

# Domestic Violence Ordinance

## Report on Domestic Violence Ordinance



THE  
**LAW SOCIETY**  
OF HONG KONG  
香港律師會

## Preface

The Law Society of Hong Kong has many functions apart from regulating the solicitors' branch of the legal profession. It has an important task to comment on law reform issues which affect the public. Solicitors volunteer their time to review, discuss and prepare recommendations on important changes to the law, as well as proposals on new legislation.

Both the Administration and Non-Government Organisations have been reviewing the legislation on domestic violence during the last few years. The Law Reform Commission published two reports, one on "*Stalking*", and the other on "*Child Custody and Access*" and recommended changes to the legislation on domestic violence, in particular the provisions in the Domestic Violence Ordinance Cap. 189. The Report on *Child Custody and Access* recommended the court should have wider powers in relation to injunction orders, to vary existing orders on children, including orders on maintenance, and to avoid orders which are inconsistent with prior custody or access orders.

The Hong Kong Council of Social Services formed a Resource Group on Domestic and Sexual Violence and proposed a multi-agency collaborative approach to tackle domestic violence. After the Tin Shui Wai Family Tragedy in April 2004, they published several papers proposing improvements to existing services, institutional support, advocated the establishment of a Specialised Domestic Violence Court, and suggested amendments to the Domestic Violence Ordinance.

Dr. Chan Ko Ling of the Department of Social Work & Social Administration of Hong Kong University was commissioned by the Social Welfare Department to prepare two reports: "*The Household Survey of the Study on Child Abuse and Spouse Battering*" ("*The Survey*") and "*The Review of the Social and Legal Measures in the Prevention and Intervention of Domestic Violence in Hong Kong*" ("*The Review*"); both reports were published in June 2005.

*The Survey* provides information on the profile of perpetrators and victims and the risk factors involved in domestic violence cases. *The Review* identifies the essential elements which can effectively prevent incidents of domestic violence, and suggests

adoption of the Public Health Approach recommended by the World Health Organization. The Approach stipulates that prevention of violence depends upon a combination of social policies and programmes, a coordinated approach by the community, as well as legal measures. Dr. Chan examined the literature and legislation in other jurisdictions and made 21 recommendations to change the law on domestic violence. He supports the suggestion made by Dr. C.K. Law, a Legislative Councillor, that the Domestic Violence Ordinance should be consolidated with other relevant ordinances in order to make the law more comprehensive and effective.

We too have studied the legislation in other jurisdictions and recommend changes by adopting and adapting policies which have been successful in combating and reducing incidents of domestic violence. Our Report approaches this issue from the perspective of legal practitioners, drawing on first-hand experiences. We trust our recommendations are sensible, practicable and feasible.

It is clear that a thorough review of the Domestic Violence Ordinance is necessary. We believe the Administration has more than sufficient material and recommendations to help it modernise its policies and existing legislation.

On 5 September 2005, at the conclusion of the inquest into the brutal deaths and suicide of a family in Tin Shui Wai, the Director of Social Welfare stated in a radio interview that the Health, Welfare and Food Bureau, and the Department of Justice were studying the law on domestic violence with a view to providing a stronger deterrent and better legal protection for victims. The time to change the law is long overdue. The Administration should make this a priority and put their words into action in order to prevent, where possible, family tragedies which occur almost on a daily basis.

Dennis C. K. Ho  
Chairman, Sub-Committee on Domestic Violence

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## Abbreviations

1.	ABH	-	Actual Bodily Harm
2.	AVO	-	Apprehended Violence Order
3.	CFI	-	Court of First Instance
4.	CPOs	-	Care and Protection Orders
5.	DVO	-	Domestic Violence Ordinance
6.	DVA	-	Domestic Violence Act 1995
7.	DVU	-	Domestic Violence Unit
8.	FLA	-	Family Law Act 1996
9.	FCPSUs	-	Family and Child Protective Services Units
10.	FCSC	-	Family Crisis Support Centre
11.	FVDG	-	Family Violence Dialogue Group
12.	HAB	-	Home Affairs Bureau
13.	HWFB	-	Health Welfare Food Bureau
14.	IDVAS	-	Independent Domestic Violence Advisors
15.	LAD	-	Legal Aid Department
16.	LRC	-	Law Reform Commission
17.	MCD	-	Ministry of Community Development
18.	MDCC	-	Multi-Disciplinary Case Conference
19.	MPPO	-	Matrimonial Proceedings and Property Ordinance
20.	NGO	-	Non Government Organisations
21.	PDPO	-	Personal Data (Privacy) Ordinance
22.	SCWO	-	Singapore Criminal of Women's Organisations
23.	SDVC	-	Specialist Domestic Violence Courts
24.	SWD	-	Social Welfare Department



# Chapter 1

## Introduction

The tragic events on 11 April 2004 when Madam Jin and her two daughters were found murdered in Tin Shui Wai shocked the community and led to a review by the Government and the Legislative Council of the Administration's policy on domestic violence.

A search of "*domestic violence*" on the internet search engine *Google* provided almost 13.5 million results, and a narrower search of "*Hong Kong and domestic violence*" produced almost 400,000 sites. Every society experiences domestic violence and governments worldwide have conducted research and introduced policies and programmes to tackle the problem.

A single incident of domestic violence can involve the following: the victim, children, perpetrator, police, emergency unit of a hospital, general practitioners, social services, temporary hostel, housing department, the courts, Department of Justice, Legal Aid Department, solicitors and barristers, counselling services for victims, children, and perpetrator, employers of the victim/perpetrator, schools.

SWD's expenditure in 2004 was estimated to be in the region of \$94.3 million for child abuse, battered spouses, and child custody cases; each incident involved a minimum of \$14,000 per case. However, the *total cost* of any single incident does not appear to have been calculated but it is clear that domestic violence has a serious economic impact on society as a whole.

The Government, through its lead bureau, the Health, Welfare and Food Bureau has stated it has a comprehensive policy and that it "*does not tolerate family violence*" as evidenced by the adoption of its "*3-pronged approach with multi-jurisdictional and cross-sectoral collaboration....*" The Government has provided information on its initiatives but the policy has not been clearly stated in a comprehensive policy document.

The Family Law Sub Committee reviewed the policy considerations in a sample of comparable jurisdictions: England and Wales, Canada, Australia, New Zealand, Singapore, Malaysia, the People's Republic of China ("PRC") and Taiwan.

*The Report of Review Panel on Family Services in Tin Shui Wai* dated November 2004 examined the effectiveness of the delivery of family services in Tin Shui Wai after the murder of Madam Jin. The Review set out recommendations to strengthen the effectiveness and co-ordination of the delivery of the services and also made recommendations to the Director of Social Welfare on other issues on the handling of family cases.

The Government's policy objectives on combating domestic violence should be reflected in legislation which should be comprehensive and proactive in its approach. There are various pieces of legislation which cover domestic violence:

- Domestic Violence Ordinance (“DVO”)(Cap. 189)
- Crimes Ordinance (Cap. 200)
- Offences Against the Person Ordinance (Cap. 212)
- Protection of Children and Juveniles Ordinance (Cap.213)
- High Court Ordinance and the District Court Ordinance providing jurisdiction to the courts under its “*Inherent Jurisdiction*”

The main piece of legislation dealing with domestic violence is the DVO which came into operation in 1986 but which has not been reviewed for almost 20 years. During the intervening period Hong Kong has become a dynamic and cosmopolitan city with the attendant stresses on society. Worldwide, governments have conducted wide-ranging reviews and overhauled their policies as domestic violence is a major problem for all societies. In August 2005, the National People's Congress passed legislation to protect women's rights making domestic violence a “punishable offence”.

**Appendix 1: Extracts from “Amendments to the Law in Respect of the Protection of Women's Rights and Interests in the PRC 修改《中華人民共和國婦女權益保障法》  
Dated 28 August 2005**

The Law Society's Family Law Committee decided to review the provisions in the DVO and put forward recommendations on appropriate amendments. A Sub Committee of experienced family law practitioners was convened to prepare a report on the Ordinance.

Many of the provisions in the DVO are outdated as they were based on the English Family Law Act 1976 and the prevailing social conditions in England and Wales in the early 1970's. It is interesting to note that the UK Government has adopted a proactive policy on domestic violence which recognizes the importance of the political will to

ensure implementation of effective reforms which are not simply declarations of policy but can be measured by the delivery of services and support for the victims. The British Government's policy is clearly stated in the Home Office Report on Domestic Violence: "*A National Report*" March 2005. The policy is steered at the highest level, including representation from the Prime Minister's Office, in order to "*provide a joined-up and robust programme of work*". A recent study, "*The Cost of Domestic Violence*" by Professor Sylvia Walby, University of Leeds, has indicated the cost of domestic violence per annum to the United Kingdom, both tangible and intangible, is a staggering £5.7 billion annually - £3.1 billion for services and £2.7 billion as a direct loss to the economy.

The Government should issue a policy statement on its objectives in relation to domestic violence and these objectives should be reflected in the proposed amendments to the DVO.

## **Recommendation**

### **1. Adoption of a Zero-tolerance policy**

**The Government's assertion that it does not tolerate domestic violence should be clearly stated by appropriate amendments to the DVO.**

## Chapter 2

### Definition of Domestic Violence

#### A. Hong Kong

##### Definition of Domestic Violence in the DVO

There is no definition of domestic violence in the DVO and the only reference to “*violence*” is in Section 3: “*Power to grant injunction*” which refers to “*molested*”:

*“On an application by a party to a marriage in the District Court, if it is satisfied that the applicant or a child living with the applicant has been **molested** by the other party to the marriage.....”*

It is interesting to note that the police stated in its information paper to the Panel on Security and Panel on Welfare Services in April 2004 that it has guidelines in relation to domestic violence. In the police context “*domestic violence*” refers to:

*“...any incident involving an assault, or breach of peace between parties who could generally be described as married or having a family relationship. The types of persons involved include co-habitants, lovers and others who are separated or divorced.”*

This definition does not include emotional or psychological abuse or intimidation in the form of “*stalking*” and is a reflection of the realities on the ground that domestic violence is not confined to married couples and their children.

##### Criminalisation

In Hong Kong, incidents of domestic violence are not classified as criminal offences. However, a perpetrator could face charges of assault or even assault causing actual bodily harm under other legislation such as the Crimes Ordinance (Cap. 200) or Offences against the Person Ordinance (Cap.212). When incidents of domestic violence occur it is not an uncommon occurrence for a victim to make a complaint of assault to the police and then for a variety of reasons to withdraw the complaint.

**The Law Society does not recommend the criminalisation of domestic violence as legislation already exists to enable perpetrators to be prosecuted for acts of violence in a domestic context. The problem has been the attitude of the public and the police in failing to regard domestic violence as a matter which needs to be addressed in a holistic manner. The Law Society advocates such charges as common assault, acts of violence causing actual bodily harm, etc in a domestic context can be dealt with by a Specialised Domestic Violence Court. This will enable the incident(s) to be dealt with in a consistent and comprehensive manner by the same judge. This is more fully discussed in Chapter 9.**

## **B. Legislation in Comparable Jurisdictions**

In most of the jurisdictions reviewed the legislation contains a specific definition of “domestic violence”, and in many cases provides for the criminalization of such acts of violence.

### **1. England and Wales**

#### **(1) Definition**

The Government has adopted a common definition of “*domestic violence*” which has been used by the Association of Chief Police Officers:

*“any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality”*

This definition is wider than the one formerly adopted by the Home Office in England and Wales. An adult is defined as any person aged 18 or over. Family members are defined as mother, father, son, daughter, brother, sister, and grandparents whether directly related, in laws or step family.

#### **(2) Criminalization**

The Domestic Violence, Crime and Victims Act 2004 came into force on 14 November 2004 when a new Section 42A was added to Part 4 of the Family Law Act 1996 when the following provisions were added:

#### **Breach of non-molestation order to be a criminal offence:**

#### **42A Offence of breaching non-molestation order**

*(1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence.*

*(2) In the case of a non-molestation order made by virtue of section 45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.*

*(3) Where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court. Depending on whether the offence is one of indictment or a summary offence the convicted person can receive a prison sentence of up to 5 years and/or a fine.*

### **Domestic violence is a criminal offence in England and Wales.**

## **2. Australian Federal Legislation**

### **(1) Definition**

Domestic violence has been defined as “Family violence” in the Family Law Act 1975:

*“conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well-being or safety.”*

Family violence covers a broad range of controlling behaviour, commonly of a physical, sexual, and/or psychological nature, which typically involves fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.

### **(2) Criminalization**

**Domestic violence is not a criminal offence.**

### 3. New Zealand

#### (1) Definition in the Domestic Violence Act 1995

*“Domestic violence, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.”*

#### (A) Violence means:-

- (a) physical abuse;*
- (b) sexual abuse;*
- (c) psychological abuse, including, but not limited to,*
  - (i) intimidation;*
  - (ii) harassment;*
  - (iii) damage to property;*
  - (iv) threats of physical abuse, sexual abuse, or psychological abuse.*

#### (B) A person psychologically abuses a child if that person:-

- (a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or*
- (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;*

*but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.*

#### (C) A single act may amount to abuse for the purposes of that subsection:

- (a) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.*

*(b) behaviour may be psychological abuse for the purposes of subsection (B) above which does not involve actual or threatened physical or sexual abuse.*

**(2) Criminalization**

**Domestic violence is not a criminal offence.**

**4. Canada – Ontario: Domestic Violence Protection Act 2000**

**(1) Definition**

Family violence is abuse of power within relationships of family, trust, or dependency. It can include many forms of abusive behaviour: emotional abuse, psychological abuse, neglect, financial exploitation, destruction of property, injury to pets, physical assault, sexual assault, and homicide.

**(2) Criminalization**

**All family violence is criminal behaviour.**

**5. Malaysia**

**(1) Definition in the Domestic Violence Act 1994**

Domestic violence means the commission of any of the following acts:

- (a) willfully or knowingly placing, or attempting to place, the victim in fear of physical injury;*
- (b) causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;*
- (c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain;*
- (d) confining or detaining the victim against the victim's will; or*
- (e) causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim, by a person against:-*
  - (i) his or her spouse;*
  - (ii) his or her former spouse;*
  - (iii) a child;*

- (iv) an incapacitated adult; or*
- (v) any other member of the family.*

Behaviour which results in physical, sexual and/or psychological damage, forced social isolation, or economic deprivation or behaviour which leaves a woman in fear. Such behaviour includes destruction of property, threats, harassment and ridicule. The key element in all of these actions is control through the exercise of force or destructive verbal or emotional harassment.

**(2) Criminalization**

**Whether an act of domestic violence is a criminal offence depends on whether the police proceed with a prosecution.**

**6. Singapore**

**The Women's Charter.**

**(1) Definition**

Family violence means the commission of any of the following acts:-

- (a) wilfully or knowingly placing, or attempting to place, a family member in fear of hurt;*
- (b) causing hurt to a family member by such act which is known or ought to have been known would result in hurt;*
- (c) wrongfully confining or restraining a family member against his will; or*
- (d) causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member,*

*but does not include any force lawfully used in self-defence, or by way of correction towards a child below 21 years of age; "hurt" means bodily pain, disease or infirmity.*

**(2) Criminalization**

**An act of domestic violence itself is not a criminal offence. The violent act will be dealt with under the criminal law if the perpetrator has breached a protection order.**

## 7. PRC

(1) **Definition:** *“Explanation on Issues relating to the Implementation of the Marriage Law of the PRC by the Supreme People’s Court”*

*“Any act that causes physical, psychological and other kinds of harm to other family members by means of battering, binding, forcible restriction to the physical freedom or other means”.*

(2) **Criminalization**

The recent changes to the “Law in Respect of the Protection of Women’s Rights and Interests in the PRC” enable a female victim to apply direct to the Courts for relief. The legislation in place prior to the amendments enabled the People’s Procuratorate to proceed with a prosecution if they were satisfied there was sufficient evidence to proceed with the case.

A person found guilty of a violent act against a woman would face a fixed term of imprisonment of not more than 5 years of criminal detention. Violent acts against a child attract heavier penalties.

## 8. Taiwan

(1) **Definition from the Taiwan Domestic Violence Prevention Act**

*“Any act of exercising any infringement, mentally or physically, among family members.”*

(2) **Criminalization**

It depends on whether the police take the matter forward as incidents of domestic violence can be dealt with in either the civil and criminal courts.

## Recommendations

### Definition of “Domestic Violence”

2. It is apparent from the review there should be a definition of domestic violence in the DVO. The term “*molest*” is vague as it has not been defined in the Ordinance. As the legislation was passed in 1986 the experience from other jurisdictions accepts domestic violence can include: psychological and emotional behaviour, stalking, and harassment as well as actual physical abuse.

**(a) “Domestic”**

**This should include current and former partners as well as extended family members. It is more fully discussed in Chapter 3.**

**(b) “Violence”**

**This should have the widest definition and should include:**

*“physical, psychological, sexual, emotional, and financial abuse; forcible restriction of physical freedom; placing or attempting to place a family member in fear of pain, disease or infirmity; continued harassment with intent to cause anguish, causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim; forced social isolation, economic desperation, control through the exercise of forced destructive verbal or emotional harassment”.*

**(c) The Law Society recommends adaptation of the provisions in New Zealand’s Domestic Violence Act 1995.**

**3. Criminalisation**

**The Law Society does not recommend the criminalisation of “domestic violence” but advocates the adoption of a holistic approach by the creation of a Specialised Domestic Violence Court to handle the prosecution of criminal charges which have occurred in a domestic context.**

## Chapter 3

### *“Who can Apply?” and “Who is Protected?”*

#### **I “Who can Apply?”**

##### **A. Hong Kong**

Under Sections 2 and 3 of the DVO only parties to the marriage or heterosexual cohabitants can apply for protection orders. The class of persons who can make an application is extremely limited compared to other jurisdictions.

##### **B. Review of Comparable Jurisdictions**

###### **1. England and Wales**

The relevant enactment is the **Family Law Act 1996 (“FLA”)**.

Under Section 62(3) the following persons associated with a perpetrator is entitled to make an application:-

- A spouse or former spouse;
- Cohabitants or former cohabitants;
- People living or have lived in the same household;
- Relatives;
- Couples who have agreed to marry each other;
- Persons who are parents to a child or have a parental responsibility for the child; or
- Parties to the same family proceedings.

Under Section 43: A child under 16 cannot apply for a non-molestation order except with leave of the Court but a child over 16 is entitled to make an application in his own right.

In November 2004, the FLA was amended by the Domestic Violence, Crime and Victims Act 2004 and a new section 42A was added whereby the class of persons entitled to apply for civil protection orders was expanded to include:

Cohabiting and former cohabiting couples including same sex couples and non-cohabiting couples depending on the level of commitment.

Under Section 60: A third party can act on behalf of victims of domestic violence to make an application for a non-molestation order.

## 2. **Australia**

The relevant enactment is the **Federal Protection Orders Act 2001**. The object of the legislation is the prevention of violence between family members and others who are in a domestic relationship, and to provide a mechanism to facilitate the safety and protection of people who experience domestic violence.

Emergency protection orders can only be obtained with the assistance of the police.

### **Persons under a legal disability**

Generally, persons who are victims of domestic violence can apply. A child has the right to apply, usually through a *guardian ad litem*, as do persons under a legal disability who receive assistance from a community advocate who acts as the person's "*Next Friend*".

## 3. **New Zealand**

The relevant enactment is the **Domestic Violence Act 1995** ("DVA"). Under this legislation, a person in a domestic relationship can apply for a protection order:

- A spouse (legally married);
- Cohabitants of same sex couples;
- Father and mother;
- Family members related by blood, marriage or adoption;
- Family members in the same culturally recognized group;
- Family members of partners who are not legally married;
- Persons ordinarily sharing a household (not apply to landlord/tenant, employer/employee, employee/employee relationship or occupy a common dwelling house);
- Persons of close relationship (does not apply to employer/employee, employee/employee relationship);
- Child under the age of 17 - not yet married can apply by a representative such as *guardian ad litem* or next friend;
- Person incapacitated may also apply by a representative such as *guardian ad litem*.

The Court may appoint an adult to act on behalf of another person who is unable by reason of physical incapacity or fear of harm or other sufficient cause to take out the application.

#### **4. Canada: Ontario**

The relevant enactment is the **Domestic Violence Protection Act 2000** (“DVPA”) with provision for “*intervention orders*” or “*emergency intervention orders*”.

The following persons can apply:

- A spouse or a former spouse;
- A same-sex partner or a former same-sex partner;
- A person who is cohabiting with the perpetrator or who has cohabited with the perpetrator for any period of time (whether or not they are cohabiting at the time of the application);
- A person who is / was in a dating relationship with the perpetrator;
- A relative of the perpetrator who resides with the perpetrator.

#### **Children**

A child is a person under the age of 18, but a child who has reached the age of 16 has the right to make an application for an intervention order.

#### **Relative**

A relative means any person related to another person by blood, marriage or adoption.

#### **5. Malaysia**

The relevant enactment is the **Domestic Violence Act 1994**.

The Malaysian Government attached the Act to the Criminal Procedure and Penal Code. This enabled domestic violence to be classified as “*criminal behaviour*” and ensures its applicability to all Malaysians otherwise family matters would fall under the Syariah law. During the passage of the legislation, the Non Government Organisations and other concerned groups had argued that if domestic violence remained a civil complaint, perpetrators of domestic violence might escape punishment because of loopholes in the Syariah law. Whether an act of domestic violence is a criminal offence depends on whether the complaint is investigated by the police, whether charges are brought, or whether the Complainant wishes to seek compensation in civil proceedings.

The Court grants “*protection orders*” which may be an interim order (pending investigation into the complaint involving domestic violence), or where a defendant has been charged with the offence of domestic violence, a final protection order can be granted at the end of the trial. The applicant for a protection order can be the victim, the police, or a prosecutor.

If the complainant is a child or an incapacitated adult, the complaint can be filed by a guardian or relative or a person responsible for the care of the child or incapacitated person, or by an enforcement officer (i.e. a police officer or a welfare officer from the Department of Social Welfare).

## 6. Singapore

The relevant legislation is in **Part VII of the Women’s Charter**.

In Singapore, a “*family member*” can make an application for a protection order; the definition is very wide and covers applications by:

- A spouse, and a former spouse;
- A child of the person including an adopted child and a step-child, adult son or daughter;
- A father or a mother of the person;
- A father-in-law or a mother-in-law of the person;
- A brother or sister of the person; (the only comparable jurisdiction which permits such applications)
- Any other relative of the person; or
- An incapacitated person, who in the opinion of the Court, can be regarded as a member of the family of the person.

### **Definition of “*a relative*”**

A relative includes a person who is related by marriage or adoption. If the application is made by a child (under 21) or an incapacitated person, the application will be made by a guardian or a relative or a person responsible for the care of the child or incapacitated person, or by any person appointed by the Minister.

Singaporean legislation does not provide protection for persons who cohabit or same-sex couples.

## 7. PRC

The relevant legislation appears to be the **Marriage Law of the People's Republic of China, Chapter V Articles 43-46.**

New legislation has been passed by the Standing Committee of the National People's Congress apparently allowing female victims the right to make applications to Court for non-molestation, protection, or intervention or such similar orders. In cases of domestic violence, the victim has a right to make a request and to seek assistance from the Neighbourhood or Village Committee. It is the duty of the relevant committee to try and to dissuade the wrongdoer from committing any further acts of violence against the spouse. If the violence continues, Public Security has the power to intervene in order to stop the violence.

## 8. Taiwan

The relevant legislation is the **Domestic Violence Prevention Act** which came into operation on 24 June 1998 and provides protective orders. The following persons or organization can make an application:

- victim
- prosecutor
- police department
- regulating authorities from municipal, or county government.

**The information contained in section B1 to 8 has been tabulated and is contained in Table A.**

## Recommendations

### “Who can Apply?”

**4. The Law Society recommends adoption of the Singaporean model on the basis that of all the jurisdictions reviewed, Singapore bears the most similarity to Hong Kong – a cosmopolitan city with a majority of ethnic Chinese citizens. Its Women's Charter recognises the need to offer the widest possible protection to its citizens and has done so by including an extended list of family members as well as relationships. The class of victims should also include former co-habitees and same sex couples.**

## **5. Children and Incapacitated Persons**

**The DVO should be amended to enable:**

**(a) A child under the age of 18 to make an application on her own behalf. The application can be made by the child's relative, guardian, "*next friend*", or Social Worker.**

**(b) Incapacitated persons should be allowed to make applications in their own right through any of the following representatives: "*parents, guardian, custodian, and persons who are responsible for their care*".**

**6. The Court should be empowered to appoint an appropriate third party, such as the Social Welfare Officer in charge of the case, or a police officer and/or any other persons having an interest, to make an application on behalf of the victim.**

TABLE A

*“Who Can Apply?”*

Description of “Applicant” in the relevant jurisdictions	HK	Singapore	Malaysia	Australia (Federal)	Ontario BC	England & Wales	NZ	PRC	Taiwan
Complainant			√						
Aggrieved person				√					
Victim								√	√
<b>“Marital” Relationship</b>									
Cohabitant	√				√	√	√		
Former Cohabitant					√	√	√		
Spouse	√	√			√	√	√		
Former Spouse	√*	√			√	√	√		
Same sex partner					√	√	√		
Former same sex partner					√		√		
Living in the same household						√			
Agreed to marry						√			
Dating					√	√			
Former Dating					√				
Parent of same child						√	√ (biological)		
Parental responsibility of same child						√			

\* Under “Inherent Jurisdiction of the Court”

TABLE A

*“Who Can Apply?”*

Description of “Applicant” in the relevant jurisdictions	HK	Singapore	Malaysia	Australia (Federal)	Ontario BC	England & Wales	NZ	PRC	Taiwan
<b>Child By</b>									
In own right				√	√ (>16)	√ >16	>17 or married		
Parent		√	√			√	√ (next friend)		
Guardian	√*	√	√						
Relative	√*	√	√						
Responsible for care		√	√			√			
Any person having an interest in the welfare of the child	√ †	√	√						
Enforcement officer									
<b>Incapacitated Parties by</b>									
-Guardian		√	√	√ (next friend)		√	√		
-Relative		√	√						
-Responsible for care		√	√						
-Regarded as family members		√							
<b>Family members</b>									
Adult son / daughter		√							
Father/mother		√							
Brother /sister		√							

\* Under “Inherent Jurisdiction of the Court”

† “Wardship proceedings/inherent jurisdiction”

**TABLE A**

*“Who Can Apply?”*

Description of “Applicant” in the relevant jurisdictions	HK	Singapore	Malaysia	Australia (Federal)	Ontario BC	England & Wales	NZ	PRC	Taiwan
Father/mother In-laws		√							
Relatives-by blood Marriage adoption		√ √ √ (considered to be family member)			√ √ √ (of respondent & reside with respondent)	√	√  √		
Relatives of Partner						√	√		
<b>Third Parties</b>									
Parties to family proceedings						√			
Same cultural Group							√		
Police/enforcement officer			√				√ (appointed officer)		√ (regulating authorities)
3 <sup>rd</sup> parties acting on behalf of victim of domestic violence						√			
Neighbourhood/village committee								√	
Public security organ								√	

NB: Malaysia: Protection order sought in criminal proceedings/Complainant can be victim or law enforcement body or prosecutor

Australia: Only police officers can make an application for an emergency order

## II “Who is protected?”

### 1. Hong Kong

The DVO only provides protection to the parties to a marriage, cohabiting parties and any children living with an Applicant. The legislation in the jurisdictions reviewed, apart from the PRC, provides protection to a wider group of victims in a domestic relationship.

### 2. “Domestic” or “Close” relationships

Some jurisdictions have extended protection to former spouses, same sex couples and even couples who have “dated”:

(a) **Singapore and Malaysia:** provides protection to former spouses.

(b) **England and Wales:** recognises other “close” relationships such as:

- persons who have or have been living in the same household,
- persons who have agreed to marry each other,
- parents of a child who have never lived together
- persons who have or had parental responsibility for a child
- parties to the same family proceedings

(c) **Ontario:** persons having a “present or former dating arrangement”.

(d) **Australia:** domestic or “de facto” partners have the right to apply for protection.

### 3. Children

All jurisdictions, apart from PRC, have specific provisions to protect children.

(a) **England and Wales:** Covers any child living with or might reasonably be expected to live with either party to the proceedings, including children who are adopted.

(b) **Australia, Ontario, British Columbia and New Zealand:** The child does not have to live with the applicant or the perpetrator.

(c) **Singapore:** A person under the age of 21 is considered to be a “child”. The legislation recognises the status of adopted and step-children and there is no

requirement that a child has to be living with the applicant or the perpetrator / respondent before they can seek protection.

(d) **Malaysia:** Persons under the age of 18 are regarded as children. The legislation only applies to children living with the perpetrator or with the perpetrator's spouse or the perpetrator's former spouse.

(e) **Taiwan:** The legislation includes "*persons having a dependant relationship*" which therefore includes a child of the parties.

#### 4. "Extended Family members or Relatives"

(a) **Australia, England and Wales and New Zealand:** Covers relatives of the applicant or the perpetrator/respondent.

(b) **Ontario:** Covers relatives residing with the perpetrator.

(c) **Singapore and Malaysia:** The definition of "*family member*" is very wide and covers the following: "*father, mother, brother, sister or relatives regarded by the Court as family members*".

In Singapore protection has been extended to "*father-in-law and mother-in-law*".

(d) **Taiwan:** The legislation covers family members who are defined as persons having a parental relationship, dependant relationship, a linear blood relationship and a linear blood marriage relationship.

**It is clear that the scope of the legislation in the jurisdictions reviewed is far wider and more comprehensive than our DVO. The PRC's adoption of a Zero Tolerance Policy clearly indicates the issue needs to be addressed. There are daily reports in the media of incidents of domestic violence involving family members – parents and children as well as spouses and cohabitants.**

**The information contained in paragraphs 1 to 4 has been tabulated and is contained in Table B.**

## **Recommendations**

### **“Who is Protected?”**

The Law Society recommends the category of persons entitled to seek protection under the DVO should include the following:

#### **7. “Domestic” Relationships**

##### **(a) Former spouses**

The DVO only allows a party to a marriage to apply for an injunction but there is no protection once the marriage has been dissolved. In some divorce cases, even after the pronouncement of the Decree Absolute, a former spouse may continue to intimidate, harass or disturb the former spouse and/or the children of the family.

The DVO should be amended to include “*former spouse*”

##### **(b) Cohabitants**

The relationship of co-habitees can be recognized as a “*common law marriage*” or “*de facto*” relationships. The same tensions and animosities which occur between married couples also occur between cohabitants. The current provisions of the DVO offer no protection to *former* cohabitants and the only course of action to be taken is for a victim to make a complaint of assault to the police.

The DVO should be amended to include “*former cohabitants*”

##### **(c) Parents of a child who have never co-habited**

There are cases, albeit small in number, where parents of the same child have never married nor have they cohabited. As parents, they need to keep in contact with each other to discuss matters relating to the child’s upbringing.

The DVO should be amended to include “*parents of the same child*”.

##### **(d) Same Sex Couples**

The Law Society notes that other jurisdictions, notably England and Wales, Ontario and New Zealand provide protection for existing and former cohabitants in same sex relationships.

This issue is likely to be controversial in Hong Kong as there is no legal recognition of “*same sex marital relationships/partnerships*”. Article 25 of the Basic Law states: “*All Hong Kong residents shall be equal before the law*”.

The Law Society recommends that protection should be extended to same sex couples as a failure to do so would be discriminatory.

(e) Children

(i) The definition of “*child*” in the DVO should be amended to provide the maximum protection and should cover a child in the following domestic relationships:

*“biological, adopted or step-child of the Applicant, the Perpetrator or Respondent.”*

(ii) The DVO fails to provide protection unless the child at risk “*lives with the Applicant*”. This qualification must be removed from the DVO as many children live with extended family members, such as grandparents.

(f) Extended Family Members living in the same household

In light of the predominant Chinese culture and the housing problems in Hong Kong, many people continue to live with their extended family after attaining the age of majority, and in many cases after marriage. In situations where a family member becomes violent, protection should be provided to the victims living in the same household such as:

*“Parents: father and mother, father and mother-in-law,  
Brother and sister, step brother and sister, brother and sister-in-law,  
Adult son and daughter  
Relatives of the parties by: blood, marriage or adoption.”*

TABLE B

**“WHO IS PROTECTED?”**

Description of persons protected in the relevant jurisdictions	HK	Singapore	Malaysia	Australia (Federal)	Ontario BC	England & Wales	NZ	PRC	Taiwan
<b>General</b>									
Victim								√	
Applicant					√				
Associated with the Respondent						√			
Close personal relationship							√		
<b>“Marital” Relationship</b>									
Party to marriage/Spouse	√	√	√		√	√	√		√
Former Spouse	√*	√	√		√	√	√		√
Cohabitant of opposite sex	√				√	√	√		√
Former cohabitants					√	√	√		
Cohabitants of same sex					√	√	√		
Former cohabitant of same sex					√	√	√		
Domestic Partner				√		√			
Dating					√	√			
Former dating					√	√			

\* Under “Inherent Jurisdiction of the Court”

TABLE B

**“WHO IS PROTECTED?”**

<b>Description of persons protected in the relevant jurisdictions</b>	<b>HK</b>	<b>Singapore</b>	<b>Malaysia</b>	<b>Australia (Federal)</b>	<b>Ontario BC</b>	<b>England &amp; Wales</b>	<b>NZ</b>	<b>PRC</b>	<b>Taiwan</b>
De-facto marital relationship						√			√
Agree to marry						√			
Parent of same child						√	√		
<b>Child</b>		√ (21)	√ (18)	√	√ (18)	(18)	√ (17)		
Living with applicant	√					√ (expect to live)	√		
Living with respondent/offender			√			√ (expect to live)			
Living with offender's spouse/former spouse			√						
Adopted		√				√			
Step		√							
Whose interests the court consider relevant Under other legislation	√					√			
<b>Incapacitated Parties</b>		√	√						
Regarded by court as family member		√							

TABLE B

**“WHO IS PROTECTED?”**

Description of persons protected in the relevant jurisdictions	HK	Singapore	Malaysia	Australia (Federal)	Ontario BC	England & Wales	NZ	PRC	Taiwan
<b>Family members</b>									
Adult son/daughter			√						
Father/Mother		√	√				√		
Father/Mother in law		√							
Parental relationship									√
Family of cohabitant							√		
Brother/sister		√	√						
Dependant relationship									√
Lineal blood relationship									√
Lineal blood by marriage relationship									√
Relatives of applicant				√	√	√	√		
Relatives of respondent				√	√ (resides with respondent)	√	√		
Relatives regarded by court as family member		√	√						
Relatives in the same culturally recognized group							√		
<b>Third Parties</b>									
Someone living in the same household				√		√	√		
Formerly lived in same household						√			
Parental responsibility towards child						√			
Parties to the same family proceedings						√			

## Chapter 4

### Types and duration of orders

#### A. Types of Orders

##### 1. Hong Kong

Under the DVO the court may grant the following orders:-

- non-molestation
- ouster
- entry
- attach a power of arrest order

##### 2. Position in Overseas Jurisdictions

###### (a) Orders

Generally, in all the jurisdictions under review save for the PRC, there is legislation providing protective or injunctive orders to prevent acts of domestic violence.

###### (b) Relief granted by the Courts

The jurisdictions provide a wide variety of injunctive relief, interim or permanent, to protect the victims:

- (i) to prevent damage to property whether jointly owned or not with the protected person (Victoria)
- (ii) prohibiting others to engage in conduct prohibited by the order (Victoria)
- (iii) prohibiting the perpetrator from approaching or going near the protected person (Victoria and NSW)
- (iv) prohibiting specific behaviour by the perpetrator in relation to the protected person (NSW)
- (v) prohibiting contact with the protected person by the perpetrator

- (vi) prohibit the taking, converting or dealing with property in which the protected person has an interest (Ontario)
- (vii) A “*peace officer*” to accompany the protected person, perpetrator or specified person to the protected person’s residence and supervise the removal of belongings (Ontario)
- (viii) Perpetrator not to evict the protected person from the home (England and Wales)
- (ix) The party in occupation of the home to take reasonable care of it (England and Wales)
- (x) The party to continue to pay the mortgage or rent for the home (England and Wales)
- (xi) An order to regulate the use of furniture and chattels in the home (England and Wales)
- (xii) Tenancy Order - vesting the tenancy of any dwelling house in the protected person i.e. the protected person becomes the tenant and the perpetrator loses the tenancy (NZ)
- (xiii) A Furniture Order excluding the perpetrator’s right to possession of furniture, appliances and household effects in a dwelling house (NZ)
- (xiv) Order for mandatory counselling by referring the perpetrator to a conciliatory body, rehabilitation therapy, psychotherapy or other reconciliatory counselling (NZ, Victoria, Ontario, and Malaysia)
- (xv) Compensation order awarding damages for personal injury or damage to property or financial loss caused by domestic violence including loss of earnings, medical or dental expenses, out-of-pocket expenses for injuries sustained, moving, accommodation expenses and costs, including legal fees for the application (Malaysia and Ontario)
- (xvi) Contact order - an order imposing conditions on the perpetrator’s future access to a child and the manner in which the perpetrator may make contact with the protected person (NZ)
- (xvii) Application for Interim Orders by Telephone (NSW: S.562H of NSW Crime Act 1900, and also available in Ontario)

The legislation in New Zealand, Ontario and Victoria provide examples of comprehensive orders including the prohibition of, *inter alia*, physical, sexual and psychological abuse together with standard conditions for each protection order. In Victoria and Ontario the court has greater discretion on the reach of the injunctive relief but this does not preclude it from granting the widest possible protection available under the legislation.

### 3. Standard Types of Injunction Orders

Injunction orders granted by the Hong Kong courts are not “*user-friendly*”. A standard injunction order from the Hong Kong courts would consist of the following:

- “(a) *The Respondent whether by himself, his servants or agents or otherwise be strictly enjoined and restrained from assaulting, molesting, annoying or otherwise interfering with the Applicant.*
  
- (b) *The Respondent be excluded from [address] (“the premises”) and do remain away from a radius of one hundred metres from the premises and the Applicant’s office at [address].”*

By comparison, the contents of injunction and protection orders in other jurisdictions are more specific and deal with the immediate needs of the victims. The contents of the injunction order under the DVO should be revised so that it can be readily understood without the need for lengthy explanations. The orders should clearly identify what the perpetrator cannot do in relation to the victim.

Section 19 (2) of New Zealand’s DVA provides the following:

*“.....at any time other than when the protected person and the respondent are, with the express consent of the protected person, living in the same dwelling house, the respondent must not --*

*(a) Watch, loiter near, or prevent or hinder access to or from, the protected person’s place of residence, business, employment, educational institution, or any other place that the protected person visits often; or*

*(b) Follow the protected person about or stop or accost the protected person in any place; or*

*(c) Without the protected person’s express consent, enter or remain on any land or building occupied by the protected person; or*

*(d) Where the protected person is present on any land or building, enter or remain on that land or building in circumstances that constitute a trespass; or*

*(e) Make any other contact with the protected person (whether by telephone, correspondence, or otherwise), except such contact as is:*

*(i) reasonably necessary in any emergency; or*

*(ii) permitted under any order or written agreement relating to custody of, or access to, any minor; or*

*(iii) permitted under any special condition of the protection order.”*

The following orders, which have been taken from the DVPA, Ontario, can also be adapted for use in Hong Kong:

*1. Restraining the respondent from attending at or near, or entering, any place that is attended regularly by the applicant, a relative of the applicant, any child or*

*any other specified person, including a residence, property, business, school or place of employment.*

*2. Restraining the respondent from engaging in any specified conduct that is threatening, annoying or harassing to the applicant, a relative of the applicant, any child or any other specified person.*

*3. Requiring the respondent to vacate the applicant's residence, either immediately or within a specified period of time.*

*4. Requiring a peace officer within a specified period of time, to accompany the applicant, respondent or a specified person to the applicant's residence and supervise the removal of that person's or another named person's belongings.*

*5. Restraining the respondent from contacting or communicating with the applicant or any other specified person, directly or indirectly.*

*6. Restraining the respondent from following the applicant or any other specified person from place to place, or from being within a specified distance of the applicant or other specified person.*

*7. Granting the applicant exclusive possession of the residence shared by the applicant and the respondent, regardless of ownership.*

*8. Requiring the respondent to pay the applicant compensation for monetary losses suffered by the applicant or any child as a direct result of the domestic violence, the amount of which may be summarily determined by the court, including loss of earnings or support, medical or dental expenses, out-of-pocket expenses for injuries sustained, moving and accommodation expenses and the costs, including legal fees, of an application under this Act.*

9. *Granting the applicant or respondent temporary possession and exclusive use of specified personal property.*

10. *Restraining the respondent from taking, converting, damaging or otherwise dealing with property in which the applicant has an interest.*

11. *Requiring the respondent to attend specified counselling.*

12. *Recommending that a child attends specified counselling at the respondent's expense.*

**See Appendix 2 for the following legislative provisions:**

**(a) New Zealand: S. 19 of the Domestic Violence Act 1995;**

**(b) Victoria: S. 5 of the Crimes (Family Violence) Act 1987;**

**(c) Ontario: S.3 of the Domestic Violence Protection Act, 2000.**

## **B. Additional Orders**

In some jurisdictions the legislation enables the court to grant additional relief covering the daily and financial needs of the victims.

### **1. England and Wales: Occupation Orders**

The court can regulate the occupation of the matrimonial home of the couple and their children in order to protect any party from domestic violence. The order can exclude an abuser from the property altogether, or divide the property to exclude him from part of the accommodation.

An occupation order will require the perpetrator to leave the applicant's property and, having left, must not enter or attempt to re-enter, or come within a specified distance. The order will also include notice of any further hearing dates and the

length of time the order is to last. Generally, the duration of these orders is between six months and one year but it can be until “*further order*”.

Before issuing such an order the Court will apply the “*balance of harm*” test, to find out which party will be at risk if an order is made, or not.

The following can make an application:

- (a) Entitled persons: some legal right to occupy a property as the freehold owner, tenant or contractual licensee and has an association with the perpetrator.
- (b) Non-entitled persons: does not have legal rights.

Section 40 of the Family Law Act 1996 enables the court to make supplemental orders to any occupation order as follows:

- (a) *impose on either party obligations as to the repair and maintenance of the dwelling house*
- (b) *impose on either party obligations as to the payment of rent, mortgage or other outgoings affecting it.*
- (c) *order a party occupying the dwelling-house to make periodical payments to the other party in respect of the accommodation, if the other party would (but for the order) be entitled to occupy it.*
- (d) *grant either party possession or use of furniture or other contents*
- (e) *order either party to take reasonable care of any furniture or other contents.*
- (f) *order either party to take reasonable steps to keep the dwelling-house and any furniture or other contents secure.*

## **2. Malaysia**

Once an Interim Protection Order has been granted the police will investigate the matter and the interim order will automatically expire once the investigation has been completed.

If the perpetrator is charged with an offence, the victim can apply for a Protection Order which can include the following:

- *to stay away from the victim's house, workplace or school*
- *not to talk or write to the victim(s).*
- *to compensate the victim(s) for loss due to the domestic violence*
- *the perpetrator to go for counselling.*

## **3. Singapore**

During the first hearing of the summons, a District Judge will consider whether there should be a referral for counselling to provide an assessment on the following issues: whether the case can be resolved without a trial, the necessity for a protection order, safety measures for the victim, provide education to both parties on the effect of family violence and consider any recommendations on long term assistance or rehabilitation. The court will decide whether to grant a Protection Order and impose a counselling order.

## **4. Taiwan**

Once the Court is satisfied that an act of domestic violence has been established, the court shall issue one or more of the following orders to:

- (a) *specify the right to use an automobile, motorcycle, and any other daily, occupational or educational necessities; and if required, to deliver any and all of the said necessities (to the victim);*
- (b) *order the perpetrator to pay rent or support for the victim;*

- (c) *order the perpetrator to pay the costs incurred by the victim or any specific family member of the victim for medical care, consultation, sanctuary or any damage to property; and*
- (d) *order the perpetrator to bear the legal costs.*

## **5. New Orders for consideration**

### **(a) “Restraining and Protection Order” (“RPO”)**

The word “*injunction*” is not “*user-friendly*” and the opportunity should be taken to clarify the function of the Court Order. The Law Society suggests changing the injunction order to “Restraining and Protection Order” “限制及保護令”.

### **(b) Counselling programmes**

Virtually all jurisdictions have introduced counselling programmes for both the perpetrators and the victims and an order for compulsory attendance may form part of the court orders. Currently, *Harmony House* in Hong Kong has been providing counselling and guidance to both victims and perpetrators in an attempt to stop the cycle of violence. This policy has been effective in educating the perpetrator and thus reducing the risks of repeat incidences of domestic violence.

It must be recognized that many victims of domestic violence do not want the perpetrator to be punished by imprisonment but would welcome mandatory attendance at such programmes which could remove the tendency to violence.

### **(c) Furniture and Personal Chattels Orders**

One of the areas of conflict between the parties involves the right to use and/or possession of the furniture or chattels in the matrimonial home. In many cases,

victims vacate the matrimonial home in order to secure their safety but are unable to take their possessions.

**(d) Compensation Orders**

Domestic violence has an economic cost not only for the victim but also for society as a whole. The cost to the victim often involves a combination of expenses and there is no reason why the perpetrator should not pay damages which can be directly attributed to the violent behaviour, *inter alia*:

- medical and dental charges
- moving and alternative accommodation expenses
- legal fees
- counselling fees including those for any child who has been directly affected by the violence etc.

In Ontario the court is given the power to summarily determine compensation for monetary losses, other courts are given the jurisdiction to order the payment of rent or order the perpetrator to continue to pay the mortgage.

**(e) Comprehensive Interim Orders**

The DVO should be amended to give victims the right to seek additional orders such as an interim maintenance order thus enabling the victim's needs to be assessed in a single comprehensive hearing.

**(f) Contact Orders**

The current legislation refers to “*non-molestation*” orders. This should be amended and the scope of the order should be made as wide and as clear as possible.

**(g) “*Stalking*”**

The Law Reform Commission's recommendations on “*Stalking*” never became legislation in Hong Kong. The provisions in the New Zealand and Ontario

legislation can be adapted to enable the courts to grant injunctive relief to prevent a perpetrator from “*stalking*” the victim.

## **Recommendations**

### **“Types of Orders”**

#### **8. “Restraining and Protection Order” (“RPO”)**

The Law Society recommends changing the injunction order to “Restraining and Protection Order” “限制及保護令”.

#### **9. Counselling Programmes**

The Law Society recommends the introduction of counselling programmes which specifically address the issues of domestic violence.

**10. The DVO be amended to enable the court to order perpetrators to attend counselling programmes as a part of any order.**

#### **11. Furniture Orders**

The Court should be empowered to make such orders.

#### **12. Compensation Orders**

The Law Society recommends amendment of the DVO to include compensation orders which could be based on the provisions in the DVPA, Ontario.

#### **13. Comprehensive Interim Orders**

The DVO should be amended to enable the Court to provide Comprehensive Interim Orders.

#### **14. Contact Orders**

The Law Society recommends the adaptation of the legislation in New Zealand and Ontario.

### **15. “Stalking”**

**The DVO should be amended to adapt the relevant provisions in the legislation in New Zealand and Ontario to enable the Court to provide protection to victims. This will provide much needed protection to victims pending action on legislation to cover “stalking”.**

### **C. Duration of orders**

#### **Hong Kong**

In Hong Kong, orders for ouster, entry and power of arrest may be granted for an initial period of no more than 3 months, and may be extended for another 3 months, thus the maximum duration of any order under the DVO is 6 months.

#### **Overseas position**

##### **England and Wales**

A non –molestation order will be granted for a specified period or until “*further order*”.

##### **Australia**

##### **New South Wales: Apprehended Violence Orders (“AVO”)**

AVOs: the duration is to be specified by the court and if not, the AVO remains in force for 6 months.

##### **Victoria**

Intervention Order: as specified by the court and if not, it remains in force until revoked.

##### **New Zealand**

Protection Order: continues in force until discharged.

Furniture Order: for such period as the court thinks fit, or if no direction from the court, continues in force for 6 months, or expires when the protection order expires or is discharged.

**Canada: Ontario**

Intervention order: for such period as specified by the court.

**Malaysia/Taiwan**

Protection order not exceeding 12 months, but may be extended once for a further period, not exceeding 12 months i.e. a maximum of 24 months.

**Recommendation****16. Duration of Injunction Orders**

**The duration of orders under the DVO is too short and restrictive. Orders should be granted on the basis “*as the court deems fit*”. The discretion of the Court should not be fettered as the facts of each case require tailored relief in order to maximise protection for the victim(s).**

## Chapter 5

### Power of Arrest

#### A. How is the power of arrest exercised?

##### 1. Hong Kong

In Hong Kong, a power of arrest is attached to an injunction granted by the Court of First Instance or the District Court. The presiding judge has the benefit of seeing the applicant, reviewing the facts of the case and in many instances the “*threat or potential threat*” the perpetrator causes the applicant. Incidents of domestic violence often occur in high conflict divorce cases which can be and are often protracted. The removal of artificial time limits will provide protection for victims and children of the family and any other applicant entitled to make an application under the DVO.

##### The Court’s Power

Section 5: If the Court is satisfied that a person has caused Actual Bodily Harm (“ABH”) to either the applicant or to the relevant child, the court *may* attach a power of arrest to the order any time during the duration of the injunction order.

The current legislation is unsatisfactory as Section 5 requires the victim to “*have suffered ABH*” before the Court can be satisfied that a power of arrest can be attached to the injunction order. The extent of the injuries can vary but it appears that powers of arrest will not be granted where the violence is only “*apprehended*” or the victim is “*in danger of being assaulted*”. In other jurisdictions, the test the Court has to consider is “*whether the perpetrator is likely to cause actual physical injury to the protected person*”. Police officers have a wider discretion to arrest when there has been reasonable cause to believe the order has been breached.

### **Duration of the Power of Arrest**

Section 6: The power of arrest can only be granted for an initial period of 3 months.

Section 7: An applicant can apply for an extension of an additional 3 months.

### **Features and Limitations**

(a) In order to obtain an injunction the applicant must make 2 separate applications, resulting in unnecessary emotional distress, legal expenses, duplication of valuable court time for an order which only lasts for a maximum period of 6 months.

(b) The power of arrest lapses when the injunction order expires. The maximum duration of the order is much shorter than in the comparable jurisdictions.

(c) The power of arrest must be attached to an injunction order thus limiting the power of the police to take immediate action, especially where violence has been inflicted and persists. Although the police can arrest a person committing acts of domestic violence under other legislation, they often decline to do so. In order to protect themselves victims have to apply for an injunction order and hope the court will attach a power of arrest.

(d) Breaches of Injunction Orders will be dealt with under the civil jurisdiction of the court. A perpetrator who has been arrested for breaching a restraining order will be brought to the court and may be imprisoned for contempt. Contempt is discussed in Section C below.

## **B. Comparable Jurisdictions**

### **1. England and Wales**

A power of arrest can be attached to an injunction by Section 2(1) of the **Domestic Violence and Matrimonial Proceedings Act 1976** (“the Act”) if the injunction order contains one of the following provisions:

- “(a) *restraining the other party to the marriage from using violence against the applicant; or*
- (b) restraining the other party from using violence against a child living with the applicant; or*
- (c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included,*

*the judge may, if satisfied that the other party has caused actual bodily harm to either the applicant or to the child and considers that the perpetrator is likely to do so again, attach a power of arrest to the injunction.”*

Under section 2(3) of the Act, where a power of arrest is attached to an injunction, a police officer may arrest, without a warrant, a person he has reasonable cause to suspect is in breach of any of the provisions outlined above.

### **Duration of the Power of Arrest**

The Act does not provide for any time limits for the power of arrest and therefore it is inferred that the power will be in place during the validity of the injunction order.

### **Features and Limitations**

In circumstances where the perpetrator has been arrested for breaching the terms of the injunction order, the police must make arrangements to bring that person before a judge within 24 hours; the person cannot be released within that period except on the judge’s direction.

### **Domestic Violence, Crime and Victim’s Act 2004**

In England & Wales, “*common assault*” is now an arrestable offence.

## **2. Australia**

### **(a) Victoria**

Under section 9 of the **Crimes (Family Violence) Act 1987** (“Act”), where a complaint has been made for an intervention order and where:

*“(7) the complaint alleges that the aggrieved family member has been assaulted or threatened with assault or that damage has been caused or threatened to be caused to property of the aggrieved family member; and*

*(8) the registrar is satisfied that the personal safety of the aggrieved family member would be seriously threatened or that damage would be likely to be caused to any property of the aggrieved family member unless the defendant was arrested and brought into custody-*

*The registrar may issue a warrant to arrest the Defendant as if the complaint alleged the commission of an offence.”*

If a warrant has been issued to arrest a person who is a defendant to a complaint, any member of the police force may arrest the person even if the execution copy of the warrant is not in the officer’s possession at the time of the arrest.

Section 18AB: entitles a police officer to enter and search any premises without a warrant if he:

*“reasonably believes that the person has assaulted or threatened to assault a family member or ... the person is on the premises in breach of an intervention order; or has power under the Crimes Act 1958 to do so; or the person committing a breach of the peace, or the officer reasonably believes that the person is likely to commit or renew a breach of the peace.*

*The police officer may also use reasonable force to enter the premises.”*

Section 18A: if a police officer is satisfied, on the balance of probabilities, that there are grounds to issue an intervention order or if an intervention order has already been made, then the officer can seize any firearm in the defendant's possession and, for that purpose, may, without warrant, enter and search any premises where the defendant resides or has resided.

Section 23: if a police officer with reasonable grounds believes a person has breached an intervention order, then the officer may, without a warrant, arrest and detain the person.

### **Duration of the Power of Arrest**

Under Section 6 the court has the discretion to specify a period the order is to remain in force, if no period is specified then it lasts until it is revoked by the court.

### **Features and Limitations**

The police have greater arresting powers as any officer may arrest a person if he has reasonable grounds to believe that the person has breached an intervention order, can search the premises of the perpetrator or suspected perpetrator, and can seize any firearms discovered in the search. The power of arrest remains in force as long as the intervention order lasts.

### **(b) New South Wales: Apprehended Violence Order (“AVO”)**

Under the **Crimes (Domestic Violence) Amendment Act 1983**, the police are required to arrest perpetrators, rather than try to mediate, and to apply for an AVO on the victim's behalf when an assault is believed to have occurred. If they are denied entry to premises, officers can obtain an immediate warrant from a magistrate via police radio. There is no time limit for an AVO and the police may arrest anyone who breaches the order.

Further, under the **Firearms Legislation (Amendment) Act 1992**, the police must confiscate firearms where domestic violence has occurred or been threatened.

### **Features and Limitations**

The police have significant powers to prevent domestic violence. The police can also apply for orders to protect young persons over the age of 16 who are at risk.

### **3. New Zealand**

A power of arrest is available when a protection order is in force.

Under section 49(1) of the **Domestic Violence Act**, every person commits an offence who, without reasonable excuse-

*“does any act in contravention of a protection order; or  
fails to comply with any condition of a protection order, not being a condition to which paragraph (c) of this subsection relates; or  
fails to comply with a direction made under section 32(1) of section 32(2) of this Act to attend a programme on such occasions as are specified in accordance with section 33.”*

Section 50(1) states that where a protection order is in force, any police officer *may arrest*, without warrant any person whom they have good cause to suspect has breached the order.

Section 50(2) states that *“in considering whether or not to arrest a person pursuant to subsection (1) the police officer must take the following four matters into account:*

- (a) risk to safety of any protected person if the arrest is not made;*
- (b) seriousness of the alleged breach of the protection order;*
- (c) length of time since alleged breach occurred; and*
- (d) restraining effect on the person liable to be arrested of other persons or circumstances.”*

### **Duration of the Power of Arrest**

There is no time limit for a protection order, which remains in force until it is discharged by the court. The police can arrest any person who breaches the protection order subject

to the exercise of discretion as outline in Section 50 (2) above. However, when a Temporary Protection Order is granted, it lapses if it has not been made into a final order within 3 months.

#### **4. Canada**

##### **(a) Ontario**

Under section 3(2) of the **Domestic Violence Protection Act 2000** an intervention order imposes the following responsibilities on the police:

*“requiring a peace officer, within a specified period of time, to accompany the applicant, perpetrator or a specified person to the applicant’s residence and supervise the removal of that person’s or another named person’s belongings; and requiring a peace officer to seize:*

*(i) any weapons where the weapons have been used or have been threatened to be used to commit domestic violence; and*

*(ii) any documents that authorize the perpetrator to own, possess or control a weapon described in paragraph (i).”*

Peace officers are required under section 3(6), to enforce provisions of an intervention order under the Criminal Code; section 127 requires:

*“every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”*

As a breach of an intervention order is an indictable offence, the police have the power to arrest any person in breach of the order.

### **Duration of the Power of Arrest**

Peace bonds are valid for 1 year, but there is no time limit for restraining orders.

### **Features and Limitations**

Peace bonds and restraining orders are available to family members who are the victims of domestic violence and the police may arrest anyone who breaches either order. As punishment for breaches vary family members can decide which type of order and level of protection they require having regard to the penalties involved.

#### **(b) British Columbia**

In British Columbia, if a family member is afraid of being assaulted or is actually assaulted by another family member, the victim may inform the police.

The police have several alternative courses of action to take:

#### **Power of Arrest**

Where there is sufficient evidence, the police will arrest the perpetrator and ask the crown counsel to lay a criminal charge against him.

#### **Peace Bond**

Where there is insufficient evidence, the police may apply for a peace bond under section 810 of the Criminal Code of Canada, commonly known as an “*810 recognizance*”.

If a violent person breaches the peace bond, that person can be arrested and be placed on probation for up to 3 years, fined up to CND\$2,000, and/or sent to jail for up to 6 months.

#### **Restraining Order**

The police may also recommend the victim to apply for a restraining order under section 37 of the British Columbia Family Relations Act.

A person breaching the order can be arrested and be fined up to CND\$2,000 and/or imprisoned from 6 months to up to 2 years.

### **Duration of the Power of Arrest**

According to Article 14 of the Domestic Violence Prevention Act, unless otherwise specified, the effective term of a protective order shall be for one year or shorter depending upon the type of order with the right to seek an extended order for a maximum of 12 months so protection orders can only be in place for a maximum of 2 years.

### **Features and Limitations**

No specific power of arrest is mentioned in the Domestic Violence Protection Act 2000 which is enforced by “*peace officers*” under the Criminal Code of Canada 2000. The police power is not specified, but it can be implied from the Criminal Code that the police would have the power to arrest a person who breaches the intervention order. A breach is an indictable offence with imprisonment as one of the penalties.

## **5. Malaysia**

By Section 7 of the **Domestic Violence Act 521** (1994), the court may attach a power of arrest to either a protection order or to an interim protection order if it is satisfied that, on the balance of probabilities, the perpetrator is likely to cause actual physical injury to the protected person or persons.

If a power of arrest is attached to a protection order, the police officer may arrest without warrant when he has reasonable cause to believe the perpetrator has breached the order by using violence or, entering into any place prohibited under the order.

### **Duration of the Power of Arrest**

The general practice is to grant a protection order for 12 months, with the possibility of one further extension not exceeding 12 months. This extension also covers ancillary orders e.g. “*not to enter the protected person’s residence, or not to communicate with the protected person either by phone or letter.*”

By Section 3(4) of the Act the terms of the intervention of order are to be determined solely by the court. The power of arrest remains in force for the duration of the intervention order.

### **Features and Limitations**

A power of arrest must be attached to a protection order thus limiting the ability of the police to take immediate action. One special feature includes a provision that the respondent may not incite any other person to commit violence against the protected person(s).

## **6. Singapore**

While no power of arrest is specified in the **Women's Charter**, any person breaching a protection order shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$2,000 or to imprisonment for a term not exceeding 6 months or both; fines not exceeding S\$5,000 or imprisonment for a term not exceeding 12 months or both can be imposed for second or subsequent convictions.

### **Duration of the Power of Arrest**

While no specific time limit is set, expedited orders will only be valid for 28 days with the right to apply for a further expedited order on the expiration of the earlier order.

### **Features and Limitation**

As the breach of a protection order is an indictable offence, the police have the power of arrest.

The Women's Charter also provides for fines and punishment for incidents of domestic violence. The court can also include provisions requiring the respondent not incite or assist any other person to commit family violence against the protected person.

## **7. PRC**

A family member who is a victim of domestic violence may call for assistance from the police who have the power to arrest the violent party. The perpetrator could face criminal charges depending on the severity of the injuries suffered by the family member.

### **Duration of the Power of Arrest**

There is no specific limitation on the power of arrest and police officers can exercise this power any time during the criminal proceedings.

### **Features and Limitation**

Recent amendments to the Law in Respect of the Protection of Women's Rights and Interests in the PRC were passed on 28 August 2005. The police have the power to arrest perpetrators in accordance with the Mainland's criminal law procedures.

## **8. Taiwan**

The Court has the power to grant a protection order for a maximum period of 2 years.

Under Article 22 of the **Domestic Violence Prevention Act**, the police have the power to make an arrest for any incident of domestic violence which warrants prosecution or breach of any protection order. The person arrested will be dealt with pursuant to Article 92 of the Law of Criminal Procedure.

Even if the suspect (of domestic violence) is not caught at the scene of the crime, but the police have sufficient reasons to believe the suspect has committed an act of domestic violence crime and/or is a continuous danger to the life, body or freedom of his/her family member(s), as defined for custody requirements in the Law of Criminal Procedure, the police can immediately take the suspect into custody and report the case to the prosecutor for a warrant of arrest to be issued. If the prosecutor refuses to sign a warrant of arrest, the suspect must be released immediately.

### **Features and Limitation**

The powers of arrest are wide as an officer can arrest any person suspected of domestic violence at the scene and then apply for the warrant from the court after the fact.

### **C. Breach of Injunction Orders: Civil Contempt of Court**

Contempt of court occurs when a person refuses or neglects to do an act within the time specified in a judgment or order of the court, or disobeys a judgment or order requiring a person to abstain from doing a specified act, or breaches an undertaking given to the court.

#### **Power of the Court to Punish Offenders**

The court will only punish disobedience of a court order, or non-compliance with an undertaking, if it is satisfied that the terms of the order or undertaking are clear and unambiguous. The Respondent must have received adequate notice of the terms, and that a breach of the order or undertaking has been proved beyond reasonable doubt. The court must normally be satisfied that there has been wilful disregard of the court order. However, a culpable degree of negligence may render a penalty appropriate.

The purpose of imposing a penalty on the party in breach (“*a contemnor*”) is to punish him and to deter others from disobeying orders of the court, and so a penalty will be imposed even though it could not secure compliance with the order breached.

#### **Contempt Proceedings**

Before instituting contempt proceedings, it will be necessary to obtain the court’s permission to apply for a committal hearing. The application must be made *ex parte* to a judge, supported by a statement providing the name and address of the contemnor, and be supported by an affidavit. Committal proceedings are quasi-criminal in nature. The only admissible evidence is direct evidence which the applicant must give in person. Evidence in an affidavit based on the “*information and belief*” of the applicant is not admissible. The complainant must provide the following evidence:

- (a) the order alleged to have been broken was served personally on the respondent; and
- (b) endorsed with the appropriate penal notice; or,
- (c) in the case of prohibitory injunctions, that the respondent had notice of the order.

A simple recital of the terms of an injunction and an allegation there has been a breach will be insufficient.

### **Types of Orders**

If the Court finds the respondent guilty of contempt, it can make any of the following orders:

#### **1. Committal to Prison**

The most common means of dealing with a civil contempt of court is the committal to prison of the contemnor for a fixed period or for an unspecified term. A committal order would be appropriate where other parties have been put in fear and the contemnor has been warned of the consequences of further breaches. Imprisonment is not automatic and is inappropriate for minor breaches and the Applicant must give sufficient details of the alleged breach.

The contemnor should be given a proper opportunity to apologise to the Court and to mitigate; he “*purges*” his contempt by “*apologizing*” to the court and agreeing to comply with the original order.

#### **2. The Respondent to pay a fine**

The court may, as an alternative to committal, impose a fine for civil contempt. In assessing the amount, account should be taken of the seriousness of the contempt and the damage to public interest.

#### **3. Position of the Contemnor**

The general rule is that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt; nor can he be heard on appeal from any order made in the cause, except for the following exceptions:

- (a) an application to purge the contempt; or
- (b) an appeal to set aside the order on which his contempt is founded; or
- (c) in some cases the Court may grant leave to enable the contemnor to defend himself in relevant applications, depending on the facts of the individual case.

## **Recommendations**

### **“Power of Arrest”**

#### **17. “.....*has caused actual bodily harm*”**

The test under Section 5 of the DVO should be amended to enable the court to consider “*whether the perpetrator is likely to cause actual physical injury to the protected person*” rather than “*has caused actual bodily harm*”.

18. Common assault is currently an arrestable offence under the Offences Against the Person Ordinance (Cap. 212). The police should provide guidelines on arresting perpetrators in cases involving domestic violence.

#### **19. “...*duration of the power of arrest*”**

The duration of the power of arrest should be left to the discretion of the Court “*as it deems fit*”.

#### **20. “*Attachment*” of the Power**

A pro-arrest policy should be reflected in the DVO. The power of arrest should be automatically attached to injunction orders, thus emphasising the Government’s Zero Tolerance policy, and shifting the mindset of front-line officers on domestic violence.

## **21. Additional Police Powers**

**The police should also have the following powers:**

- (a) power to arrest persons who have been incited or instigated by the perpetrator to commit acts of domestic violence against the victim;**
- (b) search for weapons and/or documents relating to the violent act or intended violent acts; and**
- (c) accompany the victim to return to the matrimonial home or other places in order to retrieve personal belongings without fear of intimidation.**

**22. Clearer guidelines must be put into place on the role and duties of police officers when dealing with incidents of domestic violence. The Law Society recommends the adoption of the New Zealand model which requires a police officer to conduct a balancing exercise before exercising the power of arrest for any breach:**

*“The officer must consider:*

- (a) the safety of the protected person if the arrest is not made;*
- (b) the seriousness of the alleged breach;*
- (c) the length of time since the alleged breach occurred;*
- (d) the restraining effect on the person liable to be arrested or other persons or circumstances.”*

**23. The police should be given the authority to apply for directions from the relevant court as to the time and place the perpetrator is to be brought before a judge without the necessity of waiting for the victims’ solicitors or the applicants/victims to make such applications.**

## Chapter 6

### Evidence and Procedures

#### A. Hong Kong

##### 1. Applications

Applications are usually made to the District Court and if the Court is satisfied there has been “*molestation*” it will grant an injunction order and where appropriate a power of arrest. The power to grant an injunction stems from the Court’s inherent jurisdiction or statutory authority from the following statutory instruments:-

##### (a) High Court Ordinance (Cap 4)

Sections 21L (1) and (2) provides that the Court of First Instance (“CFI”) may by order (whether interlocutory or final) grant an injunction in all cases which it appears to the CFI to be just or convenient; such orders may be unconditional or on such terms and conditions as the Court thinks just.

##### (b) District Court Ordinance (Cap 336)

Section 48(1) provides that the Court has the same power as the CFI in any proceedings before it to grant the relief, redress, or remedy or combination of remedies, either absolute or conditional, which ought to be granted or given.

##### (c) Domestic Violence Ordinance (Cap 189)

Section 3 confers the power to grant injunctions to the District Court.

The CFI may exercise the powers conferred on the District Court under Section 3 of the DVO in an urgent case or where the CFI is satisfied that special circumstances are present which make it appropriate for the CFI rather than the District Court to exercise those powers.

In order to exercise its jurisdiction, other than under the DVO, proceedings must have been issued, or the applicant gives an undertaking to the court to issue proceedings within a certain time e.g. petition for divorce, judicial separation or nullity proceedings.

Applications are dealt with by judges in the District Court or the CFI. Evidence is set out in a supporting affidavit/affirmation providing a history of the marriage, relevant information on any children and a detailed account of the acts of violence. Urgent cases can be made by an *ex parte* application when the judge reviews the application and affidavit evidence of the applicant and the perpetrator has not been given notice of the application. However, standard applications take place “*on notice*” when all the papers have been served on the perpetrator. All injunction applications are private and are heard by the judge in chambers.

## **2. Additional Orders**

The applicant must file additional evidence to support the following applications:

### **(a) Power of arrest:**

- A medical report documenting the injuries: bruising or wounds etc
- A copy of any police report card

### **(b) Exclusion of the perpetrator from the matrimonial home**

- Evidence on the ownership and occupation of the matrimonial home
- Reasons why it is not practical to remain living in the same place
- Whether any alternative accommodation is available
- Exclusion of a specified place: place of work, office,
- Information on the resources and requirements of the applicant, the perpetrator and the children.

### **(c) Non Disclosure Order**

The Applicant’s address should not be revealed to the respondent/perpetrator.

### **3. *Ex parte* (“Without Notice”) Applications**

In circumstance where the applicant requires urgent protection, an *ex parte* application can be made to the court. Advanced notice of the application can be given by telephoning the Clerk of the Duty Judge of the Family Court and an appointment will be arranged immediately. The applicant will appear before the judge in person and if the Judge is satisfied there is sufficient evidence in the supporting affidavit, will grant a temporary injunction.

As *ex parte* orders have been granted without the benefit of the Judge hearing the perpetrator’s case, the applicant is required to immediately notify the respondent of the contents of the order. Once the Respondent has been served with the order he could apply, on notice, for a discharge or variation of the order. The Clerk of Court will allocate the next hearing date and must give the respondent at least 2 clear day’s notice.

Full details of these procedures can be found in the Judiciary’s Practice Directions 11.1 and 5.3.

### **4. *Inter Partes* (“With Notice”) Orders**

During the hearing of an *inter parte* application, or the return day of an *ex parte* application, the judge can assess the evidence, and if satisfied that an incident of domestic violence has occurred, will grant an injunction order.

However, in practice, the parties often reach an agreement before the return date, or at the hearing of the *inter parte* application when the perpetrator agrees to give an undertaking, being a solemn promise to the Court, in terms similar to the injunction order.

### **5. Personal Service**

In order for the injunction orders to take effect, a sealed copy of the order must be served personally on the perpetrator, and where there is a power of arrest, a copy must be served on the police. The Law Society does not advocate the removal of personal service on the

perpetrator but changes to the DVO should be introduced so service can be effected by the police and that substituted service is permissible in certain circumstance.

## **6. Applications under the DVO**

Family law practitioners noted the number of applications for injunctive relief under the DVO has declined significantly over the years which has been confirmed in Dr. Chan's Report: "*Peace at Home: Report of the Review of the Social and Legal Measures in the Prevention and Intervention of Domestic Violence in Hong Kong*". In paragraph 4.73 of the Report Dr. Chan reports that of the rate of applications for relief under the DVO in 2003 was less than 1% of all reported cases. The research indicates victims of domestic violence have not been advised, or sufficiently advised of their legal rights. More information should be made available to the victims by front-line organisations on the availability of legal assistance.

The reason for the low number of applications is unclear. Victims may be ignorant of their rights, or they may have received advice that the facts of their particular case will not meet the evidentiary test for an injunction order.

In order to ensure victims receive appropriate legal advice the Law Society recommends that victims should be advised of their right to seek legal advice and where appropriate the availability of Legal Aid by the front-line organisations. A list of solicitors should be available at all police stations and SWD offices.

## **B. Position in Other Jurisdictions**

Most of the jurisdictions under review have legislation providing injunctive relief or protection orders for victims. In some, the police can take immediate action e.g. in Ontario, a Peace Bond can be imposed on perpetrators either by the police or by an application by the police to the court.

The procedures and evidentiary material required are similar to those in Hong Kong:

- An application must be filed with the appropriate court.
- Victims must provide evidence of the violent acts.
- Details of injuries supported by medical or police reports

Domestic violence is classified as either a civil matter, or a criminal offence, whilst some jurisdictions have developed specialized courts where the courts have both criminal and civil jurisdictions. The following features are worth noting:

### **1. Multi-Agency Approach**

Singapore, Malaysia, Canada, Australia, New Zealand, England and Wales and Taiwan, provide injunctive relief under different names: peace bonds, injunctions, protection orders. These jurisdictions adopt a multi-agency approach which involves a co-ordinated effort by social workers, counsellors and the police.

### **2. England and Wales**

#### **(a) Non-molestation orders**

A non-molestation order is used to restrain someone from causing or threatening violence to the applicant or to any children, or from molesting them. Molestation is not defined but can include: “*intimidation, pestering, threats and harassment*”. Non-molestation orders forbid the perpetrator from using or threatening violence against the applicant (or any children), or from instructing, encouraging or in any way suggesting that any other person should do so.

#### **(b) Application Procedures for non-molestation orders**

A victim can apply personally for a non-molestation order or for a relevant child. The Court has discretion to make non-molestation orders for the benefit of any party to the proceedings or child even though no application has been made. Parties to the proceedings may be “*associated*” by virtue of:

- Marriage or former marriage;

- Cohabitation or former cohabitation;
- Living together or having lived together in the same household other than as employees, tenants, lodgers or boarders;
- Being related;
- An agreement to marry;
- Being parents or having parental responsibility for a child;
- Being connected by adoption; or
- Being parties to the same family proceedings.

An applicant should:

- Complete form FL401;
- State her relationship with the perpetrator (by ticking the relevant box);
- Indicate the remedies;
- Complete form C8 if she wishes to omit her address from the FL401 form; and
- File a sworn statement in support of her application (outlining the main facts upon which she relies, including details of any criminal activity and intervention by the police).

The applicant can support the FL401 by oral evidence. In cases of extreme urgency, the Court may be prepared to accept the application without a statement in support.

### **3. New South Wales: Apprehended Violence Orders ('AVO')**

Applications for an AVO can be made by a wide class of people affected by acts of domestic violence including: the victims, solicitors, friends, support workers and police officers. However, the police must make the application in some cases involving children under 16 years and certain acts of violence against women.

### **4. British Columbia**

#### **(a) Peace Bonds**

A victim can report incidents of domestic violence to the police who will then prepare the application in a Criminal Court for a Peace Bond, and a lawyer employed by the

government, will present the case in Court. If granted, the Peace Bond remains in force for one year and is enforceable throughout British Columbia.

**(b) Restraining Orders**

Victims can also apply for a Restraining Order under Section 36.1 of the Family Relations Act, or for an order “*Prohibiting Interference*” with a child under Section 37 of the Act. The judge of the Provincial Court can make an order “*without notice*” in urgent cases. If the matter proceeds to trial, the judge may order a family case conference and/or a trial preparation conference. During these informal hearings the trial judge will try to narrow and clarify the issues to be tried and, if appropriate, explore options such as mediation; the parties may agree to a consent order without the necessity of proceeding to trial.

**(c) Domestic Violence Prevention Act**

The provisions of this Act enables designated Justices of the Peace (“JP”) to grant, on an *ex parte* basis, emergency intervention orders if satisfied that serious incidents of domestic violence have occurred and the matter is urgent. Immediately after making the order the JP is required to send to the court the following documents: a copy of the order, all supporting documents including the JP’s personal notes on the application. The Provincial Court Judge will confirm the order within 3 working days if satisfied that an order should be made.

**5. Ontario**

The relevant legislation is the Domestic Violence Protection Act 2000 which provides similar relief to that in British Columbia.

**(a) Peace Bonds/Restraining Orders**

Perpetrators may be asked to sign a Peace Bond which is a promise in writing to keep the peace and be of good behaviour. Victims who require the additional protection of a restraining order can seek help by attending the nearest Family Court or the Ontario Court of Justice where the duty counsel or advice counsel will provide assistance. Judges

have the jurisdiction to grant emergency intervention orders without prior notice to the perpetrator. Once a restraining order has been granted, a Restraining Order Information form should be filed with the Canadian Police Information Centre to facilitate easy access to front line police officers.

**(b) Special Domestic Violence Courts**

Ontario has established special domestic violence courts with the aim of making the criminal justice system more sensitive to various factors affecting cases of domestic violence. The courts have the assistance of specialized teams of Crown Attorneys, Victim/Witness Assistance Programme staff, and the police. A multi-agency approach is adopted to support victims and enhance their safety.

**6. Malaysia**

**(a) Section 13 of the Domestic Violence Act 1994: Interim Protection Orders**

Under this section a Protection Order may be sought under the Penal Code where the perpetrator can be charged with an offence which falls within the definition of domestic violence.

The Malaysian legislation is flexible. The police can apply for an Interim Protection Order on behalf of the applicant, or they can refer the applicant to a welfare office where an Investigation Officer will follow up and make the application; finally, the applicant can go direct to a welfare office for assistance to apply for an Interim Protection Order.

**(b) Protection Orders**

If the police charge the perpetrator with a criminal offence, the applicant can apply to court for a Protection Order which can include the following:

- the exclusive right to live in the matrimonial home, essentially an ouster order
- an order for the perpetrator to stay away from the applicant's house, workplace or school
- an order that the perpetrator does not talk or write or contact the applicant.

## **7. Singapore**

### **(a) Magistrate's Complaint**

A person seeking a protection order has to appear before a District Judge or a Magistrate to make a "*Magistrate's Complaint*". The applicant has to complete a standard application form, submit it to the Family Protection Unit at the Family Court, or a welfare agency which has a video-link with the Family Court. A counsellor at the welfare agency will conduct preliminary "*intake counselling*" to:-

- (a) assess the history of the case and the risk of family abuse to the Complainant and/or the children;
- (b) inform the Complainant of the court procedures and processes involved in the application for a protection order;
- (c) educate the Complainant on safety measures and the effect of family violence on the Complainant and the children;
- (d) assess the case for suitability for counselling; and
- (e) refer the Complaint to other relevant services such as crisis shelters and welfare organizations.

After counselling, an interpreter will bring the Complainant before a judge and the Complainant has to reaffirm or swear to the truth and accuracy of the matters stated in the application form. If the judge is satisfied the application is in order, he will issue a Summons and where there is imminent danger of family violence being committed make an Expedited Order.

## **8. Taiwan**

The Domestic Violence Prevention Act enables the following to apply to court for a Protective Order on the victim's behalf: a prosecutor, the police department, or regulating authorities from municipal, or county government.

As the judicial system in Taiwan is apparently inquisitorial, any court may, by exercising its jurisdiction conduct an investigation of the complaint, review the evidence and may also hold separate interrogation sessions. After making a final decision, the court may invite comments from any of the following bodies: the regulating authorities from the municipal, or county government, or the social welfare institute. The procedures apparently do not permit any interim mediation or settlement.

## **C. Filing of Application and Service of the Orders**

In some of the jurisdictions applications can be made by fax or electronically, but service of the application and any interim or final court order must be effected by personal service on the perpetrator. Service can be effected by the court bailiff or by the police.

### **1. England and Wales**

#### **(a) On-notice application**

All parties are sent notices to appear at a hearing and once the application has been filed:

- It is given a case number and listed for hearing.
- A date could be set any time from a week to four weeks later, depending on court business.
- An on-notice application must be given to the perpetrator in person, either by the applicant or her agent, not less than two days before the date of the hearing.
- The perpetrator will be served with the FL401 application, statement in support and form FL402 (notice of hearing date); and
- When the perpetrator has received the relevant papers, the applicant must file a statement of service with the Court.

**(b) “Without notice” applications**

Without notice applications are heard without notifying the perpetrator with an adequate explanation for the application. The procedure for such applications is similar to on-notice applications with the only difference being the applicant appears before the judge on the same day.

The Court must consider whether, on the balance of probability, there is a risk of harm to the applicant (or any children) if an order is not made immediately.

If an order is made without notice, the Court has to give a date for a full hearing so that the perpetrator has an opportunity to attend Court.

**2. New Zealand**

Protection Orders must be served personally by any of the following: court bailiff, private service agent or possibly the police. The Family Court has the responsibility of sending a copy of the order to the police station nearest to the victim’s residence.

**3. British Columbia**

The application must be served on the perpetrator personally by any person at least 19 years of age other than by the applicant.

Intervention orders can be served on the perpetrator by any of the following: a Peace Officer, the applicant’s counsel or agent, by the court if the applicant is unrepresented, or by any other prescribed manner.

Substituted service is allowed if the court is satisfied that personal service cannot be effected.

**4. Singapore**

Service of the summons on the perpetrator may be effected by personal service. If the victim is unrepresented then the Court Process Server effects personal service on the perpetrator. In cases where personal service cannot be effected the Process Server can

seek a court order to serve the summons by leaving it with any adult member of the perpetrator's household or by posting it on the front door of the perpetrator's residence.

## **5. Taiwan**

An application for a protective order may be filed with the court by any of the following: a victim, prosecutor, police department, or regulating authorities from municipal, or county government. Any petition for a protective order shall be made in writing: If the victim is in imminent danger, the prosecutor, police, or regulating authorities may file the petition by speech, facsimile, or any other electronic means at any time during the day, night or holiday.

## **Recommendations**

### **“Evidence and Procedures”**

#### **24. Preliminary In-take Counselling**

**There should be preliminary “in-take” counselling sessions similar to those provided in Singapore where the victims receive information on their legal rights and are advised on the range of services provided by the Government and NGOs.**

#### **25. Service of the Injunction Orders**

**A copy of the sealed court order should be faxed to Police Headquarters (or by email) by the relevant Court, and upon receipt the police should update their database to ensure the order and power of arrest is brought to the attention of its front-line officers. There are applicants who do not have legal representation and this suggestion will be of vital importance to those victims who act in person.**

#### **26. Service by the Police**

**Service of injunction orders can be carried out by the police thus the perpetrator would be left in no doubt that the victim has the protection of the court and that the**

**police have the power of arrest. This is an obvious deterrent and can prevent further acts of violence from occurring within the short term thus allowing a cooling-off period.**

#### **27. Substituted Service**

**If the perpetrator cannot be located, substituted service may be effected by leaving a copy of the order with an adult member of the perpetrator's household or posting it on the front door of his residence.**

## Chapter 7

### Institutional Support for Victims of Family Violence

#### A. Hong Kong

The Government has stated it “*does not tolerate family violence*” and has adopted the following policy objectives:

- (a) prevent family violence as far as possible
- (b) ensure safety and provide support for victims of family violence
- (c) stop batterers from committing family violence acts

It has also adopted a 3-pronged approach to deal with domestic violence/spousal abuse:

- Preventative measures: Publicity and Community Campaign
- Support services: housing assistance, financial assistance, child care services and improved accessibility to these services
- Specialized Services and Crisis Intervention: Family and Child Protective Services Units (“FCPSU”)

#### ***Procedural Guidelines for Handling Battered Spouse Cases –Implemented on 1 May 2004***

In April 2004, the Health Welfare Food Bureau (“HWFB”) and SWD published its revised Guidelines which emphasised the need for a multi-disciplinary approach to effectively tackle spousal battering requiring “*the co-ordination and collaboration on a range of social, legal, financial and health resources*”. Spousal battering refers to 2 partners who wish to maintain a lasting relationship including married couples, separated, divorced couples, co-habitees and separated partners etc. The Guide includes discussion of potential abuse of children but the guidance itself is in a separate publication: “*Procedures for Handling Child Abuse Cases -Revised 1998*”.

A Working Group on Combating Violence has been established and has representation from: HWFB, Security Bureau, Education and Manpower Bureau, SWD, Legal Aid Department (“LAD”), Hong Kong Police Force, Home Affairs Department, Housing Department, Department of Health, Hospital Authority, Department of Justice, Information Services Department, Hong Kong Council of Social Services and NGOs.

The Working Group recognises that spousal battering covers a wide range of physical and sexual violations as well as psychological abuse including deprivation of physical and financial resources.

### **Multi-Disciplinary Co-Operation in Handling Battered Spouse Cases**

The Guidelines recommend the appointment of a Case Manager whenever the situation allows and in normal circumstances should be the key social worker handling the case.

The role of the Case Manager is to explain the importance of the procedures to the victim and to co-ordinate multi-disciplinary collaboration.

### **Multi-Disciplinary Case Conference (“MDCC”)**

The MDCC should follow the procedures introduced for suspected cases of child abuse. The focus of the MDCC should be the preparation of a risk assessment and welfare plan for the victim and the children and other family members. The provisions of the Personal Data (Privacy) Ordinance (“PDPO”) have to be considered and may be a factor preventing the sharing of important information between the relevant units if the consent of the victim has not been obtained.

The *Report of Review Panel on Family Services in Tin Shui Wai* noted the following:

*“..the Panel views that strengthening the co-ordination and collaboration between different units of the concerned government departments, such as streamlining of the referral mechanism and the exchange of information on domestic violence cases will be more cost-effective”.*

The provisions of the PDPO should be reviewed and consideration given to an additional exemption to enable information in MDCCs to be released to relevant support agencies in order to prevent, where possible, future acts of violence. Section 58(1)(a) of the PDPO exempts information for the purpose of: “*the prevention or detection of a crime*” and given the purpose of the MDCC the narrow scope of the exemption can prevent an effective co-ordinated effort from taking place.

### **Social Welfare Department**

The SWD has established specialised units – FCPSUs. One of its tasks is to ascertain the victim’s views on whether legal advice should be sought and whether an application for an injunction order should be made under the Domestic Violence Ordinance. If the victim decides to take legal proceedings the social worker has the responsibility to assist the victim to approach the LAD.

The NGOs also offer services through Family Services Centres/Integrated Family Services Centres.

### **Medical Social Services Units**

Medical Officers of Accident and Emergency Departments can identify victims and make referrals to Medical Social Workers with recommendations on protocols and procedures to assist victims.

### **Refuge Centres**

Hong Kong has four refuge centres for battered spouses: Wai On Home for Women (“SWD”), Harmony House, Serene Court and Sunrise Court (“NGOs”) which accept admissions on a 24-hour basis.

### **Family Crisis Support Centre (“FCSC”)**

FCSC provides “*timeout facilities*” to give individuals and families assistance to manage their situation. It operates on 24 hour basis.

### **Standing Review Mechanism on Fatal and Serious Cases**

SWD is considering implementing a mechanism to conduct post-event multi-disciplinary reviews on cases of serious domestic violence or deaths in order to improve procedures.

### **The Police**

The Police have issued guidelines on domestic violence and implemented procedures to be taken when dealing with complaints of domestic violence. New recruits receive training on the handling of domestic violence which also includes “*victim psychology*”. All front-line officers have a pocket-size Aide Memoire card on Handling Domestic Violence Cases. At police stations, the Guidelines indicate that if a complaint is made by a member of the public, the police officer receiving the complaint “*shall record*” the report in the Police Communal Information System “*without delay*”. Police officers have also received training to heighten officers’ “*sensitivity in handling domestic violence incidents through real case study and group discussion involving social workers.*” The training material on “*Domestic Violence*” has been posted on the internal computer system. The police information system is being enhanced to enable frontline officers to check whether there have been previous reports in relation to the parties and for this information to be retrieved.

### **Domestic Incident Note**

If the police consider there is insufficient evidence to support a complaint of abuse the police will issue a “*Domestic Incident Notice*”, issue “*Family Support Service Information Cards*”, contact Refuge Centres, provide assistance for male victims or perpetrator to find temporary accommodation, make referrals without the consent of the victim under Section 58(1) of the PDPO, and where appropriate make follow up visits. A senior police officer with the rank of Chief Inspector or Inspector will oversee the liaison process.

### **Domestic Violence Ordinance**

If a police officer arrests a perpetrator by virtue of a power of arrest under the DVO, the arrested person is taken to the nearest police station and brought before the Duty Officer. Arrangements will then be made to hand the perpetrator to either the Chief Bailiff (Operations) if the injunction order is issued by the Court of First Instance or to the Assistant Chief Bailiff (Hong Kong) if the injunction order is issued by the District Court.

### **Legal Aid Department**

Legal Aid is available to victims who meet eligibility/means test requirements.

### **Department of Justice**

The Department must consider the circumstances of each case before making a decision on prosecution. The co-operation of the victim in the majority of cases is important. In cases where the victim declines to testify, the prosecution must investigate and liaise with the police in determining whether to proceed.

### **Involvement of Social Workers, Counsellors, Police and Lawyers**

#### **Hong Kong**

Victims can receive support from the SWD and NGOs, social workers, the police and lawyers. Whenever an injunction with a power of arrest has been granted, notification is sent to the police so that front line officers can take action should there be a breach of the injunction order. The level of support provided can be improved with clearer guidelines on the assistance each professional can provide so that victims of domestic violence can receive maximum support during this very stressful time.

#### **Other jurisdictions**

By comparison the social workers, counsellors and the police in other jurisdictions are more pro-active and are even required to file the application for protection orders e.g. in New South Wales, the police have the exclusive power to file the applications.

### **Legal Advice**

**The Law Society considers it is crucial that all victims should have the benefit of legal advice on the legal implications of an injunction order, and the impact it could have on future relations with the perpetrator.**

### **Multi Disciplinary Task Force**

The HWFB and SWD have established 3 multi-disciplinary committees:

- Committee on Child Abuse
- Working Group on Combating Violence
- Working Group on Elder Abuse

Domestic violence is recognised as a complex matter which requires skills to assess risks. Front line workers such as social workers, teachers, and the police have received training on the complex emotions of victims. There has been improved co-operation between the SWD and the police.

### **Pilot Project – Kwun Tong District Welfare Concourse**

The project is to improve early identification and intervention for those *“at-risk families or those with domestic violence problems through cross-sector and multi-disciplinary co-ordination and co-operation”*.

### **Policy support**

**Where countries have a distinct social policy in place to tackle family violence legislation has been introduced and resources have been provided in order to implement the political will.**

## **B. Position in Other Jurisdictions**

### **1. England and Wales**

#### **Domestic Violence and Crimes and Victims Act 2004**

Domestic violence is a serious social problem and this piece of legislation has been introduced with the aim of providing greater protection to victims and witnesses of violent crimes; implementation of the main reforms will be rolled out from April 2005.

## **Main Reforms**

- **Domestic Homicide Reviews**

Section 9 of the new Act imposes a duty on a number of institutions including the police, local authorities and the National Health Service to conduct Domestic Homicide Reviews when a child dies or suffers serious injury as a result of abuse or neglect with the aim of preventing future abuses occurring in similar circumstances.

- **Common Assault is now an Arrestable Offence**

- **Restraining Orders on Acquittal**

Adding a new Section 5A to the Protection from Harassment Act 1997 which states: *“A court before which a person (“the defendant”) is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.”*

This provision recognizes the reality of harassment and intimidation can continue despite an acquittal.

- **Family Act 1996**

This Act has been amended to extend protection to same sex couples and non-cohabiting couples - the court to review the level of commitment rather than any future commitment to marry.

- **Breaches of Non-Molestation Orders**

Breaches of non-molestation orders will be a criminal offence, perpetrators can face up to 5 years’ imprisonment.

## ***“A Guide to Civil Remedies and Criminal Sanctions” issued by the Lord Chancellor’s Department***

The Guide is an attempt to ensure that incidents of domestic violence are tackled as effectively as possible. It is intended for use by statutory and voluntary service providers,

and it has been translated into several languages including: Chinese, Bengali, Punjabi, Somali, Urdu and Welsh.

### **Home Office: A National Report on Domestic Violence March 2005**

It sets out 5 key Government goals for the coming year:

- reducing the prevalence of domestic violence
- increasing the rate that domestic violence is reported
- increasing the rate of domestic violence offences that are brought to justice
- ensuring victims of domestic violence are adequately protected and supported nationwide
- reducing the number of domestic violence related homicides

### **Research**

- **Consultation Paper:** *“Safety and Justice: The Government’s Proposals on Domestic Violence”*.
- **Domestic Violence Data Source:** an information co-ordinating system on projects relating to domestic violence within England, Wales, Scotland, Northern Ireland and the Republic of Ireland.
- **Standing Together against Domestic Violence:** The First Annual Review of the Specialist Domestic Violence Court at West London Magistrates Court November 2003.
- **Domestic Violence, Sexual Assault and Stalking:** Findings from the British Crime Survey.
- **Women & Equality Unit:** The Cost of Domestic Violence September 2004.

### **2. Australia**

The Federal Government has established *“Partnerships Against Domestic Violence Programmes”* with the aim of:

- identifying opportunities for strategic collaboration within governments, and between government and community, to enhance knowledge, develop good practice and find better ways of preventing and responding to domestic violence issues

- provide funding for wide range of research and develop projects to combat domestic violence
- provide funding for state and territory domestic violence projects

### **3. Canada**

#### **(a) British Columbia**

In 2000, British Columbia implemented its “*British Columbia Violence Against Women in Relationship Policy*” (“VAWIR”) which established distinct police and prosecution protocols to arrest and prosecute abusive partners. This reform has streamlined procedures in order to ensure speedier prosecution of perpetrators.

#### **(b) Ontario**

In Ontario there is a parallel policy called the “*Violence Against Women Initiatives and Domestic Violence Justice Strategy*”. This is a three-pronged strategy tackling the following issues: protection, prosecution, prevention and education. The Ministry of Citizenship and Immigration acts as the co-ordinating hub for the following agencies to deal with all aspects of family violence: police, prosecution, health and social welfare departments.

### **4. Singapore**

#### **Ministry of Community Development (“MCD”)**

In 1996, the MCD established a multi-disciplinary and integrated island-wide networking system to combat domestic violence. The task of the MCD is to provide a comprehensive support system for victims by the following agencies: police, hospitals, Family and Juvenile Courts, prisons, crisis shelters and social service agencies.

#### **The Family Violence Dialogue Group (“FVDG”)**

The FVDG is jointly chaired by representatives from the MCD and the Police. Its task is to develop policies, and administer programmes to prevent family violence by:

- helping victims and their families
- co-ordinates the work between the agencies

- monitors and identifies new trends in family violence
- co-ordinates public education
- reviews and strengthens services and programmes

Its activities include the promotion of public awareness by publications, dramas, exhibitions, talks at social services agencies, libraries and schools in order to raise awareness of abuse. Information is also disseminated to victims and perpetrators of the resources the community can provide.

### **Prisons Department**

The Prison Authorities are required to alert victims and their family members before the perpetrators are released from prison so that victims can protect themselves and their children. It also provides courses which focus on providing perpetrators with new skills and anger management and techniques on non-violent alternatives to deal with conflict.

### **5. PRC**

The Standing Committee of the National People's Congress has introduced amendments to Law in Respect of the Protection of Women's Rights and Interests in the PRC on 28 August 2005. It now has a central policy initiative to tackle domestic violence.

### **6. Taiwan**

The Home Affairs Department established a "*Domestic Violence Prevention Committee*" which coordinates policy; it is responsible for introducing programmes to protect victims, conduct research, and introduce domestic violence legislation.

District governments have set up Domestic Violence Prevention Centres which provides the following services:

- psychological counselling for victims and abusers
- job referrals
- residence counselling and refuges

## **C. Judicial Support**

### **1. England and Wales**

#### **Specialist Domestic Violence Courts**

This is a Pilot Scheme which has been approved by the Lord Chancellor's Department (now the Department for Constitutional Affairs) which has established 5 Domestic Violence/Cluster Courts in Cardiff, Derby, Leeds, and Wolverhampton and the West London Magistrates' Court with the following aims to:

- “1. increase the effectiveness of the judicial system in providing*
  - protection and support to victims and witnesses of domestic violence*
  - appropriate sanctions for perpetrators*
  - reducing delay by effective case management*
- 2. further increase co-ordination of agencies including the Crown Court, involved in supporting witnesses and dealing with perpetrators.*
- 3. explore the potential for linking civil courts in the criminal justice process.”*

The West London Magistrates Court published its *“First Annual Review of the Specialist Domestic Violence Court”* in November 2003.

The Court provides specialist training for the judges and the court's support staff in all areas of domestic violence. The Crown Prosecution Service provides specially trained prosecutors with experience of domestic violence cases.

The Court will appoint a *“Case Progression Officer”* to monitor the progress of all domestic violence cases to avoid unnecessary delays and will co-ordinate the attendance of specially trained police officers, probations officers, social workers, make special arrangements for video-linkage if appropriate to enable victims and witnesses to give evidence and avoid contact with the defendant. If a defendant is released on bail, procedures have been put into place to ensure the victim will receive notification in order to avoid surprise contact with the defendant.

**See in addition the comments in Chapter 9**

## **2. Canada**

British Columbia and Ontario have introduced pro-active policies in relation to arrest and prosecution of abusers.

In 1997, Ontario introduced specialized courts to handle domestic violence cases; there is support for a vigorous prosecution policy with reduced reliance on the testimony of victims. British Columbia has introduced a centralized registry, the Protection Order Registry where all protection orders are registered in order to facilitate enforcement.

## **3. Singapore**

### **The Women's Charter**

It came into force on 1 May 1997 and contains provisions to deal with domestic violence including:

- **Personal Protection Orders**

These restrain the perpetrator from using family violence and may include an order that the perpetrator may not incite or assist any other person to commit family violence against the protected person.

- **Expedited Orders**

The court makes an expedited order if it is satisfied that there is imminent danger of family violence being committed against the applicant .

- **Exclusive Occupation Orders**

Court may grant the right of exclusive occupation to any protected person of a shared residence even where the shared residence is solely owned or leased by the person against whom the order is made, or is jointly owned or leased by the parties.

- **Counselling Sessions**

The court may refer the perpetrator or all parties including any children of the family, to attend counselling sessions.

- **Mandatory Counselling Programmes**

There are mandatory programmes which perpetrators must attend. Those sentenced to less than 1 year imprisonment are handled by a social service agency, and those sentenced to more than a year will be handled by the Prisons' Psychological Service Branch.

- **Breaches of Orders**

The Court can impose a fine not exceeding \$2,000 (HK\$9,400) or imprisonment for a term not exceeding 6 months. In cases involving subsequent breaches, a fine not exceeding \$5,000 (HK\$23,500), or imprisonment for a term not exceeding 12 months, or both.

#### **4. PRC**

##### **Criminal Code**

There is an offence of "*Ill-treatment to family members*" which includes:

- physical assault, forced or excessive labour, confinement, "*insult to personality*", neglect by failure to provide shelter, starvation, deprivation of medical treatment, physical and mental persecution. A conviction can attract a sentence of 2 years' imprisonment
- prosecution can be initiated by the victim, the People's Prosecution Office, or a close relative if the victim is unable to initiate the prosecution.

##### **Administrative Law**

Women who have been victims of domestic violence and have been assaulted or been ill-treated, may ask the law-enforcing agency to:

- detain the perpetrator for 15 days or
- impose RMB200 fine or
- give a warning

## **Family law**

Under the 2001 Marriage Law (Amended) victims can apply to their Residence Committee or the Police, for assistance to stop the domestic violence.

- Victims can seek mediation from their Villagers' Committee, Residence Committee, or even the relevant Work's Department
- Innocent parties can seek compensation from the perpetrator.
- Violent behaviour is a factor when assets are distributed.

*“Law in Respect of Protection of Female Rights and Interests of the PRC”* ( 中國婦女權益保障法 ) This law affirms the protection of the lawful rights and interests of females.

## **Local Legislation**

- **Shanxi Province**

It has passed the *“Methodologies of the implementation of the Law in Respect of Protection of Female Rights and Interests of the PRC”* (婦女權益保障法).

- **Hunan Province**

It has passed legislation *“Decision of Prevention and Control of Domestic Violence”* ( 預防和制止家庭暴力的決議 ).

- **Liaoning Province**

The Higher People's Court, People's Procuratorate, Department of Public Security, Department of Justice, and Committee of Social Security under the Control in a Comprehensive Way, and Women's Federation have enacted **Regulations on Prevention and Control of Domestic Violence.**

## **5. Taiwan**

- **Prevention of Domestic Violence Act**

## **D. Police Support**

In many of the jurisdictions, the police have been issued with guidelines which standardize policing practice in relation to domestic violence.

## **1. England and Wales**

- Significant new police powers to deal with domestic violence including making it an arrestable offence to breach a non-molestation order, punishable by up to 5 years in prison.
- Providing a Code of Practice, binding on all criminal justice agencies, so that all victims receive the support, protection, information and advice they need.

## **2. Australia**

The police have the authority to apply for protection and emergency orders.

## **3. New Zealand**

The Domestic Violence Investigation Scheme has been established under the direction of the police to ensure better co-ordination between the police, social welfare and the courts.

Staff members from the police and Child Youth and Family Courts, Women's Refuge and Stopping Violence services meet every two weeks to discuss cases of domestic violence reported in the area.

## **4. Canada**

### **(a) British Columbia**

Police are instructed to report any breaches of bail or probation by abusers. They have elaborate checklists and procedures to assist frontline police officers to handle abuse cases.

### **(b) Ontario**

The government has introduced standards and guidelines for policing family violence.

## **Policing Standards Manual**

In February 2000, the Ministry of Public Safety and Security released the first **Policing Standards Manual** on domestic violence. It contains 58 guidelines and sample policies providing the *model police response* to domestic violence, and addresses such areas as: bail and violent crime, criminal harassment, and occurrences involving firearms.

On 1 January 2001 the police were required to have *policies and procedures* in place to respond to and investigate domestic violence.

The Ministry also developed a “*risk indicator checklist*” for front-line officers. The information provided in this form ensures critical information on an abuser's background, and the safety concerns of the victim are included in the prosecutor’s brief at the bail hearing.

## **5. Singapore**

The police play a crucial role in the management and investigation of domestic violence cases. They also liaise and make referrals to other agencies dealing with the medical, legal and social aspects of domestic violence.

The power of arrest is limited in scope as a police officer cannot arrest an alleged perpetrator unless an offence has been committed within view e.g. verbal threats, slapping, punching and kicking the victim to cause bodily pain or bruises.

In cases described as “*serious*” a police officer can arrest the alleged perpetrator without a warrant of arrest e.g. cases involving criminal intimidation and voluntarily “*causing grievous hurt*”, breach of Protection Order, or a breach of Protection Order with warrant of arrest attached.

In cases which have been identified as “*High risk*”, where the accused has a criminal record for breaching personal protection orders on at least 2 occasions, the police officer is entitled to arrest the accused without a warrant to prevent further injury to the victim.

## **6. PRC**

The Police have the power to arrest perpetrators in accordance with criminal procedures.

Victims can request the perpetrator to:

- apologise
- attend counselling
- be detained until formal arrest and prosecution.

## **7. Taiwan**

The police have a duty to ensure the safety of the victims and any children by advising on support services such as medical, and refuges and hostels. The police have the responsibility to apply, in appropriate cases, for a protection order. Officers have a duty to report any incidents of domestic violence during their tour of duty to their supervisors.

## **E. Social Service Support**

Domestic violence is such a major problem that social services both governmental and NGOs are involved. Services include: co-ordination of services between social services, the courts, and housing departments; developing mandatory abusers' programmes, provide counselling services for all parties - victims, perpetrators and children.

### **1. England and Wales**

Social Service support for victims of domestic violence, particularly children, has been estimated to cost the British Government a minimum of £228 million per annum. The services include providing support for child care, child protection, residential care and family support teams.

### **2. Australia**

#### **Contact Centres**

Access arrangements can be a source of tension and can result in domestic violence. "*Contact Centres*" have been established. They can be Government or privately run and provide safe and comfortable venues for contact visit, change-overs, and supervised contact visits. Staff are trained to provide practical assistance, feedback and guidance to attendees. Religious organisations such as *Catholic Welfare Australia* provide a wide range of services: counselling, mediation, conciliation and contact centres.

There are Community Legal Centres, Child Support Agencies and a wide variety of "*Help Lines*":

- *Free Call* which provides 24/7 free telephone counselling, referral and information services, Kid's Chat Line, Kid's Help Line, Domestic Violence Crisis Lines, Family Law Hotlines.
- *Family Services Australia* is an umbrella group representing counselling, mediation and other family service organizations.

### **3. Canada**

#### **(a) British Columbia**

As part of a joint initiative between the Vancouver Police Department and Family Services of Greater Vancouver, the Domestic Violence Unit ("DVU") was established in 1997 to increase the safety of women and children, reduce the harmful effects of domestic violence and increase the successful prosecution of domestic perpetrators.

This is accomplished through a variety of functions including providing assistance for victims to access appropriate social and legal services, and support systems, liaising with service providers, providing emotional and practical support and assisting victims through the court process. Research has shown that DVU involvement has resulted in a higher number of convictions than those cases which did not reserve DVU assistance: (67% versus 33%), fewer stays of proceedings (25% versus 60%), and a higher rate of client satisfaction.

#### **British Columbia: Abusive Men's Programmes**

Perpetrators who submit guilty pleas can be ordered to attend the Partner Assault Response (PAR) programme as a condition of bail. Where a perpetrator has completed the PAR, a report is submitted to the prosecution and, if satisfactory, attendance may be considered as a mitigating factor in sentencing.

#### **(b) Ontario**

Women's shelters and victim support groups offer the following services:

- Emergency shelters for women and children.

- Support programmes to help abused women prepare for life *after leaving the shelters*.
- Help lines providing referrals to services.
- Victims can also register to receive automatic notification regarding any change in the status of provisionally sentenced perpetrators.
- Victim/Witness Assistance Programmes to help them understand and participate in the criminal justice system.
- Victim Crisis Assistance and Referral Services provide crisis-intervention assistance to victims of crime and disaster through referrals from police.
- The Partner Assault Response Programme: This is an integral part of the Domestic Violence Court Programme which provides 16-weeks of counselling and education for abusers.

#### **(c) Priority Housing**

In 1995 a priority housing policy was introduced and victims have been assigned top priority for subsidized housing vacancies. This policy was given statutory force by the *Social Housing Reform Act, 2000*.

#### **4. Singapore**

##### ***Singapore Council of Women's Organizations ("SCWO")***

SCWO and the Non-Governmental Representatives on the ASEAN Committee on Women offer protection via its "*Star Shelter*" programme. This provides temporary refuge for victims of domestic violence regardless of race, language and religion, and also provides counselling services.

The social service agencies and the MCD provide the following assistance:

- advice on available community resources
- risk assessment and referral to crisis shelters
- crisis intervention: including the prevention of violence, implementing safety plans for victims and family members; empowerment of victims, developing non-violence plan with perpetrators and marriage counselling.

## **5. PRC**

- Legal aid is available
- Hotline services in Beijing and Hubei Province
- Specialised hospital to deal with incidents of domestic violence established in Hubei Province.

**It is clear that many jurisdictions have adopted clear policies to tackle domestic violence as evidenced in their adjunct policies, laws, policing and social service support. The Hong Kong Government has stated that it does not tolerate domestic violence but a review of the material before Legco indicates its message is not being clearly publicised. The Law Society agrees with the HKCSS that a “*Zero Tolerance Policy*” must be well publicised.**

## **Recommendations**

### **“Institutional Support for Victims of Family Violence”**

**The Law Society considers the following recommendations can be implemented in Hong Kong without too much strain on current resources:**

**28. The PDPO should be reviewed and consideration given to a wider exemption to enable information in MDCCs to be released to relevant support agencies in order to prevent, where possible, future acts of violence.**

### **29. Publicising information on Domestic Violence**

**In order to increase the effectiveness of the DVO, the relevant Bureaux must publicise its existence. Victims should have access to information concerning the availability of professional support. Front-line professionals such as social workers and the police should advise victims to seek legal advice at the first available opportunity. The Legal advisers will explain the legal process and victims can then make a fully informed decision on whether to seek injunctive relief.**

### **30. List of Solicitors**

Despite the documented history of violence that Madam Jin and her daughters suffered, she does not appear to have received any advice to seek a non-molestation order with a power of arrest. We therefore recommend that the Social Welfare Department, police stations and NGOs should have available a list of solicitors who can provide legal advice to the victims.

### **31. Centralised Policy for Domestic Violence**

The Social Welfare Department has issued a Guide on “*Procedures for Handling Child Abuse*” and has successfully introduced Multi-Disciplinary Case Conferences for Care Proceedings and guidelines on “*Victim Management before Court Hearing and Post Abuse Therapeutic Services*”. As the agencies all have experience of participating in multi-disciplinary case conferences it would not be difficult to transfer that experience to domestic violence cases. This proposal will require consequential amendments to the Personal Data (Privacy) Ordinance.

### **32. Police Manual**

The Police should consider producing a manual based on the Ontario “*Police Standards Manual*” for distribution to its front-line officers.

### **33. Domestic Violence Units**

Establish specialised Domestic Violence Units similar to the specialised units in place to combat child abuse. The MDCC should be routine rather than the exception.

### **34. Housing Priority**

There should be a review of the policy of providing re-housing to victims of domestic violence on compassionate grounds.

## Chapter 8

### **Domestic Violence And Ancillary Relief: Is There, Should There Be a Connection?**

The effects of domestic abuse on the victims are increasingly recognized as having long lasting impact, not only on the victim, but on society generally. The victim of an abusive relationship can suffer problems psychologically, as well as physically. There can be an adverse impact upon a victim's work or career prospects or a child's educational or developmental prospects. This often involves costs for society generally, i.e. social workers, refuge assistance, social welfare payments, educational psychologists and so on.

#### **Review of Developments in other Common Law Jurisdictions**

An increasing number of jurisdiction, and particularly Australia, New Zealand, and Ontario, are involved in extensive research on domestic violence within their own jurisdictions. Domestic violence and its impact on matrimonial proceedings is being developed in the case law. However, to date, there is no specific statutory provision in any jurisdiction which "*compensates*" victims of domestic violence in matrimonial proceedings, although it is often one of the circumstances which will be taken into account when judges exercise their discretion on the distribution of matrimonial assets, and maintenance.

When considering domestic violence during a relationship the issue is how far, and how, domestic violence should be taken into account, particularly whether such violence should be seen as a "*negative contribution*" by one of the parties to the marriage:

Does the impact of domestic violence upon the victim have any bearing on the financial award? It is clearly an evolving and difficult area of judicial discretion, as it requires an examination of the severity of the domestic violence before a decision can be made that such acts of violence can be classified as a "*negative contribution*": should the test be objective or subjective?

Additional considerations include the length of time the violence might have been taken place, as there are situations where parties have relatively short marriages, but have a history of violence prior to the marriage.

Is it possible to classify certain acts of domestic violence as just “*ordinary*” violence, or determine a dividing line for acts of “*exceptional*” violence? This is a complex problem. There is a potential issue of estoppel where it could be argued that a victim of violence should not be entitled to a better financial outcome because the abuse continued, when the victim had entered into the relationship with “*open eyes*”.

In Hong Kong, we have a wholly discretionary based system, but judges must take into account the provisions of Section 7 of the Matrimonial Proceedings and Property Ordinance (“MPPO”), and therefore the Court has to have regard:

*“in deciding whether to exercise its powers under Section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case, including the following matters, that is to say:*

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) the age of each of the parties to the marriage and the duration of the marriage;*
- (e) any physical or mental disability of either of the parties to the marriage;*

(f) *the contributions made by each of the parties to the welfare of the family including any contribution made by looking after the home or caring for the family;*

(g) *the value to either of the parties of any benefit lost as a result of the dissolution of the marriage, for example, a Pension.”*

There is no reported case law in Hong Kong which has specifically taken domestic violence into account in any financial award.

### **England and Wales**

England and Wales also has a wholly discretionary based system, although there, the Court has to consider “*the conduct of each of the parties if that conduct is such that it would in the opinion of the Court be inequitable to disregard it*”, the practical reality is that “*conduct*” cases are rare. With the introduction of Financial Dispute Resolution, with its, perhaps, more mathematic approach to ancillary relief division, pressure appears to be placed on lawyers not to raise conduct unless such conduct is regarded as “*obvious and gross*”.

### **Australia**

Similarly, in Australia, financial provision in divorce is discretionary with the objective of reaching a just and equitable result. The leading case of *Kennon* (1997) FLC 92-757. was a NSW case heard before the full Court of the Family Court of Australia in which it was stated:

*“Where there is a course of violent conduct by one party towards the other during a marriage which is demonstrated to have had a significant adverse impact upon that party’s contribution to the marriage, or, put to the other way, to have made his or her contribution significantly more arduous than it ought to have been, that is a fact which a Trial Judge is*

*entitled to take into account in assessing the parties respective contributions ...”*

The Australian Courts take a two-stage approach in that:

- (a) they consider the past contributions made by the parties to the marriage, both financial and non-financial; and
- (b) to look at the present economic and other circumstances, i.e. needs and requirements.

In *Kennon*, the Court stated that it recognized there had been marked changes in perceptions, both legal and social, about domestic violence and its impact, and it appeared appropriate to give effect to those changed perceptions. That being said, the Court was anxious about the “*Flood Gates*” argument, and said that such principles were only to apply in exceptional cases, and were not to become common usage as tactical weapons, leading the Court back to “*fault*” determination which the Court felt would only increase costs and Court time.

### **New Zealand**

In New Zealand, the legislation provides that misconduct cannot be taken into account at all unless provided by statute, and thus there is no discretionary element that can be taken into account beyond the application of strict statute. Misconduct can be taken into account, if “*gross and palpable*”, and that such misconduct “*significantly affected the extent or value of the relationship property*”. The leading case in New Zealand in this regard is *Sullivan* 1999, 1998 NZFLR 589 being the First Instance decision, and 1999 NZFLR 260, the Appeal, in which a husband had grossly abused a child of the family who almost died. The Court gave more of the assets to the Wife on the basis of her greater contribution in the care of the child and the Husband’s “*negative*” contribution. This approach would seem to be consistent with the approach that would be taken by the Hong Kong Court in its application of judicial discretion, and presumably most other discretion based jurisdictions.

## **Conclusion**

Should domestic violence be specifically considered by the court as a factor when determining the distribution of matrimonial assets by amending the relevant provisions of the MPPO, rather than the present test that such behaviour is considered under the general heading of “*conduct that should be taken into account*”?

It is a difficult issue, as the court has to take into account, inter alia, when the violence took place, how often, the quality of the evidence offered in support of the allegations of domestic violence, and the basis of quantification of any loss or negative contribution as a result. Even though most jurisdictions generally take into account financial misconduct when making ancillary relief Orders, and most jurisdictions have domestic violence law statutes to protect the parties against violence as a factor, it does not appear that any jurisdiction specifically takes into account acts of domestic violence when making a final determination regarding ancillary relief orders. Whilst there are proponents for change in this regard, there does not appear to be any imminent change in the jurisdictions reviewed.

## **Recommendation**

**“Domestic Violence And Ancillary Relief: Is There, Should There Be a Connection?”**

**35. The existing test under S7 of the MPPO should remain in place.**

## Chapter 9

### Family Court

#### A. Dedicated Family Court

##### 1. Long standing request to establish a Family Court

The request to establish a dedicated Family Court in Hong Kong was made more than 35 years ago by *the Hong Kong Federation of Women Lawyers* in a paper prepared by Ms. Elsie Leung and Ms. Maria W. C. Tam in 1979<sup>1</sup>. A dedicated Family Court would deal exclusively with family disputes such as “*divorce, separation, and maintenance orders adoption, juvenile delinquency, family violence, guardianship of infants.....*”

In 1998 the Chief Justice met with representatives of the Law Society, the Bar Association, and the Hong Kong Family Law Association to discuss a joint request that a separate Family Court be established. The Chief Justice indicated the existing structure was satisfactory. The existing court rooms allocated to the Family Court judges were refurbished and painted in separate colours in order to distinguish it from the rest of the District Court in the Wanchai Law Courts.

The Law Society considers it is time to hold an open debate on whether the existing structure of the Family Court and the resources allocated are adequate to meet the demand for the Court’s services.

##### 2. The Judgment in *Lomas v. Parle*<sup>2</sup>

The observations by the English Court of Appeal in the judgment of *Lomas v. Parle* clearly identified not only the areas of dissatisfaction but also the level of waste of judicial resources within the existing system. The Asian Economic Crisis in 1997 led to reduction of budgets across all agencies in Hong Kong, including that of the Judiciary.

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<sup>1</sup> Submissions to the Hong Kong International Year of the Child Commission 1979

<sup>2</sup> [2004] 1 F.L.R. 812

The number of unrepresented litigants is a major concern as judicial resources are finite. An obvious area for reform is the introduction of an integrated court thus avoiding the duplication of criminal and civil proceedings arising from the same act(s) of domestic violence. This recommendation clearly makes economic sense. It also improves the process for the victim. The procedure would be less stressful as the victim would not have to attend separate proceedings in the magistracy and the District Court, often fixed for hearing weeks' apart, and dealt with by different court officials.

The criticisms of the Court of Appeal in England can be applied to Hong Kong as our court system is modelled on the old English system. Thorpe LJ noted in the judgment

*“the unsatisfactory nature of the present interface between the criminal and family courts.....It is expensive, wasteful of resources and time-consuming. It is stressful for the victim to move from court to court in order to obtain redress and protection from the perpetrator. Other jurisdictions are attempting to solve this problem. The State of New York is setting up integrated courts to hear both criminal and civil proceedings before one tribunal. The publication of the Domestic Violence Crime and Victims Bill is an opportunity, we would suggest, for a reconsideration of the present dual system and an opportunity to look into the possibility of integrated courts to see if they might avoid the problems which we now raise”.*

The Law Society submits that Lord Thorpe's observations are apposite to the situation in Hong Kong. Recent tragic events have galvanised the community to demand a concerted effort to tackle this very serious social problem with effective policies by all stakeholders.

### **Appendix 3: Judgment of the English Court of Appeal: Lomas v. Parle**

#### **3. Care and Protection Orders (“CPOs”)**

The Law Society endorses the recommendations on CPOs made in the Law Reform Commission's Report: *Child Custody and Access*. The recommendation to transfer the Juvenile Court to a Family Court has merit as the physical environment for these hearings

should be considered. The Magistracy is not an appropriate place to deal with children in the 21<sup>st</sup> Century. The administration of Care and Protection Orders is a hangover from colonial times and changes could and should be introduced as soon as possible. Despite past complaints, there is evidence of a lack of empathy for the trauma these children are enduring and there is considerable room for improvement.

There is evidence of an inconsistent approach by the different Magistracies when dealing with CPOs. On the whole, the Fanling and Kowloon Magistracies have improved their procedures. The children have been separated from the juvenile delinquents and adults facing criminal charges, and hearings are conducted in a room other than the courtroom. However, some of these children can still wait up to 2 hours before a Magistrate hears the application.

It is clear that some Magistrates lack awareness and the ability to distinguish the different needs of children involved in CPO applications with those required for juvenile offenders. The following is a description of an advocate's recent experience when conducting a CPO hearing in Eastern Magistracy:

- “1. The hearings were conducted in the Juvenile Court which is otherwise used as an adult court.*
- 2. The solicitor appearing was required to stand when addressing the Bench which is a reversal of the practice introduced to make the hearings more informal and representatives were permitted to remain seated in order to maintain an air of informality.*
- 3. The child was required to stand. Even though this is “normal” it adds the formality and can be intimidating for the child concerned.*
- 4. New instructions were also posted on the advocate's desk for legal representatives **not** to say “good morning” to the magistrate. It is noted the*

*directive does not engender an atmosphere in which juveniles, let alone vulnerable children, should be dealt with.*

5. *Prior to the hearing the child was kept in a witness waiting room on the same floor as the juvenile court and escorted past adult and juvenile defendants waiting to go into the court for the hearing.”*

It should be recognised that many of these children require protection *because* of incidents of domestic violence and have suffered unnecessary anxiety as a result of institutional indifference. CPO cases should be dealt with by the Family Court and the Administration should take urgent steps to remedy this unsatisfactory situation.

#### **4. Law Reform Commission’s Report on *Child Custody and Access (“LRC”)***

There have been no amendments to the major pieces of legislation dealing with children and family-related applications for more than 30 years. This fact is clearly reflected in the 72 recommendations in the LRC’s Report and this is an opportune moment to make use of the research to introduce comprehensive reforms.

#### **5. Adoption of a holistic approach**

In order to navigate the existing procedures victims of domestic violence could attend the following hearings in order to obtain assistance:

- (a) Civil application: Under the DVO for an injunction order and a power of arrest;
- (b) Criminal: Magistrates or District Court for assault charges;
- (c) District Court: Interim ancillary relief application: maintenance and custody

The system has to be reformed in order to increase efficiency not only for the victim, but also those organisations supporting the victim – police, social workers, lawyers, the courts.

The economic cost of domestic violence alone should be a wake-up call as the total budget across all agencies such as Home Affairs Bureau, Health Welfare Food Bureau,

Security Bureau, Department of Justice, the Judiciary, and the Hospital Authority, is a significant part of the Administration's budget, and ultimately taxpayer's money. The Administration should grasp the opportunity to ensure its resources are well spent to ensure effective delivery of services by adopting a holistic approach to the reforms.

The creation of a true Family Court dealing could assist the Administration to successfully implement its family policies, particularly those tackling domestic violence.

## **B. Specialist Domestic Violence Courts**

### **1. England and Wales**

The British Government has adopted a pro-active policy to tackle domestic violence and in October 2002 launched its Pilot Scheme on Specialist Domestic Violence Courts ("SDVC"). The aim of the Scheme is to provide a co-ordinated multi-agency response and increase the effectiveness of the judicial system.

The policy involves the assignment of cases involving domestic violence being listed to a single dedicated sitting of the SDVC and the co-ordination of other services in order to deliver an effective and efficient use of the judicial system by:

- providing protection and support to victims and witnesses of domestic violence;
- providing appropriate sanctions to perpetrators; and
- reducing delay through effective case management.

There are 2 types of SDVC:

#### **(a) Clustering**

All cases are grouped into 1 court session to deal with pre-trial hearings, bail applications, pleas, pre-trial reviews, pre-sentencing reports and sentencing.

### **(b) Fast Tracking Procedure**

The Court will deal solely with criminal, adult proceedings.

The 1<sup>st</sup> Evaluation Report<sup>3</sup> of the Pilot Scheme has shown the SDVCs:

- Enhance the effectiveness of the court and support services for victims
- Makes advocacy and information sharing easier
- Improves the victim's participation and satisfaction with the system
- Increases the public's confidence in the Crown Prosecution Service

As a result of the success of the Pilot Scheme, the Home Office has announced that it will increase the number of SDVCs from 4 to 25 by April 2006.

### **Independent Domestic Violence Advisors ("IDVAs")<sup>4</sup>**

Victims of domestic violence are often overwhelmed by the legal process and the inefficiencies within the system means victims have to negotiate a number of agencies and repeat their stories in order to obtain the next stage of assistance. The IDVA helps the victim to navigate the system and provide support to ensure the safety of the victim. *The key element is the victim's safety rather than better results for any particular agency.* IDVAs need to understand the full range of procedures and remedies in the civil and criminal systems as well as the physical safety options for the victim. They need to be an effective bridge between the statutory and voluntary agencies and ensure they collaborate for the benefit of the victim.

The SDVCs have introduced an independent advocacy services for women which has been recognised by the Home office as being:

*"effective in terms of outcome for the victim and in terms of cost efficiency.... The evidence shows that support of IDVAs:*

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<sup>3</sup> "Evaluation of Specialist Domestic Violence Courts/Fast Track Systems" by Dee Cook, Mandy Burton, Amanda Robinson and Christine Vallely (March 2004)

<sup>4</sup> Home Office Report: "Domestic Violence A National Report" March 2005

- *reduces repeat victimisation;*
- *reduces attrition rates in the criminal justice system;*
- *increases victim satisfaction and confidence; and*
- *is cost effective.”*

## **2. USA**

There have been specialist domestic violence courts in the US in some states since the early 1980s with a considerable variation in the procedures and functions.

### **(a) Criminal Cluster Court Model**

The Brooklyn Felony Domestic Violence Court was one of the first of these courts to be established as a ‘*problem-solving court*’. Research has shown the practices in the court have improved the rate of victim satisfaction with the process, together with an increase in the guilty plea rate. However, the conviction rate has not gone up, thus, it is the method of disposition (plea instead of trial) that has changed. The research has shown that improved support for victims may have enhanced the quality of evidence and information available to the specialist court, which then translates into a higher guilty plea rate.

### **(b) Dade County and Broward County in Florida**

Both have an integrated model of specialist domestic violence courts dealing with both the criminal and civil aspects of a single domestic violence case. The qualitative evaluation for the Dade County Specialist Domestic Violence Court revealed that both judges and prosecutors felt that the integrated system improved administrative efficiency and helped to reduce recidivism.

Research has suggested that an integrated specialist domestic violence court has the potential to resolve the information-sharing problems that exist in the traditional judicial system but also “*evidence-sharing*” problems. Specially trained judges in integrated domestic violence courts have no difficulties applying the different evidential burdens and the tailoring of relief to each case.

## **Recommendations**

### **“Family Court”**

**36. Governments in many jurisdictions have adopted an integrated approach to family-related matters including domestic violence. Reform involves a comprehensive review of policy and legislation, the role of the Judiciary and the courts, the delivery of services by all statutory and NGO stakeholders, the legal profession and all relevant Government Bureaux and Department.**

**The Administration should:**

- (a) Conduct a comprehensive review of domestic violence by consulting all relevant stakeholders.**
- (b) Conduct research on the economic cost of domestic violence to Hong Kong’s economy.**

**37. The time is right to debate the proposal to establish a true Family Court where the following should be discussed.**

- Exclusive jurisdiction to deal with all family disputes, including CPOs**
- Adequate allocation of resources**
- Increasing the number of Specialised Family Court Judges**

### **38. Holistic Approach**

**A holistic policy should be adopted to enable incidents of domestic violence to be dealt with in a comprehensive manner. Any criminal charges arising out of incidents of domestic violence should be dealt with by a Specialised Domestic Violence Court. SDVCs should be established in Hong Kong and should be a specialised unit within the Family Court.**

### **39. Independent Domestic Violence Advisors (“IDVAs”)**

**Research has indicated IDVAs are cost-effective in improving the implementation of the policy initiatives introduced by the British Government. IDVAs should be introduced in order to enhance co-ordination between the stakeholders in Hong Kong.**

## **Chapter 10**

### **Conclusion**

**The family is the foundation of our society. The Government has a duty to implement comprehensive and enlightened policies to tackle social problems. It should acknowledge its current policies, and the legislation underpinning the policies on domestic violence are outdated and in urgent need of reform.**

**Since the tragic events in April 2004 the Administration's policy appears to have evolved from one of a "3-pronged approach" to one of "Zero Tolerance". The Administration has recently stated its policies in a comprehensive policy report which will enable much needed reforms to be introduced.**

**The DVO is outdated and amendments to this piece of legislation should be a top priority for the Administration. There is a wealth of material available in other jurisdictions and successful policies and programmes can be adopted and adapted to suit Hong Kong's domestic requirements. In particular, the Administration should review the measures taken by the British Government to tackle domestic violence in the Home Office report "*Domestic Violence: A National Report*".**

**A study should be commissioned to ascertain the total cost of domestic violence to our economy as incidents of domestic violence involve so many service providers across our society. Domestic violence is costly and the urgency of the situation should galvanise the Administration to introduce bold new policies which should be proactive and holistic rather than piecemeal. It will require a firm political will to ensure the introduction and implementation of realistic and deliverable programmes.**

**The causes of domestic violence are complex and it is therefore unsurprising that many victims do not wish to see their partner or family member face criminal charges with the possibility of imprisonment. Mandatory counselling courses should be introduced as many families would benefit; evidence from other**

jurisdictions clearly indicates the cost of providing counselling in the long term is much more effective than the cost of imprisoning perpetrators.

The observations of the English Court of Appeal in Lomas v. Parle highlighted the structural problems in the judicial system which results in a shocking waste of court time and resources. The criminal and civil jurisdictions run on parallel tracks and the ability to deal comprehensively with perpetrators of domestic violence is not only lost but the duplication of effort often results in an inconsistent approach on penalties by different judicial officers. Judicial resources are limited and the time is right to review the court system and introduce reforms in order to avoid unnecessary waste especially as the system has to deal with more and more unrepresented litigants. The establishment of a true Family Court to deal with all family-related matters would prevent unnecessary duplication of hearings and administrative time, allowing cases to be dealt with in a comprehensive manner thus releasing valuable judicial resources which can be used more effectively.

It is noted that Madam Jin sought help from a variety of providers on 10 separate occasions from 18 February 2004 until her death on 11 April 2004. However, it appears that she was not given any legal advice by the providers on the options available, such as seeking an injunction order under the DVO with a power of arrest. Victims of domestic violence should have access to legal advice in order to make informed decisions about their future and, in many cases, that of their children. This recommendation should be an essential element of the package of reforms.

The Coroner's Inquest on Madam Jin and her family has now taken place. It is 20 months since the tragic events. Many stakeholders have now published their reports and recommendations. The time has arrived for action to help those families in need. There must be a firm commitment to introduce effective reforms to combat this serious problem by all concerned. The Administration must not let another 20 years pass or wait for more tragic cases to emerge before initiating a review of its policies on domestic violence.

## Chapter 11

### Summary of Recommendations

#### 1. Adoption of a Zero-tolerance policy

The Government's assertion that it does not tolerate domestic violence should be clearly stated by appropriate amendments to the DVO.

#### “Definition of Domestic Violence”

2. It is apparent from the review there should be a definition of domestic violence in the DVO. The term “*molest*” is vague as it has not been defined in the Ordinance. As the legislation was passed in 1986 the experience from other jurisdictions accepts domestic violence can include: psychological and emotional behaviour, stalking, and harassment as well as actual physical abuse.

##### (a) “*Domestic*”

This should include current and former partners as well as extended family members.

##### (b) “*Violence*”

This should have the widest definition and should include:

*“physical, psychological, sexual, emotional, and financial abuse; forcible restriction of physical freedom; placing or attempting to place a family member in fear of pain, disease or infirmity; continued harassment with intent to cause anguish, causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim; forced*

*social isolation, economic desperation, control through the exercise of forced destructive verbal or emotional harassment”.*

**(c) The Law Society recommends adaptation of the provisions in New Zealand’s Domestic Violence Act 1995.**

### **Criminalisation**

**3. The Law Society does not recommend the criminalisation of “domestic violence” but advocates the adoption of a holistic approach by the creation of a Specialised Domestic Violence Court to handle the prosecution of criminal charges which have occurred in a domestic context.**

### **“Who can Apply?”**

**4. The Law Society recommends adoption of the Singaporean model on the basis that of all the jurisdictions reviewed, Singapore bears the most similarity to Hong Kong – a cosmopolitan city with a majority of ethnic Chinese citizens. Its Women’s Charter recognises the need to offer the widest possible protection to its citizens and has done so by including an extended list of family members as well as relationships. The class of victims should also include former co-habitees and same sex couples.**

### **5. Children and Incapacitated Persons**

**The DVO should be amended to enable:**

**(a) A child under the age of 18 to make an application on her own behalf. The application can be made by the child’s relative, guardian, “*next friend*”, or Social Worker.**

(b) Incapacitated persons should be allowed to make applications in their own right through any of the following representatives: “*parents, guardian, custodian, and persons who are responsible for their care*”.

6. The Court should be empowered to appoint an appropriate third party, such as the Social Welfare Officer in charge of the case, or a police officer and/or any other persons having an interest, to make an application on behalf of the victim.

“Who is Protected?”

#### 7. “*Domestic*” Relationships

##### (a) Former spouses

The DVO only allows a party to a marriage to apply for an injunction but there is no protection once the marriage has been dissolved. In some divorce cases, even after the pronouncement of the Decree Absolute, a former spouse may continue to intimidate, harass or disturb the former spouse and/or the children of the family.

The DVO should be amended to include “*former spouse*”

##### (b) Cohabitants

The relationship of co-habitees can be recognized as a “*common law marriage*” or “*de facto*” relationships. The same tensions and animosities which occur between married couples also occur between cohabitants. The current provisions of the DVO offer no protection to *former* cohabitants and the only course of action to be taken is for a victim to make a complaint of assault to the police.

The DVO should be amended to include “*former cohabitants*”

##### (c) Parents of a child who have never co-habited

There are cases, albeit small in number, where parents of the same child have never married nor have they cohabited. As parents, they need to keep in contact with each other to discuss matters relating to the child’s upbringing.

The DVO should be amended to include “*parents of the same child*”.

**(d) Same Sex Couples**

The Law Society notes that other jurisdictions, notably England and Wales, Ontario and New Zealand provide protection for existing and former cohabitants in same sex relationships.

This issue is likely to be controversial in Hong Kong as there is no legal recognition of “*same sex marital relationships/partnerships*”. Article 25 of the Basic Law states: “*All Hong Kong residents shall be equal before the law*”.

The Law Society recommends that protection should be extended to same sex couples as a failure to do so would be discriminatory

**(e) Children**

(i) The definition of “*child*” in the DVO should be amended to provide the maximum protection and should cover a child in the following domestic relationships:

*“biological, adopted or step-child of the Applicant, the Perpetrator or Respondent.”*

(ii) The DVO fails to provide protection unless the child at risk “*lives with the Applicant*”. This qualification must be removed from the DVO as many children live with extended family members, such as grand parents.

**(f) Extended Family Members living in the same household**

In light of the predominant Chinese culture and the housing problems in Hong Kong, many people continue to live with their extended family after attaining the age of majority, and in many cases after marriage. In situations where a family member becomes violent, protection should be provided to the victims living in the same household such as:

*“Parents: father and mother, father and mother-in-law,  
Brother and sister, step brother and sister, brother and sister-in-law,  
Adult son and daughter  
Relatives of the parties by: blood, marriage or adoption.”*

## **“Types of Orders”**

### **8. “Restraining and Protection Order” (“RPO”)**

The Law Society recommends changing the injunction order to “Restraining and Protection Order” “限制及保護令”.

### **9. Counselling Programmes**

The Law Society recommends the introduction of counselling programmes which specifically address the issues of domestic violence.

**10. The DVO be amended to enable the court to order perpetrators to attend counselling programmes as a part of any order.**

### **11. Furniture Orders**

The Court should be empowered to make such orders.

### **12. Compensation Orders**

The Law Society recommends amendment of the DVO to include compensation orders which could be based on the provisions in the DVPA, Ontario.

### **13. Comprehensive Interim Orders**

The DVO should be amended to enable the Court to provide Comprehensive Interim Orders.

#### **14. Contact orders**

The Law Society recommends the adaptation of the legislation in New Zealand and Ontario.

#### **15. “Stalking”**

The DVO should be amended to adapt the relevant provisions in the legislation in New Zealand and Ontario to enable the Court to provide protection to victims. This will provide much needed protection to victims pending action on legislation to cover “*stalking*”.

#### **16. Duration of Injunction Orders**

The duration of orders under the DVO is too short and restrictive. Orders should be granted on the basis “*as the court deems fit*”. The discretion of the Court should not be fettered as the facts of each case require tailored relief in order to maximise protection for the victim(s).

#### **“Power of Arrest”**

#### **17. “....has caused actual bodily harm”**

The test under Section 5 of the DVO should be amended to enable the court to consider “*whether the perpetrator is likely to cause actual physical injury to the protected person*” rather than “*has caused actual bodily harm*”.

**18. Common assault is currently an arrestable offence under the Offences Against the Person Ordinance (Cap. 212). The police should provide guidelines on arresting perpetrators in cases involving domestic violence.**

#### **19. “...duration of the power of arrest”**

The duration of the power of arrest should be left to the discretion of the Court “*as it deems fit*”.

## **20. “Attachment” of the Power**

**A pro-arrest policy should be reflected in the DVO. The power of arrest should be automatically attached to injunction orders, thus emphasising the Government’s Zero Tolerance policy, and shifting the mindset of front-line officers on domestic violence.**

## **21. Additional Police Powers**

**The police should also have the following powers:**

- (a) power to arrest persons who have been incited or instigated by the perpetrator to commit acts of domestic violence against the victim;**
- (b) search for weapons and/or documents relating to the violent act or intended violent acts; and**
- (c) accompany the victim to return to the matrimonial home or other places in order to retrieve personal belongings without fear of intimidation.**

**22. Clearer guidelines must be put into place on the role and duties of police officers when dealing with incidents of domestic violence. The Law Society recommends the adoption of the New Zealand model which requires a police officer to conduct a balancing exercise before exercising the power of arrest for any breach:**

***“The officer must consider:***

- (a) the safety of the protected person if the arrest is not made;***
- (b) the seriousness of the alleged breach;***
- (c) the length of time since the alleged breach occurred;***
- (d) the restraining effect on the person liable to be arrested of other persons or circumstances.”***

**23. The police should be given the authority to apply for directions from the relevant court as to the time and place the perpetrator is to be brought before a judge without the necessity of waiting for the victim's solicitors or the applicants/victims to make such applications.**

## **“Evidence and Procedures”**

### **24. Preliminary In-take Counselling**

**There should be preliminary “in-take” counselling sessions similar to those provided in Singapore where the victims receive information on their legal rights and are advised on the range of services provided by the Government and NGOs.**

### **25. Service of the Injunction Orders**

**A copy of the sealed court order should be faxed to Police Headquarters (or by email) by the relevant Court, and upon receipt the police should update their database to ensure the order and power of arrest is brought to the attention of its front-line officers. There are applicants who do not have legal representation and this suggestion will be of vital importance to those victims who act in person.**

### **26. Service by the Police**

**Service of injunction orders can be carried out by the police thus the perpetrator would be left in no doubt that the victim has the protection of the court and that the police have the power of arrest. This is an obvious deterrent and can prevent further acts of violence from occurring within the short term thus allowing a cooling-off period.**

### **27. Substituted Service**

**If the perpetrator cannot be located, substituted service may be effected by leaving a copy of the order with an adult member of the perpetrator's household or posting it on the front door of his residence.**

## **“Institutional Support for Victims of Family Violence”**

**28. The PDPO should be reviewed and consideration given to a wider exemption to enable information in MDCCs to be released to relevant support agencies in order to prevent, where possible, future acts of violence.**

### **29. Publicising information on Domestic Violence**

**In order to increase the effectiveness of the DVO, the relevant Bureaux must publicise its existence. Victims should have access to information concerning the availability of professional support. Front-line professionals such as social workers and the police should advise victims to seek legal advice at the first available opportunity. The Legal advisers will explain the legal process and victims can then make a fully informed decision on whether to seek injunctive relief.**

### **30. List of Solicitors**

**Despite the documented history of violence that Madam Jin and her daughters suffered, she does not appear to have received any advice to seek a non-molestation order with a power of arrest. We therefore recommend that the Social Welfare Department, police stations and NGOs should have available a list of solicitors who can provide legal advice to the victims.**

### **31. Centralised Policy for Domestic Violence**

**The Social Welfare Department has issued a Guide on “*Procedures for Handling Child Abuse*” and has successfully introduced Multi-Disciplinary Case Conferences for Care Proceedings and guidelines on “*Victim Management before Court Hearing and Post Abuse Therapeutic Services*”. As the agencies all have experience of participating in multi-disciplinary case conferences it would not be difficult to transfer that experience to domestic violence cases. This proposal will require consequential amendments to the Personal Data (Privacy) Ordinance.**

### **32. Police Manual**

The Police should consider producing a manual based on the Ontario “*Police Standards Manual*” for distribution to its front-line officers.

### **33. Domestic Violence Units**

Establish specialised Domestic Violence Units similar to the specialised units in place to combat child abuse. The MDCC should be routine rather than the exception.

### **34. Housing Priority**

There should be a review of the policy of providing re-housing to victims of domestic violence on compassionate grounds.

“Domestic Violence And Ancillary Relief: Is There, Should There Be a Connection?”

35. The existing test under S7 of the MPPO should remain in place.

### **“Family Court”**

36. Governments in many jurisdictions have adopted an integrated approach to family-related matters including domestic violence. Reform involves a comprehensive review of policy and legislation, the role of the Judiciary and the courts, the delivery of services by all statutory and NGO stakeholders, the legal profession and all relevant Government Bureaux and Department.

The Administration should:

- (a) conduct a comprehensive review of domestic violence by consulting all relevant stakeholders.
- (b) Conduct research on the economic cost of domestic violence to Hong Kong’s economy.

**37. The time is right to debate the proposal to establish a true Family Court where the following should be discussed.**

- **Exclusive jurisdiction to deal with all family disputes, including CPOs**
- **Adequate allocation of resources**
- **Increasing the number of Specialised Family Court Judges**

### **38. Holistic Approach**

**A holistic policy should be adopted to enable incidents of domestic violence to be dealt with in a comprehensive manner. Any criminal charges arising out of incidents of domestic violence should be dealt with by a Specialised Domestic Violence Court. SDVCs should be established in Hong Kong and should be a specialised unit within the Family Court.**

### **39. Independent Domestic Violence Advisors (“IDVAs”)**

**Research has indicated IDVAs are cost-effective in improving the implementation of the policy initiatives introduced by the British Government. IDVAs should be introduced in order to enhance co-ordination between the stakeholders in Hong Kong.**

# **Appendix 1**

## **Amendments to the Law in Respect of the Protection of Women's Rights and Interests in the PRC (passed on 28 August 2005)**

**修改《中華人民共和國婦女權益保障法》**

**Amendments to the Law in Respect of the Protection of Women's Rights  
and Interests in the PRC (passed on 28 August 2005)**  
修改《中華人民共和國婦女權益保障法》

**Domestic violence (家庭暴力)**

Domestic violence against women is prohibited. The state will adopt measures to prevent and stop domestic violence. Victims of domestic violence have a right to seek redress to the Court. All administrative departments and branches of the Judiciary, as well as other voluntary organizations, should, within their capacity, prevent and stop domestic violence, and provide necessary help to women affected by domestic violence.

禁止對婦女實施家庭暴力。國家採取措施，預防和制止家庭暴力。公安、民政、司法行政等部門以及城鄉基層群眾性自治組織、社會團體，應當在各自的職責範圍內預防和制止家庭暴力，依法為受害婦女提供救助。

**Sexual harassment**

Sexual harassment of women is prohibited. Women who are harassed can lodge complaints to the relevant Government Departments or organizations.

(The NPC representative indicated that it is the first time 'sexual harassment' is written into law in the PRC. The exact meaning of sexual harassment will be given by future judicial interpretations.)

**Gender equality**

'Granting men and women equal status' is a basic state policy of the country. The state will adopt necessary measures to gradually improve various systems to guarantee the rights and interests of women and remove all kinds of discrimination against women.

**Divorce**

1. Husbands cannot file for divorce in the following circumstances:
  - ◆ When the wife is pregnant

- ♦ Within one year after childbirth
  - ♦ Six months after the termination of pregnancy
2. When divorce is filed, if the wife considers that she has taken more responsibilities during the marriage in children-raising, taking care of the elderly, helping the husband in his career etc, she can ask to be duly compensated. When distributing property owned by the husband and wife, consideration should be taken to the interests of the wife and children.

### **Employment opportunities for women**

1. When state organizations employ women, they should sign employment contracts with them. No restrictions on the female employee's marriage or childbirth can be stipulated in the contracts.
2. Women cannot be lowered their salary, fired or have their contract terminated, due to her marital status, pregnancy, maternity leave or breast-feeding arrangements.
3. Men and women should enjoy parity of pay and other fringe benefits for work of similar nature.

### **Women's political participation**

The state should work to gradually improve the ratio of women in the seats of the NPC and People's Congresses at various levels.

### **Gender equality in other areas**

1. Schools cannot refuse to admit students or raise the admission criteria because of the student's sex.
2. The Government and schools should introduce appropriate measures to ensure female children, especially those who are poor or disabled, receive basic education.
3. No government unit shall discriminate against women when implementing the state pension system.

## **Appendix 2**

**(a) New Zealand: S.19 of the Domestic Violence Act 1995**

**(b) Victoria: S.5 of the Crimes (Family Violence) Act 1987**

**(c) Ontario: S.3 of the Domestic Violence Protection Act, 2000**

**New Zealand : Domestic Violence Act. 1995**

**S. 19 Standard conditions of protection order --**

- (1) It is a condition of every protection order that the respondent must not --
- (a) Physically or sexually abuse the protected person; or
  - (b) Threaten to physically or sexually abuse the protected person; or
  - (c) Damage, or threaten to damage, property of the protected person; or
  - (d) Engage, or threaten to engage in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person; or
  - (e) Encourage any person to engage in behaviour against a protected person, where the behaviour, if engaged in by the perpetrator, would be prohibited by the order.
- (2) Without limiting subsection (1) of this section, but subject to section 20 of this Act, it is a condition of every protection order that at any time other than when the protected person and the respondent are, with the express consent of the protected person, living in the same dwelling house, the respondent must not:-
- (a) Watch, loiter near, or prevent or hinder access to or from, the protected person's place of residence, business, employment, educational institution, or any other place that the protected person visits often; or
  - (b) Follow the protected person about or stop or accost the protected person in any place; or
  - (c) Without the protected person's express consent, enter or remain on any land or building occupied by the protected person; or
  - (d) Where the protected person is present on any land or building, enter or remain on that land or building in circumstances that constitute a trespass; or
  - (e) Make any other contact with the protected person (whether by telephone, correspondence, or otherwise), except such contact --
    - (i) As is reasonably necessary in any emergency; or
    - (ii) As is permitted under any order or written agreement relating to custody of, or access to, any minor, or
    - (iii) As is permitted under any special condition of the protection order.

**Victoria : Crimes (Family Violence) Act. 1987**  
**Act No. 19/1987**  
**Part 2 – Intervention Orders**

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**PART 2 – INTERVENTION ORDERS**

**S. 5 Restrictions in order--**

- (1) Without limiting the generality of section 4, an order may do all or any of the following--
- (a) prohibit or restrict approaches by the defendant to the aggrieved family member including prohibiting the defendant from approaching within a specified distance from the aggrieved family member; or
  - (b) prohibit or restrict access by the defendant to premises in which the aggrieved family member lives, works or frequents and such an order may be made whether or not the defendant has a legal or equitable interest in those premises;
  - (c) prohibit or restrict the defendant from being in a locality specified in the order;
  - (d) prohibit the defendant from contacting, harassing, threatening or intimidating the aggrieved family member;
  - (e) prohibit the defendant from damaging property of the aggrieved family member;
  - (f) prohibit the defendant from causing another person to engage in conduct restrained by the court;
  - (g) direct the defendant to participate in prescribed counselling;
  - (h) revoke any licence, permit or other authority to possess, carry or use firearms.

## Ontario: Domestic Violence Protection Act, 2000

### Intervention order

3.(1) On application with notice to the respondent, the court may make a temporary or final intervention order if it is satisfied on a balance of probabilities that,

- (a) **domestic violence** has occurred; and
- (b) a person or property may be at risk of harm or damage. 2000, c.33, s.3(1).

### Contents of order

(2) An intervention order may contain any or all of the following provisions that the court considers appropriate in the circumstances for the protection of any person or property that may be at risk of harm or damage or for the assistance of the applicant or any child:

1. Restraining the respondent from attending at or near, or entering, any place that is attended regularly by the applicant, a relative of the applicant, any child or any other specified person, including a residence, property, business, school or place of employment.
2. Restraining the respondent from engaging in any specified conduct that is threatening, annoying or harassing to the applicant, a relative of the applicant, any child or any other specified person.
3. Requiring the respondent to vacate the applicants residence, either immediately or within a specified period of time.
4. Requiring a police/SWD representative, within a specified period of time, to accompany the applicant, respondent or a specified person to the applicants residence and supervise the removal of that persons or another named persons belongings.
5. Restraining the respondent from contacting or communicating with the applicant or any other specified person, directly or indirectly.
6. Restraining the respondent from following the applicant or any other specified person from place to place, or from being within a specified distance of the applicant or other specified person.

7. ....
8. Granting the applicant exclusive possession of the residence shared by the applicant and the respondent, regardless of ownership.
9. Requiring the respondent to pay the applicant compensation for monetary losses suffered by the applicant or any child as a direct result of the domestic violence, the amount of which may be summarily determined by the court, including loss of earnings or support, medical or dental expenses, out-of-pocket expenses for injuries sustained, moving and accommodation expenses and the costs, including legal fees, of an application under this Act.
10. Granting the applicant or respondent temporary possession and exclusive use of specified personal property.
11. Restraining the respondent from taking, converting, damaging or otherwise dealing with property in which the applicant has an interest.
12. Requiring the respondent to attend specified counselling.
13. Recommending that a child attend specified counselling at the respondent's expense. 2000,c.33, s.3(2).

## Appendix 3

English Court of Appeal Judgment *Lomas v. Parle*

The Law Society wishes to thank *Westlaw* for providing permission to print the judgment of *Lomas v. Parle*.

Lynne Lomas v. John Parle  
B1/2003/2148

Court of Appeal (Civil Division)

CA

Before: The President of the Family Division Lord Justice Thorpe and Lord  
Justice Mance

Thursday 18th December 2003

On Appeal from Liverpool County Court (His Honour Judge Harris QC)

### **Representation**

Benet Hytner QC and Miss Bernadette Goodman (instructed by Messrs Paul Crowley & Co of Liverpool L6 5PT) appeared for the appellant.

Miss Julia Macur QC and Mrs Patricia Pratt (instructed by Messrs Morecroft Urquhart of Liverpool L2 4TQ) appeared for the respondent.

### **JUDGMENT**

THORPE LJ:

#### **Introduction**

1. This is the judgment of the court to which we have all contributed. On 16 September 2003 His Honour Judge Harris QC sitting in the Liverpool County Court sentenced the respondent, whom we will hereafter refer to as the husband, to two sentences of four months concurrent for contempt of court in twice breaching injunctions granted under section 42 of the Family Law Act 1996 for the protection of the appellant, whom we will hereafter call the wife, from domestic violence. Against such sentences there is an automatic right of appeal to this court without prior permission. The sentencing power of the trial court is, however, restricted to a maximum of 24 months by section 14 of the Contempt of Court Act 1981. Almost always these appeals seek reduction of sentence. Indeed none of us has before sat on an appeal such as this which seeks to increase the sentence. There is no doubt, however, of the court's power to increase sentence. The case of Wilson v Webster [1998] 2 FCR 575 illustrates the use of the power. However it is a power to be exercised sparingly: see the judgment of Lawton LJ in Linnett v Coles [1987] QB 555. More recently the power has been equated to the power of the Criminal Division of

this court to increase sentence on an Attorney-General's reference. It was Lord Justice Judge in the case of Neil v Ryan [1998] 2 FLR 1068 who said at 1069F:

"Before considering any increase in sentence or changing the impact of any sentence adversely to the defendant we have to remind ourselves that this is a power which must be used sparingly. The sort of circumstances in which it could reasonably be used would be to approach the problem as if the case were a reference by the Attorney-General under the Criminal Justice Act 1988. Plainly this is not a case which comes within that jurisdiction, but a sentence should not be increased under that Act unless the court is satisfied that it is not merely lenient, but 'unduly' lenient. And, what is more, if the court reaches that conclusion, when deciding the appropriate level of sentence the court must also reflect the element of what is sometimes described as double jeopardy."

2. That then defines our primary task in the present appeal, initiated by the wife's notice of 3 October 2003.

3. However there has been less guidance on the inter-relationship of the Family Law Act 1996 and the Protection from Harassment Act 1997. When this case was first listed on 27 October we noted that there was insufficient information in the papers on the parallel prosecutions of the husband under the Protection from Harassment Act 1997. Furthermore the otherwise helpful skeletons prepared by junior counsel did not address the correlation of sentences passed on the husband in the family proceedings and sentences which he had received or was yet to receive in the criminal justice system. Accordingly we adjourned the appeal to the 30 October. In that brief interim Mr Ben Hytner QC has been instructed to lead Miss Goodman. He has inherited the brief from Mr Timothy King QC and we have helpful skeletons from each. Equally Miss Macur QC has been instructed to lead Mrs Pratt and we have from her a chronology of the Protection from Harassment Act proceedings as well as helpful additional skeletons. So our secondary task is to consider the interaction of the two statutes and the interaction of parallel proceedings brought under each in different justice systems. We will first record the history, consider the legislative provisions and the authorities, then express our conclusions on the appeal and finally give guidance for the future.

### **The History**

4. It is necessary to record the essential chronology of the efforts of the courts in the family justice system and the criminal justice system to protect the wife from domestic violence and to punish the husband for his persistent breaches of their orders. As a prelude to the history of the litigation we only record that the husband and the wife commenced their relationship in about 1992. Their only child, G, was born in 1994. They were married in June 2000. By May 2002 their relationship had become extremely fraught. On 29 May the wife was subjected to a night of intimidation and threats to kill.

5. On 30 May 2002 the husband was arrested and charged with threats to kill and two charges of common assault. He was released on bail with conditions not to approach the wife.

6. However on 2 September 2002 the husband visited the former matrimonial home and threatened the wife. Accordingly on the following day he was brought before the court for breach of bail conditions and remanded in custody until 9 October.

7. Before that hearing took place the wife commenced proceedings under the Family Law Act 1996. On 4 September the district judge made an order without notice restraining the husband from approaching within 100 yards of the wife's home, from threatening violence against her and from molesting her. The orders were extended on 6 and 13 September, again without the husband's attendance, and the power of arrest was attached.

8. On 8 October the husband did appear, but in custody, and the order was extended until 31 January 2003.

9. On the following day the husband appeared in the crown court. He pleaded not guilty to the charges laid on 30 May and was remanded in custody. The trial was fixed for 22 October but the wife did not attend and accordingly the trial was adjourned for seven days and bail was granted with conditions.

10. The husband took advantage of bail persistently to harass and threaten the wife between 27 and 30 October. For these breaches of the Family Law Act injunctions he was sentenced on 31 October to a term of 56 days imprisonment.

11. On his release at the end of November the husband appeared before the crown court and pleaded guilty to the two counts of assault. No evidence was offered in respect of the threats to kill and the husband was released on bail to appear for sentencing on 18 December. He did not appear on that day and a warrant was issued for his arrest.

12. The arrest was not effected until 4 February and in the interim the husband seized the opportunity to resume his campaign of harassment and threats. Harassment between the 18 December 2002 and 4 January 2003 was made the subject of charges under section 2 of the Protection from Harassment Act 1997 in the magistrates court. Harassment on 11-12 and 16 January and 1 February 2003 was made the subject of a committal application for breach of the Family Law injunctions.

13. Accordingly in February 2003 the husband appeared before the crown court, the magistrate's court and the county court for sentence. On 4 February, when arrested on the warrant, he was sentenced to a community rehabilitation order of twelve months duration with a direction to attend the Domestic Violence Programme on

each of the common assault charges to run concurrent. For breach of bail he received a twelve months conditional discharge.

14. On the following day the husband appeared in the magistrate's court and pleaded guilty to the harassment charge. The matter was adjourned for sentence and he was granted bail with conditions.

15. On 18 February Judge Lynch in the county court sentenced the husband to four months' imprisonment for his contempt in breaching the non-molestation orders.

16. Sentence was passed in the magistrate's court on 26 March. The husband received a two year conditional discharge and a restraining order was made under section 5 of the Protection from Harassment Act 1997 without limit of time.

17. On 17 April the husband was released from the sentence imposed by Judge Lynch. On that same day occurred the first alleged breach of the restraining order. Further breaches were alleged on 19 April, 5 May, 6 May and 15 May. The husband was charged with these five breaches and a pre-trial review in the magistrate's court was fixed for 4 November 2003.

18. On 24 July the wife applied for the husband's committal alleging four breaches of the Family Law Act injunctions, extended to six by amendment of the 3 August. The six breaches were all alleged to have occurred between 25 April and 26 June 2003. The only breach common to the committal application and the charges in the magistrate's court was the breach of 15 May 2003.

19. The husband's response to this third committal application was both initially and by a statement made as late as 11 September 2003 to deny all the wife's allegations. However at the hearing before His Honour Judge Harris on 16 September 2003 he admitted not only the breach of 15 May but also the sixth and final breach, namely sending a number of threatening and abusive text messages to the wife's current partner between 20 and 26 June 2003. For reasons which we will subsequently examine, Judge Harris sentenced the husband to four months imprisonment concurrent on each of the admitted breaches.

### **The Legislative Material**

20. Part IV of the Family Law Act 1996 is headed Family Homes and Domestic Violence. Its provisions are very familiar to family lawyers. Sections 42-49 inclusive deal with non-molestation orders. Section 42 empowers the court to grant non-molestation orders and section 47 to attach a power of arrest.

21. The provisions of the Protection from Harassment Act 1997 are less familiar to lawyers who do not practise in the magistrate's courts. Accordingly we set out in full sections 1-5 inclusive.

## **"Prohibition of harassment**

### **1.**

- (1) A person must not pursue a course of conduct --
  - (a) which amounts to harassment of another, and
  - (b) which he knows or ought to know amounts to harassment of the other.
- (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
- (3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows --
  - (a) that it was pursued for the purpose of preventing or detecting crime,
  - (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

## **Offence of harassment**

### **2.**

- (1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.
- (2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.
- (3) In section 24(2) of the Police and Criminal Evidence Act 1984 (arrestable offences), after paragraph (m) there is inserted --

"(n) an offence under section 2 of the Protection from Harassment Act 1997 (harassment)."

## **Civil remedy**

### **3.**

- (1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
- (2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.
- (3) Where --

(a) in such proceedings the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and

(b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction,

the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

(4) An application under subsection (3) may be made --

(a) where the injunction was granted by the High Court, to a judge of that court, and

(b) where the injunction was granted by a county court, to a judge or district judge of that or any other county court.

(5) The judge or district judge to whom an application under subsection (3) is made may only issue a warrant if --

(a) the application is substantiated on oath, and

(b) the judge or district judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

(6) Where --

(a) the High Court or a county court grants an injunction for the purpose mentioned in subsection (3)(a), and

(b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction, he is guilty of an offence.

(7) Where a person is convicted of an offence under subsection (6) in respect of any conduct, that conduct is not punishable as a contempt of court.

(8) A person cannot be convicted of an offence under subsection (6) in respect of any conduct which has been punished as a contempt of court.

(9) A person guilty of an offence under subsection (6) is liable --

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

### **Putting people in fear of violence**

#### **4.**

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

(3) It is a defence for a person charged with an offence under this section to show that --

(a) his course of conduct was pursued for the purpose of preventing or detecting crime,

(b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

(4) A person guilty of an offence under this section is liable --

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

(5) If on the trial on indictment of a person charged with an offence under this section the jury find him not guilty of the offence charged, they may find him guilty of an offence under section 2.

(6) The crown court has the same powers and duties in relation to a person who is by virtue of subsection (5) convicted before it of an offence under section 2 as a magistrates' court would have on convicting him of the offence.

## **Restraining orders**

### **5.**

(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence under section 2 or 4 may (as well as sentencing him or dealing with him in any other way) make an order under this section.

(2) The order may, for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which --

(a) amounts to harassment, or

(b) will cause a fear of violence,

prohibit the defendant from doing anything described in the order.

(3) The order may have effect for a specified period or until further order.

(4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.

(5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.

(6) A person guilty of an offence under this section is liable --

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both."

22. The legislative scheme is relatively clear. Section 2 creates a simple offence of harassment for which the maximum sentence is six months on summary conviction. Section 4 creates the more serious offence of putting another in fear of violence. The maximum sentence on summary conviction remains six months but for a conviction on indictment the maximum term is five years. By section 5 the court sentencing for an offence under either section 2 or section 4 may make a restraining order. Subsequent breach of a restraining order is punishable on summary conviction by a term not exceeding six months but on conviction on indictment the maximum sentence is again five years.

23. Perhaps unusually in a criminal statute, section 3 creates a civil remedy. The victim of actual or apprehended harassment may launch a damages claim in either the High Court or a county court. The civil court may also grant an injunction restraining harassment. In the event of breach of the injunction application may be made to the court for a warrant for the arrest of the defendant. However section 3(6) provides additionally that breach of an injunction within the civil proceedings also constitutes a criminal offence. Conviction for that offence is punishable by a maximum sentence of six months on summary conviction or by a maximum sentence of five years on conviction on indictment. This civil remedy appears to be seldom used.

24. Miss Macur points out that, by virtue of section 24(1)(b) of the Police and Criminal Evidence Act 1984, an offence under section 3(6) is classified as an arrestable offence, since it may result in a sentence of five years imprisonment. Thus if the breach of injunction is treated as a crime arrest may be effected without the need for an application for a warrant under section 3(3).

25. Section 3(7) and (8) are also remarkable in ensuring that there can be no duplication of process. If the breach of the injunction is punished as a contempt of court there can be no conviction in the criminal justice system under section 3(6). Equally if the breach of injunction results in a criminal sentence it cannot also be punished as a contempt of court.

### **The Authorities**

26. Little has been said in the previous decisions of this court on the inter-relationship between civil sentences for contempt and the sentences in the related criminal proceedings. In the case of *Wilson v Webster* Sir Stephen Brown P observed:

"It is believed that it may be that criminal proceedings will follow in relation to this same matter. I have to say that that is of no concern to this court which is dealing with the matter of contempt. That is not a matter which can affect this appeal."

**27.** Sir Patrick Russell in his concurring judgment said:

"I agree with the order proposed by Sir Stephen Browne P and would only add by way of emphasis that the order should not inhibit the prosecution of the respondent, which we are told is pending."

**28.** However in the guideline case of Hale v Tanner [2000] 1 WLR 2377 this court specifically considered parallel proceedings under the Protection from Harassment Act 1997. Before the court was the contemnor's appeal against sentence for breach of Family Law Act injunctions. However in the course of her judgment Hale LJ recorded at 2379H the following:

"We have been told today, and in my view it is relevant to this appeal, that the proceedings in the Oxford Magistrates' Court were under the Protection from Harassment Act 1997 and related to complaints of harassment of Teresa Mahoney between 8 April and 29 December 1999. Thus, there is some overlap between the subject matter of these proceedings and the subject matter of those magistrates' court proceedings. The outcome, we are told, was a restraining order prohibiting the appellant from contacting either Miss Mahoney or the applicant."

**29.** That is no doubt the foundation for the following paragraph which concludes the guidance given by Hale LJ:

"10. In many cases the court will have to bear in mind that there are concurrent proceedings in another court based on either the same facts, or some of the same facts, which are before the court on the contempt proceedings. The court cannot ignore those parallel proceedings. It may have to take into account their outcome in considering what the practical effect is upon the contempt proceedings. They do have different purposes and often the overlap is not exact, but nevertheless the court will not want, in effect, the contemnor to suffer punishment twice for the same events."

### **The Present Appeal**

**30.** It is now necessary to look in some detail at the judgment of Judge Harris. He began with a careful review of the history. He noted that Judge Duncan must inferentially have accepted the wife's case to the effect that the husband was a drug abuser with a controlling, possessive and aggressive personality. He noted that in a threatening communication of 11 January 2003 the husband had said: 'slag, slut, I am going to do you in. I don't care if I die. I could have got you on Sunday night outside your mate's house, but I will wait'.

**31.** In relation to the visit of the 16 January 2003 Judge Harris said:

"It must have been a terrifying experience for the applicant to find him unexpectedly in her house. He behaved towards her in a deplorable and aggressive way, including making a threat that he would return that night and she was 'going to die'."

**32.** Judge Harris then recorded the breaches for which he was sentencing the husband as follows:

"Firstly, on 15 May 2003, or perhaps a little earlier, he sent to the applicant through the postal system a letter containing four Stanley knife razor blades and two newspaper clippings. The first newspaper clipping said: 'Have you made your will yet? Do it in the comfort of your home.' The second newspaper cutting concerned a funeral director. The applicant's name and address were handwritten on the front of the envelope and on the back was inscribed the word 'Soon'. That was a deeply upsetting and frightening letter for any person to receive, let alone a woman in the nervous state of the applicant in the context of history of this case.

Secondly, the respondent sent to the applicant's boyfriend, in June of this year, a series of text messages of an abusive and threatening nature. Photocopies of the messages sent on 20, 21, 25 and 26 June are annexed to the applicant's affidavit as Exhibit LL/1. Of those messages, the most serious is in these terms: 'Tell the slut when she is home she will die with you before the trial. Promise. I warned you.'

**33.** Judge Harris concluded this summary with the following findings:

"The descriptions of the fear of the respondent's conduct suffered by the applicant are, in my view, entirely credible and I accept them in their totality."

**34.** Judge Harris then made two significant findings as follows:

"In reality, you have been waging your campaign of harassment from the summer of 2002 up until June of this year. The applicant's only guaranteed respite from this has been those periods when you have been in custody. I do not accept that, in June 2003 or thereabouts, you decided to terminate that campaign and to develop a new life for yourself. In the history of this case I find as a fact that, had these proceedings not intervened, you would have carried on that campaign of harassment which I have previously described.

In reality, I have seen nothing at all to suggest that you are sorry for your conduct either by apology to the court or, more importantly, the applicant; nothing really to suggest that you have learned the error of your ways so as to require me to temper appropriate punishment and deterrence with leniency. As I expressed to Ms Pratt in argument, I was very struck by the lies you told in your affidavit as recently as a few days ago.

**35.** Given that review of the history and those findings how did Judge Harris arrive at sentences totalling four months in all? Essentially he explained that he had been moved by Mrs Platt's mitigation to repeat rather than increase the sentences imposed by Judge Lynch. The judge's reasoning is contained in two paragraphs at page 19 of his judgment as follows:

"When I came into court, I had every intention of passing a sentence of committal well in excess of the four months you last received by Judge Lynch. But I have reflected on the information provided to me by Ms Pratt as to changes in your life, albeit not necessarily in your attitude to the applicant. In particular, I have considered the fact that now you are living, apparently permanently, in a different area, with the establishment of a life separate from the applicant. There are two

further elements which I accept. Firstly, you now have a job near to the place where you live provided for you by Mr Gizzi. Mr Gizzi has demonstrated that he is a loyal and supportive employer, and I think the security of that job and his influence on you might have the effect of moderating any impulse to further abusive conduct of this sort. Secondly, although there is no corroborative evidence, I am prepared to act on the assumption that you have now established a stable relationship with a girlfriend, which might have the same effect.

Because of those two factors and because of your willingness to agree to an exclusion from entering either Liverpool or Towyn for the time being, I am prepared to reduce the sentence I would otherwise have passed upon you. But I have no doubt, even in the light of that mitigation, that a significant sentence of imprisonment by way of committal is required, firstly, to deter you from any such further conduct in the future; secondly, to mark the complete disapproval of this court of your conduct, taken in context; and thirdly, to make it clear that orders of this court are to be obeyed. But I will reduce the level of sentence I had intended to pass to the same level as was imposed by Judge Lynch."

**36.** We have some difficulty with that reasoning. It appears to us inconsistent with the first finding on the previous page of the judgment, recorded in paragraph 34 above. That finding surely precluded a sentence on the basis that the husband had learnt his lesson and turned over a new leaf.

**37.** Furthermore, as Mr Hytner points out in the course of what for him was the novel experience of a plea in aggravation, the job was no more than a job offer, and the girlfriend was just that and certainly not a partner or a cohabitee. Mr Hytner further emphasises that the husband's removal from Liverpool was not voluntary but a requirement of his bail conditions. Exclusion from the City of Liverpool adds little to the protection contained in the original injunction and repeated in all subsequent injunctions.

**38.** Mr Hytner draws the court's particular attention to the sentencing guidelines formulated by the Criminal Division for convictions under the Protection from Harassment Act 1997. He cites the authority of *Liddle v Hayes* [2000] 1 CR APP R(S) and the following passage from the judgment of Curtis J:

"For a second offence longer sentences of about 15 months on a plea of guilty would, in our view, be an appropriate starting point, and from then on it is possible to see from the maximum of 5 years fixed by the statute for this offence where each case fits into the statutory framework, working from the figure of 15 months, which may be appropriate on a plea of guilty."

**39.** Whilst not submitting that the sentencing exercises can be correlated by a reduction to 40% to reflect the proportionate difference in the maximum sentences set by statute in the two fields, he nevertheless submits that six months would be appropriate for a second offence in a case with this history and therefore that Judge Harris for a third offence should have adopted a considerably higher starting point,

particularly in a case where the plea of guilty was too belated to deserve much reflection.

40. Miss Macur does not dispute Mr Hytner's presentation of the husband's present circumstances. Rather she reminds us of Judge Harris' very great experience in this field. She emphasises that it is apparent that the judge was endeavouring to break the cycle of recurrent proceedings and a vista of future confrontations between the husband and the courts. The sentence was buttressed by further protection for the wife and, in reserving the case to himself, Judge Harris gave the husband the clearest warning that there would be heavy punishment for any future breach.

41. Despite the considerations urged by Miss Macur we are of the clear opinion that the sentences of four months' imprisonment concurrent were not merely lenient but unduly lenient. This was a case with an appalling history of intimidation and abuse. At every turn the husband had flouted the orders of the court and seized any leniency as little more than an opportunity to resume his campaign against the wife. The two breaches in respect of which he was sentenced were both individually extremely sinister in their presentation and implication. We are of the opinion that a sentence of less than ten months' imprisonment would have been unduly lenient. We only fixed a lesser sentence to reflect the element of double jeopardy. Accordingly the sentence which we passed on 30 October was a sentence of eight months' imprisonment concurrent on each of the admitted breaches.

## Guidance

42. As this appeal demonstrates it is not difficult for a persistent course of domestic violence to generate concurrent proceedings in three courts. Furthermore, as this appeal also illustrates, they may not be brought in relation to the same incidents or offences. In other cases, the same incidents are the subject of criminal and of family proceedings.

43. The victim of domestic violence has some choice of civil remedies. Protection may be sought under section 42 of the Family Law Act and under section 3 of the Protection from Harassment Act 1997. In our experience section 42 is the more usual choice. One attraction of the Family Law Act may lie in the court's ability to attach a power of arrest to the non-molestation injunction, whilst s.3(3) of the Protection from Harassment Act necessitates a separate application for a warrant for arrest in the event of breach of the court's injunction.

44. On the other hand s.3(2) of the Protection from Harassment Act offers the prospect of compensatory damages, which may be attractive in cases where the perpetrator has the means to satisfy an award. There would seem to be no bar on concurrent applications under both ss.42 and s.3 of these two Acts. In that event the application should be issued in the same court, consolidated and tried by a judge with jurisdiction in both civil and family.

45. In the criminal justice system the victim has little control of the proceedings. Charges alleging offences under section 3, 4 or 5 of the Protection from Harassment Act may be initiated in either the magistrates' court or the crown court. In a case such as the present where there have been persistent offences some may be the subject of summary proceedings and some may proceed on an indictment. The conduct of the criminal proceedings is a matter for the police and the Crown Prosecution Service.

46. We feel that it would be helpful to offer some guidance on the inter-relationship between the Family Law Act 1996 and the Protection from Harassment Act 1997 as well as on the management of concurrent proceedings in the family, civil and criminal justice systems. The guidance which we give supplements that given by Hale LJ in *Hale v Tanner*.

47. However effectively the proceedings are managed a perpetrator may face sentence for the same act which amounts to both a breach of an injunction made in family proceedings and also a crime under the Protection from Harassment Act. Of course the sentencing courts do not share the same objective and operate in different ranges. The judge in family proceedings has to fit a custodial sentence within a range of 0-24 months. An important objective for him is to uphold the authority of the court by demonstrating that its orders cannot be flouted with impunity. Nevertheless there will be a shared deterrent objective in the punishment of domestic violence by imprisonment.

48. Clearly therefore the first court to sentence must not anticipate or allow for a likely future sentence. It is for the second court to sentence to reflect the prior sentence in its judgment in order to ensure that the defendant is not twice punished for the same act. It is essential that the second court should be fully informed of the factors and circumstances reflected in the first sentence. The defendant is often publicly funded to defend the proceedings in each court and may well have different solicitors and counsel in each justice system. There is therefore an obligation on the first court to ensure that the basis of its sentence is fully expressed and that a transcript of its judgment is made available to the second court, as Judge Harris directed in the present case.

49. Experience suggests that proceedings in the criminal justice system are likely to require more extensive preparation and to prove more protracted than committal proceedings in the family justice system. Therefore the application to commit should be issued promptly after the alleged breach and listed without delay. That discipline will ensure that, if proved, the contempt will have been punished before any sentence in parallel criminal proceedings.

50. Within the constraints of the two year limit on sentences for harassment in breach of protective injunctions granted under section 42 of the Family Law Act and the different scale which this necessarily involves, judges should as far as possible ensure that sentences passed under section 42 are not manifestly discrepant with

sentences for harassment charged under section 3, 4 or s5 of the Protection from Harassment Act 1997. The experience of counsel before us is that the level of sentencing under the Protection from Harassment Act is very significantly higher than the present level of sentencing for comparable incidents leading to committal for breach of Family Law Act injunctions. Of course domestic violence may also be subject of other criminal charges varying from common assault to murder. The more serious the offences, the less scope there will be, in view of the two year limit, to maintain any relationship between family and criminal court sentences-- if indeed such cases are brought before the family court at all.

**51.** As this case illustrates, sentences of imprisonment for harassment do not necessarily deter repetition. Those who molest others are usually trapped in an obsessional emotional state derived either from a past relationship (unresolved feelings of hate or love) or from a fantasy (compelling feelings of attachment to a near stranger). For domestic violence, anger management programmes are widely available and referrals from the court have become commonplace. More extensive emotional management programmes might prove effective in helping some offenders to resolve such emotional attachments.

**52.** The above advice is based upon the existing procedures in the criminal and civil courts dealing with the same issues arising from the violence of one spouse or partner against the other. This appeal shows the unsatisfactory nature of the present interface between the criminal and family courts in such cases. It is expensive, wasteful of resources and time-consuming. It is stressful for the victim to move from court to court in order to obtain redress and protection from the perpetrator. Other jurisdictions are attempting to solve this problem. The State of New York is setting up integrated courts to hear both criminal and civil proceedings before one tribunal. The publication of the Domestic Violence Crime and Victims Bill is an opportunity, we would suggest, for a reconsideration of the present dual system and an opportunity to look into the possibility of integrated courts to see if they might avoid the problems which now arise.

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