

Domestic Violence (Amendment) Bill 2009
Response to Members' Comments Made on 10 September 2009

The New Section 3B(2)

In determining whether a relationship has the qualities that are required of a “cohabitation relationship” to which the amended Domestic Violence Ordinance (DVO) is applicable, we have proposed a new section 3B(2) with the intention of providing clear guidance to the court to have regard to all the circumstances of the case, including, but not limited to, a number of factors set out therein, in considering future applications for injunction orders. In drawing up these factors, we have made reference to the rulings made by the courts in different common law jurisdictions regarding the factors that the courts have taken into account in determining the existence of a “cohabitation relationship”. As stated in the leading textbook on family law “*Bromley's Family Law*” (Tenth Edition) in the United Kingdom (UK), from which the DVO originates, the judgments of various authorities on the essence of a relationship between two persons living together “as husband and wife” were fully reviewed in the case of *Kimber v Kimber*. After careful consideration, we have decided to adopt the eight signposts as summarised by the court in *Kimber v Kimber*, which provides a clear catalogue of factors commonly considered by the court, as the basis for guidance to the court under the new section 3B(2).

2. During the discussion at the Bills Committee meeting on 10 September 2009, some Members suggested that we should review the new section, making reference to similar factors adopted by common law jurisdictions other than the UK, as set out in LC Paper No. LS112/08-09 prepared by the Legal Service Division of the Legislative Council. In particular, some Members considered that there might be merits in adopting the factors as enshrined in the statute of other common law jurisdictions, rather than drawing reference from individual court rulings as per our proposal under the new section 3(B)2. We are asked to follow the practice adopted by the New South Wales of Australia, i.e. section 4 of the Property (Relationships) Act 1984 (“the NSW provision”).

3. We have, as per Members' suggestion, reviewed the NSW provision. We found that the NSW provision actually sets out the factors adopted by the Australian court in *Roy v Sturgeon*. The court in that case took the view that the factors were the matters commonly considered in earlier Australian cases in determining the existence of a "de facto relationship". Hence, similar to our new section 3B(2) which adopts the language used by the court in *Kimber v Kimber*, the NSW provision adopts the language used by the court in *Roy v Sturgeon*. In sum, what we are proposing in the new section 3B(2) is in fact in line with the NSW experience – i.e. to enshrine in the law such factors as considered by the court in determining whether a "cohabitation relationship", or in the case of NSW, whether a "de facto relationship" is in existence.

4. In formulating the new section 3B(2), our intention is to provide guidance to the court to have regard to such matters that are commonly considered judicially in deciding whether a particular relationship amounts to a "cohabitation relationship" under the amended DVO. Against this premise, we are grateful for Members' suggestion for us to review the factors set out in the new section 3B(2), to ensure that all important elements are included and that the factors are presented in a user-friendly manner. We are considering this further in light of Members' advice, drawing reference from experiences of other common law jurisdictions. We will revert to the Bills Committee with our proposed way forward during the clause by clause examination of the new section 3B(2).

Property/furniture arrangements

5. There is a suggestion that in conjunction with the granting of an exclusion order under the DVO, additional protection should be provided to the applicant by empowering the court to grant additional orders prohibiting, for instance, the respondent from removing the furniture and appliances from the matrimonial home, or requiring the respondent to compensate the applicant for any losses involved as a result of the respondent's violence. Some Members have considered that this would provide more comprehensive protection to the concerned victims. We do not consider that there is a need to include such additional provisions.

Our reasons are explained below.

6. With regard to furniture and appliances in the matrimonial home, unless and until an exclusion order is granted by the court which prohibits the respondent from entering or remaining in the matrimonial home, there is nothing against the law if a spouse were to remove any furniture and appliances, on which he/she enjoys the sole proprietary rights, from the matrimonial home. Once an exclusion order is granted, however, the respondent would be prohibited from remaining in, or returning to, the matrimonial home, effectively rendering it not possible for him/her to remove the furniture and appliances without breaching the exclusion order. Where under the DVO an authorization of arrest is attached to an injunction, a police officer may arrest without warrant any persons whom he reasonably suspects of being in breach of the injunction, by reason of, as the case may be, his entry into or remaining in any premises or area specified in the injunction, e.g. the matrimonial home. Also, the respondent may be liable to punishment by the court, i.e. fine or imprisonment, for breach of an injunction. On a practical level, if furniture or appliances which are of an essential nature (e.g. beds, quilts, and cooking utensils, etc.) are removed by a spouse, an applicant should seek help from the Social Welfare Department (SWD) as necessary. In this connection, SWD has advised that over the years, it has not received any request for assistance arising from the removal of furniture or appliance by a spouse in relation to the granting of an exclusion order.

7. In addition, Members may wish to note that a non-molestation order granted under the DVO generally contains provisions which serve to restrain the respondent, his/her agents or servants from assaulting, molesting, harassing, threatening, disturbing, approaching or in any manner interfering with the applicant. This would mean that any action by the spouse who is subjected to an exclusion order to cause disturbances to the applicant, such as by removing furniture and appliances, or refusing to pay rent resulting in the applicant's eviction from the matrimonial home, may amount to molestation and is therefore a breach of the court order and a contempt of court. This should help to prevent the respondent from circumventing the order and interfering with the applicant.

8. As regards the right of an applicant to require payment by the respondent for compensation of the losses suffered as a result of the respondent's violence, Members may wish to note that the court is already empowered to award damages in addition to, or in substitution for, an injunction pursuant to section 48A of the District Court Ordinance.

9. Back to our policy intent, when the DVO was introduced in 1986, the Administration had made it clear that the intention of the DVO was to provide immediate relief to a spouse without the need for divorce proceedings. In this respect, an injunction granted under the DVO is to last for a limited duration only. This would provide the couple with the necessary time and space to reflect on their relationship and decide on the way forward. While some married couples may choose to get back together upon the expiry of the injunction order, others may wish to seek a divorce, which would have to be dealt with separately in matrimonial proceedings. Only at this juncture when a decision to separate for good has been made should the consideration of maintenance, property ownership, possession of furniture or other household items, etc. come into play. The divorce courts have wide powers to make both financial provision and property adjustment orders under the Matrimonial Proceedings and Property Ordinance (Cap 192). In deciding whether to exercise its power and in determining the manner in which its discretion is exercised, the court will have regard to all the circumstances of the case, including, among other things, the financial needs, obligations and responsibilities of the parties, the duration of the marriage, and the income and property and other financial resources of the parties, etc.

Specialised domestic violence court

10. The UK has since 2005 implemented pilot specialised domestic violence court (SDVC) in 25 areas across the country. An SDVC in UK takes the form of special administrative arrangements, rather than the setting up of a specialised court, to handle both criminal and civil cases relating to domestic violence (DV). These arrangements include fast-tracking listing of criminal DV cases and better coordination of civil and criminal cases related to DV, as well as enhancements to other administrative measures to provide better support to victims of DV, etc.

11. The Judiciary has advised the Bills Committee vide LC Paper No. CB(2)2444/08-09(01) its conclusion that it sees no real need for the establishment of an SDVC. Nevertheless, the Administration has put in place administrative arrangements to better support victims of DV, mirroring on the UK experiences. Such initiatives, as explained below, will continue in the future operation of the DVO.

12. At present, applications for injunction under the DVO are dealt with in the Family Court. The Family Court always gives priority to urgent applications relating to DV cases, e.g. applications relating to removal of children or injunction applications. On the handling of criminal DV cases, following consultation between the Department of Justice (DoJ) and the Judiciary, a mechanism has been in place since October 2008 to enable expedited listing of suitable DV cases. So far, this mechanism is found to be working satisfactorily and should go some way towards addressing concerns over the timely handling of DV cases.

13. To tie in with the expedited listing arrangement, the Prosecutions Division of DoJ has also issued an internal guideline to all counsels in its Division and court prosecutors, requiring them to adopt certain administrative procedures so as to ensure that DV cases are identified and processed in a prompt manner. These procedures include ensuring as far as possible that DV cases are tried in Chinese, thereby minimising the need for translation of documents, and providing legal advice on DV cases as soon as possible.

14. The Director of Public Prosecutions of DoJ has recently issued "The Statement on the Treatment of Victims and Witnesses" (the Statement). The Statement sets proper guidelines to ensure that prosecutors focus on the interests of victims and witnesses, and pay full regard to their rights from the beginning of criminal cases to the end. For example, prosecutors should seek to expedite the processing of cases, particularly those involving children and other vulnerable witnesses. Where justified, prosecutors should make appropriate applications to the court for special measures to address the specific needs of witnesses, such as the use of screens to shield witnesses from the accused while testifying in court, and the use of two-way closed circuit television to enable witnesses to give evidence outside the courtroom through a televised link

to the courtroom. Prosecutors should also try to ensure that witnesses are made aware of the arrangements at court and the availability of facilities, and that witnesses are kept informed of the progress of cases, and their rights to privacy and confidentiality respected.

15. As reported earlier, the Family and Child Protective Services Units of the SWD has been providing a co-ordinated package of one-stop services to victims of DV. It includes outreaching, social investigation, crisis intervention, statutory protection, intensive individual and group treatment to victims of child abuse and spouse battering, batterers and their family members, as well as referrals to various other services. While resources have been allocated to the SWD in the past few years to strengthen direct support for victims of DV and families in need, such as enhancing social work manpower and clinical psychological services, strengthening the hotline service of the Department, increasing the capacity and support services of refuge centres for women, etc., it will further consider ways to enhance support services for victims of DV, in particular those undergoing the judicial process.

16. Besides, to strengthen support and safety assurance to victims and their children throughout the case enquiry and legal proceedings, the Police have also set up a protocol of Victim Management in May in 2008 for victims of serious DV cases, by way of constant contact with victims and close liaison with social workers. Standardised procedures and checklists have been established to ensure the safety of victims and keep them informed of the progress of the cases throughout the four stages, namely, investigation, pre-trial, post-trial and case review stages. Similar protocol has also been extended to victim of non-serious DV cases handled by the crime units since January 2009.