

The Administration's Review on Domestic Violence Ordinance - Preliminary Proposed Amendments

(I) The Administration's Preliminary Proposed Amendments to the Domestic Violence Ordinance (DVO)

	Details of Proposals	Justifications of the Administration's Proposed Amendments
1.	Expand the scope of the DVO to include former spouses and former co-habitees so that they can make application for an injunction order under the DVO.	<p>At present, section 3 of the DVO states that the court may grant an injunction on an application by a party to a marriage, if it is satisfied that the applicant or a child living with the applicant has been molested by the other party to the marriage. An injunction order may contain any or all of the following provisions-</p> <ul style="list-style-type: none"> (a) a provision restraining that other party from molesting the applicant; (b) a provision restraining that other party from molesting any child living with the applicant; (c) a provision excluding that other party from the matrimonial home, or from a specified part of the matrimonial home, or from a specified area; (d) a provision requiring that other party to permit the applicant to enter and remain in the matrimonial home or in a specified part of the matrimonial home. <p>According to section 2(2) of the DVO, the provisions also apply to the cohabitation of a man and a woman. However, the court should make reference to section 6(3) by taking into account the permanence of that relationship if it grants an injunction containing</p>

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		<p>a provision mentioned in section 3(1)(c) or (d).</p> <p>Having regard to the fact that most of the reported domestic violence cases are related to former spousal and former co-habitation relationships and making reference to comments of concerned groups and overseas legislation, we propose to extend the scope of the DVO to include former spouses and former co-habitees so as to strengthen the protection for victims of domestic violence.</p>
2.	<p>Amend the DVO to enable a next friend of a child under the age of 18 to make application for an injunction order on behalf of the child under the DVO and remove the requirement that the child has to be living together with the applicant.</p>	<p>In accordance with Order 80 rule 2 of the Rules of the High Court (Cap 4A) and the Rules of the District Council (Cap 336H), a child under 18 is required to bring legal action by a next friend and defended by a guardian ad litem.</p> <p>To render better protection to children under the age of 18, we suggest amending the law so that a next friend of the child may apply for an injunction order on behalf of the child under the DVO. This proposal will on the one hand render better protection to children, and on the other hand it is also compatible with the existing legal system and principles. According to legal advice, a next friend usually includes the family members or relatives of the child concerned, such as parents, elder brothers and sisters, grandparents, uncles and aunts etc. We also propose to remove the requirement that the child has to be living together with the applicant.</p>

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3.	Amend the DVO to the effect that when the court makes an order to exclude the abuser from the matrimonial home or from a specified area in accordance to section 3(1)(c), it can also vary any existing custody/access order in respect of the child concerned.	<p>At present, the court may make a custody or access order in respect of a child by his/her parent(s) in a divorce proceeding or under other circumstances as provided in various matrimonial related legislation. Under section 3(1)(c) of the DVO, the court may make an exclusion order, excluding the abuser from the matrimonial home or from a specified area.</p> <p>As mentioned in Item 1 above, we will extend the scope of DVO to cover former spousal relationship. This may result in a scenario whereby the court may make an order under the DVO to exclude an abusing parent from getting near a child from his/her former marriage, whilst at the same time, the court might have in an earlier proceeding granted a custody or access order in respect of that child and that abusing parent. This may give rise to a question as to whether the exclusion order made under the DVO or the existing custody or access order will prevail. To avoid confusion, we propose to enable the court to vary any existing custody/access order in respect of the child concerned when making an exclusion order under section 3(1)(c) of the DVO.</p>
4.	Amend the DVO to empower the Court to attach a power of arrest	Under section 5(1) of the DVO, the court is empowered to attach a power of arrest to an injunction order, if it is satisfied that the other party has caused actual bodily harm to the applicant or the child concerned.

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		<p>To render better protection to victims of domestic violence and to prevent further abuses on the victims, as well as to provide for greater deterrence against the abuser, we suggest enabling the court to attach a power of arrest if it reasonably believes that there is likelihood that the respondent will cause any bodily harm to the applicant or the child concerned.</p> <p>According to section 5(2) of the DVO, if a power of arrest is attached to an injunction order, a police officer may arrest without warrant any person whom he reasonably suspects of being in breach of the injunction by reason of that person's use of violence or, as the case may be, his entry into any premises or area specified in the injunction. The police officer shall have all necessary powers including the power of entry by the use of reasonable force to effect that arrest.</p> <p>On the other hand, breaches of injunction orders are contempt of court. In accordance with the District Court Ordinance (Cap 336), the court is empowered to impose a fine and imprisonment on the person. This should provide sufficient deterrence and ensure compliance with the injunction order.</p>
5.	Amend the DVO by extending the duration of the injunction order	According to the existing DVO, the court may, under section 3(1)(a) and (b), grant an injunction order restraining the abuser from molesting the applicant and any child living with the applicant. No

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		<p>time limit on the duration of the injunction order is specified on the DVO.</p> <p>An injunction order issued under section 3(1)(c) and (d), i.e. an order excluding the abuser from the matrimonial home or from a specified area, or an order requiring the abuser to permit the applicant to enter and remain in the matrimonial home or in a specified part of the matrimonial home, can be in force for a period as the court deems necessary, but not exceeding 3 months. Likewise, the duration of the power of arrest can be in force for a period as the court deems necessary, but not exceeding 3 months. Section 7 of the DVO empowers the court to extend the period of an injunction order or a power of arrest for a further period so that the total period does not exceed 6 months from the date on which the order was granted or the power of arrest was attached.</p> <p>Having regard to the comments received, including those from the victims, that the existing limitation on the maximum duration of the injunction order and power of arrest lacks flexibility and is unable to render sufficient protection to the victims, we propose to extend the duration of the injunction order and power of arrest. For the sake of legal clarity and certainty, we consider that the maximum duration of the order granted should be specified in the law. We propose to amend the DVO to the effect that the order and the power of arrest attached may be in force for a period as the court deems necessary,</p>

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		and the court may extend the order or the power of arrest attached for one or more than one time, provided that the maximum period does not exceed 24 months (from the date on which the order was granted or the power of arrest was attached). This would tally with the period generally required for the matrimonial or custody proceedings.

(II) The Administration's Response & Consideration to other proposals in relation to the amendment of DVO

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1.	Expand the scope of the DVO to cover all familial relationships and persons who live in the same household, including same-sex cohabitantes.	Many different organizations and parties have made recommendations on the scope of the DVO, though there are differences in the coverage of the proposals made. Generally speaking, it has been proposed to expand the scope of the DVO to cover former spousal and former co-habitation (including same-sex cohabitantes) relationships, other familial relationships as well as persons living in the same household. The Women's Commission (WoC) has recommended that the scope of the DVO be extended to include former spouses and former co-habitees, and that it be explored, in the longer term, whether to extend the scope of the DVO to cover in-law relationship (such as parents-in-law and children-in-law) and persons living in the same household

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		<p>(excluding those being the other's employee, tenant, lodger or boarder), in order of descending priority. In our consideration on whether we should expand the scope of the DVO, we have taken into account the following factors: the current situation of domestic violence in Hong Kong, statistics collected by relevant departments and their anecdotal experience, the necessity for legislating, the implication of the proposed amendments on other legislation, the present legal system, and other government policies, as well as the impact on family relations in Hong Kong. Having considered all these factors, the Administration proposes to expand the scope of the DVO to include former spouses and former co-habitees. In addition, we will take the WoC's recommendation and explore, in the longer term, the feasibility of extending the scope of the Ordinance should be further extended to cover parents-adult son/daughter and parents-in-law relationships.</p> <p>As regards the proposed extension to include other persons living in the same household, we are of the view that interactions between family members who are not of spousal or co-habitation relationship are quite different from those of spouses and co-habitees. Statistics have also revealed that the majority of domestic violence cases are related to spousal and co-habitation relationships and their children. We therefore consider that there does not appear to be a strong case for further extending the scope of DVO to cover other familial relationships. That said, we would like to stress that any violence</p>

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		<p>act that amounts to an assault are liable to criminal charges under the relevant ordinances, regardless of the relationship between the abuser and the victim.</p> <p>On the proposal to expand the scope to include same-sex cohabitantes, we consider that the proposal will also have far-reaching implications on other legislation and government policies. The proposal is controversial and before the society and citizens have more thorough debate and reach a consensus on the subject, we will not consider the proposal for the time being.</p>
2.	Introduce a definition of “domestic violence” to include physical abuse, sexual abuse and psychological abuse .	<p>According to the present DVO, the court may grant an injunction on an application by a party to a marriage if it is satisfied that the applicant or a child living with the applicant has been molested by the other party to the marriage. The term “molest” is not defined in the DVO.</p> <p>Legal advice has pointed out that the term “molest” may include physical and psychological abuse, and “molestation” covers any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court. Information gathered from the Judiciary also reveals that the court has granted injunction on application under section 3 of DVO on the ground of psychological abuse. In other words, the existing law already applies to psychological abuse.</p>

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		<p>Whilst we are in support of adding clarity to the law as a matter of principle, we are concerned that the term “psychological abuse” may not be easily defined in precision and may add ambiguity rather than clarity to the law. As the existing DVO already applies to psychological abuse, we do not consider legislative amendment necessary.</p>
3.	<p>To include in the DVO legislative sanction against stalking behaviour in domestic context.</p>	<p>The issue of criminalising stalking behaviour as recommended by the Law Reform Commission is being considered by the Home Affairs Bureau.</p> <p>There has been suggestion that in order to render better protection to victims, the DVO should be amended to make stalking in domestic context a criminal offence before the Government has completed its review on the proposed anti-stalking legislation. Having carefully considered the suggestion, we take the view that the proposal is not feasible.</p> <p>As a matter of legal principle, the law should be coherent and self-consistent. If it is decided that stalking behaviours should be penalized as a crime, all stalking behaviours, whether in domestic or non-domestic context, should be subject to the same treatment and liable to the same level of criminal sanction under the law. In the same vein, victims of stalking, whether in domestic or non-domestic</p>

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		<p>contexts, should be entitled to the same level of legal protection. In addition, the proposal may also give rise to significant enforcement problems. If the law makes it an offence for stalking behaviour whereby the stalker and victim should have some form of domestic relationship, when the Police receives a complaint, the frontline police officers will have to ascertain the relationship between the complainant and the alleged offender before they can take any further action under the proposed provision. This will lead to significant enforcement difficulties.</p> <p>In view of the above, we consider that it is not practicable to amend the DVO to make stalking in domestic context a criminal offence.</p>
4.	Amend the DVO to take exposing a child to witness domestic violence as a form of child abuse and subject to criminal sanction.	<p>We appreciate the negative impact on the child(ren) witnessing domestic violence. Hence, the Family and Child Protective Services Units (FCPSUs) of the Social Welfare Department (SWD) have been addressing the needs of the abused child(ren) and providing relevant services for them, including counseling services, statutory protection, residential child care services as well as psychological assessment and treatment. Apart from providing casework and clinical psychological services, the FCPSUs also work with clinical psychologists in preparing handbooks for the group activities of victims, abused children and batterers.</p> <p>However, the proposal of making the exposure of child(ren) to</p>

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		<p>domestic violence a criminal offence is an important subject, and has read-across implications on other crime which occur in front of the children. It will pose a question as to why we should single out witnessing domestic violence as a crime, but not other violence acts. We have reservation to this proposal.</p>
5.	<p>Launch the Batterer Intervention Programmes (BIPs) on a trial basis under the existing systems and consider amending legislation with a view to introducing a court-ordered BIP.</p>	<p>In order to further promote the development of effective BIPs in Hong Kong to better address the treatment needs of the batterers, the SWD is now conducting two pilot projects of BIP. Under the pilot projects, treatment will be provided to batterers joining the programmes on a voluntary basis, as well as batterers put on probation. Upon completion of the pilot scheme, the projects will be evaluated with a view to identifying effective treatment modalities for batterers of various backgrounds. The experience drawn from these projects will provide useful reference for defining the goals, contents and standards of BIPs. Besides, the SWD is now in the process of setting up an advisory group to provide advice and make evaluation on these projects.</p> <p>To promote the services and encourage referrals from relevant parties, SWD and Hong Kong Family Welfare Society have already organized briefings for relevant parties at both central and district levels. In addition, upon completion of the first phase of the pilot projects in mid-2006, SWD will arrange sharing sessions with judges and enforcement agencies, with a view to encouraging the court to make</p>

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		<p>more referrals to BIP.</p> <p>As for the recommendation on introducing court-ordered BIP, the Government needs more careful and in-depth examination before it can decide on whether and if so, how, it should be introduced. For example, we have to carefully consider whether court-ordered BIP should be one of the sentencing options for the court; whether participation in BIP should be in place of imprisonment penalty; and whether batterers serving sentence in jail should be required attend the BIP concurrently. In addition, legal advice also suggests that the relevant provision should be sufficiently precise and adequately accessible to the abusers to be able to foresee with a reasonable degree of certainty the circumstances in which and the conditions on which the authorities may effect the court-ordered treatment. The BIP pilot projects mentioned above is aimed exactly to develop systematic, standardized and evaluated batterer intervention programmes. Although the development of BIP and whether such programmes should be used in a court-ordered treatment context are separate issues, the outcome of the pilot projects will provide useful reference for our consideration of the way forward.</p>
6.	Consolidate all domestic violence related legislation (i.e. duplicating the relevant criminal provisions in the DVO).	The legal framework in place in dealing with domestic violence includes legal provisions in various pieces of legislation. The DVO (Cap 189) mainly provides for a civil remedy for victims of domestic violence to seek injunction from the court, whereas violence acts

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		<p>involving crime element are mainly dealt with by the Crimes Ordinance (Cap. 200) and the Offence Against Persons Ordinance (Cap. 212). The protection of children and juvenile is dealt with under the Protection of Children and Juveniles Ordinance (Cap. 213). While domestic violence includes different acts of violence committed within the domestic context, our criminal law in the area is structured based on the criminal acts themselves, regardless of whether such acts take place at home or elsewhere. To include in the DVO legal provisions dealing with identical criminal acts may give rise to unnecessary duplication and complication in our current law. We therefore consider the proposal undesirable and result in no practical advantages.</p>
7.	Empower the court to grant an injunction order in criminal proceedings.	<p>As mentioned above, section 3 of the DVO empowers the court to grant an injunction on application of a party to a marriage if it is satisfied that the other party to the marriage has molested the applicant or a child living with the applicant (the same applies to a man and a woman in cohabitation). Such application is dealt with in a civil proceeding. The standard of proof in the civil proceedings is less stringent and the court may grant the order if it on balance of probability believes that the above-said condition is met, as opposed to the standard of “beyond any reasonable doubt” adopted in criminal proceedings. Besides, if the court may grant an injunction in the criminal proceeding without the need for an application by the victim, some information, which would otherwise be available in the civil</p>

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		proceeding when an application is made under DVO, might not be available to the criminal court. This may do injustice to the defendant concerned. We therefore have reservation on the proposal.

Health, Welfare and Food Bureau
May 2006