

平等機會委員會

EQUAL OPPORTUNITIES COMMISSION

LC Paper No. CB(2)229/07-08(01)

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Ms Mary So
Clerk to Bills Committee on Domestic Violence (Amendment) Bill
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong:

30 October 2007

Dear Ms. So,

Domestic Violence (Amendment) Bill 2007

Your letter dated 17 October 2007 to the Chairperson has been passed to me for handling.

The Domestic Violence Ordinance (Cap.189) (DVO) and the proposed amendment give protection to people who are victims of domestic violence, but it does not extend to those who are in same sex relationship.

The Administration does not dispute that domestic violence may also occur equally in same sex relationship. If same sex couples may suffer from domestic violence and are in need of protection to the same extent as other couples, to deny them equal protection would be sexual orientation discrimination unless it can be justified.

This ground of discrimination is not covered by the legislation administered by the Equal Opportunities Commission. However, 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 is unconstitutional.

Whether or not a difference in treatment on ground of sexual orientation would amount to discrimination will depend on whether the difference can be justified. For the difference to be justified, the following must be shown:-

- (1) The difference must pursue a legitimate aim. For any aim to be legitimate, there must be a genuine need for the difference.
- (2) The difference in treatment must be rationally connected to the legitimate aim.
- (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.

From your letter, it seems that the Administration is saying that there is a legitimate aim in maintaining a difference in treatment between same sex couples and other couples because same sex relationship is not legally recognized under the Marriage Ordinance (Cap.181).

However, it is not at all clear that maintaining a difference between same sex couples and other couples in the context of domestic violence protection is in itself a legitimate aim. It is difficult to see any genuine need to make such a difference in the context of domestic violence. Given that non-married heterosexual couples whose relationship is not legally recognized are still given the same protection as legally married couples, it is difficult to argue that the lack of legal status makes it legitimate to deny equal protection.

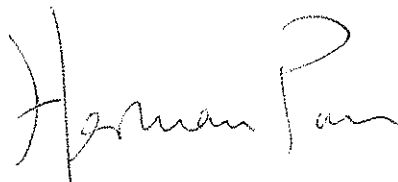
Even assuming that it may be legitimate to maintain a difference between same sex couples and other couples in some other contexts, it is questionable whether the denial of equal protection from domestic violence is rationally connected to such an aim.

With regard to proportionality, given that the Administration is not denying that same sex couples need to be protected from domestic violence, it is not at all clear that denial of the same degree of protection is a proportional response to their lack of legal status.

Although sexual orientation discrimination is not strictly within the remit of the Equal Opportunities Commission, equality on this ground is conducive to equality

on grounds which are within our remit. We urge the Administration to carefully consider whether legislative proposals are consistent with the constitutional principles of equality.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Herman Poon". The signature is written in a cursive style with a large initial "H" and "P".

Herman L. H. Poon
Chief Legal Counsel
Equal Opportunities Commission