

立法會
Legislative Council

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LC Paper No. CB(2)633/07-08
(These minutes have been seen
by the Administration)

**Bills Committee on
Domestic Violence (Amendment) Bill 2007**

**Minutes of the 4th meeting
held on Tuesday, 13 November 2007, at 2:30 pm
in Conference Room A of the Legislative Council Building**

- Members present** : Dr Hon Fernando CHEUNG Chiu-hung (Chairman)
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon James TO Kun-sun
Hon CHAN Yuen-han, SBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon CHOY So-yuk, JP
Hon TAM Yiu-chung, GBS, JP
Hon LI Fung-ying, BBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon Ronny TONG Ka-wah, SC
Hon KWONG Chi-kin
- Members absent** : Hon Margaret NG
Hon Bernard CHAN, GBS, JP
Dr Hon YEUNG Sum, JP
Hon Emily LAU Wai-hing, JP
Hon WONG Kwok-hing, MH
Hon TAM Heung-man

- Public Officers attending** : Miss Eliza LEE
Deputy Secretary for Labour and Welfare (Welfare)1
- Miss Hinny LAM
Principal Assistant Secretary for Labour and Welfare (Welfare)2
- Ms Winnie LEUNG
Assistant Secretary for Labour and Welfare (Welfare)2A
- Mr FUNG Pak-yan
Deputy Director of Social Welfare (Services)
- Mr Gilbert MO
Deputy Law Draftsman (Bilingual Drafting & Administration)
Department of Justice
- Miss Angie LI
Government Counsel
Department of Justice
- Clerk in attendance** : Miss Mary SO
Chief Council Secretary (2) 5
- Staff in attendance** : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1
- Ms Maisie LAM
Council Secretary (2) 2
- Ms Sandy HAU
Legislative Assistant (2) 5

Action

- I. Meeting with the Administration**
[LC Paper Nos. CB(2)2739/06-07(01), CB(2)229/07-08(01),
CB(2)330/07-08(01) and (02) and CB(2)347/07-08(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Excluding same sex relationships from the Domestic Violence Ordinance

Action

2. Ms Audrey EU said that the supplementary information provided by the Department of Justice (DoJ) [LC Paper No. CB(2)330/07-08(01)] failed to respond to the views made by the Equal Opportunities Commission (EOC) in its letter to the Bills Committee [LC Paper No. CB(2)229/07-08(01)] that to deny same sex couples from getting the protection provided by the Domestic Violence Ordinance (Cap. 189) (DVO) as couples of opposite sex would be sexual orientation discrimination unless it could be justified. As advised by EOC, the Court of Final Appeal held in the case of *Secretary for Justice v Yau Yuk Lung* [2007]3 HKLRD 903 that discrimination on the ground of sexual orientation was unconstitutional.

3. Senior Assistant Legal Adviser 1 (SALA1) advised that the question in the case of the *Secretary for Justice v Yau Yuk Lung* [2007]3 HKLRD 903 was whether section 118F(1) of the Crimes Ordinance (Cap. 200), which criminalised homosexual buggery otherwise than in private, was unconstitutional on the ground that it was discriminatory and infringed the constitutional right to equality. Article 25 of the Basic Law and Article 22 of Hong Kong Bill of Rights Ordinance (Cap. 383) provided for equality of treatment. Although the law should in general accord identical treatment to comparable situations, the court considered that the guarantee of equality before the law did not invariably require exact equality. Differences in legal treatment might be justified for good reason. The reason why the court upheld the offence charged unconstitutional was because the appellant (the Government) had not shown a genuine need for the difference in treatment. SALA1 further advised that according to that case, a genuine need must be identified and made out in the case of a constitutional challenge.

4. Mr Ronny TONG urged the Administration to include same sex relationships under the DVO to avoid the risk of the legislation being successfully challenged by the public at court as unconstitutional on the ground of sexual orientation discrimination, having regard to the fact that the DVO presently covered heterosexual cohabitants living as husband and wife and would be extended to former heterosexual cohabitants who had lived as husband and wife if the Bill was enacted. Mr TONG said that there was no cause for concern that by extending the "protected persons" under the DVO to same sex couples would have the implication of recognising same sex marriage in Hong Kong, as the proposal was merely to enable persons in same sex relationships to get quick and simple relief from violence perpetrated by their partners and not an entitlement guaranteeing them access to benefits, such as public housing. Mr LEE Cheuk-yan and Mr Albert HO expressed similar views.

5. Deputy Secretary for Labour and Welfare (Welfare) 1 (DSLW(Welfare)1) responded as follows -

Action

- (a) neither the provisions of the Bill nor the DVO discriminated against any person on the ground of his or her sexual orientation. The purpose of the 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 recognised under the Hong Kong law;
- (b) the 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 the DVO constituted unlawful discrimination against the victim on the ground of his or her sexual orientation;
- (c) the absence of remedy from the DVO did not preclude the victim from the protection of the criminal law nor from seeking injunctive relief under the general law and the exclusion from the specific protection of the Ordinance was common to any classes of person who might share accommodation referred in paragraph 5(b) above;
- (d) unlike the facts in the case of the *Secretary for Justice v Yau Yuk Lung* [2007]3 HKLRD 903, in which the impugned legislation applied specifically to persons engaging in male homosexual conduct, there was nothing in the Bill nor the DVO which singled out individuals for less favourable treatment on the ground of their sexual orientation; and
- (e) not including same sex relationship under the DVO as with other laws in Hong Kong reflected the conscious policy position of the Government. Specifically, the Hong Kong law did not recognise same sex marriage, civil partnerships, or any same sex relationships. Recognising same sex relationships 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.

Action

6. Ms LI Fung-ying said that it was unclear from the DVO which person in a cohabitation relationship was eligible to seek protection from the DVO.

7. DSLW(Welfare)1 responded that by virtue of section 2(2) of the DVO, the Ordinance was applicable to cohabitation of a man and a woman as it applied to marriage, and the court would have regard to the permanence of the relationship in granting injunctions as stipulated in section 6(3) of the DVO. DSLW(Welfare)1 further said that the inclusion of legal provision covering a man and a woman who lived together as husband and wife was not unique to the DVO, and it also appeared in other legislation, such as the Employees' Compensation Ordinance (Cap. 282).

8. In response to Ms Miriam LAU, DSLW(Welfare)1 said that the DVO had not been challenged by the public at court as unconstitutional on the ground of sexual orientation discrimination since its enactment in 1986.

9. Mr KWONG Chi-kin said that if the Government's policy position was to only recognise marriage contracted between a man and a woman, it should not include cohabitants in the DVO or the Bill. To avoid any legal challenge that the DVO and the Bill might discriminate same sex couples, the Administration should consider re-drafting the DVO and the Bill to cover all cohabitants regardless of their genders.

10. In the light of the views expressed by members at the meeting, the Chairman requested the Administration to provide a response in writing to address the legal point raised by EOC, particularly on the applicability of the case of the *Secretary for Justice v Yau Yuk Lung* [2007]3 HKLRD 903, and on the genuine need for not including same sex couples under the DVO. DSLW(Welfare)1 agreed.

II. Any other business

11. Ms Miriam LAU suggested and members agreed to continue scrutiny of the Bill, whilst awaiting the Administration' response referred to in paragraph 10 above.

12. There being no other business, the meeting ended at 4:35 pm.

**Proceedings of the fourth meeting of
Bills Committee on Domestic Violence (Amendment) Bill 2007
on Tuesday, 13 November 2007, at 2:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000528	Chairman	Opening remarks	
000529 - 000718	Chairman Admin	Briefing by the Administration on paragraph (f) of LC Paper No. CB(2)2739/06-07(01) on it was the normal practice in the Family Court that, unless for urgent applications for exclusion order made under the Domestic Violence Ordinance (Cap. 189) (DVO) outside work hours, it would be for the Family Court Duty Judge who would deal with such applications	
000719 - 001753	Admin Chairman Ms Audrey EU SALA1	Reply from the Equal Opportunities Commission (EOC) on whether the continued exclusion of same sex relationships from the DVO would be consistent with the constitutional right of equality guaranteed by the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) (BORO) (LC Paper No. CB(2)229/07-08(01)) A paper on the constitutionality of excluding same sex relationships from the DVO was being prepared by the Legal Service Division of the Legislative Council Secretariat	
001754 - 002723	Chairman Admin	Briefing by the Administration on the supplementary information provided by the Department of Justice on whether the continued exclusion of same sex relationships from the DVO would be consistent with the constitutional right of equality guaranteed by the Basic Law and the BORO (LC Paper No. CB(2)330/07-08(02))	
002724 - 005910	Mr LEE Cheuk-yan Mr Ronny TONG Mr Albert HO Admin	Inclusion of same sex relationships in the DVO to avoid the risk of the legislation being successfully challenged by the public at court as unconstitutional on the ground of sexual orientation discrimination	
005911 - 010829	Ms LI Fung-ying Admin SALA1 Chairman	Which type of cohabitation relationship was eligible to seek protection from the DVO under section 6(3) of the Ordinance	
010830 - 011340	SALA1	Coverage of immediate family member under the Family Status Discrimination Ordinance (Cap. 527)	
011341 - 011820	Ms Miriam LAU Admin Chairman	Whether the DVO had been challenged by the public at court as unconstitutional on the ground of sexual orientation discrimination since its enactment in 1986	

Time marker	Speaker	Subject	Action required
011821 - 012638	Mr LEE Cheuk-yan Chairman Admin SALA1	The Administration was requested to provide a response in writing to address the legal point raised by EOC, particularly on the applicability of the case of <i>Secretary for Justice v Yau Yuk Lung</i> [2007]3 HKLRD 903, and on the genuine need for not including same sex couples under the DVO	✓ (Admin to provide a written response)
012639 - 013037	Miss CHAN Yuen-han Chairman	The Administration's response to the legal issues and concerns raised by EOC in its letter to the Bills Committee	
013038 - 013847	Mr KWONG Chi-kin Ms Miriam LAU Chairman Admin	Views of Mr KWONG Chi-kin that if the Government's policy position was to only recognise marriage contracted between a man and a woman, it should not include cohabitants in the DVO or the Bill	
013848 - 014303	Miss CHAN Yuen-han Admin	Views of Miss CHAN Yuen-han that the issue of whether excluding same sex relationships from the DVO and the Bill was unconstitutional must be clarified, in order to avoid the risk of the legislation being successfully challenged by the public at court	
014304 - 014822	Ms Miriam LAU Admin	To include same sex relationships under the Bill would entail a re-drafting of the DVO, and not merely amend the existing section 2(2) of the Ordinance	
014823 - 014956	Mr LEUNG Kwok-hung Chairman	A sunset clause should be included in the Bill to the effect that the Administration would review the need of including same sex relationships in the DVO, otherwise the legislation would cease to have effect	
014957 - 015609	Mr KWONG Chi-kin Admin	The Administration should consider re-drafting the DVO and the Bill to cover all cohabitants regardless of their genders	
015610 - 020114	Chairman Ms Miriam LAU Admin Miss CHAN Yuen-han	Members agreed to continue scrutiny of the Bill, whilst awaiting the Administration's written response to address the legal point raised by EOC, particularly on the applicability of the case of <i>Secretary for Justice v Yau Yuk Lung</i> [2007]3 HKLRD 903, and on the genuine need for not including same sex couples under the DVO	