

Submissions on the “Preliminary Proposed Amendments to the Domestic Violence Ordinance” (“DVO”)

1. The Government’s Preliminary Proposals

The Law Society’s Family Law Committee’s Report on the *Domestic Violence Ordinance*, (“the *Report*”), published in December 2005 made 37 recommendations to amend the DVO and on ancillary matters, including the establishment of a true Family Court. There is general consensus that the legislation which came into effect on 19 December 1986 is outdated and fails to meet current needs. It is worth repeating the observations in the *Conclusion* to the *Report*:

“The DVO is outdated and amendments to this piece of legislation should be a top priority for the Administration.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 Health Welfare and Food Bureau (“the Bureau”) has the responsibility to co-ordinate the Administration’s proposals to amend the DVO, and members of the Family Law Committee met with representatives of the Bureau on 5 June 2006 to discuss the “*Government’s Preliminary Proposals*”. The Family Law Committee was very disappointed by the Bureau’s narrow terms of reference to amend the DVO and to the fragmented approach on policy to address the problems.

2. The DVO

The Bureau indicated its main focus will be on expanding protection under the DVO to persons involved in a “*couple-relationship*” and it does not favour widening the scope of the Ordinance to cover “*domestic relationships*”. We consider this to be an unrealistic approach to the problem given the reality of Hong Kong society today. The *Report* reviewed the

legislation in comparable jurisdictions and *all* base their legislation on “*domestic relationships*” not the Bureau’s narrow proposal which focuses on “*couples*”.

The Bureau’s representatives expressed concern that expanding the Ordinance to cover “*domestic relationships*” could involve disputes with domestic helpers or even landlord and tenants. The Family Law Committee pointed out that its recommendation excluded these contractually-based relationships and any amendments to the Ordinance can and should be clearly drafted to reflect this proposal.

It should be noted that the preamble to the DVO is very wide and states the principle aim of the legislation is:

“To provide protection of persons from domestic violence and for matters ancillary thereto”

The Administration should heed the second limb which specifically refers to “*matters ancillary thereto*” and consider amendments which will be effective rather than merely providing, as we see it, minor changes. The consensus amongst practitioners is “*the DVO is not fit for purpose*” and if the very limited proposals to reform the legislation are adopted, we consider it will remain an ineffectual piece of legislation. Domestic violence cannot be compartmentalised. ***Domestic violence involves families, not “couples”***. The Family Law Committee is very concerned that the opportunity to improve the legislation should not be lost and that short-sighted policies should not be adopted.

3. “Who Can Apply”? and “Who is Protected”?

The Family Law Committee welcomes the Administration’s proposals to expand the scope of the DVO to cover:

- “*former spouse and former co-habitees*” and
- “*enable a next friend to make an application on behalf of a child under the age of 18*”

“Who is Protected”?

The other recommendations under this section of the *Report*: “*Who is Protected*” appear to have been dismissed by the Bureau because of its decision to focus on “*couples*”.

The Law Society submits amendments to the DVO should cover “*domestic relationships*” which will include the following:

(a) “Parents of a child who have never co-habited”

e.g. a married man has a child by another woman but they have never co-habited;

(b) “Same sex couples”

The Bureau indicates “*this would be difficult*” but fails to provide *any principled* reason to exclude such couples from the scope of the Ordinance.

Under Article 25 of the Basic Law: “*All Hong Kong residents shall be equal before the law*”.

This is an entrenched right which the Bureau fails to address.

There appears to be an irrational leap in logic that providing protection to persons in same sex relationships would be tantamount to the Government providing recognition of “same sex marriages”! The Administration must provide reasons based on principles not prejudice to justify its stance.

It is interesting to note the Bureau justified its proposals to impose a time limit of 24 months on the validity of Powers of Arrest (“POA”) because of “human rights” concerns, without citing specifics. It thus appears the Bureau is willing to “defend” an abuser’s human rights but not the entrenched rights of a victim!

The Family Law Committee re-iterates its view that the duration of the POA should be left to the discretion of the court “*as it deems fit*” as there appears to be no explanation for this arbitrary time limit.

(c) **“Extended family members”**

The Bureau indicated its intention is to adopt an incremental approach to reform and that it does not, at this stage, contemplate expanding the DVO to cover “*siblings*”. It has yet to make a final decision on whether to include “*parents and in-laws*” as there are apparently objections from other Bureaux. The Committee received the following précis of the “rationale” for this policy decision:

- Including “parental relationship” may make the situation “more tense”
- Children will not be able to live with their parents
- In future, these children will not look after their parents

We submit the reasons put forward are wholly without merit or rationality and cannot be the basis on which to formulate principled policies.

(d) **Incapacitated persons**

This class of persons remains to be addressed.

4. Definition of “Domestic Violence”

The existing legislation does not define “*domestic violence*”. The *Report* addressed this issue and recommended that a definition should be included in the new legislation as follows:

“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.”

The New Zealand legislation provides:

“(A) 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.”

(B) 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.*

(C) 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.

(D) 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 (C) above which does not involve actual or threatened physical or sexual abuse.”*

The Bureau indicated there is no need to define “*domestic violence*” and it will not be making any proposals.

The Family Law Committee expresses its disappointment with this stance.

If there is going to be a holistic policy there must be a definition of “*domestic violence*” in the Ordinance and one which is as wide as possible. The Bureau’s approach towards reform appears to be one of changing as little as possible as if it is bound by the existing legislation’s outdated framework. It appears the Bureau fails to appreciate that legislation is introduced to *reflect* the Government’s policy objectives and that the DVO requires major, not minor surgery.

A definition of “*domestic violence*” in the Ordinance will establish the scope of the new legislation and the Government’s policy objectives. Hong Kong citizens recognise “*domestic violence*” must be tackled and that “*domestic violence*” covers a wide range of unacceptable behaviour not just physical assaults. The Bureau should look at the current proposals to reform civil procedure in Hong Kong which provides a clear example of the reform process as it sets out the principles and the reforms which will achieve those principles. The Bureau should review its apparent piecemeal approach on amending the DVO.

5. Types of Orders

The Law Society welcomes the proposal that the court will be given the power to:

“vary any existing custody/access order in respect of the child concerned, when the court makes an order to exclude the abuser from the matrimonial home or from a specified area in accordance with section 3(1)(c) of the DVO”.

The Bureau in this instance accepts there are other issues involved when domestic violence has taken place in the family unit and proposes that the court should have the power to amend custody /access orders in order to protect the children of the family.

However, the Bureau has indicated that it does not see the need to provide the court with the additional jurisdiction to grant other consequential orders in relation to the same incidents of domestic violence. If the Bureau’s approach is adopted this would mean the Court could not take a comprehensive approach and deal with other ancillary problems arising from the same acts of domestic violence, but will only be able to deal with the consequences of any physical acts i.e. immediate protection from further physical harm, including custody/access orders.

The Bureau has indicated *it does not want to encourage litigation* as they do not want the court to be flooded with applications. We submit this limited proposal for reform will not achieve that objective. It will in fact result in more ancillary applications and thus result in wastage of finite judicial resources as the victim and the children often require additional orders from the court.

Practitioners are only too aware of the lengthy waiting time for an appointment in the Family court; extending the jurisdiction of the court will, we submit, enable matters to be dealt with in a comprehensive manner; save costs not only for the victims but also for the taxpayer; and victims will not have the ordeal of having their matters dealt with on a piecemeal basis.

The Law Society made the following recommendations on additional Types of Orders in the *Report*:

(a) Renaming the “injunction order” to “Restraining and Protection Order (“RPO”)

This clearly identifies the nature of the order as the law should be easily understood wherever possible, by the public. *Molestation*” is not defined in the DVO. The phrase “*non-molestation order*” is not user-friendly and fails to convey to the abuser the nature of the order.

(b) Counselling orders

A Pilot Scheme on counselling programmes was launched in March 2006 and a full review will take place in March 2008. The Law Society appreciates the Social Welfare Department and the NGOs will need to need to fine tune their counselling programmes in order to offer the most effective programmes to both victims and abusers.

However, we fail to understand why this should prevent the Administration from making proposals to amend the DVO during the current exercise. The court should be provided with the jurisdiction to make an order that the parties should attend counselling. The Government has been provided with significant funds to tackle the problem and there does not appear to be an adequate reason to put this remedy out of consideration for at least another two years.

Dr. Edward Chan highlighted in his Report: “*Study on Child Abuse and Spouse Battering*” the existence in Hong Kong of programmes to counsel abusers:

- Hong Kong Family Welfare Society started a treatment group for male batterers as long ago as 1995
- Harmony House started a men's group treatment programme called “*The Third Path*” in 2001
- SWD FCPSU (NTW) has been running groups for male batterers since 2001.

We consider it is sensible to extend the jurisdiction of the court to enable it to order counselling. We do not agree with the Bureau’s approach to simply provide “informal briefings” to the Family Court judges. If counselling orders are not included during this exercise then judges will not have the power to order an abuser to participate in such programmes at the end of the Pilot Scheme in March 2008.

When will the court have this power?

When would there be a legislative slot - late 2008? or 2009? or 2010?

This stance points to the fact that a very piecemeal approach is being adopted, and the Bureau is failing to see the bigger picture.

We submit that in any event the Bureau should not lose the opportunity to include counselling programmes in its proposals and at the very least it could consider attaching a proviso that the new provision will not come into force “*until a date to be announced.*”

(c) Furniture and personal chattels orders

Each case of domestic violence has to be considered on its own facts. In reality, the victim and the children often leave the home and have to seek alternative accommodation rather than the abuser. In such cases they need to have furniture and their personal chattels. The court will be able to assess the situation and make an appropriate order. If not, there will have to be separate applications involving court time – bearing in mind the application will be of limited scope, and the judge will have to spend additional time to review the whole matter when all this could have been done during the *initial* hearing, legal costs and unnecessary stress on the victims.

(d) Compensation orders

These would cover the actual costs incurred by the victim as a direct result of the abuser's acts of violence e.g. medical and dental fees, legal fees. The purpose of this order is based on the "*abuser pays principle*" otherwise the Hong Kong taxpayer bears the costs.

(e) Comprehensive interim orders

The Bureau can appreciate there is a link between domestic violence and the need to provide the court with the jurisdiction to deal with custody/access orders, but what about maintenance for the children at the time the injunction order is granted? If no existing orders are in place, and the court doesn't have this jurisdiction, victims will have to make separate applications for interim maintenance, and again clog the court lists with unnecessary interim applications.

(f) "Contact orders"

This order is linked with RPOs in 5(a) above as the current order of the court covers "*non-molestation*". The order would make it clear to the abuser that there should be no contact by any means including telephone, mobile phones, email etc.

(g) Stalking provisions

The Bureau fails to appreciate the reality that judges should have the widest discretion to make appropriate orders based on the facts of each case and not simply focus on violent physical acts against the victims. There appears to be a misunderstanding that by giving the court wide powers these will be used in each and every case when in fact the judge will make orders tailored to the individual circumstances of the parties.

We submit the Bureau can adapt the provisions in the New Zealand and Ontario legislation to cover "stalking" which has been recognised worldwide as an element of domestic violence. It needs to be addressed as it is completely lacking in our legislation.

6. Adopt the Recommendations in the Report

The Bureau has not yet published a comprehensive policy paper or identified the principles it will adopt to tackle this problem. The approach we have seen to date is fragmented. We have been advised that the Government has allocated significant sums to deal with the problem but we doubt that the proposals to amend the DVO will achieve the goal to make this piece of legislation an effective tool.

The Bureau fails to appreciate the process from the view of the victim and by failing to make comprehensive amendments to the legislation will perpetuate the outdated system which is failing to provide protection. If the system is going to make a difference then the victim should not have to face the prospect of several visits to the court in order to obtain comprehensive relief.

The Family Law Committee expresses its disappointment with the limited proposals put forward by the Government. As practitioners with experience of the DVO and its deficiencies, we urge the Bureau to reconsider its *Preliminary Proposals* and adopt the recommendations in the *Report*.

**The Law Society of Hong Kong
The Family Law Committee
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