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HONG KONG HUMAN RIGHTS MONITOR

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Submission to the Panel of Welfare Services on the inclusion of homosexual cohabitation relationships to the amendment of the Domestic Violence Ordinance

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1. **“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”**¹ This is the General Comment made by the United Nations Human Rights Committee (“UNHRC”) in 1989 concerning “non-discrimination”. Thus, Article 2 of the International Covenant on Civil and Political Rights (“ICCPR”) obligates each State party to respect and ensure to all persons the rights recognized in the ICCPR without distinction of any kind, such as race, colour, **sex**, religion, etc.
2. Further, Article 26 of the ICCPR affirms **“all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”** It also requires that **“the law shall prohibit any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”**
3. In 1994, in the case of *Toonen v Australia*, the UNHRC, held that the reference to the word “sex” in Articles 2 and 26 of the ICCPR encompassed “sexual orientation” and that “sexual orientation” was a status protected under the ICCPR from discrimination.² The same stance was reiterated again by the

¹ Human Rights Committee, “CCPR General Comment No.18: Non-discrimination”, 37th Session, 1989, at para.1

² *Nicholas Toonen v Australia*, 50th Sess., Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1994, para 8.7

UNHRC in later cases.³ The Hong Kong Court, in 2005, also approved and adopted this interpretation, namely the reference to ‘sex’ in Articles 2 and 26 of the ICCPR is to be taken as including sexual orientation in the case of *Leung TC William Roy v Secretary for Justice*.⁴

4. Articles 2 and 26 of the ICCPR are found in the Hong Kong Bill of Rights Ordinance (Cap.383), being Articles 1 and 22 as Article 39 of the Basic Law gives recognition to the ICCPR as it is incorporated into Hong Kong’s domestic law. Article 25 of the Basic Law also provides that “**All Hong Kong residents shall be equal before the law.**”
5. Accordingly, the Hong Kong Human Rights Monitor affirms the inclusion of homosexual cohabitation relationships to the DVO because cohabiting or former cohabiting same sex couples or partners shall deserve and should be granted the same protection given by the DVO as to cohabiting or former cohabiting opposite sex couples under the current DVO as amended last year. As required under Art. 26 of the ICCPR and Art. 25 of the Basic Law, all persons, irrespective of their sexual orientation are equal before the law and shall be so protected without distinction.
6. Whilst domestic violence victims in heterosexual cohabitation relationships are provided with additional legal protections and remedies under the current DVO, singling out victims in homosexual cohabitation relationships from such protections and remedies under the DVO is clearly a discrimination based on ‘sexual orientation’ and thus breaches Articles 2 and 26 of the ICCPR and Article 25 of the Basic Law.
7. Further, domestic violence impairs the human rights and fundamental freedoms of all including the right to life, the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, the right to equality, etc.⁵ It constitutes a serious crime against the individual and society which should not be excused or tolerated.

³ See *Young v Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003; *X v Columbia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, May 14, 2007. The UNHRC has even urged states to pass anti-discrimination legislation that expressly includes sexual orientation in several Concluding Observations made in regard to different State parties.

⁴ *Leung TC William Roy v Secretary for Justice* [2005] 3 HKC 77, paras 43-46.

⁵ See e.g. in the context of domestic violence against women in General Recommendation No.19, CEDAW.

8. Where there is a right, there is a remedy.⁶ Remedies should not be confined to sanctions in criminal laws but also other measures including civil remedies like injunction to prevent or contain any probable domestic violence. In a society based on the rule of the law, a government has not only the obligation to take the necessary steps to adopt effective laws to offer the necessary protection, it has to make it non-discriminatory.
9. It should be noted that in the formulation of the right to personal security and the freedom from torture in the ICCPR, there is no qualification or derogation of these rights permissible on the grounds of morality or religion. Culture and morality cannot be cited as an excuse to deny the very right to personal security and the freedom from torture as guaranteed by the ICCPR.⁷
10. In a pluralistic and multicultural society, there are different approaches and understanding to religious doctrines even within the same religion. There are also different sets of moral values which may be conflicting. However, it is clear that no one should impose a set of religious values in a legislation governing a secular society at the expense of basic human rights.
11. As rightly pointed out by the Government, “the DVO seeks to empower individuals in certain specific relationships and their children living with them to apply to court for an injunction order against molestation by the other parties in such relationships.”⁸ The injunctions were described by the Attorney General as offering “temporary relief that will give her appropriate short-term protection” when the Bill of the DVO was first presented in 1986. It aims to remedy the shortcomings of the criminal law with reference to domestic violence.⁹
12. Quite different from the time when the DVO was first enacted to target physical abuse in spousal relationship and married couples, it is now commonly recognized that domestic violence exists in multiple forms, to different degrees and among different intimate relationships. Thus, widespread amendments to existing legislations were carried out by different countries to extend the coverage of protection for different kinds of domestic violence victims in the

⁶ This is not only a Common Law maxim but also a principle embodied in most human rights treaties, e.g. Article 2 of the International Covenant on Civil and Political Rights.

⁷ See the case of *Toonen* at para. 7.2., supra. note 2.

⁸ “Legco Panel on Welfare Services: Proposed Amendments to the Domestic Violence Ordinance”, Labour and Welfare Bureau, January 2009, LC Paper No. CB(2)559/08-09(01) at para.5

⁹ Anne Scully-Hill, “The Annotated Ordinances of Hong Kong: Domestic Violence Ordinance (Cap.189)”, Butterworths, p.1.

past decade.¹⁰ For example, in 2004, the UK introduced the Domestic Violence, Crime and Victims Act 2004 to enhance the protection of domestic violence victims and one of the key provisions is to strengthen the civil law on domestic violence to ensure cohabiting same-sex couples have the same access to protection orders as opposite sex couples.

13. The existing protection against domestic violence covers all types of intimate relations from married couples to divorced parties, from heterosexual cohabitants to former cohabitants, and more. Provided there is domestic violence and a law to deal with the problem, persons in all these intimate relations are and shall be equally protected by the same piece of legislation. Needless to say, homosexual cohabitants should not be discriminated against and get excluded by and under the law as opposed to heterosexual cohabitants.
14. In the situation of Hong Kong, there is a claim that the inclusion of homosexual cohabitation relationships under the protection of the DVO would challenge the legal definition of marriage and harm the concept of family. The claim is either misconceived or exaggerated.
15. The focus of the DVO is not confined to family constituted by marriage as recognized by law. In its present form, it already covers, in substance, relationships of heterosexual cohabitation which is not recognized or taken as to vary or replace the definition of “marriage” implied under section 40 of the Marriage Ordinance (Cap. 181)¹¹ and sections 2 and 9 of the Matrimonial Causes Ordinance (Cap. 179).
16. The Hong Kong Human Rights Monitor is therefore of the view that
 - Equal protection should be offered to homosexual cohabitants under the DVO;
 - This should be done without delay;
 - In amending the DVO, to avoid any delay or erosion of protection under the DVO, there should be no or at most, minimal changes to its title. Likewise, there should be minimal changes to its text. Even if changes to its title and/or text are necessary, they must be minimal and with no impairment to the homosexual cohabitants’ equal right to protection under the current DVO as provided under Articles 2 and 26 of the ICCPR and Article 25 of the Basic Law.

¹⁰ See, for example, *Domestic Violence, Crime and Victims Act 2004* in the UK; *Domestic Violence Act 1995* in New Zealand.

¹¹ Section 3(2) and Section 6(3) of the Domestic Violence Ordinance.