Domestic Violence (Amendment) Bill 2009
Response to the ALA's Letter of 26 June 2009

(a) To provide for a definition of "applicant" in section 2(1)

The definition of "specified minor" has made reference to "the applicant concerned". Reading in context when "specified minor" is applied to section 3 and section 3B respectively, it is clear that the expression ("the applicant concerned") refers to the applicant who makes the application under section 3 or section 3B as the case may be. It is therefore **not necessary** to further provide for a definition of "applicant" in section 2(1).

(b) To include a reference to "applicant" in parenthesis in section 3(1)

We consider that there is no doubt that the existing references to "applicant" in section 3(1) refer to the person who makes the application. It is therefore **not necessary** to include a reference to "the applicant" in parenthesis after "On an application by a person" in section 3(1) of the Domestic Violence Ordinance (DVO).

(c) To clarify whether applications for injunctions made by parties to a lawful union of concubinage will fall within section 3 or the new section 3B of the Ordinance.

According to the Department of Justice, there has not been any recorded cases in Hong Kong which dealt with applications for injunctions made by a party to a lawful union of concubinage since the enactment of the DVO in 1986. There is therefore no established case law in Hong Kong to confirm whether the Court would accept application for injunction from a concubine in the capacity of a "spouse" under section 3 of the DVO or, whether the Court would deal with such application as if it is an application made by a "cohabitant" under section 2(2).

Case law aside, the Administration's policy intent was nevertheless clearly stated by the then Attorney-General during the second reading of the Domestic Violence Bill in the Legislative Council in 1986. He said :

> "*… The Bill gives the victim of domestic violence the right to claim an injunction from a district court on a simple application,* ***without the need for divorce proceedings"***

> *"The Bill **applies to cohabitees as well as married persons**."*
> *"Special provision is made to require the judge to have regard to the permanence of the relationship. In other words, not any casual relationship will qualify for relief."*

Accordingly, upon the enactment of the DVO in 1986, "a party to a marriage" who can obtain a divorce and avail himself / herself of injunctive relief from the divorce court is also conferred the power to apply for injunction under the DVO independently.

Apart from "a party to a marriage", the DVO applies also to the cohabitation of a man and a woman. Section 6(3) deals with the requirement on the Court to consider the permanence of the cohabitation relationship.
Between these two major categories of protected persons under the DVO enacted in 1986, our view is that a concubine would <u>not</u> be considered as "a party to a marriage" under section 3 of the DVO enacted in 1986. Our reasons are :

- Under the Marriage Reform Ordinance (MRO), a concubine is excluded from the definition of "parties to a customary marriage". As a result, the mechanisms established under the MRO for post-registration and dissolution is not applicable to unions of concubinage.

- Under section 9 of the Matrimonial Causes Ordinance, the divorce court's jurisdiction is limited to registered customary marriages or monogamous marriages. As such, divorce proceedings are not applicable to unions of concubinage.

Hence our view that a concubine would not be considered as "a party to a marriage" under section 3 of the DVO enacted in 1986. That said, a concubine is not excluded from protection under the DVO per se. It is up to a concubine to make out a case for injunction under the DVO in the manner and capacity as a cohabitant, rather than as "a party to a marriage".

When we introduced an amendment bill in 2007 to expand the scope of the DVO to, inter-ilia, cover former spouses and former cohabitants, we have replaced the reference of "a party to a marriage" by "spouse" in section 3 of the DVO to simplify the drafting. Our policy intent has remained intact,

viz. the DVO to continually apply to cohabitants as well as married persons. After commencement of the legislative amendments in August 2008, an application by a concubine should continue to be processed as if it is made by a cohabitant, rather than as a "spouse".

Under the Domestic Violence (Amendment) Bill 2009, the Administration has proposed structural changes to the DVO by removing heterosexual cohabitants from the coverage of section 3 and introducing a new section 3B to deal with applications from parties in "cohabitation relationship" – defined as "a relationship between 2 persons who live together as a couple in an intimate relationship". The amendments are introduced to honour the Administration's commitment in the Legislative Council, viz. to extend the scope of the DVO from covering only heterosexual cohabitants to include also same sex cohabitants. Since there is no change in policy intent, to respond to your question, our view is that **a concubine should apply for injunction under the new section 3B**, in the manner and capacity as **"a party to a cohabitation"** after the enactment of the proposed amendments, rather than as a "spouse".

Labour and Welfare Bureau
July 2009