

Domestic Violence (Amendment) Bill 2009
Response to Members' Comments Made on 29 June 2009

Proposed definition of “cohabitation relationship”

Why the need for a new definition?

Some Members wish to be advised further of the Administration's rationale of introducing a new definition of “cohabitation relationship” under the Domestic Violence Ordinance (DVO). A few deputations attending the Bills Committee meeting on 30 July questioned the need for such a definition, given that “the cohabitation of a man and woman”, to which the DVO has all along applied, is not defined under the Ordinance.

2. To respond to Members' question, we need to trace the enactment history of the DVO.

3. Since the enactment of the DVO in 1986, Section 3 has extended injunction protection to “a party to a marriage” against molestation by his/her spouse. The injunctions were described by the then Attorney General as measures to obviate the need for a married applicant to initiate divorce proceedings in order to avail himself/herself of the court's protective jurisdiction.

4. Apart from “a party to a marriage”, by virtue of Section 2(2), the DVO is also applicable to “the cohabitation of a man and a woman” as it applies to marriage. The rationale is to extend injunction protection to people who, though not married, have established long-standing relationships which may involve children for whom the protection afforded under the divorce laws is not available. The policy intent and legislative effect of the provisions is to extend injunctive relief under the DVO to marital or quasi-marital relationships.

5. “Cohabitation of a man and a woman” needs no explicit definition under the DVO, as this concept has been widely applied in the common law and is well understood by the court.

6. “Cohabitation of a man and a woman” does not simply refer to a man and a woman residing under the same roof. Rather, it encompasses the very essence of a relationship between a man and a woman *living together as husband and wife*. To live together as husband and wife carries with it some special qualities in the relationships that differ from those between, say people dating each other, or flat-sharing buddies. There are established case laws to make reference to when determining whether such a relationship exists between a man and a woman. These case laws clearly rule out casual or transient relationships.

7. A relationship between *a man and a woman living together as husband and wife* has thus become the eligibility threshold for injunction applications under the DVO by applicants falling under the category of “the cohabitation of a man or woman”. This eligibility threshold has remained intact to date, and will continue to underpin our current legislative proposal to extend the scope of the DVO from covering only a man and a woman in cohabitation to also persons in same sex cohabitation.

8. The Administration has explored various drafting formulations in order to achieve the objective of the Domestic Violence (Amendment) Bill 2009 (the 2009 Bill). A plausible option, for instance, is to build on the existing Section 2(2) of the DVO and expand its scope to persons in same-sex cohabitation. In deciding on the way forward, we have given careful and thorough consideration to the views of different quarters of the community and Legislative Council Members. Concerns were raised by the religious and parent groups that the definition should not have the effect of equating, or linking in any way, same-sex cohabitation with “marriage”, “spouse” or “husband and wife”.

9. To address the concerns, while achieving at the same time our policy objective of rendering the same level of protection against molestation to both heterosexual and same-sex cohabitants, we have proposed, via the 2009 Bill, to remove the reference to “cohabitation of a man and a woman” in Section 2(2) altogether and introduce a new definition of “cohabitation relationship”, to read “*relationship between two persons who live together as a couple in an intimate relationship*” and include such a relationship that has come to an end.

10. The definition is gender neutral, devoid of any references to “marriage”, “spouse” or “husband and wife” and uniformly applied to cohabitation of a man and a woman, as well as cohabitation of two persons of the same sex. As reflected by the welcoming comments expressed by many deputations at the Bills Committee meeting on 30 July, the new definition has their support.

11. That said, with a new definition of “cohabitation relationship”, the established case laws on “cohabitation of a man and a woman” as explained above may not be readily applicable in the court’s future consideration of applications for injunctions by cohabitants. We consider it necessary to provide clear guidance to the court of our policy intent that notwithstanding the new definition, the expansion in scope of the DVO to cohabitants irrespective of genders is premised upon essentially the same eligibility threshold – that is to say, the continued applicability of the factors of the “husband and wife” test and exclusion of such relationships between friends, persons living under the same roof, or any casual, transient relationships from the amended DVO. We seek to provide this guidance through the definition itself as well as the eight signposts introduced under the new Section 3B(2). It is hoped that the court, in applying the new definition, would take into account factors applicable in the “husband and wife” test and adopt an eligibility threshold that is comparable to the standard of the “husband and wife” test.

Why the need for the expression “as a couple” in the definition of cohabitation relationship

12. The Administration considers it necessary to retain the expression “as a couple” in the proposed definition of “cohabitation relationship” for the following reasons –

- (a) In so far as cohabitants are concerned, our policy intent is to maintain, or to at least to pitch as close as possible to the established standard the eligibility threshold for injunction applications under the amended DVO, viz. a relationship akin to that between a husband and wife. The current formulation as a whole, viz “two persons who live together as a couple in an intimate relationship” is a precise delineation of the kind of cohabitation relationships that are intended to be covered under

the amended DVO, irrespective of the gender of the cohabitants. It brings within its scope “cohabitation of a man and a woman” under the existing DVO and also encompasses cohabitation of two persons of the same sex who live together as a couple in an intimate relationship;

- (b) The policy intent of DVO is to provide additional civil protection against molestation to persons in specific relationships, including marital relationships, quasi-marital relationships and familial relationships. The current formulation of the “cohabitation relationship” as a whole reflects that policy intent. The inclusion of the expression “as a couple” in the definition of “cohabitation relationship” is an essential and integral component to reflect the very essence, and special qualities of the relationship to be covered under the amended DVO. It also has the effect of declaring unequivocally that other “intimate relationships” (e.g. those between carers and patients, between very good friends such as 金蘭姐妹, between a mistress and a man who visits her occasionally, between persons in dating relationships, etc.) will ***not*** be covered under the amended DVO.

Married persons to be excluded from the application of new Section 3B

13. Under the new section 2(1), “party to a cohabitation relationship” is defined to exclude a person who is or was the spouse of the other party to that relationship. In other words, persons who are in a spousal relationship or former spousal relationship will not be eligible for applying for injunction order against their spouses or former spouses under the new Section 3B. They should continue to apply for injunction protection under Section 3.

14. We note Members’ suggestion for us to simplify the drafting in this respect and review the need for the proposed definition of “party to a cohabitation relationship”. We would revert to Members with our proposal once ready.

Signposts to determine whether “cohabitation relationship” exists

15. In determining whether a relationship in question has the qualities that are required of a cohabitation relationship to which the amended DVO is applicable, we have proposed a new section 3B(2) to give clear guidance to the court, to have regard to all the circumstances of the case, *including but not limited to* a number of factors as set out below –

- (a) whether the parties are living together in the same household;
- (b) whether the parties share the tasks and duties of their daily lives;
- (c) whether there is stability and permanence in the relationship;
- (d) the arrangement of sharing of expenses or financial support, and the degree of financial dependence or interdependence, between the parties;
- (e) whether there is a sexual relationship between the parties;
- (f) whether the parties have any children and how they act towards each other's children;
- (g) the motives of the parties in living together; and
- (h) whether such a relationship exists between the parties in the opinion of a reasonable person with normal perceptions.

There are enquiries as to the origin of these factors.

16. Members may wish to note that these factors are drawn up with close reference to the rulings¹ made/cited by the court regarding the factors taken into account by the court in determining the existence of a cohabitation relationship, viz. the relationship of a man and a woman (not married to each other) living together as husband and wife. As these factors have been commonly considered by the court in determining whether or not a cohabitation relationship exists between the parties concerned, and bearing in mind our policy intent to maintain, or to at least pitch as close as possible to the established standard the eligibility threshold for injunction applications under the amended DVO by cohabitants, we consider it appropriate to replicate these factors in the amended DVO to provide guidance to the court as to our policy and legislative intent in considering future applications. These signposts will help give a clear indication to the court of our intention that reference would be

¹ For example, *Kimber v Kimber* [2000] 1 FLR 383, *Crake v Supplementary Benefits Commission*, *Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498

made to the threshold of “cohabitation of a man and a woman” when determining the existence of a “cohabitation relationship” in the course of considering future injunction applications from cohabitants.

17. As pointed out by Members during the Bills Committee Meeting discussion on 29 June 2009, spelling out expressly the above factors in determining whether persons are in cohabitation relationships in the new Section 3B(2) would assist the court in determining the scope of applicability of the DVO to the parties concerned. The checklist would also be useful to prospective applicants and legal practitioners.

18. Moreover, while the formulation of "cohabitation of a man and a woman" is well understood as referring to two persons living together as husband and wife and judicial precedents in this connection are available, the new definition of “cohabitation relationship” in the 2009 Bill is, on the other hand, not an established expression. It is thus necessary and desirable to spell out expressly these factors as pointers to assist the court in determining the scope of applicability of the DVO to the parties concerned in accordance with our policy intent.

19. As regards the reference to the factor “in the opinion of a reasonable person ***with normal perceptions***” in the new section 3B(2)(h), the wordings are directly transplanted from rulings² made/cited by the court. The Administration considers it appropriate to include all common signposts in totality in the DVO without tinkering with the key words. That is to give a clear indication to the court of the underlying policy intent of the expanded scope of applicability of the DVO, and the eligibility threshold for injunction applications by cohabitants. Our concern is that, we may be giving the court confusing signals should we pick and choose the signposts for arbitrary application. If we were to exercise discretion to remove wordings from a certain signpost, doubts or uncertainty may arise as to whether the court would regard the amended version as the same signpost and attach to it the same meaning as that of the original expression (i.e. with the words “***with normal perceptions***”).

² For example, *Kimber v Kimber* [2000] 1 FLR 383, *Re Watson (Deceased)* [1999] 3 FLR 878

20. Against the above considerations, the Administration's preference is to retain the current wordings used in the new Section 3B(2) including those cited in Section 3B(2)(h).

Labour and Welfare Bureau
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