs 10 and 11

⁶ Ibid. Footnote 1: Paragraph 10, emphasis added

⁷ Report of the Bills Committee on Domestic Violence (Amendment) Bill 2007, Paragraph 11, emphasis added

*domestic violence. It remains the Administration's clear policy not to recognize same sex relationships.*⁸

The Administration has sought to resolve these two issues by adopting the legislative approach of legally accepting and recognizing same sex-relationships for domestic violence cases *only* under domestic violence legislation *but* not otherwise. However, this selective acceptance and recognition approach should, in particular (without limitation) in view of the Administration's initial objections, be further elaborated upon and/or justified to the public from a legal perspective as well as from a public policy perspective.

- 1.6 In respect of legal aspects, questions such as the constitutionality of selective recognition of (or arguably selective “non-discrimination” against) same sex couples for some legal rights and not others and, of any possible legal issues on “incompatibility” as previously raised by the Administration should be clarified and explained as aforesaid. In this context, although it is appreciated that rights of individuals under the Basic Law and the Hong Kong Bill of Rights are subject to the general legal position that differences in legal treatment may be justified if the difference pursues *a legitimate aim*; the different treatment rationally connects to a legitimate aim and it is no more than necessary to accomplish the legitimate aim (*Secretary for Justice v. Yau Yuk Lung [2007] 3 HKLRD 903, CFA*), nevertheless, legal clarification and explanation on these and other legal considerations should be provided by the Administration when the amendment bill on the Proposal is introduced in due course. In particular (without limitation), explanations on the legal basis for differentiating the proposed legal recognition of same sex couples for domestic violence purposes as providing a “legitimate aim” as against the non-recognition of same sex couples for other purposes, such as familial related matters which may affect familial social welfare and livelihood, as not being “legitimate aims”, would be most useful for the public to appreciate the legal support and justification of the Proposed Amendment in what may be argued to be a sensitive public issue.

Further, the likelihood of the legal recognition of same sex couples under the Ordinance acting as an initiating springboard for legal recognition of same sex couples for other legal purposes should also be carefully considered from a legal policy perspective and also from a public policy perspective, taking into account the public sentiments and views of Hong Kong citizens on the issue as a whole.

- 1.7 In respect of public policy aspects, it would be preferable for the views of the public to be obtained not only on the Proposal itself, but the public's views and opinions on same sex relationship and its proposed *legal recognition* under the Ordinance should also be obtained and carefully considered, in particular (without limitation), since the legal recognition of same sex couples under even one piece of legislation may have important ramifications on the society's perspective and attitude on same sex relationships. In this regard, the Administration has aptly summarized the position in that “*Recognising same sex relationship is an issue concerning ethics and morality of the society. Any change to this policy stance would have substantial implications on the society and should not be introduced unless consensus or a majority view is reached by the society*”⁹.
2. Further, it is noted that there are two other issues which the Administration may wish to consider in relation to the Proposal. They are, firstly, the *terminology to be used* for the

⁸ Legco Paper, LC Paper No. CB(2)341/08-09(03), “*Proposed amendments to the Domestic Violence Ordinance (Cap. 189)*”, Paragraph 8

⁹ Report of the Bills Committee on Domestic Violence (Amendment) Bill 2007, Paragraph 11, emphasis added

purpose of introducing the concept of same sex relationship into the current context of the Ordinance and secondly, the issue of providing similar protection to *opposite sex cohabitating* couples under the Ordinance.

- 2.1 The Proposed Amendment refers to the “***cohabitation***” of same-sex couples, namely, the extension of coverage of the Ordinance “***a current or former same-sex cohabitation relationship***”. As the draft amendment bill is not yet available, hence it is not clear whether the term “cohabitation” would be used for introducing same sex couples as eligible applicants for protection under the Ordinance. As a possibility of both providing protection to same sex couples under the Ordinance and consistency with the Administration’s aforesaid “clear policy” of not recognizing same sex couples, in the drafting process, the Administration may wish to consider using alternative concept and consequential wordings to “cohabitation” in creating a new eligible applicant category for same sex couples, such as the use of the concept of “close relationship” as used in the New Zealand Domestic Violence Act 1995 which provides for same sex partners applications for protection under the legislation. In so doing, the concept of domestic relationship is widened *beyond* familial or former familial relationship in the manner the concept of family is currently used in the current legal structure and as adopted by the Administration in its aforesaid “clear policy”.
- 2.2 If the protection coverage of the Ordinance were to be extended to cover cohabitants of the same sex, it should arguably be extended to ***cohabitants of the opposite sex*** as well. Currently, it appears that applications for protection under the Ordinance could be made by *former spouses* or *spouses* (under S.3 of the Ordinance¹⁰), but *former cohabitants* and *current cohabitants of the opposite sex* do not appear to be eligible to apply for protection under the Ordinance. If this were the case and if the Proposed Amendment were to be introduced, perhaps cohabitants of the opposite sex should also be provided with protection under the Ordinance as well.
3. Whilst the Proposal is generally welcomed since protection against violence in a domestic environment should be extended to all persons, however, legal and policy considerations should be carefully reviewed and considered, in particular (without limitation), the possible serious ramifications the Proposed Amendment may have on the stability of the legal structure and social structure of Hong Kong.

The Administration may, in both extending protection to same sex couples and maintaining its stance on not legally recognizing same sex relationships generally, wish to consider either widening the concept of protection under the Ordinance beyond familial and former familial relationships as in the New Zealand domestic violence legislation (e.g. to include those living in the same household generally) *or* it may wish to enact a separate piece of violence protection legislation to provide protection for non-familial domestic relationships; the latter alternative may or may not be viable nor more preferable than the earlier alternative though.

We hope that the above observations are of a little assistance in your consideration of the Proposal. We would also like to take this opportunity in thanking you for your invitation to provide comments on the Proposal.

¹⁰ Relatives of the Applicant could also apply under S.3A of the Ordinance

Best Regards,

Thelma Tong,

Chairman of Public Affairs and United Nations Committee of the Zonta Club of Hong Kong
For and on behalf of **The Zonta Club of Hong Kong**