

# 立法會 *Legislative Council*

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## **Panel on Welfare Services**

### **Background brief prepared by the Legislative Council Secretariat for the meeting on 8 December 2008**

#### **Proposed amendments to the Domestic Violence Ordinance**

#### **Purpose**

This paper summarizes the past discussions by Members relating to the proposal to further expand the scope of the Domestic Violence Ordinance (DVO) (Cap. 189) to cover same sex cohabitants.

#### **Background**

2. DVO mainly provides for a civil remedy for victims of domestic violence to seek injunction from the court. Violence acts involving crime element are mainly dealt with by the Crimes Ordinance (Cap. 200) and the Offences Against the Person Ordinance (Cap. 212), while the protection of children and juvenile is dealt with under the Protection of Children and Juveniles Ordinance (Cap. 213). The Guardianship Board established under the Mental Health Ordinance (Cap. 136) is empowered to make an emergency guardianship order if it has reason to believe that a mentally incapacitated person is in danger, or is being or likely to be maltreated or exploited.

3. In response to public concern over domestic violence, the Administration has conducted a review of DVO and has identified a number of areas for improvement. The Administration proposed in 2007 to amend DVO in the following ways to enhance protection for victims of domestic violence –

- (a) extend its coverage to include persons formerly in spousal/cohabitation relationships and their children; parent-son/daughter, parent-son/daughter-in-law, and grandparent-grandson/granddaughter relationships; and other extended familial relationships including between a person and his/her brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, niece and cousin;

- (b) enable a "next friend" of a child under the age of 18 to apply for an injunction order on behalf of the child;
- (c) remove the requirement for the child to be living together with the applicant to be entitled to protection under DVO;
- (d) enable the court to vary or suspend an existing custody or access order in respect of the child concerned when the court makes an exclusion order under DVO;
- (e) empower the court to also attach a power of arrest if it reasonably believes that the respondent will likely cause bodily harm to the applicant or the child concerned; and
- (f) extend the maximum duration of the injunction order and the related power of arrest from a maximum of six months to two years.

4. In addition to the above proposals, to facilitate rehabilitation of the abusers which would be conducive to the better prevention of recurrence of domestic violence, the Administration also proposed that the court might, in granting a non-molestation order under DVO, require the abuser to attend an anti-violence programme as approved by the Director of Social Welfare, seeking to change his/her attitude and behaviour that lead to the granting of the injunction order.

5. The Domestic Violence (Amendment) Bill 2007 (the Bill) was introduced in June 2007. A Bills Committee was formed to study the Bill and made a report on its deliberations to the House Committee on 30 May 2008. The Bill was passed at the Council meeting of 18 June 2008. With the commencement of the Domestic Violence (Amendment) Ordinance on 1 August 2008, the scope of DVO has been expanded, from covering molestation between married couples and heterosexual cohabitants, to cover also former spouse/cohabitants, as well as immediate and extended family members.

### **Deliberations of the Bills Committee**

6. Major views and concerns expressed by members of the Bills Committee regarding the scope of the Bill are summarized in the following paragraphs.

7. Some members of the Bills Committee, including Dr Hon Fernando CHEUNG, Hon Margaret NG, Hon Audrey EU, Hon Ronny TONG, Hon LEE Cheuk-yan, Hon Albert HO and Hon TAM Heung-man, were of the view that providing protection to victims of domestic violence should be applied to all persons regardless of their gender so long as the relation was cohabitual.

8. The Administration pointed out that to enable same sex cohabitants to apply for an injunction under DVO would be incompatible with other legislation. In Hong Kong, a marriage contracted under the Marriage Ordinance (Cap. 181) was, in law, the voluntary union for life of one man and one woman to the exclusion of all others. The existing law, which reflected the Administration's policy position, did not recognize same sex marriage, civil partnership, or any same sex relationship. Recognizing same sex relationship was 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 was reached by the society. At present, any acts of violence were liable to criminal sanctions under the relevant ordinances, irrespective of the relationship between the abuser and the victim. Persons in same sex relationship were afforded the same level of protection as with those in heterosexual relationship under the existing criminal legislative framework.

9. Members remained of the view that same sex cohabitants should not be excluded from the protection of DVO, as seeking civil injunctive orders under DVO would be the fastest, easiest and cheapest means to obtain protection from the court. Concern had also been raised as to whether the exclusion of same sex relationships from the protection of DVO would be inconsistent with the human rights provisions of the Basic Law and the Hong Kong Bill of Rights.

10. The Administration pointed out that the purpose of DVO was to provide additional protection in the form of civil injunctive orders to individuals in certain specific relationships who were particularly prone to falling victim to violence in the domestic context, i.e. married persons and cohabitants who had long standing quasi-spousal relationships. The latter category would include people who had not undergone marriage ceremony recognized under Hong Kong law. DVO was never intended to apply to all categories of person who might, for one reason or another, decide to live in the same household. The categories of person who were not covered by the Bill could include friends, or fellow students or persons who chose, or were obliged to live together, for various reasons including a common economic interest, and it could not be argued that excluding same sex relationships from the protection of DVO constituted unlawful discrimination against the victim on the ground of sexual orientation. The absence of remedy under DVO did not preclude the victim from the protection of the criminal law nor from seeking injunctive relief under the general law.

11. Members urged the Administration to re-visit its position of not covering same sex cohabitants under DVO. They were of the view that extending the protection under DVO to persons in same sex cohabitation merely sought to protect such persons from being molested by their partners, and should not be regarded as equivalent to giving legal recognition to same sex relationships or providing legal entitlements to persons in such relationships.

12. Having regard to members' views, the Administration had re-examined the matter and came to the view that the protection under DVO should be extended to cover cohabitation between persons of the same sex. It however emphasized that the proposed extension of the scope of DVO to cover such cohabitation was only introduced in response to the distinct and unique context of domestic violence. It remained the Administration's clear policy not to recognize same sex relationships. Any change to this policy stance should not be introduced unless a consensus or a majority view was reached within the society.

13. The Administration further advised that as the proposed amendment to DVO to include cohabitation between persons of the same sex in its coverage would fall outside the scope of the Bill, the proposed amendment would have to be effected by way of a separate amendment bill. Accordingly, the Secretary for Labour and Welfare (SLW) would, when moving the resumption of Second Reading debate on the Bill, undertake that the Administration would introduce amendments to DVO to include cohabitation between persons of the same sex at the earliest possible time in the next legislative session.

14. While welcoming the change of policy by the Administration to extend the coverage of DVO to same sex cohabitants, members raised the concern about the delay in providing protection to same sex cohabitants in DVO if the two-stage approach proposed by the Administration was adopted. Some members suggested that the Administration could consider amending the long title of the Bill such that amendments could be made to the Bill at the Committee Stage to extend coverage of DVO to include same sex cohabitants.

15. The Administration responded that according to its legal advice, and in accordance with Rule 58(9) of the Rules of Procedure, the Administration was not in a position to move an amendment to the title of the Bill at the outset for the purpose of enabling the proposed amendments to extend the coverage of the Bill to include same sex cohabitants. The Administration added that more time was required to examine and draft the amendments to effect the intended coverage of same sex cohabitation.

16. Whilst most members preferred extending the coverage of same sex cohabitants in the Bill, they had taken note of the Administration's position regarding amendments to bills. Following discussion, the Bills Committee supported the two-stage approach as proposed by the Administration.

17. During the resumption of Second Reading debate on the Bill at the Council meeting of 18 June 2008, SLW gave an undertaking to further amend DVO to extend its scope to cover same sex cohabitants at the earliest possible time in the 2008-2009 session.

### **Latest development**

18. The Administration will consult the Panel on Welfare Services on the proposed amendments to DVO at the meeting on 8 December 2008. According to the Legislative Programme 2008-2009 provided by the Administration, it plans to introduce the amendment bill in the first half of the current legislative session.

### **Relevant papers**

19. Members are invited to access the Legislative Council website (<http://www.legco.gov.hk>) for details of papers, minutes of meetings, and the report of the Bills Committee on Domestic Violence (Amendment) Bill 2007.

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