



# A LANDSCAPE ANALYSIS OF DOMESTIC VIOLENCE LAWS

DECEMBER 2013





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## ACKNOWLEDGEMENTS



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It has been a privilege and a pleasure to assist Beijing Fanbao with this research which aims to inform consultation on anti-domestic violence laws in China. We would like to thank Beijing Fanbao for giving us the opportunity to be part of such a significant project.

We thank all those who helped with this project in the numerous jurisdictions involved, many of whom faced significant challenges in obtaining information on domestic violence for this report. We are also grateful to Transperfect Legal Solutions and Fred Li who translated the final report into Mandarin.

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# FOREWORD

The Thomson Reuters Foundation is proud to present this Report which forms part of a series of TrustLaw Connect publications that aim to improve laws and policies that affect women. TrustLaw Connect partnered with CMS and DLA Piper International LLP to produce a comparative analysis of the laws that govern anti-domestic violence in 24 jurisdictions, specifically: Cambodia, China (PRC), Czech Republic, England & Wales, France, Germany, Hong Kong, Indonesia, Japan, Laos, Kenya, Malaysia, Mongolia, Myanmar, North Korea, Poland, Russia, Rwanda, Singapore, South Africa, South Korea, Taiwan, Ukraine and Vietnam.

We would like to thank the lawyers from CMS and DLA Piper International LLP, as well as John W Fooks & Co, Kaplan & Stratton, Intel Corporation, and Werksmans Attorneys for donating their time and expertise to this project and making this Report possible.

The Thomson Reuters Foundation launched TrustLaw Connect in July 2010. Our goal: to spread the practice of pro bono worldwide and empower people with trusted information. TrustLaw Connect is the Foundation's global pro bono service that connects NGOs and social enterprises with the best lawyers worldwide who are willing to provide free legal assistance.

Women's rights are a major priority for the Thomson Reuters Foundation. We work on women's rights issues through TrustLaw Connect projects and reports, as well as through our news coverage. We have 26 journalists at the Foundation writing about a range of issues impacting women, including forced labour and trafficking, sexual violence and child marriage. In addition, through our annual women's rights conference, Trust Women, we bring the world's most innovative leaders in women's rights together with the best minds in law, finance, technology, media, government and philanthropy, to help spark new collaborations and solutions.

We hope that this Report will be a useful tool for legislators, policymakers and civil society to analyze the existing laws that protect victims of domestic violence and the laws that will need to change in order to strengthen that protection.



# INTRODUCTION

In the People's Republic of China, a 2013 survey found that 54.6% of 1858 respondents had experienced domestic violence. Recent high-profile cases have helped draw attention to the issue of domestic violence in China but there is still much work that needs to be done.

Beijing Fanbao (Anti-Domestic Violence Network) is the first and only multi-disciplinary and multi-sectoral alliance focusing on domestic violence against women in China. Their mission is to eliminate gender-based violence and to create a gender-equal society. Beijing Fanbao requested legal research to help them understand anti-domestic violence legislation in other countries so that they can use it in their advocacy activities, aimed at accelerating the approval of anti-domestic violence legislation in China. This work is vitally important as the National People's Conference recently stated that anti-domestic violence legislation would be included in a review of important laws in 2013 and in the future.

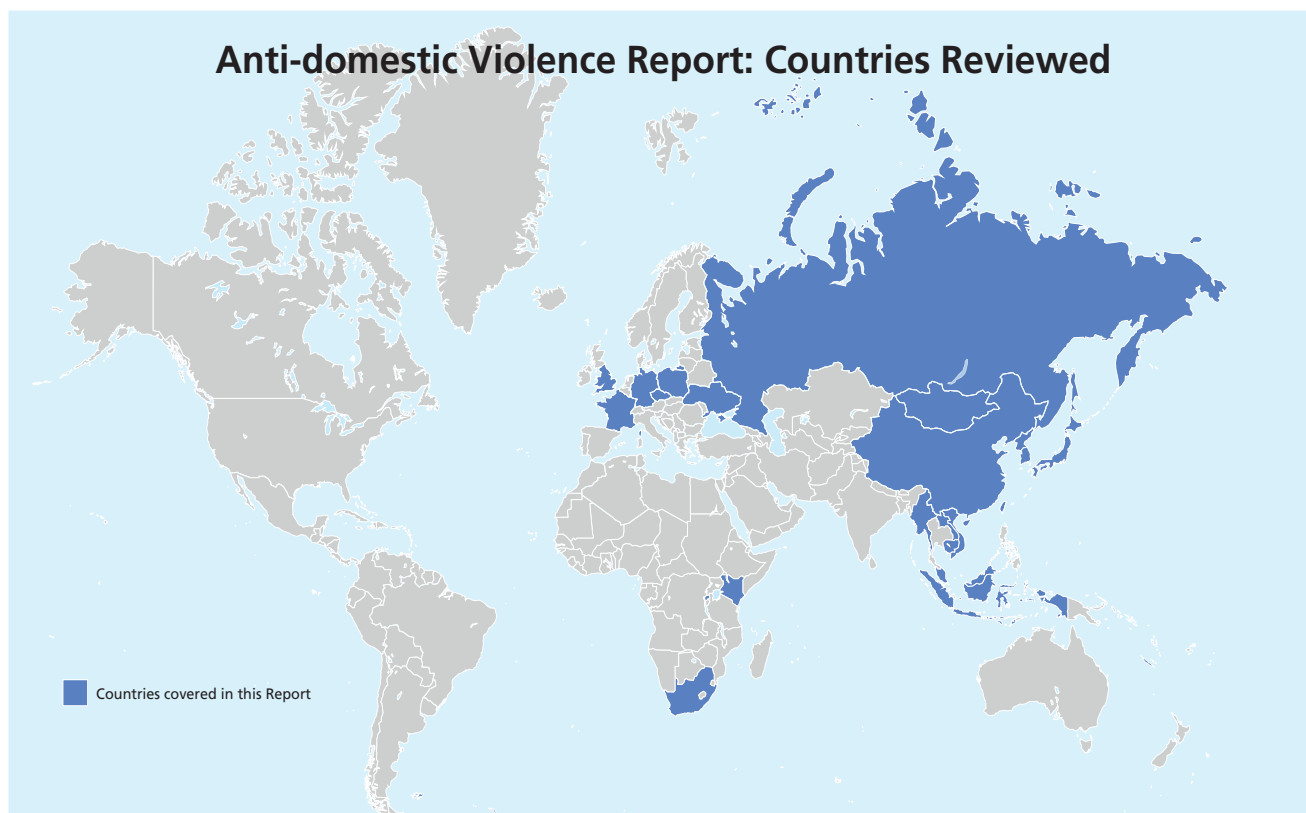
Through TrustLaw Connect, Beijing Fanbao was connected to lawyers from CMS and DLA Piper who performed research on the legal frameworks that govern domestic violence. The research covers 24 jurisdictions and identifies the existence of anti-domestic violence laws and how they work in practice. It includes analyses of whether relevant laws apply

universally regardless of sexuality or gender, and also whether the laws protect domestic workers.

China is not alone in facing the scourge of domestic violence — this Report reveals shocking statistics and attitudes in countries around the world, ranging from cultural acceptance of violence against women in general, to acceptance of domestic violence as a private family matter that should not be referred to authorities. While domestic violence can clearly be suffered by persons of any sex, in cultural systems where women are perceived as the subservient gender, domestic violence against women is often condoned and so enforcement of anti-domestic violence laws is even more difficult.

On the positive side, most countries acknowledge the need to strengthen legal frameworks that protect victims of domestic violence and almost all jurisdictions covered by this Report have recently or are in the process of reforming anti-domestic violence laws and addressing enforcement issues. It is hoped that this Report will assist legislators and civil society organisations to better understand the challenges facing victims and to identify gaps and flaws in existing laws so that improvements can be made. We hope that this research will not only be helpful in China but in countries worldwide.

# LANDSCAPE MAP



# COMPARISON TABLE

Country	Cambodia	People's Republic of China	Czech Republic	England & Wales	France	Germany	Hong Kong	Indonesia	Japan	Kenya	Laos	Malaysia	North Korea	Poland	Russia	Rwanda	Singapore	South Africa	South Korea	China (Taiwan)	Ukraine	Vietnam
Is there an express legal definition of DV?	√	√	X	X	X	X	X	√	√	√	√	√	X	√	X	X	√	√	√	√	√	√
Does legal or accepted definition of DV extend beyond married/heterosexual couples?	√	X	√	√	√	√	√	X	X	X	X	X	X	√	√	√	X	√	√	X	√	X
Is DV specifically provided for as a separate offence?*	√	√	X	X	X	X	√	√	√	√	X	√	√	√	X	X	X	√	√	√	√	√
Is there legislation which makes preliminary/interim measures available to victims?	√	√	√	√	√	√	√	√	√	√	X	√	X	√	√	√	√	√	√	√	X	√
Does legislation create third party responsibilities?	√	X	X	√	X	X	√	√	√	X	X	X	X	√	√	X	X	√	√	√	X	√
Does legislation provide for support of victims?	√	X	√	√	√	√	√	√	√	√	√	√	X	√	X	√	X	√	√	√	√	√
Does legislation include special protection for children/minors?	√	√	√	√	X	X	√	√	√	√	√	√	√	√	√	√	X	√	√	√	√	X

\* Where there is no specific domestic violence law, the above table has referred to general criminal laws. For example, in the Czech Republic there is no specific domestic violence law, but support for victims is provided under other legislation so a tick has been put in the support for victims row.

# EXECUTIVE SUMMARY

## DEFINING DOMESTIC VIOLENCE

In all the jurisdictions researched in this Report domestic violence is recognised as an issue which needs addressing. The research has highlighted a wide range of approaches being taken to enforce the law, protect victims and rehabilitate offenders against differing cultural backgrounds. While domestic violence is identified in all jurisdictions as an issue, only 14 out of the 24 jurisdictions have specific laws on domestic violence. In the remaining jurisdictions, domestic violence offences fall under general criminal laws on violence with certain remedies being provided for in civil law.

Each jurisdiction's interpretation of what constitutes "domestic violence" varies depending on the cultural view of "domesticity". The common denominator of all the definitions is the presence (or history of) a domestic context or shared dwelling between the offender and the victim. However, the relationship required between the offender and victim in order to constitute a domestic violence offence varies between jurisdictions. A number of jurisdictions, including France, Indonesia, Laos, Mongolia, Myanmar, Malaysia, Singapore, South Korea and Vietnam provide that the cohabitants must be members of the same family. A wider approach is seen in Cambodia, the Czech Republic, Germany, Poland, Rwanda and Ukraine where the only requirement is that the offender and victim are cohabiting at the time of the abuse. An even broader interpretation can be seen in England & Wales, Kenya and South Africa where domestic violence can occur where the victim either is or was previously in a domestic relationship with the offender. This approach is intended to protect victims who are no longer living with an offender (i.e. an aggrieved ex-partner).

The majority of the jurisdictions covered by this Report do not expressly state whether those in non-heterosexual relationships, or situations in which the victim is transgender or a domestic worker, fall within the definition of domestic violence. It is reasonable therefore to assume that inclusion of such individuals and contexts within a jurisdiction's definition of what constitutes domestic violence will depend upon the cultural background of the jurisdiction in question. England & Wales is the only jurisdiction whose approach is that domestic violence can be experienced by all persons regardless of gender and sexuality. Domestic workers are also likely to be recognised as domestic violence victims in jurisdictions where the definition of domestic violence includes those living in a common household and is not limited to for example

legally married heterosexual couples, although as observed in Hong Kong, domestic workers may be reluctant to report domestic violence for fear of repercussions in their employment.

In all of the jurisdictions researched domestic violence is considered to include physical, psychological and sexual abuse. Economic abuse, including deprivation/restriction of funds, is recognised as a form of domestic violence in nearly half the jurisdictions researched. However, although not expressly recognised in all jurisdictions, economic abuse is considered by some as a form of psychological abuse and therefore it is possible that such abuse would be indirectly recognised as a form of domestic violence by the remaining jurisdictions. Indeed this interrelation between psychological and economic abuse has expressly been recognised in the laws of certain jurisdictions, for example in Ukraine.

## OFFENDERS

Punishment of offenders (either under specific domestic violence laws or general criminal laws) usually takes the form of imprisonment and/or a fine depending on the severity of the offence. Other types of punishments include, for example, public works or corrective labour (Ukraine), restrictions on offenders from carrying out certain types of work or working in certain fields (France) and community service (Czech Republic).

In the majority of jurisdictions the court can order that an offender undergo counselling or psychotherapy as a form of rehabilitation in an attempt to address the issues underlying the domestic violence. Some non-governmental organisations and crisis centres also run voluntary programmes to help offenders address the underlying issues, for example Rifka Annisa, a women's crisis centre in Indonesia, set up a programme for men in 2007 to provide counselling and anger management, and the ANNA National Centre for Prevention of Violence in Russia provides psychological counselling for male domestic violence offenders. Similar programmes can be found in Ukraine, the Czech Republic and England & Wales.

Whilst theoretically an offender can be required by the court to enter into a rehabilitation programme, how often such orders are given and whether they are complied with is largely unknown. The limited information available suggests that whilst the ability to order rehabilitation is available, this option is not being used effectively. For example, in Ukraine in 2012, more than 2000 domestic violence offenders were registered by the police but only 165 offenders attended the mandatory Correctional Programme centres for court



ordered counselling. Commentators have also suggested that judges impose rehabilitation or psychological treatment in an inadequate number of cases, due in part to a lack of systematic organisation and/or for the simple reason that judges are not aware of the programmes available in their district. Further, the programmes provided by non-governmental organisations and charities are often voluntary, meaning an offender has to proactively decide to engage with a programme rather than having the programme mandated by the court.

## VICTIMS

Across the jurisdictions researched the level of support for victims varies. In most jurisdictions the victim is able to obtain a protection order which can result in the offender being prohibited from: contacting the victim, returning to the shared home, coming within a certain distance of the victim or going to places frequented by the victim. In Laos, Malaysia, South Africa, South Korea and Ukraine, the victim can also claim monetary compensation for any loss caused by the offender for example medical expenses, loss of income, cost of temporary shelter etc. In South Africa, the offender can also be ordered to provide emergency monetary relief to the victim on an interim basis.

A number of jurisdictions, including Ukraine, the Czech Republic, France, Germany, Japan and South Korea, have set up specialist support institutions for domestic violence victims where shelter, medical assistance and sometimes legal help is provided. Most other jurisdictions will also have a way of providing temporary shelter, medical assistance and occasionally (for example in China (PRC), Cambodia and Laos) mediation services to facilitate reconciliation of the parties. Telephone hotlines giving free support and advice are also available in Rwanda, Ukraine, France, Russia, South Korea and China (Taiwan) and in some jurisdictions “gender desks” have been set up to facilitate the reporting of crimes by women (Indonesia and Rwanda).

Whilst provision is made for the support of victims in the majority of jurisdictions, it is questionable whether such support is sufficiently resourced to meet the needs of the population. For example, in Ukraine, theoretically there should be at least one specialised support centre for every 10,000 people but instead there is just one in Kyiv, a city with a population of 10.7 million, and in certain areas there are no centres at all. Further, in some jurisdictions the only support for victims is provided by non-governmental organisations and charities which receive no or very limited assistance from the State, potentially limiting the impact of their activities.

Legal aid for victims is available on a limited basis in the European and African jurisdictions researched, generally on a means tested basis and providing that

civil actions can be fully or partially funded by the State. In jurisdictions where the State does not provide legal assistance there are non-governmental or charitable organisations who offer some assistance to victims. In all jurisdictions covered by this Report criminal prosecutions are funded by the State.

Almost all of the jurisdictions have additional legal provisions concerning the welfare of children and require that the interests of the child are paramount when deciding what action to take in a domestic violence situation. Some jurisdictions have specific legislation applicable solely to children, for example the Children's Act in Kenya and the Adoption and Children's Act in England & Wales. Most jurisdictions permit that in cases of domestic violence involving a child, the child can be removed from the abusive situation and placed into a safe refuge. Some countries, including Rwanda, France and Ukraine, have put resources into developing specialised organisations and procedures to support child victims of domestic violence and to ensure action is taken swiftly to prevent violence.

## CHALLENGES

One of the greatest challenges to the prevention of domestic violence is the perceived nature of violence in the domestic sphere. Many jurisdictions, and in particular France, Russia, South Korea and China (Taiwan) at least at a cultural level, still see domestic violence as a private family issue which should be dealt with within the family and not referred to an external authority. The situation is compounded where the police or authorities share the opinion that domestic violence is a private family matter as this limits the assistance provided by such bodies to the victim. In some jurisdictions there is also an inherent mistrust of the police and/or authorities (which is particularly observed by commentators in Russia and China (PRC)) which augments a general reluctance to resolve a violent situation with external help.

Another challenge is the cultural perception of women, particularly observed in the Asian/Far East jurisdictions. While domestic violence can clearly be suffered by persons of any sex, in cultural systems where women are perceived as the subservient gender, domestic violence against women is often condoned. In a society where women are seen as "sex providers" for their husbands (Indonesia) or where religious systems state that women can be "disciplined" for non-compliance (Cambodia), domestic violence is the norm and an accepted part of religious or cultural beliefs. Added to this is a social acceptance of violence as a casual occurrence, noted particularly in China (Taiwan) and Laos. Enforcement of anti-domestic violence laws where these norms exist will therefore be extremely challenging.

Further, in such societies, education and opportunities for women are often limited, resulting in women being unaware of their rights or what protection is available, or with no other means of supporting themselves, having little option but to remain in a violent relationship. For example, in a survey carried out in Vietnam, 60% of the women surveyed did not know of the existence of the domestic violence legislation. Until such social perceptions of women are challenged and women are given opportunities outside the domestic sphere, arguably domestic violence laws will be difficult to enforce.

Restricted access to legal support also restricts the implementation of domestic violence laws and insufficient legal assistance in light of demand was particularly noted in reports from the African jurisdictions, Hong Kong, Poland, Russia and Ukraine. Many of the Asian jurisdictions researched do not seem to provide any free legal assistance at all. In some jurisdictions there seems to be no effective framework for dealing with domestic violence offences nor adequate support from the police for victims. A general lack of expertise and specialism in domestic violence issues is noted in a number of jurisdictions, although it is clear that work is being done to address this by reforming law and procedure on domestic violence.

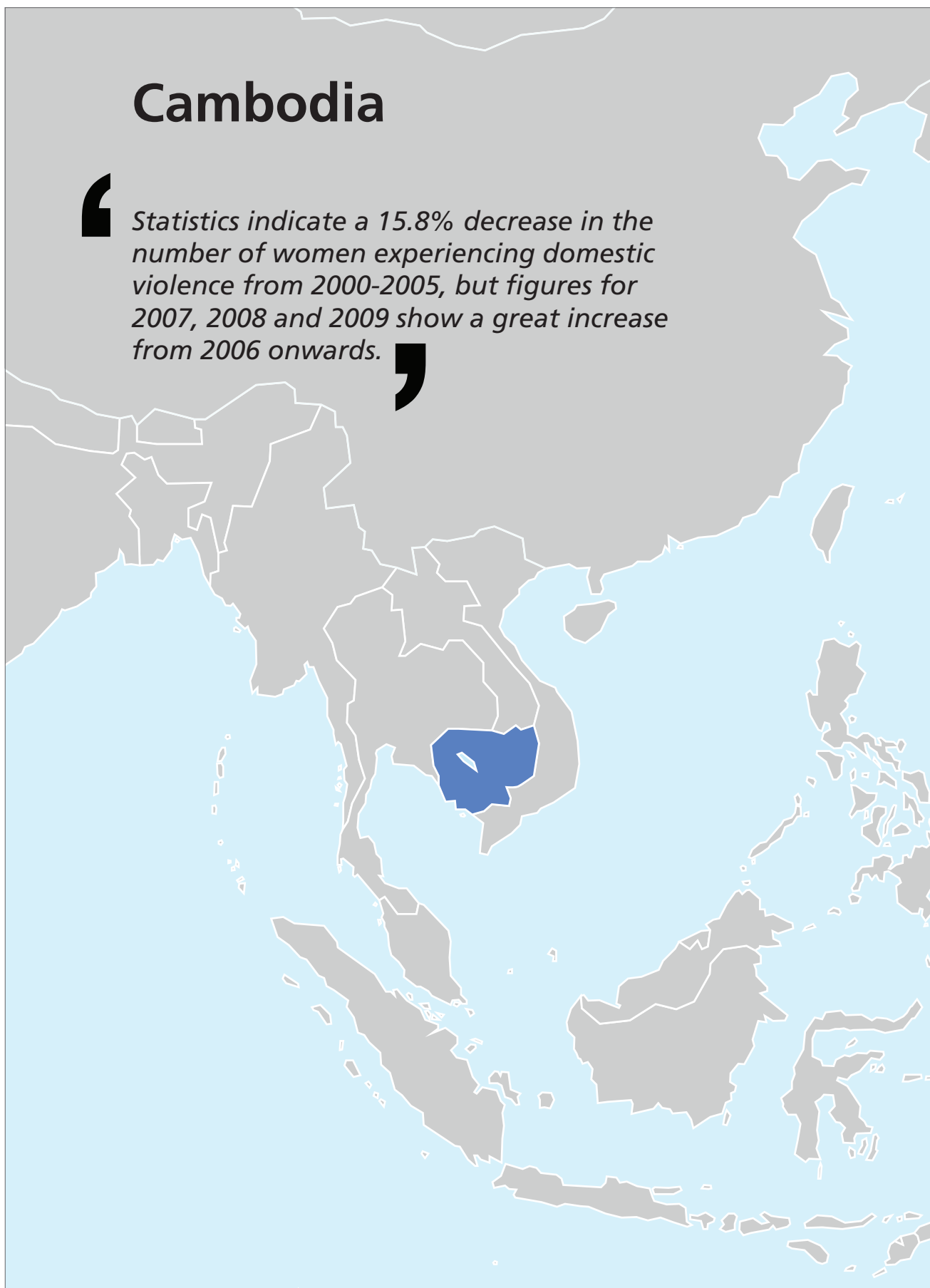
## OUTLOOK

Almost all jurisdictions covered by this report have recently or are in the process of reforming domestic violence laws and addressing enforcement issues. Cambodia, China (PRC), the Czech Republic, Kenya, Laos, Russia and Ukraine are all actively considering draft legislation to improve domestic violence legislation and England & Wales has just amended its domestic violence laws to provide more comprehensive protection to victims.

Whilst clearly much more reform is required, the overall picture of the prevention of domestic violence is a hopeful one as the majority of jurisdictions researched, with the assistance of non-governmental organisations and charities, are working to address domestic violence and to enhance protection for victims. Perhaps what will be most effective in combating and addressing the issue of domestic violence will be for jurisdictions to enter into global dialogue and to encourage an international culture of transparency about the issue of domestic violence. In so doing, it is possible to draw on the experiences of the range of legal, social and educational mechanisms and strategies applied in other jurisdictions in order to inform future developments, enhance protection for victims of domestic violence and deter such behaviour.

# Cambodia

‘ Statistics indicate a 15.8% decrease in the number of women experiencing domestic violence from 2000-2005, but figures for 2007, 2008 and 2009 show a great increase from 2006 onwards. ’



# DOMESTIC VIOLENCE IN CAMBODIA

DLA Piper International LLP, Australia

## EXECUTIVE SUMMARY

In the Kingdom of Cambodia, there is a central piece of legislation which defines domestic violence. However, the prevention of and protection from domestic violence is covered by several legislative acts, most importantly the general criminal law which carries sanctions for breach.

The definition of domestic violence under the legislation is relatively broad, covering acts of physical, mental, sexual and social abuse. Where child victims are involved, there are a number of special civil actions which are in place for support.

However, despite the relative robustness of the definition, there are a number of key criticisms of the law's ability to prevent domestic violence. Most notably, these criticisms include the general societal attitude, the unwillingness of police to intervene and the unwillingness of victims to come forward.

Indeed, as recently as June of 2013, a professor of Comparative and International Education at Lehigh University, who has researched and published articles about domestic violence in Cambodia, said that marital rape is accepted as normal.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Cambodia. The legislation, the Law on the Prevention of Domestic Violence and the Protection of Victims (the "Law"), defines domestic violence as:

"any act or failure (negligence of household members) by a person with respect to another person that infringes upon the latter's constitutional rights and freedoms, or any act that causes or contains a threat to cause him/her physical, psychological, sexual or economic violence causing moral, physical or mental suffering".<sup>1</sup>

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<sup>1</sup> The Law on the Prevention of Domestic Violence and the Protection of Victims (2006), Glossary "*domestic violence*".

Domestic violence is referred to as violence that happens and could happen towards:<sup>2</sup>

- husband or wife;
- dependent children; and/or
- persons living under the roof of the house and who are dependant of the households.

Domestic violence is required to be prevented in time effectively and efficiently and it is required that the most appropriate measures in order to protect the victims or the persons who could be vulnerable are taken.<sup>3</sup>

Violence includes:<sup>4</sup>

- acts affecting life;
- acts affecting physical integrity;
- tortures or cruel acts; and
- sexual aggression.

Acts affecting life include:<sup>5</sup>

- premeditated homicide;
- intentional homicide;
- unintentional homicide resulted from other intentional acts of perpetrators; and
- unintentional homicide.

Acts affecting physical integrity include:<sup>6</sup>

- physical abuses with or without using weapons, with getting or not getting wounded; and
- tortures or cruel acts.

Tortures or cruel acts include:<sup>7</sup>

- harassment causing mental/psychological, emotional, intellectual harms to physical persons within the households; and
- mental/psychological and physical harms exceeding morality and the boundaries of the law.

Sexual aggression includes:<sup>8</sup>

- violent rape;

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2 Ibid, Article 2.

3 Ibid, Article 3.

4 Ibid, Article 3.

5 Ibid, Article 4.

6 Ibid, Article 5.

7 Ibid, Article 6.

8 Ibid, Article 7.

- sexual harassment; and
- indecent exposures.

It is also required to prevent threats aiming at frightening, shocking the victims and acts affecting individuality and properties of the persons living under the same roof of the house and who are dependent of the same households.<sup>9</sup>

Further, it is mandated that “every disciplining by giving advice or reminding or appropriate measures taken to allow spouses or children or dependent persons to follow the good ways of living with dignity and the nation’s good custom and tradition, if the disciplining and teaching are conducted with the noble nature (consisting of compassion, pity, joy at other’s happiness, and sincerity) and in accordance with the principles of the United Nations Conventions on Human Rights and Child Rights recognized by the Kingdom of Cambodia, shall not be included as the use of violence or acts of domestic violence”.<sup>10</sup>

Therefore, while the definition does not expressly include informal relationships or divorcees, the definition could be interpreted as including these types of relationships due to the phrase “persons living under the roof of the house and who are dependant of the households”. However, domestic violence within relationships between people who do not live in the same house are not included. Common relationships in Cambodia including a man and mistress, “sweetheart relationships” or divorcees not living under the same roof are not covered by the definition. Additionally, the phrase “dependant of the households” is not further defined.

Further, while the legislation is silent on gay, lesbian and transgender relationships, it is possible that these relationships could be included within the definition in the same way as *de facto* relationships above.

Domestic workers are expressly included within the definition, by virtue of Article 2.

Mental abuse and financial abuse are also expressly included by virtue of Article 6. Mental abuse is defined as “psychological violence” meaning “any act that causes direct pressure to bear on a person’s mind like threatening, racketeering, persecution, or to degrade, slander her/his reputation and dignity by means of threats, insults or blackmail, isolating from relatives and close friends, coercion or against his/her intention, will or capability”.<sup>11</sup> In relation to punishment of mental abuse offences, it must be noted that generally throughout the law, and specifically in relation to its treatment of mental abuse as a form of domestic violence, the Law is aimed at preventative and protective practices rather than punishment of the abuser.<sup>12</sup> Specifically, as noted in the

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9 Ibid, Article 8.

10 Ibid.

11 Ibid, Glossary “Psychological violence”.

12 Ibid, Articles 9 and 10.

Law's Glossary, the Law does not contain any substantial penal provisions, and so there is no punishment on the basis of the Law alone.<sup>13</sup> In this vein, the perpetrators of any domestic violence (including mental abuse as subsumed in the definition of domestic violence) can:

- be moved from the scene;<sup>14</sup>
- have administrative decisions issued against them,<sup>15</sup> including prohibitions on destroying property,<sup>16</sup> approaching or entering a shared house or a victim's place of work without the permission of authorities in charge<sup>17</sup> (the concept of authorities in charge is explained below);
- be placed under a court order;<sup>18</sup> and/or
- be placed under additional measures adopted by the court.<sup>19</sup>

Likewise, financial abuse or hardship is expressly included in a separate definition. Financial abuse is defined as “economic violence” and includes “any act of depriving or restricting rights entitled to a victim concerning ownership, use or disposal of housing, food, clothing and other pieces of property, income or resources in such a way of destruction or damaging of property, e.g. cutting an opportunity to generate income”.<sup>20</sup>

## 1.2 FORMS OF DOMESTIC VIOLENCE

Therefore, domestic violence can be committed in any, or a combination, of the following forms:

- mental violence — including torture and cruel acts, frightening threats;
- physical violence;
- sexual violence — including acts of sexual aggression;
- economic violence — including acts affecting properties; and/or
- social violence — including acts affecting individuality.

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13 Ibid, Glossary.

14 Ibid, Article 13.

15 Law of Management of Commune Administration, Articles 43, 48 and 49.

16 The Law on the Prevention of Domestic Violence and the Protection of Victims (2006), Article 14.

17 Ibid.

18 Ibid, Chapter 5.

19 Ibid, Article 25.

20 Ibid, Glossary “Economic violence”.



## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Cambodia is the Law on the Prevention of Domestic Violence and the Protection of Victims.

Additionally, the Law on Management of Commune Administration is the source of authority for the protection orders able to be issued by authorities in domestic violence cases under the Law. Further, the Criminal Code is relevant in circumstances where offences are committed in a domestic context, and the Criminal Procedure Code of Cambodia (the “Criminal Procedure Law”) details matters of procedure.

The Law is specifically aimed at the prevention of domestic violence in Cambodia and is the main source of law on this topic. The Law was introduced to overcome prevailing domestic violence and a society that was tolerant of such violence and to provide victims with protection. It was passed due to the lobbying of domestic non-governmental organisations and international groups. The Law’s objective is to prevent domestic violence, protect the victims and strengthen the culture of non-violence and the harmony within the households in society in the Kingdom of Cambodia and “to establish a legal mechanism to prevent domestic violence, protect the victims and preserve the harmony within the households in line with the Nation’s good custom and tradition and in accordance with Article 45 of the Constitution of the Kingdom of Cambodia, in addition to the regulations in effect.”

The legislation can be summarised as follows:

- Chapter 2: Scope of Implementation: Includes (in Articles 2–8) the definition of domestic violence in terms of the victims/target of the violence and the violence itself (what constitutes the violence).
- Chapter 3: Authorities and Procedures: Includes the bodies/authorities that have authority to enforce the Articles of the Law and the mechanisms by which such authority can be gained.
- Chapter 4: Prevention and Protection of Victims: Includes the specific powers (actions) that can be taken by the authorised bodies (from Chapter 3).
- Chapter 5: Authorities of the Court: Outlines the Court’s authority to intervene in domestic violence issues — including application of protection orders.
- Chapter 6: Education, Dissemination and Training: Outlines the training and education of the population in respect of violence against women.
- Chapter 7: Penalties: Provides that domestic violence acts that are deemed criminal offences shall be punished under the penal law act.
- Chapter 8: Ending Provision: Declares the law shall be in urgency.

- Glossary: Comprehensive list of all terms defined in the Law and others that do not appear in the Law itself but which may be relevant in contextualising the Law.

There are also a number of other pieces of legislation which are relevant to the issue of domestic violence. These include:

- the Law on Management of Commune Administration (as noted above), which is the source of authority for the protection orders able to be issued by authorities in domestic violence cases, under Article 14 of the Law. Specifically, Articles 43, 48 and 49 of the Law on Management of Commune Administration are most relevant;
- the general criminal law, which other than where it is expressly excluded by the Law (such as in Article 36) is applicable to acts of violence committed in a domestic context. That is, in addition to the measures provided by the Law noted below, punishment may be a further consequence for perpetrators where penal law allows such punishment. This is known as the “parallelism” of the Law and the penal law. The operation of this parallelism is stated in Article 35 of the Law. The source of penal law in Cambodia is the Criminal Code;
- the Constitution of Cambodia guarantees gender equality in Article 31; and
- the Law on Suppression of Human Trafficking and Sexual Exploitation (2008) (the Kingdom of Cambodia) considers specific forms of violence against women and seeks to prevent it in Cambodia.

## 2.2 INTERNATIONAL TREATIES

Additionally, the government of Cambodia has signed and ratified the Convention of the Elimination of all Forms of Discrimination against Women (CEDAW) in 1991 and therefore is obliged to protect women from violence and discrimination.

# 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

## 3.1 BURDEN OF PROOF

Generally, the prosecution holds the burden of proof in criminal proceedings for domestic violence in Cambodia. However, the burden is specific to each charge and each charge must therefore be consulted. The standard of proof is also established by reference to the specific charge. Both the burden of proof and the standard of proof are determined in the Criminal Procedure Law.

The public prosecutor has the sole right to initiate prosecutions of offenders.

### 3.2 RELEVANT COURT

The Court in which criminal proceedings for domestic violence are brought will depend on the seriousness of the offence and therefore varies. The Cambodian court system consists of provincial and municipal courts which function as courts of first instance, appeal courts and a Supreme court. These matters are determined by reference to the Criminal Procedure Law.

The following parties are involved in the pursuit of criminal action against perpetrators of domestic violence, under the Law, in the following ways:

- The nearest authorities in charge shall make a clear record about the incident and report it to prosecutors in charge,<sup>21</sup> and are able to arrest any domestic violence perpetrators (in the confined circumstances where they have breached a Court's protection orders);<sup>22</sup> and
- These nearest authorities are prohibited however from attempting to reconcile or mediate domestic violence that could be characterised as severe misdemeanours or felonies so as not to interfere with criminal law suits.<sup>23</sup>

Article 19 of the Law specifies that domestic violence characterised as a criminal offence (classified as felonies or severe misdemeanours) shall be subject to a criminal suit and the complaint of such a crime should be raised in accordance with the penal procedures specific to the offence itself under the Criminal Code.

### 3.3 PROSECUTION FUNDING

The prosecution of offenders under criminal law is carried out by the State Prosecution Department at the expense of the State.

### 3.4 TIMESCALES

The prosecution timescales of domestic violence perpetrators is dependent upon the specific criminal charge they are pursued for under the Criminal Code. However, in relation to limitations periods, according to Article 10 of the Criminal Procedure Law, the time limitation for bringing a criminal action is 15 years for a felony, five years for a misdemeanour and one year for a petty offense. As Article 35 of the Law states that acts of domestic violence that are considered as criminal offences will be punished under the penal law, the time limitation for acts of domestic violence would be determined on a case-by-case basis with regard to the relevant criminal offences.

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<sup>21</sup> Ibid, Articles 9 and 15.

<sup>22</sup> Ibid, Article 18.

<sup>23</sup> Ibid, Article 17.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

Under the Law, there are two primary preliminary or interim measures available. These are the:

- the Authorities in charge power of intervention and implementation of protection orders;<sup>24</sup> and
- the Court-ordered civil law actions.<sup>25</sup>

The Powers of Authorities in Charge Civil Law Action grants authorities in charge powers of intervention and the power to implement protection orders. Within the ambit of these powers, authorities can act on the request of victims to move the perpetrators from the scene.

The court-ordered Civil Law Actions grants courts separate authority to implement protection orders and victims can request these protection orders. There are two forms of Court-ordered protection orders:

- Stage 1 Protection Orders which are effective within a two month period in which domestic violence occurred; and
- Stage 2 Protection Orders which are effective for six months during the investigation of alleged domestic violence cases and before final verdicts are delivered in relation to the allegations.

The actions available to be exercised by the court include:<sup>26</sup>

- prohibition of the perpetrators from committing domestic violence by themselves or others;
- prohibition of perpetrators from approaching/entering shared house or the place where the victim stays/works without the permissions from the victims;
- prohibition of the perpetrators from contacting the victims through any means;
- prohibition of perpetrators from contacting the victims through any means;
- prohibition of perpetrators from destroying the properties or arranging to sell the victim's properties, separating the perpetrators or victims;
- ordering any police agent/Royal Gendarmerie to preserve personal properties of the victims;
- making a decision on custody of children, halting victims' duty of financial support towards the perpetrators; and
- imposing perpetrators to provide financial assistance to the victims, based on the perpetrators' financial resources.

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<sup>24</sup> Ibid, Articles 13 and 14.

<sup>25</sup> Ibid, Article 20.

<sup>26</sup> Ibid, Article 25.

## 4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

There is no express burden of proof requirement noted in the Law to access the civil relief described above.

However, actions taken against domestic violence perpetrators such as protection orders by virtue of the wide definition of “perpetrators” provided for in the Law extends to persons who have committed, persons who are committing or persons preparing to commit domestic violence. Furthermore, a court-ordered protection (temporary) order can be made without questioning the perpetrators as a temporary protection of victims or preservation of properties of the alleged victim.<sup>27</sup>

## 4.3 RELEVANT COURT

Generally, an application must be submitted to the District Court in the jurisdiction where the commonly-shared dwelling is located.

However, an application regarding a child/minor can be brought either in the jurisdiction where the victim resides, or as typically a third party or the municipality acts as the applicant on behalf of the child, it can also be brought in the jurisdiction where the applicant has her or his residence in the case of a natural person or seat in the case of a corporation.

Civil law actions can be instigated by the following parties in the following way:

- authorities in charge have a duty to intervene urgently in cases where domestic violence is occurring or is likely to prevent and protect the victims.<sup>28</sup>
- courts (municipal and provincial courts) have the authority to issue protection orders
- the issuing of these court-ordered protection orders can be made by:
  - victims;
  - representatives of victims;
  - representatives of the victims in charge within the victims’ residential areas;
  - officials, agents who fulfil their work at the scene; and/or
  - any person who has learned about the incident of domestic violence where the victims are children, mentally retarded persons, or persons whom the court believes to be unable to file the complaint themselves.<sup>29</sup>

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<sup>27</sup> Ibid, Article 24.

<sup>28</sup> Ibid, Article 9.

<sup>29</sup> Ibid, Article 22.

#### 4.4 TIMESCALES

The legislation does not provide timescales for civil actions and there does not appear to be a way of expediting the process.

#### 4.5 FUNDING TO PROSECUTE

The Law is silent as to the funding of civil law provisions above. However, under Article 25 of the Law, where a Court-ordered protection order is made there may be the imposition of financial assistance to victims by the alleged perpetrators as well as the halting of any financial duty of the victim owed to the perpetrator.

### 5 SUPPORT FOR VICTIMS

#### 5.1 STATUTORY PROVISIONS

Under the Law, there are a number of provisions relating to the support of victims. These include:

- offering appropriate assistance to the victims in accordance with their circumstances, especially providing the temporary shelter in which safety can be guaranteed and urgent medical assistance;<sup>30</sup>
- explaining, educating and mediating both parties to stop violence and informing the victims about their rights to prevent violence as stated in the Law;<sup>31</sup> and
- taking other legitimate measures that are necessary to protect the safety of the victims and the household members or the persons involved.<sup>32</sup>
- Further, Article 28 of the Law provides that a court can grant a mandate to institutions in charge (in respect of cases of domestic violence with child victims) to seek assistance and support for victims of domestic violence as to protect the safety and welfare of victims when the court is handling proceedings.

#### 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

Under Article 28 of the Law, there are a number of provisions relating to children. The legislation provides that authorities in charge must serve the interests and protect the welfare of any children that are involved in domestic violence. Furthermore, they are required to file the case in court if it is severe. Following that initial intervention there is a requirement of a responsible person,

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<sup>30</sup> Ibid, Article 13.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, Article 14.

assigned by the court and including prosecutors, to take charge of following-up on the situation and to make a report about the child's situation to the court. Additionally, the court can grant a mandate to the institutions in charge to seek assistance to support the victims of domestic violence as well as to protect the safety and welfare of the victims when the court is handling the proceedings.

### 5.3 INTERVENTION CENTRES

As noted in the recent "Refworld" findings (discussed in detail below), there are a number of shelters operating frontline services in Cambodia. Some of the points made by "Refworld" are extracted here:<sup>33</sup>

- The Cambodia Women's Crisis Center (CWCC), a women's organisation that advocates for the elimination of violence against women, offers three shelters for women and children who are victims of gender-based violence, which are located in Phnom Penh, Banteay Meanchey and Siem Reap. Shelter services are provided to victims of domestic violence, rape and trafficking. CWCC's website notes that the shelter in Phnom Penh can accommodate 40 to 55 people, the one in Banteay Meanchey can accommodate 70 to 100 people, and the one in Siem Reap can accommodate 50 to 60 people. According to their annual report for 2011, in "complicated or serious" cases of abuse, survivors can stay at the shelters for up to eight months. In 2011, a total of 448 survivors were accommodated at the three shelters: 136 in Phnom Penh, 217 in Banteay Meanchey and 95 in Siem Reap. Of the 448 clients, 253 were victims of domestic violence. In addition to accommodation and food, the shelters offer immediate medical care, individual counselling and group counselling. The CWCC also offers legal services to victims, as well as vocational training programs.
- The Cambodian Women's Development Agency, a Phnom Penh-based non-governmental organisation that "aims to empower women through education, organisation and self-development", operates a shelter for young women who are victims or at risk of trafficking and domestic violence. In addition to safe accommodations, the shelter reportedly provides food, clothes, counselling, rehabilitation, legal advocacy, formal education and vocational training.
- A Professor at Lehigh University said that in addition to the shelters operated by CWCC, there is a non-governmental organisation operated shelter in Ckam Pong Thom. He was not aware of any government-operated shelters and said that non-governmental organisations, particularly CWCC, play an important role in providing services to victims of domestic violence. According to the Professor, "only the very serious cases get referred to shelters, such as cases of physical violence that are bloody or result in the hospitalization of the victim". He noted that there

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33 As noted below, the full report can be found here: <http://www.refworld.org/docid/520e1f2b4.html>.

were not enough shelters or shelter spaces to refer all cases of domestic violence, and that the location of the shelters were a barrier to people from other areas of Cambodia, since they would need to travel a great distance to access the shelters.

## 6 OFFENCES

### 6.1 CRIMINAL OFFENCES

There are no specific domestic violence offences provided for in the Criminal Code. However, as noted above, by virtue of Article 19 of the Law any acts of domestic violence that constitute a criminal offence under the Criminal Code are punishable in the ordinary way.

Therefore, there are a number of such offences and some of these are included in the table below:

OFFENCE	LEGAL REFERENCE
<b>LAW – THE CRIMINAL CODE OF THE KINGDOM OF CAMBODIA (2007)</b>	
Murder	Article 199
Premeditated murder	Article 200
Murder committed with utilisation of poison	Article 201
Murder with aggravating circumstances in relation to victim (i.e. when pregnancy is apparent)	Article 202
Murder with aggravating circumstances depending on targets	Article 203
Murder with torture, cruel act or rape	Article 205
Unintentional homicide	Article 207
Torture and barbarous acts:	Article 210
— aggravating circumstances in relation to victims: pregnant woman	Article 211
— aggravating circumstances resulting from maiming and disability	Article 214
— aggravating circumstances resulting from death of victim	Article 215
Violence committed by spouse or concubine	Article 222
Aggravating circumstances resulting from maiming and disability	Article 223
Aggravating circumstances caused by death of the victim	Article 224



However, by virtue of Article 36 of the Law, all minor misdemeanours or petty crimes (in a domestic violence context) are unable to be prosecuted as criminal offences. The Criminal Code defines these two as:

- petty crime: where the maximum prison term able to be imposed as punishment is less than or equal to six days. The prison term may be accompanied by a fine;<sup>34</sup>
- misdemeanour: An offence where the maximum prison term imposed as punishment is more than six days and less than or equal to five years. The punishment for a prison term may be accompanied by a fine.<sup>35</sup> Such offences include:
  - unintentional homicide (one to three years' imprisonment)
  - intentional violence (one to three years);<sup>36</sup>
  - with aggravating circumstances: premeditation, weapon use, many persons (two to five years);<sup>37</sup>
  - aggravating circumstances in relation to victims (two to five years): pregnant women;<sup>38</sup>
  - aggravating circumstances in relation to targets (two to five years);<sup>39</sup> and
  - violence committed by spouse or concubine<sup>40</sup> (two to five years).

## 7 PENALTIES AND SANCTIONS

As noted above there are no specific domestic violence offences under the Law. As such, any sentences or punishments for domestic violence acts are determined by the criminal charge chosen to be pursued to address the commission of that act of domestic violence.

The terms of imprisonment for the above mentioned offences (taking into account the fact that prosecution is restricted to offences over five years, as petty crime and misdemeanours are classified in accordance to terms of imprisonment imposed and are excluded from prosecution as domestic violence acts) ranges from five years to 30 years.

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34 Criminal Code of the Kingdom of Cambodia, Article 54.

35 Ibid, Article 53.

36 Ibid., Article 217.

37 Ibid., Article 218.

38 Ibid, Article 219.

39 Ibid, Article 220.

40 Ibid, Article 222.

Aside from monetary fines which are available under Article 49 of the Criminal Code, Article 59 of the Criminal Code provides for “Additional Punishments” available for offences under the Criminal Code, which includes:

- deprivation of some civil rights;
- rights to vote;
- rights to stand for election;
- rights to work in public function;
- rights to be designated as an expert, arbitrator and proxy in court;
- rights to receive all official decorations;
- rights to serve as a witness under oath at court;<sup>41</sup>
- prohibition from pursuing a profession when the offence was committed while carrying out this professional task;<sup>42</sup>
- prohibition from driving all kinds of motor vehicles;<sup>43</sup>
- confiscation of the driver’s license;
- prohibition from taking residency;<sup>44</sup>
- for a convicted foreigner, the prohibition from entering and residing in the territory of the Kingdom of Cambodia;<sup>45</sup>
- confiscation of any instruments, materials or objects which are used to commit the offence;<sup>46</sup>
- seizure of objects or funds which are intended to commit the offence;
- seizure of incomes or properties earned as a result from the offence;
- seizure of utensils, materials and movable properties garnishing a premise in which the offence was committed;
- seizure of vehicles belonging to the convicted person;
- prohibition from having in possession of or carrying a weapon and ammunition;<sup>47</sup>
- expelling from the public transactions or agreements;<sup>48</sup>
- closure down of an establishment having served to prepare or to commit the offence;
- prohibition from the operation a business that is open or used by the public;

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41 Ibid Article 61.

42 Ibid, Article 62.

43 Ibid, Article 63.

44 Ibid, Article 65.

45 Ibid, Article 66.

46 Ibid, Article 67.

47 Ibid, Article 70.

48 Ibid, Article 71.

- posting the decision of the sentence;<sup>49</sup>
- publication of the newspapers of the decision of the sentence;<sup>50</sup>
- broadcasting of the decision of the sentence by means of audio-visual communications.<sup>51</sup>

Under Article 60, these additional penalties are often optional but sometimes mandatory if the law provides for it expressly.

Note further that community work is not applicable as a punishment for the offences pursued for domestic violence, given that community work is only applicable where jail sentences are three years or less (and such offences are unable to be pursued where domestic violence occurs as they are classified as misdemeanours).<sup>52</sup>

## 8 REHABILITATION MEASURES

The Law provides that the State will educate and disseminate the legislation itself, and educate the people of Cambodia as to responsibilities of the household and the solving of conflicts through non-violence.<sup>53</sup> Further, it states that parties who experience domestic violence crises should seek counselling sessions to learn about problem-solving without the use of violence.

## 9 THIRD PARTY RESPONSIBILITIES

Under the Law, certain authorities have a duty to intervene in suspected instances of domestic violence. These authorities include members of the Ministry of Women's Affairs who have obtained legal qualifications as judiciary police. Otherwise, if no judiciary police are available, the other officials that are authorised to act include police officials, police agents, Royal Gendarmerie, local authorities in commune, officials of the Ministry of Women's Affairs as well as village chiefs who have intervened.

Additionally, as noted above, Article 3 of the Law mandates that “domestic violence is required to be prevented in time effectively and efficiently and that it is required to take the most appropriate measures in order to protect the victims or the persons who could be vulnerable”.

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49 Ibid, Article 74.

50 Ibid, Article 75.

51 Ibid, Article 76.

52 Ibid, Article 78.v

53 Ibid, Article 33.

Additionally, persons assigned by the court as “responsible persons” have a duty to monitor the situation of the child victims which are the subject of the allegation of domestic violence.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 CRIMINAL PROSECUTIONS & CIVIL ACTIONS

There does not appear to be any official statistics regarding successful prosecutions under the criminal and civil law.

However, an independent survey by the organisation Cambodian Human Rights and Development Association (ADHOC) suggests that 364 domestic violence cases were reported in 2005 and 531 in 2006 (that being an increase of 146%). 501 out of the 531 cases reported an injury (speared with a harpoon, thrown hot water and acid at, used abusive language). In 30 cases the victims were dead (this figure remained constant and did not increase). However, the Ministry of Women’s Affairs Report on Data Collection and Monitoring of Violence Against Women in 2010 concluded that domestic violence was decreasing. In particular the National Institute of Statistics, Cambodia Demographic and Health Survey noted that there was a 15.8% decrease in the number of women experiencing domestic violence from 2000–2005. However, figures for 2007, 2008 and 2009 showed great increase from 2006.<sup>54</sup>

### 10.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

The obligation placed on the authorities in charge to take action is cited as one of the effective features of the legislation, as this effectively breaks the cycle of domestic violence by placing the responsibility for the domestic violence on society rather than the victim.

However, a report titled *Report on the Violence Against Women in Cambodia – with a Focus on the Status of Implementation of the Law on the Prevention of Domestic Violence and the Protection of Victims* (the relevant Law) notes that in apparent contradiction to the broad list of potential victims in the legislation, the list of victims is likely confined to the following: husband who gets married traditionally without a proper registration, adult with disability, an adult ward, an adult under curatorship, grandparents, an uncle, an aunt, a cousin, a niece, a nephew, a maid, a cook, a domestic helper, a cleaner, a

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<sup>54</sup> Cambodia League for the Promotion and Defence of Human Rights (LICADHO), *Violence Against Women in Cambodia in 2006 Report*, March 2007, page 9.

baby sitter, a driver and those that cannot easily escape from the dangerous circumstances. This closed definition would exclude a number of other relationships, such as divorcees and the like.

A particular issue of concern is the use of “authorities in charge”. The concept is not properly defined. This has minimised the practical effect of the force of the Law, as there is often confusion surrounding which authority is obligated to act in circumstances where there are multiple authorities denying responsibility. Further, it has been asserted that there is over promotion or tendency by those in charge to push victims and offenders into reconciliation in circumstances where this is not appropriate. Additionally, the cultural identity of women in Cambodia, whose behaviour is tightly regulated by the cultural code *Chbab Shrey*, is one of inferiority. Under this code women are able to be disciplined by men for non-compliance. It is difficult to provide an effective mechanism to prevent violence against women (and domestic violence specifically) where such a code, which undermines these principles, is still in existence. However, in 2006, the CEDAW Committee interviewed the Cambodian Government on the existence of this code for women and whether they were attempting to dispose of it. To this the Government responded that the code was “a matter of national identity”, but further stated that it could be changed, should the present day require it if a “broad set of stakeholders, including civil society” necessitated it and were involved in this process.

This perception of women as inferior arises from the Buddhism principles that underlie Cambodian society. Also, domestic violence has previously been used to solve problems in Cambodian society.

The online publication “Refworld”, produced by the United Nations High Commissioner for Refugees, has recently published the findings of the Immigration Refugee Board of Canada on the state of domestic violence protections in Cambodia.<sup>55</sup> The publication has made a number of important findings, some of which is extracted here:

- according to the President of the Cambodia League for the Promotion and Defence of Human Rights (LICADHO), at least 25% of women in Cambodia have experienced domestic violence. Similarly, Gender and Development for Cambodia (GADC), a local non-governmental that promotes gender equality through advocacy, training, and community outreach, indicated that 20% of married women in Cambodia have experienced domestic violence at the hands of their husbands. ADHOC reports that in 2012, according to their own investigations and monitoring, there were at least 1,089 cases of domestic violence against women and children. According to

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55 See the following link for the full publication: <http://www.refworld.org/docid/520e1f2b4.html>.

ADHOC, domestic violence killings in 2012 included “brutal” cases in which bodies were cut to pieces and acid was thrown on victims;

- according to a joint report by the United Nations Development Programme (UNDP) and VBNK, a Cambodian training and consultancy organization that provides services in the field of social development, domestic violence in Cambodia is linked to poverty and lack of education, and is particularly high in the countryside where literacy rates are low. Sources also link domestic violence to alcohol abuse, gambling, and stress linked to landlessness;
- societal attitudes: according to Cambodia’s Women’s Affairs Minister, domestic violence stems “from societal attitudes that men are stronger and more valuable than women”. Similarly, in a qualitative study on gender norms, masculinity and domestic violence in Cambodia, GADC explains that violence against women is rooted in masculinity or structural male dominance and unequal gender relations. In Cambodian society men are expected to provide money for the family and to demonstrate their strength (which may include disciplining the family). Women are expected to remain quiet and obedient, managing the household and not refusing sex with their husband. A 2010 academic study about domestic violence in Cambodia, which was authored by four academics at Texas Tech University and published in the *Journal of Family Violence*, describes Cambodia as a “highly patriarchal society” in which women “are not encouraged to engage in discussion or voice opinions”. The study notes that Cambodia’s educational curriculum for junior high school students includes “Rules for Girls” (*chbab srey*), which include “talking softly, walking softly without making noise, sitting appropriately with her legs to the side, no screaming or yelling, and obeying and pleasing her husband”. Within this context, the study notes that society is tolerant of men controlling and beating their wives;
- sexual violence: according to the GADC survey, both men and women believed “that men had the control and power over sexual behaviour within marriage” and “women said that denying their husband sex would result in assumptions or accusations of infidelity and/or physical violence or forced intercourse”. In a telephone interview with the Research Directorate, a professor of Comparative and International Education at Lehigh University, who has researched and published articles about domestic violence in Cambodia, said that marital rape “is accepted as normal” in Cambodia (28 June 2013).
- implementation of the Law: several sources indicate that there is limited implementation of the domestic violence law. GADC states that there is “a disconnect between policy and implementation” and a need for increased knowledge of the law. UNDP and VBNK similarly note that there is “a lack of education and awareness of legal rights” about domestic violence. In a joint shadow report about the implementation of CEDAW in Cambodia, Cambodian non-governmental organisation, CEDAW, a coalition of 72 local and international non-governmental organisations that promote

gender equality in Cambodia, and the Cambodian Committee for Women (CAMBOW) state that the law is unknown to the majority of women in Cambodia because of the high rates of female illiteracy and limited information available about the law. According to the head of monitoring at ADHOC, as reported in Phnom Penh Post, the laws to protect women from violence are not enforced. Country Reports 2012 indicates that non-governmental organisations similarly describes enforcement of the domestic violence law as “weak”.

- police: sources describe Cambodia’s law enforcement as “weak” or “not effective”. The UNDP and VBNK state that among the police “there is an overall indifference towards domestic violence because they consider it a private or domestic matter” (2010, 2). The UN Committee on the Rights of the Child (CRC) similarly notes that domestic violence is “widely tolerated” by law enforcement officials in Cambodia. In addition, Country Reports 2012 states that authorities avoid taking action in domestic conflicts. A Lehigh University Professor stated that the police view most cases of domestic violence as “not serious” and as “a family matter”. He noted that sometimes the police do not check on reports of domestic violence, which he attributed as partially due to transportation costs and partially due to their attitudes towards domestic violence, low salaries and low moral. However, he also said that the police would refer “very serious cases, such as those involving blood” to the court. Country Reports 2012 indicates that during that year, the Criminal Police Department of the Ministry of the Interior investigated 871 cases of violence against women and children, including 237 rape or attempted rape cases, resulting in the arrest of 1,151 perpetrators. The same source explains that the number of incidents was “likely” underreported “due to ineffective enforcement, inadequate crime statistics reporting, and the fact that women were afraid to make complaints against perpetrators”. GADC’s survey also found that few people informed the police about incidents of domestic violence. According to the President of LICADHO, more than 80% of domestic violence cases go unreported for reasons such as “tradition, shame and fear of public reaction” (Phnom Penh Post 9 Mar. 2012). Sources indicate that the police sometimes take bribes from perpetrators of domestic violence. In the GADC survey, there was an example in which the police were bribed by the parents of an abusive husband to have him released. According to UNDP and VBNK, Cambodian law enforcement officials often accept bribes from perpetrators of domestic violence, which “seems to reinforce a culture of impunity and tacit acceptance that emboldens unlawful settlements”;
- judiciary: GADC describes Cambodia as having “weak rule of law,” but “strong traditions of informal dispute resolution outside of the court system”. According to their survey, some women have turned to village chiefs to help resolve domestic violence. However, GADC notes that this has produced “mixed results” and few prosecutions. According to Phnom Penh Post, 80% of civil cases among poor people are settled outside the formal legal process and there are 31 alternative justice centres in the provinces and capital, where cases are settled before a local commune chief or

governor. The article indicates that cases of domestic violence are among the cases resolved through this alternative dispute resolution process. The UNDP and VBNK note that even in “serious” cases of domestic abuse, women often accept community arbitration instead of pursuing legal justice. According to the Cambodian non-governmental organisation CEDAW “[l]ocal reconciliation processes often discriminate against women with pressure applied inappropriately to continue living with a violent partner”. According to the joint report by CEDAW and CAMBOW, there is not a sufficient number of qualified lawyers and sensitive judges in Cambodia to support victims of domestic violence. According to UNDP and VBNK, women who take legal action in cases of domestic violence “often face discriminatory judicial and legal systems that sympathize with men and too often emphasize reconciliation as the answer”. The same source indicates that most Cambodian women cannot afford the legal costs to bring a case of domestic violence forward to court or to obtain a medical certificate to prove the physical abuse. CEDAW similarly states that there are “significant financial costs” involved in bringing forward domestic violence court cases, which acts as a barrier to women accessing justice.<sup>56</sup>

### 10.3 PLANNED REFORMS/PILOT SCHEMES

While there are no formal pilot schemes in place, a number of recommendations have been discussed. These include:

- the Law should be amended to be in line with the United Nations Declaration of the Elimination of Violence against Women and should further state that no consideration for custom, tradition and religion shall be given when interpreting the Law and contemplating the content of its guidelines for implementation;
- the provision allowing domestic violence when it is “disciplining” should be deleted;
- the list of potential victims should be widened to include former spouses;
- a sub-decree should be enacted to clarify the meaning of “authorities in charge” for the purposes of the legislation;
- training should be provided to those empowered to implement the legislation so as to prevent confusion;
- punishment for contravention of protection orders should be clearly codified;
- the provision allowing conciliation as a means of addressing domestic violence should be limited in application to instances where both parties wish this to be the means of recourse;
- the Ministry of Women’s Affairs should implement better training system; and
- support and protection for victims should be widened and separated

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<sup>56</sup> As noted above, the full report can be found at: <http://www.refworld.org/docid/520e1f2b4.html>.



from any domicile or financial resources of victims. In Particular, government shelters should be introduced and long-term rehabilitation, psychological counselling and self-support assistance (job training) should be implemented.

#### 10.4 REVIEW OF DOMESTIC VIOLENCE LAWS

There is no prescribed regulatory review of the legislation. However, the legislation draws much attention worldwide which means that it is reviewed regularly by external bodies such as international non-governmental organisations.

#### 10.5 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS

The inclusion of “torture or cruel acts” as a form of domestic violence in the legislation facilitates Cambodia’s international obligations under Article 7 of the International Covenant on Civil and Political Rights (1966) that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and also Article 2, Paragraph 1 of the Convention Against Torture that “each state Party shall take effective legislation, administration, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. However, the apparent disciplinary/preventative nature of the Law then may pose problems in terms of fulfilment of these international obligations.

## ADDITIONAL RESOURCES

### APPLICABLE LAW

1. Law on the Prevention of the Domestic Violence and Protection of Victims (2005) (the Kingdom of Cambodia)
2. Criminal Code of the Kingdom of Cambodia (the Criminal Code) (2009) (the Kingdom of Cambodia)
3. Constitution of the Kingdom of Cambodia (1993) (the Kingdom of Cambodia)
4. Law on Management of Commune Administration (2001) (the Kingdom of Cambodia)

### PUBLICATIONS

1. United Nations High Commissioner for Refugees, “Refworld”, Immigration and Refugee Board of Canada, *Cambodia: Domestic Violence, including state protection and support services (2010–June 2013)* <http://www.refworld.org/docid/520e1f2b4.html>

2. Cambodian League for the Promotion and Defence of Human Rights (LICADHO), *Violence Against Women in Cambodia 2006*, March 2007
3. Human Rights Now, *Report on the Violence Against Women in Cambodia*, November 2011

### **NON-GOVERNMENTAL ORGANISATIONS**

1. Cambodian League for the Promotion and Defence of Human Rights <http://www.licadho-cambodia.org/>
2. The Cambodian National Council for Women <http://cncw.gov.kh/>
3. Ministry of Women's and Veteran's Affairs (MWVA) Cambodia [www.mwva.gov.kh](http://www.mwva.gov.kh)

### **GOVERNMENTAL ORGANISATIONS**

1. Statement by the Secretary of State, Ministry of Women's Affairs of the Kingdom of Cambodia, 57th session of the Commission on the Status of Women, March 2013
2. Minister of Women's Affairs (Cambodia), Follow-up Survey, Executive Summary – Violence Cambodia, 2009

## China (PRC)

‘ A 2013 survey found that 54.6% of 1858 respondents had experienced domestic violence. ’



# DOMESTIC VIOLENCE IN THE PEOPLE'S REPUBLIC OF CHINA (PRC)

DLA Piper International LLP, Beijing/Melbourne

## **EXECUTIVE SUMMARY**

In the People's Republic of China, the prevention of and protection against domestic violence is covered by several legislative acts, each dealing with different aspects of domestic violence. Domestic violence is defined by a Supreme People's Court interpretation of the Marriage Law. The definition is broad, and includes mental and physical injury by any means to family members including children.

Prevention of and protection from domestic violence in the People's Republic of China is provided for by the Public Security Bureau (who respond to domestic violence and report and investigate at a local level), the People's Procuratorate (who review cases and prosecute offenders), the local Neighbourhood Committees (who coordinate mediation of disputes), the Healthcare Departments (who provide training to staff in responding to domestic violence and report to investigation authorities), the Civil Affairs departments (who provide aid and refuge to victims), and other non-governmental organisations (who provide support services to victims). Where children are involved, there are specific provisions to protect the child's interests in legal proceedings and to move them to a safe place where appropriate.

Recent high-profile cases have helped raise the profile of domestic violence in the People's Republic of China. Some female delegates to the 12th National People's Congress have recently spoken about the importance of finalising national Anti-Domestic Violence laws as soon as possible. In response, in April 2013 the National People's Conference ("NPC") stated that Anti-Domestic Violence legislation would be part of a review of important laws in 2013 and beyond. It is possible that enhanced domestic violence rules will be created at a national level in the People's Republic of China in the coming years.

# 1 DEFINITIONS OF DOMESTIC VIOLENCE

## 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in the People's Republic of China (PRC).

Domestic violence is defined as behaviour whereby a person causes physical, psychological or other injury to a family member by beating, binding, maiming, forced restriction of personal freedom or other means.<sup>57</sup>

Psychological harm is specifically included in the definition.

Furthermore, while financial abuse or economic hardship is not explicitly included, this form of abuse could be included due to the words by "other means" in the definition.

Nevertheless, Article 2 of the Supreme People's Court's Guidelines for Hearing Cases Touching on Domestic Violence deals explicitly with "economic control" as a way of inflicting domestic violence.

The definition of family members is not entirely clear. However, according to the Marriage Law, marriage is defined as between a man and a woman. Therefore, it is unlikely that the definition includes *de facto*, gay, lesbian, transgender or domestic worker relationships.

A draft Law on the Prevention and Punishment of Domestic Violence has been prepared by experts at the Anti-Domestic Violence Network of the China Law Society. This draft goes beyond the current definition, stating that domestic violence refers to any of the following:<sup>58</sup>

- physical injury and restriction of personal liberty of a victim, including threats of such acts;
- sexual harm and other sexual abuse against the victim's will, including threats of such acts;
- psychological harm by means of intimidation, insult, libel or breach of privacy;
- property damage and other acts of economic control;
- forced abortion by illegal means;
- abandonment; and
- other acts resulting in physical, psychological or sexual harm or property damage.

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<sup>57</sup> Explanation of Various Questions Regarding Use of the Marriage Law (Interpretation No 1).

<sup>58</sup> Explanation of the Law on the Prevention and Punishment of Domestic Violence (A Draft Proposed by Experts), available at: <http://www.iolaw.org.cn/showLaws.asp?id=22730>.

This definition is relatively broad, but a final definition as adopted by the legislature may be expected to mirror at least some of the wording used in this draft.

In March 2013 Sun Xiaomei and Zhao Donghua, who are both female delegates to the 12th National People's Congress, spoke out about the importance of implementing Anti-Domestic Violence laws as soon as possible.<sup>59</sup> In April 2013 the NPC stated that Anti-Domestic Violence legislation would be part of a review of important laws in 2013 and beyond.<sup>60</sup>

An online survey by the Maple Women's Psychological Counselling Centre of Beijing (Maple) in April 2013 found that 54.6% of 1858 respondents said they suffered from domestic violence<sup>61</sup> Maple has also submitted proposals to the National People's Congress on law reform with respect to domestic violence. Further, Maple run a hotline for victims of domestic violence.

## 1.2 FORMS OF DOMESTIC VIOLENCE

Therefore, domestic violence can be committed in any, or a combination, of the following forms:

- mental violence — including psychological harm connected with physical violence;
- physical violence — including beating, binding, maiming, forced restriction of personal freedom or other means; and/or
- sexual violence — included indirectly by the definition which includes violence by "other means".

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

There is no central piece of legislation on domestic violence in the PRC.

The relevant law dealing with the issue of domestic violence is the Marriage Law of 1980, as amended in 2001. However, the Marriage Law does not define domestic violence. The interpretation of what constitutes domestic violence is found in the Supreme People's Court's *Explanation of Various Questions Regarding Use of the Marriage Law* (Interpretation No 1).

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59 For Sun Xiaomei see: [http://www.npc.gov.cn/npc/sjb/2013-03/16/content\\_1787636.htm](http://www.npc.gov.cn/npc/sjb/2013-03/16/content_1787636.htm). For Zhao Donghua see: [http://www.npc.gov.cn/npc/sjb/2013-03/16/content\\_1786504.htm](http://www.npc.gov.cn/npc/sjb/2013-03/16/content_1786504.htm).

60 The NPC hands down its legislative work plan for 2013, available at: [http://www.npc.gov.cn/npc/xinwen/syxw/2013-04/27/content\\_1793635.htm](http://www.npc.gov.cn/npc/xinwen/syxw/2013-04/27/content_1793635.htm).

61 See <http://www.maple.org.cn/tabid/62/ArticleID/1695/Default.aspx>

Domestic violence is also dealt with in other National legislation and Provincial laws and regulations. At the national level these include:

- the Law of the People’s Republic of China on the Protection of Rights and Interests of Women;
- the Law of the People’s Republic of China on the Protection of Minors; and
- the Law of the People’s Republic of China on Protection of the Rights and Interests of the Elderly.

At the provincial level, the Standing Committee of many Provincial Peoples’ Congresses have passed their own “Resolution on the Prevention and Elimination of Domestic Violence”. In total 28 Provinces or equivalent administrative regions (out of 34) have either created local rules on, or have local policies dealing with, domestic violence related issues.<sup>62</sup>

The Supreme People’s Court have also issued their Guidelines for Hearing Cases Touching on Domestic Violence (the “Guidelines”) but these guidelines do not have the force of law.

Additionally, protection for victims of domestic violence who defend themselves is a major problem in the PRC. Article 20 of the Criminal Law of the People’s Republic of China (the “Criminal Law”) protects people from liability if they use proportionate force to prevent or stop an attack, but in practice this has not operated to help victims of domestic violence.

Xing Hongmei of China Women’s University conducted a study of 121 female inmates at a Sichuan jail. She found that more than “80 per cent received the heaviest possible sentences for murder or bodily harm”, and the fact that their crimes were precipitated or provoked by domestic violence was not taken into account.<sup>63</sup>

## 2.2 INTERNATIONAL TREATIES

Additionally, the PRC has ratified the following international treaties which are relevant to domestic violence:

- United Nations Convention on the Elimination of All Forms of Discrimination against Women (ratified by the PRC on 4 November 1980);
- International Covenant on Economic, Social and Cultural Rights (ratified by the PRC on 27 March 2001);
- United Nations Convention on the Rights of the Child (ratified by the PRC on 2 March 1992); and

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<sup>62</sup> See <http://www.chinacourt.org/article/detail/2012/12/id/799170.shtml>.

<sup>63</sup> Didi Kirsten Tatlow, Chinese courts turn a blind eye, available at: <http://www.nytimes.com/2013/01/30/world/asia/chinese-courts-turn-a-blind-eye-to-abuse.html>.

- United Nations Convention on the Rights of Persons with Disabilities (ratified by the PRC on 1 August 2008).

The PRC is a signatory to, but has not yet ratified, the International Covenant on Civil and Political Rights (signed by the PRC on 5 October 1998).

The United Nations General Assembly also passed the non-binding Declaration on the Elimination of Violence Against Women. The Supreme People's Court refers to this Declaration in Article 2 of its Guidelines as informing their definition of domestic violence in the PRC.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Article 45 of the Marriage Law states that domestic violence may be a criminal matter, and that any person engaging in domestic violence “can be investigated for criminal responsibility in accordance with law”.

The victim may, in accordance with relevant provisions of the Criminal Procedure Law, lodge a private prosecution with the People's Court; the public security organ shall investigate the case in accordance with law, and the People's Procuratorate shall institute public prosecution in accordance with law.<sup>64</sup>

The burden of proof for criminal prosecution rests with the People's Procuratorate, who initiate public prosecution of criminal cases as an arm of the State.<sup>65</sup>

The People's Procuratorate has the sole right to initiate public criminal prosecutions for domestic violence.<sup>66</sup>

### 3.2 RELEVANT COURT

The People's Procuratorate is the administrative organ responsible for the investigation and prosecution of criminal matters.<sup>67</sup> The People's Procuratorate will investigate and prosecute domestic violence matters insofar as the acts of domestic violence are constituted by acts that are themselves criminal acts.<sup>68</sup>

A hearing will then be held in a Local People's Court.<sup>69</sup>

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<sup>64</sup> Criminal Procedure Law of the People's Republic of China, Article 3.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. See also Chapter 3 of Part 2 of the Criminal Procedure Law.

<sup>69</sup> See generally Part 3 of the Criminal Procedure Law.



### 3.3 STAGES OF THE PROCEEDINGS

Under Chinese law, criminal proceedings typically follow these stages:<sup>70</sup>

- report of the alleged crime;
- investigation and associated tasks carried out by the Public Security Bureau (PSB);
- procuratorial work carried out by the People's Procuratorate; and
- adjudication carried out by the People's Courts.

#### Reporting the crime<sup>71</sup>

The Criminal Procedure Law bestows the right and duty on all people to report any instance of a crime or provide information about any crime to a public security organ.

Victims are also entitled to report crimes.<sup>72</sup>

The public security organ receiving the report must accept all reports, and can refer the reporter to a different public security organ if the alleged crime is outside its jurisdiction.<sup>73</sup>

The public security organ shall, within the scope of its jurisdiction, promptly examine the materials provided by a reporter, complainant or informant and the confession of an offender who has voluntarily surrendered. If it believes that there are facts of a crime and criminal responsibility should be investigated, it shall file a case. If it believes that there are no facts of a crime or that the facts are obviously incidental and do not require investigation of criminal responsibility, it shall not file a case and shall notify the complainant of the reason. If the complainant does not agree with the decision, he or she may ask for reconsideration.<sup>74</sup>

#### PSB Investigation<sup>75</sup>

The PSB are responsible for investigation, detention, execution of arrests and preliminary inquiry into criminal matters. The Criminal Procedure Law provides specifically for powers of interrogation, questioning, examination, search, seizure, expert evaluation, and arrest warrants.

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<sup>70</sup> See Chapters 1 to 3 of Part 2, and Part 3 generally, of the Criminal Procedure Law of the People's Republic of China.

<sup>71</sup> Criminal Procedure Law, Chapter 1 of Part 2.

<sup>72</sup> Criminal Procedure Law, Article 84.

<sup>73</sup> Ibid.

<sup>74</sup> Criminal Procedure Law, Article 86.

<sup>75</sup> Criminal Procedure Law, Chapter 2 of Part 2.

### Procuratorial work by the People's Procuratorate<sup>76</sup>

The People's Procuratorate are responsible for procuratorial work, authorising approval of arrests, conducting investigation and initiating public prosecution of cases directly accepted by the procuratorial organs. In examining a case, the People's Procuratorate is required to ascertain:<sup>77</sup>

- whether the facts and circumstances of the crime are clear, whether the evidence is reliable and sufficient and whether the charge and the nature of the crime has been correctly determined;
- whether there are any crimes that have been omitted or other persons whose criminal responsibility should be investigated;
- whether it is a case in which criminal responsibility should not be investigated;
- whether the case has an incidental civil action; and
- whether the investigation of the case is being lawfully conducted.

Where the Procuratorate considers that there is sufficient evidence to support the conclusion that a crime has been committed then it will initiate proceedings in a People's Court.<sup>78</sup>

### Court proceedings<sup>79</sup>

Adjudication of court proceedings is managed by the People's Courts. Criminal matters are dealt with at trial, and a right of appeal exists for defendants.

## 3.4 PROSECUTION FUNDING

Prosecutions are funded by the State through the People's Procuratorate. However, it should be noted that in practice if a victim wants to formalise their complaint they will request their local neighbourhood committee to conduct mediation of domestic violence disputes in accordance with Article 43 of the Marriage Law.

Article 43 of the Marriage Law further states that "Where the victim advances a request, the public security organ shall, in accordance with the legal provisions on administrative penalties for public security, impose an administrative penalty on the person who commits family violence or maltreatment of a family member".

The practical effect of these provisions is that more commonly, disputes will be dealt with outside the courts by a family's local residents' committee or through the family's local PSB.

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<sup>76</sup> Criminal Procedure Law, Chapter 3 of Part 2.

<sup>77</sup> Criminal Procedure Law, Article 137.

<sup>78</sup> Criminal Procedure Law, Article 141.

<sup>79</sup> Criminal Procedure Law, Part 3.

### 3.5 TIMESCALES

There are no official statistics on the time required to prosecute a perpetrator of domestic violence. However, in one recent high profile case a victim of domestic violence waited approximately two years from when she first reported the domestic violence to receiving a court-ordered divorce from her abusive husband.<sup>80</sup>

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

In the PRC, preliminary and interim measures are technically available, but are rare in practice.

For example lower courts have begun to more regularly issue “personal protection orders” in a domestic violence context.<sup>81</sup> The Supreme People’s Court’s Guidelines at Articles 23–27 also provide guidance on means available to the courts to protect people’s safety and privacy.<sup>82</sup> However, due to widespread mistrust of the legal system and lack of confidence in legal processes among citizens, victims of domestic violence in the PRC will generally not rely on legal recourse to solve their issues.

In practice most successful interim measures will be likely be informal.

Nonetheless there are some specific interim rights available to victims of domestic violence. These include:

- Article 43 of the Marriage Law, which provides that a victim of domestic violence has the right to advance a request to their local neighbourhood committee. The local committee must then endeavour to solve the problem through mediation;
- Article 32 of the Marriage Law, which provides that domestic violence is one of the grounds under which a court will allow a divorce. Parties must first engage in mediation before applying to the court for a divorce; and
- Article 46 of the Marriage Law, which provides that where domestic violence leads to a divorce the innocent party shall have the right to claim compensation.

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80 The domestic violence was reported on about 11 September 2011, see: <http://www.newyorker.com/online/blogs/evanosnos/2011/09/crazy-english-teacher-admits-to-domestic-violence.html>. The case was finally decided in early 2013, see: <http://www.newyorker.com/online/blogs/evanosnos/2013/02/a-landmark-domestic-violence-case-in-china.html>.

81 Increasing popularity of personal protection orders, available at: <http://www.chinacourt.org/article/detail/2011/09/id/464731.shtml>.

82 See <http://www.chinacourt.org/article/detail/2011/09/id/464731.html>.

The Supreme People's Court's Explanation of Various Questions Regarding Use of the Marriage Law (Interpretation No 1) adds to the detail in Article 46 of the Marriage Law by clarifying that the right to compensation includes compensation for psychological damage as well as property damage.

However, due to opacity in the legal system and citizens' lack of confidence in legal processes, victims of domestic violence in the PRC will generally not rely on legal recourse to solve their issues.<sup>83</sup>

## 4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

Under the Marriage Law, victims of domestic violence are given certain rights. In any civil claim the burden of proof will rest with the claimant.<sup>84</sup>

## 4.3 RELEVANT COURT

An incidental civil claim related to a criminal claim can be dealt with contemporaneously by the local People's Court.<sup>85</sup>

## 4.4 TIMESCALES

There are no official statistics on the time required to bring a civil action for compensation for domestic violence.

However, it is interesting to note that in one recent high-profile case a victim of domestic violence waited approximately two years from when she first reported the domestic violence to receiving a divorce and compensation.<sup>86</sup>

That case was unique because it involved a US citizen married to a high-profile Chinese national. The female victim was able to successfully utilise social media to raise public awareness of her case.<sup>87</sup>

In other types of cases, for example compulsory land acquisition cases, claimants who are able to raise the profile of their case through social media have experienced substantially better and faster outcomes. The timescales for a claim brought by an 'average' victim of domestic violence in the PRC will likely

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83 Based on research and consultation this appears to be a generally accepted view.

84 *Supreme People's Court's Several Provisions on Evidence in Civil Proceedings*, Article 4-7.

85 Criminal Procedure Law, Article 78.

86 The domestic violence was reported on about 11 September 2011, see: <http://www.newyorker.com/online/blogs/evanosnos/2011/09/crazy-english-teacher-admits-to-domestic-violence.html>. The case was finally decided in early 2013, see: <http://www.newyorker.com/online/blogs/evanosnos/2013/02/a-landmark-domestic-violence-case-in-china.html>.

87 Ibid.

be longer than two years, but the recent landmark case described above may open the door to compensation for other victims of domestic violence.<sup>88</sup>

The Guidelines also contain some guidance for lower courts and the legal industry on case management for matters involving domestic violence.

#### **4.5 FUNDING TO PROSECUTE**

The legal system in the PRC is intended to be accessible to everyone, however in practice the cost of bringing a claim appears to be prohibitive for many victims.<sup>89</sup>

## **5 SUPPORT FOR VICTIMS**

### **5.1 STATUTORY PROVISIONS**

There does not appear to be any provision made for support for victims in the legislation.

However, general support for victims of domestic violence may also be provided by the:

- public security organs;
- local neighbourhood committees;
- healthcare and social welfare departments; and
- non-governmental organisations.

### **5.2 INTERVENTION CENTRES AND STATE ORGANS**

There are a number of State organs which support victims. These include the:

- PSB; and
- government departments that provide training to staff and provide places of refuge for victims.

### **5.3 NON-GOVERNMENTAL ORGANISATIONS**

There are a number of other organisations that support victims of domestic violence. These include the:

- local neighbourhood committees that help with mediation of disputes; and

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<sup>88</sup> The case prompted a flurry of discussion and publicity among people working in domestic violence support services.

<sup>89</sup> Based on general research and consultation this appears to be a generally accepted view.

- non-governmental organisations such as Maple.

In relation to local neighbourhood committees, these organisations are grassroots support committees which operate in each neighbourhood. These committees often have links to the local public security organs and party machinery but are a relatively informal first option for victims wishing to report domestic violence.<sup>90</sup>

In relation to non-governmental organisations, 24-hour domestic violence hotlines, counselling services, and referral advice are some of the common services provided to victims of domestic violence.<sup>91</sup>

## 5.4 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

Article 10 of the Law of the People's Republic of China on the Protection of Minors provides that domestic violence against minors is prohibited. Article 51 provides that "Where a minor whose lawful rights and interests are infringed upon brings a lawsuit, the People's Court shall...take into consideration his [or her] physical and mental characteristics and the need of his [or her] healthy growth".

That power to conduct proceedings in a way that protects the child's interest extends to the right under Article 53 of the law, which empowers a minor (or some other body acting in the minor's interests) to apply to have the minor placed in a different home.

The Supreme People's Court's Guidelines also touch on the impact of domestic violence on minors at Article 13 of the law, and the protection orders alluded to in the Guidelines at Article 23–27 can operate to protect both parents and their children.

### Guidance notes

There are guidelines and quasi-legal regulations dealing with the provision of support for adult victims of domestic violence. These include the Supreme People's Court's Guidelines for Hearing Cases Touching on Domestic Violence.

## 6 OFFENCES

Domestic violence is not currently a crime in the PRC. However, acts of violence or property damage that could constitute domestic violence if they are perpetrated in the home are covered by Chapters 4 and 5 of Part 2 of the Criminal Law.

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<sup>90</sup> Based on general research and consultation this appears to be a generally accepted view.

<sup>91</sup> Maple run one such support hotline.

The most relevant offences are in the table below:

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW – THE CRIMINAL LAW OF THE PEOPLE’S REPUBLIC OF CHINA</b>		
Intentional homicide	Article 232	Minimum ten years’ imprisonment
Intentionally or negligently injuring another person	Articles 234–235	Imprisonment up to three years; criminal detention or public surveillance.
Acting indecently against, or insulting a woman (or a child) by violence, coercion or any other forcible means.	Article 237	Up to five years’ imprisonment (more if victim is a child).
Unlawful detainment of another person, or unlawful deprivation of another person’s personal freedom.	Article 238	Up to three years’ imprisonment, criminal detention, public surveillance or deprivation of political rights. Three to ten years’ imprisonment if perpetrator inflicts serious injury on victim.
Bigamy	Article 258	Up to two years’ imprisonment, or criminal detention.
Maltreatment of family member (where circumstances are flagrant).	Article 260	Up to two years’ imprisonment, criminal detention, or public surveillance. Two to seven years’ imprisonment if victim is seriously injured or killed.

## 7 REHABILITATION MEASURES

There does not appear to be any formal rehabilitation measures dealing specifically with domestic violence under the legislation.

## 8 THIRD PARTY RESPONSIBILITIES

There does not appear to be any duties placed on third party individuals. However, 28 Provinces or equivalent administrative regions (out of 34) have created local rules or policies dealing with domestic violence.

On paper, and to varying degrees of success in practice, the outcome is that the PSB (who respond to domestic violence and report and investigate at a local level), the People’s Procuratorate (who review and prosecute offenders), the local Neighbourhood Committees (who coordinate mediation

of disputes), the Healthcare Departments (who provide training to staff in responding to domestic violence and report to investigation authorities), the Civil Affairs departments (who provide aid and refuge to victims), and other non-governmental organisations (who provide support services to victims) must all coordinate with each other to provide a full-service response to the problem of domestic violence.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

There are no official records of the number of prosecutions carried out under the legislation.

### 9.2 PROSECUTIONS UNDER CIVIL LAW

There are no official records of the number of civil actions carried out pursuant to the Marriage Law or the associated interpretations and guidelines. However, recent landmark cases may make access to justice easier, and conduct of court cases more expeditious for claimants.<sup>92</sup>

### 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Due to the preference among Chinese citizens to resolve disputes without recourse to formal legal mechanisms, it is difficult to measure the overall effectiveness of the legal framework.

In general the legal system is relatively hard to access. Effective legal outcomes can sometimes depend on how effectively the claimant can utilise non-legal resources such as social media in conjunction with legal avenues for dispute resolution.

As noted above, the legal framework regarding domestic violence looks strong on paper, but the social context makes enforcement difficult. Recent high profile cases noted above have resulted in divorce and compensation being awarded to victims of domestic violence, and this may lead to greater awareness among victims of their rights and options, and subsequently to more effective implementation of the laws in mediations and in the courts.

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<sup>92</sup> See footnote 30, above.



## 9.4 PLANNED REFORMS/PILOT SCHEMES

As noted above, in March 2013 Sun Xiaomei and Zhao Donghua, both female delegates to the 12th National People's Congress, spoke out about the importance of implementing Anti-Domestic Violence laws as soon as possible. In April 2013 the NPC stated that Anti-Domestic Violence legislation would be part of a review of important laws in 2013 and beyond. It is relatively likely that enhanced domestic violence rules will be implemented at a national level in the PRC in the coming years.<sup>93</sup>

## 9.5 REVIEW OF DOMESTIC VIOLENCE LAWS

The Standing Committee of the National People's Congress is responsible for reviewing all legislation in the PRC, and is the body that creates and promulgates all new national legislation.

Domestic violence has become a high-profile issue in recent years, and the increasing number of women in the National People's Congress may help create momentum for legal change.

## ADDITIONAL RESOURCES

### Applicable law

1. Marriage Law of the People's Republic of China
2. Law of the People's Republic of China on the Protection of Rights and Interests of Women
3. Law of the People's Republic of China on the Protection of Minors
4. Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly
5. Supreme People's Court's Guidelines for Hearing Cases Touching on Domestic Violence

### Publications

1. *Explanation of the Law on the Prevention and Punishment of Domestic Violence* (A Draft Proposed by Experts), available at <http://www.iolaw.org.cn/showLaws.asp?id=22730>
2. Expert's proposed draft (Chinese version) <http://www.stopdv-china.org/detail.aspx?id=300836>

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<sup>93</sup> Based on recent announcements from the National People's Congress. See, eg, 4. The NPC hands down its legislative work plan for 2013, available at: [http://www.npc.gov.cn/npc/xinwen/sywxw/2013-04/27/content\\_1793635.htm](http://www.npc.gov.cn/npc/xinwen/sywxw/2013-04/27/content_1793635.htm).

3. Xin He and Kwai Hang Ng, *In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation*, International Journal of Law, Policy and the Family (2013) 27(1), pp 97-115

### Judgments

Explanation of Various Questions Regarding Use of the Marriage Law (Interpretation No 1)

### Other sources

1. <http://www.theatlantic.com/international/archive/2013/02/can-an-american-woman-stop-domestic-violence-in-china/272954/>
2. Sun Xiaomei on domestic violence in the PRC, available at [http://www.npc.gov.cn/npc/sjb/2013-03/16/content\\_1787636.htm](http://www.npc.gov.cn/npc/sjb/2013-03/16/content_1787636.htm)
3. Zhao Donghua on domestic violence in the PRC, available at [http://www.npc.gov.cn/npc/sjb/2013-03/16/content\\_1786504.htm](http://www.npc.gov.cn/npc/sjb/2013-03/16/content_1786504.htm)
4. *The NPC hands down its legislative work plan for 2013*, available at [http://www.npc.gov.cn/npc/xinwen/syxw/2013-04/27/content\\_1793635.htm](http://www.npc.gov.cn/npc/xinwen/syxw/2013-04/27/content_1793635.htm)
5. Implementation of domestic violence policies across China, available at <http://www.chinacourt.org/article/detail/2012/12/id/799170.shtml>
6. Increasing popularity of personal protection orders, available at <http://www.chinacourt.org/article/detail/2011/09/id/464731.shtml>

### Statistics

1. <http://www.maple.org.cn/tabid/62/ArticleID/1695/Default.aspx>
2. [http://www.china.org.cn/china/2013-05/10/content\\_28781884.htm](http://www.china.org.cn/china/2013-05/10/content_28781884.htm)

### Non-governmental organisations

1. <http://www.stopdv-china.org>
2. <http://www.maple.org.cn>

### Governmental organisations

1. <http://www.women.org.cn/english/english/whatisnws/2002-3.htm>
2. <http://www.womenofchina.cn/>

# Czech Republic

**‘** *In 2011, 100% of domestic violence victims in the Czech Republic experienced mental violence, 77.3% had experienced physical violence, 65.5% had experienced economic violence and 40% had experienced sexual violence.* **’**



# DOMESTIC VIOLENCE IN THE CZECH REPUBLIC

CMS, Prague

## EXECUTIVE SUMMARY

In the Czech Republic, the prevention of and protection against domestic violence is covered by several legislative acts, each dealing with different aspects of domestic violence. There is no single definition of domestic violence, but interpretation by the courts is broad and includes mental, physical, sexual and economic violence within a variety of relationships.

Prevention of and protection from domestic violence in the Czech Republic is provided for by the police, the courts and specialist Intervention Centres. Where children are involved, the work of these organisations is supported by the responsible authority for the Social and Legal Protection of Children.

Changes to legislation during 2013 and 2014 will provide for longer periods during which an offender is restricted from entering a residence which they share with the victim, greater support for victims of domestic violence and clarification of the rules as to when victims can receive free legal advice and representation.<sup>94</sup>

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 GENERAL DEFINITION OF DOMESTIC VIOLENCE

Domestic violence is not expressly defined under Czech law. However, a variety of definitions have been developed by specialists and organisations dealing with domestic violence in the Czech Republic,<sup>95</sup> for example:

- the Ministry of the Interior of the Czech Republic defines domestic violence as: “Long-lasting violent behaviour in the family including all types of acts or omissions which are committed within the family against family member(s), and which undercut the life, physical or mental integrity or freedom of a family member or the family as a whole, or which present serious harm to the evolution of the person.”
- *Bílý kruh bezpečí*, one of the largest non-governmental organisations

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<sup>94</sup> Detailed research was undertaken during 2013. Due to the fluidity of changes in this area in the period between submission of research and publication of the consolidated report further developments may have occurred.

<sup>95</sup> <http://www.domacinasili.cz/domaci-nasili/>

helping victims of domestic violence in the Czech Republic, defines domestic violence as: “Physical, mental or sexual violence between two close people which happens repeatedly in private. The intensity of each attack worsens and leads to a loss of control to stop these attacks and to effectively repair the relationship between the two close people.”

- academic experts on domestic violence, Ms Střílková and Mr Fryšták, define domestic violence as: “Repetitive and violent behaviour or the repetitive threat of violent behaviour resulting in a serious attack against the life, health, freedom or human dignity which happens (or will happen) between persons who live (or have lived) together in an intimate, family or similar relationship, and who are living together in a commonly used dwelling. The offender and the victim can be clearly identified.”

The key features of domestic violence recognised by Czech organisations and other specialists dealing with domestic violence are:<sup>96</sup>

- repetitive and long-lasting violent behaviour (if the violent attack happens only once, this will not constitute domestic violence);
- an escalation of the violent attacks (for example where the violence escalates from verbal to physical attacks);
- a clear identification of, and division between, the offender and the victim (if both parties attack each other this will not constitute domestic violence);
- an emotional, social or economic connection between the offender and the victim; and
- an element of privacy (i.e. the domestic violence happens “behind closed doors”).

All the above features need to be present for the behaviour to be defined as domestic violence.

## 1.2 LEGAL DEFINITION

The Czech courts have held that domestic violence can be present in a wide range of relationships, including informal intimate relationships between unmarried partners and also non-intimate relationships. These relationships can be between persons of all sexual orientations (i.e. gay, lesbian or transgender). Domestic violence can also occur in non-intimate relationships, such as relationships between family members (e.g. between children and their parents, step-parents or other family members); or between elderly family members and other family members, and other similar relationships (e.g. between disabled persons and carers).

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96 <http://www.domacinasili.cz/domaci-nasili/>

Domestic violence can also occur between persons living in a commonly-shared dwelling such as domestic workers (for example, *au pairs*), provided that all of the features of domestic violence mentioned in section 1.1 above are present.

### 1.3 FORMS OF DOMESTIC VIOLENCE

Domestic violence can be committed in any, or a combination, of the following forms:

- mental violence — including verbal offences, humiliation, ridicule, threats to hurt the victim or the victim's children, threats of suicide or damaging clothes or other personal items of the victim;
- physical violence — including the use of physical force to hurt, harm, intimidate or threaten the victim, or deprivation of food or sleep;
- sexual violence — including involuntary sexual contact of any kind and rape;
- economic violence — including absolute control over family finances, prevention of access to the financial resources of the victim or family finances, forcing the victim to transfer his or her assets to the offender, prohibiting the victim from being economically active or making the victim financially dependent on the offender; and/or
- social violence — including isolation of the victim from their family or friends, or control of the victim's telephone, email or other means of communication.

Statistics prepared by the non-governmental organisation ROSA<sup>97</sup> show that in 2011, 100% of domestic violence victims who contacted ROSA had experienced mental violence, 77.3% had experienced physical violence, 66.5% had experienced economic violence and 40% had experienced sexual violence.

It is very hard to prove domestic abuse by way of mental abuse or violence. There is no set evidence which should be provided to the court when alleging domestic violence. However, in practice, the following are often provided to the court as evidence of mental violence:

- the testimony of neighbours or other witnesses of "verbal" violence; and
- pieces of clothing or other personal items which have been damaged by the offender.

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<sup>97</sup> In ROSA: *Sociological probe of clients, victims of the domestic violence in the year 2011, 2012*. The statistics are based on data collected regarding 233 of ROSA's clients who were victims of domestic violence.

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

There are no specific legislative acts which provide a discreet set of rules on domestic violence. However, domestic violence is part of several different criminal offences under Czech law. These include, in particular the:

- Civil Procedure Act, which deals with preliminary/interim measures regarding domestic violence and the procedure for eviction of an offender from a commonly-shared dwelling;
- Act on Police of the Czech Republic, which includes provisions which deal with the eviction of an offender from a commonly-shared dwelling;<sup>98</sup>
- Criminal Code, which includes provisions which stipulate certain relevant criminal offences, such as maltreatment;
- Minor Offences Act;
- Act on Social and Legal Protection of Children, which includes an obligation to notify the relevant authority of any signs of domestic violence towards children; and
- Act on Social Services, which includes provisions governing the establishment of Intervention Centres.

### 2.2 INTERNATIONAL TREATIES

International treaties ratified and promulgated by the Czech Republic form part of Czech law. These international treaties have “application priority”, meaning that provisions of these treaties have supremacy over national law if there is a conflict between the provisions of the international treaty and of national law.

The following international treaties have been ratified and promulgated by the Czech Republic and could therefore be relevant in domestic violence cases:

- International Covenant on Civil and Political Rights (ICCPR), ratified by the Czech Republic on 23 December 1975;
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by the Czech Republic on 16 February 1982;
- Convention on the Rights of the Child (CRC), ratified by the Czech Republic on 7 January 1991;
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ratified by the Czech Republic on 18 March 1992;
- Convention Against Torture (CAT), ratified by the Czech Republic on 22 February 1993;

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98 A dwelling means a house, apartment or other premises used as a residence and the fittings associated with it.

- The International Covenant on Social, Economic and Cultural Rights (ICESCR), ratified by the Czech Republic on 22 February 1993; and
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ratified by the Czech Republic on 26 February 2001.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Czech criminal law is based on the presumption of innocence principle, i.e. the accused person is innocent until proven guilty.

The burden of proof is on the State prosecutor. The prosecutor has to collect and present enough compelling evidence to convince the court that the accused is guilty beyond reasonable doubt. If reasonable doubt remains, the accused must be acquitted.

For the prosecution to be successful, the State prosecutor has to prove that:

- the action which the offender has been charged with has been committed;
- the accused is the individual who committed the action; and
- the action qualifies as a criminal offence under the applicable criminal law.

The relevant circumstances of the case, including the type of offence and seriousness of the charge brought, are also taken into account.

### 3.2 RELEVANT COURT

#### The courts of first instance

In general, cases are first brought before the District Court<sup>99</sup> which has jurisdiction over the territory where the crime was committed. For domestic violence cases, the competent court will typically be the District Court of the area where the offender and victim live.

The cases are heard by a criminal judge.

#### The court of appeal

The Regional Court<sup>100</sup> is competent to decide on cases on appeal from first instance decisions.

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<sup>99</sup> The District Courts are the first (lowest) level of the court hierarchy in the Czech Republic.

<sup>100</sup> The Regional Courts are at the second level of the court hierarchy in the Czech Republic.



Appeals are heard by three criminal judges.

### 3.3 STAGES OF THE PROCEEDINGS

Under Czech law, criminal proceedings typically follow three stages:

- police investigation: the police are required to investigate and take all necessary steps to ascertain whether a criminal offence has been committed and, if so, to identify the offender;
- preparation of charges by a State prosecutor: the State prosecutor, in cooperation with the police, undertakes all necessary investigations and measures to prepare the charges against the offender; and
- court proceedings: the court decides on the guilt of the offender and, if required, the appropriate punishment.

#### Police investigation

The police have a legal obligation to initiate an investigation when there are any suspicions that a crime has been committed in the following situations:

- when a motion is filed by any individual or organisation who suspects a crime has been committed or by a victim or witness;
- when a motion is filed by any State authority which suspects a crime has been committed; or
- if the police themselves have a suspicion, based on the information known to them from their own activities, that a crime has been committed.

The police are obliged to notify the State prosecutor about the commencement of any investigation.

In general, where an offender is considered to be a “close person”<sup>101</sup> to the victim, investigations can only be initiated and carried out with the consent of the victim.

However, investigations of domestic violence which qualify as “maltreatment of a person living in common dwelling” under section 199 of the Criminal Code or as “maltreatment of a person in ward” under section 198 of the Criminal Code (see further section 6.1 below), can be initiated without the consent of the victim and even against the victim’s will.

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<sup>101</sup> A “close person” is defined as a relative in direct ancestry/lineage, adopter, adoptee, sibling, husband or registered partner (registered partners being two people of the same sex who are officially registered as living together in a partnership as a couple). Other persons in a family or similar relationships are considered close persons if harm suffered to one would emotionally harm the other as well.

### **Preparation of the charges by the State prosecutor**

The State prosecutor is obliged to prosecute all criminal offences it is notified of by the police or is aware of from its own activities.

### **Court proceedings**

Cases can only be heard in court through charges brought by the State prosecutor. If the investigation undertaken by the police suggests that a criminal offence has been committed and an individual offender has been identified, the State prosecutor is obliged to bring charges and prosecute the criminal offence.

## **3.4 PROSECUTION FUNDING**

The prosecution of offenders under criminal law is carried out by State prosecutors at the expense of the State.

A victim can participate in the criminal proceedings as both a witness and an aggrieved person. When participating in the court proceedings, the victim may elect to have legal assistance or legal representation to ensure his or her rights are protected in the proceedings. If the victim proves that she or he does not have sufficient resources to pay for legal representation, the judge can decide that the legal representation should be carried out, fully or partially, at the expense of the State.

The State provides victims of domestic violence with the necessary legal, social and psychological assistance through special “Intervention Centres” which are free of charge.

There are also a number of non-governmental organisations active in the Czech Republic providing legal, social and psychological assistance to victims of domestic violence free of charge as a part of their voluntary activities.<sup>102</sup>

## **3.5 TIMESCALES**

The Ministry of Justice of the Czech Republic issues statistics annually in relation to the overall length of criminal proceedings and of the individual criminal offences. These statistics are prepared separately for proceedings at the courts of the first instance and the courts of appeal. The statistics show that the length of proceedings is the same irrespective of whether the offender was found guilty or acquitted.

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<sup>102</sup> For a list of the major non-governmental organisations active in this area, please see the Additional Resources section below.

### The courts of first instance

For the years 2010 and 2011, the average length of criminal proceedings at the courts of the first instance was:

- 207 days in 2010; and
- 192 days in 2011.

For the years 2010 and 2011, the average length of criminal proceedings at the courts of the first instance specifically relating to the criminal offence of domestic violence under section 199 of the Criminal Code was:

- 169 days in 2010; and
- 199 days in 2011.

### Courts of appeal

For the years 2010 and 2011, the average length of criminal proceedings at the courts of appeal was:

- 672 days in 2010; and
- 687 days in 2011.

For the years 2010 and 2011, the average length of criminal proceedings at the courts of appeal specifically in relating to the main criminal offence of domestic violence under section 199 of the Criminal Code was:

- 173 days in 2010; and
- 322 days in 2011.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES<sup>103</sup>

Czech law does not provide for the prosecution of domestic violence offences under civil law. However, domestic violence situations are considered in the civil courts as part of divorce proceedings or where an order is sought for an individual to move out of their commonly-shared dwelling.

In order to protect victims from a violent situation until such time as the court case has been decided, victims of domestic violence are able to request that the court issue either: (i) a preliminary measure (if the main divorce proceedings or the order to move out of a commonly-shared dwelling has not been initiated); or

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<sup>103</sup> Section 76(b) of the Civil Procedure Act.

(ii) an interim measure (if the main divorce proceedings or order to move out of a commonly-shared dwelling has been initiated).

A preliminary/interim measure can be issued by a court if the offender puts the life, health, freedom or human dignity of the victim at serious risk. An application for a preliminary/interim measure can only be submitted by the victim of the domestic violence.

By such preliminary or interim measure, the court can order the offender:

- to leave the commonly-shared dwelling and its immediate surroundings and prohibit residence or re-entry to the commonly-shared dwelling;
- not to remain in the surroundings of the commonly-shared dwelling or reside in the surrounding area near the victim;
- to refrain from meeting the victim; or
- to refrain from following or pestering (stalking) the victim.

Where an offender has been prohibited from staying in the commonly-shared dwelling, the offender must hand over the keys of the commonly-shared dwelling. The court may however allow the offender to pick up his or her personal valuables or items necessary for business activities from the commonly-shared dwelling.

An interim measure lasts for one month but it can be extended on further application for up to a total period of one year.

## 4.2 PRELIMINARY/INTERIM MEASURES CONCERNING CHILDREN<sup>104</sup>

Czech law provides for specific preliminary and interim measures to be sought at civil courts in situations where children/minors are threatened by domestic violence. These measures are used to temporarily address situations where domestic violence has been alleged.

An application made regarding a child/minor can only be submitted by the local municipality in the area where the child lives. However, the court can initiate proceedings *ex officio* in its own capacity and without any prior application.

A preliminary/interim measure can be issued by a court if there is a child/minor:

- who is not receiving an adequate level of care; or
- whose life, health or personal development is seriously threatened or violated.

The court can order that a child/minor be placed in a more suitable environment including where there is a person or a facility capable of providing the child/minor with appropriate care and who will respect their physical and mental state.

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<sup>104</sup> Section 76(a) of the Civil Procedure Act.

As with preliminary/interim measures for adults, measures relating to a child/minor last for one month. However, they can only be extended for a period of up to six months.

### **4.3 EVICTION OF THE OFFENDER BY THE POLICE**

In addition to the provisions in civil law, there are specific provisions which can be used in response to domestic violence situations under Czech administrative law. The most relevant provision gives the police the power to issue a restraining order under the Act on Police of the Czech Republic, evicting an offender from the commonly-shared dwelling.<sup>105</sup>

According to the provisions of this Act, a police officer is entitled to evict an offender from a commonly-shared dwelling for a fixed period of ten days if it can be presumed on reasonable grounds, that the offender may commit a dangerous assault on the life, health or freedom of a person or an extremely grave assault on human dignity. The police officers making this decision are entitled to base their decision on either a request by the victim or on their own assessment of the situation, taking into the account the risk that the violence will be repeated. If the police consider that the risk of repeated violence is high and that domestic violence is occurring, they will evict the offender from the commonly-shared dwelling.

The eviction can be followed by (but is not a prerequisite to) issuance of a preliminary or interim measure (as set out in sections 4.1 and 4.2 above).

### **4.4 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES**

The burden of proof lies with the applicant. The application must identify the parties/participants and describe those facts which most significantly justify the issuance of a preliminary or interim measure.

This applies equally where a preliminary measure is requested in relation to a child/minor (see section 4.2 above). The application must identify the child, the other parties/participants and describe those facts which are most relevant and important in justifying the issuance of a preliminary or interim measure.

### **4.5 RELEVANT COURT**

Generally an application must be submitted to the District Court in the jurisdiction where the commonly-shared dwelling is located.

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<sup>105</sup> Sections 44–47 Act on Police of the Czech Republic.

However, an application regarding a child/minor can be brought either in the jurisdiction where the victim resides, or as typically a third party or the municipality acts as the applicant on behalf of the child, it can also be brought in the jurisdiction where the applicant has her or his residence in the case of a natural person or seat in the case of a corporation.

#### **4.6 TIMESCALES**

The court must decide on the application to issue the preliminary/interim measure within 48 hours following receipt of the application.

Where the preliminary/interim measure concerns a child/minor, the court must decide on the application within 24 hours following receipt of the application.

When considering whether to evict an offender from a commonly-shared dwelling, there is no set time frame, although the situation usually requires the police to act without undue delay.

#### **4.7 FUNDING TO PROSECUTE**

Where a victim is applying for a preliminary/interim measure and requires legal advice, if the victim can prove that they do not have sufficient resources to pay for legal representation, the judge can decide that the legal representation should be provided, fully or partially, at the expense of the State.

Action by the police to evict an offender is carried out at the expense of the State at no cost to the victim.

## **5 SUPPORT FOR VICTIMS**

### **5.1 STATUTORY PROVISIONS**

In general, there are no laws or official codes of conduct issued by public authorities governing the provision of support for adult victims of domestic violence.

However, support for victims of domestic violence may be provided by the:

- police;
- Intervention Centres; and/or
- non-governmental organisations.

The Act on the Police of the Czech Republic states that when a decision is made by the police to evict an offender from a commonly-shared dwelling (as described in section 4.3 above), the police are obliged to advise the victim of the:

- possibility of filing an application at the relevant court for the issuance of an interim measure under section 76b of the Civil Procedure Act; and
- psychological, social or other assistance available to victims of domestic violence.

Within 24 hours, the police must also notify the following bodies and authorities of the police action which resulted in the eviction of the offender from the commonly-shared dwelling:

- the Intervention Centre;<sup>106</sup>
- the relevant court which would authorise a preliminary/interim measure under section 76b of the Civil Procedure Act; and
- the authority responsible for the Social and Legal Protection of Children (if there are any children/minors living in the commonly-shared dwelling).

The police must also comply with any guidance notes which govern the provision of support for victims of criminal offences, including domestic violence. Police officers are provided with particular training in this respect.

## 5.2 INTERVENTION CENTRES

The State provides the victims of domestic violence with the necessary legal, social and psychological assistance in specialised institutions called Intervention Centres.

At the Intervention Centres, victims of domestic violence are provided with:

- social-therapeutical assistance;
- legal assistance to exercise their rights and legitimate interests;
- assistance taking care of personal matters;
- accommodation; and
- the provision of food or assistance with the provision of food.

Intervention Centres assist the victims in person in their clinics, via telephone or email, or by visiting the victim at their place of residence.

Each Intervention Centre produces its own standards or codes of conduct governing the provision of support for victims of domestic violence. These codes of conduct are not legally enforceable.

The activities of the Intervention Centres are overseen by the Ministry of Labour and Social Affairs of the Czech Republic and are subject to inspection checks.

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<sup>106</sup> The regional Intervention Centre contacts the evicted offender within 48 hours of the police notification. The Intervention Centre provides the evicted person with information on the services available from the Intervention Centre.

### 5.3 NON-GOVERNMENTAL ORGANISATIONS

Non-governmental organisations providing support for victims of domestic violence usually have their own codes of conduct/guidance notes on the services they can provide. However, these documents are not legally enforceable.

### 5.4 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

The Act on the Social-Legal Protection of Children sets out the rules concerning support for children/minors who are threatened by domestic violence. This Act sets out several rules on the prevention or cessation of domestic violence and provides that everyone has a duty to notify the responsible authority of any information suggesting that a child is threatened by domestic violence.

Support for children is primarily provided by the relevant authorities responsible for the Social and Legal Protection of Children. In practice, specialised social workers should be appointed in every municipality to exercise the authority provided for in the Act on the Social and Legal Protection of Children.

#### Guidance notes

Guidance notes have been issued by the Ministry of Labour and Social Affairs regarding the provision of support to children/minors who are threatened by domestic violence. These notes must be observed by the authorities responsible for the social and legal protection of children.

However, in the experience of the Prague Intervention Centre, the authorities responsible for the social and legal protection of children do not always apply the Ministry's guidance notes properly in practice — something that can be attributed to a lack of training.

## 6 OFFENCES

### 6.1 CRIMINAL OFFENCES UNDER THE CRIMINAL CODE

There are three main criminal offences under which domestic violence offences would be prosecuted, the first being maltreatment of a person living in a commonly-shared dwelling;<sup>107</sup> the second being maltreatment of a person in ward (usually applies where the victim is a child); and the third being dangerous pursuit (or stalking).

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<sup>107</sup> A dwelling means a house, an apartment or other premises used for housing and the fittings associated with it.



### **Maltreatment of a person living in a commonly-shared dwelling**

Maltreatment of a person living in a commonly-shared dwelling may be committed by anyone who maltreats a close person or another person living with them in a commonly-shared dwelling.

### **Maltreatment of a person in ward<sup>108</sup>**

According to the Czech Criminal Code, a criminal offence is committed by anyone who maltreats a person who is in their care or custody (including, for example, the mentally disabled). This criminal offence can specifically apply to situations of domestic violence committed against children/minors. The care or custody can be of a short-term nature, for example in situations where an offender is taking care of a relative during his or her illness, or where a teacher is taking care of children on a school trip.

### **Dangerous pursuit**

Another offence under which domestic violence is prosecuted is dangerous pursuit (also referred to as “stalking”). This offence is aimed at prosecuting dangerous acts of an offender. Usually the offender will be an ex-husband or ex-partner of the victim. However, it can be committed by anyone who pursues another person over a long period of time by:

- threatening them with bodily or other harm or harm to a person close to them;
- following or watching them;
- persistently contacting them via any means of communication including in writing, by telephone or by email;
- restricting them in their usual way of life; or
- abusing personal data or information possessed about the victim in order to obtain further personal or other contact.

Such conduct must be capable of raising substantial concerns for the victim’s own life or health or that of persons close to them.

This criminal offence applies especially to situations where an ex-husband or ex-partner continues their attacks after they have left the commonly-shared dwelling or where the offender does not live with the victim.

### **Other offences**

Offenders can also be prosecuted for a number of other criminal offences under the Criminal Code which are not specifically defined as acts of domestic violence but apply nonetheless, specifically:

- neglect of a duty of care owed to another — a criminal offence is committed

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<sup>108</sup> A person in someone’s ward means a person in their care or custody.

by anyone who fails to comply, even negligently, with their legal obligation to support, nourish or provide for another person for a period of longer than four months;

- grievous bodily harm — a criminal offence is committed by anyone who intentionally causes grievous harm on another person;
- actual bodily harm/battery — a criminal offence is committed by anyone who intentionally harms another person;
- restriction of personal freedom — a criminal offence is committed by anyone who, without having the authority to do so, restricts someone else's personal freedom;
- blackmail — a criminal offence is committed by anyone who forces another person to do, not to do, or to tolerate something, through violence, the threat of violence or the threat of other harm; and
- rape — a criminal offence is committed by anyone who forces another person to have sexual intercourse through violence, the threat of violence, a threat of other grievous harm, or by exploiting the person's vulnerability for such an act.

## **6.2 ADMINISTRATIVE PROCEEDINGS AS MINOR OFFENCES<sup>109</sup> UNDER THE MINOR OFFENCES ACT**

If the violent action is not of such a serious nature as to qualify as a criminal offence, it can still be investigated as a minor offence under the Minor Offences Act.

Minor offences are investigated and decided upon by the police in administrative proceedings. The proceedings can only be initiated and carried out with the consent of the victim. The sentence imposed on the offender for the commitment of a minor offence is typically a fine of up to CZK20,000 (approximately EUR800).

An offender can be prosecuted, in particular, for the following minor offences:

- harming another person's reputation through insults or causing him or her to be ridiculed;
- negligently harming another person;
- wilfully disturbing the coexistence of citizens by threatening another person with assault, causing minor bodily injury to another person, untruthfully accusing another person of a minor offence, by spiteful acts or by other rude conduct;
- restricting or making it impossible for a citizen belonging to a national minority to exercise his rights pertaining to him being a member of this national minority; and

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<sup>109</sup> Also called misdemeanours or petty offences.

- causing harm to another person because he belongs to a (i) national minority; or because of his (ii) ethnic origin; (iii) race; (iv) colour; (v) sex; (vi) sexual orientation; (vii) language; (viii) faith or religion; (ix) political or other convictions; (x) membership or activity in political parties or movements, trade union organisations or other associations; (xi) social background; (xii) property; (xiii) family background; (xiv) state of health; or (xv) marital or family status.

## 7 PENALTIES AND SANCTIONS

### 7.1 SENTENCES FOR MALTREATMENT

If found guilty of domestic violence which qualifies as maltreatment of person living in a commonly-shared dwelling under section 199 of the Criminal Code; or as maltreatment of a person in ward under section 198 of the Criminal Code, the offender can be given one of the following sentences:

- imprisonment;
- conditional imprisonment or conditional deferral of imprisonment;
- community service;
- prohibition of an authorised activity;
- monetary penalty (fine), if the offender sought to acquire or acquired material benefit by committing the crime; or
- forfeiture of an item intended to be used or which was used by the offender to commit the crime.

The official statistics issued by the Ministry of Justice show that the following sentences have been imposed on offenders found guilty of maltreatment of a person living in a commonly-shared dwelling under section 199 of the Criminal Code:

YEAR	2008	2009	2010	2011
IMPRISONMENT	58	41	26	75
CONDITIONAL IMPRISONMENT OR CONDITIONAL DEFERRAL OF IMPRISONMENT	188	164	41	205
COMMUNITY SERVICE	4	7	0	1
PROHIBITION OF AN AUTHORISED ACTIVITY	0	0	0	5
FINE	0	0	0	0
FORFEITURE OF AN ITEM	0	0	0	0

These statistics highlight that imprisonment and conditional imprisonment are the most common sentences imposed on offenders. In contrast, the monetary and forfeiture of an item penalties are in practice rarely used by the courts.

The length of a custodial sentence that can be imposed on offenders found guilty of maltreatment of a person living in a commonly-shared dwelling under section 199 of the Criminal Code differs based on the following:

LENGTH OF CUSTODIAL SENTENCE (RANGE)	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
SIX MONTHS TO FOUR YEARS	No applicable conditions provided that the conditions for the more severe penalties (as outlined below) have not been fulfilled.
TWO TO EIGHT YEARS	<ul style="list-style-type: none"> <li>(a) the offending act was committed in an exceptionally inhumane manner; or</li> <li>(b) grievous bodily harm was caused by committing such an act; or</li> <li>(c) such an act was committed on at least two persons; or (d) such an act was committed over a long period of time.</li> </ul>
FIVE TO TWELVE YEARS	If such offending act resulted in: <ul style="list-style-type: none"> <li>(a) grievous bodily harm to at least two persons; or</li> <li>(b) death of a person.</li> </ul>

The length of a custodial sentence that can be imposed on offenders found guilty of maltreatment of a person in ward under section 198 of the Criminal Code differs based on the following:

LENGTH OF CUSTODIAL SENTENCE (RANGE)	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
ONE TO FIVE YEARS	No applicable conditions provided that the conditions for the more severe penalties (as outlined below) have not been fulfilled.
TWO TO EIGHT YEARS	<ul style="list-style-type: none"> <li>(a) the offending act was committed in an exceptionally inhumane manner; or</li> <li>(b) grievous bodily harm was caused by committing such an act; or</li> <li>(c) such an act was committed on at least two persons; or</li> <li>(d) such an act was committed over a long period of time.</li> </ul>
FIVE TO TWELVE YEARS	If such offending act resulted in: <ul style="list-style-type: none"> <li>(a) grievous bodily harm to at least two persons; or</li> <li>(b) death of a person.</li> </ul>

## 7.2 SENTENCES FOR STALKING

If found guilty of dangerous pursuit (stalking) under section 354 of the Criminal Code, the offender can be given one of the following sentences:

- imprisonment;
- conditional imprisonment or conditional deferral of imprisonment;
- house arrest;
- community service;
- prohibition of authorised activity;
- monetary penalty (fine), if the offender sought to acquire or acquired material benefit by committing the crime; or
- forfeiture of an item intended to be used or which was used by the offender to commit the crime.

The length of a custodial sentence that can be imposed on offenders found guilty of dangerous pursuit under section 354 of the Criminal Code differs based on the following:

LENGTH OF CUSTODIAL SENTENCE (RANGE)	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
UP TO ONE YEAR	No applicable conditions provided that the conditions for the more severe penalty (as outlined below) have not been fulfilled.
SIX MONTHS TO THREE YEARS	The offending act was committed: <ul style="list-style-type: none"> <li>(a) on a child or a pregnant woman; or</li> <li>(b) with a weapon; or</li> <li>(c) together with at least two other persons.</li> </ul>

## 7.3 FINES

The law allows the court to impose a monetary penalty on the offender only where the offender sought to acquire or acquired a material benefit by committing the crime.

However, in practice, this penalty is not used generally in cases of domestic violence (see the official statistics at section 7.1 above).

## 8 REHABILITATION MEASURES

### 8.1 COURT-IMPOSED REHABILITATION

No specific rehabilitation for domestic violence offenders may be imposed by the court. However, the court can impose an obligation on an offender who is found guilty to undergo therapy as a protective measure. Types of therapy can include:

- anti-alcohol treatment (if the domestic violence was committed in connection with the abuse of alcohol);
- anti-drug treatment (if the domestic violence was committed in connection with the abuse of drugs);
- sex-related therapy (if the domestic violence was committed in connection with a diagnosed sexual deviance of the offender); or
- any other relevant therapy (including psychological treatment).

Statistics produced by the Ministry of Justice show that in some domestic violence cases where there has been maltreatment of person living in a commonly-shared dwelling under section 199 of the Criminal Code, judges sometimes deem it appropriate to impose anti-alcohol or anti-drug treatment on the convicted offender. In these cases alcohol or drugs will have played a role in the domestic violence offence. Imposition of other types of therapy tends to be rare.

Where therapy is mandated by the court, the Probation and Mediation Service of the Czech Republic<sup>110</sup> controls the progress of the convicted offender and keeps the court updated as to their progress. The court has the discretion to change its decision concerning the protective measure in response to the feedback received.

### 8.2 SERVICES PROVIDED BY INTERVENTION CENTRES

Some Intervention Centres organise preventive rehabilitation or therapy programmes for domestic violence offenders and for people who have problems coping with their aggression. Participation in these rehabilitation programmes is voluntary.

In addition, all Intervention Centres provide offenders with the assistance as outlined in section 5.2 above.

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<sup>110</sup> The Probation and Mediation Service of the Czech Republic is run by the State to carry out the following: mediate conflicts between offenders and victims, control the performance of sentences by offenders, coordinate rehabilitation programmes and to help the offenders to return to society after they have served their sentences.

### 8.3 SERVICES PROVIDED BY NON-GOVERNMENTAL ORGANISATIONS

Some non-governmental organisations also organise preventive rehabilitation or therapy programmes for domestic violence offenders and for people who have problems coping with their aggression. The participation in these rehabilitation programmes is voluntary. Usually, the offenders who participate in the voluntary programme recognise that they have a problem and wish to prevent further violence and preserve their family relationships.

The criteria that the offenders have to meet before being admitted to either the Intervention Centres or non-governmental organisations vary based on the requirements set by the organisers of these programmes.

## 9 THIRD PARTY RESPONSIBILITIES

In general, there is no duty to notify the relevant authorities of domestic violence committed between adults. However, more protective provisions are set out with respect to children/minors. Under the Act on the Social-Law Protection of Children, every person has a statutory obligation to notify the authority responsible for the Social and Legal Protection of Children when a child is threatened by domestic violence. This obligation is imposed on all individuals as well as on schools, hospitals or State authorities. However, there are no penalties for not complying with this obligation.

If the act of domestic violence qualifies as a serious criminal offence (such as murder, grievous bodily harm, restriction of personal freedom, blackmail, rape or maltreatment of a person in ward), every person has an obligation to stop or to report such action to the State prosecutor or the police without undue delay.

If a person fails to notify such a finding, he or she may be held criminally liable and could be punished with a prison sentence of up to three years. An exception applies in some cases for: (i) lawyers and their employees if they have made this discovery in connection with the provision of their legal services; (ii) priests of a registered church if they have made this discovery in connection with the provision of their services; and (iii) a person close to the offender.<sup>111</sup>

However, acts qualified as maltreatment of a person living in a commonly-shared dwelling or stalking do not belong to the above group of criminal offences and there is no general obligation to stop or report such an action.

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<sup>111</sup> Sections 367 and 368 of the Criminal Code.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 CRIMINAL PROSECUTIONS

Statistics are issued annually by the Ministry of Justice of the Czech Republic in relation to criminal activity and criminal prosecutions in the Czech Republic:

YEAR	2008	2009	2010	2011
NUMBER OF CRIMES	455	469	288	565
NUMBER OF CRIMINAL PROSECUTIONS	<i>Men</i> 403 <i>Women</i> 13	<i>Men</i> 419 <i>Women</i> 16	<i>Men</i> 281 <i>Women</i> 7	<i>Men</i> 551 <i>Women</i> 14
NUMBER OF SUCCESSFUL PROSECUTIONS (I.E. GUILTY VERDICT)	<i>Men</i> 250 <i>Women</i> 4	<i>Men</i> 208 <i>Women</i> 8	<i>Men</i> 68 <i>Women</i> 0	<i>Men</i> 274 <i>Women</i> 9
NUMBER OF OFFENDERS SENT TO PRISON	58	41	26	75

These statistics show that since 2008 there has been an increase (albeit with a decrease in 2010) in the reporting of domestic violence-related crimes and that the majority of these offences are carried out by men.

When comparing the number of successful prosecutions (where a verdict of guilty was decided) and the number of offenders who were imprisoned as a result, these statistics also show that a large majority of the offenders were not imprisoned and instead received non-custodial penalties or community service.

### 10.2 PROSECUTIONS UNDER CIVIL LAW

There are currently no statistics evidencing the enforcement of preliminary/ interim measures under civil law. However, statistics for evictions by the police are as follows:<sup>112</sup>

YEAR	2008	2009	2010	2011	2012
NUMBER OF OCCASIONS THE CZECH POLICE EXERCISED THEIR POWER TO EVICT	679	778	1058	1430	1405

<sup>112</sup> The statistics available regarding the use of this power in practice have been prepared by *Bílý kruh bezpečí*, a non-governmental organisation, based on data provided by the police.



It should be noted however that the power to evict was relatively new in 2008 and 2009 and so, as the statistics show, the number of occasions where the Czech police exercised this power was relatively low in these years compared to subsequent years.

However, the Intervention Centre in Prague has suggested that the police remain unsure of the circumstances when and the manner by which, this power can be exercised. As a result, it is possible that the figures for 2008–2012 do not accurately reflect all the situations where the police would have been entitled to use this power.

### 10.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

The Director of the Prague Intervention Centre, Ms Barbora Holušová, has outlined the main difficulties and challenges faced by the authorities when enforcing domestic violence laws to be as follows:<sup>113</sup>

- length of eviction by the police — the police have the power to evict an offender from the property in which the offender and victim live, for a period of ten days. This period cannot be shortened or prolonged. According to the Prague Intervention Centre, this period is too short and a longer statutory period would better serve the purpose of giving the offender time to “cool off” and to consider the impact of their harmful actions;
- specialisation of police and other authorities — in some cases, the police and the individuals acting as the authority responsible for the Social and Legal Protection of Children are insufficiently educated or not trained to respond properly to domestic violence situations. According to the Prague Intervention Centre, it would be sensible to have specialised police units or police officers to act in domestic violence cases. It is noted that the Prague Intervention Centre has recently introduced an initiative which focuses on educating and training relevant police officers and authorities on how to react in situations of domestic violence and how to better assist victims;
- insufficient focus on the offenders — there are not enough legal provisions focusing on the preventive or rehabilitation work with offenders to develop or rectify their social habits and/or to control their aggression. The programmes provided in this respect by Intervention Centres and non-governmental organisations are not organised systematically. In some regions of the Czech Republic, it can be difficult to find any suitable preventive, educative or rehabilitation programmes; and
- rehabilitation programmes — judges do not impose protective measures, e.g. psychological-social treatment or other rehabilitation programmes, in an adequate number of cases. The explanation for this could be that the

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<sup>113</sup> Intervention Centres are special institutions in which the State provides the victims of domestic violence with the necessary legal, social and psychological assistance. Intervention Centres are established in each region. There is one Intervention Centre established for the region of Prague.

rehabilitation programmes for offenders are not organised systematically. Similarly, in some cases it may simply be that judges do not have information about the types of programmes available in their district.

## 10.4 PLANNED REFORMS/PILOT SCHEMES

### New Civil Code

A new Civil Code<sup>114</sup> will come into force on 1 January 2014 which includes provisions for a new civil law action in domestic violence situations.

Under these provisions, it will be possible to file a special civil action requesting that the offender leave the commonly-shared dwelling and prohibiting the offender from residing in or entering that commonly-shared dwelling for a period of up to six months. This period can be prolonged repeatedly where justified.

Any person living in the commonly-shared dwelling will be entitled to file this action. This means not only the victim but also other family members (adult children, siblings, grandparents etc) or other individuals (tenant, house-worker, *au pair* etc) living in the commonly-shared dwelling.

The Prague Intervention Centre and the legal professionals specialising in this area consider this new civil law action to be an important contribution to the system of protection from domestic violence.<sup>115</sup>

### New Act on Crime Victims<sup>116</sup>

A new act concerning victims of crime came into force on 1 August 2013.

This Act regulates the rights of crime victims with respect to: psychological and social assistance; free legal advice; protection from the offender and monetary compensation.

According to this Act, victims of crime should be provided with greater assistance and protection by the police and the judiciary system. The victims' rights will be enforced through the recovery of damages for losses incurred as a result of the criminal act.

The Prague Intervention Centre and legal professionals specialising in this area consider this new law to be evidence of the success of a previous campaign in the Czech Republic which sought improvement to domestic violence laws in this area.

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<sup>114</sup> Act No. 89/2012 Coll., the Civil Code.

<sup>115</sup> See Čuhelová, K., Šínová, R.: *Protection against domestic violence in the context of harmonisation of civil process legislation with recodification of private law* in *Právní rozhledy* 3/2013, p. 104.

<sup>116</sup> Act No. 45/2013 Coll. on the Crime Victims.

### **Law scheme of an Act on Free Legal Assistance**

A draft law for an Act on Free Legal Assistance has been prepared by the Ministry of Justice and is currently being discussed by the Czech government. The draft Act aims to unify and clarify the rules under which people can request free legal advice and representation in the courts.

Currently, the legal provisions regarding free legal advice are spread across various individual procedural acts. The new Act aims to provide a comprehensive legal framework for providing legal advice to people who cannot afford to pay for legal services.

The Prague Intervention Centre considers this draft to be a desirable and, if adopted, an important contribution to the system of protection of domestic violence victims in the Czech Republic.

## **10.5 REVIEW OF DOMESTIC VIOLENCE LAWS**

### **National Action Plan**

The Czech government has issued a National Action Plan on the Prevention of Domestic Violence and the plan currently in place covers the years 2011–2014.

The aim of the National Action Plan is to set long-term goals for the government with regards to the prevention of domestic violence. The objectives are to:

- (i) analyse the current legal framework; (ii) propose adequate changes; and
- (iii) ensure the development of a systematic legal framework in this area.

### **Committee for the Prevention of Domestic Violence**

The Committee for the Prevention of Domestic Violence was established as a counsel organ of the Czech government in 2008. The objectives of the Committee include supervision of the fulfilment of the National Action Plan. The Government Council for Human Rights also presents a report on progress under the Plan annually and the government is then advised of the report's conclusions.

## **10.6 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS**

A particular provision in the Criminal Code applies in situations where a victim of domestic violence kills the perpetrator of the acts of domestic violence towards him or her. Although these actions do not have the necessary attributes to be qualified as self-defence, they may qualify as manslaughter.<sup>117</sup>

According to this provision on manslaughter, if a person (usually a victim of domestic violence) intentionally kills another person because of strong

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<sup>117</sup> Section 141 paragraph 1 of the Criminal Code.

“agitation” arising out of fear, dismay, confusion, or another “excusable” mind set, or as a result of the previous reprehensible conduct of the person who has been killed, he or she may receive a sentence with a maximum penalty of ten years imprisonment (as opposed to a maximum penalty of 18 years for an “ordinary” murder).

This provision applies where such act would, in other circumstances, be considered as murder. However, Czech law recognises the particular circumstances of a case where a domestic violence victim has acted out of frustration arising from a situation of domestic violence which the victim may have been living with for a number of years.

## ADDITIONAL RESOURCES

### Applicable law

1. Act No. 99/1963 Coll., Civil Procedure Act
2. Act No. 40/2009 Coll., Criminal Code
3. Act No. 200/1990 Coll., Minor Offences Act
4. Act No. 273/2008, Coll., on the Police of the Czech Republic
5. Act No. 135/2006 Coll., on the Change of Some Laws on Protection Against Domestic Violence
6. Act No. 108/2009 Coll., on Social Services
7. Act No. 359/1999 Coll., on Social and Legal Protection of Children
8. Act No. 89/2012 Coll. Civil Code
9. Act No. 45/2013 Coll. on the Crime Victims
10. Decree of Ministry of Labour and Social Affairs No. 505/2006 Coll., on the implementation of the Act on Social Services

### Publications

1. Šámal, P. *et al.*: Trestní zákoník I. a II. díl. Komentář. 2. vydání. Praha: C. H. Beck (*Criminal Code volume I. and II. Commentary. 2. Issue. Prague: C. H. Beck*), 2012
2. Drápal, L., Bureš, J. *et al.*: Občanský soudní řád I, II Komentář. 1. vydání, Praha: C. H. Beck (*Civil Court Code I, II Commentary. 1. Issue. Prague: C. H. Beck*), 2009, ISBN 978-80-7400-107-9
3. Spáčil, J. *et al.*: *Commentary on Civil Procedure Act*, effective as at 1 July 2009

4. Vangeli, B.: *Zákon o Policii České republiky, 1. vydání*. Praha : C. H. Beck (*Law on Police of the Czech Republic, 1. Issue, Prague: C. H. Beck*), 2009, ISBN 978-80-7400-142-0
5. Hendrych, D. et al.: *Právní slovník. 3. vydání*. Praha : C. H. Beck (*Legal Dictionary. 3. Issue, Prague: C. H. Beck*), 2009
6. Ševčík, D., Špatenková, N.: *Domácí násilí*, Praha (*Domestic Violence, Prague*), 2011

### Bulletins and published articles

1. Čuhelová, K., Šínová, R.: Protection against domestic violence in the context of harmonisation of civil process legislation with recodification of private law in *Právní rozhledy*, 3/2013, p. 104
2. Kočová, K.: *Domestic Violence and so called Evictment — new institute of judicial code of the CR*, Bulletin advokacie 10/2007, p. 34
3. Púry, F.: *Over legislative proposals against domestic violence in Právní zpravodaj*, 3/2005, p. 14
4. Mates, P.: *Contribution to the legal solution of the domestic violence issue in Právní zpravodaj*, 5/2007, p. 8
5. Šebesta, K., Komárek, P.: *New criminal law in legislation of the CR — dangerous following, so called stalking*, 2010

### Judgments

1. Decision of Regional Court in Hradec Králové No. 19 Co 144/2008 dated 15 April 2008
2. Decision of District Court in Plzeň — město No. 13 Nc 20/2012 dated 14 June 2012
3. Decision of the European Court of Justice No. C-483/09, C-1/10 dated 15 September 2011

### Other sources

1. Government of the Czech Republic: *National Action Plan for the Prevention of Domestic Violence for the years 2011–2014*, 2011
2. Members of Parliament of the Czech Republic: *Explanatory Report to the proposal of the Act No. 135/2006 Coll., on the Change of some Laws on Protection against Domestic Violence*, Prague, 2004
3. Linhart, M.: *Resolution of Department of Security Policy No. 47 on ownership or other similar right to the commonly-shared dwelling and their influence on conducting of expel*, Prague, 2011

## Statistics

1. Ministry of Justice of the Czech Republic: *Annual Statistics of Criminality in the Czech Republic for the years 2008, 2009, 2010 and 2011*
2. Ministry of Justice of the Czech Republic: *The Length of Criminal Proceedings in the Czech Republic for the years 2010 and 2011*
3. Bílý kruh bezpečí: *Overview of reported numbers of offenders evicted from a commonly-shared dwelling by the Police of the Czech Republic in the years 2008, 2009, 2010, 2011 and 2012*
4. ROSA: *Sociological probe of clients, victims of the domestic violence in the year 2011, ROSA 2012*

## Internet

Public defender of rights – Ombudsman: *Domestic violence*, accessed on 13 March 2013. <http://www.ochrance.cz>

## Non-governmental organisations

1. ROSA – centrum pro týrané a osamělé ženy (ROSA – Centre for Battered and Lonely Women) <http://www.rosa-os.cz>, <http://www.rosa-os.cz/english-resume/about-us/>
2. Bílý kruh bezpečí, o.s. (White Circle of Safety) <http://www.bkb.cz/>, <http://www.bkb.cz/en/>
3. Domáci násilí.cz (Domestic Violence) <http://www.domacinasili.cz/>
4. Acorus, o.s. <http://www.acorus.cz/>, <http://www.acorus.cz/cz/o-nas/english.html>
5. proFem, konzultační středisko pro ženské projekty (ProFem, Consulting Centre for Women's Projects) <http://www.profem.cz>, <http://www.profem.cz/en/>
6. Magdalenium, o.s. <http://www.magdalenium.cz>, <http://www.magdalenium.cz/index.php?nid=4875&lid=cs&oid=666894>
7. THEIA – OBČANSKÉ SDRUŽENÍ <http://www.theia.cz>
8. Persefona o. s. <http://www.persefona.cz>
9. SPONDEA při ČČK Brno, o.p.s. (SPONDEA) <http://www.spondea.cz>, <http://www.spondea.cz/odborna-verejnost/index.php?url=english>
10. KOORDONA – koalice organizací proti domácímu násilí (Coalition of organisations against domestic violence) <http://www.koordona.cz/>
11. Arcidiecézní charita Praha – Projekt Magdala (<http://praha.charita.cz/sluzby/magdala/>, <http://praha.charita.cz/en/social-services/project-magdala>)

12. Élektra, o.s.  
(<http://www.centrumelektra.cz/>)
13. Most k životu, o.p.s. (vzdělávací a akreditační centrum v Trutnově, Azylový dům) (Asylum House) <http://www.mostkzivotu.cz/>
14. Občanská poradna Nymburk, o.s. <http://www.opnymburk.cz/>
15. Slezská diakonie, poradny Elpis (Ostrava, Třinec, Karviná) Trutnov  
<http://www.slezskadiakonie.cz/>
16. SKP-CENTRUM, o.s. <http://www.skp-centrum.cz/>
17. Pro bono aliance <http://www.probonocentrum.cz/>, <http://www.probonocentrum.cz/english>
18. Liga lidských práv (Human Rights League) <http://llp.cz/>
19. Liga otevřených mužů – projekt Bílá stužka (League of Open Men – the White Ribbon Project) <http://www.muziprotinasili.cz/>

### Governmental organisations

1. Veřejný ochránce práv – Ombudsman (Public defender of rights – Ombudsman)  
<http://www.ochrance.cz/>, <http://www.ochrance.cz/en/>
2. Ministerstvo práce a sociálních věcí (Ministry of Labour and Social Affairs)  
<http://www.mpsv.cz/cs/9>, <http://www.mpsv.cz/en/1613>
3. Ministerstvo vnitra České republiky (Ministry of Interior of the Czech Republic)  
<http://www.mvcr.cz/>, <http://www.mvcr.cz/mvcren/>
4. Ministerstvo spravedlnosti ČR – Institut pro kriminologii a sociální prevenci (Ministry of Justice – Institute of Criminology and Social Prevention)  
<http://www.ok.cz/iksp/index.html>, <http://www.ok.cz/iksp/en/aboutus.html>
5. Výbor pro prevenci domácího násilí (Committee for prevention of domestic violence)  
<http://www.vlada.cz/cz/pracovni-a-poradni-organy-vlady/rada-pro-rovne-prilezitosti/prevence-domaciho-nasili/vybor-pro-prevenci-domaciho-nasili-30381/>
6. Rada vlády pro lidská práva (Government Council for Human Rights)  
<http://www.vlada.cz/cz/ppov/rlp/rlp-uvod-17537/>,  
<http://www.vlada.cz/en/ppov/rlp/government-council-for-human-rights-50632/>
7. Zmocněnkyně vlády pro lidská práva (Government Commissioner for Human Rights)  
<http://www.vlada.cz/cz/ppov/zmocnenec-vlady-pro-lidska-prava/zmocnenecnenkyne-vlady-pro-lidska-prava-15656/>,

<http://www.vlada.cz/en/ppov/zmocnenec-vlady-pro-lidska-prava/government-commissioner-for-human-rights-17253/>

8. Rada vlády pro nestátní neziskové organizace (Government Council for non-governmental organisations)  
<http://www.vlada.cz/cz/ppov/rnno/zakladni-informace-767/>,  
<http://www.vlada.cz/en/ppov/rnno/basic-information-45510/>
9. Policie ČR (Police of the Czech Republic)  
<http://www.policie.cz/clanek/pomoc-obetem-trestne-cinnosti-404389.aspx>
10. Intervenční centrum Praha (Intervention Centre Prague)  
<http://www.intervencnicentrum.cz/>



# England & Wales

**‘** *On average, two women a week and one man every seventeen days are murdered by their current or former partner.* **’**



**READER NOTE:** Detailed research was undertaken to compile this report during 2013. Due to the fluidity of changes in this area in some jurisdictions in the period between submission of research and publication of the consolidated report further developments may have occurred.

# DOMESTIC VIOLENCE IN ENGLAND & WALES

CMS, London

## EXECUTIVE SUMMARY

In England & Wales measures to deal with domestic violence are encompassed within both civil and criminal law. The civil law provides a basis for obtaining some form of protection for the victim whereas the criminal law seeks to deal with the offender. A number of different types of courts are used for various purposes.

The non-statutory definition of domestic violence used by authorities is broad and covers psychological, physical, sexual, financial and emotional abuse. It covers all genders and sexualities. The definition has recently been expanded to include acts by those above sixteen years of age (rather than 18 years of age).

Whilst there is no specific anti-domestic violence criminal legislation, there is a raft of other legislation and laws which can apply to domestic violence. The range of offences has recently been increased to include stalking.

There are a number of interim measures available aimed at protecting the victims of domestic violence, which also include children. Further measures are also available if the child is the target of domestic violence. Piloting of additional protective measures such as the disclosure of past violent behaviour and domestic violence focused injunctions have been welcomed by some commentators but such schemes are not widely implemented and are subject to review. In particular domestic violence injunctions are being piloted where there is a threat of ongoing violence, because of a perceived potential delay between obtaining existing injunctive measures or the prospect of the perpetrator being charged with a criminal offence.

Whilst official statistics suggest that conviction rates for domestic violence-related offences are improving, under-reporting remains an issue and not all cases proceed to trial or sentencing. On 28 August 2013 Her Majesty's Inspectorate of Constabulary (HMIC), which assesses possible improvements to the police, announced that it is in discussions with the UK government's Home Secretary about looking at the effectiveness of the police response to domestic violence and abuse across England & Wales. The Home Secretary has said she will speak to Parliament soon about how police in England & Wales can improve the way they handle domestic violence.

There are a number of established non-governmental organisations at national and local level which seek to provide support and advice services for victims of domestic violence and to promote awareness and education about the issue.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

Domestic violence is not defined either in statute or by common law in England & Wales. The UK government has a definition of domestic violence and abuse which is applied by authorities to identify cases of domestic violence. Once labelled as such, certain policies apply as to how the case will be prosecuted.<sup>118</sup>

The present definition of abuse and domestic violence is:

“Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, the following types of abuse:

- » psychological
- » physical
- » sexual
- » financial
- » emotional”

“Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.”

“Coercive behaviour is: an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.”<sup>119</sup>

The definition includes those “who are or have been intimate partners”.

The definition does not discriminate on grounds of sexuality or gender, and would cover gay, lesbian and transgender victims. Domestic workers are not automatically covered by the definition as they would not fall in the category of

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<sup>118</sup> A recent consultation extended the definition of domestic violence. The new revised definition applies from 31 March 2013. The former definition read “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”. The present definition includes 16 and 17 year olds also.

<sup>119</sup> <http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/>.

being or having been family members of the perpetrator and would generally not fall within intimate partners.

Psychological abuse is specifically included in the definition and “controlling behaviour” and “coercive behaviour” (as included in the definition) both have elements of mental abuse.

Financial hardship is not included in the definition of psychological abuse, but is listed as a separate category of abuse that may constitute domestic violence.

The definition includes “honour” related violence, female genital mutilation and forced marriage.

In 2010 the Home Office published a strategy on *Violence Against Women and Girls*. In November 2012 the Welsh Assembly updated its domestic violence strategy.<sup>120</sup>

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

There are no specific criminal anti-domestic violence laws in England & Wales. The behaviour and actions which form domestic violence are dealt with by various criminal offences depending on the factual circumstances.

In respect of other legislation, there are a number of statutes which contain provisions to provide protection to those impacted by domestic violence. The Domestic Violence, Crime and Victims Act 2004<sup>121</sup> (DVCVA) extends the scope of civil law protection offered under Part IV of the Family Law Act 1996 (see section 2.2 below).

The DVCVA makes breach of a non-molestation order a criminal offence, with a maximum penalty of five years’ imprisonment. It also extends the availability of injunctions to same-sex couples and those who, while not living together, have or have had an intimate relationship “of significant duration” – to be determined on a case-by-case basis. As yet there is not a large body of case law as to what will be taken to be a relationship of a significant duration, but during Parliamentary discussion of the Bill it was indicated that the crucial factor in assessing relationships should be the opportunity for abuse and control. It was noted that “certain relationships, because of their intensity, become significant. Although they may not be as long as others, they are still of significant duration. It is a qualitative issue that the courts will have to determine.”

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<sup>120</sup> “The Right to be Safe” [http://wales.gov.uk/topics/housing\\_and\\_community/safety/domestic\\_violence](http://wales.gov.uk/topics/housing_and_community/safety/domestic_violence).

<sup>121</sup> As amended by Domestic Violence, Crime and Victims (Amendment) Act 2012.

A consultation on legislation to end violence against women and domestic abuse in Wales ended in February 2013. The consultation focuses on three themes: (i) stronger leadership; (ii) better education and awareness; and (iii) strengthening and integrating services.

## **2.2 LEGAL PROVISIONS REGARDING ANTI-DOMESTIC VIOLENCE WHICH ARE PART OF OTHER STATUTES/REGULATIONS**

Part IV of the Family Law Act 1996 addresses domestic violence within the family home. It sets out civil law remedies including occupation orders (rights of occupation of the non-owning spouse/civil partner), and non-molestation orders to prevent further violence to the victim or their children. For further information about these injunctions see section 4.1 below.

The Protection from Harassment Act 1997 provides remedies under both civil and criminal law, and deals with violence outside the home, thereby extending protection to victims who do not live with the offender.

Under the Housing Act 1996, local authorities have a duty to provide immediate temporary accommodation to persons who are unintentionally homeless and in “priority need.” The Homelessness Act 2002 extended the definition of “homelessness” to include victims of domestic violence, and states that a homeless person is in priority need if they are “vulnerable as a result of ceasing to occupy accommodation by reason of violence from another person or threats of violence from another person which are likely to be carried out.” For unintentionally homeless persons who are not considered to be in priority need, local authorities have a duty to provide free advice and assistance (to include a list of hostels and private accommodation in the victim’s local area).

Additionally, local authorities are empowered to take direct action against offenders, to prevent domestic violence in the context of their housing management functions. Section 153A of the Housing Act 1996 entitles landlords to apply for a court injunction if they can show that the defendant’s conduct is capable of causing a nuisance or annoyance to the relevant person. This provides a means for the victim to seek relief through their landlord, and can be significant in cases where the victim is reluctant or unable to apply for an injunction, for example, due to lack of funding.

The Children Act 1989 places a duty on local authorities to promote and safeguard the welfare of children in need in their area.

The Forced Marriage (Civil Protection) Act 2007 amends the Family Law Act 1996 to include provisions enabling a court to make an order for the purposes of protecting a person from being forced into a marriage or a person who has been forced into marriage.

The UK has signed but not yet ratified the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence which includes obligations to prevent and protect against domestic violence, provide the right to claim compensation and to apply effective, proportionate and dissuasive sanctions.

### 2.3 STANDARD CRIMINAL OFFENCES

As there are no criminal laws specifically for domestic violence, standard criminal offences may apply, including:

- murder and attempted murder (common law);
- criminal damage (under the Criminal Damage Act 1971);
- common assault (under the Criminal Justice Act 1988);
- threats to kill/Grievous Bodily Harm (GBH) with intent/GBH – wounding/ Actual Bodily Harm (ABH) (under the Offences Against the Person Act 1861);
- harassment (under the Protection from Harassment Act 1997);
- false imprisonment (common law);
- affray (under the Public Order Act 1986);
- threatening behaviour and threatening behaviour with intent (under the Public Order Act 1986);
- rape/assault by penetration/sexual assault (under the Sexual Offences Act 2003);
- criminal trespass (under the Criminal Law Act 1977);
- child destruction/procuring a miscarriage or abortion (under the Offences Against the Person Act 1861);
- blackmail (under the Theft Act 1968);
- breach of non-molestation order (under the DVCVA); and
- female genital mutilation (under the Female Genital Mutilation Act 2003).

In November 2012 two new stalking offences were introduced. An offence of stalking<sup>122</sup> (tried in the Magistrates' Court only) and an offence of stalking involving fear of violence or serious alarm or distress<sup>123</sup> that has a substantial adverse effect on a person's usual day to day activities (an either way offence in the Magistrates' Court or in the Crown Court).

There are also plans to introduce a new criminal offence of forced marriage in 2013–2014.

In May 2013, official police media statements acknowledged that, on average, two women a week and one man every seventeen days are murdered by their

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<sup>122</sup> Section 2A Protection from Harassment Act 1997 as updated by the Protection of Freedoms Act 2012.

<sup>123</sup> Section 4A Protection from Harassment Act 1997 as updated by the Protection of Freedoms Act 2012.

current or former partner.<sup>124</sup> There have been calls for a public inquiry into the handling of domestic violence cases and the Home Secretary has announced plans to discuss the issue with Parliament.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

The burden of proof in all criminal cases in England & Wales is “beyond reasonable doubt”. It is for the prosecutor to satisfy the burden of proof.

### 3.2 RELEVANT COURT

All cases initially come before the Magistrates’ Court, but will be allocated to the Crown Court depending on the seriousness of the offence being prosecuted.

Many areas of the UK have Specialist Domestic Violence Courts (SDVC) that have trained staff and will attempt to fast track cases where domestic violence is a factor.

Due to the definition of domestic violence, there may be cases where abusers are under 18, in which case the Youth Justice System shall apply and the offender shall either be dealt with in the Youth Courts or in a SDVC.

### 3.3 STAGES OF PROCEEDINGS

All criminal cases in the UK are brought by the Crown Prosecution Service (CPS).<sup>125</sup> The CPS is the government department responsible for prosecuting criminal cases investigated by the police in England & Wales. Prosecutions will be carried out following the CPS guidance on prosecuting cases of domestic violence.

All criminal proceedings initially commence in the Magistrates’ Court and may be sent to the Crown Court for trial and sentencing depending on the seriousness of the alleged offence.

Sentencing is carried out in accordance with the Sentencing Council’s official guidelines on cases involving domestic violence. In brief, the overarching guidelines<sup>126</sup> make clear that crimes committed in a domestic context are to be treated no less seriously than those committed in a non-domestic context.

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<sup>124</sup> <http://www.acpo.presscentre.com/Press-Releases/ACPO-comment-on-the-national-police-response-to-domestic-abuse-222.aspx>.

<sup>125</sup> <http://www.cps.gov.uk/>.

<sup>126</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_domestic\\_violence.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_domestic_violence.pdf).

In many cases, the domestic nature of the crime leads to aggravating factors, which could lead to a more severe sentence.

Aggravating factors include abuse of power/trust, where the victim is particularly vulnerable (for example, for religious or cultural reasons, due to age or disability or where steps are taken to prevent the victim seeking help), impact on children, using contact arrangements with a child to instigate an offence, a proven history of violence or threats by the offender in a domestic setting, a history of disobedience to court orders or where the victim is forced to leave home.

### **3.4 PROSECUTION FUNDING**

Funding is available to the CPS to bring a prosecution in any criminal case. A victim does not pay for the prosecution unless a private prosecution is instigated.

### **3.5 TIMESCALES**

Following arrest, bail or custody is considered and bail may be granted at the initial hearing. After this hearing, it takes at least a few months for a case to come to trial. However, where a SDVC is involved, the process may be quicker. Expedited trials will also be considered in rape and child abuse cases. Applications may be made to the court for special measures. In December 2012 there were changes to sentencing and bail including the right of appeal by the prosecution regarding bail decisions made by judges.

There are no specific statistics for the time taken to conclude domestic violence cases. However, in 2011, on average a case heard in the Magistrates' Courts took 144 days from the time of the offence to the conclusion of trial. In the Crown Court the average was 120 days.<sup>127</sup>

## **4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW**

### **4.1 PRELIMINARY/INTERIM MEASURES**

Victims can apply for injunctions under Part IV of the Family Law Act 1996. Non-molestation orders are used to restrain someone from causing or threatening violence to the applicant or to any children, or from molesting them. The DVCVA makes breach of a non-molestation order a criminal offence.

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<sup>127</sup> [https://www.gov.uk/government/publications?keywords=&publication\\_filter\\_option=statistics&topics%5B%5D=all&departments%5B%5D=ministry-of-justice&world\\_locations%5B%5D=all](https://www.gov.uk/government/publications?keywords=&publication_filter_option=statistics&topics%5B%5D=all&departments%5B%5D=ministry-of-justice&world_locations%5B%5D=all).



Occupation orders regulate the occupation of the home shared by the couple and their children to protect any party or children from domestic violence. The order can exclude an abuser from the property altogether, or divide the property to exclude the abuser from part of the accommodation. Occupation orders and non-molestation orders are normally granted for a specified period of time (e.g. six months) but can be renewed; or they may be made “until further order”. There is no limit on the length of time that non-molestation orders can be extended. Occupation orders can only be extended beyond twelve months if the victim has a legal right to stay in the home (i.e. as owner or co-owner, tenant or joint tenant, or because they have been married to the owner or tenant).

Forced Marriage Protection Orders (FMPO) are available to protect someone who is being forced into a marriage or who is in a forced marriage.<sup>128</sup> Breach of a FMPO is treated as contempt of court and is punishable with up to two years’ imprisonment. Timing depends on whether the application is made without giving notice to the respondent or on notice. If the applicant is in immediate danger, a without notice application can be made to provide protection more quickly. If a without notice application order is granted, it will not become effective until it is served on the respondent (in order to prevent the respondent from unknowingly breaching a court order). The court is likely to set a further hearing date (or the other party may request one) to enable arguments and evidence against the need for such an order to be heard.

Domestic Violence Protection Orders (DVPO) have been piloted by three police forces. On the pilot scheme the police and Magistrates can use a DVPO to protect a victim by preventing a perpetrator from contacting the victim or returning to their home for up to 28 days. An evaluation of the pilot is expected in late summer 2013. Where the police have reasonable grounds for believing that a perpetrator has used or threatened violence towards the victim and the victim is at risk of future violent behaviour, a Domestic Violence Protection Notice can be issued immediately (subject to authorisation). The Magistrates’ Court must hear the case for the DVPO within 48 hours of the Notice being made. If granted, the Order may last between 14 and 28 days. A DVPO will be issued only where there are no other enforceable restrictions which can be placed on the perpetrator.

Applications for restraining orders may be made on conviction or acquittal of a party accused of an offence stemming from domestic violence.

An application for an injunction or damages may be initiated pursuant to the Protection from Harassment Act 1997.

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<sup>128</sup> A forced marriage is a marriage that takes place without the full and free consent of both partners pursuant to the Forced Marriage (Civil Protection) Act 2007.

## 4.2 PRELIMINARY/INTERIM MEASURES CONCERNING CHILDREN

As noted above non-molestation orders and occupation orders may be used in the case of children. There is also the possibility of obtaining a Prohibited Steps Order (PSO) which forbids someone from removing a child from someone else's care and control. No power of arrest is attached to the order although they are enforceable in the County Court as contempt of court.

The court will list hearings for non-molestation orders and occupation orders as quickly as possible, usually within a few days. In practice, it is usually easier to obtain a non-molestation order on a without notice basis than it is to obtain an occupation order without notice. For on-notice applications, personal service of notice on the respondent is required not less than two business days prior to the hearing.

The tests differ for the granting of an order:

### Non-molestation order

The court has a great degree of discretion; section 42 of the Family Law Act 1996 simply states that the court shall have regard to all the circumstances, including "the need to secure the health, safety and well-being of the applicant and of any relevant child."

### Occupation order

There are two tests the courts will apply; firstly, the "balance of harm" test. If the applicant is entitled to occupy the dwelling house, or is a spouse or former spouse (or a civil partner or former civil partner) of the respondent, and there would be a risk of the applicant or relevant child suffering significant harm, attributable to the respondent, if the order was not made, greater than any harm caused to the respondent or relevant child if the order were made, then the court has a duty to grant the order. If the applicant is a cohabitant or a former cohabitant but is not entitled to occupy the property then the court must simply "have regard" to the balance of harm test. If the applicant is associated in some other way to the respondent and not entitled to occupy the property then they are unable to make an application for an occupation order.

Secondly, even if the court finds against the applicant on the balance of harm test, it may have regard to certain "core criteria" in deciding whether or not to grant the occupation order. The content of the core criteria depend upon the applicant's entitlement to occupy the property and their relationship with the respondent, but by way of example may include: the housing needs or resources of each of the parties and of any relevant child, the financial resources of each of the parties, the likely effect of any order or lack of order on the health, safety or well-being of the parties and of any relevant child, and the conduct of the parties.

## PSO

The applicant must have parental responsibility under the Children Act 1989; the respondent must have made a direct or indirect threat to remove the child from the applicant's care and control and it is in the best interests of the child.

## Emergency Protection Order (EPO)<sup>129</sup>

The court must be satisfied there is reasonable cause to believe that a child is likely to suffer significant harm if the child is not removed to different accommodation provided by the applicant or does not remain in the place in which the child is being accommodated. There must be evidence that the child is in "imminent danger" and that the Order is necessary and proportionate. (There are also other grounds for such an Order). The court may include an exclusion requirement which allows a perpetrator to be removed from the home (rather than the child). This type of order gives authority to remove a child and places them under the protection of the applicant.

### 4.3 VENUE

Applications for injunctions under the Family Law Act 1996 are dealt with by the Magistrates' Family Proceedings Court or the County Court, or in some cases the High Court. Applications for FMPOs can only be heard in the High Court and designated County Courts at present. PSOs are dealt with in the Magistrates' Court. An application for an EPO may be made to the Family Proceedings Court.

### 4.4 PROCEDURE

Eligibility for orders under the Family Law Act 1996 depends on the nature of the relationship between the applicant and the respondent – they must be an "associated person". The definition of associated persons<sup>130</sup> includes persons who:

- are or have been married to each other or in a civil partnership with each other;
- are or have been cohabitants;
- have lived in the same household (other than as tenant, lodger, boarder or employee – this includes those in gay and lesbian relationships, and those sharing a house);
- are relatives;
- have agreed to marry;
- are both parents of or have parental responsibility for a child or children; or
- are in an intimate relationship of significant duration (not defined further in

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<sup>129</sup> Section 44 of the Children Act 1989.

<sup>130</sup> Section 63(3) of the Family Law Act 1996.

the Act; to be determined on a case-by-case basis).

A person can apply to the County Court to obtain an injunction to stop harassment and to claim damages.

## 4.5 FUNDING

Victims who take legal action to protect themselves or their families from domestic violence or abuse, may qualify for legal aid. The income of an abusive partner will not be taken into account when deciding whether the victim qualifies for legal aid. All cases are judged on their individual circumstances and measured against the criteria set out in the Legal Services Commission Funding Code.

From April 2013 new legal aid rules apply.<sup>131</sup> Legal aid for proceedings under the Children Act 1989 or for financial provision will generally only be available when someone can show that they are the victim of forced marriage, domestic violence or are seeking to protect a child from abuse subject to means and merits criteria. There are concerns as to the level at which objective evidence of domestic violence is required given some parties' reluctance to report domestic violence until a late stage (and thereby potentially reduce the amount of objective evidence available).

The availability of legal aid for domestic violence cases is at the time of writing subject to debate in the Houses of Parliament.

# 5 SUPPORT FOR VICTIMS

## 5.1 STATUTORY PROVISIONS

The criminal justice agencies share a duty to treat victims of crime in a respectful, sensitive and professional manner without discrimination of any kind. Guidance is set out in the Code of Practice for Victims of Crime introduced in 2006 known as the Victim's Code. Consultation on a revised more user friendly code ended in May 2013.

CPS guidelines highlight the importance of victim support in cases of domestic violence.<sup>132</sup> The CPS Violence Against Women (VAW) strategy includes detail of many measures, for example:

- Multi-Agency Risk Assessment Conferences (MARCs) are meetings where

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<sup>131</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>132</sup> [http://www.cps.gov.uk/legal/d\\_to\\_g/domestic\\_violence\\_aide-memoire/index.html#a42](http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/index.html#a42).

statutory and voluntary agency representatives share information about high risk victims of domestic abuse. They may take place between all agencies involved (e.g. police, Probation Service, charities and Independent Domestic Violence Advisers) to discuss how best to protect a victim or witness;

- Independent Domestic Violence Advisers (IDVAs) work with victims and are independent of the criminal justice system. They work with all other agencies on the victim's behalf. There are also Independent Sexual Violence Advisers (ISVAs) for victims of sexual violence and Sexual Referral Centres which provide medical care, counselling and forensic examination facilities;
- Witness Care Units, run jointly by the CPS and police, are set up to recognise that victims often also have to act as witnesses in cases;
- special procedures that can be used in court to minimise stress, such as use of screens in court, giving evidence by TV link, clearing the public gallery (victims of sexual offences are always entitled to such measures although victims of non-sexual offences must make a request to the court); and
- the opportunity to make a Victim Personal Statement (describing to the court how the crime has affected the victim personally).

A pilot scheme is currently running in certain areas of England & Wales whereby an individual can ask the police to check whether a new or existing partner has a violent past ("right to ask").<sup>133</sup> If police checks show that a person may be at risk of domestic violence from their partner, the police will consider disclosing the information. The pilot is also considering how the police can proactively release information ("right to know") to protect a person from domestic violence where it is lawful, necessary and proportionate.

The independent charity Victim Support runs Witness Services in all Magistrates' and Crown Courts.

The National Domestic Violence Helpline (run by two UK charities, Women's Aid and Refuge) offers support and advice as well as details of shelters and refuges.

## 5.2 NON-GOVERNMENTAL ORGANISATIONS

There are a number of non-governmental organisations which provide support services in connection with domestic violence:

- "Women's Aid" is the national domestic violence charity which co-ordinates and supports over 350 local domestic violence organisations in England. Welsh Women's Aid is the umbrella organisation representing local organisations in Wales;

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<sup>133</sup> <http://www.womensaid.org.uk/domestic-violence-articles.asp?itemid=2805&itemTitle=Government+pilots+Domestic+Violence+Disclosure+Scheme&section=00010001002200260001&sectionTitle=Articles%3A+consultations>.

- the “Rape Crisis Co-ordination Group” co-ordinates centres in England & Wales;
- the “Survivors Trust” is a charity providing organisational support to specialist voluntary services;
- “Refuge” has a network of safe houses providing emergency accommodation for women and children facing domestic violence; and
- “Respect” is the UK membership association for domestic violence perpetrator programmes which also provides support for male victims. Men’s Advice Line provides a confidential helpline for men experiencing domestic abuse.

### 5.3 SUPPORT FOR VICTIMS WHO ARE CHILDREN

The police have emergency powers to enter premises and remove a child to ensure their immediate protection.<sup>134</sup>

CPS guidelines (set out above) apply equally to children as well as victims. The guidelines state “our primary concern is the safety of the victim and any children... violence will often be witnessed by children and there is an overlap between the abuse of women and abuse (physical and sexual) of children.” As such many of the measures set out above have also been implemented in respect to children (for example many local authorities have established children’s IDVA services). Local Safeguarding Children Boards seek to ensure the safety of children by co-ordinating what is done and reviewing the effectiveness of action taken.

There is also specific legislation on the protection of children. The Adoption and Children Act 2002 broadened the definition of significant harm provided by the Children Act 1989, adding a new category of “impairment suffered from seeing or hearing the ill-treatment of another”, which encompasses domestic violence.

The Education Act 2002 provides that schools, academies and colleges have a statutory responsibility for safeguarding and promoting the welfare of children and young people. A similar duty applies to independent schools.

*A Vision for Services for children and young people affected by domestic violence*, published by the Local Government Association, Women’s Aid and the Children and Family Court Advisory and Support Service (CAFCASS), provides guidance to local commissioners of children’s services. It expresses the aim of connecting the support provided to children under the Children Act 2004, and support for victims of domestic violence under the DVCVA.

Department of Health guidance: *Improving safety, reducing harm – Children, young people and domestic violence* provides practical guidance for front-line practitioners, based on the Vision for Services document.

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<sup>134</sup> Section 46 of the Children Act 1989.

In practice many of the requirements are placed on local authorities. They must have in place a clear strategy for child protection from abuse, including the effects of domestic violence. For example, every local authority in England was required to have a “children and young person’s plan” in place by 2006, to give strategic direction to all services to children. Services should be led by a children’s services director and an elected lead member for children’s services – these are the people responsible for producing and implementing child protection procedures and policies for professionals working with children. Statutory guidance<sup>135</sup> provides that everyone who works with children has a responsibility for keeping them safe. The statutory guidance identifies roles required of relevant organisations.

## 6 OFFENCES

In deciding whether to prosecute, the CPS has to consider the Code for Crown Prosecutors which contains an evidential test and a public interest test. In addition it will consider its policy for prosecuting Cases of Domestic Violence<sup>136</sup> which makes clear that the CPS will act vigorously to prosecute cases of domestic violence.

In certain instances legal outcomes may be other than prosecution, such as a warning, a caution or a “community resolution”.

## 7 PENALTIES AND SANCTIONS

### 7.1 PENALTIES FOR DOMESTIC VIOLENCE

Penalties may be in the form of a rehabilitative order, a community penalty, fines, or imprisonment.

The Sentencing Council Guidelines (which must be followed when sentencing an offender) state that often an offence will be viewed more seriously as it was carried out in a domestic context.<sup>137</sup>

Where sentences include imprisonment, the maximum terms of imprisonment for offenders is as follows:

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<sup>135</sup> HM Government 2013, *Working Together to Safeguard Children: a guide to inter-agency working to safeguard and promote the welfare of children*.

<sup>136</sup> <http://www.cps.gov.uk/publications/docs/DomesticViolencePolicy.pdf>.

<sup>137</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_domestic\\_violence.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_domestic_violence.pdf).

OFFENCE	MAXIMUM TERM OF IMPRISONMENT FOR OFFENDERS
MURDER	Life imprisonment
ATTEMPTED MURDER	Life imprisonment
CAUSING OR ALLOWING THE DEATH OF A CHILD OR VULNERABLE ADULT	14 years
CAUSING OR ALLOWING A CHILD OR VULNERABLE ADULT TO SUFFER SERIOUS PHYSICAL HARM	Ten years
CRIMINAL DAMAGE/THREAT TO PROPERTY	Three months
COMMON ASSAULT	Two years
THREATS TO KILL	Ten years
GBH WITH INTENT	Life imprisonment
GBH – WOUNDING	Five years
GBH (RACIALLY AGGRAVATED)	Seven years
ABH	Five years
FEAR OF VIOLENCE	Five years
HARASSMENT	Six months
STALKING	Six months
STALKING INVOLVING FEAR OF VIOLENCE OR SERIOUS ALARM OR DISTRESS	Five years
FALSE IMPRISONMENT	Eight years
AFFRAY	Three years
RAPE/ ASSAULT BY PENETRATION	Life imprisonment
SEXUAL ASSAULT	Ten years
CHILD DESTRUCTION/ PROCURING A MISCARRIAGE OR ABORTION	Life imprisonment
BLACKMAIL	14 years
BREACH OF NON-MOLESTATION ORDER	Five years
FEMALE GENITAL MUTILATION	14 years



A court can require an offender to attend a domestic abuse perpetrator programme which is run by the Probation Service. The aim of the perpetrator programme is to enhance the safety of victims by helping perpetrators change their behaviour and develop respectful and non-abusive relationships.

## 7.2 COMPENSATION

A court, when sentencing, may make a compensation order requiring the offender to pay compensation to the victim for personal injury, loss or damage resulting from the offence.<sup>138</sup>

On a limited basis it is possible to apply for Criminal Injuries Compensation.

## 8 REHABILITATION MEASURES

There are presently three offending behaviour programmes accredited by correctional services:

### **Community Domestic Violence Programme (CDVP)**

A domestic violence programme aimed at reducing the risk of violent crime and abusive behaviour towards women in relationships by helping male perpetrators change their attitudes and behaviour and to reduce the risk of all violent and abusive behaviour in the family. The programme is delivered in the community;

### **Healthy Relationship Programme (HRP)**

A programme for men who have committed violent behaviour in a domestic setting. The aim is to end violence and abuse against participants' intimate partners. Participants will learn about their abusive behaviours and be taught alternative skills and behaviours to help them develop healthy, non-abusive relationships. There are two versions of HRP — the moderate intensity programme for men assessed as having a moderate risk/moderate need profile and the high intensity programme designed for high risk/high need offenders. The programme is delivered while the offender is in custody; and

### **Integrated Domestic Abuse Programme (IDAP)**

A domestic abuse programme designed for men who have committed violence in an intimate relationship. The aim is to end violence and abuse against the participants' intimate partners. Participants will learn about their abusive

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<sup>138</sup> Powers of Criminal Court (Sentencing) Act 2000.

behaviours and be taught alternative skills and behaviours to help them develop healthy, non-abusive relationships. The programme is delivered in the community.

Provision of rehabilitation therapy or schemes will depend on local availability and funding. There is an online toolkit for stakeholders to use to provide support to victims (<http://www.ccrm.org.uk/>). The toolkit is provided by the Anti Violence and Abuse Network.

## 9 THIRD PARTY RESPONSIBILITIES

Although not set out specifically in domestic violence legislation, positive duties exist under European human rights law (implemented via the Human Rights Act 1998) in relation to the police. In addition, local authorities and employers have various legal duties which may be directly relevant to victims of domestic violence.

### Police

The European Convention of Human Rights (ECHR), implemented in the UK through the Human Rights Act 1998, places positive obligations on public authorities to act compatibly with Convention rights. The police must take reasonable action, which is within their powers, to safeguard the following rights of victims and children:

- right to life (Article 2 ECHR);
- right not to be subjected to torture or to inhuman and degrading treatment (Article 3 ECHR); and
- right to private and family life (Article 8 ECHR).

The positive duties of the police were confirmed by the European Court of Human Rights.<sup>139</sup>

### Local authorities

In addition to the Human Rights Act 1998, the most significant duty is that imposed on local authorities is by section 6(1) of the Crime and Disorder Act 1998. The “responsible authorities”<sup>140</sup> must formulate and implement a strategy for the reduction of crime and disorder in the area (including anti-social and other behaviour adversely affecting the local environment). Many local authorities have established Third Party Reporting Centres, to encourage individuals to report cases of domestic violence and hate crimes (although there is no legal obligation to do so).

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<sup>139</sup> *Osman v UK* 1988.

<sup>140</sup> As defined in section 5.

## Employers

Employers have a duty of care under the Health and Safety at Work Act 1974 to ensure, as far as is reasonably practicable, the health and safety at work of their employees and those affected by their undertaking. The Management of Health and Safety at Work Regulations 1999 also requires employers to assess the risks of violence to employees and make arrangements for their health and safety by effective planning, organisation and control. This is relevant as the perpetrator may already know their partner's work times, telephone numbers, colleagues and security entry systems, and therefore may pose an increased risk of workplace violence. Some organisations have policies on domestic violence. The UK Corporate Alliance Against Domestic Violence is a group of employers working collectively to raise awareness and provide policies, procedures and training. It states that it is "committed to reducing the human and economic cost of domestic violence".

Police and public authorities may face an investigation and legal action under the Human Rights Act in domestic courts, which may be escalated to the European Court of Human Rights in Strasbourg. Local authorities and employers may face legal action in UK courts under the applicable legislation as set out above.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 AVAILABLE STATISTICS

The CPS produces an annual report on Violence Against Women and Girls which details domestic violence prosecutions. The overall figures for all strands (domestic violence, rape and sexual offences, human trafficking, with a focus on trafficking for sexual exploitation, prostitution, forced marriage, honour based violence and female genital mutilation, child abuse, pornography) are:

YEAR	2009/2010	2010/2011	2011/2012
TOTAL NUMBER OF PROSECUTIONS	85,904	95,257	91,466
NUMBER OF CONVICTIONS	61,677 (71.8%) <sup>140</sup>	68,154 (72%) <sup>141</sup>	66,860 (71.3%) <sup>142</sup>

<sup>141</sup> CPS Violence Against Women and Girls (VAWG) report 2009–2010 ([http://www.cps.gov.uk/publications/docs/CPS\\_VAW\\_report\\_2010.pdf](http://www.cps.gov.uk/publications/docs/CPS_VAW_report_2010.pdf)).

<sup>142</sup> CPS VAWG report 2010–2011 ([http://www.cps.gov.uk/publications/docs/CPS\\_VAW\\_report\\_2011.pdf](http://www.cps.gov.uk/publications/docs/CPS_VAW_report_2011.pdf)).

<sup>143</sup> CPS VAWG report 2011–2012 ([http://www.cps.gov.uk/publications/docs/cps\\_vawg\\_report\\_2012.pdf](http://www.cps.gov.uk/publications/docs/cps_vawg_report_2012.pdf)).

The figures for the domestic violence strand only (mainly offences against the person and criminal damage offences) are:

YEAR	2009/2010	2010/2011	2011/2012	2012/2013
<b>TOTAL NUMBER OF PROSECUTIONS</b>	74,113	82,187	79,268	70,702
<b>NUMBER OF CONVICTIONS</b>	53,347 (72%) <sup>143</sup>	59,101 (71.9%) <sup>144</sup>	58,138 (73.3%) <sup>145</sup>	52,549 (74.3%) <sup>146</sup>

Statistics held by the CPS for the numbers of prosecutions brought for breaches of non-molestation orders and restraining orders are as follows:

YEAR	2009/2010	2010/2011	2011/2012	2012/2013
<b>BREACHES OF NON-MOLESTATION ORDERS STARTED PROSECUTION</b>	5,024	5,281	5,323	5,563
<b>BREACHES OF RESTRAINING ORDERS OFFENCES STARTED PROSECUTION</b>	2,944	5,922	8,733	10,275

Ministry of Justice data for 2011 indicated 17,765 restraining orders were issued in 2011 on conviction and 1,358 on acquittal. Figures are not available for earlier years.

In relation to civil law remedies, figures are held by the Ministry of Justice. These figures include applications made in Family Proceedings Courts, as well as County Courts:<sup>148</sup>

REMEDY	NUMBER OF APPLICATIONS	NUMBER OF ORDERS GRANTED
<b>2012</b>		
Non-molestation orders	16,288	19,399
Occupation orders	4,969	2,759
<b>TOTAL</b>	<b>21,257</b>	<b>22,158</b>

<sup>144</sup> CPS VAWG report 2009–2010 ([http://www.cps.gov.uk/publications/docs/CPS\\_VAW\\_report\\_2010.pdf](http://www.cps.gov.uk/publications/docs/CPS_VAW_report_2010.pdf)).

<sup>145</sup> CPS VAWG report 2010–2011 ([http://www.cps.gov.uk/publications/docs/CPS\\_VAW\\_report\\_2011.pdf](http://www.cps.gov.uk/publications/docs/CPS_VAW_report_2011.pdf)).

<sup>146</sup> CPS VAWG report 2011–2012 ([http://www.cps.gov.uk/publications/docs/cps\\_vawg\\_report\\_2012.pdf](http://www.cps.gov.uk/publications/docs/cps_vawg_report_2012.pdf)).

<sup>147</sup> CPS VAWG Report 2012–2013.

<sup>148</sup> Ministry of Justice Court Statistics Quarterly – January to March 2013 edition (<https://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013>) – includes data for previous years.

REMEDY	NUMBER OF APPLICATIONS	NUMBER OF ORDERS GRANTED
<b>2011</b>		
Non-molestation orders	16,135	19,555
Occupation orders	5,189	3,171
<b>TOTAL</b>	<b>21,324</b>	<b>22,726</b>
<b>2010</b>		
Non-molestation orders	18,358	21,194
Occupation orders	6,193	3,715
<b>TOTAL</b>	<b>24,551</b>	<b>24,909</b>

As an overall trend, the number of applications made, and the number of orders granted, has been decreasing since 2002.

## 10.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Most sources reviewed highlighted that the greatest problem facing enforcement of laws is that victims are often scared or unable to come forward. Abuse, by its nature, often takes place in private and therefore the victim is the only witness. The CPS has recently reported<sup>149</sup> that cases charged which were unsuccessful due to victim issues reduced in the year 2012–2013 which is considered by the CPS to reflect improvement in victim confidence. However, the level of cases reaching prosecution is questioned by some domestic violence commentators.

Civil law injunctions may not be the most practical option for every victim of domestic violence, and in some cases may expose the victim to further violence; therefore most support organisations emphasise that they should not be promoted as a “one size fits all” remedy.

It appears that the provision of rehabilitation is unclear and inconsistent. The courts have received criticism for using the cheaper alternative of “at home” rehabilitation rather than more expensive, intensive schemes.<sup>150</sup>

<sup>149</sup> Media statement dated 15 July 2013.

<sup>150</sup> <http://www.guardian.co.uk/society/2012/mar/16/union-domestic-violence-rehabilitation>.

### 10.3 PLANNED REFORMS/PILOT SCHEMES

Reforms have recently taken place, for example by extending the definition of domestic violence, piloting a scheme to provide information about a partner's past abusive behaviour,<sup>151</sup> and an extension of the SDCV system.

Previously, civil legislation on domestic violence was criticised (by charities and academic sources) for its narrow scope of application — specifically, the original Family Law Act focused on abuse between spouses in the family home. This did not encompass the full range of circumstances in which domestic violence could take place, and left many victims who were not spouses without redress. Recent reforms, including the DVCVA and Protection from Harassment Act have broadened the protection offered to victims, but have also been criticised for being too vague. For example, Women's Aid expressed concerns that uncertainty surrounding the definition of “an intimate relationship of significant duration” in the DVCVA may lead to inconsistent application of the legislation by courts.

The Home Office monitors the progress of initiatives under its Domestic Violence Policy *Ending Violence Against Women and Girls in the UK*. It regularly runs pilot schemes and consults on the success or failure of each scheme.<sup>152</sup>

### 10.4 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS

The Family Justice Review commissioned in March 2010 by the Ministry of Justice, the Department of Education and the Welsh government reviewed the effectiveness of the whole of the family justice system in England & Wales. Its aims were to improve the system so that it is quicker, simpler, more cost-effective and fairer whilst continuing to protect children and vulnerable adults from risk of harm. The Review's final report dated 3 November 2011 recommended the establishment of a Family Justice Board to assist governance of the family justice system. The government accepted the majority of the Review's recommendations. The Family Justice Board was established in March 2012 to provide the leadership and direction necessary to implement reforms.

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<sup>151</sup> Known colloquially as “Clare's Law”.

<sup>152</sup> <https://www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk>.

## ADDITIONAL RESOURCES

### Applicable law (non-exhaustive)

1. Crime and Disorder Act 1998
2. Crime and Security Act 2010
3. Criminal Damage Act 1971
4. Criminal Justice Act 1988
5. Criminal Law Act 1977
6. Domestic Violence, Crime and Victims Act 2004
7. Domestic Violence, Crime and Victims (Amendment) Act 2012
8. Family Law Act 1996
9. Female Genital Mutilation Act 2003
10. Forced Marriage (Civil Protection) Act 2007
11. Homelessness Act 2002
12. Housing Act 1996
13. Human Rights Act 1998
14. Malicious Communications Act 1988
15. Offences Against the Person Act 1861
16. Theft Act 1968
17. Protection from Harassment Act 1997
18. Public Order Act 1986
19. Sexual Offences Act 2003

### Other sources

1. Home Office website [www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/](http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/)
2. Home Office policy [www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk](http://www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk)
3. Home Affairs Select Committee Report (June 2008) on Domestic Violence, Honour Based Violence and Forced Marriage [www.publications.parliament.uk](http://www.publications.parliament.uk)
4. CPS Policy for Prosecuting Cases of Domestic Violence [www.cps.gov.uk/publications/docs/domesticviolencepolicy.pdf](http://www.cps.gov.uk/publications/docs/domesticviolencepolicy.pdf)
5. Centre for Social Justice report (may be used to create government policy in the future) [www.centreforsocialjustice.org.uk/publications/beyond-violence-breaking-cycles-of-domestic-abuse](http://www.centreforsocialjustice.org.uk/publications/beyond-violence-breaking-cycles-of-domestic-abuse)

6. Home Office consultation in disclosure scheme for victims of domestic violence [www.gov.uk/government/consultations/domestic-violence-disclosure-scheme](http://www.gov.uk/government/consultations/domestic-violence-disclosure-scheme)
7. Sentencing Council guidelines on prosecuting cases of domestic violence [sentencingcouncil.judiciary.gov.uk/docs/web\\_domestic\\_violence.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_domestic_violence.pdf)
8. [www.guardian.co.uk/society/domestic-violence](http://www.guardian.co.uk/society/domestic-violence)
9. Ministry of Justice Judicial and Court Statistics 2011 (published 28 June 2012) [www.gov.uk/government/publications?keywords=&publication\\_filter\\_option=statistics&topics%5B%5D=all&departments%5B%5D=ministry-of-justice&world\\_locations%5B%5D=all](http://www.gov.uk/government/publications?keywords=&publication_filter_option=statistics&topics%5B%5D=all&departments%5B%5D=ministry-of-justice&world_locations%5B%5D=all)
10. Coordinated Community Response Model Online Toolkit [www.ccrm.org.uk/](http://www.ccrm.org.uk/)

### **Non-governmental organisations**

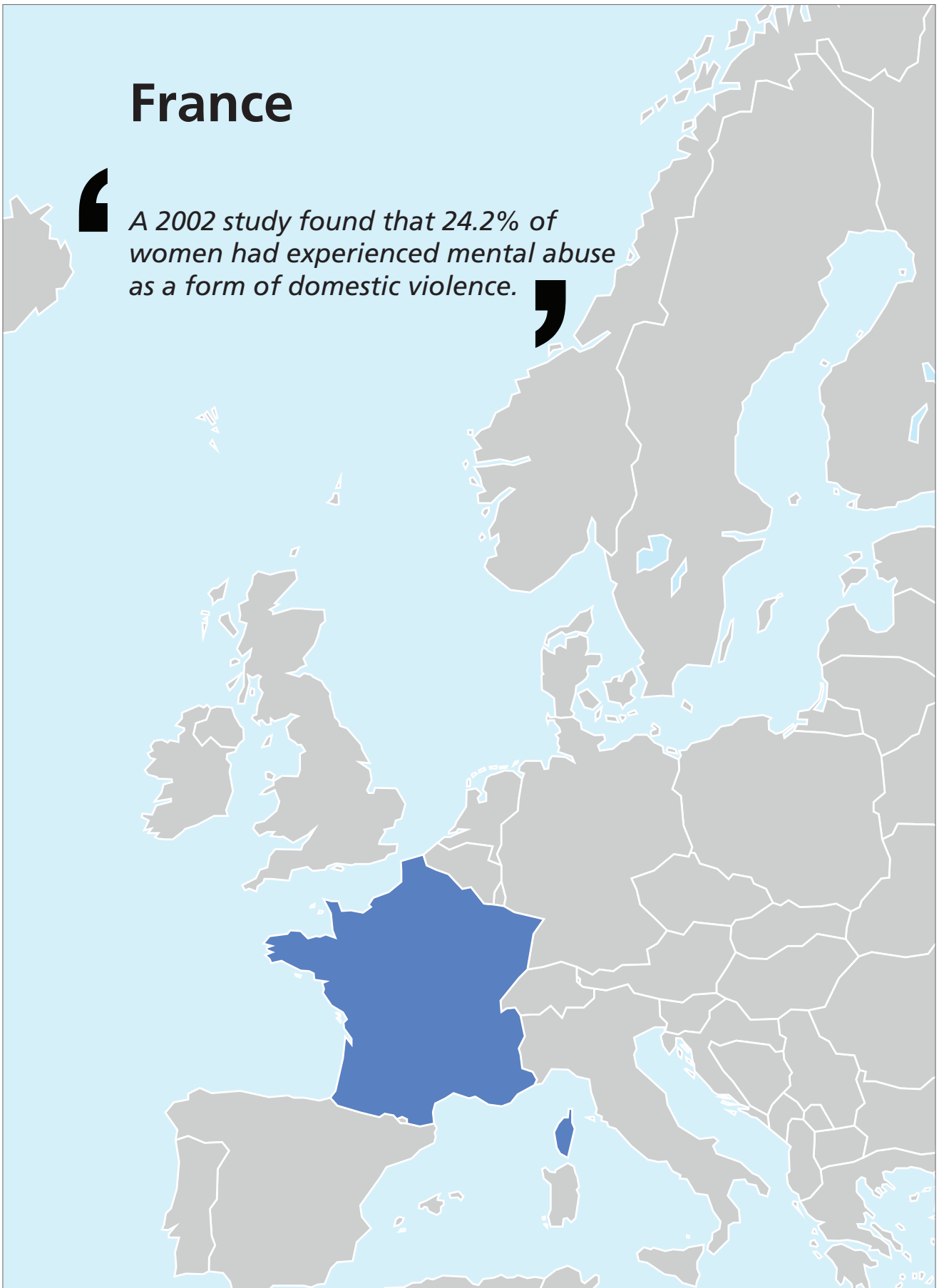
1. [www.womensaid.org.uk](http://www.womensaid.org.uk)
2. [www.welshwomensaid.co.uk](http://www.welshwomensaid.co.uk)
3. [www.refuge.org.uk/](http://www.refuge.org.uk/)
4. [www.respect.uk.net](http://www.respect.uk.net)
5. [www.mensadviceline.org.uk](http://www.mensadviceline.org.uk)
6. [www.nspcc.org.uk](http://www.nspcc.org.uk)
7. [www.barnados.org.uk](http://www.barnados.org.uk)
8. [www.caadv.org.uk](http://www.caadv.org.uk)



# France



*A 2002 study found that 24.2% of women had experienced mental abuse as a form of domestic violence.*



# DOMESTIC VIOLENCE IN FRANCE

CMS Paris and Intel Corporation

## EXECUTIVE SUMMARY

For an extended period of time the problem of domestic violence in France has been a difficult issue which was not widely addressed in public. Discussions concerning the problem of domestic violence were seen as taboo in France, with the focus in French society being to maintain the peace between family members.

However, in 1989 Ms Michèle André, the State secretary for women's rights (*Secrétaire d'Etat aux droits de la femme*), launched an awareness campaign to raise the issue of domestic violence and to start discussions on how to address it.

Gradually the government and parliament became engaged with and involved in legislating to prevent domestic violence, such that today domestic violence is seen as a matter of national concern which needs to be addressed.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 DEFINITION OF DOMESTIC VIOLENCE

The concept of domestic violence is not defined in French legislation. However, the French dictionary "Larousse" defines violence as very aggressive actions leading to moral and/or physical harm. Domestic violence is interpreted in French law to mean the aggressive behaviour of one family member towards another family member. As domestic violence largely occurs in private, it is not often reported to the authorities.

According to the article 212 of the French Civil Code,<sup>153</sup> spouses (here taken to mean married couples) have obligations of respect, loyalty, "rescue" (i.e. an obligation to help or aid, for example to contribute financially to the marriage) and assistance towards one another. This obligation is quite wide and can be interpreted as a prohibition of domestic violence. However, the impact of this article is limited as it only applies to married couples and does not specifically define the offence of domestic violence.

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<sup>153</sup> Code Civil.

However, domestic violence is also interpreted through other laws to refer to violence between spouses, people who cohabit and also between children and their parents. For example, the French Criminal Code<sup>154</sup> lists aggravating circumstances for committing a violent act and refers specifically to domestic violence that leads to death. Where death was non-intentional, the offender can be given twenty years' imprisonment if they were the spouse or partner of the victim (including civil partners) or without such aggravating circumstances, the maximum imprisonment is fifteen years.<sup>155</sup>

Protective measures provided for by the French Civil Code are applicable to all types of couples.<sup>156</sup>

Although French legislation does not refer to gay, lesbian or transgender relationships, the courts will apply the relevant laws to persons in such relationships in the same way in which it would be applied to heterosexual couples.

Violence towards domestic workers would not fall under the above domestic violence provisions; instead, it is covered under generally-applicable criminal law.

## 1.2 FORMS OF DOMESTIC VIOLENCE

Professor Henrion, a member of the National Academy of Medicine (*Membre de l'Académie Nationale de Médecine*) highlighted in a note to the Minister of Health in 2001 that domestic violence can present in a number of different forms.

Professor Henrion identified four main types of domestic violence, specifically:

- physical violence (beatings, mutilation);
- sexual violence (rape, sexual assault);
- verbal and psychological violence (blackmail, insults); and
- economic violence (confiscation of income, economic alienation).

## 1.3 MENTAL ABUSE

French law specifically prohibits mental abuse such as blackmail,<sup>157</sup> threats and insults.<sup>158</sup> When considering mental abuse the court will examine the specific facts before it. For example, in a decision of the Criminal Court of the *Cour de Cassation* (the highest civil Court in France), the judges acknowledged that pointing a loaded gun without shooting is a serious enough threat to constitute mental abuse.

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<sup>154</sup> Code Pénal.

<sup>155</sup> Article 222-8 Criminal Code.

<sup>156</sup> Article 515-9 Civil Code.

<sup>157</sup> Article 312-10 Criminal Code.

<sup>158</sup> Article 222-17 Criminal Code.

Mental abuse is difficult to prove as, unlike physical violence, it does not leave marks on the victim. Although the type of evidence required to prove mental abuse is not stipulated by French legislation, the common law burden of proof will apply and as such rests with the victim. Case law has suggested that the victim will need to prove domestic violence by using evidence of positive acts which led to an infringement of his or her physical or mental integrity<sup>159</sup> (see further at section 4.3 below.)

The Criminal Code provides that punishment of the offender will depend on the nature of the mental abuse:

- blackmail is punished by five years' imprisonment and EUR75,000 fine;<sup>160</sup>
- threat of death is punished by three years' imprisonment and EUR45,000 fine;
- a simple threat is punished by six months' imprisonment and EUR7,500 fine;<sup>161</sup> and
- moral harassment is punished by one year's imprisonment and EUR15,000 fine.<sup>162</sup>

A study from 2002 found that 24.2% of women experienced mental abuse as a form of domestic violence.

## 1.4 ECONOMIC/FINANCIAL ABUSE

Economic/financial abuse is one of the types of domestic violence that Professor Henrion (see section 1.2 above) identifies. This form of abuse would include, for example, making someone beg for money or refusing to make any contribution to the expenditures of the household. However, the notion of financial abuse is not yet recognised in French legislation, although gradually domestic violence by way of financial abuse is being captured within the court's consideration of "abuse of a [victim's] weakness".<sup>163</sup>

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<sup>159</sup> Court of Appeal of Toulouse, 26 June 2003.

<sup>160</sup> Article 312-10 Criminal Code.

<sup>161</sup> Article 222-17 Criminal Code.

<sup>162</sup> Article 222-33 Criminal Code.

<sup>163</sup> Article 406 Criminal Code.

## 2 APPLICABLE LEGISLATION

### 2.1 GOVERNMENT POLICY

Since 2005, addressing domestic violence has been high on the government's agenda and two projects (one between 2005 and 2007 and the other between 2008 and 2010) led by several ministries were undertaken. One project, under the presidency of Nicolas Sarkozy, consisted of general plans to combat violence against women and led to ten measures being adopted to protect women and give them more autonomy.

The second project, similar to the first, was entitled *Twelve goals to combat violence to women*. This project also dealt with how to protect women and allowed the government to have open discussions on the topic of domestic violence. To better protect partners, particularly women, the government created several specific criminal and civil laws against physical and moral violence.

### 2.2 DOMESTIC VIOLENCE LAWS

The law "On Divorce" dated 26 May 2004<sup>164</sup> (the "26 May 2004 law") created the concept of "violence summary judgment". It specifically relates to divorce and gives judges the power to forbid violent partners from entering their partner's residence. Before this law was enacted, a victim would have to leave the shared home for his or her own safety.

The law "Reinforcing the prevention and punishment of conjugal violence and protection of minors" dated 4 April 2006<sup>165</sup> extended the 26 May 2004 law to non-married couples.

In 2010, Prime Minister François Fillon went further and proclaimed domestic violence to be a serious national matter. He stated that domestic violence should be a national cause and that steps should be taken to prevent violence against women.<sup>166</sup>

Also in 2010, a working group made up of 25 associations campaigned for greater awareness of domestic violence and the campaign was funded by a combination of government funds and private donations. A victim support hotline was also created (see further section 5.1 below).

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<sup>164</sup> Loi n° 2004-439 du 26 mai 2004 relative au divorce.

<sup>165</sup> Loi n° 2006-399 du 4 avril 2006 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs.

<sup>166</sup> Grande cause nationale 2010/la lutte contre les violences faites aux femmes.

The law “On specific conjugal violence against women and consequences on children” dated 9 July 2010<sup>167</sup> (the “9 July 2010 law”) further improved the legal framework. This law was unanimously voted in by parliament. A new provision in the Civil Code was created for “measures protecting victims of violence”. Although the provision focuses on female victims of domestic violence, this law can also apply to male victims.

The 9 July 2010 law introduced the concept of a “protection order”, which allows a judge to take specific measures “when there are serious reasons to consider true the claims of violence.” A victim can request a protection order or a prosecutor can do so on the victim’s behalf. On receiving this request, the judge will arrange a hearing with both parties at the end of which the judge will decide on whether specific measures are required.

The protection order has a maximum duration of four months. The Civil Code provides for seven measures which can be imposed, specifically:

- forbidding the offender from meeting or keeping in touch with specific individuals named by the judge;
- forbidding the offender from carrying or owning a weapon. If he or she owns a weapon, he or she is required to inform the police of such ownership and complete a statement;
- ordering that the two parties live separately and deciding on which party is permitted to stay in the shared home. The judge will also consider how to allocate general daily costs of living and will fix the contribution of each spouse to ensure that the victim still receives financial assistance from the offender despite the parties not sharing a residence. If the violence is very serious, the judge will automatically allow the victim to remain in the shared home;
- depriving a parent of their parental authority and deciding on the allocation of costs for support of the child/children;
- authorising the victim to make a declaration that they are residing at their lawyer’s office for administrative purposes; and
- providing legal assistance to the victim for example by providing a grant that covers all or part of the legal fees including lawyers’ and experts’ fees.

The 9 July 2010 law contains both civil and criminal provisions. The criminal provisions cover three main topics: (i) protection of victims; (ii) prevention of violence; and (iii) control of violence. The provisions regarding the protection of victims are only relevant where a protection order has not been complied with.

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<sup>167</sup> Loi n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants.

There are several articles that refer to the prevention of violence although these provisions are not cohesive.<sup>168</sup> As referred to above, the Criminal Code provides that if the violence is carried out by a spouse/partner on another spouse/partner, this is an aggravating circumstance. The Criminal Code also contains provisions regarding mental harassment and forced marriage.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

In France, the presumption of innocence is very important and an accused person is considered to be innocent until proven guilty. The burden of proof is on the prosecutor and in domestic violence cases the prosecutor must investigate and collect enough evidence of the positive acts that led to the infringement of the victim's integrity.<sup>169</sup> A judge will then decide if there is sufficient evidence to convict the accused.

### 3.2 RELEVANT COURT

Domestic violence cases will be brought to the *Tribunal Correctionnel*, a Criminal Court of first instance. The decision of this court can be appealed to the Court of Appeal. Further appeals can be brought to the Criminal Chamber of the *Cour de Cassation* (the highest court dealing with civil and criminal matters). However, at this stage the judges will not review the facts of the case, only the application of the law or other legal issues.

### 3.3 STAGES OF THE PROCEEDINGS

According to the first article of the Criminal Procedure Code,<sup>170</sup> a case has to be brought against the defendant by a magistrate (prosecutor) or any person appointed by the law who can carry out the "public action" and who is also working in a public institution.

The second article of the Criminal Procedure Code specifies that a case can be initiated by the victim or, in certain circumstances, by any person directly suffering as a result of the offence. In such cases, the victim will file a complaint on the

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<sup>168</sup> Articles 141-4 and 141-12-1 Criminal Procedure Code; articles 131-36-12-1 and 222-18-3 (as amended by article 222-48-1) Criminal Code.

<sup>169</sup> Court of Appeal of Toulouse, 26 June 2003.

<sup>170</sup> Code de Procédure Pénale.

basis of which the magistrate will prosecute. Filing the complaint demonstrates the victim's involvement and willingness to initiate court proceedings.

If the police are aware of any infraction of the law and the victim is unwilling to file a complaint, the police will initiate proceedings.

### 3.4 PROSECUTION FUNDING

The State pays the costs of a criminal lawsuit.<sup>171</sup> The parties have to pay their own legal fees and a victim can be ordered to pay a fine if the magistrate considers the victim has abusively engaged in litigation. Further, the losing party may have to cover the legal fees of the other side if the magistrate deems this appropriate.

Both the victim and the offender can access free legal assistance — see further section 4.6 below.

### 3.5 TIMESCALES

French legislation does not provide a specific timescale for the prosecution of an offence although it does state that prosecution must be achieved within a reasonable period.<sup>172</sup> This principle also exists in article 5(3) of the European Convention of Human Rights. According to a decision given by the Court of Appeal of Paris in 1988, the timescale must be gauged globally by taking into consideration the nature of the case.

According to statistics gathered to improve the administration of justice, the average length of time between the infraction and the decision of first instance in the criminal courts is approximately 9.8 months. The average length of time between the infraction and the decision of the Court of Appeal is around 31.5 months.

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<sup>171</sup> Article 800-1 Criminal Procedure Code.

<sup>172</sup> Criminal Procedure Code.



## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

There are a number of protective measures a family judge can adopt in cases of urgency. Where an individual is a victim of domestic violence, the judge can issue a protection order as discussed in section 2.2 above. The measures available under a protection order (including forbidding an offender from returning to the victim's home, contacting the victim or their family members) can be given in cases of urgency and the victim can receive injunctive relief quickly.

### 4.2 TIMESCALES

Legislation does not state a specific timescale for interim measures to be imposed, but it does specify that a protection order is an emergency procedure, which implies that the period between the demand and the execution of the order must be short. The procedure is verbal, which makes it easier and quicker.

The victim applies to the court for the order and if there is enough evidence, the court will summon the victim and his or her partner to a hearing. During that hearing a judge specialising in family matters will examine the claims of both parties. At the end of the hearing the judge will decide whether there is enough evidence to grant the protection order. If granted, the order is effective immediately.

### 4.3 BURDEN OF PROOF

At the hearing it is up to the person making the claims (i.e. here the victim) to prove the allegations.<sup>173</sup> The victim must show proof of positive acts that led to a violation of the victim's physical and mental integrity.<sup>174</sup>

The proof must have been gathered in a fair manner and without fraud or breach of privacy: for example, the courts will not admit a recording of private conversation. The court can hear a child's testimony.

### 4.4 COURT

In the first instance, the case will be brought to the *Tribunal de Grande Instance*. Any appeal will then be to the Court of Appeal. This judgment can then be appealed to the Criminal Chamber of the *Cour de Cassation*. For appeals to this court, the judges will not discuss the facts, only the application of the law or legal issues.

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<sup>173</sup> Article 9 Civil Procedure Code.

<sup>174</sup> Court of Appeal of Toulouse, 26 June 2003.

## 4.5 PROCEDURE

A civil law action can be instigated by anyone who has an interest, usually the victim.<sup>175</sup> Civil proceedings can be initiated in addition to a criminal law action. Where a victim files a case in the criminal courts, they will also automatically become a civil party (“constitution of civil part”). The case will only be heard by the criminal courts who will decide on both the criminal offence and civil liability. In this situation, the criminal court can award damages to the victim. However, victims can instigate a civil law action separately from criminal proceedings.

## 4.6 FUNDING

The European Court of Human Rights encourages members of the European Union to provide legal assistance for people who cannot afford to bring a case. This decision was based on the right of access to the court deduced from article 6(1) of the European Convention of Human Rights.

The law “On jurisdictional assistance” dated 10 July 1991<sup>176</sup> provides for legal assistance for victims from the State. Such assistance can be complete or partial: where complete, the State pays the costs the victim would have had to bear without this assistance; where partial, the victim has to pay part of the costs. Whether the victim will receive complete or partial costs will depend on the victim’s resources.

Other organisations can assist with legal costs. People can subscribe to private insurance, which will cover the costs of a lawsuit if necessary; beneficiaries of this private insurance cannot access government assistance. Previously the government considered making such insurance mandatory for all to reduce the cost to the State but this was not implemented.

Some charitable organisations also provide help to the victims by giving free and confidential consultations. For example, the Lyon based charity LAVI (*Lyon Aide aux Victimes*) has signed agreements with the appeal court of the Ministry of Justice, the Lyon prefecture and various municipalities and offers legal and psychological support for victims. As well as funding the prosecution, LAVI will also pay for medical care and psychological counselling and will also provide administrative support.

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<sup>175</sup> Article 85 Criminal Procedure Code.

<sup>176</sup> *Loi n° 91-647 du 10 juillet 1991 relative à l’aide juridique.*

## 5 SUPPORT FOR VICTIMS

### 5.1 PROJECT ANALYSING THE EFFECTIVENESS OF 9 JULY 2010 LAW

A new project concerning domestic violence against women led by several government ministries was initiated in 2011. The project plans to study and analyse the effectiveness of the 9 July 2010 law<sup>177</sup> and conclude whether the measures taken are appropriate (the “Domestic Violence Project”). The study is composed of 62 actions addressing domestic violence, ranging from general points such as improving general knowledge about domestic violence to more specific points such as addressing the issue of forced weddings.

The aims of the Domestic Violence Project are defined in a guidance note, which states that the project is in place to “facilitate provision of support for victims of domestic violence”. Such support is broken down into a number of actions, namely to:

- create one telephone number for victims to contact and to standardise the response to victims so as to guarantee consistently professional support (currently there are several phone numbers that victims can contact for support);
- improve the network of professionals specialising in domestic violence — currently every county has separate specialised professionals including psychologists and social workers;
- create more reception centres for victims of domestic violence to add to the reception centres already set up for female victims and their children, which were created during a previous project;
- create a daytime reception centre so female victims of domestic violence can talk to someone who can inform them on how to proceed and guide them through the situation; and
- study the needs of female victims of domestic violence and improve the existing infrastructures.

### 5.2 CHILD VICTIMS

There is no separate law regarding support for children who have experienced domestic violence. However, if the victim of domestic violence is a child this is considered an aggravating circumstance.

The “Domestic Violence Project” guidance note referred to above includes provision for the support of victims of domestic violence who are children. It

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<sup>177</sup> Loi n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants.

applies both to children who have directly experienced domestic violence and also to children who have witnessed domestic violence in their family. The specific action points regarding children in the guidance note are:

- launching a major campaign of awareness for children so they know their rights and who to contact if they are victims of domestic violence;
- putting a structure in place for people who specialise in domestic violence to ensure they are trained to manage the specific needs of children;
- creating a special area where it is safe for the offending parent and their child to meet. Such meetings aim to preserve the bond between the parent and the child while ensuring appropriate monitoring is in place to ensure the child's safety;
- putting in place a reporting structure (*signalement*) so that if someone is aware that a child is experiencing domestic violence they are able to inform the authorities, who in turn will take measures to protect the child (see further section 9 below); and
- studying the needs of victims of domestic violence who are children and improving the existing support infrastructures.

### 5.3 EFFECTIVENESS OF SUPPORT FOR VICTIMS

Each French county decides how to act but all of them must provide proper support for victims of domestic violence. Some departments build reception centres; others offer to pay for a hotel for the victim. In every county the victim can access professional support from those specialised in domestic violence, including doctors and psychologists, lawyers and social workers.

## 6 OFFENCES

Several offences can be linked to domestic violence. Some of those offences refer specifically to domestic violence and in these cases the penalties are generally more severe.

There are two types of domestic violence offences: (i) acts that are automatically taken to court even if the victim does not file a complaint; and (ii) acts that will only lead to prosecution following a complaint by the victim.

Acts which are automatically taken to the courts are:

- preventing the victim from leaving the home alone or from seeing/calling relatives by using force;
- confinement of the victim;
- threatening to kill the victim or remove their children;

- physical violence which does not leave marks on the body but which is often repeated;
- one occurrence of physical violence leaving marks on the body (i.e. bruises, broken nose or ribs);
- physical violence leading to severe injuries (i.e. disfiguration, permanent mental illness);
- not assisting an injured victim and preventing others from assisting;
- putting the victim in a dangerous situation, i.e. pointing a loaded gun at the victim or leaving the victim alone in an isolated place without any food;
- murder/attempted murder;
- rape/attempted rape;
- forced prostitution; and
- sexual abuse.

Acts which are only prosecuted following complaint by the victim are:

- insults;
- physical violence which does not leave marks on the body and which has only occurred a few times;
- slander/defamation;
- persistently contacting the victim via electronic means; and
- trespass.

## 7 PENALTIES AND SANCTIONS

### 7.1 SENTENCING

The severity of the sentence depends on the seriousness of the offence. An offender found guilty of domestic violence can be sentenced with:

- imprisonment or suspended imprisonment;
- a fine;
- prohibition from doing certain work/working in certain fields;
- prohibition from carrying a weapon;
- suspension of a hunting licence;
- revocation of a driving license; and/or
- an obligation to attend a “civic rights class”.

## 7.2 IMPRISONMENT

The length of imprisonment will depend on the offence committed. For violent offences that could be committed in a domestic situation, the applicable imprisonment sentences are as follows:

- intentional homicide: life imprisonment;<sup>178</sup>
- sequestration: 20 years' imprisonment.<sup>179</sup> If the sequestration lasts less than seven days the sentence is reduced to five years' imprisonment and EUR75,000 fine;
- death threat: five years' imprisonment and EUR75,000 fine. If it is a simple threat the sentence is reduced to two years' imprisonment and EUR30,000 fine;<sup>180</sup>
- violence leading to death of the victim: 20 years' imprisonment;<sup>181</sup>
- violence leading to mutilation: 15 years' imprisonment;<sup>182</sup>
- violence resulting in the victim having to stop working for more than eight days: five years' imprisonment and EUR75,000 fine;<sup>183</sup>
- violence resulting in the victim having to stop working for fewer than eight days: three years' imprisonment and EUR45,000 fine;<sup>184</sup>
- preventing someone from giving help to an injured person: seven years' imprisonment and EUR100,000 fine;<sup>185</sup>
- not helping someone in danger: five years' imprisonment and EUR75,000 fine;<sup>186</sup>
- rape: 20 years' imprisonment;<sup>187</sup>
- sexual abuse: seven years' imprisonment and EUR100,000 fine;<sup>188</sup>
- insults: first degree fine (misdemeanour);
- non-public defamation: first degree fine (misdemeanour);<sup>189</sup> and
- trespass: one year imprisonment and EUR150,000 fine.<sup>190</sup>

Some provisions of the Criminal Code provide for additional sentences as well as those outlined above. For example, in addition to the sentence outlined

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178 Article 221-4 Criminal Code.

179 Article 224-1 Criminal Code.

180 Article 222-18-3 Criminal Code.

181 Article 222-8 Criminal Code.

182 Article 222-10 Criminal Code.

183 Article 222-12 Criminal Code.

184 Article 222-13 Criminal Code.

185 Article 223-5 Criminal Code.

186 Articles 223-6 and 223-16 Criminal Code.

187 Article 222-24 paragraph 11 Criminal Code.

188 Article 222-28 paragraph 7 Criminal Code.

189 Article R621-1 Criminal Code.

190 Article 226-4 Criminal Code.

above for murder, the Criminal Code also provides that such offenders can be prevented from practising certain professions, be forbidden from carrying a weapon, have their driving or hunting licence suspended or be forbidden from driving certain vehicles.<sup>191</sup>

In addition to the sentence available for threats, offenders can have their civil, civic or family rights limited (including the right to vote, right to testify during trial, right to be a guardian), and can be prohibited from working in a government organisation or carrying out social work, be forbidden from owning a weapon and/or being obliged to attend classes on the responsibility of parents.<sup>192</sup>

## 8 REHABILITATION MEASURES

### 8.1 REHABILITATION FOR OFFENDERS

French law provides for rehabilitation of offenders generally but there are no specific provisions regarding domestic violence offenders. The rehabilitation measure will depend on the offence; the more severe the offence, the stricter the rehabilitation will be. For example a sexual offender will be forced to follow psychiatric treatment.

Rehabilitation can include requiring the offender to report to the police station every day/week once out of prison to ensure the authorities are aware of the offender's location. The offender can also be obliged to see a psychiatrist and follow a course of treatment.

An offender can also be forbidden from going near the residence of a former partner and the victim can be given an emergency telephone number to call if the offender approaches them. The offender can also be given an electronic tagging device so the police can track their movements.

### 8.2 SUPPORT FOR OFFENDERS

Some support is given to domestic violence offenders through the organisation of social and medical care. A project was undertaken between 2011 and 2013 that aimed to improve the quality of care for offenders by ensuring that appropriate local structures were in place to provide such support.

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<sup>191</sup> Article 221-8 Criminal Code.

<sup>192</sup> Article 224-9 Criminal Code.

The use of these measures is still in the trial phase and the efficacy of such measures is constantly reviewed by the French Senate's commission of enquiry into delinquency in France.<sup>193</sup>

## 9 THIRD PARTY RESPONSIBILITIES

The concept of duty of care does not exist in French legislation. However, the Criminal Code provides that anyone who has the knowledge of a crime that is either about to happen or has happened must report this crime to the authorities. Failure to do so can lead to a sentence of three years' imprisonment and EUR45,000 fine.<sup>194</sup>

An even greater obligation is imposed by the Criminal Procedure Code, which provides that anyone who works in a public institution and is aware of any offence must inform the prosecutor.<sup>195</sup>

A special procedure is in place where violence is committed against children. The reporting (*signalement*) procedure is quick and easy. Anyone who has strong suspicions that a child is experiencing violence must write a letter to the prosecutor or the President of the General Council of the department describing the facts leading to these suspicions. A board composed by doctors, social workers and psychologists will then examine the case and take any measures necessary to ensure the safety of the child.

## 10 EFFECTIVENESS/IMPLEMENTATION

The specific domestic violence legislation discussed above is quite recent and a study is in progress regarding the effectiveness of the legislation between 2011 and 2013. However, at the time of writing the results have not yet been published and no other review/analysis of domestic violence has taken place.

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193 For more information and to find reports on the results of such studies please see:  
<http://www.senat.fr/rap/l99-449/l99-4495.html>  
<http://www.assemblee-nationale.fr/13/pdf/projets/pl4001-ei.pdf>  
<http://www.ladocumentationfrancaise.fr/dossiers/prison-detention-reinsertion/reinsertion-peines-alternatives.shtml>  
<http://www.vie-publique.fr/actualite/panorama/texte-vote/loi-du-24-novembre-2009-penitentiaire.html>.

194 Article 343-1 Criminal Code.

195 Article 40 Criminal Procedure Code.



## ADDITIONAL RESOURCES

### Applicable laws

1. Civil Code
2. Criminal Code
3. Civil Procedure Code
4. Criminal Procedure Code
5. *Loi n° 2004-439 du 26 mai 2004 relative au divorce* ("Relating to divorce")
6. *Loi n° 2006-399 du 4 avril 2006 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs* ("Reinforcing the prevention and punishment of conjugal violence and protection of minors")
7. *Loi n°2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants* ("About violence made to women in a couple and the consequences on children")
8. *Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique* ("On jurisdictional assistance")

### Published articles

1. M. Azavat, Regards civilistes sur la loi du 4 avril 2006 renforçant la prévention et la répression des violences conjugales au sein du couple, *Dr Famille*, 2006, n°4
2. M. Lamarche, *Violences faites aux femmes : le droit et les faits*, *Dr Famille*, 2008, n°7
3. V. Larribeau-Terneyre, *Premiers éclairages sur l'application de la loi du 9 juillet 2010 dans le temps et au fond*, *Dr Famille*, 2011, n°4
4. E. Mulon, J. Casey, *Loi du 9 juillet 2010 et décret du 29 septembre 2010 sur les violences conjugales : aspect de droit civil et de droit pénal*, *Gaz. Pal.* 2010, n°315, p.6

### Publications

1. P. Malaurie, *Droit de la Famille*, Montchrestien, 2012
2. P. Murrat, *Droit de la Famille*, Dalloz, 2008/2009
3. R. Henrion, *les femmes victimes de violences conjugales, le rôle des professionnels de santé : rapport au ministre chargé de la santé*, 2001
4. Minister of solidarity and social cohesion, "Project of fight against domestic violence made to women", 2011–2013 [http://www.stop-violences-femmes.gouv.fr/IMG/pdf/Plan\\_de\\_lutte\\_contre\\_les\\_violences\\_2011-2013.pdf](http://www.stop-violences-femmes.gouv.fr/IMG/pdf/Plan_de_lutte_contre_les_violences_2011-2013.pdf)

### Judgments

1. Crim, 7 août 1934, DH 1934,477
2. CA Toulouse, 26 June 2003, D2003, IR p.2728

### Statistics

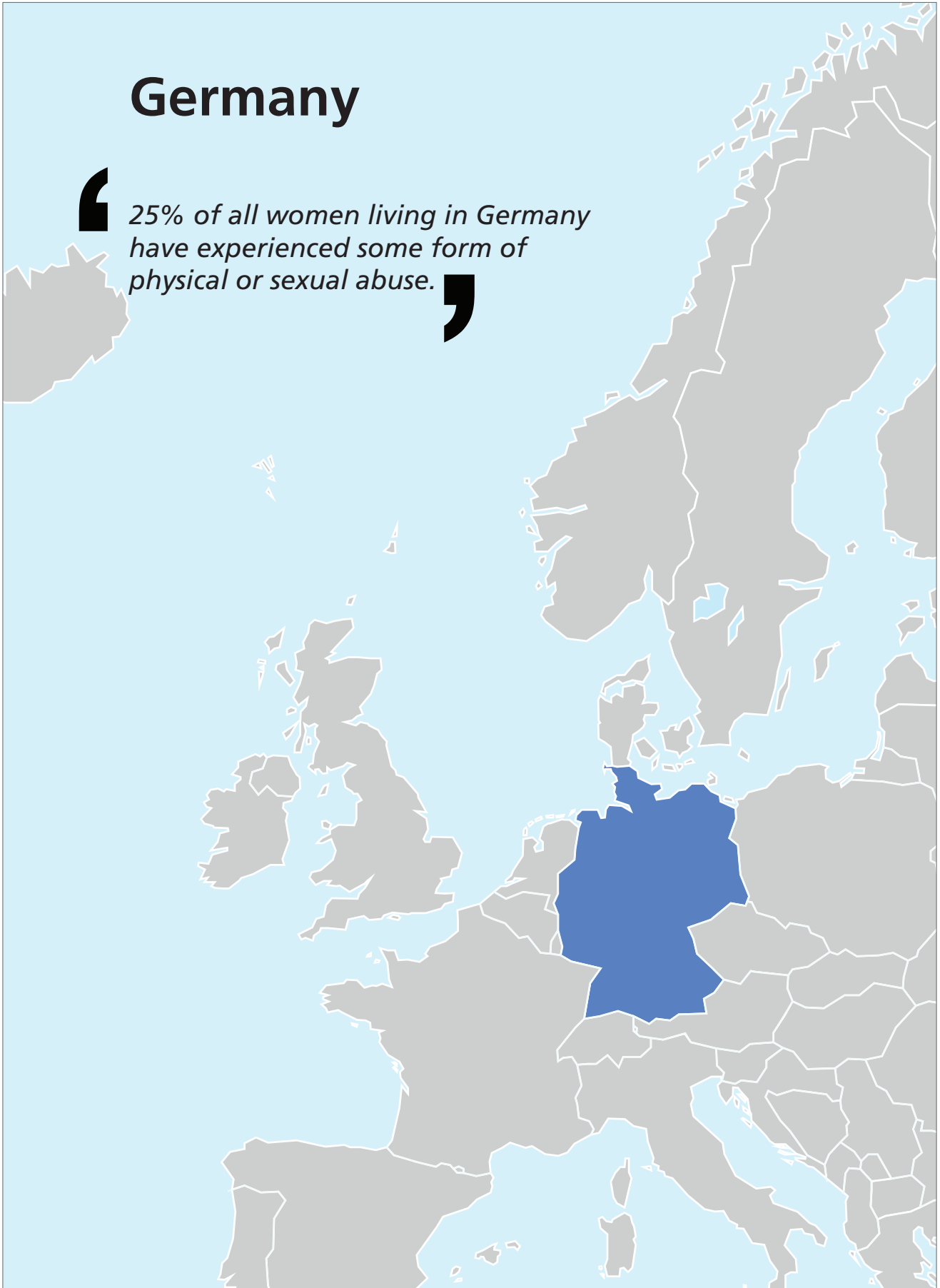
1. Enquête INSEE avec l'ENVEFF Réunion, *la violence envers les femmes*, 2003
2. <http://www.gip-recherche-justice.fr/spip.php?article189>
3. [http://www.sosfemmes.com/infos/pdf/dossier-presse\\_violences-conjugales\\_20051123%5B1%5D.pdf](http://www.sosfemmes.com/infos/pdf/dossier-presse_violences-conjugales_20051123%5B1%5D.pdf)
4. <http://www.senat.fr/rap/r09-553/r09-5533.html>

### Other useful resources

1. [http://www.violencesfaitesauxfemmes.com/ewb\\_pages/p/presentation-grande-cause2010.php](http://www.violencesfaitesauxfemmes.com/ewb_pages/p/presentation-grande-cause2010.php)
2. <http://www.lyonaideauxvictimes.fr/>
3. <http://www.stop-violences-femmes.gouv.fr/>
4. <http://www.who.int/mediacentre/factsheets/fs239/fr/index.html>
5. <http://www.savif.fr/>
6. [http://www.sosfemmes.com/ressources/liens\\_violences.htm](http://www.sosfemmes.com/ressources/liens_violences.htm)
7. <http://www.justice.gouv.fr/aide-aux-victimes-10044/femmes-victimes-de-violences-23197.html>

# Germany

‘ 25% of all women living in Germany have experienced some form of physical or sexual abuse. ’



# DOMESTIC VIOLENCE IN GERMANY

CMS Germany

## EXECUTIVE SUMMARY

Domestic violence is a prevalent issue which affects both sexes and victims of any age, although reported cases suggest domestic violence largely affects women. Statistics show that around 25% of all women living in Germany have experienced some form of physical or sexual abuse. Domestic violence can occur between parties in any form of relationship including non-sexual relationships.

In Germany, there are a number of laws which deal with domestic violence and protect a victim's rights. Commencing a case or making an application is very easy and many governmental and non-governmental organisations can assist. Legal aid can be obtained in certain circumstances. The victim can also apply for an interim injunction to protect them from further violence from the offender until the court reaches its final decision.

A key problem prevalent in Germany is the reluctance of domestic violence victims to report a crime and even the most effective legislation cannot overcome this. Many people need help but do not ask for it due to fear of repeated violence from the offender or a fear of the perceived humiliation the victim will suffer if they report the violence. The number of unreported domestic violence cases in Germany is likely to be significant.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

There is no official definition of domestic violence under German law; however, it is commonly interpreted as including all types of physical, sexual and psychological violence between adults living in a common household.

Domestic violence can occur outside of a formal legal relationship, i.e. outside of a marriage or civil partnership. Domestic violence can occur between parties in any type of relationship, for example, domestic violence can occur where one party is a senior citizen inhabiting an assisted living facility and the other is a carer in the same facility. The gender, sexual orientation and age of the victim/offender are irrelevant. The only connection required is that the offender and victim must live in a common household.

The domestic violence must lead to injury of the body, health or personal freedom of the victim. Bodily injury is defined as any interference in the victim's physical integrity, including any impairment of the victim's physical, psychological or emotional life. Psychological abuse includes infringements of the victim's personal rights within the civil law and threats and unreasonable harassment such as sleep deprivation, slander, humiliation or menace. Psychological abuse does not include negative or counterproductive behaviour.

Domestic violence also includes sexual violence and social violence. Social violence is a wide category and includes confinement of the victim, prohibition of contact and economic restrictions, such as the refusal of money or prohibition of employment.

A study of violence against women in Germany by the Federal Ministry for Family-Affairs, Senior Citizens, Women and Youth, published 2004, found that:

- 13% of women (almost one woman in seven) experienced some form of sexual violence when they were over the age of 16;
- 40% of the respondents experienced either physical or sexual abuse or both since the age of 16 (35% confirmed such experiences during an oral interview);
- 58% of women experienced various forms of sexual harassment;
- 42% of women experienced forms of psychological violence, ranging from intimidation and aggressive yelling to slander, threats and humiliation; and
- approximately 25% of all women living in Germany experienced some form of physical or sexual abuse or both from a current or previous partner.

A separate study undertaken in 2009 investigating the occurrence of violence against women by their partners showed that women who experienced physical and/or sexual abuse were also likely to have experienced intense physical and psychological violence. Overall the study found indications of physical, sexual and psychological violence inflicted on one partner by the other in 38% of relationships.

## 2 APPLICABLE LEGISLATION

### 2.1 NATIONAL DOMESTIC VIOLENCE LAWS

There are a number of laws which deal with domestic violence including:

- the Act for the Civil Jurisdictional Protection against Violent Acts and Stalking (*Gewaltschutzgesetz*, hereafter referred to as the "Protection against Violence Act");
- the Act on Court Procedure in Family Matters and Jurisdiction over Non-Contentious Matters; and
- the German Criminal Code.

The Protection against Violence Act sets out various provisions regarding domestic violence. The Act was enacted as part of the Act to Improve Civil Jurisdictional Protection against Violent Acts and Stalking and to Ease the Abandonment of the Marital Home in Cases of Separation.

The Protection against Violence Act provides that victims of domestic violence have the right to make an application to the court for relief. The court has a number of different measures it can grant to protect the victim from further violence. Such measures include prohibiting the offender from contacting the victim and forbidding the offender from going to places the victim will be at certain times. The offender can also be forced to vacate the shared residence.

The Protection against Violence Act does not apply to the protection of children (or people under conservatorship or curatorship) as the German Civil Code exclusively applies. The German Civil Code provides that a child has the right to be educated in a non-violent way<sup>196</sup> and, if necessary, a law court can intervene to protect this right.<sup>197</sup> Where a case involving a child is brought before the court, the child is appointed a special advocate/guardian by the court to speak on their behalf.

Similarly, the Protection against Violence Act does not apply where the victim and offender are married and are planning to get divorced, as the relevant sections of the German Civil Code exclusively apply. The German Civil Code also provides for what should happen with regards to a jointly occupied residence in cases of domestic violence.<sup>198</sup> Taking into account the needs of all the parties involved, e.g. if there is a child's well-being to take into account, the right to continue occupation of the shared apartment will be granted to the party who needs it the most. In cases of domestic violence, this is usually the victim.

In addition to the penalties available under the Protection against Violence Act, almost all manifestations of domestic violence are also punishable under provisions in the German Penal Code. For example, there are penalties for offences such as insults,<sup>199</sup> assault,<sup>200</sup> and sexual abuse<sup>201</sup> (see further section 7 below). Particularly relevant to domestic violence offenders is a new section on stalking which was introduced into the German Penal Code in 2007.<sup>202</sup>

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196 Paragraphs 1618a and 1631 of the German Civil Code ("BGB").

197 Paragraphs 1666 and 1666a BGB.

198 Paragraphs 1361b and 1568a BGB.

199 Paragraph 185 of the German Penal Code ("StGB").

200 Paragraph 224 StGB.

201 Paragraphs 174, 176 and 177 StGB.

202 Paragraph 238 StGB.

## 2.2 ACTION PLANS

The Federal Government published two Action Plans to combat violence against women. The Plans include actions to be taken regarding new legislation and the provision of support and advice for women affected by violence. The support is to be given through a national network of systems facilitated by both governmental and non-governmental organisations.

Action Plan I of the Federal Government led to the enactment of the Protection against Violence Act. Action Plan II contains a draft of an “Act to Ease Measures of the Family Court in Cases of Risks to the Child’s Well-being”. This draft stipulates mandatory participation in anti-aggression training and other such programs for offenders. The draft has been passed and as a result the German Civil Code has been amended to allow the court to take measures to prevent violence against children.<sup>203</sup>

## 2.3 INTERNATIONAL TREATIES

The Convention on the Rights of the Child sets out binding international law for EU Member States regarding children’s rights.<sup>204</sup> These rights include a child’s right to physical integrity and a right to a non-violent education.

The Convention on the Elimination of All Forms of Discrimination against Women<sup>205</sup> provides that family education should include a proper understanding of maternity as a social function and a recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interests of children are the primary consideration in all cases.<sup>206</sup>

# 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

## 3.1 COMMENCING A CASE

The public prosecution can bring a case against an offender before the criminal courts and will do so when prosecution of the offence is in the public interest. A case is considered to be in the public interest where the scale or particular danger of the offence makes prosecution a major concern to the general public.<sup>207</sup> A case will also be considered to be in the public interest where the

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<sup>203</sup> Paragraph 1666 BGB.

<sup>204</sup> Convention on the Rights of the Child (“CRC”), 20 November 1989.

<sup>205</sup> Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), 6th October 1999.

<sup>206</sup> Article 5(b), CEDAW.

<sup>207</sup> Nr. 86(2) of the Guideline for Criminal and Summary Proceedings (“RiStBV”).

victim cannot reasonably be expected to bring an action against the offender due to their relationship. This includes situations where the victim fears continuous violence from the offender but cannot remove themselves from the violent situation due to the presence of children or other family associations.

The public prosecutor must show intentional domestic violence in order to successfully plead the case. The burden of proof is on the victim and there must be evidence of the offence i.e. injury sustained, witness report, affidavit or a police report. However, where the offender has committed a violent act previously, there is a rebuttable presumption of guilt. The burden of proof shifts to the offender and the offender must prove his or her innocence.

For domestic violence offences, the victim can bring a case against the offender themselves (“private suit”).<sup>208</sup> However, prior to commencing a case, the victim must engage in judicial conciliation<sup>209</sup> as mandated by the appropriate authority.

If conciliation is unsuccessful, the victim can commence a case. A domestic violence offence can give rise to a number of charges including domestic disturbance, insults, stalking, assault or harassment. The public prosecution will provide assistance to the victim if it deems it appropriate.<sup>210</sup>

Even if the victim does not wish to commence an action, a third party (in most cases the victim’s neighbours) can report the domestic violence to the police who will investigate and notify the public prosecution if appropriate.

### 3.2 RELEVANT COURT

Most cases will be brought in the local criminal court. More serious crimes, such as murder or manslaughter or when a minimum imprisonment of four years is expected, will be brought in the district court.

Decisions can be appealed.<sup>211</sup> Both the public prosecution and the offender can appeal on points of law at the district court or to a higher regional court. The options on appeal depend on the severity of the offence and where the initial case against the offender was tried.

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208 Paragraph 374 German Code of Criminal Procedure (Strafprozessordnung, “StPO”).

209 Paragraph 380 StPO.

210 Paragraph 377 StPO.

211 Paragraphs 312 and 333 StPO.



### 3.3 PROSECUTION FUNDING

In private prosecution proceedings the victim can apply for legal aid.<sup>212</sup> The amount of legal aid will depend on the victim's means. This is assessed by way of a questionnaire on the victim's personal and economic means and which requires the victim to set out his or her monthly earnings and outgoings.<sup>213</sup> Relevant earnings and outgoings include income from pensions and alimony payments, rental costs and any outgoings due to serious illness. A specified amount is deducted from the victim's monthly earnings and even more if they have a partner and/or children.

If legal aid is given, all or part of the victim's costs will be covered. Alternatively, the victim can be given the option to pay their costs in affordable monthly instalments.

### 3.4 TIMESCALES

The timescale for prosecution and conviction of offenders is approximately three to six months in first instance proceedings. Appeal proceedings can last more than a year depending on the circumstances of the case.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PROTECTION AGAINST VIOLENCE ACT

The relationship between victims who are subject to parental authority/guardianship and their parents/guardians is not covered by the Protection against Violence Act. Victims subject to parental authority/guardianship in other social relationships are included.

Generally, only acts of wilful intent can result in an offence under the Protection against Violence Act, acts of negligence or mistake will not constitute an offence. Further, the Protection against Violence Act provides that the offence must be committed by unexcused, culpable conduct.

Under the Protection against Violence Act, the court can take appropriate measures to prevent further violations when the offender has intentionally harmed the body, health or personal freedom of the victim.

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<sup>212</sup> Paragraph 379(3) StPO in conjunction with paragraph 114ff. of the German Code of Civil Procedure (*Zivilprozessordnung*, "ZPO").

<sup>213</sup> Paragraph 115 ZPO.

The victim must apply to the court for either an interim injunction<sup>214</sup> or final decision.<sup>215</sup> The application does not need to include a police report but has to identify the victim and the offender, state the events which constituted the alleged offence and be supported by some form of evidence, i.e. bodily injury, witness statement or an affidavit.

The court can order a range of measures to protect the victim. Such measures include:

- forbidding the offender from entering the residence of the victim;
- mandating that the offender has to stay a specified distance away from the victim;
- forbidding the offender from frequenting specific locations which the victim frequents regularly; and
- prohibiting the offender from contacting the victim.

The duration of these measures depends on the gravity of the offence and when the offence took place. The duration of the order can be extended upon application to the court.

The victim can request a court order that the offender has to leave the shared residence. For such an order to be granted there has to be a high probability that more violent acts will occur in the shared residence if such an order is not granted. The victim must request the allocation of the shared residence in writing within three months of the violent act. If the offender is the owner of the residence, the maximum period the order can be maintained for is six months. The offender can demand remuneration for costs resulting from the court's order not to inhabit the shared home and the victim may have to pay such remuneration if the court deems it appropriate.<sup>216</sup> The court can also order the termination of a lease.

The court can order the above measures even if the offender committed the violent act in a state of mental disturbance including after the consumption of alcohol or narcotics.

## 4.2 PROCEDURAL ASPECTS

The victim can instigate court proceedings under the Protection against Violence Act in the:

- court in which district the domestic violence offence has been committed;
- district in which the shared home is located; or

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<sup>214</sup> Paragraphs 214, 49ff of the Act on Court Procedure in Family Matters and Jurisdiction over Non-Contentious Matters ("FamFG").

<sup>215</sup> Paragraphs 22, 210 and 52(2) FamFG.

<sup>216</sup> Paragraph 2(5) Protection against Violence Act.

- the court in which the offender has their permanent residence.

Since the introduction of the Act on Court Procedure in Family Matters and Jurisdiction over Non-Contentious Matters (“FamFG”) in 2009, the Family Court is the relevant court in which to bring domestic violence cases.<sup>217</sup>

The victim bears the burden of proof. Where there has already been injury to the victim’s health or personal freedom, or a threat to it or harassment by stalking, the victim does not have to prove the threat with further injury. Where there have already been acts of violence, there is a positive presumption that further violent acts will occur. The burden is on the offender to rebut that presumption (see section 3.1).

The court’s order regarding the applicable penalty for the offender can be made effective immediately.<sup>218</sup>

Costs are at the discretion of the relevant court, but a child never has to bear costs. Costs can be imposed on the person whose acts led to the commencement of the process, which in domestic violence cases, is usually the offender by gross negligence.<sup>219</sup> In cases of wilful violence, gross negligence is regularly found by the court.<sup>220</sup>

The court should inform the police and other relevant public institutions, for example, the school, kindergarten or youth welfare organisation, where a domestic violence case involves a child.<sup>221</sup>

### 4.3 FUNDING

Legal advice can be obtained under the German legal advice scheme and/or legal aid. A person’s ability to utilise these schemes is dependent on their economic means.<sup>222</sup> The Legal Advice Scheme Act provides that people with low income can receive assistance with the cost of obtaining legal advice.

The rules regarding the conduct of court proceedings provide that the individuals under the Legal Advice Scheme also receive assistance with the conduct of court proceedings and do not have to pay court costs.

An application for assistance under the Legal Advice Scheme must be submitted to the local court in the district where the applicant is resident.

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217 See LG Dessau-Roßlau, 20 September 2012, Case 1 S 116/12; Saenger, Zivilprozessordnung, 5th Edition 2013, paragraph 210 Rn. 6ff.

218 Paragraph 216 FamFG.

219 Paragraph 81 FamFG.

220 See OLG Frankfurt a.M., 26 February 2013, Case 4 WF 279/12.

221 Paragraph 216a FamFG; BT-Drucks. 16/9733, 296.

222 Paragraph 115 ZPO.

Information on assistance under the Legal Advice Scheme and assistance with court costs can be obtained from local courts and lawyers.<sup>223</sup>

#### **4.4 INTERIM ORDER/INJUNCTION**

As proceedings can take several months, the victim can apply for an interim injunction to bridge the time gap until the court's final decision.<sup>224</sup> The court can order the same measures available under the Protection against Violence Act (and as outlined in section 4.1 above) on an interim basis.

An application for an interim order needs the same supporting evidence as an application for a normal court proceeding, i.e. evidence (by way of medical report/witness statement) that the offender has intentionally violated the body, health or personal freedom of the victim or that a violation is seriously expected. However, for an interim application, the victim must also show the need for urgent action by the court, for example, by illustrating that it is not possible to live with the offender in the shared residence as repeated violence is expected.

In urgent cases, the interim order can be issued within one day and without the offender having an opportunity to be heard by the court. Alternatively, the judge can make his decision based on written submissions which can mean that several days will pass before an interim order is given. The judge can also decide to set a court date to hear submissions from the offender which can mean a wait of up to four weeks before the hearing.

The interim order lasts as long as the court deems necessary to ensure the safety of the victim.

#### **4.5 CONSEQUENCES ARISING FROM THE CONTRAVENTION OF THE JUDGMENT**

The Protection against Violence Act is a civil act. However, paragraph 4 provides for a criminal penalty where the offender violates a court order. The offender can be punished either with imprisonment for a term not exceeding one year or a fine. The amount of the fine depends on the personal and economic circumstances of the offender.

Similarly, if an offender violates civil enforcement measures, such as eviction from the shared apartment by a bailiff, a fine or detention can be imposed.

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<sup>223</sup> [http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ger_en.htm).

<sup>224</sup> Paragraph 214 FamFG.

## 4.6 PROTECTIVE MEASURES BY THE POLICE

In the time between the offence and a court order, the police can carry out protective measures to assist the victim. The police can temporarily prohibit contact between the victim and the offender or ban the offender from the family residence. The evidence the victim must show before the police will offer such protective measures varies according to the law in the separate German states.

In the majority of states the police can ban the offender from the family residence for a period of 10–20 days. Such a measure does not have to be requested by the victim and is carried out based on a threat assessment by the police. If the police impose an expulsion order, the offender has to leave the apartment immediately. The police can take the keys from the offender and he or she is only allowed to take items they will require for the next few days. If the offender breaches the protective measures, the police can take him or her into custody.

## 4.7 GERMAN CIVIL CODE

Where the offender and victim are married but plan to divorce, domestic violence is dealt with under the German Civil Code.<sup>225</sup>

In contrast to the provisions regarding the allocation of the shared home within the Protection against Violence Act, under the German Civil Code, the marital home can be allocated for a longer period. Allocation of the marital home to one party can last until the divorce has been finalised, even if the party not entitled to stay in the home is the legal owner. However, in such cases the victim may have to pay remuneration to the legal owner (see section 4.1).

# 5 SUPPORT FOR VICTIMS

## 5.1 STATUTORY PROVISIONS

There are several public and private organisations which specialise in supporting victims of domestic violence, for example, the nationwide organisation *Berliner Initiative gegen Gewalt an Frauen – BIG e.V.*<sup>226</sup>

There are women's support organisations all over Germany<sup>227</sup> who provide help via telephone (telephone number: 08000 116016) and a special website for

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<sup>225</sup> Paragraph 1361b BGB or paragraph 14 LPartG BGB for civil partnerships.

<sup>226</sup> <http://www.big-berlin.info/>.

<sup>227</sup> For example see <http://www.frauenhauskoordination.de/>.

children who experience domestic violence has been set up.<sup>228</sup> The majority of larger cities have State and charitable organisations that victims can seek help from in cases of domestic violence.

## 5.2 SPECIFIC PROVISIONS REGARDING PROTECTION OF CHILDREN

As outlined in section 4.1 above, the Protection against Violence Act does not apply to relationships between children and their parents/guardians. Instead, the rules of the German Civil Code apply.

In accordance with the German Civil Code, the court can intervene where it is aware of violence against children. An application can be made by the child themselves or by third parties such as neighbours or school/kindergarten workers. Probable cause of violence has to be shown, for example, by a witness statement, affidavit or actual bodily harm. The court has the power to act in the absence of any formal application<sup>229</sup> although in these cases the court does have to hold an official hearing to hear from all the parties involved.<sup>230</sup>

The Family Court has the power to take appropriate measures to protect a child's well-being or property when they are in danger and their parents/guardians are unable or unwilling to do so.<sup>231</sup> This includes prohibiting a person from temporarily or indefinitely using the family home. The court can also withdraw parental custody for a limited period of time or permanently.

The Youth Welfare service<sup>232</sup> has to participate in court proceedings<sup>233</sup> regarding domestic violence between children and their parents/guardians. All children who have experienced abuse or violence have the right to advice and support by the Youth Welfare service and their parents may not be notified. A special number is available, *Nummer gegen Kummer* (telephone number: 0800 1110333), which children can call for help. On receiving a call, the Youth Welfare office estimates the risk to the child by working with psychologists and other youth professionals and takes appropriate action.<sup>234</sup>

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228 <http://www.gewalt-ist-nie-ok.de/>.

229 Münchener Kommentar zum BGB, 6. Auflage 2012, paragraph 1666 Rn. 234.

230 BGH, 17 February 2010, Case XII ZB 68/09.

231 Paragraphs 1666 and 1666a BGB.

232 <http://kinder-jugendhilfe.info/>.

233 Paragraph 1666 (3) Nr. 1 BGB.

234 Paragraph 8a of Book 8 of Code of Social Law ("SGB").

## 6 OFFENCES

In addition to the domestic violence offence under the Protection against Violence Act, offenders can commit other violence based offences under the German Penal Code. Such offences include:

- insults/defamatory statements made in writing;<sup>235</sup>
- domestic disturbance;<sup>236</sup>
- harassment (such that the victim fears serious violence);<sup>237</sup>
- duress;<sup>238</sup>
- deprivation of liberty;<sup>239</sup>
- assault (to goods or the victim’s health);<sup>240</sup>
- sexual offences;<sup>241</sup> and
- stalking.<sup>242</sup>

## 7 PENALTIES AND SANCTIONS

Penalties and sanctions are set out in the German Penal Code. There is no specific sanction for “domestic violence”, the penalty will depend on the type of offence committed within the context of the domestic situation, i.e. the penalty will be for severe bodily harm. Possible offences which could constitute domestic violence offences and their corresponding penalty include:

- assault: punishable in simple cases with a prison sentence of up to five years and in serious cases, for example where assault is committed with weapons or causes severe bodily harm, with a prison sentence of up to ten years;<sup>243</sup>
- sexual coercion: punishable with a prison sentence of not less than a year and up to a maximum sentence of 15 years;<sup>244</sup>
- duress: punishable with a prison sentence of up to three years or in serious cases, e.g. in combination with sexual coercion, a minimum prison sentence

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235 Paragraph 185 StGB.

236 Paragraph 123 StGB.

237 Paragraph 241 StGB.

238 Paragraph 240 StGB.

239 Paragraph 239 StGB.

240 Paragraph 223 StGB.

241 Paragraph 174, 176 and 177 StGB.

242 Paragraph 238 StGB.

243 Paragraph 223ff StGB.

244 Paragraphs 174, 176 and 177 StGB.

of six months up to five years;<sup>245</sup>

- stalking: punishable with a prison sentence of up to three years;<sup>246</sup>
- defamation: punishable with a prison sentence of up to two years;<sup>247</sup>
- deprivation of liberty: punishable with a prison sentence of up to five, and in serious cases, of up to ten years;<sup>248</sup>
- breach of domestic peace/domestic disturbance: punishable with a prison sentence of up to one year;<sup>249</sup> and
- harassment: punishable with a prison sentence of up to one year.<sup>250</sup>

Where an offender breaches restraining measures ordered by the court in accordance with the Protection against Violence Act, penal sanctions can be imposed by the court.<sup>251</sup> The offender can be punished with either a prison sentence of up to one year or a fine. These sanctions will not affect the offender's criminal liability under other acts.

While the Federal Criminal Agency compiles information on the number of crimes committed every year, there are no statistics specifically regarding the occurrence of domestic violence.<sup>252</sup>

## 8 REHABILITATION MEASURES

There is no specific legislation regarding rehabilitation either in German civil or criminal law. However, many charitable organisations provide rehabilitation support nationwide, especially in Men's Counselling Centres.<sup>253</sup> In these centres people can ask for help if they are the victim of domestic violence or if they need support in learning how to control their emotions to avoid causing harm/further harm to their partners. Increasingly also, the State police provide programmes for offenders such as training.

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245 Paragraph 240 StGB.

246 Paragraph 238 StGB.

247 Paragraph 185 StGB.

248 Paragraph 239 StGB.

249 Paragraph 123 StGB.

250 Paragraph 241 StGB.

251 Paragraph 4 Protection against Violence Act.

252 [http://www.bka.de/nn\\_224658/DE/Publikationen/PolizeilicheKriminalstatistik/pks\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/nn_224658/DE/Publikationen/PolizeilicheKriminalstatistik/pks__node.html?__nnn=true).

253 <http://www.4uman.info/seiten/wo/karte.php>.



## 9 THIRD PARTY RESPONSIBILITIES

A victim can obtain assistance from the police, the courts, the municipal women and equal opportunity commissioners<sup>254</sup> and the Youth Welfare service.

The municipal commissioners are part of a nationwide organisation which can provide help by telephone or through other mediums in almost every city. They give information about what individuals can do to protect themselves and can also help in bringing a charge against an offender, relocating the victim and recommending where the victim can find psychological support.

There are no special duties placed on third parties such as employers, hospitals, schools or public institutions regarding the identification, reporting or prevention of domestic violence. Medical practitioners are in fact under strict confidentiality obligations which mean they cannot report actual or suspected domestic violence unless the patient consents.

## 10 EFFECTIVENESS/IMPLEMENTATION

According to the first nationwide survey on domestic violence which took place in 2004, 25% of women experienced physical and/or sexual abuse by their current or former partner (see section 1.1).<sup>255</sup> This survey was part of Action Plan I of the Federal Government to combat violence against women. There have been no comparative surveys since or surveys on men as victims of domestic violence, and so there is no way to assess the effectiveness of domestic violence legislation in Germany.

## ADDITIONAL RESOURCES

### Applicable Law

1. The Act for the Civil Jurisdictional Protection against Violent Acts and Stalking (GewSchG) (Information about the legislative procedure of the Protection against Violence Act can be found at <http://dip.bundestag.de/extrakt/14/019/14019543.html>)
2. Act on Court Procedure in Family Matters and Jurisdiction over Non-Contentious Matters

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<sup>254</sup> <http://www.frauenbeauftragte.de/>.

<sup>255</sup> Schröttle/Müller (2004): *Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland. Eine repräsentative Untersuchung zu Gewalt gegen Frauen in Deutschland*, published by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, [www.bmfsfj.de/publikationen](http://www.bmfsfj.de/publikationen).

3. German Code of Criminal Procedure
4. Guideline for Criminal and Summary Proceedings
5. Code of Social Law
6. German Code of Civil Procedure

### Publications

1. Schweikert/Schirmacher, *Der Schutz vor Gewalt in der Familie*, available at [http://www.familienhandbuch.de/cms/Rechtsfragen\\_Schweikert-Gewalt.pdf](http://www.familienhandbuch.de/cms/Rechtsfragen_Schweikert-Gewalt.pdf)
2. Kay, *Polizeiliche Eingriffsmöglichkeiten bei häuslicher Gewalt*, FPR 2005, 28
3. Illigens, *Institutionelle Reaktionen auf häusliche Gewalt in der Bundesrepublik Deutschland*, FÜR 2005
4. Müller in Schnitzler, *Familienrecht*, 3. Aufl. 2010, paragraph 15
5. Kindler, *Häusliche Gewalt und Hochstrittigkeit*, FPR 2011, 207
6. Rotax, *Kinder und häusliche Gewalt – Voraussetzungen gerichtlichen Eingreifens nach §§ 1666, 1666a BGB*, FPR 2001, 251
7. Söpfer, *Kinder und häusliche Gewalt aus dem Blickwinkel der Verahrenspflegschaft*, FPR 2001, 269
8. Viefhues, *Einstweiliger Rechtsschutz bei Maßnahmen nach dem Gewaltschutzgesetz innerhalb und außerhalb eines Scheidungsverfahrens*, FÜR 2005, 32
9. Heinke, *Gewaltschutzgesetz*, 1st. Edition 2012
10. Saenger, *Zivilprozessordnung*, 5th. Edition 2013

### Judgments

1. LG Dessau-Roßlau, 20.09.2012, Case 1 S 116/12
2. OLG Frankfurt a.M., 26.02.2013, Case 4 WF 279/12
3. BGH, 17.02.2010, Case XII ZB 68/09

### Statistics

1. Nationwide criminal statistics by the Federal Criminal Agency [http://www.bka.de/nn\\_224658/DE/Publikationen/PolizeilicheKriminalstatistik/pks\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/nn_224658/DE/Publikationen/PolizeilicheKriminalstatistik/pks__node.html?__nnn=true)
2. Schröttle/Müller (2004): *Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland. Eine repräsentative*

*Untersuchung zu Gewalt gegen Frauen in Deutschland*, published by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth <http://www.bmfsfj.de/publikationen>

### Internet

1. *Gewalt gegen Frauen in Paarbeziehungen*, published by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth <http://www.bmfsfj.de/publikationen>
2. Action Plan I of the Federal Government to combat violence against women: English version <http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/Pdf-Anlagen/actionplan-violence-against-women,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>
3. Action Plan II of the Federal Government to combat violence against women [http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/Pdf-Anlagen/aktionsplan-II-zur-bek\\_C3\\_A4mpfung-von-gewalt-gegen-frauen,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf](http://www.bmfsfj.de/RedaktionBMFSFJ/Broschuerenstelle/Pdf-Anlagen/aktionsplan-II-zur-bek_C3_A4mpfung-von-gewalt-gegen-frauen,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf)

### Non-governmental organisations

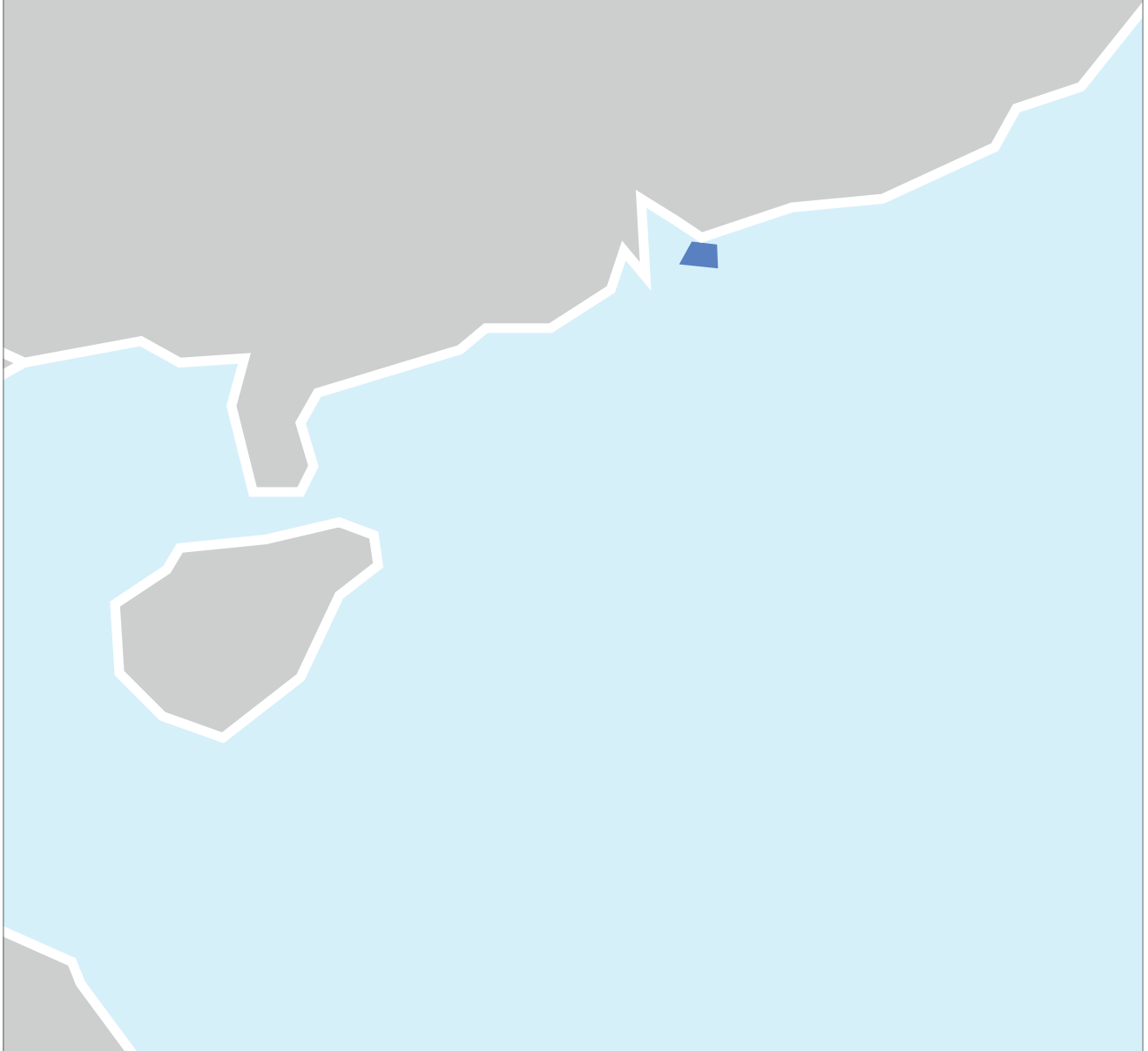
Berliner Initiative gegen Gewalt an Frauen — BIG e.V. <http://www.big-berlin.info/>

### Governmental Organisations

1. Nationwide telephone-service <https://www.hilfetelefon.de/de/startseite/>
2. Information for persons concerned, available in English <http://www.gewaltschutz.info/index.php?lang=en&PHPSESSID=7afaa97e068b44844dd312da5240a01d>
3. Women commissioners nationwide <http://www.frauenbeauftragte.de/>
4. Information for children about domestic violence <http://www.gewalt-ist-nie-ok.de/>

# Hong Kong

**‘** *In a 2004 poll, 30% of police respondents said that husbands were entitled to hit their wives.* **’**



# DOMESTIC VIOLENCE IN HONG KONG

DLA Piper International LLP, Hong Kong

## EXECUTIVE SUMMARY

In Hong Kong, the prevention of and protection against domestic violence is covered by several legislative acts, each dealing with different aspects of domestic violence. While there is no single express legal definition of domestic violence, the concept has been interpreted by the courts and a number of relevant organisations to include mental, physical, sexual and potentially economic violence.

Prevention of and protection from domestic violence in Hong Kong is provided for by the police, the courts, and a number of specialist organisations and intervention centres. Where children are involved, there are a number of special measures available, including special social welfare organisations.

While there are currently no specific reform proposals in place in relation to the key domestic violence legislation, there have been a number of important developments. These include calls for the establishment of specialist family/ domestic violence courts, recommendations for specific anti-stalking laws and systems in place for regular review of the legal framework.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

In Hong Kong, the applicable anti-domestic violence legislation is the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) (the “DCRVO”). However, the phrase ‘domestic violence’ is not defined under the DCRVO, any other statute or the common law.

In formulating the Domestic Violence (Amendment) Bill 2007, the Bills Committee considered a proposal to introduce a definition of ‘domestic violence’ into the domestic violence legislation. It was suggested by a number of non-government organisations<sup>256</sup> (“NGOs”) that this was necessary to:

“put beyond doubt that “violence” includes physical abuse, psychological abuse, sexual abuse, neglect of children, the elderly and the mentally incapacitated, stalking in intimate relationships, and exposing a child to domestic violence.”<sup>257</sup>

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<sup>256</sup> Law Commission, *Bills Committee on Domestic Violence (Amendment) Bill 2007: Summary of views/ suggestions given by deputations* (LC Paper No. CB(2)330/07-08(01)), p.1. The inclusion of a definition of ‘domestic violence’ was supported by the Alliance for the Reform of Domestic Violence Ordinance; Amnesty International Hong Kong Section; Association for Concern for Legal Rights of Victims of Domestic Violence; Caritas Hong Kong - Family Service; Hong Kong Alliance for Family and Hong Kong Council of Social Service.

<sup>257</sup> *Ibid*, p.1.

The Hong Kong government's concern with defining 'domestic violence' was that it may:

"inadvertently restrict the scope of coverage of the legislation, lead to borderline disputes, hence undermining the protection for victims of domestic violence, as it will be extremely difficult to clearly and exhaustively define..."domestic violence" in statutory term [sic]."<sup>258</sup>

Although not defined under statute or common law, 'domestic violence' and variations of this phrase, have been defined by government departments as noted below.

Intimate Partner Violence & Spouse/Cohabitant Battering: both these phrases have the same meaning and refer to a sub-category of domestic violence.<sup>259</sup>

They are defined by the Social Welfare Department ("SWD") in its Procedural Guide for Handling Intimate Partner Violence Cases ("Procedural Guide").<sup>260</sup>

The Procedural Guide attempts to facilitate a coordinated response to incidents within the scope of these defined terms. Both phrases refer to:

"battering that occurs in a relationship between a couple who live or have lived together intimately. They maintain or have maintained a lasting intimate relationship which is more than just brief encounter [sic]. They can be married couples, co-habitees and separated spouses/co-habitees, etc. In the majority of cases, the abused person is likely to be a woman".<sup>261</sup>

Domestic Violence: both the Hong Kong Police Force ("HKPF") and the Department of Justice ("DOJ") have defined this phrase for its administrative and operative purposes. The HKPF's and DOJ's definitions of 'domestic violence' appear narrower than the SWD's definition of 'intimate partner violence'.

This may be because the HKPF and the DOJ will unlikely encounter domestic violence until the conduct is so severe that it may be regarded as criminal conduct. The HKPF defines 'domestic violence' as:

"any incident involving an assault, or breach of the peace between parties who could generally be described as married or having intimate partners relationship [sic], which also includes lovers having a lasting relationship or former lovers [and is applicable to same sex cohabitants and lovers]".<sup>262</sup>

The DOJ describes domestic violence as follows:

"'Domestic violence' is a general term which describes a range of behavior often used by one person to control or dominate another with whom they have, or have had, a close or family relationship. It is often a series of abusive incidents, whether physical or not, that has a cumulative effect on the victim. Domestic violence occurs irrespective

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<sup>258</sup> Ibid, p.3.

<sup>259</sup> Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), para 1.4.

<sup>260</sup> Ibid.

<sup>261</sup> Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), para 1.2.

<sup>262</sup> Ibid, para 5.1.

of background and circumstance, sexuality, age, disability and gender, but the majority of abusers are male and victims female.

Domestic Violence may be broadly described as any criminal offence which arises out of violence, threatening behavior or physical, sexual or emotional abuse, between adults who are or have been intimate partners, or else between family members. An adult is any person aged 18 years and over, and family members include mother, father, son, daughter, brother, sister and grandparents, whether directly related, in-laws or step-family”.<sup>263</sup>

These definitions do not appear limited to marital relationships and therefore it is possible that divorcees and other informal relations could be included.

While these definitions apply to gay and lesbian partners in cohabitation, it is unclear whether transgender relationships will be included. Transgender relationships are potentially applicable as the Court of Final Appeal recently found that a transgender woman has the right to marry a man.<sup>264</sup> In doing so, the court held that it is “contrary to principle to focus merely on biological features fixed at the time of birth and regarded as immutable”.<sup>265</sup> The effect of this decision is that transgender persons are to be treated as ‘men’ or ‘women’ as the case may be, rather than being characterised as a pseudo-type of man or woman.<sup>266</sup>

Likewise, domestic worker relationships are not included in these definitions. However, domestic workers have rights and protections under Hong Kong labour and criminal laws. Further, the government has adopted a zero tolerance attitude towards violence against domestic workers.<sup>267</sup> Notwithstanding this, domestic workers are reluctant to report instances of abuse or violence for various reasons including fear of punishment by their employer or further financial hardship.<sup>268</sup>

Mental abuse is included in the definitions. To be within the ambit of the DOJ’s and HKPF’s definitions, the conduct complained of must arguably be criminal in nature. Although forms of psychological abuse may amount to criminal conduct, it is more difficult to conceive of circumstances where economic abuse would similarly be criminal. Of course, it would depend on the circumstances. However, the phrases “intimate partner violence” and “spouse/cohabitant battering” are

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263 Department of Justice, *The Policy for Prosecuting Cases involving Domestic Violence*, (doj.gov.hk, 27 March 2013) <http://www.doj.gov.hk/eng/public/pubppcdv.html> accessed 13 May 2013, paras 7, 8.

264 *W v The Registrar of Marriages* [2013] HKCFA 39 [FACV No. 4 of 2012].

265 Ibid, paras. 103, 104, 118.

266 Ibid, paras. 96, 99.

267 Constitutional and Mainland Affairs Bureau, *Response to the List of Issues presented by the Human Rights Committee on 16 November 2012 (March 2013)*, (cmab.gov.hk, March 2013) [http://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/the\\_rights\\_of\\_the\\_individuals/response\\_to\\_list\\_of\\_issues\\_mar\\_2013.pdf](http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/response_to_list_of_issues_mar_2013.pdf) accessed 13 May 2013, para 15.3.

268 Hong Kong Federation of Asian Domestic Workers, *2013 Women’s Day – Domestic workers are forced to keep silence on sexual violence HK Government Must Remove discriminatory policies on domestic workers Violence No More on Domestic Workers*, (fadwu.org, 3 March 2013) <http://www.fadwu.org/node/189> accessed 13 May 2013.

defined with reference to the term “batter”. “Batterer” is defined in the Procedural Guide as including a person who abuses a victim mentally and financially:

“a person who exercises a pattern of coercive control in a partner relationship, punctuated by one or more acts of intimating physical violence, sexual assault, or credible threat of physical violence. This pattern of control and intimidation may be predominantly psychological, economical, or sexual in nature, or may rely primarily on the use of physical violence”.<sup>269</sup>

## 2 APPLICABLE LEGISLATION

Specific anti-domestic violence legislation, in the form of the Domestic Violence Ordinance (Cap 189) (“DVO”), was first introduced in 1986.<sup>270</sup> The DVO was adopted from the Domestic Violence and Matrimonial Proceedings Act 1976 of the United Kingdom.<sup>271</sup> The DVO was amended in 2008 and 2009 and is now known as the DCRVO. The DCRVO aims to protect persons from domestic violence and seeks to provide redress for victims who have been ‘molested’ by specified persons. The relevant provisions of the DCRVO are outlined below at section 4.1 below.

The DCRVO empowers the court to grant an injunction where a victim has been ‘molested’ by one of the following persons:

- spouse or former spouse;<sup>272</sup>
- relative;<sup>273</sup> and
- person in a cohabitation relationship.<sup>274</sup>

The term ‘molest’ was intentionally left undefined and is of wide import.<sup>275</sup> It has been equated to the word ‘pester’,<sup>276</sup> and extends beyond violence or threats of violence, the harm from which may be mental or physical.<sup>277</sup> It potentially captures any intentional conduct<sup>278</sup> which harasses another.<sup>279</sup> The DCRVO is intended to capture the categories of conduct suggested by the NGOs. Its intention is manifested as follows:

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269 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), para 1.2.

270 Domestic Violence and Cohabitation Relationships Violence Ordinance (Cap 189).

271 Law Commission, *Bills Committee on Domestic Violence (Amendment) Bill 2007: Meeting on 20 July 2007* (LC Paper No. CB(2)2739/06-07(01)).

272 Domestic Violence and Cohabitation Relationships Violence Ordinance (Cap 189), s. 3.

273 *Ibid*, s. 3A.

274 *Ibid*, s. 3B.

275 Law Commission, *Bills Committee on Domestic Violence (Amendment) Bill 2007: Summary of views/suggestions given by deputations* (LC Paper No. CB(2)330/07-08(01)), p. 1, 2.

276 *P v C* [2007] HKFLR 195, para. 22; see also *Vaughan v Vaughan* [1973] 3 All ER 449.

277 *Ibid* [2007] HKFLR 195, para. 22; see also *Davis v Johnson* [1979] AC 264.

278 *Ibid* [2007] HKFLR 195, para. 24; see also *Johnson v Walton* [1990] 1 FLR 350.

279 Halsbury’s Laws of Hong Kong at [180.529]; see also *Horner v Horner* [1982] 2 All ER 495; *Johnson v Walton* [1990] 1 FLR 350; *P v C (Ouster and Domestic Violence)* [2007] HKFLR 195.



“There is no doubt that the term “molest” includes, but is wider than violence. Decided court cases reveal that the concept of “molest” is wide in the context of family, extending to abuses beyond the more typical instances of physical assaults to include any form of physical, sexual or psychological molestation or harassment which has a serious detrimental effect upon the health and well-being of the victim, and the threat of any form of such molestation or harassment. Information gathered from the Judiciary also confirms that the court has granted injunction under the DVO on grounds of physical, sexual and psychological abuses. In other words, the existing law already applies to psychological, physical and sexual abuse and there is no evidence of problems caused by the absence of a statutory definition.”<sup>280</sup>

Additionally, the following legislation prescribe various offences, the commission of which may potentially be regarded as domestic violence such as assault “Domestic Violence Offences”):<sup>281</sup>

- Crimes Ordinance (Cap 200),<sup>282</sup> and
- Offences Against the Person Ordinance (Cap 212).<sup>283</sup>

A sample of offences which could potentially be Domestic Violence Offences are listed at section 6.1 below. Please note that this list is not comprehensive.

Apart from the DCRVO and the general criminal laws, the Protection of Juveniles and Children Ordinance (Cap 213) also contains provisions which may be regarded as performing anti-domestic violence functions.<sup>284</sup> It is aimed at affording children care and protection from danger. A number of provisions which are potentially applicable, some of which are listed in section 4.1 below.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

The prosecution holds the burden of proof in criminal proceedings for domestic violence. The standard of proof is beyond reasonable doubt.<sup>285</sup>

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280 Law Commission, *Bills Committee on Domestic Violence (Amendment) Bill 2007: Summary of views/ suggestions given by deputations* (LC Paper No. CB(2)330/07-08(01)), p. 1.

281 Constitutional and Mainland Affairs Bureau, Response to the List of Issues presented by the Human Rights Committee on 16 November 2012 (March 2013), (cmab.gov.hk, March 2013) [http://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/the\\_rights\\_of\\_the\\_individuals/response\\_to\\_list\\_of\\_issues\\_mar\\_2013.pdf](http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/response_to_list_of_issues_mar_2013.pdf) accessed 13 May 2013, para 7.1.

282 Crimes Ordinance (Cap 200), s. 24, 25, 27, 122.

283 Offences Against the Person Ordinance (Cap 212), s. 19, 20, 40.

284 Protection of Juveniles and Children Ordinance (Cap 213), s. 34, 35.

285 Department of Justice, Legal System in Hong Kong, (doj.gov.hk, 1 January 2013) <http://www.doj.gov.hk/eng/legal/> accessed 15 April 2013.

### 3.2 RELEVANT COURT

Domestic Violence Offences may, depending on the seriousness of the case, be prosecuted in the Magistrates' Court, the District Court, or the Court of First Instance.<sup>286</sup>

### 3.3 STAGES OF THE PROCEEDINGS

The DOJ is responsible for criminal prosecutions. Generally, criminal proceedings are prosecuted by the Prosecutions Division of the DOJ, Court Prosecutors or Departmental Prosecutors, as instructed by the DOJ. Such prosecutions are brought on behalf of the Hong Kong Special Administrative Region ("HKSAR"), not the government or police.<sup>287</sup> In determining whether a prosecution will be brought, the DOJ requires full evaluation of the evidence and surrounding circumstances, including whether the prosecution is required by the public interest. The following public interest criteria<sup>288</sup> are identified by the DOJ as providing an indication that proceedings may not be required, and which we have identified as being potentially applicable to Domestic Violence Offences:

- attitude of the victim — the prosecutor may have regard to the views of the victim as to the appropriateness of prosecution. In this respect, research demonstrates that victims generally only call the police in desperate circumstances.<sup>289</sup> The SWD recognises this tension between the public interest in condemning personal violence on the one hand, and the benefit of preserving the family unit, on the other.<sup>290</sup> However, proceedings may nevertheless be instituted against the victim's wishes if doing so is in the public interest due to the seriousness of the offence.<sup>291</sup> Research has shown that victims often do not have sufficient knowledge or legal advice in deciding whether he or she wishes to press charges. Further, we are aware of an instance where a police officer attempted to dissuade the victim from pressing charges and to forgive the abuser;<sup>292</sup> and
- availability of a civil remedy — in many instances, victims may be granted an injunction under the DCRVO. Such a right may be a factor against prosecution.<sup>293</sup>

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286 Ibid, <http://www.doj.gov.hk/eng/legal/> accessed 15 April 2013.

287 Department of Justice, *The Statement of Prosecution Policy and Practice — Code for Prosecutors* (27 March 2013).

288 Ibid, para. 9(k).

289 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), para. 7.2.

290 Ibid, para. 7.4.

291 Department of Justice, *The Policy for Prosecuting Cases involving Domestic Violence*, ([doj.gov.hk](http://www.doj.gov.hk), 27 March 2013) <http://www.doj.gov.hk/eng/public/pubppcdv.html> accessed 13 May 2013, paras. 6, 12, 15, 22.

292 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011), p. 23.

293 Department of Justice, *The Statement of Prosecution Policy and Practice — Code for Prosecutors* (27 March 2013), para 9(k).

### 3.4 PROSECUTION FUNDING

Criminal prosecutions are instituted by the DOJ and are government funded.

### 3.5 TIMESCALES

There is no set timescale for the prosecution and conviction of an offender. Much would depend on the facts and circumstances of the case. However, the prosecution is required to progress the case “expeditiously and without any undue delay”.<sup>294</sup>

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

Depending on the nature of the domestic violence, the following civil remedies may be available:

- under the DCRVO, victims may seek injunctive relief in the form of a non-molestation order, an ouster order, restraining order, and an entry order.<sup>295</sup> These remedies are set out at section 4.1 below; and
- under the Protection of Children and Juveniles Ordinance, the court may grant various custody orders in respect of the aggrieved child, or a guardianship order.<sup>296</sup>

A person who has been molested by certain persons or a certain class of persons may bring an action under the DCRVO.<sup>297</sup> Where the victim is a minor, civil proceedings may be instituted by the minor’s next friend who should be a person willing to conduct and assume responsibility for the proceedings, on behalf of the minor.<sup>298</sup>

The following table sets out the key operation of the DCRVO:

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<sup>294</sup> Department of Justice, The Policy for Prosecuting Cases involving Domestic Violence, ([doj.gov.hk](http://www.doj.gov.hk), 27 March 2013) <http://www.doj.gov.hk/eng/public/pubppcdv.html> accessed 13 May 2013, paras. 6, 12, 15, 22, 24, 25, 26.

<sup>295</sup> The Domestic and Cohabitation Relationship Violence Ordinance (Cap 189); see also Hong Kong Judiciary, *How to Apply for Injunctions Under the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189)*, ([judiciary.gov.hk](http://www.judiciary.gov.hk), 14 March 2013) [http://www.judiciary.gov.hk/en/crt\\_services/pphlt/html/dov.htm](http://www.judiciary.gov.hk/en/crt_services/pphlt/html/dov.htm) accessed 16 April 2013.

<sup>296</sup> Protection of Juveniles and Children Ordinance (Cap 213), s. 34, 35.

<sup>297</sup> Ibid, (Cap 189).

<sup>298</sup> Ibid, s. 3A(3).

PREScribed CONDUCT	APPLICATION	LEGAL REDRESS
<b>MOLESTATION BY SPOUSE OR FORMER SPOUSE, RELATIVE, OR BY OTHER PARTY TO A COHABITANT RELATIONSHIP</b>	<p>Where a person, being an adult ("Applicant") or child, has been molested by:</p> <ul style="list-style-type: none"> <li>— the spouse or former spouse of the Applicant;</li> <li>— a relative<sup>299</sup> of the Applicant;</li> <li>— the other party to a cohabitation relationship,<sup>300</sup> (together, "Respondent")</li> </ul> <p>the Applicant may seek an injunction from the court.</p>	<p>The injunction may have the following effect:</p> <ul style="list-style-type: none"> <li>— Non-molestation/Restraining Order. Restrain the Respondent from molesting the adult or child;</li> <li>— Non-molestation/Restraining Order. Restrain the Respondent from molesting the adult or child and require the Respondent to participate in an approved program aimed at changing the attitude and behavior that lead to injunction;</li> <li>— Ouster Order. For a period the court considers appropriate, but not more than 24 months, prohibit the Respondent from, whether or not the residence is the common residence or matrimonial home of the adult, child or Respondent, entering or remaining in the residence, a specified part of the residence, a specified area whether or not the residence of the adult or child is in that area, of the adult or child;</li> <li>— Entry Order. For a period the court considers appropriate, but not more than 24 months, require the Respondent permit the adult or child to enter and remain in the whole or part of the common residence or matrimonial home.</li> </ul>
<b>BREACH OF ORDER UNDER THE DVO<sup>301</sup></b>	<p>Where the Respondent is enjoined from:</p> <ul style="list-style-type: none"> <li>— using violence against the Applicant; or</li> <li>— entering or remaining in any premises or area, and</li> <li>— the Respondent has caused or likely will cause actual bodily harm to the Applicant, the Applicant may seek attachment of an authorisation of arrest.</li> </ul>	<p>Where an authorisation of arrest has attached to the injunction, a police officer is empowered to arrest without warrant any person reasonably suspected of breaching the injunction through his or her use of violence, or entry into or remaining in any premises or area which he or she is enjoined from entering. In order to effect such an arrest, the police officer is conferred all necessary powers including the power of entry by the use of reasonable force.</p>

299 The definition of 'relative' under section 3A of the DCRVO includes a father, mother, grandfather or grandmother (whether natural or adoptive); step-father, step-mother, step-grandfather or step-grandmother; father-in-law or mother-in-law who is the natural parent, adoptive parent or step-parent of the victim's spouse; grandfather-in-law or grandmother-in-law who is the natural grandparent, adoptive grandparent or step-grandparent of the applicant's spouse; son, daughter, grandson or granddaughter (whether natural or adoptive); step-son, step-daughter, step-grandson or step-granddaughter, son-in-law or daughter-in-law who is the spouse of the victim's natural child, adoptive child or step child; grandson-in-law or granddaughter-in-law who is the spouse of the applicant's natural grandchild, adoptive grandchild or step-grandchild; brother or sister (whether full or half blood or by virtue of adoption) or their spouse; step-brother or step-sister; step-brother or step-sister of the victim's spouse, or their spouse; uncle, aunt, nephew, niece or cousin (whether full or half blood or by virtue of adoption) or their spouse; the uncle, aunt, nephew, niece or cousin (whether full or half blood or by virtue of adoption) of the victim's spouse, or their spouse.

300 "Cohabitation Relationship" is defined under section 2 of the DCRVO as including any relationship between 2 persons (whether of the same sex or of the opposite sex) who live together as a couple in an intimate relationship, whether or not that relationship has come to an end.

301 Domestic Violence and Cohabitation Relationships Violence Ordinance (Cap 189), s. 5.

The following table sets out other relevant legislation:

PREScribed CONDUCT	APPLICATION	LEGAL REDRESS
<b>LAW – PROTECT TO CHILDREN AND JUVENILES ORDINANCE (CAP 213)</b>		
<b>CHILD OR JUVENILE IN NEED OF CARE OR PROTECTION</b>	<p>A juvenile court and the Director of Social Welfare are empowered to assist children under the age of seven years who are in need of care or protection.<sup>302</sup> A child is deemed to be in need of care or protection if:<sup>303</sup></p> <ul style="list-style-type: none"> <li>— the child has been or is being assaulted, ill-treated, neglected or sexually abused;</li> <li>— the child's health, development or welfare has been, is, or appears likely to be neglected or avoidably impaired; or</li> <li>— the child is beyond control, to the extent that harm may be caused to him or to others.</li> </ul>	<p>Where the child is in need of care or protection, a juvenile court on its own motion, or on application of the Director of Social Welfare, any person authorised by the Director of Social Welfare, or any police officer, may:<sup>304</sup></p> <ul style="list-style-type: none"> <li>— appoint the Director of Social Welfare as the child's legal guardian;</li> <li>— commit the child to the care of any person whether a relative or not, who is willing to undertake the care of him, or of any institution which is so willing;</li> <li>— order his parent or guardian to enter into recognisance to exercise proper care and guardianship; or</li> <li>— order that the child be placed for a specified period, not exceeding three years, under the supervision of a person appointed for the purpose.</li> </ul>
<b>PROTECTION OF CHILD FROM DANGER</b>	<p>The Director of Social Welfare is empowered to assist children who are reasonably believed:<sup>305</sup></p> <ul style="list-style-type: none"> <li>— to have been brought into or is about to be taken out of Hong Kong by force, threats, intimidation, false pretences, false representations or other fraudulent means; or</li> <li>— to be in the custody or control or under the direction of another person and is or is likely to be exposed to any danger of seduction or prostitution or is likely to be exposed to any moral or physical danger.</li> </ul>	<p>The Director of Social Welfare may inquire into the case and may:<sup>306</sup></p> <ul style="list-style-type: none"> <li>— make any order regarding the control and custody of the endangered child which he thinks desirable in the interest of that person;</li> <li>— require any person into whose charge he shall place the endangered child, to enter into a bond with one or more sureties to treat her or him well; or</li> <li>— require the person with custody of the endangered child to: produce the endangered child; furnish photographs of the endangered child and of himself; to give security that the endangered child will not leave Hong Kong without the Director of Social Welfare's written consent; to give security that the endangered child will not be trained for or employed in any occupation other than those approved of in writing by the Director of Social Welfare.</li> </ul>

302 Protection of Children and Juveniles Ordinance (Cap 213), s. 34(1).

303 Ibid, s. 34(2).

304 Ibid, s. 34(1).

305 Ibid, s. 35(1).

306 Protection of Children and Juveniles Ordinance (Cap 213), s. 35(1).

## 4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

The burden of proof lies with the party seeking the injunction, the victim. The victim must satisfy the court that, “on the balance of probabilities”,<sup>307</sup> he or she has been molested.

## 4.3 RELEVANT COURT

Generally, cases under the DCRVO may be brought in the Family Court division of the District Court.<sup>308</sup> However, cases may also be heard by the Court of First Instance in cases of urgency, where special circumstances exist, or where the District Court feels it would be more appropriate.<sup>309</sup>

## 4.4 TIMESCALES

An application for injunctive relief will be made ex parte and may be done quickly in accordance with Practice Direction 11.1 issued by the Hong Kong judiciary to supplement the civil procedure rules.<sup>310</sup> The undertaking as to damages that an applicant for injunctive relief is usually required to provide, is not a mandatory requirement in respect of domestic violence cases.

For example, P. Cheung J in *Luk Suet Shi Cissy v Woo Chin Man*<sup>311</sup> further commented that “I cannot imagine what possible damage will be suffered by a Respondent if an injunction is granted”.

## 4.5 FUNDING TO PROSECUTE

Legal aid, funded by the government, is available to victims where they pass the eligibility criteria (means and merits tests) set down by the Legal Aid Department.<sup>312</sup> Provided these thresholds are met, the Legal Aid Department treats domestic violence cases as urgent and are to be processed expeditiously.<sup>313</sup>

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307 Department of Justice, *Legal System in Hong Kong*, (doj.gov.hk, 1 January 2013) <http://www.doj.gov.hk/eng/legal/> accessed 15 April 2013; Department of Justice, *The Statement of Prosecution Policy and Practice – Code for Prosecutors* (27 March 2013), para 23.3.

308 Hong Kong Judiciary, *Practice Direction 15.12: Matrimonial Proceedings and Family Proceedings*, 7 June 2011, s. A(1), D. Section A(1) states that the Family Court deals with matrimonial and family proceedings; Section D of the Practice Direction defines ‘family proceedings’ as including proceedings issued under the DCRVO.

309 Domestic and Cohabitation Relationship Violence Ordinance (Cap 189), s. 4.

310 Practice Direction 11.1, Ex Parte, Interim and Interlocutory Applications for Relief (including Injunctive Relief).

311 *Luk Suet Shi Cissy v Woo Chin Man* [1999] HKCU 115.

312 Department of Justice, *Legal System in Hong Kong*, (doj.gov.hk, 1 January 2013) <http://www.doj.gov.hk/eng/legal/> accessed 15 April 2013; The Women’s Commission Report on Women’s Safety in Hong Kong: Eliminating Domestic Violence, January 2006, at page 26.

313 Legislative Council Panel on Welfare Services, *Policies on Handling of Domestic and Sexual Violence Case* (LC Paper No. CB(2)620/12-13(15)), para. 40.

## 5 SUPPORT FOR VICTIMS

The Procedural Guide provides guidelines for organisations, professionals and social workers who provide intervention or other support services to victims of ‘intimate partner violence’ and their family members.<sup>314</sup>

The Procedural Guide offers guidance to competent bodies and professionals in handling cases where children have witnessed domestic violence. The SWD acknowledges that:

“Children who have been exposed to intimate partner violence may suffer from fear, worry, distress, guilt, anger, confusion and frustration. Living in families with violence, some children learn and develop maladaptive coping behavior and/or exhibit psychological problems”.<sup>315</sup>

The following specialised services have been established to address these needs:<sup>316</sup>

- Family and Child Protective Services Unit (“FCPSU”) — FCPSUs are one of SWD’s Social Welfare Service Units. The SWD has established 11 FCPSUs in Hong Kong. The function of an FCPSU is to provide a coordinated package of services for all persons involved in a domestic violence incident, including the victim, their family and the batterer. In particular, they aim to assist these persons, including children, to overcome the trauma caused by the domestic violence incident;<sup>317</sup>
- clinical psychologist or psychiatrist — the SWD has established five Clinical Psychology Units. A function of these units is to assess and treat children who present with psychological symptoms resulting from witnessing domestic violence;<sup>318</sup>
- statutory protection<sup>319</sup> — where the child requires statutory protection from the aggrieved conduct, proceedings may be instituted on behalf of the child under the DCRVO, or the Protection of Children and Juveniles Ordinance (by social workers of the SWD)<sup>320</sup>; and
- witness support program — the SWD and the HKPF run a witness support program which arranges for persons to accompany child witnesses in giving evidence via live television link.<sup>321</sup>

314 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011).

315 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), para. 1.9.

316 Legislative Council Panel on Welfare Services, *Policies on Handling of Domestic and Sexual Violence Cases* (LC Paper No. CB(2)620/12-13(15)), para. 5 ; Legislative Council Panel on Welfare Services, *Welfare Services to Support Victims of Domestic Violence and their Families* (LC Paper No. CB(2)447/12-13(06)), para. 21.

317 Legislative Council Panel on Welfare Services, *Welfare Services to Support Victims of Domestic Violence and their Families* (LC Paper No. CB(2)447/12-13(06)), para. 22.

318 Ibid, para. 23.

319 Legislative Council Panel on Welfare Services, *Policies on Handling of Domestic and Sexual Violence Cases* (LC Paper No. CB(2)620/12-13(15)), para. 5.

320 Ibid, para. 6.

321 Legislative Council Panel on Welfare Services, *Welfare Services to Support Victims of Domestic Violence and their Families* (LC Paper No. CB(2)447/12-13(06)), para. 26.

In Hong Kong, various government departments and NGOs work together to protect and help victims of domestic violence. In order to regulate this collaborative approach, the Procedural Guide sets out the expectations of each participating party.

## 6 OFFENCES

There are six main criminal offences under which domestic violence offences would be prosecuted. These are detailed in the table below:

OFFENCE	LEGAL REFERENCE	SANCTION
LAW – <i>THE OFFENCES AGAINST THE PERSON ORDINANCE</i> (CAP 212)		
WOUNDING OR INFLECTING GRIEVOUS BODILY HARM	Section 19	Maximum three years imprisonment
CHOKING, SUFFOCATING OR STRANGLING	Section 20	Maximum life imprisonment
ASSAULT	Section 40	Maximum one year imprisonment. (common assault)  Maximum one year imprisonment (assault with an intention to commit another offence)  Maximum one year imprisonment (assault occasioning actual bodily harm)
LAW – <i>CRIMES ORDINANCE</i> (CAP 200)		
INTIMIDATION	Section 24	Maximum two years imprisonment and fine of \$2,000 (on summary conviction)  Maximum five years imprisonment (on indictment)
ASSAULT	Section 25	Maximum two years imprisonment and fine of \$2,000 (on summary conviction)  Maximum five years imprisonment (on indictment)
INDECENT ASSAULT	Section 122	Maximum ten years imprisonment (on indictment)



## 7 REHABILITATION MEASURES

Under the DCRVO, in addition to an order restraining the offender from molesting the victim, the court is able to require the offender to participate in a rehabilitation program. The court mandated program must be approved by the Director of Social Welfare and aimed at changing the attitude and behaviour of the offender that lead to the granting of the injunction.<sup>322</sup>

In practice, following the making of a rehabilitation order, the court will provide the relevant information to the SWD. The SWD will then match the offender to a suitable program provided by a NGO (either Christian Family Service Centre, Harmony House, Hong Kong Family Welfare Society, Neighbourhood Advice-Action Council, Tung Wah Group of Hospitals, and Yang Memorial Methodist Social Service). These programs generally involve an intake assessment, and group or individual treatment of 12 to 14 weekly sessions of at least 90 minutes each.<sup>323</sup>

## 8 THIRD PARTY RESPONSIBILITIES

Hong Kong has adopted a multi-disciplinary approach where government departments, NGOs and professionals aim to provide a coordinated response to domestic violence. This coordinated effort is to perform three roles — prevention of domestic violence; protection and support of victims; and rehabilitation of abuser's behavior.<sup>324</sup> In respect of the identification, reporting or prevention of domestic violence, responsibilities are imposed, or voluntarily assumed by the entities listed below. In many reported circumstances, the services of these third parties fell well short of the expectations set out in the Procedural Guide.<sup>325</sup>

**Social Welfare Service Units:**<sup>326</sup> There are a number of NGOs as well as welfare service units under the SWD which have been established to respond to and handle domestic violence. These units respond when alerted to such incidents by direct approach from victims, or by way of referral from the other bodies

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322 Domestic and Cohabitation Relationship Violence Ordinance (Cap 189).

323 Social Welfare Department, *Guide to Participants of Approved Programme under Domestic and Cohabitation Relationships Violence Ordinance* August 2011; see also Social Welfare Department, Services on Victim Support, ([swd.gov.hk](http://www.swd.gov.hk), 27 November 2012) <http://www.swd.gov.hk/vs/english/welfare.html> accessed 16 April 2013.

324 Legislative Council Panel on Welfare Services, *Welfare Services to Support Victims of Domestic Violence and their Families* (LC Paper No. CB(2)447/12-13(06)), paras. 3, 12.

325 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011) <http://www.cydho.org.hk/pdf/AntiDVRReport-ho.pdf> accessed 15 May 2013.

326 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), para. 16; The Social Welfare Service Units are the Family and Child Protective Services Units, Integrated Family Service Centres/Integrated Services Centres, Probation Offices/Community Service Orders Office, Medical Social Services Units, Refuge Centres for Women, CEASE Crisis Centre, Family Crisis Support Centre, Clinical Psychology Units and School Social Work Service.

listed in this paragraph. Where alerted to cases, the responsibility of these units involve taking charge of the intervention process and arranging a co-ordinated package of services, including the formulation and implementation of a treatment plan, suitable for the victim's circumstances.<sup>327</sup>

Staff of hospitals or clinics at which a victim is brought must:<sup>328</sup>

- diagnose and treat the victim for any new or existing injuries;
- evaluate the victim's emotional status;
- provide medical treatment, if required; and
- assess and evaluate whether the victim has any other service needs, including referral social services for assessment or follow-up.

Where police involvement is required, the Hong Kong Police Force/Child Protection Policy Unit (CPPU) of the Hong Kong Police Force responsibilities include:<sup>329</sup>

- ensuring the safety of the victim and his or her children (if any);
- preventing victims from risks of further violence;
- responding and investigating all reports promptly and decisively, including to arrest and initiate prosecutions in accordance with the law;
- timely referral to appropriate government departments and NGOs; and
- to serve a Domestic Violence Incident Notice on the alleged offender.

Where a victim wishes to seek a remedy under the DCRVO, the victim may apply to the Legal Aid Department for legal assistance. The handling officer should assess and decide whether legal aid will be offered, based on:<sup>330</sup>

- a means test on the victim; and
- a brief statement taken from the victim;

The Department of Justice is responsible for determining whether to prosecute the offender. In doing so, the DOJ is required to consider whether there is sufficient evidence such that there is a reasonable prospect of prosecution, and whether the victim is willing to give evidence.<sup>331</sup> A prosecutor's prime responsibility is to the public. As such, even where a victim wishes to withdraw from the case, and her evidence is not vital, the prosecution should nevertheless proceed if the public interest so demands. In determining whether the evidence is sufficient where a victim has withdrawn, a prosecutor should ensure she has caused the police to procure all relevant information.

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<sup>327</sup> Ibid, paras. 3.2, 3.8.

<sup>328</sup> Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), ch. 4.

<sup>329</sup> Ibid, p. 44.

<sup>330</sup> Ibid, ch. 6; The Department of Justice has also issued *The Policy for Prosecuting Cases involving Domestic Violence*.

<sup>331</sup> Ibid, ch. 7.

Members of the school's staff should refer the matter to the school's social worker, the SWD or other NGO, with the victim's consent, at the earliest opportunity. Further responsibilities include:<sup>332</sup>

- paying continuous attention to the concerned student;
- where known, safe guarding the well-being of students; and
- providing emotional support and assistance to students where risks have been identified.

Where Housing department staff have identified any cases, the staff should, if consented to, refer the victim to the SWD or other NGO, and inform them of temporary accommodation services. Further, where the victim requests housing assistance, the victim, with consent, should be referred to NGOs dealing with this issue for assessment of the request and need for other welfare services. However, there have been a number of reported instances where social workers have been unwilling to assist victims in procuring public housing.<sup>333</sup>

Staff of any organisations that deals with families should, with consent, refer the victim to SWD or other NGO, at the earliest possible time.<sup>334</sup>

However, the Procedural Guide is not law. There are no consequences of failing to comply with these guidelines apart from possible internal disciplinary action instituted by the relevant body specified above.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 STATISTICS

Generally, it is important to note that the Human Rights Committee has considered the Third Report of the Hong Kong Special Administrative Region of the People's Republic of China in the [sic] light of the International Covenant on Civil and Political Rights.<sup>335</sup> The Committee has expressed concern that, notwithstanding the introduction of the DCRVO, the incidence of domestic

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332 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), ch. 8.

333 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011) <http://www.cydho.org.hk/pdf/AntiDVReport-ho.pdf> accessed 15 May 2013.

334 Social Welfare Department Working Group on Combating Violence, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), ch.10.

335 Constitutional Mainland Affairs Bureau, *Third Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights*, (cmab.gov.hk, 23 September 2011) [http://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/the\\_rights\\_of\\_the\\_individuals/ICCPR\\_3rd\\_report\\_en.pdf](http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/ICCPR_3rd_report_en.pdf) accessed 31 May 2013.

violence against women remains high. In this respect, it recommends that efforts should be increased in combating domestic violence by ensuring provision of assistance and protection to victims, criminal prosecution of perpetrators of domestic violence, and sensitizing society to domestic violence.<sup>336</sup>

As noted, the domestic violence legislation, the DCRVO, does not prescribe any offences. Statistics regarding criminal prosecutions under the general criminal law specifically in the domestic violence context are not available.

From 2007 to 2012, the number of injunctions were granted under the DCRVO (and the DVO as it then was):

YEAR	2009 <sup>337</sup>	2010 <sup>338</sup>	2011 <sup>339</sup>	2012 <sup>340</sup>
NO. OF INJUNCTIONS GRANTED	26	23	Unidentified	Unidentified

The HKPF publishes annual domestic violence statistics. From 2007 to 2012, the HKPF have handled the following amount of criminal cases involving domestic violence:<sup>341</sup>

YEAR	2007	2008	2009	2010	2011	2012
NO. OF CASES WITH DOMESTIC VIOLENCE	2,505	2,341	2,373	2,157	1,928	2,002
NO. OF DEATH CASES WITH DOMESTIC VIOLENCE	6	8	9	7	5	Unidentified <sup>342</sup>

The SWD also publishes annual domestic violence statistics. These statistics are compiled from information reported to the Child Protection Registry and the Central Information System on Battered Spouse Cases and Sexual Violence

336 Labour and Welfare Bureau, *Replies to LegCo Questions LCQ13: Domestic Violence*, ([lwb.gov.hk](http://www.lwb.gov.hk), 16 March 2011) [http://www.lwb.gov.hk/eng/legco/16032011\\_Q13.htm](http://www.lwb.gov.hk/eng/legco/16032011_Q13.htm) accessed 17 April 2013.

337 Human Rights Committee, *Concluding Observations on the third periodic report of Hong Kong China*, prepared by the Human Rights Committee (Advance Unedited Version), 107th session, 11–28 March 2013.

338 Ibid, [http://www.lwb.gov.hk/eng/legco/16032011\\_Q13.htm](http://www.lwb.gov.hk/eng/legco/16032011_Q13.htm) accessed 17 April 2013.

339 We were unable to procure this information from publicly available sources. Further, we were unable to procure this information directly from the Hong Kong Judiciary.

340 We were unable to procure this information from publicly available sources. Further, we were unable to procure this information directly from the Hong Kong Judiciary.

341 Hong Kong Police Force, *Examination of Estimates of Expenditure 2012-13: Controlling Officer's Reply to Initial Written Question – Crime Statistics Comparison*, ([police.gov.hk](http://www.police.gov.hk), 23 February 2012) [http://www.police.gov.hk/ppp\\_en/11\\_useful\\_info/doc/1213/SB-e036.pdf](http://www.police.gov.hk/ppp_en/11_useful_info/doc/1213/SB-e036.pdf) accessed 17 April 2013.

342 We were unable to procure this information from publicly available sources. Further, we were unable to procure this information directly from the HKPF.

Cases. The below table, which sets out the number of domestic violence cases (spouse and cohabitant battering cases) reported to the SWD and other NGOs, from 2010 to 2013.<sup>343</sup>

As mentioned previously, the DCVRO was substantially amended in 2008 and 2009. The more effective amendments include:

- broadened category of victims. Under the DCVRO, the category of victims was extended beyond spouses or partners in heterosexual cohabiting relationships. Now same-sex cohabitants, former cohabitants, children of cohabitants and immediate and extended family members can benefit from the protection and redress afforded by the legislation.<sup>344</sup> The extended scope of victims protected by the DCRVO is one of the more effective amendments;
- extended validity of injunctions — the validity of injunctions has been extended from six months to 24 months. This provides protection for the victim during his or her associated matrimonial or custody proceedings which are usually very lengthy.<sup>345</sup> Additionally, it is no longer necessary for violence to occur before an arrest can be made. Courts now have the power to attach compulsory batterer intervention orders and authorisations of arrest to injunctions where the court reasonably believes that the abuser will cause actual bodily harm to the victim or his or her child;<sup>346</sup> and
- Mandatory counselling — courts can now order abusers to attend anti-violence programs when injunctions are granted.<sup>347</sup> These programs will be designed for various types of abusers and will focus on the key aspects of positive and healthy relationships, including gender equality, and mutual respect, support and empathy.<sup>348</sup>

## 9.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

There are a number of challenges in enforcing the domestic violence laws. These include:

- limitation of legal aid and high refusal rate — over 50% of persons seeking legal aid are refused.<sup>349</sup> Without legal advice, victims are unable to bring an

343 Women's Commission, *Hong Kong Women in Figures 2011*, (women.gov.hk, 2011) [http://www.women.gov.hk/download/library/report/HK\\_Women2011\\_e.pdf](http://www.women.gov.hk/download/library/report/HK_Women2011_e.pdf) accessed 16 May 2013, p.58; see also Social Welfare Department, *Statistics on Child Abuse, Spouse/Cohabitant Battering and Sexual Violence Cases for 2010 to 2013*, (swd.gov.hk, 9 May 2013) <http://www.swd.gov.hk/vs/english/stat.html> accessed 16 May 2013.

344 The Domestic and Cohabitation Relationship Violence Ordinance (Cap 189), s. 2; D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011), p. 5.

345 Gender Mainstreaming, *A Review of Domestic Violence Ordinance (DVO)* (lwb.gov.hk, 2013) [http://www.lwb.gov.hk/Gender\\_Mainstreaming/eng/casea1.html](http://www.lwb.gov.hk/Gender_Mainstreaming/eng/casea1.html) accessed 19 May 2013.

346 The Domestic and Cohabitation Relationship Violence Ordinance (Cap 189), s. 5.

347 Ibid, s. 3(1A).

348 Gender Mainstreaming, *A Review of Domestic Violence Ordinance (DVO)* (lwb.gov.hk, 2013) [http://www.lwb.gov.hk/Gender\\_Mainstreaming/eng/casea1.html](http://www.lwb.gov.hk/Gender_Mainstreaming/eng/casea1.html) accessed 19 May 2013.

349 Harmony House, *Hong Kong Women's NGO Forum: Working with CEDAW*, 7 May 2011, p. 14.

injunction application, or give an informed decision whether or not he or she wishes for the abuser to be charged after reporting an incident to police;

- insufficient public awareness — a view is that victims may be deprived of remedies under the DCRVO as they are simply unaware of their rights and the availability of support services;<sup>350</sup>
- seven year residence rule — a person is not entitled to social security benefits unless they have resided in Hong Kong for seven years. Women forced from their homes are often referred to shelters which only offer a limited period of stay. For women who have not satisfied the seven year requirement, they are precluded from applying for and being granted allowances or public housing. These victims almost have no choice but to stay in the abusive relationship because they have no way to support themselves and their children if they do not. According to anecdotal evidence, where these women manage to escape the violent environment, they are at the mercy of social workers who may be unable or unwilling to assist them, and may even force them from the shelter.<sup>351</sup> Two of the primary aims of the 2009 reform were to improve access to remedies and provide greater protection for victims of domestic violence. However the practical effect of the residence requirement is that a large percentage of victims of domestic abuse are excluded from seeking protection under Hong Kong domestic violence legislation;
- publicly addressing a traditionally private issue — a difficulty which may not be overcome through the enactment of domestic violence laws, is ideology. Violence against women is traditionally viewed as a purely private issue, as the Chinese believe that outsiders have no right to interfere with family matters.<sup>352</sup> In a poll conducted by the Chinese University of Hong Kong in 2004, almost 30% of police respondents said that husbands were entitled to hit their wives.<sup>353</sup> Additionally, only 25%–28% of doctors, lawyers and social workers believed domestic violence and violence against women was a serious problem in Hong Kong.<sup>354</sup> A study conducted in 2009 after the reform of the DCRVO suggests that very little has changed. Police have in many recorded instances discouraged abused women from filing complaints. When complaints were filed, they were considered ‘low

350 Women's Commission, *Women's Safety in Hong Kong: Eliminating Domestic Violence*, August 2009, p. 37; D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011).

351 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011), pp. 31 to 33.

352 K Chan, *Intimate Partner Violence in Hong Kong* in K Chan (ed), *Preventing Family Violence: A Multidisciplinary Approach* (HKUP 2012) [http://books.google.com.hk/books?id=e4Kpc6bAq5MC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com.hk/books?id=e4Kpc6bAq5MC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) accessed 19 May 2013, p. 34.

353 R Wu, *A Tragic Lesson of Battering* (2004) 188 Hong Kong Christian Institute Newsletter <http://www.hkci.org.hk/eng/newsletter/188b.html> accessed 15 May 2013.

354 Ibid, <http://www.hkci.org.hk/eng/newsletter/188b.html> accessed 15 May 2013.

priority’ and not ‘real’ work.<sup>355</sup> The continuing prevalence of this attitude was supported by a study concluded in 2011 which evaluated the access to remedies under the DCRVO and the effectiveness of the legislative reform.<sup>356</sup> It shows that the reluctant attitude of the police and social workers means that rights of victims under the domestic violence laws are not properly protected; and

- social isolation — in many cases, the victims who are immigrants do not have friends or family in Hong Kong to whom they can turn. In many cases, this causes the victim to be dependent on the abuser. As a result, victims are unable to escape the violent environment. On this basis, and without a source of income to support themselves (and possibly a child), a victim’s only option is social services. However, a case study has revealed that these services can be unreliable as some social workers are unwilling to provide pragmatic assistance.<sup>357</sup> This prohibits the proper implementation of the DCRVO.

### 9.3 PLANNED REFORMS/PILOT SCHEMES

There are no current proposed amendments to the DCRVO. However, various NGOs and government departments continue to discuss ways in which the domestic violence regime can be improved.<sup>358</sup> It is an on-going process. Prior to 2009, the government was widely criticised for not addressing the problem of violence against women. This cry for reform exploded after the Tin Shui Wai Family tragedy in 2004 where a husband killed his wife and two children before committing suicide.<sup>359</sup> The failed attempts of the wife to procure help from both the police and social workers in the 24 hours before the murders highlighted the weaknesses of the domestic violence legislation. In particular, it failed to provide adequate protection to victims of domestic violence.<sup>360</sup>

In respect of the recent amendments in 2009, many argue that the government has not gone far enough in their law reform. Despite extending the scope of persons who may seek injunctive relief under the DCRVO, the reform did little to provide additional remedies to victims. The DCRVO does not criminalise domestic violence. Rather, victims must rely on prosecutions under the

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355 L C Leung, *The Possibility of Gender Mainstreaming Social Policy on Family Violence in Hong Kong* (2009) 2 Public Policy Digest <http://www.ugc.edu.hk/rgc/ppd2/eng/03.htm> accessed 15 May 2013.

356 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011).

357 Ibid.

358 Recently, the Hong Kong Law Reform Commission published a report on child custody and access orders which makes recommendations concerning domestic violence. Law Reform Commission of Hong Kong, *Child Custody and Access*, ([hkreform.gov.hk](http://www.hkreform.gov.hk), March 2005) <<http://www.hkreform.gov.hk/en/docs/raccess-e.pdf>> accessed 20 May 2013.

359 Women’s Commission, *Women’s Safety in Hong Kong: Eliminating Domestic Violence*, January 2006, p. 15.

360 S Ng, *Domestic Violence in Hong Kong* (GordonMoyes.com, 7 August 2009) <http://www.gordonmoyes.com/2009/08/07/domestic-violence-in-hong-kong/> accessed 20 May 2013.



Offences Against the Persons Ordinance and Crimes Ordinance for criminal law sanctions.<sup>361</sup> Under the DCRVO, victims can apply for three month injunctions which can be extended to 24 months. However, this does not provide a realistic remedy for women who do not have property ownership.<sup>362</sup> Most of these women, mainly immigrants from mainland China, are hesitant to report domestic violence for fear of being forced from their homes without a place to stay.<sup>363</sup>

Additionally, it is argued by many NGOs and women's groups that the DCRVO as currently in force, although more comprehensive, approaches violence against women and domestic violence as a family issue, rather than a gender issue.<sup>364</sup> The social and cultural legitimisation of domestic violence and female subordination in Chinese families is a crucial contributing factor to the prevalence of violence against women. Policymakers have failed to take this into account.<sup>365</sup> As a result, it is argued that the DCRVO fails to be very effective. In a study relating to the effectiveness of the DCRVO, it was found that, on the rare occasion where the victims were aware of their options under the DCRVO, the victims encountered difficulties reporting the violence to the police. Further, social workers often discouraged victims from filing charges against their abusers or refused to help. Citing Chinese proverbs about the benefits of suffering and a woman's role in a relationship, the social worker reportedly told the victim<sup>366</sup> "the more suffering you can bear, the more honourable you are."

The main criticism of the DVO was its ineffective protection of victims and provision of inadequate support.<sup>367</sup> Many lamented that there was no interdisciplinary approach to resolve these issues.<sup>368</sup> Increased collaboration between NGOs and government agencies would improve the response to violence against women through the improvement in access to services.<sup>369</sup> Specifically,

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361 Department of Justice, *The Policy for Prosecuting Cases involving Domestic Violence*, ([doj.gov.hk](http://www.doj.gov.hk), 27 March 2013) <http://www.doj.gov.hk/eng/public/pubppcdv.html> accessed 13 May 2013.

362 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011).

363 S Ng, Domestic Violence in Hong Kong (GordonMoyes.com, 7 August 2009) <http://www.gordonmoyes.com/2009/08/07/domestic-violence-in-hong-kong/> accessed 20 May 2013.

364 L C Leung, *The Possibility of Gender Mainstreaming Social Policy on Family Violence in Hong Kong* (2009) 2 Public Policy Digest <http://www.ugc.edu.hk/rgc/ppd2/eng/03.htm> accessed 19 May 2013.

365 K Chan, *Intimate Partner Violence in Hong Kong* in K Chan (ed), *Preventing Family Violence: A Multidisciplinary Approach* (HKUP 2012) [http://books.google.com.hk/books?id=e4Kpc6bAq5MC&printsec=frontcover&source=gbg\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com.hk/books?id=e4Kpc6bAq5MC&printsec=frontcover&source=gbg_summary_r&cad=0#v=onepage&q&f=false) accessed 19 May 2013.

366 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011), p. 29.

367 Women's Commission, *Women's Safety in Hong Kong: Eliminating Domestic Violence*, January 2006.

368 L C Leung, *The Possibility of Gender Mainstreaming Social Policy on Family Violence in Hong Kong* (2009) 2 Public Policy Digest <http://www.ugc.edu.hk/rgc/ppd2/eng/03.htm> accessed 19 May 2013.

369 S Ng, Domestic Violence in Hong Kong (GordonMoyes.com, 7 August 2009) <http://www.gordonmoyes.com/2009/08/07/domestic-violence-in-hong-kong/> accessed 20 May 2013.



the Women's Commission argued that a multi-dimensional approach involving enhanced community support, public education programmes, increased publicity of the issue would provide more comprehensive support for victims and increase the effectiveness of domestic violence legislation in Hong Kong.<sup>370</sup> This multi-disciplinary approach is now embodied in the Procedural Guide. However, a shortcoming appears to lie in the fact that assistance to victims may depend on the attitude of the assigned social worker.

Although many of the reforms recommended by various NGOs and government departments have been implemented,<sup>371</sup> there remains a number of areas in which these laws could offer more protection. These include:

- The introduction of anti-stalking laws.<sup>372</sup> There have been many incidents where victims have felt unsafe due to continued stalking notwithstanding geographical separation.<sup>373</sup> In 2000, the Hong Kong Law Reform Commission published the Stalking Report<sup>374</sup> which detailed the inadequate protection against stalking under both the civil and criminal law. In this respect, it recommended criminalisation of stalking.<sup>375</sup> This recommendation was not adopted;
- In December 2011, the government issued the Consultation Paper on Stalking which explored the need for anti-stalking legislation in Hong Kong.<sup>376</sup> The effect would be to criminalise stalking. The consultation period closed on 31 March 2012. Anti-stalking laws are still in the public consultation stage.<sup>377</sup> The Law Reform Commission received 506 written submissions. Of those, 46% (approx.) supported the introduction of anti-stalking laws, 35% (approx.) opposed and the remaining 19% (approx.) did not express an opinion.<sup>378</sup> A key concern was the impact of the legislation on freedom of the press and the insufficiency of the proposed “reasonable pursuit” defence. Under the “reasonable pursuit” defence, a person would not be guilty of stalking if their conduct was reasonable in the specific circumstances.<sup>379</sup> Many groups including women's groups, the media and

370 V Lee, *Strategies and measures in tackling domestic violence in selected places* (RP09/07-08, 16 June 2008), p. 18.

371 Women's Commission, *Women's Safety in Hong Kong: Eliminating Domestic Violence*, January 2006, p. 36.

372 Ibid, p. 36.

373 D Ho Kwok-leung and S Kong Sui Ting, *A review of the impact of the implementation of the Domestic Violence Ordinance (Cap. 189, revised 2008) on the well-being of domestic violence victims* (Hong Kong Polytechnic University, June 2011).

374 Law Reform Commission of Hong Kong, *The Law Reform Commission of Hong Kong Report: Stalking* (**hkreform.gov.hk**, October 2000) <http://www.hkreform.gov.hk/en/docs/rstalk-e.pdf> accessed 20 May 2013.

375 Ibid, <http://www.hkreform.gov.hk/en/docs/rstalk-e.pdf> accessed 20 May 2013.

376 Stalking Risk Profile, *International Legislation* (January 2013) <https://www.stalkingriskprofile.com/what-is-stalking/stalking-legislation/international-legislation> accessed 20 May 2013.

377 Hong Kong Lawyer critique on Anti-Stalking Law (1), <http://interlocals.net/?q=node/384&page=4> accessed 20 May 2013.

378 Legislative Council Panel on Constitutional Affairs, *Consultation on Stalking: Summary of Views Received*, (LC Paper No. CB(2)196/12-13(04)) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca1119cb2-196-4-e.pdf> accessed 20 May 2013, p. 3.

379 Ibid at p. 2.

human rights organisations expressed concern that the anti-stalking laws would be exploited by public figures and debtors trying to avoid debt collectors.<sup>380</sup> Women's groups expressed their concern that the "reasonable pursuit" defence does not provide adequate protection and could be easily manipulated to fit the circumstances;<sup>381</sup> and

- There have been longstanding requests for the establishment of a dedicated Family Court.<sup>382</sup> In support of the establishment of a dedicated Family Court, the Law Society of Hong Kong cited the success of Specialist Domestic Violence Courts established in England & Wales.<sup>383</sup> It is argued that such dedicated courts are able to appropriately protect victims and reduce delay in the prosecution of cases.<sup>384</sup>

## 9.4 REVIEW OF DOMESTIC VIOLENCE LAWS

There are many NGOs and government departments which actively strive towards continual improvement of domestic violence laws. Entities which have a connection with the government and provide continuous review include:

- the Subcommittee on Strategy and Measures to Tackle Domestic Violence, of the Panel on Welfare Services. This Subcommittee was established in 2012 to review strategies and measures to overcome the issue of domestic violence. This review includes the analysis of statistics, legal proceedings and support services for victims of domestic violence;<sup>385</sup>
- the Social Welfare Advisory Committee. The purpose of this Committee is to advise the government on matters of social welfare policy and to continuously review social welfare services;<sup>386</sup> and
- the Women's Commission. This Commission was established by the government in January 2001 to provide a comprehensive view of women's issues and devising long-term strategies for the development and advancement of women.<sup>387</sup>

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380 Ibid, pp. 3, 7.

381 Ibid, p. 9.

382 Law Commission, Letter from the Law Society of Hong Kong to the Bills Committee dated 18 September 2007 enclosing submissions (LC Paper No. CB(2) 2739/06-07(05)) ([legco.gov.hk](http://www.legco.gov.hk/yr06-07/english/bc/bc61/papers/bc610928cb2-2739-5-e.pdf), 18 September 2007) <http://www.legco.gov.hk/yr06-07/english/bc/bc61/papers/bc610928cb2-2739-5-e.pdf> accessed 20 May 2013; *Women's Commission, Women's Safety in Hong Kong: Eliminating Domestic Violence*, January 2006, p. 36.

383 Law Commission, Letter from the Law Society of Hong Kong to the Bills Committee dated 18 September 2007 enclosing submissions (LC Paper No. CB(2) 2739/06-07(05)) ([legco.gov.hk](http://www.legco.gov.hk/yr06-07/english/bc/bc61/papers/bc610928cb2-2739-5-e.pdf), 18 September 2007) <http://www.legco.gov.hk/yr06-07/english/bc/bc61/papers/bc610928cb2-2739-5-e.pdf> accessed 20 May 2013.

384 Ibid, <http://www.legco.gov.hk/yr06-07/english/bc/bc61/papers/bc610928cb2-2739-5-e.pdf> accessed 20 May 2013.

385 Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, Fifth Legislative Council (2012–2016): Subcommittee on Strategy and Measures to Tackle Domestic Violence ([legco.gov.hk](http://www.legco.gov.hk/general/english/panels/yr12-16/ws_dv.htm), 2011) [http://www.legco.gov.hk/general/english/panels/yr12-16/ws\\_dv.htm](http://www.legco.gov.hk/general/english/panels/yr12-16/ws_dv.htm) accessed 21 May 2013

386 Labour and Welfare Bureau, Social Welfare Advisory Committee ([lwb.gov.hk](http://www.lwb.gov.hk/eng/advisory/swac.htm), 8 May 2013) <http://www.lwb.gov.hk/eng/advisory/swac.htm> accessed 21 May 2013.

387 Women's Commission, 'Introduction' ([women.gov.hk](http://www.women.gov.hk/colour/en/about_woc/introduction.htm), 21 December 2012) [http://www.women.gov.hk/colour/en/about\\_woc/introduction.htm](http://www.women.gov.hk/colour/en/about_woc/introduction.htm) accessed 21 May 2013.

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2. Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189)
3. Offences Against the Person Ordinance (Cap 212)
4. Protection of Juveniles and Children Ordinance (Cap 213)
5. Hong Kong Judiciary, Practice Direction 15.12: Matrimonial Proceedings and Family Proceedings, 7 June 2011
6. Practice Direction 11.1, Ex Parte, Interim and Interlocutory Applications for Relief (including Injunctive Relief)

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# Indonesia

‘ About 90% of female victims go back to their husband. ’





# DOMESTIC VIOLENCE IN INDONESIA

DLA Piper International LLP, Melbourne

## EXECUTIVE SUMMARY

In Indonesia, the prevention of and protection against domestic violence is covered predominantly by one main legislative act. The definition of domestic violence appears to be somewhat narrower than the international standard.

For example, it does not include economic harm. It also does not extend to *de facto* couples, divorced couples or gay, lesbian and transgender relationships. However, children are included under the domestic violence legislation and given extra protection under other Indonesian laws.

The Indonesian legislation has been criticised by a number of commentators, principally for not being comprehensive enough in its definitions of what constitutes domestic violence. There have also been issues with enforcing the legislation at a local level – particularly in communities where local laws and customs prevail.

Nonetheless the Indonesian domestic violence law has been proclaimed as an important first step in overcoming serious cultural problems in recognising the equality of women.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Indonesia.

The legislation, the Law of the Republic of Indonesia, Number 23 of Year 2004 regarding Elimination of Violence in Household (the “Domestic Violence Law”), defines domestic violence as “violence in a household” and states that:

“violence in a household shall be any act against anyone particularly women, bringing about physical, sexual, psychological misery or suffering, and/or

negligence of household including threat to commit act, forcing, or seizure of freedom in a manner against the law within the scope of household”.<sup>388</sup>

While it is not entirely clear, the definition of household likely does not extend to divorcees or *de facto* couples as it is defined as husband, wife, children, or blood relatives of those people, or people under the care or guardianship of those people.

Likewise, while the definition does not expressly exclude gay, lesbian and transgender relationships it is unlikely that these would be included, as marriages of this nature are not permitted. However, domestic workers are expressly included, due to the inclusion in the definition of “the individual working to assist the household and living in the household”.<sup>389</sup>

While mental abuse is expressly included, economic abuse is not. However, economic abuse may come within the definition of psychological abuse provided the abuse is sufficiently serious.

Sexual violence is defined as “forcing sexual intercourse carried out against an individual living within the scope of the household” and “forcing sexual intercourse against one of the individuals within the scope of the household for commercial purpose and/or a certain purpose”.<sup>390</sup>

By contrast, international law requires that definitions of rape should not just focus solely on force or threat of force, but also breaches of the right to sexual autonomy as is, for example, the definition used in the Elements of Crimes of the Rome Statute of the International Criminal Court (ICC). The ICC definition of rape defines both victim and perpetrator in a gender-neutral way, and refers to penetration of any part of the victim’s body with any object or any other part of the perpetrator’s body by force or threat of force or otherwise without consent.

Amnesty International is also concerned that marital rape has yet to be criminalised in the Criminal Code, and the Domestic Violence Law refers to sexual violence but not specifically to rape.<sup>391</sup>

## 1.2 FORMS OF DOMESTIC VIOLENCE

Domestic violence can be committed in any, or a combination, of the following forms:

- mental abuse — including bringing about fear, loss of self-confidence, loss of capability to act, hopelessness, and/or serious psychic suffering on someone;

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388 The Law of the Republic of Indonesia, Number 23 of Year 2004 Regarding Elimination of Violence in Household, Article 1.

389 Ibid, Article 2(1).

390 Ibid, Article 8.

391 Amnesty International, Indonesia: Briefing to the UN Committee on the Elimination of Discrimination against Women, July 2012 [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AmnestyInternationalForTheSession\\_Indonesia\\_CEDAW52.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AmnestyInternationalForTheSession_Indonesia_CEDAW52.pdf).

- physical violence; and/or
- sexual violence — including forcing sexual intercourse carried out against an individual living within the scope of the household, and forcing sexual intercourse against one of the individuals within the scope of the household for commercial purpose and/or a certain purpose.

While the burden of proof requirements for proving mental abuse is the same as it is in relation to other offences under the legislation, there is specific provision for the punishment of mental abuse offences.

Article 45 of the legislation states that anyone committing a physic act of violence will be punished with imprisonment of no longer than three years or fine of not more than nine million rupiah (approx. \$900 AUD). Article 45 of the legislation also specifies that if the act does not bring about sickness or obstruction to perform work of his or her position or to earn daily livelihood or activity, the punishment will be imprisonment of no longer than four months or fine of not more than three million rupiah (approx. \$300 AUD).

Amnesty International has commented on aspects of the definition of domestic violence under Indonesian law, observing that some areas lack clarity — in particular what constitutes rape and sexual violence. Amnesty argues that the term sexual violence is defined narrowly in the Law on Domestic.<sup>392</sup>

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Indonesia is the Law of the Republic of Indonesia, Number 23 of Year 2004 regarding Elimination of Violence in Household.

Additionally, the Law of the Republic of Indonesia, Number 23 of Year 2002 on Child Protection is relevant and this is discussed below.

Further, domestic violence is part of several different criminal offences under Indonesian law. These include, in particular the:

- The Penal Code of Indonesia (the “Criminal Law”); and
- The Criminal Law is carried out according to the Law of the Republic of Indonesia, Number 8 of Year 1981 concerning the Law of Criminal Procedure (the “Criminal Procedure Law”).

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<sup>392</sup> Ibid.

## 2.2 INTERNATIONAL TREATIES

Indonesia has also signed and ratified a number of international treaties relevant to domestic violence. These are the:

- International Covenant on Civil and Political Rights, acceded to on 23 February 2006;
- Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 13 September 1984;
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, signed on 28 February 2000;
- Convention on the Rights of the Child, ratified on 5 September 1990;
- Convention Against Torture, acceded to on 28 October 1998; and
- International Covenant on Economic, Social and Cultural Rights, acceded to on 23 February 2006.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Indonesian criminal law is based on the presumption of innocence principle, i.e. the accused person is innocent until proven guilty.

Therefore, the prosecution holds the burden of proof in criminal proceedings for domestic violence in Indonesia and the public prosecutor has the sole right to initiate prosecutions.<sup>393</sup>

There is no special burden of proof for domestic violence offences. Consequently, the burden is found in the Criminal Procedure Law.

Article 66 of the Criminal Procedure Law provides that a suspect or an accused shall not bear the burden of proof. Article 183 of the Criminal Procedure Law instructs that a judge shall not impose a penalty upon a person except when with at least two legal means of proof he has come to the conviction that an offense has truly occurred and that it is the accused who is guilty of committing it.

Article 184 of the Criminal Procedure Law explains that legal means of proof shall be:

- the testimony of a witness;
- the testimony of an expert;
- a document;

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<sup>393</sup> The Law of the Republic of Indonesia, Number 8 of Year 1981 Concerning the Law of Criminal Procedure, Art 66.

- an indication; and
- the testimony of the accused.

Article 55 of the Domestic Violence Law specifies that, as one of the legitimate instruments of proof, the testimony of a victim witness alone shall be adequate to prove that the accused is guilty, if accompanied with another legitimate instrument of proof. This overrides Article 185(2) of the Criminal Procedure Law, which outlines the general rule that the testimony of one witness alone is not sufficient to prove that an accused is guilty of that act of which he is accused.

## 3.2 RELEVANT COURT

### The courts of first instance

In general, criminal prosecutions for domestic violence will be brought in the District Court.

### The court of appeal

There is then the ability for the accused or the Public Prosecutor to make a petition for appeal to the High Court, or an application or petition of cassation to the Supreme Court.

## 3.3 PROSECUTION FUNDING

Whilst there appears to be no specific provision for public funding for criminal prosecutions, under Article 10 of the Domestic Violence Law, victims are entitled to the services of a legal aid worker. The main legal aid foundation providing these services is the Indonesian Women's Association for Justice (LBH APIK).<sup>394</sup>

## 3.4 TIMESCALES

Specific timescales for the above proceedings do not appear to be available.

# 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

## 4.1 PRELIMINARY/INTERIM MEASURES

Indonesian law does provide for the prosecution of domestic violence offences under civil law.

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<sup>394</sup> Ratna Bataramunti, *Justice for women? New anti-domestic violence law brings hope for women*, Inside Indonesia, 87: Jul-Sep 2006 <http://www.insideindonesia.org/feature-editions/justice-for-women>.

Under the Domestic Violence Law it is provided that a victim may be granted a Protection Instruction, which is defined to mean a ruling issued by a court to provide protection to the victim. A victim is entitled to get protection from the family, police, district attorney's office, a court, advocate, social institution, or another party based on the ruling regarding a protection instruction by a court.

Article 29 of the Domestic Violence Law states that an application to obtain a protection instruction letter from the court may be submitted by:

- the victim or family of the victim;
- a friend of the victim;
- the police;
- the companion volunteer; or
- the spiritual mentor.

## **4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES**

In domestic violence cases, the burden of the proof is the same in criminal and civil matters, as noted above. The normal criminal burden which required witness testimony from two people has been lowered so that only one person's witness testimony (along with another piece of evidence) is required.

## **4.3 RELEVANT COURT**

Applications for a Protection Instruction are submitted to the District Court, which is a court of first instance.

## **4.4 TIMESCALES**

Chapter VI of the legislation outlines the protection provisions under the Domestic Violence Law.

Article 16 provides that, within 24 hours from the time of knowing or receiving a report on violence in the household, the police shall be obliged to immediately provide temporary protection to the victim. Article 16 further positions that, within 24 hours after temporary protection has been provided, the police shall be obliged to request a protection instruction ruling from a court.

Article 28 then outlines that the chief justice of the court within a period of seven days after receiving the application shall be obliged to issue a ruling letter containing the protection ruling for the victim and other family members, unless there is a proper reason.

Finally, Article 32 states that the protection instruction may be provided for a period of no longer than one year but may be extended upon a court ruling.

#### 4.5 FUNDING TO PROSECUTE

Whilst there appears to be no specific provision for public funding for civil matters, as mentioned above, under Article 10 of the Domestic Violence Law, victims are entitled to the services of a legal aid worker. The main legal aid foundation providing these services is the Indonesian Women's Association for Justice (LBH APIK).<sup>395</sup>

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

Under the Domestic Violence Law, victims are expressly entitled to:

- protection of the family, police, district attorney office, a court, advocate, social institution, or another party either temporary or based on the ruling on protection instruction of a court;
- health service in accordance with medical need;
- special handling related to confidentiality of the victim;
- counter parting by a social worker and a legal aid worker at each examination process level in accordance with the stipulations of laws and regulations; and
- spiritual guidance service.

Additionally, the Law of the Republic of Indonesia, Number 13 of Year 2006 concerning Protection of Witness and Victim provides protection to victims during all stages of the criminal judiciary process in court. Further, the Ministry of Women Empowerment and Child Protection has issued Ministry Decree No. 1 of 2010 regarding the minimum service standard on integrated services for women and children victims of violence and the Ministry of Health has also issued guidelines for hospitals on integrated services for women and children victims of violence.

### 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

Whilst there are no responsibilities or civil duties of care placed on specific third parties, the legislation places a general duty on all citizens.

This general duty requires all citizen who hear, see or know of the occurrence of violence in a household to make all efforts, within in their capacity, to prevent the

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<sup>395</sup> Ibid.

continuation of the crime, provide protection to the victim, provide emergency assistance and assist in the process of an application for a protection ruling.

Additionally, the Law of the Republic of Indonesia, Number 23 of Year 2002 on Child Protection makes specific provision for the protection of children. Article 59 states that the Government or an authorised State institution is to be responsible and accountable for providing special protections to a child who is the victim of both physical and/or mental violence or a child who is the victim of abuse. This is then expanded on in Article 69 as follows:

the special protection to be afforded to a child who is the victim of violence, including physical, psychological, and sexual violence, as stated in Article 59 of this law is to include the following:

- the dissemination and/or socialisation of the laws and regulations relating to the protection of a child from violence; and
- monitoring, reporting, and the imposition of penalties;
- all persons is to be prohibited from permitting, undertaking, ordering to be undertaken, or participating in the type of violence stated above.

## 6 OFFENCES

There are five main criminal offences under which domestic violence offences would be prosecuted. These are itemised in the following table:

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW – LAW OF THE REPUBLIC OF INDONESIA, NUMBER 23 OF YEAR 2004 REGARDING ELIMINATION OF VIOLENCE IN HOUSEHOLD</b>		
PHYSICAL VIOLENCE	Article 44	<i>Imprisonment</i> up to fifteen years <i>Fine</i> up to 45 million rupiah
PSYCHIC VIOLENCE	Article 45	<i>Imprisonment</i> up to three years <i>Fine</i> up to nine million rupiah
SEXUAL VIOLENCE	Articles 46–48	<i>Imprisonment</i> up to 20 years <i>Fine</i> up to 500 million rupiah
NEGLIGENCE OF HOUSEHOLD	Article 49	<i>Imprisonment</i> up to three years <i>Fine</i> up to fifteen million rupiah
<b>LAW – THE PENAL CODE OF INDONESIA</b>		
RAPE	Article 285	<i>Imprisonment</i> up to twelve years



## 7 REHABILITATION MEASURES

### 7.1 COURT-IMPOSED REHABILITATION

A judge may order that a domestic violence offender undergo a counselling program. However, this must be in conjunction with an imprisonment sentence or fine for the offence.

### 7.2 SERVICES PROVIDED BY INTERVENTION CENTRES

Additionally, Rifka Annisa, Indonesia's oldest women's crisis centre, established a men's program in 2007 to provide counselling and anger management for perpetrators of domestic violence.

As the coordinator of the program, Haysim, explained, "we started the men's program because our database shows most women go back to their husbands – about 90 per cent...Most of the men who have joined our program are volunteers because their wives have insisted they do this, [although]...there is a law where judges can order men undergo counselling".<sup>396</sup>

In comparison, under Article 97 of the Law of Criminal Procedure, a person is entitled to obtain rehabilitation only if the court has acquitted him or her of all charges by a judgment which has become final and binding.

## 8 THIRD PARTY RESPONSIBILITIES

Whilst there are no responsibilities or civil duties of care placed on specific third parties, the Domestic Violence Law places a general duty on all citizens. This general duty requires all citizens who hear, see or know of the occurrence of violence in a household to make all efforts, within in their capacity, to prevent the continuation of the crime, provide protection to the victim, provide emergency assistance and assist in the process of an application for a protection ruling.

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<sup>396</sup> Trisha Sertori, *Domestic violence is a war zone*, The Jakarta Post, 9 March 2010, <http://www.thejakartapost.com/news/2010/03/09/domestic-violence-a-war-zone.html>.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

While there does not appear to be any recent statistics, the United States Department of State's Country Reports on Human Rights Practices in Indonesia has consistently noted that violence against women remains poorly documented and significantly underreported by the government and that nationwide figures are unavailable.

Furthermore, most non-governmental organisations working on women and children's issues believe that the real figure of domestic violence was far higher than the available government statistics, as there is a tendency of many victims to keep silent. Reliable nationwide statistics on the incidence of rape also continue to be unavailable.

Although the same message is prevalent also in older reports, some statistics regarding prosecutions carried out in accordance with the legislation found that in 2005 three cases were investigated but no prosecutions were effected and in 2006 at least ten cases were prosecuted with punishments ranging from three to 18 months imprisonment.<sup>397</sup>

Nevertheless, the passing of the Domestic Violence Law itself has been hailed as overcoming an important cultural and psychological barrier, in that the parliament, and thus the legal system, has declared that domestic violence is not acceptable. Systemic and cultural change would be impossible without this essential first step. This is because, before this legislation was passed, domestic violence was considered a private matter.

The legislation has also been effective in giving police, prosecutors, and others within the justice system specific duties when reports of domestic violence are made, ensuring that they do not reject complaints.

A further positive and significant change from the legislation is in regards to evidence. As explained above, Article 55 of the Domestic Violence Law provides that the testimony of one witness, being the victim's, will be sufficient if combined with another piece of evidence (such as a document). This overrides the general rule under the Article 185(2) of the Law of Criminal Procedure, which prescribes that there must be at least two witnesses for an accused to be found guilty. This is important because, in reality, the only witness in a domestic violence case would be the victim themselves.

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<sup>397</sup> Bureau of Democracy, Human Rights and Labor, *Indonesia: 2005*, U.S. Department of State <http://www.state.gov/j/drl/rls/hrrpt/2005/61609.html>.

## 9.2 PROSECUTIONS UNDER CIVIL LAW

Whilst there appear to be no records regarding effectiveness of civil actions, the National Commission on Violence against Women (Komnas Perempuan) has documented the number of reported cases of violence against women. In 2011, the number stood at 113,878 domestic violence cases (95.61% of all violence against women cases) with data being collected from 395 service providers for women victims of violence across 33 provinces.<sup>398</sup>

In comparison, in 2009 the number of reported cases at 136,849 (95.31% of all violence against women cases), with data being collected from 300 organisations. The highest region with regards to domestic violence was Java, with a total of 120,326 reported cases (87.93% of all domestic violence).<sup>399</sup>

## 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Kamala Chandrakirana, chairwoman of Indonesia's National Commission on Violence against Women, noted in 2006 that a key challenge has been that law enforcement institutions have differing interpretations of the law, what constitutes domestic violence and which evidence will be admissible in court. This creates inconsistency in the implementation of the legislation. Indeed, most regions of Indonesia are still yet to implement the new procedures.<sup>400</sup>

One practical shortcoming of the legislation relates to a victim of domestic violence being medically examined at a hospital. The procedure set out in the legislation provides that when someone reports to police that they have been physically abused the police are required to give them a letter to request an examination at a hospital. The issue, however, is that if that examination does not occur within three days of the injuries being received, the results are not considered evidence in law.<sup>401</sup>

Rita Serena Kolibonso, head of Mitra Perempuan, a local women's crisis centre, has explained that this procedure creates another obstacle for women from low-income families. "With no money to undergo an examination, it's the same as saying they should forget about asking for help from the police".<sup>402</sup>

The prevailing norms, values and beliefs of Indonesian society also pose difficulties. According to one article from Inside Indonesia, these beliefs result

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398 Komnas Perempuan, *Annual Notes (CATAHU) of 2011*, Press Release, 7 March 2012 <http://www.komnasperempuan.or.id/en/2012/03/the-stagnation-of-the-legal-system-delays-hope-for-women-victims/>

399 Ibid.

400 T. Sima Gunawan, *Kamala fights to promote women's rights*, The Jakarta Post, 16 April 2006, <http://www.accessmylibrary.com/article-1G1-144915000/kamala-fights-promote-women.html>.

401 D Nugroho, *Abuse victims reluctant to speak out*, The Jakarta Post, 23 December 2005 <http://www.thejakartapost.com/news/2005/12/23/abuse-victims-reluctant-speak-out.html>.

402 Ibid.

in women being seen as having certain roles — as wives, as ‘sex providers’ for their husbands, as domestic workers.<sup>403</sup> Therefore, while women can, under the Domestic Violence Law, report domestic violence to the police, in practice their role in family life, as chattel of their husbands, places them in highly vulnerable and impoverished positions. They are essentially trapped in domestic violence by their lack of alternatives. This is because, if a woman tries to leave her husband or assists with the prosecution against him for domestic violence, she becomes a victim of her own community (sometimes even her own family), as they place all the blame on her and pronounce her to be a bad wife.

Furthermore, although the legislation is meant to apply nationally, there have been issues enforcing it at a local level, where autonomous decision-making does not recognise national legislation and priorities, meaning that women are facing further obstacles in accessing justice. One instance of this is in Bali, where the local *adat* laws run counter to and override national laws such as the Domestic Violence Law. Therefore, if a woman files for divorce in Bali, she will lose everything — her children, her home and her assets (including her money). This presents a huge challenge, as the local *adat* laws mean that the reality of a woman reporting domestic violence greatly diminishes, even disappears altogether.<sup>404</sup>

#### 9.4 PLANNED REFORMS/PILOT SCHEMES

While there appear to be discussions regarding reforms to the 2004 legislation, the legislation has been criticised by the media and other commentators. There have been a number of articles in the Jakarta Post. One article, *Roll out free exams to boost violence reporting*, says NGO, highlighted the shortcoming in the procedure for medical examination of a victim under the Domestic Violence Law. Another article, *Domestic violence is a war zone*, criticised the national Domestic Violence Law by outlining the issues surrounding its implementation at the local level. The piece also drew attention to the fact that, although there is no certainty regarding the precise numbers when it comes to domestic violence, it is alleged that only one in ten cases is being reported. Although not direct, this is still a criticism of the legislation, because if its enforcement were more effective, the number of cases being reported would be higher. A further article, *Kamala fights to promote women’s rights*, summarised one of the obstacles in the consistent implementation of the legislation.<sup>405</sup>

Additionally, Amnesty International has also raised concerns in regards to the setting up of Women and Children Service Units or ‘women’s desks’ in

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<sup>403</sup> Ibid, above n 3.

<sup>404</sup> Ibid, above n 6.

<sup>405</sup> Ibid.

regional, city and district police stations, as provided for under the legislation. The idea of these women's desks is that female officers receive reports of domestic violence from women and child victims and that they provide a place for temporary shelter. However, despite the promise of this service, Amnesty International has stressed that there are shortcomings with its implementation and effectiveness. For example, at a regional level, there is a lack of qualified personnel and resources to successfully run these women's desks. Furthermore they are not always located in a private area of the police station, meaning that victims of domestic violence are in the same vicinity as criminal suspects and other victims.<sup>406</sup>

There are also issues with accessing the women's desk when a victim is required to go through the Police Central Service Unit, located at the front of the police station, and usually staffed by men. Amnesty International has therefore recommended that the Indonesian authorities ensure that the Women and Children Service Units are publicised, adequately resourced, located in an area where women feel safe to approach them and that they are available throughout the country, to ensure they have a successful impact.

## 9.5 REVIEW OF DOMESTIC VIOLENCE LAWS

There does not appear to be a prescribed system for regular review of the legislation at a national level. However, internationally Indonesia's domestic violence law and other related legislation receive attention from organisations including human rights and women's rights bodies, such as the United Nations and its subsidiary UN Women, in their analysis of Indonesia's adherence to human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women, which Indonesia ratified in 1984. This results in a form of regular review being undertaken.

## 9.6 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS

The director of Legal Aid Institute for the Indonesian Women's Association for Justice (LBH Apik) director, Estu Rahmi Fanani, was cited in a Jakarta Post article as saying that of the approximately 300 reports their organisation had received by June 2009, nearly 50 domestic abuse claims were from the wives and partners of police officers, soldiers, lawyers, judges and public servants. This has a very negative impact on the effective implementation of the Domestic Violence Law.<sup>407</sup>

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<sup>406</sup> Ibid, above n 1.

<sup>407</sup> Ibid, above n 3.

The following quote from Kamala Chandrakirana, chairwoman of Indonesia's National Commission on Violence against Women sums up why there is still a long way to go, despite the enactment of national legislation on domestic violence:

“Isn't it because of our culture, the fact that we live in a male dominated society? Of course, perceptions of women's rights or violence against women cannot be changed in a year. There is a very long way to go because it involves the values of our own society, a society that where people have used culture, tradition and religion as a way to justify beating the wife. And even if the law says that if you beat your wife, you are committing a criminal offense, the culture says that once you marry a woman, you own her and you can do anything you want. Even the law cannot guarantee that men will stop beating their wives”.<sup>408</sup>

## ADDITIONAL RESOURCES

### Applicable law

1. Law of the Republic of Indonesia, Number 13 of Year 2006 concerning Protection of Witness and Victim
2. Law of the Republic of Indonesia, Number 23 of Year 2004 regarding Elimination of Violence in Household
3. Law of the Republic of Indonesia, Number 23 of Year 2002 on Child Protection
4. Law of the Republic of Indonesia, Number 8 of Year 1981 concerning the Law of Criminal Procedure
5. Penal Code of Indonesia

### Publications

1. Amnesty International, *Indonesia: Briefing to the UN Committee on the Elimination of Discrimination against Women*, July 2012 [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AmnestyInternationalForTheSession\\_Indonesia\\_CEDAW52.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/AmnestyInternationalForTheSession_Indonesia_CEDAW52.pdf)
2. Bureau of Democracy, *Human Rights and Labor, Country Reports on Human Rights Practices for 2011 – Indonesia*, U.S. Department of State <http://www.state.gov/j/drl/rls/hrrpt/2011humanrightsreport/index.htm?dliid=186273#wrapper>
3. Bureau of Democracy, *Human Rights and Labor, 2010 Human Rights Report: Indonesia*, U.S. Department of State <http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154385.htm>

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408 Ibid, above n 9.

4. Bureau of Democracy, *Human Rights and Labor*, 2009 Human Rights Report: Indonesia, U.S. Department of State <http://www.state.gov/j/drl/rls/hrrpt/2009/eap/135992.htm>
5. Bureau of Democracy, *Human Rights and Labor*, Indonesia: 2006, U.S. Department of State <http://www.state.gov/j/drl/rls/hrrpt/2006/78774.htm>
6. Bureau of Democracy, *Human Rights and Labor*, Indonesia: 2005, U.S. Department of State <http://www.state.gov/j/drl/rls/hrrpt/2005/61609.htm>
7. Department of Family Health and Research, Indonesia, World Health Organization <http://www.searo.who.int/entity/gender/data/indonesia.pdf>
8. UN Women, Indonesia, Factsheet <http://www.unwomen-eseasia.org/docs/factsheets/03%20INDONESIA%20factsheet.pdf>
9. National Commission on Violence against Women, *It is not only at Home: Women's Experience of Violence in Unequal Power Relation, Annual Note on Violence Against Women*, 7 March 2010 <http://www.komnasperempuan.or.id/publikasi/English/Komnas%20Publish/03.Annual%20Note%202010.pdf>

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1. IRIN, *Child protection a low priority in Indonesia*, 8 April 2013 <http://www.irinnews.org/report/97800/child-protection-a-low-priority-in-indonesia>
2. Komnas Perempuan, *Annual Notes (CATAHU) of 2011*, Press Release, 7 March 2012 <http://www.komnasperempuan.or.id/en/2012/03/the-stagnation-of-the-legal-system-delays-hope-for-women-victims/>
3. Telaumbanua & Partners, *Indonesian Criminal Procedures*, Open Trial <http://www.opentrial.org/lexpose-prototypes/indonesia/criminal-procedures>

### Governmental organisations

Australian Government (Refugee Review Tribunal), *Country Advice – Indonesia*, 18 February 2010. This is a useful resource regarding avenues of assistance available to a female victim of domestic violence, the Domestic Violence Law, and divorce in Indonesia.

# Japan

‘ *The definition of “child abuse” includes exposing a child to violence between their parents.* ’





# DOMESTIC VIOLENCE IN JAPAN

DLA Piper International LLP, Tokyo

## EXECUTIVE SUMMARY

In Japan, the prevention of and protection against domestic violence is covered by one main legislative act. The definition of domestic violence specifically includes physical and mental violence but is silent on economic abuse. The legislation operates relatively broadly to cover victims in a *de facto* state of marriage and divorcees, and has been interpreted to extend to gay relationships.

Prevention of and protection from domestic violence in Japan is provided for by the police, the courts and domestic violence agencies such as the Support Centre. Children are afforded additional protection under two separate pieces of legislation and accompanying guidelines provided by the Japanese Government.

Initially the main problem with Japan's domestic violence legislation was a reluctance on behalf of the authorities to investigate and prosecute anything other than the most serious cases. There are also perceived inadequacies in the safety afforded by "Protection Orders". However in recent years the National Police Agency has been more proactive in ensuring the domestic violence law is more widely implemented and the Gender Equality Bureau has undertaken regular audits to further address these issues.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Japan.

The legislation, the Act on the Prevention of Spousal Violence and Protection of Victims, defines domestic violence as:

"bodily harm by one spouse (illegal attacks threatening the other's life or body) or the words and deeds of one spouse that cause equivalent psychological or physical harm to the other".

The definition of spouse includes persons who are in a *de facto* state of marriage even if the marriage has not been legally registered, those who have obtained a divorce but are still being subjected to violence by a former spouse and those

in a *de facto* state of divorce after being in a *de facto* state of marriage. However, the definition does not extend to those in relationships outside of marriage or *de facto* marriage such as a man and a woman in a boyfriend and girlfriend cohabitation situation.

Further, while the definition is silent on gay, lesbian and transgender relationships, there is a 2007 case which applied the definition to a lesbian couple.

Mental abuse is specifically included, due to the words “equivalent psychological...harm to the other person” in the definition.

While the definition is silent regarding financial abuse, it is possible that the definition could cover financial abuse provided the harm is sufficiently serious, particularly if the abuse causes mental harm.

Teiko Tamaki of the Niigata University in Japan,<sup>409</sup> discusses the definition of domestic violence in relation to its application to same sex couples. The definition of spouse includes persons who are in a *de facto* state of marriage, even if it has not been legally registered. Tamaki argues that same sex couples could arguably be in a *de facto* state of marriage, despite not being legally registered (same sex couples in Japan are not recognised by law). However, “there was no implication for including same-sex couples at the legislation process and, moreover, there has hardly been any action or lawsuit to speak of about the issue”.<sup>410</sup>

## 1.2 FORMS OF DOMESTIC VIOLENCE

Domestic violence can be committed in any, or a combination, of the following forms:

- mental abuse;
- physical violence; and/or
- sexual violence — including rape;

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Japan is the Act on the Prevention of Spousal Violence and Protection of Victims (the “Prevention of Violence Act”).

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<sup>409</sup> Tamaki, T, *What’s in between the Lines—Principles and Realities of Family Law in Japan*, International Journal of the Jurisprudence of the Family, Vol.2(149) (2011).

<sup>410</sup> Ibid.

Additionally, the Anti-Stalking Act is relevant as it prohibits the stalking of others for the purpose of satisfying amorous feelings towards another as well as malignant stalking and is not limited to particular genders or types of relationships.

Further, the provisions of the Penal Code (the general criminal law) would apply in a domestic context.

## **2.2 INTERNATIONAL TREATIES**

Japan has signed and ratified a number of international treaties relevant to domestic violence. These are the:

- International Covenant on Civil and Political Rights, ratified on 21 June 1979;
- Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 25 June 1982;
- Convention on the Rights of the Child, ratified on 22 April 1994;
- Convention Against Torture, acceded to on 29 June 1999; and
- The International Covenant on Social, Economic and Cultural Rights, ratified on 21 June 1979.

# **3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW**

## **3.1 BURDEN OF PROOF**

Japanese criminal law is based on the presumption of innocence principle, i.e. the accused person is innocent until proven guilty.

The burden of proof is on the State prosecutor. Further, in the absence of physical evidence of abuse the prosecution may establish domestic violence by the victim's testimony or any available circumstantial evidence.

## **3.2 RELEVANT COURT**

Domestic violence prosecutions may be brought in the local district court or the summary court. In Japan, summary courts have jurisdiction for crimes punishable with a fine or other relatively minor penalties including penal custody from not more than 30 days.

The prosecutor has exclusive authority to prosecute offenders in the criminal jurisdiction and neither the police or any other government agencies may do so.

### 3.3 PROSECUTION FUNDING

Japan does not have special funding procedures for prosecuting domestic violence prosecutions.

The prosecutor's office itself is a tax-payer funded organisation, and therefore the funding of prosecutions is a matter for the government of Japan.

### 3.4 TIMESCALES

Subject to the complexity of the matter, an uncontested charge takes up to one month and a contested charge takes approximately six months or longer.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES<sup>411</sup>

Japanese law provides for the prosecution of domestic violence offences under civil law.

Under the Prevention of Violence Act, a victim may petition a court to:

- enjoin the offender from approaching
  - » the victim;
  - » the victim's children who have not reached the age of majority (which in Japan is 20 years old); or
  - » the victim's relatives or other persons with whom the victim has a close relationship in his or her social life;
- compel the offender to leave the domicile that the offender-spouse share as primary residence with the victim; and/or
- enjoin the offender from contacting the victim.

### 4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

The burden of proof lies with the applicant.

In civil actions it is for the victim to prove that he or she has been subjected to bodily harm or life-threatening intimidation by a spouse, and, that it is highly likely that he or she will receive serious bodily harm or life threatening injury due to the spouse.

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<sup>411</sup> Section 76(b) of the Civil Procedure Act 2007.

### 4.3 RELEVANT COURT

An application for injunctive relief must be filed with the district court that has jurisdiction over the areas where the offender maintains an address, or where the petitioner resides, or where the spousal abuse took place.

### 4.4 TIMESCALES

The average timescale for a hearing to obtain injunctive relief is 12.6 days (October 2001 to November 2008).<sup>412</sup>

### 4.5 FUNDING TO PROSECUTE

The provisions of the Civil Procedure Code apply to the protection order procedures provided under the Prevention of Violence Act.

Therefore, judicial aid could be granted to victims of domestic violence who lack the financial resources necessary to pay for trial costs or who will suffer substantial detriment in his/her standard of living by paying such trial costs (Article 21 of the Prevention of Violence Act and Article 82 of the Civil Procedure Code).

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

The Prevention of Violence Act establishes the Support Centre. The Support Centre provides:

- consultations to victims;
- guidance to victims regarding mental health issues;
- safety to victims in emergency situations including temporary protection; and
- information to victims regarding employment, changing living arrangements and other general support.

### 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

The Child Abuse Prevention Act and the Child Welfare Act provide special procedures for children. Under the Child Abuse Prevention Act, the definition of “child abuse” includes exposing a child to violence between parents.

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<sup>412</sup> Statistics provided by National Police Agency: <http://www.npa.go.jp/safetylife/seianki/24DV.pdf>.

Additionally, the Ministry of Health, Labour and Welfare has provided guidelines regarding support for children who have suffered abuse.<sup>413</sup>

Under this legislation and the guidelines provided by the ministry, a person who discovers a child has been abused by people with custody over the child is required to notify the Consultation Office for Children.

Through development of this system, a number of abuses are being discovered and the Consultation Office for Children works on these abuses by protecting the children involved, questioning the people with custody, inspection, requests to make appearance and the like.

## 6 OFFENCES

There are six main criminal offences under which domestic violence offences would be prosecuted. These are detailed in the table below:

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW – THE PENAL CODE</b>		
INJURY	Article 204	Imprisonment with labour for up to fifteen years or a fine of not more than JPY 500,000
VIOLENCE	Article 208	Imprisonment with for up to two years or a fine of not more than JPY 300,000, misdemeanour imprisonment without work or a petty fine
RAPE	Article 177	Imprisonment with labour for a minimum of three years
<b>LAW – ACT ON THE PREVENTION OF SPOUSAL VIOLENCE AND PROTECTION OF VICTIMS</b>		
VIOLATION OF PROTECTION ORDER	Article 29	Imprisonment with labour for up to one year or a fine of up to JPY 1,000,000
<b>LAW – ANTI-STALKING ACT</b>		
STALKING	Article 13	Imprisonment with labour for up to six months or a fine of up to JPY 500,000
VIOLATION OF RESTRAINT ORDER	Article 14	Imprisonment with labour for up to one year or a fine of up to JPY 1,000,000

<sup>413</sup> [http://www.mhlw.go.jp/seisakunitsuite/bunya/kodomo/kodomo\\_kosodate/dv/dl/120502\\_11.pdf](http://www.mhlw.go.jp/seisakunitsuite/bunya/kodomo/kodomo_kosodate/dv/dl/120502_11.pdf).

## 7 REHABILITATION MEASURES

The Child Abuse Prevention Act and the Child Welfare Act requires the national government as well as local government entities to promote research and study concerning methods for rehabilitation of offenders. These programs are to be supervised by the relevant national and local government entities and not by the courts.

However, there are few public organisations which offer such programs. In practice, not-for-profit organisations and private institutions such as rehabilitation centers provide these programs.

## 8 THIRD PARTY RESPONSIBILITIES

The Child Abuse Prevention Act and the Child Welfare Act requires those who are aware of spousal violence to report it to the Support Centre and or the police.

Further, if hospital practitioners treat people who they believe to be victims of spousal violence, they must report it to the Support Centre or the police.

Additionally, physicians or other medical personnel who, while treating a patient, detect injuries or medical conditions consistent with spousal violence may notify the Support Centre or the police but are not obligated to do so. However, they are obligated to make a good faith effort to provide the patient with information with regard to use of the Support Centre.

Once informed of spousal violence the Support Centre must advise the victim of its statutory duties and make any recommendations regarding the victims protection as it deems appropriate.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

There are no official records of the number of prosecutions carried out under the legislation. However, there are records of the number of arrests in relation to domestic violence.<sup>414</sup>

YEAR	2010	2011	2012
DOMESTIC VIOLENCE RELATED ARRESTS BY THE POLICE.	2,346	2,424	4,103

414 Statistics provided by National Police Agency: <http://www.npa.go.jp/safetylife/seianki/24DV.pdf>.

## 9.2 PROSECUTIONS UNDER CIVIL LAW

YEAR	2010	2011	2012
PROTECTION ORDERS GRANTED BY THE COURTS.	2,428	2,144	2,572

## 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Overall, protection orders under the Child Abuse Prevention Act and the Child Welfare Act appear to be the most effective legal measures for the prevention of domestic violence in Japan.

Additionally, the legislation has encouraged the police to be proactive in this area. Before the implementation of this legislation, the police would rarely commence an investigation into domestic violence unless there was evidence of serious injury or death. In response to relevant provisions in the legislation noted above, the National Police Agency have made internal non-binding guidelines which include best practice procedures in circumstances where a victim comes to the police seeking support.<sup>415</sup>

Nevertheless, there are significant problems with implementation and prevention. For example, a protection order simply requires the offender to maintain physical distance from the victim and does not provide additional financial and other support to the victim.

## 9.4 REVIEW OF DOMESTIC VIOLENCE LAWS

The Act on the Prevention of Spousal Violence and Protection of Victims has been amended a number of times since its inception — most notably in 2004 and 2007.<sup>416</sup> Moreover, the Japanese Government has intermittently released what are called a Basic Plan for Gender Equality — the most recent of which was in 2010. These statements identify the particular areas of concern for women in Japan and look at ways to best address them. The 2010 plan looked at eliminating all forms of violence against women.<sup>417</sup> It is expected that these reviews of the Act will continue into the future. The Japanese Government also instigated a National Council on Domestic Violence between 2008 and 2010.

<sup>415</sup> [http://www.keishicho.metro.tokyo.jp/sikumi/kunrei/seian\\_pdf/seisou/030.pdf](http://www.keishicho.metro.tokyo.jp/sikumi/kunrei/seian_pdf/seisou/030.pdf).

<sup>416</sup> <http://www.gender.go.jp/e-vaw/book/images/pdf/stoptheviolence.pdf>.

<sup>417</sup> [http://www.gender.go.jp/english\\_contents/about\\_danjo/whitepaper/pdf/3rd\\_bpg.pdf](http://www.gender.go.jp/english_contents/about_danjo/whitepaper/pdf/3rd_bpg.pdf).



## 9.5 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS

Additionally, it is important to note that foreigners who do not have permanent resident status tend to refrain from seeking legal assistance with spousal abuse. This is because if a foreigner wishes to continue living on a residency visa, they require a guarantee letter from their Japanese spouse.

A victim of domestic violence who is reliant on this visa is arguably less likely to report their abuse as they require the cooperation of their Japanese spouse. As such, it can be difficult for foreign spouses of Japanese citizens to receive support as they may be concerned that it could cause their deportation, especially if their term of residency has expired. While there is an official directive which allows officers not to report the expiration of residency to immigration authorities if a foreigner with expired residency status contacts the police to report spousal abuse, this directive is not well known or utilised.

Further, the directive is not binding and technically the police are permitted to report the victim to the immigration authorities. There are currently public calls for the enactment of legislation to assist foreign spouses with residency issues so that they may more freely report spousal abuse.

## ADDITIONAL RESOURCES

### Applicable law

1. Act on the Prevention of Spousal Violence and Protection of Victims (2007)
2. Anti-Stalking Act (2013)
3. Child Abuse Prevention Law (2004)
4. Child Welfare Act (2007)
5. Code of Civil Procedure (2011)
6. Penal Code (2007)

### Bulletins and published articles

Tamaki, T, *What's in between the Lines – Principles and Realities of Family Law in Japan*, International Journal of the Jurisprudence of the Family, Vol.2 No.149, (2011)

### Statistics

National Police Agency: <http://www.npa.go.jp/safetylife/seianki/24DV.pdf>

### Internet

[http://www.mhlw.go.jp/seisakunitsuite/bunya/kodomo/kodomo\\_kosodate/dv/dl/120502\\_11.pdf](http://www.mhlw.go.jp/seisakunitsuite/bunya/kodomo/kodomo_kosodate/dv/dl/120502_11.pdf)

**Governmental organisations**

1. Gender Equality Bureau, 2010 Basic Plan for Gender Equality  
[http://www.gender.go.jp/english\\_contents/about\\_danjo/whitepaper/pdf/3rd\\_bpg.pdf](http://www.gender.go.jp/english_contents/about_danjo/whitepaper/pdf/3rd_bpg.pdf)
2. Gender Equality Bureau Cabinet Office (English Site) [http://www.gender.go.jp/english\\_contents/index.html](http://www.gender.go.jp/english_contents/index.html)
3. Gender Equality Bureau Cabinet Office, 'Stop the Violence' Pamphlet, <http://www.gender.go.jp/e-vaw/book/images/pdf/stoptheviolence.pdf>
4. Internal circulation regarding enforcement of the Anti-Stalking Act by National Police Agency
5. [http://www.keishicho.metro.tokyo.jp/sikumi/kunrei/seian\\_pdf/seisou/021.pdf](http://www.keishicho.metro.tokyo.jp/sikumi/kunrei/seian_pdf/seisou/021.pdf)
6. Internal circulation regarding enforcement of the Act by National Police Agency
7. [http://www.keishicho.metro.tokyo.jp/sikumi/kunrei/seian\\_pdf/seisou/030.pdf](http://www.keishicho.metro.tokyo.jp/sikumi/kunrei/seian_pdf/seisou/030.pdf)

# Kenya

**‘** *In 2003 nearly half of the women in Kenya between the ages of 15 and 49 were victims of violence, and one out of four women had been a victim of violence in the preceding twelve months.* **’**



# DOMESTIC VIOLENCE IN KENYA

Kaplan & Stratton, Nairobi

## EXECUTIVE SUMMARY

Domestic violence law is relatively undeveloped in Kenya. Some commentators consider that the reason for the reluctance to identify domestic violence as an offence is because there is a continuing relationship between the victim and the assailant. The traditional view is that the law should not interfere in or potentially break up a family, for any reason.<sup>418</sup>

The legal framework regulating the prevention of and the protection against domestic violence, the legal redress for victims and State supervision of the issue can be divided into three main pillars: (i) the police, (ii) the courts; and (iii) non-governmental organisations.

The police control the peaceful co-existence of citizens and are tasked with the responsibility of investigating allegations of domestic violence when reported and prosecuting the offender. The courts deal with domestic violence under both civil and criminal law although there are currently no specific laws relating to domestic violence. Non-governmental organisations act as centres for education, awareness, counselling and rehabilitation for victims of domestic violence.

A bill on domestic violence has been proposed which, if passed, will mark the first time domestic violence has been acknowledged as a unique offence. The bill also sets out increased responsibilities for the police and greater support for victims by empowering the courts to make certain orders.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 GENERAL DEFINITION OF DOMESTIC VIOLENCE

There is no one definition of domestic violence in Kenyan law. A number of laws and organisations who work to prevent domestic violence have defined domestic violence in different ways.

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<sup>418</sup> Charles Morrison, *Offending or Chastising? Towards Codifying Domestic Violence*, 2007, 13.

The Protection Against Domestic Violence Bill 2012 defines domestic violence as “violence against [a] person, or threat of violence or of imminent danger to [a] person by any other person with whom [that] person is, or has been, in a domestic relationship.”

FIDA (Federation of Women Lawyers) Kenya, in its paper *Gender-based domestic violence in Kenya*, defines domestic violence as an act that “occurs when a family member, partner or ex-partner attempts to physically, sexually, economically or psychologically dominate another.”

In the article, *Setting up of a Kenya National Domestic Violence Call Centre (K-NDVCC): Prototype and Pilot*, authors David Ndegwa Kuria, Moses Murimi Ngigi, Moses Kariuki Gachari and John Gitau Kahiu<sup>419</sup> use the brief definition by Chambliss<sup>420</sup> that domestic violence is “abuse involving intimate partners”.

Muchera in *A Critical Assessment of the Efficacy of Domestic Laws in Kenya*<sup>421</sup> defines domestic violence as an “an array of abusive behavior by either spouse in an intimate association such as marriage, courting, family, associates or cohabitation, and in which either spouse uses physical ferocity, compulsion, extortions, intimidation, and isolation, emotional, carnal, or financial manipulation to regulate the other spouse in a relationship.”

ACORD’s paper, *Pursuing Justice for Sexual and Gender based violence in Kenya*<sup>422</sup> provides a gender focused definition of domestic violence as “the use of force or threats by a husband or boyfriend to coerce or intimidate a woman into submission.”

The United Nations Centre for Social Development and Humanitarian Affairs: *Strategies for Confronting Domestic Violence’s Resource Manual*<sup>423</sup> defines domestic violence as violence between members of a household, usually spouses. It can come in the form of pushing, hitting, choking, slapping, kicking, burning or stabbing.

Organisations that deal specifically with issues of domestic violence apply gender oriented definitions. Whilst violence involving children in the family setting would be referred to as family violence, domestic violence in Kenya connotes spousal violence. Kenya has also adopted the common law definition of what is considered a spouse or partner meaning marriage is not a pre-requisite to domestic violence.

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419 2012 International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies; <http://www.tuengr.com/V03/55-74.pdf>.

420 Chambliss et al 1995.

421 Muchera Sr., J. N., *A critical assessment on the efficacy of Domestic Violence laws in Kenya*, Independent, 2011.

422 *Options for Protecting and compensating survivors of sexual and gender-based violence*, ACORD — Agency for Cooperation and Research in Development, March 2010.

423 *Strategies for Confronting Domestic Violence*, 7 U.N. DOC. ST/CSDHA/20, 1993.

Since there is no clear definition of domestic violence in Kenya, it can be assumed that it only applies to heterosexual persons. Non-governmental organisations such as FIDA have not openly recognised domestic violence against gay, lesbian or transgendered people. A few exceptions are the Gay Kenya Trust<sup>424</sup> and the Gay and Lesbian Coalition of Kenya.<sup>425</sup>

The courts recognise transgendered people as having equal constitutional rights.<sup>426</sup> Gay people however, have not been acknowledged as such. This, however, would only be relevant if there was an Act that governed domestic violence. Since the Penal Code is the most widely used Act in situations of domestic violence and offences such as common assault are the usual charges against the offenders, the issue of sexual orientation does not arise.

## 1.2 MENTAL ABUSE AS A FORM OF DOMESTIC VIOLENCE

According to FIDA, domestic violence “comes in the form of emotional, psychological, sexual, financial and physical abuse.”<sup>427</sup>

Mental abuse in a domestic context is recognised in Kenyan divorce legislation. One of the grounds for divorce is cruel treatment as per the Matrimonial Causes Act.<sup>428</sup> The High Court of Kenya<sup>429</sup> adopted the following explanation of cruelty by Sir Charles Newbold:<sup>430</sup>

“no comprehensive definition of cruelty has ever been accepted as satisfactory — much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.”

Mental abuse can be perpetuated in the form of intimidation or threats. The Penal Code provides that a person is deemed to have intimidated another where:

- there is intent to cause alarm to that person or to cause him to do any act which he/she is not legally bound to do; or
- he or she causes or threatens to cause unlawful injury or damage to the reputation or property of that person or anyone in whom that person is interested.<sup>431</sup>

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424 <http://gaykenya.com>.

425 <http://galck.org/>.

426 *R.M. v Attorney General & 4 others* [2010] eKLR.

427 <http://fidakenya.org/2011/01/domestic-violence/>.

428 Section 8.

429 In *W.M. M v B.M.L* [2012] KLR.

430 *Colarossi v Colarossi* [1965] E.A. 129.

431 Section 238(2).

## 2 APPLICABLE LEGISLATION

### 2.1 CONSTITUTION OF KENYA

In Kenya, the primary law from which the tenets of all law derive from is the Constitution of Kenya (the “Constitution”). Its preamble states “[w]e the people of Kenya are committed to nurturing and protecting the well being of the individual, the family, communities and the nation.”

Notwithstanding the protections afforded to victims of domestic violence within criminal law (and as discussed further below), the Constitution also contains shields which a victim can employ in a court by way of a Constitutional petition relying on the following personal rights:

- Article 45 recognises the family as a natural and fundamental unit of society and the necessary basis of social order and exhorts the State to accord it protection. The article also gives equal rights for persons over 18 years of age to marry provided they both freely consent. Parties to a marriage are also accorded equal rights during and, if relevant, at the dissolution of the marriage;
- Article 28 maintains the respect and protection of human dignity;
- Article 29(f) stipulates protection from being treated or punished in a cruel, inhuman or degrading manner;
- Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law; and
- Article 2(6) provides that Kenya shall be bound by any treaty or convention it ratifies and the same shall form part of the law of Kenya under the Constitution.

### 2.2 KENYAN NATIONAL COMMISSION ON HUMAN RIGHTS (THE “COMMISSION”)

The Commission was established pursuant to Article 59 of the Constitution and its mandate is the promotion and protection of human rights. The Commission’s function includes but is not limited to informing and sensitising the public on human rights through lectures, publications, symposia and other means. The Commission has to observe the principle of impartiality and gender equity in the course of its work.

The Commission is set up to promote democracy and a culture of human rights protection in the country. The Commission’s role is to advance gender equality in all spheres of society and make recommendations on any legislation affecting the status of women. It’s ethos is to promote gender equity, working to ensure a level playing field for both men and women, removing all forms of discrimination that prevail against women.

## 2.3 DOMESTIC VIOLENCE LAWS

There are currently no specific laws in Kenya regarding domestic violence. However, the Protection Against Domestic Violence Bill is awaiting assent and does specifically relate to domestic violence offences.

Currently under Kenyan law domestic violence is dealt with under the provisions of a number of separate legal acts depending on the type and severity of the offence. These include:

- the National Police Service Act No 11A of 2011 — this Act makes it the role of the police to assist the public, maintain law and order, preserve peace, protect life and property, investigate crimes, collect intelligence, prevent and detect crime, apprehend offenders and enforce law.<sup>432</sup> Furthermore, the Act provides that if a police officer has reasonable cause to believe that anything necessary to the investigation of an offence is in any premises, the officer may enter;<sup>433</sup>
- the Criminal Procedure Code<sup>434</sup> — provides that a police officer can intervene in a situation for the purpose of preventing a cognisable offence and that the police officer shall to the best of his ability prevent an offence occurring;<sup>435</sup>
- the Penal Code<sup>436</sup> — includes offences such as common assault<sup>437</sup> and assault causing actual bodily harm<sup>438</sup> which are common offences committed in a domestic violence situation;
- the Sexual Offences Act<sup>439</sup> — includes offences of rape, sexual assault, defilement and indecent acts with children. These acts committed on a person of close relationship would constitute domestic violence;
- the Act on Social and Legal Protection of Children — this Act contains provisions requiring individuals to notify the authorities where there are any signs of domestic violence against children; and
- the Children's Act<sup>440</sup> — enacted to give effect to the principles of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (Kenya has ratified both instruments). The Children's Act provides that the primary consideration for any act concerning a child should be the child's best interests.<sup>441</sup> This sets a high expectation for the protection of children including within their own homes. The Act also expressly identifies the effect domestic violence has on children, what measures can be taken and what orders the court can give.

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432 Section 24.

433 Section 57.

434 Chapter 75, Laws of Kenya.

435 Section 62.

436 Chapter 63, Laws of Kenya.

437 Section 250.

438 Section 251.

439 No. 3 of 2006.

440 No. 8 of 2001.

441 Section 4(2).



## 2.4 INTERNATIONAL TREATIES

After the passing of the 2010 Kenya Constitution, Kenya shifted from being a dualist state to a monist state in terms of the applicability of international law. Previously, international laws were not applicable in Kenya unless they had been ratified and confirmed in the form of a domestic law. For example, after ratifying the Convention on the Rights of the Child, Kenya enacted the Children's Act to make the obligations in the Convention binding in domestic situations.

However, the position now is that domestic laws and international laws, once ratified, have the same gravity and force domestically regardless of whether the treaty or convention has been enacted in domestic law.

The following international treaties have been ratified by Kenya and could be relevant in situations of domestic violence:

- International Covenant on Civil and Political Rights (ICCPR), ratified by Kenya on 1 May 1972. It is substantially incorporated into Kenyan law as most of its provisions are incorporated in the Bill of Rights under the current Constitution. The ICCPR prohibits domestic violence. It contains a non-discrimination clause<sup>442</sup> and also provides that “all individuals are equal under law and are eligible devoid of any discrimination the equal protection of the law.” Further, Article 7 protects persons from torture or cruel, inhuman or degrading treatment or punishment and Article 9(1) which protects the right to liberty and servility of person may be construed to cover the issue of domestic violence;
- African Charter on Human and People's Rights ratified by Kenya on January 23 1992;<sup>443</sup>
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the “Maputo Protocol”). The Maputo Protocol places an obligation upon States to address violence against women and other aspects of women's rights. It defines violence in Article 1 to include all harmful acts perpetrated against women including physical, sexual, psychological and economic harm, or even threats to take such acts.<sup>444</sup> Kenya signed the Maputo Protocol in 2003 and is therefore required to implement it at a national level, and to submit periodic reports on the progress made and challenges met during implementation;
- International Covenant on Social, Economic and Cultural Rights (ICESCR), ratified by Kenya on 1 May 1972;
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), acceded to by Kenya on 9 March 1984. As a signatory, Kenya is under an obligation to eradicate discrimination against women and guarantee women's equality in all aspects of law including law relating to marriage;

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<sup>442</sup> Article 2.

<sup>443</sup> <http://www.hrcr.org/docs/Banjul/afrhr.html>.

<sup>444</sup> [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html).

- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Kenya on 6 October 1999;
- Convention on the Rights of the Child (CRC), ratified by Kenya on 31 July 1995;
- Universal Declaration of Human Rights provides that every person is born at liberty and is equal in self-worth and rights<sup>445</sup> and that no person will be submitted to torture or harsh, inhuman or undignified treatment.<sup>446</sup> The non-discrimination clause taken together with Article 3<sup>447</sup> and Article 5<sup>448</sup> may be construed to mean that any form of violence amounting to the threat to life, liberty or serenity of the person or which constitutes torture or cruel, inhuman or degrading treatment is a violation of the international obligation of member states;
- United Nations Declaration on the Elimination of Violence Against Women; and
- United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

### 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

#### 3.1 BURDEN OF PROOF

Kenyan criminal law is based on the presumption of innocence principle, meaning the accused is considered to be innocent until proven guilty. The threshold to convict is quite high and the burden of proof is on the victim (and the State prosecutor) to prove beyond reasonable doubt that the accused committed the offence.

To convict, the State prosecutor must show that:

- the action the accused has been charged with has been committed;
- the action qualifies as a criminal offence under the applicable criminal law; and
- the accused is the individual who committed the action.

#### 3.2 RELEVANT COURT

Usually cases are first brought before the Principal Magistrates' Court having jurisdiction in the area where the offender and victim reside or where the offence occurred. Matters specifically involving children are usually heard in the Children's Court.<sup>449</sup>

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445 Article 1.

446 Article 5.

447 Article 3 states, "Everyone has the right to life, liberty and security of person."

448 Article 5 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

449 Children's Act, Cap 586, section 73.

Upon appeal, the matter is brought before the Chief Magistrate's Court<sup>450</sup> and then can be appealed to the High Court. The High Court can also be a court of first instance as it has unlimited jurisdiction.<sup>451</sup>

Appeals from the High Court are heard by the Court of Appeal.<sup>452</sup> The Supreme Court of Kenya has the jurisdiction to hear matters on appeal from the Court of Appeal if they raise issues of national importance.<sup>453</sup>

### 3.3 STAGES OF THE PROCEEDINGS

Criminal proceedings usually proceed as follows:

- a claim is filed by the victim at the nearest police station — his or her statement is taken and they are referred to the police doctor if necessary and then to an external doctor to confirm the findings;
- the alleged offender is investigated by the police — the police take all necessary steps to ascertain whether a criminal offence was committed and to identify the offender;
- preparation of charges by a State prosecutor — the State prosecutor, in cooperation with the police, undertakes all necessary investigations to prepare charges against the offender. The State prosecutor is obliged to prosecute all criminal offences it learns about from the police or from its own activities; and
- court proceedings — the court will decide on the guilt/punishment or innocence of the offender.

### 3.4 PROSECUTION FUNDING

The prosecution of offenders under criminal law is carried out and funded entirely by the State. A special unit was established in 2005 under the Director of Public Prosecutions to handle sexual offences and their prosecution.

A victim can participate in the criminal proceedings in the position of a witness and/or an aggrieved party. In criminal cases the victim will be represented by the State prosecutor and does not require separate legal assistance.

Pursuant to Article 50 of the Constitution, accused persons (in this case, the domestic violence offenders) are also entitled to legal counsel because their liberty is at stake.<sup>454</sup>

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<sup>450</sup> Judicature Act, Cap 8.

<sup>451</sup> Article 165, Constitution.

<sup>452</sup> Appellate Jurisdiction Act, Cap 9.

<sup>453</sup> Supreme Court Act, No. 7 of 2011.

<sup>454</sup> In *David Njoroge Macharia v Republic*, 2011, Eklr, the Court of Appeal affirmed that an accused person would have the right to have a lawyer provided at the expense of the government in cases where “*substantial injustice would otherwise result*” and where due to the matter’s complexity in issues of fact or law, the accused is unable to conduct his own defense effectively.

### 3.5 TIMESCALES

The time a matter will take is dependent on the: complexity of the issues of fact and law; number of witnesses; preparedness of the prosecutor and diaries of the police, defence counsel and the court. If a party feels a matter has been unnecessarily protracted, a complaint can be made to the Judiciary Ombudsman.<sup>455</sup>

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

There are currently orders which a victim can apply for to restrain the movement of a domestic violence offender, and an injunction can be granted preventing the offender from being present in certain property (i.e. the victim's home) or preventing the offender from selling a property. Injunctions restraining the alleged offender's movements will be permitted once the new bill, Protection from Domestic Violence 2012 is passed.

The police can also arrest the offender to protect the victim. The police will assess the situation and consider the risk of repeated attacks. If the police consider that the risk is high and that domestic violence has taken place, the offender will be arrested.

### 4.2 SPECIFIC PROTECTION FOR CHILDREN

The Children's Act specifically provides remedies for where the victim of domestic violence is a child. The Act identifies exposure to domestic violence as an indicator that the child is in need of care and protection.<sup>456</sup>

The Children's Act maintains that all actions concerning children should be in their best interest<sup>457</sup> and states that parental responsibility includes a duty to protect the child from neglect, discrimination and abuse.<sup>458</sup> Every child is entitled to protection from abuse<sup>459</sup> and the Act provides that it is an offence for a person with parental responsibility to assault, abandon, expose a child to unnecessary suffering or knowingly cause that child to become in need of care and protection.<sup>460</sup>

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<sup>455</sup> <http://www.judiciary.go.ke/placeholder/>.

<sup>456</sup> Section 119 (1)(j) Children's Act.

<sup>457</sup> Section 4 Children's Act.

<sup>458</sup> Section 23(2) Children's Act.

<sup>459</sup> Section 13 Children's Act.

<sup>460</sup> The penalty for this offence is a fine of not more than Kshs.200,000 and/or a minimum imprisonment term of five years.

The Children's Act outlines the procedure for an application to the court to deal with a child who is in need of care and protection as a preliminary measure.<sup>461</sup> To protect the child on an interim basis, the court can order that the child be committed to a rehabilitation school, put in the custody of an appointed local authority or a charitable children's institution or relocated to another place of safety.<sup>462</sup> The interim measure lasts for one month but can be repeatedly granted up to a maximum of six months.

### **4.3 TIMESCALES FOR OBTAINING RELIEF**

The police must act without undue delay when responding to a domestic violence situation, although no timescales are expressly set out in legislation.

The court must decide on domestic violence matters which involve a child on a priority basis due to the sensitive nature of the situation and the need to immediately protect the child.

There is no systematic way of accurately predicting the timescales in which the court will hear cases. The Civil Procedure Act provides that cases be classified as small claims, fast track or multi track.

A small claims matter would be a claim of a value of less than Kshs.49,999. A fast track matter is where there are undisputed facts and legal issues, relatively few parties and it is thought that the case will be concluded within 180 days of the pretrial directions.

Contrastingly, a multi-track case will involve complex facts and legal issues, several parties and is thought likely to be concluded within 240 days of the date of the pretrial directions.

### **4.4 BURDEN OF PROOF**

The burden of proof is on the applicant. An application for a preliminary measure must identify the parties involved and describe the most important facts justifying the issuance of such preliminary measure.

### **4.5 RELEVANT COURT**

An application requesting a preliminary measure in a domestic violence situation should be submitted to the High Court of Kenya which has the power to issue injunctions.

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<sup>461</sup> Section 120 Children's Act.

<sup>462</sup> Section 2 defines that a place of safety is any institution, hospital or suitable place where the occupier is willing to accept the temporary care of a child.

An application for a preliminary measure regarding a child must be submitted to the Children's Court.

#### 4.6 PROCEDURE

An application for a preliminary measure can only be submitted by the victim or their guardian *ad litem*. However, proceedings can also be initiated by the court *ex offio suo motto* within its own capacity (without any prior application) if an offence has been identified by the court.

#### 4.7 FUNDING

A victim who has initiated or wishes to initiate legal proceedings may require legal advice from a qualified advocate to help them prepare the application and to represent him or her in the proceedings.

If the victim can show that they do not have sufficient resources to pay for legal representation the judge can order that the legal representation is carried out, fully or partially, at the expense of the State. These "pauper briefs" are provided for in the Civil Procedure Act.

Police action is carried out at the expense of the State and the victim does not have to expend any money for the arrest, investigation or charge of an alleged offender.

A number of non-governmental organisations are active in Kenya and can provide free legal assistance to victims of domestic violence as a part of their voluntary activities. Such organisations include FIDA, Centre for Rehabilitation and Education of Abused women, Kituo Cha Sheria and CRADLE.<sup>463</sup>

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

There are no laws or official codes of conduct issued by public authorities governing the provision of support for adult victims of domestic violence. Support is in practice largely provided by the police and non-governmental organisations.

There are provisions in the Act on the Police of Kenya governing the obligations of the police towards victims of domestic violence. The police are required to

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<sup>463</sup> For the list of the major non-governmental organisations active in this area, please refer to the Additional Resources section below.

protect members of the public and are obliged to take all reasonable measures to stop the violence from taking place and to arrest the perpetrator.

The police are obliged to give advice on what recourse a victim can take. The police must also record the victim's statement, ensure the victim is given adequate medical care depending on the gravity of their ordeal and must maintain confidentiality especially when dealing with minors.

## 5.2 SUPPORT FOR CHILDREN

The applicable laws regarding child welfare are: the Constitution, the Children's Act, the Penal Code and Civil Procedure Act. There is also a general obligation on any person witnessing or having knowledge of domestic violence against children to report it to the police.

Support for children threatened by domestic violence is largely provided by the National Council for Children's Services which set up the Area Advisory Councils to provide legal and psychological assistance to children who are victims of domestic violence.

Children at risk are relocated to places of safety. Whilst in theory the government should provide such places of safety, in reality, it is non-governmental organisations who provide limited (albeit vital) shelter and protection for child victims of domestic violence. There are codes of conduct within the various institutions/places of safety that children in need of care are relocated to. Non-governmental organisations have their own codes of conduct which they follow in line with their constitution and the relevant legislation.

Matters handled by non-governmental organisations are overseen by the NGO Coordination Board.<sup>464</sup>

## 6 OFFENCES

Domestic violence acts can be prosecuted:

- in criminal proceedings as criminal offences under the Penal Code;
- in administrative proceedings as sexual offences under the Sexual Offences Act; or
- in Children's Court proceedings under the Children's Act.

Criminal offences include:

- intimidation (where the offender intends to cause alarm to another

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<sup>464</sup> To be replaced by the Public Benefit Organisations Regulatory Authority when the Commencement date is announced and the Authority is set up.

person or to cause him/her to do any act which he/she is not legally bound to, and causes or threatens unlawful injury to the reputation or property of another person);

- common assault;
- assault causing actual bodily harm;
- rape (unlawfully and intentionally committing an act which causes penetration with his or her genital organ); and
- defilement (intentionally commits rape or an indecent act with another or within the view of a family member, child or a person with mental disabilities).

## 7 PENALTIES AND SANCTIONS

For the above offences, the typical sentences are as follows:

- intimidation – imprisonment for not more than three years;
- common assault – if the assault is not committed in circumstances for which a greater punishment is provided for in the Penal Code, imprisonment for one year;
- assault causing actual bodily harm – imprisonment for five years;
- rape – imprisonment for a term of not less than five years. For more serious rape offences a life sentence can be given; and
- defilement – imprisonment for a term of not less than ten years.

For criminal misdemeanours where the offender sought to acquire or acquired a material benefit by committing the crime, punishment is usually in the form of a fine. In practice, this penalty is not frequently used unless it has been expressly stipulated in the Penal Code.

## 8 REHABILITATION MEASURES

### 8.1 COURT-IMPOSED REHABILITATION

There is no therapy specifically aimed at the rehabilitation of domestic violence offenders which can be imposed by a court. The court can however require that an offender who is on trial undergo psychiatric evaluation (as a type of protective measure).

The lack of court-imposed rehabilitation could be explained by the fact that the court is not focussed on the offender's mental, sociological or situational motivation for committing the offence. The offence is perceived as the root



problem and it is not considered if the offence has arisen due to a greater widespread societal deficiency.

## **8.2 SERVICES PROVIDED BY NON-GOVERNMENTAL ORGANISATIONS**

Some non-governmental organisations such as ACORD participate in rehabilitation or therapy programmes for domestic violence offenders and for people who have problems coping with their aggression. Participation in these rehabilitation programmes is voluntary. Usually, the offenders who recognise they have a problem and who wish to save their family are willing to participate in these programmes to prevent further violence.

The criteria that offenders have to meet before being admitted to such programmes and the conditions offenders must comply with while participating vary depending on the requirements of the programme organisers.

## **9 THIRD PARTY RESPONSIBILITIES**

No legal duty is imposed on individuals to notify the police or authorities of domestic violence committed between adults (subject to the duty outlined in the paragraph below regarding serious criminal offences). More protective provisions are set out with respect to children. All individuals, including those in schools, hospitals and State authorities, have a statutory obligation to notify the relevant authorities if a child is threatened by domestic violence. However, there are no legal consequences for not complying with this obligation.

If the act of domestic violence qualifies as a serious criminal offence such as murder, grievous bodily harm, restriction of personal freedom, blackmail, rape or maltreatment of a person in ward, all individuals are legally obliged to thwart the violence or to report the violence to the police or State prosecutor without undue delay.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 OCCURRENCE OF DOMESTIC VIOLENCE TO DATE

The problem of domestic violence is widespread in Kenya. According to the Kenya Demographic and Health Survey (KDHS) in 2003 nearly half of the women in Kenya between the ages of 15 and 49 were victims of violence, and one out of four women had been a victim of violence in the 12 months preceding the survey.<sup>465</sup>

The results of the survey also showed that in 5% of cases of violence against women between the ages of 15 and 49, the spouse was the perpetrator of the violence. The mother, father or brother was the aggressor in 24%, 15% and 8% of cases respectively.<sup>466</sup> The survey also indicated that 40% of married, separated or divorced women had experienced physical abuse, while 26% had been subjected to psychological abuse and 16% experienced sexual abuse.<sup>467</sup>

### 10.2 CHALLENGES

Challenges faced by the authorities when enforcing domestic violence laws include:

- the lack of a legal framework for domestic violence;
- a lack of expertise to deal with the social and psychological aspects of domestic violence.<sup>468</sup> In Kenya, there is only one “women only” police station, Kilimani Police Station which deals exclusively with rape, domestic violence and child abuse. However, this station alone does not have the capacity or resources to provide the shelter, legal advice and counselling needed to tackle the effects of domestic violence. Public institutions are ill equipped to provide such support and there is a disproportionate reliance on non-governmental organisations;
- tradition and culture — the police function within the largely conservative patriarchal Kenyan society. Domestic violence is deemed to be a private family issue. This makes any intervention or reporting very unlikely. Female empowerment is an issue that needs to be addressed to educate women so they are not dependent on their husbands and can actively oppose violence against them without fearing that if they do so they will become destitute;
- a lack of specialisation of police and other authorities — there is insufficient education or training in domestic violence given to the police or persons working for the National Council for Children’s Services and the Area Advisory Councils;
- the institutions required for the housing and rehabilitation of victims and

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<sup>465</sup> Kenya — July 2004, 242.

<sup>466</sup> Kenya — July 2004, 243.

<sup>467</sup> Kenya — July 2004, 250.

<sup>468</sup> Amnesty International, 2005, Kenya: Rapport 2005, Paris: Editions francophones d’Amnesty Intl.

offenders respectively have not been efficiently set up to cope with the demand;

- insufficient focus on the offenders — there is not enough legal focus on preventive or rehabilitation work with offenders to develop or rectify their social habits and/or to control their aggression. It is difficult to find any suitable preventive, educative or rehabilitation programmes; and
- judges do not impose protective measures, e.g. psychological-social treatment or other rehabilitation programmes, in an adequate number of cases. This could be due to rehabilitation programmes not being organised systematically meaning a judge may not be aware of the types of programmes available in his or her district.

### 10.3 REFORM OF DOMESTIC VIOLENCE LAWS

A new bill titled Protection from Domestic Violence 2012 is waiting to be passed. If passed, the Protection against Domestic Violence Bill 2012 will mark the first time domestic violence has been specifically acknowledged as being a unique offence that warrants particular awareness and management. Further, the new law expands the responsibilities of police who will now be expected to advise on relief measures, the rights of the applicants and arrest and charge the alleged offender.

The Protection from Domestic Violence Bill 2012 further recognises domestic violence (in all its forms) as unacceptable behaviour and ensures that where it happens, the victims are protected by:

- empowering the courts to make certain orders to protect the victims;
- ensuring speedy, inexpensive and simplified procedures to access justice;
- requiring perpetrators of such violence to undergo counselling programs with a view to preventing the violence; and
- providing counselling programmes for the victims.

If the Protection against Domestic Violence Bill 2012 is passed, the courts will be able to issue protection orders and will have a wide discretion as to the remedies to be given to the victim. Such remedies could include prohibiting the offender from contacting or being in the vicinity of the victim.<sup>469</sup>

The Commission on the Implementation of the Constitution sent the Bill to the Attorney General's office and it is awaiting Gazettment. The Attorney General is charged with the responsibility of publishing it. According to the Kenya Law Reports office, all indicators show that the Bill is still within the Attorney General's precinct.<sup>470</sup>

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<sup>469</sup> See the definition of a "protection order" in section 2, Protection against Domestic Violence Bill 2012.

<sup>470</sup> As of 30th April 2013.

Although the debate on whether domestic violence is primarily a gender-based act is ongoing, most Kenyan organisations aiming to tackle domestic violence have taken a pro-feminist approach and have focussed their work on women's issues. However, following a rise in incidents of male victims of domestic violence in various regions in Kenya, a male-oriented movement, "*Maendeleo ya Wanaume*",<sup>471</sup> has raised awareness that men can also be victims of domestic violence.

There are no legal provisions requiring regular review of domestic violence laws. However, the Commission for the Implementation of the Constitution is tasked with taking the initiative to continuously implement laws in accordance with the Constitution.

## ADDITIONAL RESOURCES

### Applicable law

1. Constitution of Kenya, 2010
2. Penal Code, Cap 63
3. Sexual Offences Act
4. Matrimonial Causes Act
5. Evidence Act, Cap 80
6. National Police Service Act, No. 11A of 2011
7. Appellate Jurisdiction Act, Cap 9
8. Supreme Court Act, No. 7 of 2011
9. Children's Act No. 8 of 2001
10. National Commission on Gender and Development Act of 2003
11. Judicature Act, Cap 8
12. Public Benefit Organisation Act, 2013
13. Criminal Procedure Code, Cap 75
14. Civil Procedure Rules 2010
15. Convention of the Elimination of Discrimination against Women
16. United Nations Convention against Torture and other cruel inhuman or degrading treatment or punishment
17. United Nations Declaration on the Elimination of Violence against women

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<sup>471</sup> *Maendeleo ya Wanaume* is an organisation that advocates for the empowerment and rights of men in Kenya <http://maendeleoyawanaumekenya.kbo.co.ke/home>.

18. African Charter on Human and People's Rights
19. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol)
20. International Covenant on Civil and Political Rights
21. Universal Declaration on Human Rights
22. Convention on the Rights of the Child
23. International Covenant on Social, Economic and Cultural Rights
24. Protection from Domestic Violence Bill, 2012

### **Publications**

1. Muchera Sr. J. N., *A Critical Assessment on the Efficacy of Domestic Violence laws in Kenya*, Independent, 2011
2. ACORD (Agency for Cooperation and Research in Development), *Options for Protecting and Compensating Survivors of Sexual and gender-based violence*, March 2010

### **Bulletins and published articles**

1. Kuria D. N., Ngigi M. M. and Kahiu J.G., *Setting up of a Kenya National Domestic Violence Call Center (K – NDVCC): Prototype and Pilot Implementation*, International Transaction Journal of Engineering, Management and Applied Sciences and Technologies
2. Federation of Women Lawyers (FIDA) Kenya, *Gender Based Domestic Violence in Kenya*, undated
3. Charles Morrison, *Offending or Chastising? Towards Codifying Domestic Violence*, (2007) 13
4. LR Chambliss, RC Bay, RF Jones III, *Domestic Violence: An educational imperative*, American Journal of Obstetrics and Gynecology and Academic Affairs, Maricopa Medical Center, USA
5. J. M. Migai, *The Penal Code and Spousal Rape: Is there need for legislative intervention? (1995)*, University of Nairobi Law Journal Issue No. 2, 16th January 2011

### **Judgments**

1. *Chea v Republic* Criminal Case No.495 of 2002
2. *AB v CD* [2001] 28 KLR 210
3. *Republic v Duncan Gichuhi Waiyaki* [1995] EA 929
4. The Wilmina Achieng case [1998] EA 177736
5. *David Njoroge Macharia v Republic* [2011] Eklr
6. *R.M. v Attorney General and 4 others* [2010] Eklr
7. *W.M.M. v B.M.L.* [2012] Eklr
8. *Colarossi v Colarossi* [1965] E.A. 129

### Other sources

United Nations: *Strategy for confronting Domestic Violence*, 7 U.N. DOC.ST/CS DHA/20 (1993)

### Statistics

Kenya Demographic and Health Survey National Survey on Domestic Violence, July 2004

### Internet resources

The Office of the Ombudsman <http://www.ombudsman.go.ke>

### Non-governmental organisations

1. Women Against Domestic Violence, Kenya <http://www.wopadovikenya.org/>
2. Federation of Women Lawyers, Kenya <http://www.fidakenya.org>
3. Safe World for Women, Kenya <http://www.asafeworldforwomen.org/>
4. Maendeleo ya Wanaume <http://maendeleoyawanaumekenya.kbo.co.ke/home>
5. The CRADLE – The Children’s Foundation [www.thecradle.or.ke](http://www.thecradle.or.ke)
6. Coalition on violence against women [www.covaw.or.ke](http://www.covaw.or.ke)
7. Centre for Rehabilitation and Education of Abused women <http://directorykenya.com/associations-ngos/family-development-support/centre-for-rehabilitation-and-education-of-abused-women-and-children.html>
8. Women’s Resource Access Programme [www.ifad.org/program/wrapabout.htm](http://www.ifad.org/program/wrapabout.htm)

### Governmental organisations

1. Ministry of Gender, Children and Social Development <http://www.gender.co.ke>
2. The Kenya Police <http://www.kenyapolice.go.ke>

# Laos

‘ *There is a belief that violence is accepted as a casual occurrence in the domestic environment.* ’



# DOMESTIC VIOLENCE IN LAOS

DLA Piper International LLP, Laos

## EXECUTIVE SUMMARY

In the People's Democratic Republic of Laos, the prevention of and protection against domestic violence is covered by one main legislative act and implemented by an accompanying government decree. The definition of domestic violence is not particularly specific. Physical and mental abuse are specifically included, but the legislation is silent on economic abuse. Moreover the definition of who exactly is covered by the legislation is left unstated, with the legislation merely referring to "any act or omission by someone in the family". It is unlikely that the definition includes gay, lesbian, or domestic worker relationships.

Prevention of and protection from domestic violence in Laos is provided for by the police, the People's Courts and agencies such as the Laos Women's Union and the Centre for Counselling and Protection of Women and Children. Children are also given extra protection under the domestic violence law, and a body responsible for the administration of these provisions.

The domestic legislation, whilst effective on paper, appears to fall down due to a lack of enforcement resources on the ground as well as an unwillingness of victims to report incidents of domestic violence. However, the government of Laos has indicated that reducing domestic violence is a key priority and it is hoped that with a greater allocation of resources aimed at educating the population, the domestic violence legislation will be implemented more effectively in the future.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Laos.

Article 29 of the legislation, the Laos' Law on the Development and Protection of Women (the Protection of Women Law), defines domestic violence as:

"any act or omission committed by someone in the family which causes physical or mental impact on or which impacts on the assets of women and children in the family".



The concept of “family” is undefined. However, when considered with other relevant legislation it appears that “family” is likely limited to blood relatives and married couples.

Likewise, it is unlikely that the definition includes gay, lesbian, transgender and domestic worker relationships.

Mental abuse is specifically included, due to the words “mental impact” in the definition. Further, mental abuse is specifically in Article 31 of the legislation. Mental abuse is defined to include “an act of any individual in the family that causes damage to the mental health of women and children in the same family, such as adultery, coercion, insults, defamation, scorn, and putting up obstacles against the performance of different kinds of activities, especially social activities”.

No provision for the requirements of proof of mental abuse is made in the legislation. Any evidentiary requirements for the less serious matters would therefore be very informal as it is conducted within a family/community setting.

In the “serious cases” involving police investigation, the matters are governed by the Penal Code laws and laws governing Civil Procedure. Article 21 of the Law on Criminal Procedure (the “Criminal Procedure Law”) requires “strong and reliable” evidence. Where the evidence indicates ‘doubt’, the accused will be released. Victims of abuse have the right to seek assistance from other family members, people close by in the community or, in extreme circumstances, police officers. Where the abuser is found to have committed mental abuse, or indeed any form of abuse, under Article 50 of the Protection of Women Law, the abuser will be re-educated and receive an official warning. Where the conduct was serious so as to constitute an offence under the Penal Code, the abuser will be punished according to the particular offence provision.

While the Protection of Women Law is silent on financial abuse or economic hardship, it may come within the definition of mental abuse provided the abuse is sufficiently serious.

## **1.2 FORMS OF DOMESTIC VIOLENCE**

Therefore, domestic violence can be committed in any, or a combination, of the following forms:

- mental abuse — including adultery, coercion, insults, defamation, scorn and putting up obstacles against the performance of different kinds of activities, especially social activities;
- physical violence; and/or
- economic violence — to the extent that it could come within the definition of mental abuse.

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Laos is the Protection of Women Law.

There is also a decree titled *On the Implementation of the Law on Development and Protection of Women* (the “Protection of Women Decree”) which was enacted to implement the law.

Additionally, offences under this legislation are punishable under the Penal Code.

### 2.2 INTERNATIONAL TREATIES

Laos has signed the following treaties:

- United Nation’s Convention on the Elimination of all Forms of Racial Discrimination against Women;
- Convention on the Rights of the Child (CRC);
- International Covenant on Civil and Political Rights (ICCPR); and
- International Covenant on Economic, Social and Cultural Rights (ICESCR).

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Laos criminal law is based on the presumption of innocence principle, i.e. the accused person is innocent until proven guilty.

The prosecution holds the burden of proof in criminal proceedings for domestic violence in Laos.<sup>472</sup> The State prosecutor has the sole right to initiate criminal proceedings for domestic violence.

### 3.2 RELEVANT COURT

Domestic violence prosecutions are brought in any of the People’s Courts. The People’s Courts are provincial and city courts, district and municipal courts, the People’s Supreme Court, appellate courts and military courts.

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<sup>472</sup> The Law on Criminal Procedure, Article 21.

Under the Protection of Women Law, where there is reliable evidence that the violence constitutes a relevant offence, the matter will be referred to the public prosecutors who will then prosecute the offender.<sup>473</sup>

Additionally, witnesses to the violence have the right to arrest the offender and bring the offender to the police who will then take necessary measures.<sup>474</sup>

### 3.3 PROSECUTION FUNDING

Article 39 of the Protection of Women Law states that the State will provide an appropriate budget to organisations that provide assistance to victims of domestic violence. These organisations include departments such as Public Prosecutors.

### 3.4 TIMESCALES

There does not appear to be any available relevant statistics. However, under the Criminal Procedure Law, the timeframes for conviction will depend on the length and thoroughness of the initial investigation and complexity of the case. In a straightforward scenario, the investigator, upon receiving the case from the police has 60 days to complete their investigation pursuant to Article 41 of the Criminal Procedure Law.

If the public prosecutor is satisfied with the investigation, it is submitted to the courts.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

Laos law does not provide for the prosecution of domestic violence offences under civil law.

However, Article 52 of the Protection of Women Law provides that a victim may claim monetary compensation from offenders for costs such as medical expenses, loss of income and costs of travel and lodging. This suggests some form of civil redress under the legislation.

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<sup>473</sup> Ibid, Article 36.

<sup>474</sup> Ibid, Article 43.

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

Under the Protection of Women Law there are a number of different support services for victims of domestic violence. Women have rights to support from organisations and individuals responsible for the protection of women.

These organisations include individual family members, village mediation units, counselling services, providers of legal, health and moral advice and police officers. The legislation outlines the main organisations responsible for counselling victims.

These organisations are:

- the village units themselves;
- the district/municipality offices of counselling and protection of women and children; and
- the Province/Capital offices of counselling and protection of women and children.

Further, the Protection of Women Law provides that organisations which violate their responsibilities will be subject to re-education and penal measures, depending on the gravity of the violation and may also be liable for civil damages.

### 5.2 NON-GOVERNMENTAL ORGANISATIONS

There are two primary organisations responsible for supporting victims. These are the

- Centre for Counselling and Protection of Women and Children; and
- the Laos Woman's Union.

The Centre for Counselling and Protection of Women and Children is responsible for assisting victims of domestic violence, receiving appeals and requests from women and children, participating in and monitoring ways to settle disputes, organise short-term vocational training for victims and where appropriate reporting more serious offences to the relevant authorities.

The Lao Women's Union is responsible for the provision of counselling services to victims, investigating and taking action against organisations violating their responsibilities, providing education on the various programs, policies and laws governing the protection of women.

### 5.3 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

The Protection of Women Law contains specific provisions in relation to children. These provisions establish a network which is required to monitor neglected children, identify those who may need special attention and provide support to those children. This network is overseen by the Committee on Protection and Assistance to Children.

## 6 OFFENCES

As noted above, under Article 50 of the Protection of Women Law, for “less serious” acts of domestic violence, the offender shall be given an official warning and re-educated.

For “serious offences”, sentences are subject to the type of offence made out under the Penal Law. The following table sets out offences which may constitute domestic violence.

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW – THE PENAL LAW</b>		
BATTERY	Article 90	Three months to ten years imprisonment (depending on the injuries sustained).
PHYSICAL INJURY CAUSED NEGLIGENTLY	Article 91	Six months to three years imprisonment (where serious injury established)
DEFAMATION AND LIBEL/INSULTS	Articles 94–95	Three months to one year imprisonment (where the offence seriously impacted on the victim’s honour)
DURESS	Article 97	Three months to three years imprisonment
ADULTERY	Article 126	Three months to one year imprisonment
VIOLATION OF INDIVIDUAL FREEDOM	Article 102	Three months to one year imprisonment
DESTRUCTION OF PROPERTY	Article 122	Six months to two years imprisonment
DISCRIMINATION AGAINST WOMEN	Article 177	One year to three years imprisonment

## 7 REHABILITATION MEASURES

No specific rehabilitation for domestic violence offenders may be imposed by the court.

However, the legislation appears to require rehabilitation to be implemented without the need for court supervision. The legislation provides that, for the majority of non-serious offences, the local community will handle any mediation or rehabilitation that is required. Additionally, an official warning will be issued. Where the offence is serious and the offender is brought before a court for prosecution the court may, depending on the offence, elect to order re-education.

All reported offenders are required to go through a form of rehabilitation which is run at a village level by mediation units or within family circles. The particular action is taken will depend on the seriousness of the offence.

## 8 THIRD PARTY RESPONSIBILITIES

In general, there does not appear to be a duty placed on individuals to notify the relevant authorities of domestic violence.

However, as noted above, the Lao Women's Union and the Centre for Counselling and Protection of Women and Children are third parties responsible for the care of victims.

The Centre for counselling and protection of women and children (including offices and units at Province and village levels) are responsible for assisting victims of domestic violence, receiving appeals and requests from women and children, participate in, monitor and find ways to settle disputes, organise short-term vocational training for victims and, where appropriate, report more serious offences to the relevant authorities.

The Lao Women's Union is similarly made up of a central office with smaller agencies and local administrations. Their responsibilities include the provision of counselling services to victims, to investigate and take action against organisations violating their responsibilities to protect women and children and to disseminate and provide education on the various programs, policies and laws governing the protection of women.

For the Centres operating at a village level, the main responsibility is on the provision of counselling services for victims, arranging and taking part in mediations and reporting serious offences to the public prosecutors.

Article 48 of the Protection of Women Law states that individuals or organisations who violate their responsibilities under the law will be subject to re-education measures and penal measures, depending on the gravity of the violation.

Individuals or organisations may also be liable for civil damages if they default on their obligations under the legislation.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

There are no official records of the number of prosecutions carried out under the legislation.

### 9.2 PROSECUTIONS UNDER CIVIL LAW

There are no official records of the number of civil actions carried out under the legislation.

### 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

On its face, the Protection of Women Law appears very effective as it clearly criminalises domestic violence and provides a raft of measures for its prevention and prosecution. However, the implementation of the legislation appears to be quite ineffective due to a lack of capacity and or willingness on the part of the relevant authorities to implement and enforce the legislation. For example, according to the United Nations Population Fund, the village mediation units lack trained staff to adequately deal with complaints. Further, there appears to be problems in rural, ethnic communities concerning access to justice for women.<sup>475</sup>

The main difficulty with the Protection of Women Law appears to be the reluctance of victims to report the abuse to the relevant authorities. This appears to be due to cultural reasons, namely because women are often hesitant to make reports for fear of shame or because there is a belief that violence is accepted as a casual occurrence in the domestic environment. In the period between 2006 and 2010, the Lao Women's Union reported only 110 complainants. According to the Child Rights Centre Asia, the legislation needs more "teeth".<sup>476</sup>

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<sup>475</sup> Integrated Regional Information Networks, LAOS: *Lawmakers meet to address domestic violence*, <http://www.irinnews.org/report/91174/laos-lawmakers-meet-to-address-domestic-violence>.

<sup>476</sup> Child Rights Coalition Asia, *Laos PDR* <http://www.childrightscoalitionasia.org/southeast-asia/laos/>.

Domestic violence against children is still widespread in Laos, with some 71% of Laos children suffering corporal punishment in 2006 according to UNICEF.<sup>477</sup> This is not helped by what the Child Rights Centre Asia calls a “dearth of civil rights organisations in the country”, including those who could be responsible for the protection of children experiencing domestic violence.<sup>478</sup> For example, there is no telephone hotline dedicated to reporting child abuse and there is only limited rehabilitation services available for children who have suffered abuse.

## 9.4 PLANNED REFORMS/PILOT SCHEMES

There are currently a number of discussions regarding women’s issues in Laos generally, of which domestic violence is a key component. As noted above, United Nations organisations have highlighted their concerns and the Laos government in a speech given to the UN in March 2013 acknowledged that more work needed to be done to address the effectiveness of the new domestic violence laws.<sup>479</sup>

## 9.5 REVIEW OF DOMESTIC VIOLENCE LAWS

The Centre for Counselling and Protection of Women and Children and the Laos Woman’s Union conduct intermittent reviews and report their findings to the relevant government agency.

## ADDITIONAL RESOURCES

### Applicable law

1. Law on Development and Protection of Women
2. Decree on the Implementation of the Law on Development and Protection of Women
3. Lao Penal Law
4. Law on Family
5. Law on the Protection of the Rights and Interests of Children

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477 Ministry of Labour and Social Welfare, *Broken Promises, Shattered Dreams – A Profile of Child Trafficking in the Lao PDR*, <http://www.unicef.org/media/files/BrokenPromisesFULLREPORT.pdf>.

478 Ibid.

479 Statement by H.E. Mme Khempheng Pholsena, At the Fifty-Seventh Session of the Commission on the Status of Women, New York, 06 March 2013, [http://www.un.int/lao/sites/default/files/pdf/Statement\\_by\\_HE\\_Mme\\_Khempheng.pdf](http://www.un.int/lao/sites/default/files/pdf/Statement_by_HE_Mme_Khempheng.pdf).



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1. Statement by H.E. Mme Khempheng Pholsena, At the Fifty-Seventh Session of the Commission on the Status of Women, New York, 06 March 2013 [http://www.un.int/lao/sites/default/files/pdf/Statement\\_by\\_HE\\_Mme\\_Khempheng.pdf](http://www.un.int/lao/sites/default/files/pdf/Statement_by_HE_Mme_Khempheng.pdf) (accessed 1 October 2013)
2. Integrated Regional Information Networks, *LAOS: Lawmakers meet to address domestic violence* <http://www.irinnews.org/report/91174/laos-lawmakers-meet-to-address-domestic-violence> (accessed 1 October 2013)
3. Child Rights Coalition Asia, *Laos PDR* <http://www.childrightscoalitionasia.org/southeast-asia/laos/> (accessed 1 October 2013)

### Governmental organisations

Ministry of Labour and Social Welfare, *Broken Promises, Shattered Dreams — A Profile of Child Trafficking in the Lao PDR* <http://www.unicef.org/media/files/BrokenPromisesFULLREPORT.pdf> (accessed 1 October 2013)

# Malaysia

‘ *In 2010, there were 3173 incidents of domestic violence reported to the police.* ’



# DOMESTIC VIOLENCE IN MALAYSIA

DLA Piper International LLP, Australia

## EXECUTIVE SUMMARY

In Malaysia, the prevention of and protection against domestic violence is covered by one central piece of legislation called the Domestic Violence Act. Under this Act, there is an express legal definition of domestic violence which covers mental as well as physical forms of abuse. However, there is no protection for gay, lesbian, transgender or domestic worker relationships under the Act.

Prevention of and protection from domestic violence in Malaysia is provided for by the police, the courts as well as some important non-governmental organisations such as the Women's Aid Organisation – Pertubuhan Pertolongan Wanita.

Amendments to the Act in 2012 mean that mental abuse is now specifically included in the definition of domestic violence. However, there are a number of shortcomings in the laws, most notable is the fact that the Act does not criminalise acts of domestic violence, but merely provides for certain civil protection orders.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Malaysia.

- The legislation, the Domestic Violence Act 1994, defines domestic violence as the commission of any of the following acts:<sup>480</sup>
- wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury;
- causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;
- 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;
- confining or detaining the victim against the victim's will; or
- 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;

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<sup>480</sup> Domestic Violence Act 1994, section 2.

- causing psychological abuse which includes emotional injury to the victim;
- causing the victim to suffer delusions by using intoxicating substance or any other substance without the victim's consent or if the consent is given, the consent is unlawfully obtained; or
- in the case where the victim is a child, causing the victim to suffer delusions by using intoxicating substance or any other substance, and

by a person, whether by himself or through a third party against:<sup>481</sup>

- his or her spouse;
- his or her former spouse;
- a child;
- an incapacitated adult; or
- any other member of the family.

However, women do not have the right to abstain from having sexual relations with their husbands. This means marital rape is not considered a form of domestic violence. This is because the legislation is linked to the Penal Code which does not allow women to legally abstain from sex within marriage.<sup>482</sup>

The definition of "spouse" likely does not include informal relationships or divorcees. This is because the definition of "spouse" includes *de facto* relationships only to the extent that the partners have gone through a form of ceremony recognised as a marriage ceremony according to the religion or custom of the parties concerned.<sup>483</sup>

The definition is silent on gay, lesbian, transgender and domestic worker relationships and it is unlikely that these would be include on any interpretation of the definition, due to Malaysia's policies in the area of marriage equality.

Due to amendments made in 2012, mental abuse is expressly included within the definition.<sup>484</sup> However, economic abuse is not included in the definition.

## 1.2 FORMS OF DOMESTIC VIOLENCE

Domestic violence can be committed in any, or a combination, of the following forms:

- mental violence;
- physical violence; and/or
- sexual violence — including compelling sexual acts (outside of marriage).

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<sup>481</sup> Ibid.

<sup>482</sup> Ibid, section 3.

<sup>483</sup> Ibid, section 2.

<sup>484</sup> Domestic Violence Amendment Act 2012 section 2 at [http://malaysianlaw.my/attachments/Act-A-1414-Domestic-Violence-A-Act\\_63822.pdf](http://malaysianlaw.my/attachments/Act-A-1414-Domestic-Violence-A-Act_63822.pdf).

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Malaysia is the Domestic Violence Act 1994 (the “DVA”). The legislation is to be read with general criminal law in the Penal Code.

The legislation is split into 5 parts. These are:

1. **PRELIMINARY:** short title, application, interpretation and operation of Penal Code
2. **PROTECTION ORDER:**
  - » victims are able to request Interim Protection Orders (“IPOs”) and Protection Orders. This is done by making a complaint at a police station in which they outline the domestic violence and report that they would like protection. They then need to go see a Welfare Officer who will accompany them to a Magistrate’s Court after they have discussed the situation and assist them in making an application;
  - » section 4(1) of DVA states that, the court may, during the pendency of investigations relating to the commission of an offence involving domestic violence, issue an interim protection order prohibiting the person against whom the order is made from using domestic violence against his or her spouse or former spouse or a child or an incapacitated adult or any other member of the family, as the case may be, as specified in the order. The IPO needs to be served on the abuser within seven days and shall cease to have effect upon the completion of the investigations;
  - » a Protection Order may be made by a court under section 5(1) providing specific orders to restrain or prohibit the person against whom the order is made;
  - » protection orders may:
    - » grant exclusive occupation to any protected person;
    - » prohibit the entry of the person against whom the order is made from entering the protected person’s premises;
    - » require the person against whom the order is made to allow the protected person to enter their residence or the shared residence;
    - » prohibit the person against whom the order is made to telephone or make written communication with a protected person and specify the conditions that apply to communication;
    - » require the person against whom the order is made to allow a protected person to have continued use of any vehicle they ordinarily had use of;
    - » any other direction as necessary for the proper carrying out of the above; and

- » for a period not longer than twelve months.
  - » a power of arrest may be attached to the protection order where there is a threat of physical injury to the protected person. Power of arrest may be used where a person against whom the order is made is reasonably thought to be in breach of the order. Where the power of arrest is exercised the person against whom the order is made will be brought before a judge within 24 hours and not released within that time except at the direction of the judge.<sup>485</sup>
3. **COMPENSATION AND COUNSELLING:** outlines the circumstances in which compensation orders may be made and when counselling can be ordered.
  4. **PROCEDURE ON IPO AND PROTECTION ORDER:** outlines procedure for complaints, interim protection orders and protection orders.
  5. **MISCELLANEOUS:** outlines duties of enforcement officers, grants authority to the Minister to make regulations and notes that those giving evidence in good faith will not be subject to defamation proceedings.

## 2.2 INTERNATIONAL TREATIES

Malaysia is a signatory to the United Nations Convention on the Elimination of Discrimination Against Women. However, the government of Malaysia agreed to the convention with the following reservation: “subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia law and the Federal Constitution of Malaysia”. Importantly, domestic legislation is always required in order to give effect to International law in Malaysia.

# 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

## 3.1 BURDEN OF PROOF

The prosecution holds the burden of proof in criminal proceedings for domestic violence in Malaysia.

The Deputy Public Prosecutor or the Police Prosecutor have the sole right to initiate prosecutions.

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<sup>485</sup> Domestic Violence Act 1994, section 5.

### 3.2 RELEVANT COURT

Proceedings for criminal prosecutions will be commenced in the Magistrate's court.

### 3.3 PROSECUTION FUNDING

Aside from the government funded Public Prosecutor's or the Police Prosecutor's offices, the Women's Aid Organisation has assisted women to make complaints through their refuge by helping them access medical resources as well as the police, the welfare department and the courts.

### 3.4 TIMESCALES

It appears that the prosecution of offenders is a lengthy process and often only occurs long after a complaint has been made making it difficult for victims or witnesses to recall details.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

Under the legislation, there are a number of preliminary or interim measures available. The most important of these are the Interim Protection Order and the Compensation Order. Under the Interim Protection Order, victims may make a complaint a police station whereby they will be put in contact with a Welfare Officer who accompanies them to the Magistrates' Court where the application is made. The Magistrates can then order an Interim Protection Order pending the outcome of criminal proceedings in relation to the investigation. The Interim Protection Order may:<sup>486</sup>

- grant exclusive occupation to any protected person;
- prohibit the entry of the person against whom the order is made from entering the protected person's premises;
- require the person against whom the order is made to allow the protected person to enter their residence or the shared residence;
- prohibit the person against whom the order is made to telephone or make written communication with a protected person and specify the conditions that apply to communication;
- require the person against whom the order is made to allow a protected person to have continued use of any vehicle they ordinarily had use of;
- any other direction as necessary for the proper carrying out of the above;

for a period not longer than twelve months.

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<sup>486</sup> Ibid, section 6.

A power of arrest may be attached to the protection order where there is a threat of physical injury to the protected person. The power of arrest may be used where a person against whom the order is made is reasonably thought to be in breach of the order. Where the power of arrest is exercised the person against whom the order is made will be brought before a judge within 24 hours and not released within that time except at the direction of the judge.

Under a Compensation Order, a Magistrate may award compensation as it deems reasonable taking into account:

- pain and suffering of the victim and extent of physical and mental injury;
- cost of medical treatment for injuries;
- loss of earnings;
- value of property taken or destroyed;
- costs of separation from defendant incurred by victim;
- financial position of each party;
- relationship of parties; and
- possibility of other proceedings and appropriateness of this being dealt with there.<sup>487</sup>

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

There are two key provisions relating to support for victims in the DVA.

Compensation for victims is provided for “where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of domestic violence, the court hearing a claim for compensation may award such compensation in respect of the injury or damage or loss as it deems just and reasonable”.<sup>488</sup>

Further, counselling of victims is provided for “in any proceedings in which a protection order is sought, instead of or in addition to issuing a protection order”.<sup>489</sup> This includes providing for the victim to attend “suitable reconciliatory counselling” at a “conciliatory body” being the Department of Social Welfare

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<sup>487</sup> Ibid, section 10.

<sup>488</sup> Ibid, section 10.

<sup>489</sup> Ibid, section 11.



and, in the case where parties are Muslims, bodies set up under the Islamic Religious Affairs Department.<sup>490</sup>

## 5.2 INTERVENTION CENTRES

According to a 2012 Australian Government Refugee Review Tribunal *Country Advice Malaysia*, a number of public health initiatives have been developed by the Malaysian government to assist in the interception, shelter and rehabilitation of victims. In addition, non-governmental organisations and political parties maintain a number of independent women's shelters that coordinate their operation with government public health initiatives. Portions of this report are extracted below. The complete findings can be found at: <http://www.refworld.org/country/MYS,4562d8cf2,5146fa4b2,0.html>.

Whilst the development of such programs has generally been received positively by non-governmental organisations, activists continue to assert that support mechanisms for victims remain inadequate.<sup>491</sup>

According to a 2006 report on police interception published by The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, written by the Head of the Sexual Investigation Unit in the Criminal Investigation Department of the Royal Malaysia Police, "it's the option of the victim whether to choose to stay in a safe house or otherwise. The Welfare Department has 28 houses all over Malaysia to give temporary shelter to these women. More are being designed to meet the purpose at the state level and these premises are called 'Rumah Nur' or House of Light".<sup>492</sup> The report claims that "these facilities are adequately equipped to ensure the comfort and safety of the victims and their children". No further information was located about the quality and nature of these shelter services.

According to a report published by the Japan International Corporation of Welfare Services (JICWS) under the Japanese Ministry of Health, Labour and Welfare in 2006, One Stop Crisis Centres (OSCC) were also introduced into all Malaysian hospitals in 1996. The report asserts that OSCC seek to provide a centralised one-stop facility to assist victims of domestic violence who attend public hospitals "by bringing help from all relevant departments in the hospital, as well as outside agencies, to the victim in the hospital" in an effort to minimise the trauma and stress for the victim. For a case of domestic violence or alleged rape "[i]f it appears that the victim will be in danger if she returns home, the

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<sup>490</sup> Ibid.

<sup>491</sup> <http://www.refworld.org/country/MYS,4562d8cf2,5146fa4b2,0.html>.

<sup>492</sup> Ibid.

doctor or counsellor arranges for her to go to an emergency shelter or admits her to the accident and emergency ward for 24 hours”.

In addition, the hospital will call the police who would visit the victim at the OSCC to record the victim’s report, while the social and welfare department officer or the legal bureau officer are contacted if needed, to offer appropriate help to the victim. In some urban centres, non-governmental organisations provide active support to the OSCC service by being “on-call” – to provide counselling, emotional support and assistance where needed. According to Bernama, the Malaysian State news agency, in 2008 there were approximately one hundred centres throughout Malaysia that provided integrated support services. As an example, the OSCC in Kuala Lumpur includes “examination, evidence management diagnosis, definitive care, appropriate referral, documentation and medical reporting with female doctors” as well as “therapeutic and medical intervention, multi-level crisis intervention, counselling and emotional support, temporary shelter as well as legal assistance”. As no further information was located about the diversity or quality of services provided by other OSCC it is unclear if this example is representative of all OSCC across Malaysia.<sup>493</sup>

### 5.3 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

The Child Act 2001 contains provisions dealing with support for children. These include restrictions on media reporting, duties of police officer taking children into temporary custody, duty of medical officer to report any finding of abuse of a child and the duty of a family member or child care provider to inform a police officer or protector.

## 6 OFFENCES

The key criminal offence in relation to the domestic violence legislation is that a person can be prosecuted for a contravention of a Protection Order.<sup>494</sup>

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<sup>493</sup> Ibid.

<sup>494</sup> Ibid, section 8.

## 7 PENALTIES AND SANCTIONS

A person who wilfully contravenes a protection order will be guilty of an offence and may be imprisoned for up to six months. A person who uses violence on a protected person to contravene a protection order will be guilty of an offence and may be imprisoned for up to a year.<sup>495</sup>

A person who subsequently contravenes a protection order will be punished by imprisonment of between 72 hours and two years.<sup>496</sup>

Where a person contravenes a protection order that person will be guilty of an offence and may be liable to pay a fine of up to 2000 ringgit.<sup>497</sup> A person who uses violence on a protected person to contravene a protection order will be guilty of an offence and may be liable to pay a fine of up to 4000 ringgit.

A person who subsequently contravenes a protection order will be liable to pay up to 5000 ringgit.<sup>498</sup>

## 8 REHABILITATION MEASURES

Under the legislation, courts are able to order one or more parties attend rehabilitative therapy, psychotherapy or reconciliatory counselling but only after they have been referred to a conciliatory body and the conciliatory body has given a report for the court's consideration.<sup>499</sup>

However, these measures appear to be aimed at fostering conciliation rather than rehabilitation and there does not appear to be any information on the criteria that offenders would have to meet.

While imprisoned offenders will undergo counselling sessions by way of rehabilitation and attend religious classes as outlined by prison religious officers.

However, there seems to be no psychological evaluation attached to this process, nor any follow up treatment to be conducted when they leave.

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<sup>495</sup> Ibid, sections 8(1), 8(2).

<sup>496</sup> Ibid, sections 8(3).

<sup>497</sup> Ibid, sections 8(1), 8(2).

<sup>498</sup> Ibid, sections 8(3).

<sup>499</sup> [http://malaysianlaw.my/attachments/Act-A-1414-Domestic-Violence-A-Act\\_63822.pdf](http://malaysianlaw.my/attachments/Act-A-1414-Domestic-Violence-A-Act_63822.pdf) read with Domestic Violence Act, section 10 of the amending Act.

## 9 THIRD PARTY RESPONSIBILITIES

The Law does not create any third party responsibilities. However, under the Child Act medical practitioners and officers, family members and child care providers have duties to report any suspected physical or emotional injury or neglect.

Where a person fails to comply with the duty, they may be subject to imprisonment of up to two years and/or a fine of up to 5000 ringgit.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 CRIMINAL PROSECUTIONS

In 2010 there were 3173 incidents of domestic violence reported by Royal Malaysia Police.

More recent statistics do not appear to be available and official records of the number of prosecutions carried out under the legislation do not appear to be available.

### 10.2 PROSECUTIONS UNDER CIVIL LAW

There are no official records of the number of civil actions carried out under the legislation.

### 10.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

It appears that the IPO is not as effective as it could be as it does not give adequate protection to victims waiting for the investigation to be completed and the Order to be issued. Essentially the Protection Order only requires a person to not be physically violent towards the complainant. The failure of the Order to require the offender to maintain physical distance from the victim leaves the victim vulnerable.

The enforcement of the legislation appears to be especially problematic. Of particular concern is the unwillingness of witnesses to come forward which in turn leads to victims withdrawing their complaints. There is also an entrenched bias towards men in Malaysia which causes police and welfare officers to be reluctant to take complaints or act on complaints when they are received as well as failures to take action where incidents are not deemed to be sufficiently serious. These problems are compounded by the lengthy processes in the legislation.

The laws have fallen short of the expectations of the Women's Aid Organisation. This is a not for profit organisation that was heavily involved in campaigning for domestic violence laws.

Originally, the DVA had been drafted to classify domestic violence as a crime in itself. However, this was rejected by the government and the failure to criminalise domestic violence in and of itself has since been criticised.

The DVA has also been criticised as it fails to protect all Malaysians. While the government took the stance that they did not want to encourage people to live together without marrying this fails to recognise the reality in Malaysia where many couples cohabit or are in relationships and have not married or undergone a ceremony that could be recognised by religion as marriage.

Further, there is no protection for gay, lesbian or transgender people nor for domestic workers.

The failure to protect domestic workers is especially troubling given the large population of migrant workers and the growing problem of this type of abuse.<sup>500</sup>

## 10.4 REVIEW OF DOMESTIC VIOLENCE LAWS

The legislation does not include provisions relating to regular review.

## ADDITIONAL RESOURCES

### Applicable law

1. Domestic Violence Act 1994
2. Domestic Violence (Amendment) Act 2012
3. Evidence Act 1950
4. Penal Code

### Other

Australian Government Refugee Review Tribunal Country Advice Malaysia, 2012 see <http://www.refworld.org/countryMYS,4562d8cf2,5146fa4b2,0.html>

### Publications

1. UNAFEI – United Nations Asia and Far East Institute, Nor Azilah Binti Haji Jonit, *Country Report – Malaysia* see: [http://www.unafei.or.jp/english/pdf/RS\\_No69/No69\\_15PA\\_Jonit.pdf](http://www.unafei.or.jp/english/pdf/RS_No69/No69_15PA_Jonit.pdf)

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<sup>500</sup> [http://www.wao.org.my/Migrant+Domestic+Workers\\_54\\_5\\_1.htm](http://www.wao.org.my/Migrant+Domestic+Workers_54_5_1.htm).

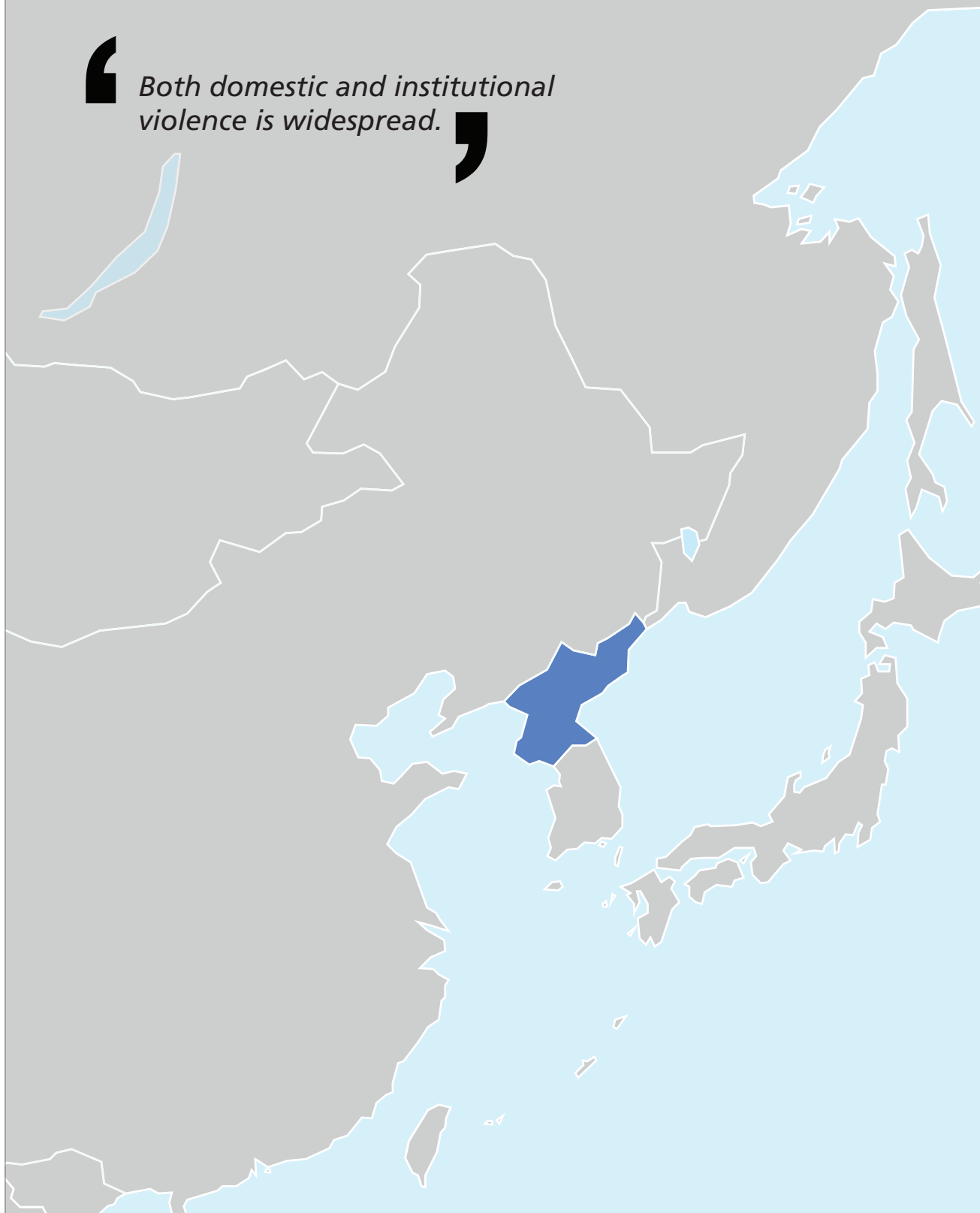
2. UPI Next, Saera Hamanaka (Monsah University), *Domestic Violence in Malaysia: what we should understand*, October 2011

**Non-governmental organisations**

1. Women's Aid Organization – Pertubuhan Pertolongan Wanita (WAO) <http://www.wao.org.my/>
2. All Women's Action Society (AWAM) <http://www.awam.org.my/domesticv.html>

# North Korea

‘ Both domestic and institutional violence is widespread. ’



# DOMESTIC VIOLENCE IN NORTH KOREA

DLA Piper International LLP, Australia

## EXECUTIVE SUMMARY

In North Korea, the prevention of and protection from domestic violence is not covered by any specific law, in the sense that there is no clear legal definition of what constitutes domestic violence. Indeed, it is vital to note that by all outside accounts, there is no proper rule of law in North Korea at all.

Further, it has been widely reported that the law or the constitution in North Korea is valued far less than the policies imposed by Kim Il Sung, Kim Jong Il, or Kim Jung Un (the countries rulers). North Korean citizens have rarely seen the law function around them and as a result, see the rule of law as a “scarecrow”.

Additionally, the North Korean society fosters the belief that it is a virtue of women to be understanding when their husbands engage in infidelities and remain stoic even if violence is inflicted upon them by their partner and that a woman’s sacrifice is perpetuated as being for the country and for the children.

Having said this, it appears that what prevention of and protection from domestic violence does exist in North Korea is provided for by the Criminal Code. There are quite detailed rules governing forum and procedure. Nevertheless, the key point is that any laws that do exist are not properly enforced.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

Domestic violence does not have an express legal definition in North Korea.

Indeed, it is vital to note at the outset of this report that by all outside accounts, there is no proper rule of law in North Korea. However, the following can be said.

North Korea sees legislation as “the process of realising the legal thoughts and theories of Juche Ideology developed by the Great Suryong (Kim Il-sung) and the Dear Leader (Kim Jong-il).” In his 1958 speech at the National Conference of Judicial Workers Kim Il-Sung said that “laws of our country are the important realisation of national policy. Laws are expressions of politics, hence subservient to politics, from which they can never be separated”.<sup>501</sup>

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<sup>501</sup> Soo-Am K, *The North Korean Penal Code, Criminal Procedures and their Actual Application*, Korea Institute for National Unification, 2006.



Indeed, the recent United Nation's Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea in February 2013 noted that "both domestic and institutional violence, particularly in prisons and other closed institutions, is widespread in the Democratic People's Republic of Korea...what is lacking in the Democratic People's Republic of Korea is specific legislation to deal with all forms of violence against women and accompanying prevention and protection measures for victims".<sup>502</sup>

The United States Department of State, Bureau of Democracy, Human Rights and Labour in its report titled a Country Report on Human Rights Practices for 2012: Democratic People's Republic of Korea 2012 Human Rights Report noted in relation to sexual harassment that women who have left the country report that sexual violation was understood, but that sexual harassment is not defied.

Further, the US Report notes that despite the 1946 Law on Equality of Sexes, defectors report that sexual harassment of women was generally accepted due to patriarchal traditions and that there is little recourse for women who have been sexually harassed.<sup>503</sup>

Given the state of legislation in North Korea as it is understood, is unlikely that gay, lesbian, transgender and domestic worker relationships will be included within any laws.

## 2 APPLICABLE LEGISLATION

There is no central piece of legislation on domestic violence in North Korea.

However, the United Nation's *Report of Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea* in February 2013 noted that there was some legislation that might be used to target domestic violence offences. In particular, it was noted that the Penal Code (1950) as amended in 2004 contains certain provisions that deal with sexual violence.<sup>504</sup> Specifically, Article 293 of the Penal Code states that:

"any man who forces a woman into sex, in cases where the victim works for or reports to him, will be punished with up to two years labour training or, in serious cases, up to two years of correctional labour penalty".

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502 United Nations Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of North Korea, see: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.57\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.57_English.pdf).

503 United State Department of State, Bureau of Democracy, Human Rights and Labour, Country Report on Human Rights Practices for 2012: Democratic People's Republic of Korea 2012 Human Rights Report, see: <http://www.state.gov/documents/organization/186491.pdf>.

504 United Nations Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of North Korea, see: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.57\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.57_English.pdf).

Furthermore, the United States Department of State, Bureau of Democracy, Human Rights and Labour Report noted:

“Rape and Domestic Violence: The Government appeared to criminalise rape, but no information was available on details of the law or how effectively it was enforced. Women in prison camps were reportedly subjected to rape by prison guards and to have forced abortions. Violence against women was reported as a significant problem both inside and outside the home. No information was available on government efforts to combat rape, domestic violence, and other societal violence directed against women.”

Also in relation to discrimination against women generally, it was noted that:

“the constitution states that women hold equal social status and rights with men; however, although women were represented proportionally in the labour force, few women reached high levels of the party or the government. KINU reported that discrimination against women emerged in the form of differentiated pay scales and types of works assigned to women. The press and think tanks have reported that while women were less likely than men to be assigned full-time jobs, they had more opportunity to work outside the socialist economy”.<sup>505</sup>

Additional legislation includes:

- the (Civil and Criminal) Evidence and Witness Law;
- the Criminal Procedure Law; and
- the Penal Code.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Information regarding the burden of proof requirements is available under the (Civil and Criminal) Evidence and Witness Law and/or the Criminal Procedure Law.

Specifically, in relation to the criminal burden of proof under Article 326 of the Criminal Procedure Law the prosecutor must “accuse the defendant for his crime and scientifically cite the legal basis for the violations, including the relevant criminal law clauses”. The Defence attorney will then, under Article 327 “plead his case by elaborating on the Defendant’s motives, purposes,

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<sup>505</sup> United State Department of State, Bureau of Democracy, Human Rights and Labour, *Country Report on Human Rights Practices for 2012: Democratic People's Republic of Korea 2012 Human Rights Report*, see: <http://www.state.gov/documents/organization/186491.pdf>.

damage levels and genuineness of the defendant's penitence, and request due consideration of these factors in sentencing".

The Criminal Procedure Law makes the following state organisations responsible for prosecutions of criminal offences:

- People's Security Agency;
- State Security Agency (SSA);
- Office of the Prosecutors;
- courts; and
- attorneys.

The Ministry of People's Security ("MPA") is responsible for investigations, preliminary examination, and correctional centres as well as Social Safety Control Laws.

Specifically, investigation processes are said to follow the steps set out in the table below:

OFFENCE		LEGAL REFERENCE	SANCTION
INVESTIGATION (INVESTIGATION AGENTS)	Ordinary Investigation	Anti-State & Anti-People Case	NSPA
		Ordinary Crimes	PSA
		Routine crimes during surveillance of economic, administrative and law enforcement	Prosecution
	Special Investigation	Ordinary crimes by rail employees or Rail-related ordinary crimes by outsiders	PSA or Railroad
		Ordinary crimes during surveillance of economic, administrative and law enforcement	Railroad prosecutors
		Crimes by soldiers, PSA agents, and military employees.	Military prosecutors

OFFENCE		LEGAL REFERENCE	SANCTION
PRELIMINARY EXAMINATION (PE AGENTS)	Ordinary PE	Anti-State and Anti-People crimes	NSPA
		Ordinary Crimes	PSA
		Ordinary crimes during surveillance of economic, administrative and law enforcement	Prosecutors' Office
	Special PE	Military Crimes Ordinary crimes in the military Crimes by soldiers, security agents, and military employees.	Military prosecutors' Office
		Ordinary crimes by rail employees Rail-related ordinary crimes by rail outsiders	Rail PSA
		Ordinary crimes during surveillance of economic, administrative, and law enforcement in rail operation	Railroad Prosecutors

Essentially, the MPA appears to be responsible for investigation and preliminary examination of ordinary crimes.

Once the investigation is complete, it appears to be the case that the information gathered during the investigation will then be used to determine whether to open the case and a copy of that decision will be given to the Prosecutor. The Prosecutor's approval must be obtained to pursue the crime.

At a later stage, only the Judge will determine whether the defendant's case should be turned over to trial deliberations — this is only where the judge is convinced that the preliminary examination was sufficient for trial.

### 3.2 RELEVANT COURT

Article 126 and 133 of the Criminal Procedure Law determines where a case will be brought.

While it is not entirely clear, domestic violence prosecutions will most likely be brought in either:

- the People's Courts which hears "ordinary crimes" not belonging to Province (Major city) courts; special courts and Central Court;
- the Province (Major City) Courts are lower first level courts for proceedings involving Anti-state, Anti-People cases and cases to result in death or "no-term" correctional-labour sentences, and appeals from People's Courts within its jurisdiction, and cases under the jurisdiction of the people's courts if necessary;
- the Military Court which hears "crimes of soldier and People's Safety agents" and "crimes by employees of military agencies";
- the Railroad Court which hears "Crimes by railroad employees" and "rail-related crimes by people outside the railroad"; and
- the Central Court which hears appeals from 1st level courts, like the Railroad court of Provincial Court and decisions on jurisdiction of 1st level courts if necessary.

### 3.3 STAGES OF THE PROCEEDINGS

After the investigation is finalised, the information gathered will then be used to determine whether to open the case (a copy of this decision will be given to the Prosecutor).

The Prosecutor's approval must be obtained to pursue the crime.

At a later stage only the Judge will determine whether the Defendant's case should be turned over to trial deliberations — this is only where he is convinced that the preliminary examination was sufficient for trial.

### 3.4 PROSECUTION FUNDING

As North Korea is a communist state, prosecutions would simply be funded by the state.

### 3.5 TIMESCALES

While there are no available reliable official statistics regarding timescales of prosecutions, it appears that generally the period of time between prosecution and conviction will depend on the court in which the matter is heard.

Generally, for a trial in a lower court where the trial is divided into the trial "preparation phase" and the "deliberation phase" the court can detain the defendant for up to 25 days.

If it is anticipated that the punishment will be a labour-training sentence then the period of detention is 15 days, meaning the trial should be concluded within

10 days of receipt of the case records. In both instances, or where it is warranted by a particularly complex cases, the trial may be extended by 5 days or more.<sup>506</sup>

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

Although it is highly unlikely that there are any preliminary or interim measures available to victims of domestic violence in North Korea, it is interesting to note that Article 69 of the *Constitution* states that:

“citizens are entitled to submit complaints and petitions. The state shall fairly investigate and deal with complaints and petitions as fixed by law”.

Additionally, under the Law on Complaint and Petition, citizens are entitled to submit complaints to stop encroachment upon their rights and interests or seek compensation for the encroached rights and interests.

## 5 SUPPORT FOR VICTIMS

As noted above, a key finding in the United Nation’s Report is the assertion that there are limited legal provisions for the victims of domestic violence, restricted entirely to the general sexual offences under the Criminal Code.

The UN Committee on Rights of the Child, as noted above, have published written replies by the Government of the Democratic People’s Republic on the Rights of the Child in Connection with the consideration of the 3rd and 4th periodic reviews of the DPRK, 22 December 2008, which noted in relation to children and domestic violence:

- the Penal Code contains the following provisions of prevention measures;
- Article 271 – a person who, in duty bound to protect the old, children or the disabled, does harm to their health by deliberately neglecting his or her duty shall be committed to less than two years of disciplining through labour. In case of a grave offence, he or she shall be committed to less than two years of reform through labour.
- Article 272 – a person who does harm to the health of another person, who is his or her subordinate or under his or her protection, through maltreatment shall be committed to less than two years of disciplining through labour. In case where he or she cause the death of another person through the above-mentioned act, he or she shall be committed to less than 2 years of reform through labour; and

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<sup>506</sup> Soo-Am K, *The North Korean Penal Code, Criminal Procedures and their Actual Application*, Korea Institute for National Unification, 2006.

- Article 288 – a person who commits violence on another shall be committed to less than two years of disciplining through labour.

The Report further notes that so far, no person was subjected to criminal punishment on charges of domestic violence or child abuse.

## 6 OFFENCES

The Penal Code appears to divide crimes into two basic categories:

- ordinary crimes; and
- crimes of a political nature.

Any domestic violence crimes or those that could be perceived as such would likely fall under the former category.

Indeed, the cause of ordinary crimes is thought to stem from inside the people themselves. As such, ordinary crimes are defined as: “crimes stemming from selfish motives and remnants of corrupt old thinking, not from anti-revolutionary motives.”<sup>507</sup> Such crimes can include, amongst other things and most relevantly here, infringing upon the life and property of other citizens.

As noted at paragraph above, Article 293 of the Penal Code states:

“any man who forces a woman into sex, in cases where the victim works for or reports to him, will be punished with up to two years labour training or, in serious cases, up to two years of correctional labour penalty”.

Furthermore, there may be applicable crimes under the separate criminal justice system (quasi-judicial system) that operates under the Social Safety Control Law in North Korea. This law states its purpose as to “contribute to the protection of people’s life, property and constitutional rights and to safeguard national sovereignty and the socialist system of government” and “to protect life, property and rights of the people”.

Other quasi-justice systems that might be applicable include, comrade judgment committees and socialist lawful living guidance committees. The comrade judgement committee is an independent and unique trial. The socialist lawful living guidance committee are decision-making bodies also. There is also the ‘safety committee’ which punishes North Korean citizens.

Further, Article 18 of the Penal Code states:

“Criminal Liability for Crimes Committed Against Family Members or

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<sup>507</sup> Soo-Am K, *The North Korean Penal Code, Criminal Procedures and their Actual Application*, Korea Institute for National Unification, 2006.

Relatives which states that “crimes against a family member or relative shall bear no criminal liability when the victim himself/herself demands a pardon. The foregoing paragraph does not apply to murder, robbery, rape and aggravated assault”.

## 7 PENALTIES AND SANCTIONS

The punishments applicable to the offences noted above appear to be those attached to the sexual offences under the Penal Code, where those offences could constitute domestic violence (i.e. in the relevant domestic context).

Specifically, the Penal Code lists the following as basic punishment categories:

- death sentence (e.g. by firing squad);
- no term (lifetime) correctional labour;
- term correctional labour (five to fifteen years sentence); and
- labour training (sentence of six months to two years).

Further, the October 2009 amendments to the Penal Code include an array of monetary fines, under Article 27. However, it appears that such fines are not applicable in terms of punishing domestic violence perpetrators.<sup>508</sup>

Additional punishment categories include:

- suspension of electoral rights;
- confiscation of personal property; and
- disqualification or suspension of qualification of civic rights.

Also, unique to North Korea is the “social education” punishment which involves no physical detention — whereby the person is treated the same under the law as if they did not commit a crime. Specifically, this means that labour training or correctional labour penalties are used.<sup>509</sup>

Furthermore, for criminal trials general, the decisions are of three kinds:

- handing down a punishment sentence;
- a guilty decision requiring “social education”; and
- a not guilty decision. All sentences are imposed in the name of the Democratic People’s Republic of Korea.

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508 Kyu-Chang, L. *Revising North Korea’s Legislation on Controlling the People and Maintaining the System*, 2013, Online series.

509 Soo-Am K, *The North Korean Penal Code, Criminal Procedures and their Actual Application*, Korea Institute for National Unification, 2006.



## 8 REHABILITATION MEASURES

Since North Korea actively engages in enslavement for labour, forced “re-education” and indoctrination and the like, it is unlikely that there would be any formal rehabilitation programs, as they would be understood outside of North Korea.

## 9 THIRD PARTY RESPONSIBILITIES

In general, there is likely no duty to notify the relevant authorities of domestic violence committed between adults.

However, Article 324 of the Criminal Procedure Law states that:

“if a person or persons who were responsible for the education of the Defendant, or who have allowed the opportunity for the defendant to violate the laws, have participated in the process of the fact deliberations, that person(s) must be made to come up with the appropriate lessons from the case before concluding the fact deliberations”.

Article 325 further says:

“if necessary, leaders of the agency, workplace, or organisation, who had participated in the trials, may also be allowed to speak”.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 GOVERNMENT INTERVENTION

As a general point, it is vital to note that by all outside accounts, the government of North Korea as a totalitarian government that enslaves and oppresses its citizens. Therefore, any legislation in relation to domestic violence in North Korea, or any other human rights issues, may be assumed to be ineffective, unenforced and simply for show and purposes of appearances.

The UN Committee on Rights of the Child, as noted above, has published written replies by the North Korean government which noted relevantly here that:

“So far, no person was subjected to criminal punishment on charges of domestic violence or child abuse”.

Further, the United Nation’s Report from February 2013 noted, in respect of the reporting and/or investigation and pursuit of domestic violence offenders as follows at paragraph 70: “Even when a witness or a victim of domestic violence presents a case of violence to the police, reportedly, it is often not acted upon”.

## 10.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

The United Nations report states relevantly here that:

“There are prevailing cultural assumptions in the Democratic People’s Republic of Korea that women are dependent on men, and it is expected that women will be obedient and passive. As a result, women are more directly exposed to various types of cultural practices in the family that result in violence towards them. There is also a perception that domestic violence is not a crime and that the State should not intervene in such private family matters”.

Furthermore, a Report by the Korean Institute of Criminology (in Korean) (*The Law Culture of North Korea and the Methods of Educating North Korean Escapees on Law*, Spring 2011) supporting the viewpoint that North Koreans do not see domestic violence as a serious issue, suggests:

“The North Korean society fosters the belief that it is a virtue of women to be understanding when their husbands engage in infidelities and remain stoic even if violence is inflicted upon them by their partner. A woman’s sacrifice is perpetuated as being for the country and for the children. North Korean men who have adapted to these cultural values see women’s sacrifices and suffering as natural and inherent and show the opinion that they do not understand the value of women having rights. The patriarchal culture in the North Korean society as well as the government’s blind eye towards the issue of domestic violence has perpetuated domestic violence even further and people tend to see violence within a domestic household as being a very personal and daily issue. A man who has escaped from North Korea stated in his interview that he has beaten his wife until she was nearly dead and portrayed this story as being nothing unusual.

It’s okay even if I hit my wife until she’s almost dead. The law doesn’t care... I’ve done it too. Even if she reports me nothing will be done. I know that there are many consequences here if I harm a disabled person, a child, or a woman but North Korea doesn’t have anything like that”.

Additionally, escapees from North Korea have been reported being quite surprised to learn that the government actively becomes involved in prosecuting violence between individuals. These escapees have noted that:

- in North Korean society the government rarely becomes involved within disputes between individuals;
- even when the police do become involved in solving personal disputes, they do not prosecute the person who engaged in the violent act and rather look to the reason of their dispute, and blame the individual who has caused the violent act to happen;
- violence against someone who has caused a legitimate reason for violence is seen to be fair;

- most North Korean citizens don't find physical assault to be a major issue or problem and do not report incidents of physical assault to the police; and
- generally, the North Korean's perception of the law, which is negative, is generally an impediment to effective law enforcement of any crimes (and therefore implicitly domestic violence crimes).

Indeed, it is widely accepted that the law or the constitution in North Korea is valued far less than the policies imposed by Kim Il Sung, Kim Jong Il, or Kim Jong Un. North Korean citizens have rarely seen the law function around them and as a result, see the rule of law as a “scarecrow”. Citizens are much more fearful of political crimes over anything else and as a result of this, people tend to think that all crimes other than political crimes are light and trivial. Furthermore, North Korean citizens tend to see the law in a negative light. They see government legal bodies as places that exist to accept bribery and see the department of prosecutions or the police as bodies which exist to hurt and harm the citizens, as opposed to protecting them. This view leads to the lack of reporting even when someone is a victim of domestic violence.

Additionally, there is a lack of follow-up of prosecution of offenders even where a woman does issue a complaint. Even when incidents are reported, the relevant government bodies usually tell the women to deal with it themselves. When women's rights agencies become involved, they have a tendency to avoid using legal routes and usually criticise the offender in a public forum and cease any further actions.<sup>510</sup>

### 10.3 PLANNED REFORMS/PILOT SCHEMES

There is strong and growing international political pressure on North Korea to address its breaches of human rights, particularly in relation to violence against women, as exhibited by the recent United Nations Report chaired by former Australian High Court Judge Michael Kirby.<sup>511</sup> As such, there are numerous human rights groups constantly monitoring the country and its progression in relation to laws against breaches of human rights, including domestic violence offences.

### 10.4 REVIEW OF DOMESTIC VIOLENCE LAWS

There are regular reports required to be made to various Human Rights bodies. In particular there are periodic reviews required by various United Nations bodies.

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<sup>510</sup> Korean Institute of Criminology, *The Law Culture of North Korea and the Methods of Educating North Korean Escapees on Law*, 2011.

<sup>511</sup> See: <http://www.unaa.org.au/the-hon-kirby-updates-unhrc-on-gross-violations-in-north-korea.html>.

## 10.5 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS

Information relating to North Korea is very difficult to gain access to given the restrictive practices in place. Therefore the above information may be limited and not reflective of the entire situation in relation to domestic violence in North Korea.

## ADDITIONAL RESOURCES

### Applicable law

1. Penal Code (1950)
2. (Civil and Criminal) Evidence and Witness Law
3. Criminal Procedure Law

### Publications

Soo-Am K, *The North Korean Penal Code, Criminal Procedures and their Actual Application*, Korea Institute for National Unification, 2006

### Non-governmental organisations

1. United Nation's General Assembly: Human Rights Council, Twenty-Second Session Report of the Special Rapporteur on the situation on human rights in the Democratic People's Republic of Korea (Feb 2013)
2. United States Department of State, Bureau of Democracy, Human Rights and Labour (on a Country Report on Human Rights Practices for 2012: Democratic People's Republic of Korea 2012 Human Rights Report)
3. UN Committee on Rights of the Child (CRC) has published written replies by the Government of the Democratic People's Republic on the Rights of the Child in Connection with the consideration of the 3rd and 4th periodic reviews of the DPRK, 22 December 2008
4. Symposium on Preparation for the 6th Session of UPR, United Nations Human Rights Council
5. Report by the Korean Institute of Criminology (in Korean) (*The Law Culture of North Korea and the Methods of Educating North Korean Escapees on Law*, Spring 2011)

### **Governmental organisations**

UN Committee on Rights of the Child (CRC) has published written replies by the Government of the Democratic People's Republic on the Rights of the Child in Connection with the consideration of the 3rd and 4th periodic reviews of the DPRK, 22 December 2008

# Poland

‘ *In Poland, a person who, through the use of violence, makes cohabitation of a family especially difficult, may be evicted from a jointly occupied home...even where the offender is the sole holder of the legal title to the premises.* ’



# DOMESTIC VIOLENCE IN POLAND

CMS, Warsaw

## EXECUTIVE SUMMARY

In Poland the prevention of domestic violence is provided for under the Act of 29 July 2005 on the Counteraction of Domestic Violence. However, other criminal and civil offences may constitute domestic violence and these are provided for in other legislation, for example the Criminal Code of 6 June 1997 which penalises a number of violent acts.

Domestic violence is widely defined and cases can be brought either by the State prosecutor or the victim themselves, depending on the severity of the offence. The court has a number of flexible measures it can grant to protect victims of domestic violence including evicting the offender from the shared residence. Legal funding and relief from court fees can be granted by the court and support and legal advice is also available from non-governmental organisations.

Although problems can be identified in the way that domestic violence is responded to in Poland, including the reaction time of the police and the length of court proceedings, there are currently no plans for reform.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

Domestic violence is defined in the Act of 29 July 2005 on the Counteraction of Domestic Violence (the “Counteraction of Domestic Violence Act”) as:

“a single or repetitive intentional action or nonfeasance that violates the rights or personal goods of family members as well as persons jointly living in or running a common household, and particularly exposes those persons to danger of loss of life, health, destroys their dignity, personal inviolability, freedoms, including sexual freedom, harms their physical and psychic health, as well as causes suffering and moral damage to persons affected by violence”.<sup>512</sup>

The State Agency for the Prevention of Alcohol-Related Problems, defines domestic violence as:

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<sup>512</sup> Article 2 Counteraction of Domestic Violence Act.

“an action or nonfeasance within the family performed by one of its members against the other by using existing or circumstantial advantage or power which might affect victim’s personal rights and freedoms, especially their life or health (physical and mental) and result[ing] in damages and suffering”.<sup>513</sup>

These are wide definitions which include informal relationships and do not take into account the parties’ sexuality, employment status or marital status. Where parties are living together or running a common household, they will be treated as a family for the purpose of the Counteraction of Domestic Violence Act.

The above definitions recognise that domestic violence can include mental abuse. Mental abuse is understood to be verbal or non-verbal threats of violence against a person or items belonging to that person. Mental abuse includes situations where the offender causes financial abuse or economic hardship. Domestic violence legislation does not include separate provisions for mental abuse offences, it is just one form of domestic violence offence recognised by the Counteraction of Domestic Violence Act.

The burden of proof in domestic violence cases is on the victim.

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The Counteraction of Domestic Violence Act sets out: (i) actions to counteract domestic violence; (ii) provisions for dealing with people affected by domestic violence; and (iii) actions that can be taken to punish/restrain domestic violence offenders.

The following regulations also set out legal provisions regarding domestic violence:

- the Regulation of the Council of Ministers dated 13 September 2011 (regarding the Blue Card Procedure and Blue Card forms);
- the Regulation of the Minister of Health dated 22 October 2010 (sets out the form in which doctors’ testimony must be presented regarding any bodily harm caused by an offender);
- the Regulation of the Minister of Interior and Administration dated 31 March 2011 (outlines the procedure for removing a child from their family where there is direct danger to the life or health of that child); and
- the Regulation of the Minister of Labour and Social Policy dated 22 February 2011 (regarding the standard of basic services granted by Specialised Support

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<sup>513</sup> Spurek S., *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Wolters Kluwer Polska, 2012.



Centres for domestic violence victims. This includes the qualifications of personnel hired in these centres, detailed directions for conducting correctional and educational interventions for offenders and the qualifications of persons conducting such correctional and educational interventions).

Other legislation containing provisions which can be relevant in domestic violence situations include:

- the Criminal Code of 6 June 1997 (the “Criminal Code”);
- the Criminal Procedure Code of 6 June 1997 (the “Criminal Procedure Code”);
- the Civil Procedure Code of 17 November 1964;
- the Code of Execution of Criminal Sentences of 6 June 1997; and
- the Tenants’ Protection Act of 21 June 2001.

## 2.2 INTERNATIONAL TREATIES

The following international treaties which refer to the issue of domestic violence have been ratified and promulgated by Poland:

- the International Covenant on Civil and Political Rights (ICCPR), ratified by Poland on 18 March 1977;
- the International Covenant on Social, Economic and Cultural Rights (ICESCR), ratified by Poland on 18 March 1977;
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by Poland on 30 July 1980;
- the Convention Against Torture (CAT), ratified by Poland on 26 July 1989;
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ratified by Poland on 19 January 1993; and
- the Convention on the Rights of the Child (CRC), ratified by Poland on 7 June 1991.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Polish criminal law is based on the presumption of innocence principle, i.e. the accused is innocent until proven guilty. Therefore the burden of proof lies with the victim.

Cases against domestic violence offenders can be brought either by the public prosecution (where the offence is an indictable offence) or privately by the victim. If the domestic violence offence is an indictable offence (such

as mistreatment), the State prosecutor has to prove that the offence was committed. However, if the offence is being prosecuted privately based on an allegation by the victim (such as battery), the victim must prove the offence was committed.

### 3.2 RELEVANT COURT

Cases are brought before the district courts (*sądy rejonowe*), which are lower ranked courts that deal with the majority of criminal cases.

Appeals can be brought in the circuit court (*sąd okręgowy*) and, subject to the relevant provisions of Polish Criminal Procedure, may be brought to the Supreme Court as the court of final appeal (*sąd najwyższy*).

### 3.3 STAGES OF THE PROCEEDINGS

Once an offence has been reported, the police must start a preliminary criminal investigation to ascertain whether an offence has been committed and to identify/confirm the identification of the offender. Police officers have the power to arrest a domestic violence offender who poses a threat to a victim's life or health.

Once the investigation is complete, the police provide the relevant information to the prosecutor who prepares an indictment setting out the charges against the offender.

The court will hear representations from the parties and reach a judgment on whether the offender is guilty and if so, what the appropriate penalty should be. The verdict will be binding if the losing party does not appeal to a higher court or, if following an appeal, the appeal court finds that the verdict should stand.

### 3.4 PROSECUTION FUNDING

As most domestic violence offences are indictable, the legal costs of the trial are covered by the State. If a victim brings a private action against an offender, the costs of legal representation may be covered by the State if the court deems it appropriate. In a private action, the costs of the trial will be decided at the same time as the verdict.

Certain State agencies and non-governmental organisations (such as the Blue Line Foundation and the Feminoteka Foundation) provide, or help to find, pro bono legal assistance for victims of domestic violence.<sup>514</sup>

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<sup>514</sup> For a list of the major non-governmental organisations active in this area, please see the Additional Resources section below.

### 3.5 TIMESCALES

The Polish Ministry of Justice issues statistics annually on the average length of court proceedings but does not collate information specifically regarding domestic violence offences.

In the district courts, the average length of criminal proceedings was:

- 4.75 months in 2012;
- 4.9 months in 2011; and
- 3.8 months in 2010.

In the circuit courts, acting as a court of appeal, the average length of criminal proceedings was:

- 1.92 months in 2012;
- 2.0 months in 2011; and
- 1.9 months in 2010.

The average timeframe from the offence being committed to the end of the trial is five years.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

The Counteraction of Domestic Violence Act provides that a person who, through the use of violence, makes cohabitation of a family especially difficult, may be evicted from a jointly occupied home. This is even possible in situations where the offender is the sole holder of the legal title to the premises.

The same remedy can be sought under the Tenants' Protection Act against any inhabitant who, through manifestly wrongful behaviour, makes cohabitation impossible. However, the Tenants' Protection Act does not permit this remedy to be granted against a wrongdoer who holds the legal title to the premises.

The Counteraction of Domestic Violence Act provides that a decision regarding eviction shall be taken within one month after an application has been filed and is immediately enforceable. Under the Tenants' Protection Act, the duration of proceedings varies and may take up to several months; however no official statistics are maintained by the Ministry of Justice.

Restraining orders are also available under Polish law, but are considered to be criminal law sanctions.

## 4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

The burden of proof lies with the victim and an application for a preliminary/interim measure is usually instigated by the victim.

## 4.3 RELEVANT COURT

Applications for preliminary/interim measures are brought in the civil division of the district courts.

## 4.4 FUNDING TO PROSECUTE

In general, court charges are not payable in civil law cases connected with alimony or child support.

In other civil cases, the victim may seek a court order granting relief from court fees. The court may also, where requested by the victim, order that State-funded legal representation be provided. The court will only make such an order where the complexity of the case justifies such legal assistance and the victim is unable to pay for legal representation themselves.

In some cases the victim may be given legal support by the Office of the Public Prosecution, the Office of the Ombudsman or the Office of the Child Ombudsman. Certain State-founded organisations, most notably the National Helpline for Victims of Domestic Violence, can also provide legal advice. However, these organisations will not normally provide legal representation at trial.

Many non-governmental organisations, such as the Feniks Foundation,<sup>515</sup> offer help to any victims of crime including those who have experienced domestic violence.

# 5 SUPPORT FOR VICTIMS

## 5.1 STATUTORY PROVISIONS

The Counteraction of Domestic Violence Act and the Code of Execution of Criminal Sentences govern the provision of support for victims of domestic violence.

Further provisions can be found in other legislation, for example, the Code of Execution of Criminal Sentences provides for the establishment of a Crime Victims Support Fund. This fund is financed by the State and run by selected non-governmental organisations (a list of which can be found on the Ministry

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<sup>515</sup> Please see the Additional Resources section below.

of Justice website) to support victims of crime.<sup>516</sup> The funds are used to pay for legal assistance; psychiatric and psychological support; health care; education costs; housing costs; transportation costs and food expenses. The victim must approach the organisation directly to receive such assistance.

In cases where the victim has suffered a serious injury, compensation from the State may also be sought.

In practice, some commentators note that resources available to victims of crime are rather limited.

## 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

The Counteraction of Domestic Violence Act provides that a child whose life or health is threatened may be removed from the care of its guardian by a social worker and put into the custody of other close relatives. The court must be notified immediately of a decision to remove a child from the care of its guardian and may choose to overrule the decision.

The Civil Procedure Code provides that cases before the Court of Protection (the court division responsible for civil law matters concerning children) may be conducted *ex officio*. For criminal matters, the civil court may empower a court officer to act on behalf of a child who is a victim.

## 6 OFFENCES

It is a criminal offence for an individual to mentally or physically mistreat a person close to them, or a person who is permanently or temporarily dependent on them.

It is an offence for an individual to mistreat a minor or other person who is vulnerable due to their mental or physical condition.

In many cases, as well as committing a domestic violence offence, the offender will also satisfy the criteria of other criminal offences provided for in the Criminal Code. The major differences for domestic violence offences are:

- any form of assault is an indictable offence and can be prosecuted by the State; and
- special provisions in the Criminal Code regarding sanctions for offenders convicted of violence against a cohabitating family member, including eviction and restraining orders. Please note, the Criminal Code adopts a more narrow definition of domestic violence which is limited to family members only.

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<sup>516</sup> <http://bip.ms.gov.pl/pl/dzialalnosc/fundusz-pomocy-pokrzywdzonym-oraz-pomocy-postpenitencjarnej/pomoc-pokrzywdzonym/>

## 7 PENALTIES AND SANCTIONS

Prison sentences can range from three months to twelve years.

LENGTH OF CUSTODIAL SENTENCE (RANGE)	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
THREE MONTHS TO FIVE YEARS	Provided that the conditions for a more severe penalty as outlined below have not been fulfilled.
ONE TO TEN YEARS	If the act is committed with exceptional cruelty.
FIVE TO TWELVE YEARS	If, as a result of the mistreatment, the victim attempts to commit suicide.

There are no provisions for fines to be given as a penalty for domestic violence offences. However, under general criminal law, a fine may be imposed when a sentence is suspended or mitigated in an extraordinary way.

Further restrictions can be placed on offenders such as a prohibition on joining certain communities or visiting certain locations. An offender can also be prohibited from contacting certain individuals or leaving a specific place of residence without the court's consent.

The court may require an offender to remedy any damage done or to compensate the victim for any harm done.

## 8 REHABILITATION MEASURES

### 8.1 COURT-IMPOSED REHABILITATION

There are several legal bases on which the court may require an offender to undergo compulsory treatment. Under both the Criminal Code and the Law on Counteracting Domestic Violence, an offender may be obliged to attend corrective and educational therapy.

Where the violence is connected with alcohol or drug abuse, the Criminal Code provides that the court may, when suspending the penalty, impose an obligation to undergo treatment. The court may also impose an obligation to undergo such treatment on an offender serving time in prison.

Further, the Upbringing in Sobriety and Alcoholism Prevention Act provides, in cases where alcohol abuse is the cause of a family breakdown, that the court may require the offender to undergo compulsory treatment.

Even where offenders do not receive a sentence which includes treatment, the State can impose treatment on imprisoned offenders.

## **8.2 SERVICES PROVIDED BY NON-GOVERNMENTAL ORGANISATIONS**

Therapy, in particular corrective and educational therapy, is quite common. There are a number of non-governmental organisations who can provide help, particularly to offenders who have a history of substance abuse or who have problems coping with their aggression. There is, however, no specific data on the success rates of such measures.

Participation in these rehabilitation programmes is voluntary. Usually, offenders who participate recognise that they have a problem and wish to prevent further violence and preserve their family relationships.

## **9 THIRD PARTY RESPONSIBILITIES**

The Law on Counteracting Domestic Violence provides that individuals with official duties which require them to report domestic violence should immediately report any suspicions of domestic violence being committed to the police or the State prosecutor. This obligation is also set out in the Criminal Procedure Code.

The Criminal Code states that only a person (or organisation) who has a specific legal obligation to take care of others may be held responsible if they fail to report suspicions of domestic violence.

## **10 EFFECTIVENESS/IMPLEMENTATION**

### **10.1 CRIMINAL PROSECUTIONS**

There are no specific statistics on the occurrence of domestic violence offences. However, according to information collated by the Ministry of Justice,<sup>517</sup> the number of recorded crimes is as follows:

- 22,600 in 2007;
- 21,023 in 2008; and
- 20,378 in 2009.

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<sup>517</sup> <http://ms.gov.pl/pl/dzialalnosc/przeciwdzialanie-przemocy-w-rodzinie/przemoc-w-rodzinie--diagnoza-zjawiska-i-reakcja-organow-wymiaru-sprawiedliwosci/statystyki/>.

The number of successful prosecutions is recorded as:

- 15,233 in 2007;
- 15,001 in 2008; and
- 14,506 in 2009.

The statistics show that a majority of reported crimes result in a successful prosecution. However, it is likely that many instances of domestic violence are not reported and are not therefore included in these official statistics.

Criminal proceedings are the most effective way of prosecuting a domestic violence offence due to the wide range of penal measures available.

## **10.2 CHALLENGES IN ENFORCEMENT**

There are a number of challenges in enforcing domestic violence laws. In particular, the lengthy nature of proceedings can exacerbate the conflict. The length of proceedings is a general problem with the Polish judiciary system and constant appeals for reform are made.

Another challenge is the temporary nature of the obligation to leave the commonly-shared premises. Such obligation cannot be extended or imposed for an indefinite period of time, meaning situations may arise where the offender can reoccupy the common residence even if the victim does not agree to this.

Victims of domestic violence often encounter issues due to a lack of legal support. The legal provisions governing domestic violence are spread across a number of different acts. If the victim does not have legal assistance it can be very difficult for them to understand what is required to successfully bring a case.

Further, the lack of immediate response by the authorities often allows offenders to intimidate victims and can lead to further harm being caused.

## **10.3 GENERAL REFORMS**

There are no discussions regarding legal reform to the existing domestic violence legislation, or any system in place for the regular review of domestic violence law. The regulations governing the prevention of domestic violence were amended in 2010 and, despite the above issues, are generally regarded as satisfactory.

The only related issue that is currently being discussed in the Polish media is the amendment of the law so as to permit some forms of corporal punishment for children (currently not permitted).



## ADDITIONAL RESOURCES

### Applicable law

1. Code of Execution of Criminal Sentences (Journal of Laws No. 90, item 842, as amended)
2. Counteraction of Domestic Violence Act (Journal of Laws No. 125, item 842, as amended)
3. Civil Code (Journal of Laws No. 16, item 93, as amended)
4. Civil Procedure Code (Journal of Laws No. 43, item 296, as amended)
5. Criminal Code (Journal of Laws No. 88, item 553, as amended)
6. Criminal Procedure Code (Journal of Laws No. 89, item 555, as amended)
7. Tenants' Protection Act (Journal of Laws No. 125, item 842, as amended)

### Articles and publications

1. Browne K., Herbert M., *Zapobieganie przemocy w rodzinie*, PARPA, Warsaw, 1999
2. Czyż E., Szymańczak J. et al., *Dziecko krzywdzone. Próba opisu zjawiska*, Fundacja "Dzieci Niczyje", Warsaw, 1995
3. Płatek M., *Ochrona dzieci przed przemocą w rodzinie na tle najnowszych rozwiązań prawnych w Polsce*, *Studia Iuridica*, 2006(46), 233–251
4. Płatek M., *Prawnoporównawcze aspekty projektu ustawy o przeciwdziałaniu przemocy w rodzinie*, *Studia Iuridica*, 2005(44), 307–331
5. Spurek S., *Przeciwdziałanie przemocy w rodzinie. Komentarz*, Wolters Kluwer Polska 2012

### Statistics

1. Informacja statystyczna o ewidencji spraw i orzecznictwie w sądach powszechnych oraz o więziennictwie w 2010, 2011 i 2012 roku, Ministerstwo Sprawiedliwości
2. Przemoc w Rodzinie. Dane za rok 2012, Komenda Główna Policji

### Internet resources

1. Fundacja Dzieci Niczyje (The Nobody's Children Foundation) <http://fdn.pl/en>
2. Fundacja Pomoc Kobietom i Dzieciom (The Help for Women and Children Foundation) <http://www.przemockid.pl/>
3. Stowarzyszenia na Rzecz Przeciwdziałania Przemocy w Rodzinie "Niebieska Linia" (The Association for the Counteraction of Domestic Violence "Blue Line") <http://www.niebieskalinia.org/>

# Russia

*12,000 women die as a result of domestic violence every year in Russia; that is one woman every 40 minutes.*



# DOMESTIC VIOLENCE IN RUSSIA

CMS, Moscow

## **EXECUTIVE SUMMARY**

There are no specific laws regarding domestic violence in Russia. Any violent actions will fall within the provisions in the Criminal Code of the Russian Federation regarding violent offences such as murder, infliction of death by negligence, incitement to suicide, battery, torture, intentional infliction of a grave injury, etc. It is therefore irrelevant what relationship exists between the offender and the victim, as the Criminal Code prohibits violent acts between any two parties. The Criminal Code does provide for protective measures to be put in place at the request of the victim to prevent further violence against them.

The ANNA National Centre for the Prevention of Violence, one of the largest charitable organisations in Russia providing support to victims of domestic violence, defines domestic violence widely including in this definition physical, mental, sexual and economic abuse.

New legislation on domestic violence is currently being discussed in the Civic Chamber of the Russian Federation. However, as it has not yet been submitted to the State Duma for consideration, no further information is publicly available on the subject as yet.

# Domestic Violence in Russia

Russian family violence-related statistics

## 40%

of all capital offenses committed in Russia take place in families

### Children



## 26,000

children are abused by their parents every year

## 2,000

children and teenagers commit suicide to escape domestic violence

## 10,000

children and teenagers run away from home (annually)



### Women



## 36,000

Russian women are beaten by their husbands every day

## 12,000

women die as a result of domestic violence every year, that is one woman every 40 minutes

## 60-70%

of victims do not seek help

## 97%

of domestic violence cases never end up in court

Source: the Russian Interior Ministry



Editor: Alexey Timatkov, Designer: Masha Mikhailova, Art Director: Ilya Ruderman, Supervisor: Pavel Shorokh, Author of cliché: Alexei Novichkov

"An estimated 14,000 Russian women are killed every year, on average, by partners or other family members, according to a Russian Government report to the Committee on the Elimination of all Forms of Discrimination against Women. That is nearly one per hour. Many are victims of systematic abuse. To put these numbers into perspective, an estimated 14,000 Russian soldiers were killed during the 10-year Afghan war according to published figures."<sup>519</sup>

518 Rianovosti statistics available at <http://en.rian.ru/infographics/20130131/179108086.html>.

519 Amnesty International, *Russian Federation: Nowhere to turn to — Violence against Women in the Family*, London, 2005, pp. 7–8 available at [www.amnesty.org/library/print/ENGEUR460562005](http://www.amnesty.org/library/print/ENGEUR460562005).

## 1 DEFINITION OF DOMESTIC VIOLENCE

There is no definition of domestic violence under Russian legislation; however the concept is discussed in scholarly writings and by organisations who deal with domestic violence.

The ANNA National Centre for the Prevention of Violence, one of the largest charitable organisations providing support to victims of domestic violence, defines domestic violence as:

“a cycle of physical, sexual, verbal, emotional and economic abuse repeating with increasing frequency in order to control, intimidate and frighten. In chronic situations of domestic violence one person controls or is trying to control the behaviour and feelings of the other, which may result in psychological, social, economic, sexual or physical harm, damage or injury of the victim.”

Under Russian law, domestic violence is not regarded as a separate type of offence, but is classified under the Criminal Code of the Russian Federation (the “Criminal Code”)<sup>520</sup> according to the actual crime committed by the offender, i.e. murder, infliction of death by negligence, incitement to suicide, battery, torture, intentional infliction of a grave injury, etc. The offences which could constitute domestic violence all result in physical harm to the victim; no concept of mental abuse of a victim, domestic or otherwise, exists.

The violent crimes outlined above can be committed by parties in any type of relationship, and it is irrelevant whether the parties are married or living together. The position is the same regardless of the sexual orientation or work status of the parties.

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

As outlined above, there is no specific legislation governing domestic violence. However, pursuant to clause 21 of the Russian Constitution, human dignity must be protected by the State and nothing may serve as a basis for its derogation. Further, no one shall be subject to torture, violence or other cruel or humiliating treatment or punishment.

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<sup>520</sup> Criminal Code of the Russian Federation № 63-Fz of June 13, 1996 (with Amendments and Additions as at December 3, 2012).

The particular offences that may apply to cases of domestic violence (as well as to other violent crimes) are detailed further in section 6 below.

## 2.2 INTERNATIONAL TREATIES

Russia is a party to the following international treaties which are relevant when considering domestic violence:

- the Committee on the Elimination of Discrimination against Women;
- the Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in 1993; and
- the Beijing Declaration, as adopted by the United Nations Fourth World Conference on Women in 1995.

Being one of the parties to the Council of Europe, Russia is required to also take into account the following Recommendations:

- Recommendation No. R (85) 4 on violence in the family;
- Recommendation No. R (85) 11 on the position of the victim within the framework of criminal law and procedure;
- Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation; and
- Recommendation No. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults.

These treaties and Recommendations are not currently reflected in or supported by specific domestic violence legislation in Russia.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

The burden of proof lies with the prosecution, requiring the prosecution to prove the guilt of the offender beyond reasonable doubt.<sup>521</sup> The alleged offender is not required to prove his innocence and uncertainties as to the guilt of the offender which cannot be resolved are interpreted in the offender's favour.<sup>522</sup>

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521 Criminal Procedural Code of the Russian Federation № 174-FZ of December 18, 2001 (with Amendments and Additions as at December 30, 2012) (the "Criminal Procedural Code").

522 Clause 14 of the Criminal Procedural Code.

### 3.2 RELEVANT COURT

Domestic violence cases are brought before the courts of general jurisdiction. The courts of general jurisdiction try disputes arising from civil, family or labour relationships where at least one party is an individual.

The first tier of the general jurisdiction courts comprises all general jurisdiction district (*raiyon*) courts including city and intermunicipal courts in Russian territory.

The middle tier of general jurisdiction courts includes the supreme courts of the republics, regional (*krai*) and provincial (*oblast*) courts, the city courts of Moscow and St. Petersburg and the courts of autonomous provinces and districts.

Domestic violence cases can be brought before any of the aforementioned courts.

### 3.3 STAGES OF THE PROCEEDINGS

To commence proceedings the victim must submit an application (orally or in writing) to the police or the prosecution, setting out the facts of the case. Cases dealing with domestic violence are brought before the court by a prosecutor — an official authorised to conduct criminal prosecutions on behalf of the State in criminal court proceedings and to supervise the preliminary investigation and inquiries.

### 3.4 FUNDING

No specific funding is provided to enable private individuals to bring domestic violence claims.

### 3.5 TIMELINE

The timeline for prosecution and conviction varies significantly from case to case. Preliminary investigation of a criminal case should be completed within two months of the day of commencement, but this period may be extended to twelve months if deemed necessary by the prosecuting authorities, e.g. if the necessary evidence cannot be obtained within the standard time period.

A judge undertakes an initial review of the case no later than 30 days after the date of filing at court. If the court accepts a criminal case against an offender who is being held in custody, the judge is obliged to carry out this review no later than 14 days after the date of the case being filed at court.

Examination of a criminal case in court must commence no later than 14 days from the date when the court session is scheduled by a judge. Where the case involves the participation of a jury, the trial must start no later than 30 days from the scheduled date. Consideration of a criminal case in court cannot begin earlier than seven days from the date of the accused being notified of the court hearing.

There are no strict time limits for court hearings as the conduct of the case is determined by the judge and will depend on the circumstances of the case. Hearings may be adjourned to allow expert evidence to be gathered or certain documents to be obtained.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 RESTRICTIVE MEASURES

There are no specific civil law remedies available in cases of domestic violence; however, certain protective measures may be granted under the Criminal Code.

The victim may request that an investigator, the police official authorised to conduct the preliminary investigation in criminal cases, or the court, impose one of the restrictive measures provided for in the Criminal Code. In selecting the appropriate protective measure, the gravity of the crime, as well as other factors including the suspect's personality, age, health, marital status and occupation are considered. Once the protective measure has been selected, an investigator or judge will pass a resolution or ruling, containing an indication of the crime of which the person is accused, and the grounds for imposing the protective measure.

If a protective measure, for example the detention of the suspect, is imposed by an investigator, the judge must rule on the application of the protective restrictive measure within 48 hours of the moment of detention.

Protective measures will only be imposed where there are sufficient grounds to believe that the accused may abscond, continue the criminal activity, threaten a witness or other participants in the criminal court proceedings, destroy evidence, or otherwise interfere with the proceedings.

The following protective measures are available:

- restriction of movement within the country/area or prohibition from travelling abroad;
- the provision of a surety by a third party to satisfy the court that the accused will not abscond or commit further offences whilst under investigation;
- military surveillance (only applicable if the offender is undergoing military service);
- bail;
- house arrest;
- custody; and
- in cases where the accused is a minor, making the minor a ward of the court or placing the minor under other guardianship.



The protective measure is applied for a time period deemed necessary by the official imposing it.

## 4.2 SUPPORT FOR VICTIMS OF DOMESTIC VIOLENCE

As domestic violence is not expressly recognised by Russian law, there are no specific legal obligations for family members or public institutions to support victims of domestic violence.

However, the Criminal Code contains an obligation to help other individuals if their life or health is at risk. If an individual's life or health is at risk and he or she is unable to take measures towards self-preservation because of his or her age, health, or other state of helplessness and another person has the opportunity to give aid, that other person is obliged to do so.<sup>523</sup> Failure to do so may result in one of the following penalties:

- a fine in the amount of 50 to 100 times the monthly minimum wage, or the amount of the wage or salary, or any other income, of the offender for a period of up to one month;
- compulsory unpaid work for a term of 120 to 180 hours;
- corrective labour in an organisation selected by the penal commission for a term of up to one year; and/or
- imprisonment for a term of two to four months.

Where a person has a duty to give aid to an ill person under the law or any specifically applicable rules (e.g. doctors), a failure to do so without good reason is a separate criminal offence. However, such failure to give aid will only be a criminal offence if it was negligent and led to medium or grave injury to the health of the ill person, or his or her death.<sup>524</sup>

There are several charitable organisations providing support to victims of domestic violence, none of which receive financial support from the State:

- “Sisters”, an independent centre providing help to the victims of sexual domestic violence in Moscow;
- “Shelter”, a women's crisis centre in Murmansk;
- Centre for family problems in Langeepas, near Tyumen;
- ANNA National Centre for the Prevention of Violence; and
- “Cradle of Hope”, a crisis centre set up by a charitable fund.

There is also a national domestic violence helpline in Russia, which is specifically aimed at supporting women. The helpline is operated by the ANNA National

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<sup>523</sup> Clause 125 Criminal Code.

<sup>524</sup> Clause 124 Criminal Code.

Centre for the Prevention of Violence. The helpline (08800 700 600) is free of charge and operates seven days a week, 12 hours per day. Multilingual support is not available.

### 4.3 SUPPORT FOR VICTIMS WHO ARE CHILDREN

There is no additional support specifically for children who have experienced domestic violence. However, under the Criminal Code, certain failures to discharge the duties of bringing up a minor (under the age of 18) are offences.

A failure by a parent or any other person with such duty of care, (e.g. a teacher or other worker in an educational, medical, or alternative establishment who has a duty to exercise surveillance over a minor) that can be classed as cruel treatment is punishable with:

- a fine of up to 100,000 roubles or equal to the amount of the wage/salary or other income of the convicted person for a period of up to one year;
- obligatory labour in any organisation with a certain monetary sum deducted from every salary payment of the offender for a period of up to 440 hours;
- corrective labour in an organisation selected by the penal commission for a period of up to two years;
- compulsory unpaid labour for a term of up to three years either with or without a restriction on holding certain specified offices or engaging in specified activities for a period of up to five years; or
- custodial sentence for a term of up to three years with or without a restriction on holding certain specified offices or engaging in specified activities for a period of up to five years.<sup>525</sup>

If the treatment is not cruel, the offence by the parent or third party may result in a warning or imposition of a small administrative fine in the amount of 100,000–500,000 roubles.<sup>526</sup>

There is no requirement to strike off or ban a doctor or teacher who has committed such offences from practising medicine or teaching again.

## 5 OFFENCES

Criminal offences that may be relevant in cases of domestic violence are set out in the table in section 6 below. As noted above, the offences all address actions resulting in physical harm; there is no specific offence for mental abuse.

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<sup>525</sup> Clause 156 Criminal Code.

<sup>526</sup> Clause 5.35 Code of the Administrative Offences of the Russian Federation № 195-FZ of December 30, 2001 (with the Amendments and Additions as at December 30, 2012).

## 6 PENALTIES AND SANCTIONS AVAILABLE

Russian law provides for the following penalties and sanctions:

CLAUSE	CRIMINAL OFFENCE	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
105	Murder	<ul style="list-style-type: none"> <li>— custodial sentence for a term of six–20 years with or without non-custodial restriction of liberty thereafter for a term of up to two years;</li> <li>— custodial sentence for life; or</li> <li>— death penalty.</li> </ul>
106	The killing of a new-born child by their mother	<ul style="list-style-type: none"> <li>— non-custodial restriction of liberty for a term of two to four years;</li> <li>— compulsory unpaid labour for a term of up to five years; or</li> <li>— custodial sentence for a term of up to five years.</li> </ul>
107	Murder committed in a state of temporary insanity	<ul style="list-style-type: none"> <li>— corrective paid labour for a term of up to two years;</li> <li>— non-custodial restriction of liberty for a term of up to three years;</li> <li>— compulsory unpaid labour for a term of up to five years; or</li> <li>— custodial sentence for a term of up to five years.</li> </ul>
108	Murder committed in excess of the requirements of justifiable self-defence or in excess of the measures needed for the detention of a person who has committed a crime	<ul style="list-style-type: none"> <li>— corrective labour in an organisation selected by the penal commission for a term of up to two years;</li> <li>— non-custodial restriction of liberty for a term of up to three years;</li> <li>— compulsory unpaid labour for a term of up to three years; or</li> <li>— custodial sentence for a term of up to three years.</li> </ul>
109	Infliction of death by negligence	<ul style="list-style-type: none"> <li>— corrective labour in an organisation selected by the penal commission for a term of up to four years;</li> <li>— non-custodial restriction of liberty for a term of up to two years;</li> <li>— compulsory unpaid labour for a term of up to four years with or without a restriction on carrying out certain specified duties or engaging in certain activities for a term of up to three years; or</li> <li>— custodial sentence for a term of up to four years with or without a restriction on carrying out certain specified duties or engaging in specified activities for a term of up to three years.</li> </ul>
110	Incitement to suicide	<ul style="list-style-type: none"> <li>— non-custodial restriction of liberty for a term of up to three years;</li> <li>— compulsory unpaid labour for a term of up to five years; or</li> <li>— custodial sentence for a term of up to five years.</li> </ul>
111	Intentional infliction of a grave injury	<ul style="list-style-type: none"> <li>— custodial sentence for a term of up to 15 years with non-custodial restriction of liberty thereafter for a term of up to two years or without such.</li> </ul>

CLAUSE	CRIMINAL OFFENCE	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
112	Intentional infliction of injury of medium gravity	<ul style="list-style-type: none"> <li>— non-custodial restriction of liberty for a term of up to three years;</li> <li>— compulsory unpaid labour for a term of up to three years;</li> <li>— custodial sentence in an 'arrest institution' for a term of up to six months (only applicable to offenders under 16 years old, pregnant women or women with children under 14 years of age); or</li> <li>— custodial sentence for a term of up to five years.</li> </ul>
113	Infliction of grave injury or injury of average gravity while in a state of temporary insanity	<ul style="list-style-type: none"> <li>— corrective labour in an organisation selected by the penal commission for a term of up to two years;</li> <li>— non-custodial restriction of liberty for a term of up to two years;</li> <li>— compulsory unpaid labour for a term of up to two years; or</li> <li>— custodial sentence for a term of up to two years</li> </ul>
114	Infliction of grave injury or injury of average gravity in excess of the requirements of justifiable self-defence or in excess of the measures needed for the detention of a person who has committed a crime	<ul style="list-style-type: none"> <li>— corrective labour in an organisation selected by the penal commission for a term of up to two years;</li> <li>— non-custodial restriction of liberty for a term of up to two years;</li> <li>— compulsory unpaid labour for a term of up to two years; or</li> <li>— custodial sentence for a term of up to two years.</li> </ul>
115	Intentional infliction of light injury	<ul style="list-style-type: none"> <li>— a fine of up to 40,000 roubles or in the amount of the wage or salary or any other income of the convicted person for a period of up to three months;</li> <li>— compulsory unpaid labour for a term of up to 480 hours;</li> <li>— corrective labour in an organisation selected by the penal commission for a term of up to one year;</li> <li>— non-custodial restriction of liberty for a term of up to two years;</li> <li>— compulsory unpaid labour for a term of up to two years;</li> <li>— custodial sentence in an 'arrest institution' for a term of up to six months (only applicable to offenders under 16 years old, pregnant women or women with children under 14 years of age); or</li> <li>— custodial sentence for a term of up to two years.</li> </ul>

CLAUSE	CRIMINAL OFFENCE	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
116	Battery	<ul style="list-style-type: none"> <li>— a fine in the amount of up to 40,000 roubles, or in the amount of the wage or salary or any other income of the convicted person for a period of three months;</li> <li>— obligatory labour with a specified monetary sum deducted from the salary of the offender for a term of up to 360 hours;</li> <li>— corrective labour in an organisation selected by the penal commission for a term of up to one year;</li> <li>— non-custodial restriction of liberty for a term of up to two years;</li> <li>— compulsory unpaid labour for a term of up to two years; or</li> <li>— custodial sentence in an 'arrest institution' for a term of up to six months (only applicable to offenders under 16 years old, pregnant women or women with children under 14 years of age);</li> <li>— custodial sentence for a term of up to two years.</li> </ul>
117	Torture	<ul style="list-style-type: none"> <li>— non-custodial restriction of liberty for a term of up to three years;</li> <li>— compulsory unpaid labour for a term of up to three years; or</li> <li>— custodial sentence for a term of up to seven years.</li> </ul>
118	Infliction of grave injury or injury of medium gravity by negligence	<ul style="list-style-type: none"> <li>— non-custodial restriction of liberty for a term of up to four years;</li> <li>— compulsory unpaid labour for a term of up to two years with deprivation of the right to hold specified offices or to engage in specified kinds of activities for a term of up to three years or without such;</li> <li>— custodial sentence for a term of up to one year with the deprivation of the right to hold specified offices or engage in specified activities for a term of up to three years, or the permanent deprivation of such right;</li> <li>— a fine in the amount of up to 80,000 roubles or in the amount of the wage or salary of any other income of the convicted person for a period of up to six months;</li> <li>— obligatory labour with a specified monetary sum deducted from the salary of the offender for a term of up to 480 hours;</li> <li>— restraint of liberty for a term of up to three years; or</li> <li>— arrest for a term of up to six months.</li> </ul>
119	Threat of murder or infliction of grave injury	<ul style="list-style-type: none"> <li>— compulsory unpaid labour for a term of up to five years with or without a restriction on holding certain specified offices or engaging in specified activities for a term of up to three years;</li> <li>— custodial sentence for a term of up to five years with or without a restriction on holding certain specified offices or engaging in specified activities for a term of up to three years;</li> <li>— obligatory labour with a specified monetary sum deducted from the salary of the offender for a term of up to 480 hours;</li> <li>— non-custodial restriction of liberty for a term of up to two years; or</li> <li>— arrest for a term of up to six months.</li> </ul>

CLAUSE	CRIMINAL OFFENCE	CONDITIONS UNDER WHICH CUSTODIAL SENTENCE RANGE CAN BE IMPOSED
131	Rape	<ul style="list-style-type: none"> <li>— custodial sentence for a term of up to 20 years with or without a restriction on holding certain specified offices or engaging in specific activities for a term of up to 20 years with non-custodial restriction of liberty for a term of up to two years; or</li> <li>— life imprisonment.</li> </ul>
132	Violent sexual actions	<ul style="list-style-type: none"> <li>— custodial sentence for a term of up to 20 years with or without a restriction on holding certain specified offices or engaging in a certain activity for a term of up to 20 years and with non-custodial restriction of liberty for a term of up to two years; or</li> <li>— life imprisonment.</li> </ul>
133	Compulsion to perform sexual actions	<ul style="list-style-type: none"> <li>— a fine in the amount of up to 120,000 roubles or in the amount of a wage/salary or other income of the convicted person for a period of up to one year;</li> <li>— obligatory labour with a specified monetary sum deducted from the salary of the offender for a term of up to 480 hours;</li> <li>— corrective labour in an organisation selected by the penal commission for a term of up to two years;</li> <li>— compulsory unpaid labour for a term of up to five years with or without a restriction on holding certain specified offices or engaging in specific activities for a term of up to three years or without such; or</li> <li>— custodial sentence for a term of up to five years with deprivation of the right to hold specific offices or to engage in specific activities for a term of up to three years or without such restriction.</li> </ul>
134	Sexual intercourse and other actions of a sexual nature with a person who has not reached the age of 16	<ul style="list-style-type: none"> <li>— custodial sentence for a term of 15–20 years with or without a restriction on holding certain specified offices or engaging in certain activities for a period of up to 20 years and with non-custodial restriction of liberty for a term of up to two years or without such restriction; or</li> <li>— life imprisonment.</li> </ul>
135	Depraved actions	<ul style="list-style-type: none"> <li>— obligatory labour with a specified monetary sum deducted from the salary of the offender for a term of up to 480 hours;</li> <li>— non-custodial restriction of liberty for a term of up to three years;</li> <li>— compulsory unpaid labour for a term of up to five years with or without a restriction on holding certain specified offices or engaging in certain activities for a period of up three years; or</li> <li>— custodial sentence for a term of up to 15 years with deprivation of the right to hold specific offices or to engage in specific activities for a term of up to 20 years.</li> </ul>

## 7 REHABILITATION MEASURES

Under the Criminal Code, government agencies are entitled to give housing and employment assistance to former convicts. However, in practice, the necessary legal mechanisms are lacking.<sup>527</sup> There is no established governmental agency for probation and at a national level the focus remains resolutely on the prosecution and punishment of offenders rather than social reintegration, probation or support of ex-convicts. Often only transportation is provided to convicts to the area of Russia where they are registered (which is often, though not always, the area where they previously lived).

There are non-governmental organisations in Russia that work with ex-offenders, including Criminon<sup>528</sup> and the Criminal Justice Reform Centre (working with the Moscow Patriarchy). Such organisations provide practical support, for example with lodging and ID cards, and some attempt to address the underlying causes of offending behaviour.<sup>529</sup> In the Perm region, a locally based and funded follow-up service was initiated in 2008 providing practical support to released prisoners including psychological counselling if required.<sup>530</sup>

A programme organised by the ANNA National Centre for the Prevention of Violence provides psychological support to male domestic violence offenders before they are brought before the court.

## 8 THIRD PARTY RESPONSIBILITIES

Russian law does not impose a duty of care on third parties to report domestic violence, apart from the instances discussed above in section 4.2.

## 9 ANALYSIS OF DOMESTIC VIOLENCE LEGISLATION

As there are no specific laws on domestic violence in Russia it is difficult to analyse and monitor the occurrence and prevention of domestic violence.

Amnesty International reports that there are fewer than 20 shelters for victims of domestic violence in Russia<sup>531</sup> and, according to a survey published by RIA Novosti and the ANNA National Center for Violence Prevention, around 36,000

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527 V. Gaikov, *Legal and Practical Actions on Preventing Repeated Crime in Russia*, Studia Iuridica XLVI/2006, Moscow available at [http://www.wuw.pl/ksiegarnia/tresci/studiaiuridica/46/46\\_4.pdf](http://www.wuw.pl/ksiegarnia/tresci/studiaiuridica/46/46_4.pdf).

528 <http://www.criminon.ru/>.

529 [http://www.owl.ru/win/books/nasilie/10kr\\_cen.htm](http://www.owl.ru/win/books/nasilie/10kr_cen.htm).

530 <http://www.opendemocracy.net/od-russia/svetlana-reiter/russias-dead-end-prison-system>.

531 <http://report2009.amnesty.org/en/regions/europe-central-asia/russia#amnesty-international-reports>.

women suffer from domestic violence in Russia every day, with 12,000 deaths attributed to this annually (equating to one woman dying every 40 minutes).

In 97% of cases, victims do not seek judicial redress and, in 60–70% of the cases, victims do not seek any help whatsoever.<sup>532</sup> This is likely to be largely attributable to the ineffectiveness of the legal system, e.g. no legal intervention is possible unless a crime has been committed. Another key factor is the traditional Russian approach to privacy and the desire to keep family matters strictly within the family. Victims of domestic violence will often refuse to seek help as they consider family relations to be private matters which are not to be shared outside the family.

Public sources have speculated that the Civic Chamber of the Russian Federation<sup>533</sup> considered submitting a draft law “On Control and Prevention of Domestic Violence” to the State Duma in the Spring of 2013, but no official data has been released.<sup>534</sup> Olga Kostina, a member of the Civic Chamber, mentioned in an interview to RIA Novosti, a local newspaper, that several approaches to new legislation on domestic violence are being reviewed and analysed at the moment.

The most problematic area to be considered when drafting the new legislation is the interaction between the new legislation and the current Criminal Code. Another question to be considered is whether a separate governmental body or court needs to be created to deal exclusively with domestic violence cases.

## ADDITIONAL RESOURCES

### Applicable law

1. The Criminal Code of the Russian Federation № 63-Fz of June 13, 1996 (with Amendments and Additions as at December 3, 2012)
2. Criminal Procedural Code of the Russian Federation № 174-FZ of December 18, 2001 (with Amendments and Additions as at December 30, 2012)
3. Code of Administrative Offences of the Russian Federation № 195-FZ of December 30, 2001 (with the Amendments and Additions as at December 30, 2012)

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<sup>532</sup> <http://en.rian.ru/infographics/20130131/179108086.html>.

<sup>533</sup> The Civic Chamber of the Russian Federation is a State institution with 126 members which analyses draft legislation and monitors the activities of the parliament, government and other government bodies in Russia. Its role is similar to an oversight committee and it has consultative powers. The Chamber is in power for a three year term.

<sup>534</sup> [http://rbth.ru/society/2013/03/01/authorities\\_to\\_address\\_domestic\\_violence\\_issue\\_23423.html](http://rbth.ru/society/2013/03/01/authorities_to_address_domestic_violence_issue_23423.html).



### Other sources

1. <http://en.rian.ru/infographics/20130131/179108086.html>
2. [www.amnesty.org/library/print/ENGEUR460562005](http://www.amnesty.org/library/print/ENGEUR460562005)
3. [http://www.wuw.pl/ksiegarnia/tresci/studiaiuridica/46/46\\_4.pdf](http://www.wuw.pl/ksiegarnia/tresci/studiaiuridica/46/46_4.pdf)
4. <http://www.criminon.ru/>
5. [http://www.owl.ru/win/books/nasilie/10kr\\_cen.htm](http://www.owl.ru/win/books/nasilie/10kr_cen.htm)
6. <http://www.opendemocracy.net/od-russia/svetlana-reiter/russias-dead-end-prison-system>
7. <http://report2009.amnesty.org/en/regions/europe-central-asia/russia#amnesty-international-reports>
8. [http://rbth.ru/society/2013/03/01/authorities\\_to\\_address\\_domestic\\_violence\\_issue\\_23423.html](http://rbth.ru/society/2013/03/01/authorities_to_address_domestic_violence_issue_23423.html)

# Rwanda

‘ *It can be postulated that the root causes of physical violence are not related to poverty, drugs or ignorance, but rather rooted in the patriarchal system that gives and sustains an inequality of powers, rendering women vulnerable to violence.* ’



# DOMESTIC VIOLENCE IN RWANDA

John W Ffooks & Co, Madagascar and Kaplan & Stratton Advocates

## **EXECUTIVE SUMMARY**

Rwanda bore the brunt of one of the greatest acts of mass violence in recent history. The Rwandan genocide left various sociological phenomena including a disproportionate ratio between men and women, a struggle to attain equal gender rights and a quest to heal Rwanda's national trauma.

Gender-based violence has been a widespread problem for women both during the genocide and now. Gender-based violence can manifest as domestic violence, sexual assault/rape and/or psychological abuse.

Relevant bodies working to respond to the challenges and problems presented by gender-based domestic violence in Rwanda include the Rwandan government, civil society organisations and the international community. Civil society organisations include a diverse range of groups such as widows, women's organisations, education-focused non-governmental organisations, and Haguruka, a legal aid organisation that specialises in providing legal services for women.

Both governmental and non-governmental organisations provide training and education to raise awareness about gender-based violence issues, as well as providing victims with legal aid, advice, counselling and health services. Some of these groups also carry out research into gender-based violence, the results of which are used to advocate reform and lobby policy/law makers to improve this area of law in Rwanda.

In recent years, the number of reported domestic violence abuses has dropped. For example, the Rwandese Police cite a 22% drop in child molestation. This can be attributed to civil education resulting in a greater public awareness of rights, offenses, consequences, treatment and rehabilitation. In May 2012, Rwanda was awarded the United Nations Public Service Award, for its efforts in fighting sexual and gender-based violence and in recognition of the success of the Isange one-stop centre.

# 1 DEFINITIONS OF DOMESTIC VIOLENCE

## 1.1 LEGAL DEFINITION OF DOMESTIC VIOLENCE

There are no specific anti-domestic violence laws in Rwanda and no legal definition of what constitutes domestic violence. The law that governs violence within a domestic setting is a gender-based one.

However definitions of domestic violence can be found elsewhere. In 2007, Barbara Hart from the National Unit and Reconciliation Commission (NURC) defined domestic violence as “violence that involves a continuum of behaviours ranging from degrading remarks to cruel jokes, economic exploitation, punches and kicks, false imprisonment, sexual abuse, suffocating actions, maiming assaults, and homicide”.

The United Nations Centre for Social Development and Humanitarian Affairs: Strategies for Confronting Domestic Violence’s Resource Manual,<sup>535</sup> defines domestic violence as violence between members of a household, usually spouses. Such violence can come in the form of pushing, hitting, choking, slapping, kicking, burning or stabbing.

The General Assembly Resolution on the Elimination of Domestic violence against Women also defines domestic violence widely as “any act of gender-based violence that results in physical, sexual or psychological harm or suffering, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life, economic deprivation and isolation...[which may cause] imminent harm to the safety, health or well-being of women”.<sup>536</sup>

## 1.2 LEGAL DEFINITION OF GENDER-BASED VIOLENCE

The law on the Prevention and Punishment of Gender-Based Violence (N° 59/2008) (the “Law on Gender-Based Violence”) defines gender-based violence as

“any act that results in a bodily, psychological, sexual and economic harm to somebody just because they are female or male. Such act results in the deprivation of freedom and negative consequences. This violence may be exercised within or outside their household”.<sup>537</sup>

The Gender Monitoring Office has defined gender-based violence as “any behaviour aimed at sexual relations or any other sexual behaviour which affects the dignity of a male or a female victim, whether such behaviour may be from a superior at the work place, school or whether from families as well as from

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<sup>535</sup> Strategies for Confronting Domestic Violence: 7 U.N. DOC. ST/CSDHA/20 (1993).

<sup>536</sup> General Assembly Resolution 58/147 A/RES/58/147 19 February 2004, para 1 (a).

<sup>537</sup> Law N°59/2008 of 10 September 2008 On Prevention And Punishment Of Gender-Based Violence.

elsewhere”.<sup>538</sup> This definition indicates that gender-based violence is essentially sexual in nature.

However, the Gender Monitoring Office specifies wide categories of what can constitute gender-based violence, specifically:

- economic violence: denial of economic rights to property, succession, employment or other economic benefits;
- physical violence: the intentional use of physical force with the potential to cause harm, injury, disability or death;
- sexual violence: the act of forcing another individual, through violence, threats, deception, cultural expectation, weapons or economic circumstances, to engage in sexual behavior against her or his will; and
- psychological violence: trauma to the victim caused by acts, threats of acts or coercive tactics; these threats are often related to sexual or physical violence.<sup>539</sup>

### 1.3 RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE

The definition of gender-based violence is not necessarily applicable to domestic violence. Domestic violence is violence that occurs particularly within the household and by persons related to the victim. Gender-based violence is not limited to the household or spouses.

In Rwanda, the accepted definition of domestic violence includes non-married couples. Whilst the Law on Gender-Based Violence is silent on the definition of “spouses”, the practice is that any person in a relationship who has been subjected to violence can rely on the law’s provisions. The organisations that deal specifically with issues of domestic violence apply gender-oriented definitions, which includes children, the elderly and handicapped people.

The Family Civil Code identifies marriage as being between people of different sex. Since there is no clear definition of domestic violence in Rwanda and who it is between, it can be assumed that it only applies to heterosexual persons.

### 1.4 MENTAL ABUSE

Article 4 of the Law on Gender-Based Violence prohibits the distortion of a spouse’s tranquillity by engaging in polygamy, concubinage, adultery or not paying dowry as promised. It also includes distorting tranquillity through reproduction and denying a spouse their right to property or employment. Article 3 provides that gender-based violence can also be perpetuated

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<sup>538</sup> Gender Monitoring Office, GMO Strategic Plan Framework 2011–2016.

<sup>539</sup> Gender Monitoring Office, Assessment of Intervention Programmes for Gender-based Violence Prevention and Response, 2010, pp. 18–23.

in the form of threats. The above shows that forms of mental abuse are recognised as domestic violence.

To prove such mental abuse the victim must submit evidence of such mental abuse to the court.<sup>540</sup>

## 2 APPLICABLE LEGISLATION

### 2.1 THE CONSTITUTION OF RWANDA

In Rwanda, the primary law from which the tenets of all law derive from is the Constitution of Rwanda.<sup>541</sup> Its Preamble states that it is the “supreme law of the Republic of Rwanda.”

Alongside the protections under criminal law, the Constitution contains shields that a victim of domestic violence can use in a court of law (by way of a Constitutional petition) by relying on the following personal rights:

- Article 9 recognises the equality of all Rwandans as a fundamental principle;
- Article 10 makes a simple yet profound statement: “The human person is sacred and inviolable. The State and all public powers have the absolute obligation to respect, protect and defend it”;
- Article 15 states that every person has the right to physical and mental integrity, that no person shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment;
- Article 22 provides that a person’s home is protected from arbitrary interference (although the Article does acknowledge that this right can be limited by law);
- Article 26 recognises that parties to a marriage are accorded equal rights during the marriage and at the dissolution of the marriage;
- Article 27 provides that the State must protect the family institution; and
- Article 28 states that children are entitled to “special measures of protection by his or her family, society or State”.

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<sup>540</sup> Rwandan Organic Law – Evidence.

<sup>541</sup> 2003.

## 2.2 DOMESTIC VIOLENCE LAWS

Despite the absence of specific domestic violence laws, the Law on Gender-Based Violence contains provisions which, to an extent, cover situations of domestic violence. This law is aimed at preventing and suppressing gender-based violence including domestic violence in Rwanda.

The Law on Gender-Based Violence prohibits individuals from:

- threatening to deprive another person of their rights;<sup>542</sup>
- harassing one's spouse;<sup>543</sup>
- undertaking any indecent conduct or behaviour;<sup>544</sup> and
- performing sexual intercourse without consent.<sup>545</sup>

Domestic violence offences involving physical violence can also fall under the Penal Code. Articles 310–338 of the Penal Code prohibit acts of attacking another, threats to attack and homicide. The maximum sentence is life imprisonment.

The Family Civil Code, adopted in 1988, governs the law on family, marriage and divorce. As is typical of many African countries, traditional law marriages are usual. Such marriages are considered indissoluble. Where disputes arise, there is an attempt at conciliation before the rare scenario where the hesitant family decides on a permanent separation.<sup>546</sup> Divorce is equally difficult if married under the Family Civil Code. Notwithstanding mutual consent, divorce is only granted after five years. Domestic violence is a ground for divorce.

When charging domestic violence perpetrators, the police may consider including penal offences as further counts in the charge sheet. Other applicable laws include the:

- Police Law (No. 09 of 2000), which provides that the police will assist the public, maintain law and order, preserve peace, protect life and property, investigate crimes, collect intelligence, prevent and detect crime, apprehend offenders and enforce the law. The law also provides that a police officer may enter any premises if he or she has reasonable cause to believe that anything necessary to an investigation of an offence is in such premises;<sup>547</sup>
- Penal Code which contains offences against the person which may be relevant in domestic violence situations;<sup>548</sup> and

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<sup>542</sup> Article 3 Law N° 59/2008.

<sup>543</sup> Article 4 Law N° 59/2008.

<sup>544</sup> Article 11 Law N° 59/2008.

<sup>545</sup> Article 5 Law N° 59/2008.

<sup>546</sup> Charles Ntampaka, *Family Law in Rwanda*, Rwanda, A. Bainham (ed.), The International Society of Family Law, Netherlands.

<sup>547</sup> Section 57.

<sup>548</sup> Article 310–338.

- Law relating to Rights and Protection of Children, which provides that, in any situation concerning a child, the child's best interests should be the primary consideration.<sup>549</sup> This sets a high expectation for the protection of children, including within their own homes.

## 2.3 INTERNATIONAL TREATIES AND CONVENTIONS

Rwanda is a monist state, directly applying all conventions and treaties that it has ratified, regardless of whether the treaty or convention has been promulgated into domestic law or not. However, international instruments are only directly applicable in Rwanda if they are duly ratified and applied by the other party.<sup>550</sup>

The following have automatically become part of Rwandese law:

- the African Charter on Human and People's Rights (ratified on 23 January 1992);
- the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) which requires parties to address violence against women and other aspects of women's rights (signed in 2003). The Protocol defines violence in Article 1 to include all harmful acts perpetrated against women including physical, sexual, psychological and economic harm or threats to take such acts.<sup>551</sup> As a signatory, Rwanda is required to implement the Protocol at a national level and submit periodic reports on the progress made and challenges met during implementation;
- the International Covenant on Civil and Political rights which prohibits domestic violence. It contains a non-discrimination clause<sup>552</sup> and also provides that "all individuals are equal under law and are eligible devoid of any discrimination the equal protection of the law." Further, Articles 7 (protecting persons from torture or cruel, inhuman or degrading treatment or punishment) and 9(1) (protecting the right to liberty and servility of person) may be construed to apply in domestic violence situations;
- the International Covenant on Social, Economic and Cultural Rights (ICESCR), ratified on 16 April 1975;
- the Universal Declaration of Human Rights which states that every person is born at liberty and equal in self-worth and rights,<sup>553</sup> and that no person

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549 Section 4 (2).

550 UN International Convention on Civil and Political Rights, Human Rights Committee, *Replies Of The Government Of Rwanda To The List Of Issues (Ccpr/C/Rwa/Q/3/Rev.1) To Be Taken Up In Connection With The Consideration Of The Third Periodic Report Of Rwanda (Ccpr/C/Rwa/3)*, 29 March 2009.

551 [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html).

552 Article 2.

553 Article 1.



will be tortured or subjected to harsh, inhuman or undignified treatment.<sup>554</sup> The non-discrimination clause combined with the provisions in Articles 3 and 5<sup>555</sup> may be construed to mean that any form of violence amounting to a threat to life, liberty or the serenity of the person, or which constitutes torture or cruel, inhuman or degrading treatment, is a violation of the international obligations of member states;

- the United Nations Declaration on the Elimination of Violence Against Women;
- the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child (CRC), ratified on 24 January 1991; and
- the Convention on the Elimination of Discrimination Against Women (CEDAW) under which Rwanda is obligated to eradicate discrimination against women and guarantee women's equality in all aspects of life, including law relating to marriage.

### 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

#### 3.1 BURDEN OF PROOF

The Law on Gender-Based Violence provides that the burden of proof rests with the public prosecutor or, if a civil action, with the victim. Article 19 of the Constitution states that “every person accused of a crime shall be presumed innocent until his or her guilt has been conclusively proven in accordance with the law in a public and fair hearing, in which all the necessary guarantees for a defence have been made available.”

This position is replicated in Article 44 of the Criminal Procedure Code.

#### 3.2 RELEVANT COURT

According to Article 12 of the Law on Gender-Based Violence, the hearing of such matters shall be whenever it is convenient for the victim. The matter can be heard and pronounced at the scene of the crime if possible. Normally, cases are commenced as soon possible in a Lower Instance Court.<sup>556</sup>

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<sup>554</sup> Article 5.

<sup>555</sup> Article 3 states that “Everyone has the right to life, liberty and security of person”, Article 5 states “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”.

<sup>556</sup> Article 12 Law N° 59/2008.

The decision of a Lower Instance Court can be appealed in a Higher Instance Court.<sup>557</sup> An appeal should be lodged within a period not exceeding 30 days following the day on which the judgement was delivered.

### **3.3 STAGES OF THE PROCEEDINGS**

A claim should be filed by a victim at the nearest police station. His or her statement is taken and they are referred to the police doctor if necessary and then to an external doctor to confirm the findings.

The alleged offence will then be investigated by the police who will take all necessary steps to ascertain the facts, determine if a criminal offence was committed and identify the offender. The police have three days to investigate a reported case, after which the police findings are handed over to a prosecutor.

The prosecutor, in co-operation with the police, will spend no more than seven days carrying out further investigations and preparing charges where appropriate. The prosecutor will then present a dossier to a judge who will decide whether to remand the accused into custody during the trial.

Court proceedings will then take place to determine the innocence or guilt of the alleged offender and any appropriate punishment.

### **3.4 PROSECUTION FUNDING**

The prosecution of offenders under criminal law is carried out by the State prosecutors at the expense of the State. The victim does not have to spend any of their own money for the offender to be prosecuted.

The victim can participate in the criminal proceedings as a witness and/or an aggrieved party. When participating in the court proceedings, the victim may require legal assistance or legal representation.

When participating as an aggrieved party, the victim may require legal advice from a qualified attorney to represent his or her rights in the proceedings. In civil suits, if the aggrieved party can show that he or she does not have sufficient resources to pay for legal representation, the judge can decide that legal representation should be funded, fully or partially, at the expense of the State. This is known as a "pauper brief".

When acting as a witness, the victim will not usually need legal representation.

Both local non-governmental organisations and the Rwandan government can provide legal, social and psychological support to help gender-based

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<sup>557</sup> Law N° 13/2004 Relating to the Code of Criminal Procedure.

violence victims investigate their options and navigate the legal system. Two government entities, three public organisations and five non-governmental organisations offer such support.

### 3.5 TIMESCALES

If the judge considers that the initial investigations are conclusive enough to warrant a trial, the prosecutor can be given a maximum of six months to collate evidence for a hearing. However, further delays can occur if the court is busy and has no hearing dates available. A common criticism of gender-based violence cases is that they are not heard quickly enough by the court and the offender is not usually remanded in custody until the hearing takes place.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 CIVIL LAW ACTIONS

Domestic violence proceedings are seen as quasi criminal matters and the courts can deal with domestic violence either under criminal or civil law. Article 130 of the Civil Procedure Code limits a victim to either civil or criminal remedies.

Victims of gender-based violence can bring a civil action for damages.<sup>558</sup>

The courts have the power to issue restraining orders, protection orders, rehabilitation orders and sentences. However, the accused cannot be held in custody unless the evidence against him or her is strong.<sup>559</sup> Usually, applications for preliminary measures can only be submitted by the victim or their guardian *ad litem*.

However, the proceedings can also be initiated by the court *ex offio suo motto* within its own capacity (without any prior application) if an offence has been identified by the court.

### 4.2 BURDEN OF PROOF

The burden of proof with respect to preliminary measures lies on the applicant. The application must identify the parties and set out the important facts justifying the issuance of such preliminary measures.

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<sup>558</sup> Article 9 Law N° 59/2008.

<sup>559</sup> Article 93 Law N° 59/2008.

The decision whether to evict the offender lies with the police, who assess the situation on the spot and consider the risk of repetition of the attack. If the police consider that the risk of a repeated attack is high and that domestic violence has occurred, the offender is arrested.

### 4.3 RELEVANT COURT

Depending on the severity of the offence, domestic violence matters are usually instituted in mediation committees, District Courts, Provincial Courts or the High Court of Rwanda.<sup>560</sup>

Another route preferred by many who have entered into customary marriages or who favour a traditional means of resolving disputes, is to involve family members to assist in reconciliation or, in the extreme cases, the separation of the two parties.

### 4.4 FUNDING TO PROSECUTE

If the victim can show that they do not have sufficient resources to pay for legal representation, the judge can decide that the legal representation should be funded, fully or partially, at the expense of the State.

Arrests, investigations and charges are funded by the State.

There are also a number of non-governmental organisations active in Rwanda providing free legal assistance to victims of domestic violence as a part of their voluntary activities.

### 4.5 TIMESCALES

The court must decide on preliminary measures regarding children on a priority basis due to the sensitive nature and need for immediate protection of the woman and child.

Domestic violence situations usually require the police to act without undue delay and often to act appropriately on the spot (i.e. by arresting the offender). However, there is no time period set out by law for the police to act or domestic violence cases to be heard by the court.

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<sup>560</sup> Eunice Musiime, "Rwanda's Legal System and Legal Materials" Globalex, April 2007.

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

The Law on Gender-Based Violence obliges the general public to provide assistance to victims of violence specifically stating that:

- “Any person must prevent gender based violence, rescue, and call for the rescue of, the victims of this violence”; and
- “Any person who refuses to assist the victim of violence or to testify over the violence against himself or herself or against someone else shall be liable to imprisonment of six (6) months to two (2) years and a fine between fifty thousand (50,000 Rwf) and two hundred thousand (200,000 Rwf) Rwandan francs or one of those penalties”.<sup>561</sup>

The Law on Gender-Based Violence further provides that a Prime Minister’s Order shall determine the means by which government institutions prevent gender-based violence. Such an Order determines the method for receiving, relieving, defending, medicating and assisting the victim for the purposes of rehabilitation.<sup>562</sup>

There are particular provisions in the Rwandan National Police Law<sup>563</sup> governing the obligations of the police towards victims of domestic violence. The police must protect members of the public and are obliged to take all reasonable measures to stop violence from taking place and to arrest the perpetrator.

The police are obliged to take action following the assault of an adult or child. The police must record the victim’s statement and ensure that the victim is given adequate medical care depending on the gravity of their ordeal. The police are required to maintain confidentiality, especially when dealing with minors.

Support is also given to victims through “gender desks” in the police stations and also through two telephone hotlines specifically for domestic violence. Trained counsellors are also available at police stations (for more on the gender desks see further section 10.1 below).

### 5.2 NON-GOVERNMENTAL ORGANISATIONS

There are a number of non-governmental organisations which support victims of gender-based and domestic violence, providing education, awareness, counselling and rehabilitation for victims. They usually have their own codes of conduct or guidance notes. It should be noted, however, that these types of documents are not official and cannot be enforced by the State.

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<sup>561</sup> Article 36 Law N° 59/2008.

<sup>562</sup> Article 10 Law N° 59/2008.

<sup>563</sup> Law N°46/2010 of 14/12/2010 Determining The Powers, Responsibilities, Organization And Functioning Of The Rwanda National Police.

Such organisations include Haguruka, which seeks to protect the rights of women and children, the Rwandan Youth Information Community Organisation (RYICO) which provides a shelter for women who are victims of domestic violence in Rwanda and the Rwanda Women’s Network which opposes domestic violence and the rape of children and young girls.

### 5.3 SUPPORT FOR VICTIMS WHO ARE CHILDREN

The Law on Gender-Based Violence provides that “the parent, trustee or any other person responsible for a child shall protect the latter against any gender based violence”.<sup>564</sup> A person witnessing or having knowledge of domestic violence against a child has an obligation to report it to the police. Failure to do so constitutes an offence under Article 10.

There are no other legal provisions regarding support for children who have witnessed, or who have been exposed to, domestic violence.

However, there are codes of conduct within the various places of safety that children in need of care are relocated to. The government provides such places of safety in partnership with non-governmental organisation initiatives.

UNICEF<sup>565</sup>, UNIFEM<sup>566</sup>, UNFPA<sup>567</sup> and other partners set up the “Isange One Stop Centre” in July 2009 to provide free services for child survivors of domestic abuse and gender-based violence. The centre provides:

- specialised medication;
- medico-legal tools and equipment for forensic interviews;
- child therapy services and training;
- staff training to recognise and address the needs of survivors of violence and abuse;
- treatment manuals and protocols to support staff;
- outreach and awareness raising activities; and
- financial support to the most vulnerable survivors.

A second One Stop Centre has opened at Gihundwe Hospital in south-western Rwanda. The Government intends to expand the services provided by One Stop Centres to each of the country’s 30 districts.

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<sup>564</sup> Article 7 Law N° 59/2008.

<sup>565</sup> United Nations Children’s Fund (<http://www.unicef.org>).

<sup>566</sup> United Nations Development Fund for Women (<http://www.unifem.org>).

<sup>567</sup> United Nations Population Fund (<http://www.unfpa.org/public/home/about>).

The National Commission for Children was established by Law N° 22/2011 of 28 June 2011. One of its aims is to “integrate an ill-treated child in a family or any place where he/she can receive good education”.<sup>568</sup>

The Rwandan National Commission on Human Rights was established by Law No 04/99 of 12 March 1999 to handle complaints of human rights abuse against individuals and, in particular, children. The Commission’s role is to advance gender equality in all spheres of society and make recommendations on any legislation affecting the status of women. On receiving a complaint it will investigate and use a range of dispute resolution mechanisms, including mediation, hearings (public and private) and enquiries on a local or national level. Criminal cases are forwarded to the public prosecutor.

## 6 OFFENCES

There are a number of criminal offences outlined in the Law on Gender-Based Violence, including:

- distorting the tranquility of one’s spouse;<sup>569</sup>
- conjugal rape;<sup>570</sup>
- adultery;<sup>571</sup>
- spouse harassment;<sup>572</sup>
- sexual slavery;<sup>573</sup> and
- sexual violence against an elderly person.<sup>574</sup>

Gender-based violence offences can also include bullying, unwanted sexual advances, the threat of violence and neglect of children.

Criminal offences of relevance in a domestic violence situation include murder, attacking another person, threats of attack and causing injury.

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<sup>568</sup> Mission of The National Commission of Children as in their website: <http://ncc.gov.rw/spip.php?article2>.

<sup>569</sup> Article 4.

<sup>570</sup> Article 5.

<sup>571</sup> Article 14.

<sup>572</sup> Article 20.

<sup>573</sup> Article 23.

<sup>574</sup> Article 32.

## 7 PENALTIES AND SANCTIONS

The sanctions for gender-based violence offences, including domestic violence, depend on the act committed by the offender. It is at the court's discretion whether an offender serves a prison term and/or pays a fine.

The minimum penalty for gender-based violence offences is a prison sentence of six months. Certain crimes listed in the Law on Gender-Based Violence, including sexual torture, rape resulting in death or terminal illness or killing one's spouse, receive a sentence of life imprisonment. Other offences and their corresponding penalties include:

- deprivation of rights — six months to two years imprisonment and a fine of RWF500–100,000;
- harassing a spouse — six months to two years imprisonment;
- adultery — six months to two years imprisonment;
- distorting the tranquility of one's spouse — six months to two years imprisonment and a fine of RWF50,000;
- sexually indecent acts — 2–5 years imprisonment and a fine of RWF100,000–200,000;
- sexual intercourse without consent — 10–15 years imprisonment;
- sexual violence directed at an elderly person — 10–15 years imprisonment; and
- sexual slavery — 10–15 years imprisonment and a fine of RWF500,000–1,000,000.

## 8 REHABILITATION MEASURES

### 8.1 REHABILITATION IMPOSED BY THE COURT

In Rwanda the Penal Code allows for the courts to order that the offender be rehabilitated. Article 141 states that every convict can be rehabilitated. Further, Article 142 provides for rehabilitation of an offender where five years have elapsed and where there is evidence of good conduct.

Rehabilitation imposed by the court is common where the offender mitigates his situation and what rehabilitation is given will depend on the gravity and extent of the offence.



## 8.2 SERVICES PROVIDED BY NON-GOVERNMENTAL ORGANISATIONS

Limited rehabilitation is offered through the “Couples in conflict” program. In August 2012, with support from UNFPA, gender-based violence training was carried out in Rusizi for 180 couples living in a state of conflict. Several husbands realised through this training that they had been committing forms of violence which were gender-based.

As detailed further in section 5.3 above, the Isange One Stop Centres provide psychological, social and medical assistance.

Participation in rehabilitation programmes is voluntary. Usually, offenders who recognise the problem and who wish to save their families are willing to participate in these programs to prevent further violence. The criteria that the offenders have to meet before being admitted to the programmes vary according to the organisers of the programmes.

## 9 THIRD PARTY RESPONSIBILITIES

As mentioned above, all individuals have an obligation to prevent gender-based violence and to either rescue, or call for the rescue of, victims.<sup>575</sup>

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 MEASURES IN PLACE

Government policy has been vital in the control and prevention of domestic violence. The government has drawn up a National Strategic Plan for fighting gender-based violence for 2011–2016.<sup>576</sup>

Special attention is given to sexual violence cases by the Judicial Police and prosecution service. Sexual violence cases are also given priority in the courts. The prosecution service has a special department which deals with cases of violence and specific funds are allocated for providing support in the prosecution of such cases.

Community policing was introduced by the Judicial Police to help tackle issues faced by communities at a grassroots level, using the police in partnership with communities. Community policing supports the implementation of strategies for

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<sup>575</sup> Article 10. Law N° 59/2008.

<sup>576</sup> Republic of Rwanda — Ministry of Gender and Family Promotion.

fighting the causes of crime and social disturbances through solutions such as domestic dispute resolution and civic education.

The police, prosecution and institutions supporting women have intensified their campaigns to prevent sexual violence against women. Recent progress can be seen in the establishment of “gender desks”, which were set up in police stations across the country in May 2005 under the framework of the joint UN Women-UNDP Project, *Enhancing Protection from Gender-based Violence*.

These gender desks are staffed by trained women who help victims of sexual, and other, violence. They investigate cases and ensure that evidence is available for court proceedings. The police station must also have an interview room to enable women to speak in confidence with a trained officer and/or a UN Women-UNDP-funded adviser.

In 2005, a nationwide toll-free hotline service for reporting sexual gender-based violence was also set up.

## 10.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

As mentioned above, the Law on Gender-Based Violence requires individuals to assist victims of violence. This helps to enforce laws by prohibiting communities from being complicit in excusing or condoning domestic and gender-based violence.

However, even good laws can fail if the legal process is too expensive. Free legal services are limited and the number of victims is often greater than the resources available. The Law Clinic at the National University of Rwanda and local non-governmental organisations provide legal advice and aid, which usually consists of sourcing and paying for the victim’s legal representation.

The lack of access to economic opportunity and education for many women increases their dependence on their husbands. This inhibits many women from escaping violent relationships. The lack of literacy and female empowerment also means that many victims do not have a means of survival other than relying on their spouses. Female empowerment is an issue that needs to be tackled so women can take a stand against domestic violence without having to fear being made destitute by their actions.

Moreover, the fear of reporting and stigma associated with being a victim is a challenge. This is rooted in Rwandan society’s cultural acceptance of a man’s dominant role and the fact that it is not abnormal in Rwanda for women to experience domestic violence. Traditionally, men are culturally trained to be the breadwinners, with women playing a more subservient role. Therefore, men find it a challenge to accept a women’s earning capacity as this is likely to challenge their powers; thus the risk of violence is high. If one accepts this

analysis, it can be postulated that the root causes of physical violence are not related to poverty, drugs or ignorance, but rather rooted in the patriarchal system that gives and sustains an inequality of powers, rendering women vulnerable to violence.

The police themselves exist in a largely conservative patriarchal society. Domestic violence is deemed as an issue that is private to the family. There is, however, a gradual reform of the traditional thinking due to programs by non-governmental organisations.

There may also be underlying residual psychological effects of the genocide that may have an impact on the way families resolve disputes. Further, the genocide resulted in an unbalanced ratio of men to women which has led to an increase in polygamy which is practiced to date, albeit illegally.<sup>577</sup>

Another issue is that judges do not impose protective measures (e.g. psychological-social treatment or other rehabilitation programmes) in an adequate number of cases. The explanation for this could be that the rehabilitation programmes for offenders are not organised systematically. Sometimes the judge may not have information on the types of programmes available in his or her district.

### 10.3 PLANNED REFORMS/PILOT SCHEMES

There is a proposal to amend the Family Civil Code, which includes a proposal to reduce the time a couple must wait to be granted a divorce from five to two years. This is contained in a Divorce Bill that is yet to be passed.<sup>578</sup>

### 10.4 OTHER POINTS TO NOTE REGARDING DOMESTIC VIOLENCE LAWS

Due to the patriarchal system in Rwanda, children follow their fathers' lineage and thus in cases of a family break up, the child will remain with its father. According to Ntampaka, child custody is rarely argued before the courts. Due to tradition, custom and practice, the child will automatically reside with their father. However, Article 283 of the Family Civil Code directs that the child must remain with the 'innocent' spouse or, in the interests of the children, the spouse who can best ensure their education.

Although the debate on whether domestic violence is primarily a gender-based act is ongoing, most of the Rwandan and international organisations aiming to tackle domestic violence have taken a pro-feminist approach, focusing their

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<sup>577</sup> Article 22 of the Law on Prevention of Gender based Violence prohibits polygamy and provides that offender must be sentenced to three to five years and a fine of RWF 300,000–500,000.

<sup>578</sup> James Karuhanga, "Divorce Bill gathers pace" May 2013.

work on women's issues. Male victims of domestic violence are nevertheless assisted and treated at the Isange One Stop Centres. Interestingly, the Rwanda Men's Resource Centre offers assistance to women suffering from domestic violence but men are not catered for or recognised as victims.

The focus on gender raises a number of questions including whether domestic violence is defined by the gender of the person perpetuating it, how gender plays a part in the dynamics of it being perpetuated, and whether it is objective to disregard all factors other than gender that may contribute to its occurrence such as finance, anger issues and stress.

## ADDITIONAL RESOURCES

### Applicable Law

1. Constitution of the Republic of Rwanda of 04 June 2003 as amended
2. International Covenant on Civil and Political Rights of 19 December 1966 ratified by the Presidential Order N° 8/75 of 12/02/1975
3. The Convention on the Eradication of all Forms of Discrimination Against Women adopted in 1979 by the United Nations and ratified by Presidential Decree N° 431/12 dated November 10, 1980
4. International Convention on Elimination of all Forms of Discrimination against Women of May 1, 1980 ratified by the Presidential Order N° 431/16 of 10/11/1981
5. The African Charter on Human and Peoples Rights of 27 June 1981 ratified by the Presidential Order N° 10/1983 of 17/05/1985
6. International Convention on the Rights of the Child of November 20, 1989 ratified by the Presidential Order N° 773/16 of September 19/09/1990
7. The Decree-law N° 21/77 of 18/08/1977 establishing the Penal Code
8. Law N° 42/1988 of 27/10/1988 instituting the Preliminary Title and Book One of the Civil Code
9. Law No 04/99 of 12/03/1999 establishing Rwanda's National Human Rights
10. Law N° 22/99 of 12/11/1999 to supplement Book One of the Civil Code and to institute Part V regarding matrimonial regimes, liberalities and succession
11. Police Law No. 9 of 2000
12. Law No 54/2000 of 14/12/2011 came to effect in June 2012 related to the Rights and the Protection of the Child

13. Law N° 51/2001 of 30/12/2001 establishing the Labour Code
14. Law N° 27/2001 of 28/04/2001 relating to rights and protection of the child against violence
15. Law N° 22/2002 of 09/07/2002 establishing general statutes for Rwanda Public Service
16. Law N° 13/2004 of 17/05/2004 relating to the code of criminal procedure as modified and complemented to date
17. Law N° 15/2004 of 12/06/2004 relating to evidence and its production
18. Law No. 59/2008 of 10/09/2008 on Prevention and Punishment of Gender-based violence
19. Law No. 22/2011 of 28/06/2011 establishing the National Commission for Children
20. The National Policy on Violence against women and children drafted by the MIGEPROF
21. The National Reproductive Health Policy and Health Policy, which incriminates both sexual and domestic violence, states that perpetrators of the same must be punished by the law
22. The Draft Law on reproductive health governs the sexual violence in general and the violence against children and minors in particular
23. The Beijing Platform of Actions adopted in September 1995, which comprises 12 priority areas of action for all the countries that attended that conference, including Rwanda
24. The Convention on the repression of trade in human beings and the exploitation of prostitution to which Rwanda also adhered through a presidential decree dated December 31, 2002
25. The Universal Declaration on Human Rights
26. The African Charter on Human and People's Rights
27. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, dated July 11, 2003, adopted during the second summit of the African Union in Maputo, Mozambique; the Protocol violence against women in Africa, and the setting up of a policy of equality between men and women by African governments. It was ratified by Rwanda on June 24, 2004
28. United Nations Convention against Torture and other cruel inhuman or degrading treatment or punishment
29. United Nations Declaration on the Elimination of Violence against women
30. The International Covenant on Social, Economic and Cultural Rights
31. The Divorce Bill

## Publications

1. Gahongayire, L. (2012), *Combating gender-based violence in Rwanda*, International Journal of Development and Sustainability, Vol. 1 No. 2, pp. 417–436
2. Report produced by UNIFEM In collaboration with the Department of Applied Statistics of the National University of Rwanda June 2008
3. Ministry of Gender and Family Promotion: Gender Based Violence Training Module, April, 2011
4. US Agency for International Development Centre for Development and Training Services, In, Women's Legal Rights Initiative of the Women in Development; Rwanda Assessment and Analysis Report 11–24 Oct 2004
5. UN General Assembly Resolution on the elimination of domestic violence against women 58/147 A/RES/58/147 19 February 2004
6. Gender Monitoring Office, Assessment of the Intervention Programmes for Gender-based violence Prevention and Response 2010
7. Strategies for confronting domestic violence: 7 UN. DOC. ST/CS DHA/20 (1993)
8. GMO, *GMO Strategic Plan Framework 2011–2016*
9. UN International Convention on Civil and Political Rights, Human Rights Committee, "Replies of the Government of Rwanda to the list of issues (Ccpr/C/Rwa/Q/3/Rev.1) To Be Taken Up in connection with the Consideration of the third periodic report of Rwanda (Ccpr/C/Rwa/3)" 29 March 2009
10. UN Rwanda Country Assessment on Violence against women, Rwanda UNFPA – undated
11. United Nations, *Strategy for confronting Domestic Violence*, 7 U.N. DOC.ST/CS DHA/20 (1993)
12. Charles Ntampaka *Family Law in Rwanda*, Rwanda, A. Bainham (ed.), The International Society of Family Law, Netherlands
13. Nirere Madeleine, Human Rights of Women and Girls, Gender Equality, "The Role of a National Human Rights Institution" The Rwandan Experience
14. Eunice Musiime, *Rwanda's Legal System and Legal Materials*, Globalex, April 2007
15. James Karuhanga, *Divorce Bill gathers pace* May 2013

## Internet

African Commission on Human and Peoples' Rights <http://www.achpr.org/network/ngo/425/>

### Non-governmental organisations

1. UNFPA: The United Nations Population Fund  
<http://www.unfpa.org/public/>
2. Isange One Stop Centres [<http://rw.one.un.org/index.php/en/olympics2012/badminton/132-isange>]
3. UNICEF
4. UN-CEDAW (United Nations-Convention on the Elimination of all Forms of Discrimination against Women)
5. HAGURUKA
6. ARCT-Ruhuka (a trauma counselling association)
7. RYICO
8. Rwanda Men's Resource Centre (group aims to mobilise Rwandan men to support women aspiring to gain access to decision-making positions in Rwanda, in order to put an end to the violence perpetrated by men and to be positive male role models) <http://www.rwamrec.org>
9. Rwanda Women's Network <http://www.rwandawomennetwork.org/>
10. Profemmes Twese Hamwe (group of 41 women's associations together forming a platform for the exchange of information and consultation on how to promote women's development. The group is also an effective and efficient participant in national development)
11. USAID Rwanda <http://www.usaid.gov/where-we-work/africa/rwanda>
12. Make every woman count <http://makeeverywomancount.org>
13. Global grassroots – conscious social change for women <http://www.globalgrassroots.org/>

### Governmental Organisations

14. MIGEPROF: Ministry of Gender and Family Promotion <http://www.migeprof.gov.rw>
15. MINALOC: Ministry of Local Government, Good Governance, Community Development and Social Affairs  
<http://www.minaloc.gov.rw>
16. MINISANTE: Ministry of Health <http://www.moh.gov.rw/index.php?id=2>
17. The Rwanda police <http://www.police.gov.rw>

# Singapore

*80% of people would not intervene if they knew a friend, relative or neighbour was being abused by a partner.*





# DOMESTIC VIOLENCE IN SINGAPORE

DLA Piper International LLP, Singapore

## EXECUTIVE SUMMARY

In Singapore, the prevention of and protection against domestic violence is covered by several legislative acts. The central piece of legislation contains a relatively broad definition of domestic violence, including acts of physical, mental and wrongful restraint.

It can be said that Singapore has relatively developed laws to combat and prevent domestic violence, as well as an evident judicial tendency to impose strong penalties in cases of violent abuse, whilst also recognising the need for rehabilitative action for offenders.

However, according to several commentaries, the typical challenges are present in Singapore, such as reluctance of victims to come forward for fear of reprisals and/or because of financial dependence on the offender.

One prevalent criticism is that marital rape is not illegal in Singapore and there is an online petition which presses for reform in this area.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

Domestic violence has an express legal definition in Singapore.

The legislation, the Women's Charter, defines domestic violence at section 64 as "family violence", meaning the commission of any of the following acts:

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

However, the definition expressly excludes any force lawfully used in self-defence, or by way of correction towards a child below 21 years of age.<sup>579</sup>

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<sup>579</sup> Women's Charter, section 64.

Family member is defined as a spouse or former spouse of the person:

- a child of the person, including an adopted child and a step-child;
- a father or mother of the person;
- a father-in-law or mother-in-law of the person;
- a brother or sister of the person; or
- any other relative of the person or an incapacitated person who in the opinion of the court should, in the circumstances, in either case be regarded as a member of the family of the person.

Hurt is defined as bodily pain, disease or infirmity.

However, the definition of family member will likely not extend to those in a *de facto* state of marriage as it appears to be limited to a spouse or former spouse. The inclusion of these types of relationships is unlikely because the word 'spouse' is not defined in the Women's Charter or generally in Singaporean law, and in the absence of any specific legal meaning, 'spouse' should be given its ordinary meaning, which is a person's husband or wife.

Although not concerning family violence, the case of *Kay Swee Pin v Singapore Island Country Club*<sup>580</sup> incidentally touches on the general definition of spouse and observes that in circumstances where the term must be ascribed its natural and ordinary meaning it means a person's husband or wife.<sup>581</sup>

Further, given the definition's restriction to spouses and former spouses, it is unlikely that gay or lesbian relationships will be protected under the legislation as same sex marriage is not permitted under Singaporean law.

However, it must be noted that transgender (post-operative) marriages are recognised under Singaporean law. Therefore, the definition of family member does (or may) include violence against transgender spouses. This would not include unmarried transgender partners, but note that general criminal laws against physical violence will still apply in these circumstances and this is detailed below.

Domestic workers are not included in the definition of family member or family violence. However, there is special provision in the Penal Code for criminal offences perpetrated against female domestic workers<sup>582</sup>. Note these provisions only increase the penalties for offenders and do not offer any specific protection

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<sup>580</sup> [2007] SGHC 166.

<sup>581</sup> Note that the decision in this case was subsequently overturned on appeal. However, the trial Judge's comments on the definition of spouse were not in issue in the appeal. It should also be noted that the trial Judge's comments on the 'natural and ordinary meaning' of spouse were in the context of the definition of 'spouse' for the purpose of a social club's rules, and not in interpreting any law.

<sup>582</sup> Section 73.

to domestic workers of the kind potentially afforded by the family violence provisions of the Women's Charter.

Mental abuse is likely included due to the words "placing...or attempting to place, a family member in fear of hurt" as well as "causing continual harassment...that is likely to cause anguish". Whilst the definition does not refer specifically to, or provide especially for, mental abuse, these above-quoted classes of family violence potentially encompass instances of mental abuse or emotional/psychological abuse, in the sense that they can include violence that is not physical. A review of a sample of family violence protection order cases reveals that the continual harassment category appears to be the one most relied upon by victims to seek protection in instances of non-physical family violence.

The case of *Yue Tock Him, Yee Chok Him v Yee Ee Lim*<sup>583</sup> provides a detailed discussion on the meaning of "harassment" in this context, including an examination of previous Singaporean and UK cases. Relevantly, the Judge found that harassment should be given a 'common-sense meaning' and can include (non-exhaustively):

"a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person".<sup>584</sup>

A survey of sample cases shows that the court will focus on the context and pattern of events in construing if something amounts to "continual harassment". The following instances of behaviour have been found to be examples of "continual harassment" for the purposes of the meaning of 'family violence':

- verbal threats and locking the victim out of the house;<sup>585</sup> and
- a wife snatching her husband's phone whilst he was driving (in the context of a prolonged pattern of abusive behaviour).<sup>586</sup>

Various rights organisations and non-governmental organisations commenting on the prevailing understanding of non-physical acts of violence in Singapore, note the following actions as being examples of family violence in relation to a family member:

- insulting or humiliating a person;
- intimidating a person by screaming, making threats, harassment or destroying property;

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<sup>583</sup> [2011] SGDC 99.

<sup>584</sup> At paragraph 9.

<sup>585</sup> *BCM v BCN* [2012] SGDC 288.

<sup>586</sup> *BDJ v BDK* [2012] SGDC 415.

- emotional blackmail or using emotions to manipulate a person;
- demeaning a person in front of others or in public places;
- monitoring and controlling a person’s activities and relationships;
- persistent hostility, including ignoring or blatantly rejecting a person; and/or
- confining a person within the home or stopping a person from going somewhere.

Further, while financial abuse is not expressly included, it may be included within the concept of continual harassment provided that it is sufficiently serious.

However, the cases involving continual harassment involve a range of scenarios, so it is conceivable that, in certain circumstances, financial abuse/economic hardship may amount to continual harassment and therefore family violence.

The burden of proof here falls on the person who would fail if no evidence at all were given on either side, as noted in section 104 of the Evidence Act (Chapter 97) (Evidence Act). Family violence (or likely family violence) must be proven on the balance of probabilities for the court to make a resulting protection order (section 65(1) of the Women’s Charter). If mental abuse is proven under continual harassment, and necessity for protection is established, the normal family violence redress of a personal protection order is potentially available to the victim against the perpetrator. Such an order may, among other things, restrain the perpetrator from committing family violence against the victim. Protection orders are discussed further below. The proof requirements are dealt with further below.

Additionally, other laws such as the general criminal law in the Penal Code (Chapter 224) (the “Penal Code”) contain criminal offences and penalties for certain instances of physical violence and will apply in circumstances of abuse in non-marriage relationships. However, these offences are limited to physical violence and do not include instances of non-physical violence.

In cases of family violence, this burden would ordinarily lie on the victim alleging family violence. This is discussed in further detail below.

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Singapore is the Women’s Charter.

Additionally, there are a number of other specific pieces of legislation which may be relevant to domestic violence. These include the Children and Young Persons

Act, the Miscellaneous Offences (Public Order and Nuisance) Act and the Maintenance of Parents Act. These pieces of legislation are summarised below:

- under the Children and Young Persons Act, children and young persons are protected from violence and abuse which includes domestic violence. Child abuse can include physical abuse, neglect, sexual abuse, or emotional/psychological abuse;
- under the Miscellaneous Offences (Public Order and Nuisance) Act, sections 13A, 13B and 13C, victims are protected from general instances of mental and physical violence; and
- under the Maintenance of Parents Act, the family unit itself is protected. Given the primacy of the family unit in Singapore, there is also legislation to protect the maintenance of parents. The Maintenance of Parents Act (Chapter 167B) provides recourse to the elderly who are unable to maintain themselves financially, by obtaining financial maintenance from their children. The Tribunal for the Maintenance of Parents has the jurisdiction to hear and determine the outcomes of all applications made under this Act. Any person domiciled and resident in Singapore, aged 60 years and above and unable to maintain themselves adequately can claim maintenance from their children, who are capable of supporting them but are not doing so. A person below 60 years may also apply if the Tribunal is satisfied that they are suffering from infirmity of mind or body or for special reasons which prevents them or makes it difficult for them to maintain themselves.

Further, as noted above, the general criminal law in the Penal Code is relevant to offences committed in a domestic violence context. Specifically, sections 320 to 322, which relate to offences of voluntarily causing harm and “voluntarily causing grievous harm”. These are discussed further below.

## 2.2 INTERNATIONAL TREATIES

The government of Singapore has signed and ratified to the following international conventions which are relevant to domestic violence:

- United Nations Convention on the Elimination of All Forms of Discrimination Against Women (UNCEDAW); and
- ASEAN Declaration on the Elimination of Violence Against Women (DEVAW).

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

The burden of proof will generally lie on the prosecution in criminal cases and the generally accepted standard of proof for criminal law offences in Singapore is beyond reasonable doubt.<sup>587</sup>

### 3.2 RELEVANT COURT

Depending on the seriousness of the penalty attached to the offence, criminal proceedings will be brought in either the Magistrates' Courts, the District Courts or the Subordinate Courts.<sup>588</sup>

### 3.3 PROSECUTION FUNDING

The Public Prosecutor is funded by the government. The government only provides limited legal aid to individuals charged with capital offences.

However, the Law Society of Singapore has run a separate and independent Criminal Legal Aid Scheme which provides legal aid for those charged with offences under a number of Acts, including:

- Miscellaneous Offences (Public Order and Nuisance) Act (Cap. 184);
- Penal Code (Cap. 224); and
- Women's Charter (Cap. 353) specifically sections 65(8) and 140(1)(i) and section 65(8) being a breach of personal protection order.

### 3.4 TIMESCALES

The timescales will depend on whether the offender pleads guilty or not guilty as well as the general complexity of the matter.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

Under the legislation there are a number of preliminary or interim measures.

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<sup>587</sup> See *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at 17.

<sup>588</sup> See <http://app.subcourts.gov.sg/subcourts/page.aspx?pageid=4420>.

The primary redress for victims under civil law is the issuing of a protection order, noting this redress is limited to violence committed against “family members”, which means spouses and children as is noted above.

It would also be open to a victim of domestic violence to bring a civil action for trespass for physical violence or harassment for non-physical violence.

A victim of family violence may seek a protection order against the perpetrator, which may, among other things, restrain the perpetrator from committing family violence against the victim and order the perpetrator to undergo counselling.

This order provides that:

- if family violence has been (or is likely to be) committed; and
- it is necessary for the protection of the victim, the court may make a protection order restraining the perpetrator from committing family violence against the victim.

The court has a broad discretion for setting any other conditions in protection orders as it sees fit and may include:

- excluding the perpetrator from the family home, or specified parts of the family home; and
- referring the perpetrator and/or victim to counselling.

An application for a protection order may be made by the victim, or in the case of the victim being a child below the age of 21 or an incapacitated person, the guardian or relative or person responsible for the care of the child or incapacitated person.

Further, the legislation provides for expedited orders to be made in circumstances where the victim faces “imminent danger”. This allows the court to make an expedited order even where the normal application process for a protection order has not been complied with, due to time constraints.

Under the Women’s Charter, a protection order is potentially available to victims of family violence. A protection order may contain any orders the court sees fit, and can include orders restraining the perpetrator from committing or inciting family violence and/or counselling orders for the perpetrator and/or victim.

## **4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES**

The burden of proof in a civil suit or proceeding lies on that person who would fail if no evidence at all were given on either side, pursuant to section 104 of the Evidence Act.

In relation to family violence or likely family violence, the violence must be proven on the balance of probabilities for the court to make a resulting protection order pursuant to section 65(1) of the Women’s Charter.

Note that amendments made to the Women's Charter in 1996 moved the burden of proof test from beyond reasonable doubt to the probabilities doctrine. Commentary suggests this was for social policy reasons namely so as to enable orders to be granted more frequently.

### **4.3 RELEVANT COURT**

An application for a protection order must be brought in the Family Court and will be heard by a Magistrate or District Judge. An application can be made to the Protection Order Services unit of the Family Court in person, or through video-link at one of several women's facilities.

The victim of the family violence, or where the victim is a child under 21 or an incapacitated person, the guardian or relative or person responsible for the care of the child or incapacitated person.

### **4.4 TIMESCALES**

It appears that it could normally take four to five weeks to obtain a protection order, as the process involves filing, service, mentions, then a substantive hearing.

However, in cases where the victim faces "imminent danger" the court may issue an expedited order, which can be ordered immediately, pending the trial. An expedited order will last for 28 days or until the trial commences (whichever is sooner), but the court may extend the duration of an expedited order.

### **4.5 FUNDING TO PROSECUTE**

Given that it only costs an applicant a nominal sum of \$1 to seek a protection order (for the cost of the issuance of a summons), it appears that funding the action may not be a significant concern.

A victim does not require legal representation to seek a protection order, however if they need any assistance, several organisations are available, including possible legal aid funding and support.

## **5 SUPPORT FOR VICTIMS**

### **5.1 STATUTORY PROVISIONS**

While there does not appear to be any specific provisions relating to support for victims, there are a number of organisations that work to protect women's rights generally.



These include:

- AWARE;
- the Centre for Promoting Alternatives to Violence (PAVe);
- SAFE@TRANS;
- the Project START Care Corner FSC; and
- the Singapore Association of Women Lawyers' Pro Bono Legal Consultation Clinics.

## 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

While there does not appear to be any specific provisions relating to support for children, the Ministry of Social and Family Development Child Protection Unit is responsible for administering the Children and Young Persons Act.

The Ministry of Social and Family Development and other authorities may investigate instances of child abuse and instigate proceedings in the Juvenile Court seeking a Child Protection Order. The Ministry of Social and Family Development has the capacity to remove children from their homes and place them into other care in instances of suspected child abuse.

## 6 OFFENCES

There are five main criminal offences under which domestic violence offences would be prosecuted. These are detailed in the table below:

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW – THE PENAL CODE</b>		
VOLUNTARILY CAUSING HURT	Section 321	Maximum two years imprisonment and/or fine of up to \$5,000
VOLUNTARILY CAUSING GRIEVOUS HURT	Section 322	Maximum ten years imprisonment and/or fine or caning
<b>LAW – THE WOMEN'S CHARTER</b>		
WILFUL CONTRAVENTION OF A PROTECTION ORDER (EXPERT COUNSELLING ORDERS)	Part V	Maximum six months imprisonment and/or fine of up to \$2,000 Maximum twelve months imprisonment and/or fine of up to \$5,000 (subsequent breaches)
<b>LAW – THE MISCELLANEOUS OFFENCES ACT</b>		

OFFENCE	LEGAL REFERENCE	SANCTION
COMMITTING OR CAUSING HARASSMENT	Sections 13A, 13B and 13C	Fine of up to \$5,000 (section 13A) Fine of up to \$2,000 (sections 13B and 13C)
LAW – THE CHILDREN AND YOUNG PERSONS ACT		
CHILD ABUSE	Section 5	Maximum seven years imprisonment or fine of up to \$20,000 (in case where death is caused to child or young person) Maximum four years imprisonment or fine of up to \$4,000 (in and other case)

As a general observation, the following commentary from the judiciary in this area which indicates a strong preference to administer custodial sentences for family violence incidents:

- *Public Prosecutor v Luan Yuanxin*:<sup>589</sup> “[v]iolent acts such as these are particularly heinous when they are committed within the confines of a familial relationship as they constitute an abuse of the bonds of trust and interdependency that exist between family members...In this regard, I was mindful of the need to deter anyone else who might resort to such violence, especially in view of the deplorable increase in the number of cases involving family violence”; and
- *Public Prosecutor v Russell Tan Rui Leen*:<sup>590</sup> “[t]he respondent behaved like an uncivilised savage who had no qualms about mistreating his estranged wife. It would certainly be sending out the wrong signal to the public if such a person who physically abused and threatened to kill his wife got away with a mere fine. In a marital relationship, it is inevitable that there will be differences and disagreements between spouses. However, parties should not resort to violence to resolve such conflicts. Spousal violence should not and will not be tolerated as a normal part of marital life.”

## 7 REHABILITATION MEASURES

As noted above, a protection order may require an offender to undergo counselling. An offender may also be required to undergo counselling with a court counsellor during the proceedings.

589 [2002] SGHC 65, per Yong Pung How CJ at para 17 on increasing the sentence of a domestic violence offender on appeal from the Public Prosecutor.

590 [2008] SGDC 379, per District Judge May Lucia Mesenas.

In the case of family violence, it is in the court's discretion to require an offender to undergo counselling. If so required, the offender must attend a Government-approved counselling program. There is no prescribed time period, and the court can make orders as it sees fit.

## 8 THIRD PARTY RESPONSIBILITIES

There do not appear to be any third party responsibilities in relation to domestic violence in Singapore.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS AND CIVIL ACTIONS

While there does not appear to be any statistics of successful prosecutions in relation to domestic violence in Singapore specifically, the number of applications for protection orders and breaches of protection orders is detailed in the table below:

ORDER/BREACH	2009	2010	2011
FRESH PROTECTION ORDER APPLICATIONS	2,971	3,058	2,871
VARIATION/RESCISSION OF PROTECTION ORDER	123	133	158
BREACH OF PROTECTION ORDER	115	119	98
BREACH OF COUNSELLING ORDER	46	27	15

### 9.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

A government publication, *Protecting families from violence*, claims (based on a 2004 survey) that the court-ordered mandatory counselling can be effective against recurrence of physical violence, but that verbal abuse is still common. This survey noted its limitations in that it was only able to survey a small group. A separate survey into family violence recidivism over three cohorts found an average recidivism rate of 3.1%.

However, according to several commentaries, the typical challenges are present in Singapore, such as reluctance of victims to come forward for fear of reprisals and/or because of financial dependence on the offender.

The laws have already been reformed in the past ten to fifteen years, most notably to include the concept of non-physical harm in the definition of family violence.

One prevalent criticism is that marital rape is not illegal in Singapore. There is an online petition which presses for reform in this area.

### **9.3 PLANNED REFORMS/PILOT SCHEMES**

It should be noted that Singapore has relatively developed laws to combat and prevent domestic violence, as well as an evident judicial tendency to impose strong penalties in cases of violent abuse, whilst also recognising the need for rehabilitative action for offenders.

There are also organisations that are available to support women in need and actively campaign for change. However, a recent survey from one such group, AWARE, has found that community attitudes toward domestic violence are still not satisfactory. Findings included that 80% of people would not intervene if they knew that a friend, relative or neighbour is being abused by a partner. It was also found that negative stereotypes of women and conservative views on gender roles remain strong, especially among men aged 18–29.

### **9.4 REVIEW OF DOMESTIC VIOLENCE LAWS**

The Committee for Family Justice was established in 2013 to look into reform to the family justice system to better deal with family disputes.

The Ministry of Social and Family Development and the Singapore Police Force also jointly head the Family Violence Dialogue Group which provides a platform for various agencies to jointly set strategic policy frameworks and promote public education.

Additionally, the National Family Violence Networking System symposium is also held annually to discuss key issues in the sphere of domestic violence.

## **ADDITIONAL RESOURCES**

### **Applicable law**

1. The Women's Charter
2. The Penal Code

3. The Children and Young Person's Act
4. The Miscellaneous Offences (Public Order and Nuisance) Act
5. The Maintenance of Parents Act

### **Publications**

1. PAVe Centre, Management of Family Violence in Singapore, 30 July 2006
2. United Nations Entity for Gender Equality and the Empowerment of Women, *Domestic Violence Legislation and its Implementation – an analysis for ASEAN countries based on international standards and good practices*, 2011
3. Family & Juvenile Justice Division, *Personal Protection Against Family Violence*, March 2013

### **Judgments**

1. *AWR v AWS* [2011] SGDC 410
2. *BCM v BCN* [2012] SGDC 288
3. *BDJ v BDK* [2012] SGDC 415
4. *BDV v BDW* [2012] SGDC 433
5. *Jimmy Lim Boon Hai v Public Prosecutor* [2002] SGDC 2
6. *Kay Swee Pin v Singapore Island Country Club* [2007] SGHC 166
7. *Kay Swee Pin v Singapore Island Country Club* [2008] SLR(R) 802; [2008] SGCA 11
8. *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286
9. *Public Prosecutor v Luan Yuanzin* [2002] 1 SLR(R) 0613, [2002] SGH 65
10. *Public Prosecutor v Russell Tan Rui Leen* [2008] SGDC 379
11. *Shang Hong v Carys Hua Ling* [2012] SGDC 291
12. *Tan Hock Chuan v Tan Tiong Hwa* [2002] 2 SLR(R) 90; [2002] SGHC 117
13. *Wong Leong Chin v Public Prosecutor* [2000] 3 SLR(R) 0560; [2000] SGHC 286
14. *Yue Tock Him, Yee Chok Him v Yee Ee Lim* [2011] SGDC 99

### **Other sources**

1. The Subordinated Courts of Singapore, *Personal Protection Orders – a summary*, April 2012
2. The Subordinated Courts of Singapore, *Research Bulletin – Faces of Family Violence, a profile study on family violence*, December 2004

### **Non-governmental organisations**

1. AWARE
2. the Centre for Promoting Alternatives to Violence (PAVe)
3. SAFE@TRANS
4. the Project START Care Corner FSC
5. the Singapore Association of Women Lawyers' Pro Bono Legal Consultation Clinics

### **Governmental organisations**

Ministry of Community Development, Youth and Sports, *Protecting Families from Violence: the Singapore Experience*, October 2009

# South Africa

‘ Women in South Africa experience amongst the highest levels of gender based violence in the world. ’



# DOMESTIC VIOLENCE IN SOUTH AFRICA

Werksmans Attorneys, Johannesburg

## EXECUTIVE SUMMARY

In South Africa extensive focus has been placed on domestic violence by the promulgation of detailed legislation, national guidelines and the ratification of a range of international and regional treaties and conventions on this topic. The prevention and prosecution of domestic violence intersects the jurisdiction of the South African Police Service, the Department of Justice and Constitutional Development, the Department of Social Development and the Department of Women, Children and People with Disabilities and affects men and women, children, the elderly and people with disabilities, irrespective of class, race or culture.

Despite highly sophisticated legislation, national guidelines, and most importantly supreme law, (being the South African Constitution, all of which recognise the rights of all people to be free from abuse), the occurrence of domestic violence is rife. The statistics are summarised in “The Domestic Violence Act: 15 Years Later” published by the Legal Resources Centre in March 2013 as follows:

‘Women in South Africa experience among the highest levels of gender based violence in the world. According to Gender Links’ research, 77% of women in Limpopo province, 51% of women in Gauteng, 45% of women in the Western Cape and 36% of women in KwaZulu-Natal have experienced some form of violence (emotional, economic, physical or sexual) in their lifetime, both within and outside [of] intimate relationships. Further the research notes that a “higher proportion of men in Gauteng (76%) and KwaZulu-Natal (41%) admitted to perpetrating violence against women in their lifetime, while a slightly lower proportion of men – compared to the proportion of women reporting [gender based violence] – said they perpetrated [gender based violence] in Limpopo (48%) and Western Cape (35%).”

The report notes that “the majority of violence reported occurred within women and men’s private lives, with 51% of women in Gauteng, 51% in Limpopo, 44% in the Western Cape and 29% in KwaZulu-Natal reporting having experienced intimate partner violence in their lifetime.”

When testing and implementing the various forms of legislation aimed at preventing domestic violence, the South African courts have not been shy to reinforce that the State has an obligation to deal effectively with family violence.



The Supreme Court of Appeal (the highest court in non-constitutional matters) emphasised how the issue of domestic violence is a priority for magistrates and judges in South Africa:

“No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act).”<sup>591</sup>

This report sets out the manner in which the legal protection of the rights described above is judicially constructed, while keeping in mind the practical considerations of implementation and the shortfalls experienced by the consumers of the legal system.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 GENERAL DEFINITION OF DOMESTIC VIOLENCE

This report on domestic violence in South Africa acknowledges that in South Africa the victims of domestic violence are both men and women, children, the elderly and people with disabilities. Throughout the report, words relating to any gender shall include the other gender and vice versa.

Domestic violence is defined in the Domestic Violence Act No 116 of 1998 (“Domestic Violence Act”) as conduct which is harmful or is likely to imminently become harmful and which has or may affect the complainant’s safety, health or wellbeing in any of the following ways:

- physical abuse — an act or threatened act of physical violence;
- sexual abuse — any abuse, humiliation, degradation or violation of the complainant’s sexual integrity;
- emotional, verbal and psychological abuse — a pattern of degrading or

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<sup>591</sup> *Director of Public Prosecutions, Western Cape v Prins and Others* (369/12) [2012] ZASCA 106; 2012 (2) SACR 183 (SCA); 2012 (10) BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA) (15 June 2012) accessed at <http://www.saflii.org.za/za/cases/ZASCA/2012/106.html> on 19 August 2013.

humiliating conduct for example: repeated insults, ridicule or name calling, repeated threats that cause emotional pain or a recurring obsessive or possessive behaviour or jealousy which results in an invasion of the complainant's privacy, liberty, integrity or security;

- economic abuse — unreasonably depriving the complainant of economic or financial resources to which they are entitled by law or out of necessity (i.e. household necessities, mortgage bond repayments or rental payments for shared residence) or unreasonably disposing of the complainant's household effects or other property in which the complainant has an interest;
- intimidation — threatening or sending a threat to the complainant which causes them to become fearful;
- harassment — becoming involved in conduct which causes the complainant to fear that they will be harmed. This behaviour includes: repeated watching; wandering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be or making telephone calls; persuading another person to make telephone calls to the complainant, whether or not they engage in a conversation; or, sending, delivering or initiating the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;
- stalking — repeatedly following, pursuing or accosting the complainant;
- damage to property;
- entry into the complainant's residence without consent, where the parties do not share the same residence; and
- any other controlling or abusive behaviour.

## 1.2 INFORMAL RELATIONSHIPS

The definition of domestic violence under South African law includes informal relationships between people who are not married. A "domestic relationship" is defined in the Domestic Violence Act as a relationship between the complainant and the respondent (whether of the same sex or of the opposite sex) where they currently live or have lived together in a relationship of a marital nature and even if they are not married to each other or are unable to marry each other.<sup>592</sup> The parties may be dating, engaged or in a customary relationship or an actual or perceived romantic, intimate or sexual relationship over any period of time,<sup>593</sup> or where they share or have recently shared the same residence.<sup>594</sup>

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592 Section 1, sub-section (b) under the definition "*domestic relationship*", Domestic Violence Act.

593 Section 1, sub-section (e) under the definition "*domestic relationship*", Domestic Violence Act.

594 Section 1, sub-section (f) under the definition "*domestic relationship*", Domestic Violence Act.

The definition includes “family members related by consanguinity, affinity or adoption”.<sup>595</sup> In the case of *Daffy v Daffy*,<sup>596</sup> the South African Supreme Court of Appeal looked at the question of whether a domestic relationship existed between two adult brothers who did not share a common household. One brother applied to court for an interim protection order against the other brother under the Domestic Violence Act and the court held that the dispute which arose between the parties was of a commercial nature and not a domestic violence matter. The court stated that for a domestic relationship to exist there must be more involvement between the parties than mere consanguinity and the fact that the parties were brothers did not mean that they shared a domestic relationship.

The court then looked at the definition of “complainant” in terms of the Domestic Violence Act as “any person who is or has been in a domestic relationship with the respondent and who is and has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant”.

The court found that the concept of “family” is in itself extremely wide. The court further referred to the case of *S v Baloyi*,<sup>597</sup> wherein the South African Constitutional Court stated that “the concept of domestic violence is commonly understood as being violence within the confines of the family unit, often hidden from view by reason of the helplessness of the victim and the position of power of the abuser.” The court went on to state that the common meaning of the word “domestic” is “pertaining to the home, house, or household: pertaining to one’s home or family affairs” and a domestic relationship involves persons sharing a common household. While the Legislature intended the definition of domestic relationship to have a wider meaning for the purposes of the Domestic Violence Act, the judge did not believe that it intended that a mere blood relationship would in itself be sufficient.

According to the South African Law Reform Commission Report of March 2006, a “domestic partnership” is referred to as the stable, monogamous living together as husband and wife of persons who do not wish to, or are not allowed, to marry. This includes men, women and opposite-sex persons and relationships between two men or two women and persons in non-conjugal relationships. The relationships must have a considerable degree of permanence and stability and must not be of a casual or intermittent character. Other words used to describe domestic partnerships includes shacking-up, living together, concubinage, associate libre, common-law marriage, *de facto* marriage, quasi-

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<sup>595</sup> Section 1, Domestic Violence Act.

<sup>596</sup> 2012 4 All SA 607 (SCA).

<sup>597</sup> Minister of Justice and another intervening) 2000 (2) SA 425 (CC).

marriage, and putative marriage. Domestic partnerships may also be referred to as a registered partnership, universal partnership or private marriage.

### 1.3 OTHER RELATIONSHIPS

The definition of domestic violence also includes a relationship between the complainant and respondent where the parties are of the same sex, i.e. those who are gay, lesbian and transgender.

The definition in the Domestic Violence Act does not however specifically mention domestic workers. One would have to argue to a magistrate that such a person fitted into one of the definitions of domestic relationship detailed above. However, a domestic worker would be able to obtain similar injunctive relief in the form of a protection order under the Protection from Harassment Act,<sup>598</sup> without having to prove a domestic relationship.

### 1.4 MENTAL ABUSE AS A FORM OF DOMESTIC VIOLENCE

The definition under the Domestic Violence Act does not include the term “mental abuse”. However, such abuse would fall within the definition of emotional, verbal and psychological abuse (see section 1.1 above).

In the Protection of Harassment Act, “harm” is widely defined to include mental and psychological harm. However, economic abuse is separately defined in the Domestic Violence Act (see section 1.1 above)

In terms of proving such psychological (i.e. mental) abuse, the burden of proof lies with the complainant. An interim protection order is issued if the court is satisfied that there is *prima facie* evidence of domestic violence (including incidents of mental abuse) and that the complainant will suffer undue hardship if an order is not immediately issued.<sup>599</sup> There is no definition of the term “undue hardship” in the Domestic Violence Act. Persons who have knowledge of the matter may provide supporting affidavits which will be attached to the application. The court will consider the application for relief and additional evidence as it deems fit including oral evidence or evidence by affidavit. The complainant or person acting on behalf of the complainant, may provide any proof of the mental abuse that they may possess, including but not limited to documentary evidence, witness statements, objects utilised to the effect the humiliation, police reports, counselling reports etc. The test

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<sup>598</sup> Act 17 of 2011.

<sup>599</sup> Section 4(5) Domestic Violence Act.

is whether on a balance of probabilities, the offender has committed or is committing an act of domestic violence.<sup>600</sup>

Psychological abuse is treated in the same manner as other forms of abuse. If found to have been psychologically abused by the offender, the complainant will be granted a protection order. Breach of final protection order allows for the immediate arrest of the offender, and charge with contravening the protection order, the punishment for which is a monetary fine or imprisonment of five years.

## 2 APPLICABLE LEGISLATION

The specific anti-domestic violence laws in South Africa are summarised in the table below:

<b>CONSTITUTION OF SOUTH AFRICA</b>	<p>Acts of domestic violence violate several rights fundamentally protected under the Bill of Rights,<sup>603</sup> including:</p> <ul style="list-style-type: none"> <li>— Section 9 – Equality;</li> <li>— Section 10 – Human Dignity;</li> <li>— Section 12 – Freedom and Security of the Person; and</li> <li>— Section 28 – Children.</li> </ul>
<b>DOMESTIC VIOLENCE ACT</b>	<ul style="list-style-type: none"> <li>— The provisions of this Act are dealt with at length in other parts of this report.</li> </ul>
<b>PROTECTION FROM HARASSMENT ACT</b>	<ul style="list-style-type: none"> <li>— This is a new piece of legislation, brought into effect on 27 April 2013, which allows anyone to obtain a protection order against another person (regardless of the domestic relationship) in the face of any type of harassment, including but not limited to sexual harassment, physical harassment and electronic harassment using mechanisms such as the internet or social networks. The definition of harassment in this Act relates specifically to actions that cause harm or inspire the reasonable belief that harm may be caused.</li> <li>— Harm in this instance is extremely broad and includes mental, psychological, physical or economic harm. The practical procedure for obtaining protection under this Act is very similar to the procedure for obtaining protection under the Domestic Violence Act and results in a final protection order being granted, together with a warrant for the arrest for the offender.</li> <li>— If an offender breaches the protection order, he can be found guilty of a criminal offence, punishable by fine or imprisonment for a period not exceeding five years.</li> </ul>

<sup>600</sup> Section 6(4) Domestic Violence Act.

<sup>601</sup> For a more detailed discussion on how these rights are infringed by domestic violence, see *Desktop Review of the Laws in South Africa on The Obligations of the State: Legislation, Policy, Guidelines and Directives in respect of Domestic Violence* published by the Legal Resources Centre (February 2013) available at: <http://www.lrc.org.za/images/publications/2013%2005%2015%20Desktop%20Review%20of%20the%20Laws%20in%20South%20Africa%20-%20Series%201.pdf> at page 37.

**CHILDREN'S ACT (ACT 38 OF 2005)**

- This Act deals with the rights of children (being any person under the age of 18 years) as protected under the South African Constitution. The provisions pertaining to protecting children from domestic violence under this Act are dealt with elsewhere in this report.

**PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (ACT 4 OF 2000)**

- This Act does not deal specifically with domestic violence but the provisions relating to prohibition of harassment may be useful for victims of abuse to obtain protection. The criteria for use of this Act is that the unwanted harassing conduct must be related to the sex, gender, sexual orientation or membership of the person who is receiving the harassment of a group identified by one or more of the prohibited grounds of discrimination as listed in the equality provisions of the South African Constitution.
- These include race, gender, sex, pregnancy, marital status, ethnic or social origin, conscience, colour, sexual orientation, age, disability, religion, belief, culture, language and birth. The Constitution specifically sets out that no person may subject any other person to harassment.

South Africa has ratified the following international and regional treaties and conventions which affect its duties in relation to domestic violence:<sup>602</sup>

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- CEDAW General Recommendation No. 19;
- African Charter on Human and People's Rights (African Charter);
- Protocol to the African Charter on the Rights of Women in Africa;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Universal Declaration of Human Rights; and
- Southern African Development Community Protocol on Gender and Development.

602 For a complete discussion on South Africa's obligations under these treaties and conventions, see *Desktop Review of the Laws in South Africa on The Obligations of the State: Legislation, Policy, Guidelines and Directives in respect of Domestic Violence* published by the Legal Resources Centre (February 2013) available at: <http://www.lrc.org.za/images/publications/2013%2005%2015%20Desktop%20Review%20of%20the%20Laws%20in%20South%20Africa%20-%20Series%201.pdf>.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

In South Africa the case against the alleged offender will be brought by the State. The burden of proof under criminal law is that guilt must be proved “beyond a reasonable doubt”. This standard applies to all criminal offences stemming from acts of domestic violence.

### 3.2 RELEVANT COURT

Ordinarily, the jurisdiction of the court will depend on the gravity of the criminal act arising from the domestic violence. Criminal cases may be heard by the Magistrates’ Court, Regional Court and also the High Court of South Africa.

### 3.3 PROSECUTION FUNDING

In South Africa the State finances criminal prosecutions.

### 3.4 TIMESCALES

The criminal justice system in South Africa does not operate as swiftly as some would like it to. This sentiment is echoed in the *Victims of Crime Survey, 2012* conducted by Statistics South Africa.<sup>603</sup> In this survey, about 25% of households in South Africa are of the opinion that cases dragged on for far too long due to postponements. A further 10.8% of households were dissatisfied on the basis that courts did not hand down the necessary convictions.

One must note that although the statistics mentioned herewith are based on public perception, they should not be ignored because these are the perceptions of those who rely on an efficient justice system. The survey did highlight that there was a decline in the number of households reporting concerns about the drawn-out nature of criminal prosecution and the low conviction rate.

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603 Available at <http://www.statssa.gov.za/publications/P0341/P03412012.pdf>.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 CIVIL LAW ACTIONS

Civil law actions for monetary compensation from the offender, where the damages result from the acts of domestic violence, and against the State for non-compliance with the process under the Domestic Violence Act are possible under South African law, but rare in practice. Increasing jurisprudence in this area of law is essential.

Civil actions have been brought on the basis of the tortious consequences for non-compliance with statutory duties to protect women from violence,<sup>604</sup> but these are mainly test cases. The high costs of litigation “ensure that only individual women with means will be able to rely on this approach to holding the state accountable”.<sup>605</sup>

The South African Supreme Court of Appeal has dealt with the question of the application of limitation statutes to claims by adult survivors of child abuse.<sup>606</sup> An important outcome of these cases, and other test cases, has included the “increased use and recognition of expert testimony that explains the physical and psychological impact of violence” and has “begun to challenge the social and legal understanding of women’s experiences with violence and to act to ensure that these experiences are increasingly embodied within the law and criminal justice practice.”<sup>607</sup>

Injunctive relief is available under the Domestic Violence Act and Protection from Harassment Act. These Acts make provision for a protection order against the person who has allegedly committed an act of domestic violence and/or harassment.

The terms of the protection order will specifically set out certain actions from which the offender is ordered to desist, such as not to:

- commit any acts of domestic violence;
- get the help of another person to commit any act of domestic violence;
- enter the shared residence;
- enter the complainant’s residence;

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604 <http://www.womensnet.org.za/news/media-release-minister-safety-and-security-settles-damages-claim-domestic-violence-case>.

605 Vetten L, *Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice*, <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf>, accessed on 4 June 2013.

606 *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) accessed at <http://www.saflii.org/za/cases/ZASCA/2004/84.html>.

607 Smythe, D., Artz, L.M., Combrinck, H., Doolan, K. and Martin L.J., *Caught between policy & practice: health & justice responses to gender-based violence*, 2008, Crime, Violence & Injury Review, South Africa: Medical Research Council, pp. 180.



- enter the complainant’s place of employment; or
- commit any other act (which the complainant can specifically request in the application for the protection order and which can be tailored to the complainant’s situation).

The legal effect and consequences of a protection order, including an interim protection order, are that the court must make an order:

- authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
- suspending the execution of that warrant subject to compliance with any prohibition, condition, obligation or order imposed on the respondent.

The warrant referred to above remains in force unless the protection order expires naturally after a period of five years, is set aside, or is cancelled after execution.

## 4.2 TIMESCALES

The timescales for obtaining the above relief will depend on many factors, such as the competency of the court officials and administrative staff. However, section 5 of the Domestic Violence Act provides that a court must consider an application for a protection order as soon as reasonably possible. The concept of reasonable possibility has to be assessed in light of availability of the magistrates and the congestion of the court roll. Furthermore, the process is prolonged by the fact that the granting of a protection order is considered to be a two stage process.

The interim order, together with the application brought by the complainant, must be served on the respondent and must call upon the respondent to show, on the return date specified in the order, why a (final) protection order should not be issued.

The return date may not be less than ten days after service has been effected upon the respondent provided that the return date may be anticipated by the respondent upon not less than 24 hours’ written notice to the complainant if an interim protection order has been issued.

This means that the respondent can arrange with the court for the return date to be brought forward to an earlier date. In the event that the court does not order that an interim protection order be issued, the return date may not be less than ten days after service has been effected upon the respondent as contemplated above. Practically, return dates are usually six to eight weeks after interim orders are obtained, depending on each court.

### 4.3 STAGES OF THE PROCEEDINGS

Cases for protection orders may be brought in a district Magistrates' Court, which is the lowest court of law in South Africa.

Notwithstanding the provisions of any other law, an application for a protection order may be brought on behalf of the complainant by any other person, including a counsellor, health service provider, member of the South African Police Service, social worker or teacher, who has a material interest in the wellbeing of the complainant. However, that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is:

- a minor;
- mentally disabled;
- unconscious; or
- a person whom the court is satisfied is unable to provide the required consent.

Furthermore, any minor, or any person on behalf of a minor, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

### 4.4 BURDEN OF PROOF

An interim protection order is issued if the court is satisfied that there is *prima facie* evidence of the facts.

In the second stage of the proceedings, after the respondent has been served with the interim protection order and details of the return date, (and if the respondent attends such hearing), the court must, after the hearing, issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. If the respondent does not attend, the protection order will be issued in the absence of the respondent if the complainant's evidence *prima facie* proves that the respondent is committing or has committed an act of domestic violence.

A Guideline for the Implementation of the Domestic Violence Act for Magistrates<sup>608</sup> has been published in order to aid Magistrates to treat each case in a serious and fair manner, with the appropriate cognisance of the complainant's personal circumstances such as socio-economic status, race and culture,<sup>609</sup> when determining whether to grant protection orders in domestic violence cases.

608 Available at [http://www.justice.gov.za/docs/other-docs/2008\\_DVGuidelines.pdf](http://www.justice.gov.za/docs/other-docs/2008_DVGuidelines.pdf), last accessed 19 August 2013.

609 For a detailed discussion on the Guidelines for the Implementation of the Domestic Violence Act for Magistrates, see *Desktop Review of the Laws in South Africa on The Obligations of the State: Legislation, Policy, Guidelines and Directives in respect of Domestic Violence* published by the Legal Resources Centre (February 2013) available at: <http://www.lrc.org.za/images/publications/2013%2005%2015%20Desktop%20Review%20of%20the%20Laws%20in%20South%20Africa%20-%20Series%201.pdf> at page 56.

## 4.5 FUNDING

South Africa has a system of free legal services for those who cannot afford such services in the form of Legal Aid South Africa. Legal Aid South Africa's role is to provide legal aid to those who cannot afford their own legal representation, this includes poor people and vulnerable groups such as women, children and the rural poor. Legal Aid South Africa uses a means test to determine who qualifies for the free legal services, e.g. a person will qualify if they earn R5500 (approximately USD550) or less or as a family the combined household income is R6500. Children and the elderly automatically qualify for free legal aid. Furthermore, there are specialised services for domestic violence and child abuse cases.

There are also private providers of legal aid such as Legal Resource Centre, ProBono.Org and legal firms acting on a *pro bono* basis. Attorneys are required to perform 24 hours of free legal services per year under law society rules.

The process to apply for a protection order under the Domestic Violence Act and Protection from Harassment Act do not strictly require legal representation but it is advisable to have assistance in completing the application, particularly where the other party is likely to oppose the proceedings.

## 5 SUPPORT FOR VICTIMS

### 5.1 VICTIM SUPPORT STRUCTURES

Domestic violence is a major problem in South Africa, and there are multiple support structures for victims, in and outside the scope of legislation. It has been generally recognised in South African society that victims of domestic violence require *inter alia*, safety, maintenance, shelter, jobs, counselling and legal advice.<sup>610</sup> The various types of victim support structures are discussed below.

#### The South African Police Services ("SAPS")

Domestic violence is classified as a criminal offence in terms of the Criminal Procedure Act,<sup>611</sup> and the SAPS and court systems play an integral role in providing support for domestic violence victims. A victim of domestic violence can bring a criminal charge at the police station and apply for a protection order at the Magistrates' Court.

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<sup>610</sup> South African Law Commission, *Research Paper on Domestic Violence*, (1999) at page 241.

<sup>611</sup> Act 51 of 1977, section 40.

Members of the SAPS assist domestic violence victims to get access to medical attention, shelter and victim counselling. They also inform the victim of the support services available in the area, alternative shelters, counselling,<sup>612</sup> medical assistance, free services that are available and the time of day that such services are available.<sup>613</sup>

### Shelters

An effective way of supporting victims of domestic violence is the provision of shelters that are integrated with other programmes involving counselling and legal services.<sup>614</sup> Shelters may therefore, in addition to providing temporary housing, serve as a mechanism to inform abused women of the options of bringing a criminal prosecution, obtaining a restraining order or other alternatives.<sup>615</sup> This will not only heighten an abused woman's awareness of the services and facilities available but will also facilitate access to legal and related support systems.<sup>616</sup>

South Africa has a policy framework for providing shelter for victims of domestic violence, the Policy Framework and Strategy for Shelters for Victims of Domestic Violence in South Africa (Department of Social Development) (the "Policy"). In accordance with this Policy, services have begun to be provided for victims of other forms of violence against women.<sup>617</sup>

The Policy was developed in 2003 in response to the constraints that were identified by the SAPS in the implementation of the Domestic Violence Act. The Policy serves as a guideline for the establishment of safe shelters and the implementation of minimum standards for service delivery for victims of domestic violence.<sup>618</sup>

### Non-governmental organisations

In South Africa, the shelters that are established in accordance with the Policy are operated mainly by non-governmental organisations which focus on vulnerable groups such as women and children.

An example of a non-governmental organisation is the "National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) Women's Support Centre". Some of the support centres provide a 24-hour support helpline,

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612 [http://www.saps.gov.za/crime\\_prevention/women/domestic\\_violence.htm](http://www.saps.gov.za/crime_prevention/women/domestic_violence.htm), accessed: 6 May 2013.

613 [http://www.saps.gov.za/crime\\_prevention/women/domestic\\_violence.htm](http://www.saps.gov.za/crime_prevention/women/domestic_violence.htm), accessed: 6 May 2013.

614 South African Law Commission, see note 610, page 241.

615 South African Law Commission, see note 610, page 241.

616 South African Law Commission, see note 610, page 241.

617 South African Law Commission, see note 610, page 241.

618 For insight into the actual provision of shelters, see Sipamla, *Social Services for Victims of Domestic Violence: the Role of the Department of Social Development in the Implementation of the Domestic Violence Act* (2012) accessed at <http://www.shukumisa.org.za/wp-content/uploads/2013/05/Soc-Dev-and-DVA.pdf>.

where victims can phone at any time of the day for advice and support. Victim empowerment and other campaigns motivated by the prevention of domestic violence and violence against women and children are also common in South Africa and provide support to victims.

### **The Department of Social Development**

This department is staffed by social workers in all of the nine South African provinces who can be approached by victims of domestic violence.

Social workers provide a myriad of services to victims and offenders of domestic violence.<sup>619</sup> Direct services to victims of domestic violence include providing shelters for abused women, victim empowerment, counselling to abused men and women and their children/families, skills training and development, referrals to legal and medical services and personal development.

## **5.2 LEGAL REQUIREMENTS RELATING TO THE PROVISION OF SUPPORT IN RESPECT OF CHILDREN**

In addition to the general fundamental rights provided for, the Constitution of South Africa, 1996 (the “Constitution”) endows children with specific rights.<sup>620</sup> The rights and concomitant obligations towards children are entrenched in section 28 of the Constitution, which provides that “every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment,”<sup>621</sup> and that “every child has the right to be protected from maltreatment, neglect, abuse or degradation.”<sup>622</sup> Furthermore, the Constitution directs that in every matter concerning a child, his or her best interests are of paramount importance.<sup>623</sup>

As has already been set out, the Domestic Violence Act seeks to provide redress for victims of domestic violence who are identified as being among the most vulnerable members of society. In doing so, it embraces a wide range of domestic relationships, including those between children and their parents or the people responsible for them, as well as the relationship between people who share or have recently shared a residence.<sup>624</sup> In fulfilling its aim, the Domestic

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619 Sipamla, *Social Services for Victims of Domestic Violence: the Role of the Department of Social Development in the Implementation of the Domestic Violence Act* (2012) accessed at <http://www.shukumisa.org.za/wp-content/uploads/2013/05/Soc-Dev-and-DVA.pdf>.

620 Kruger, *Addressing domestic violence: to what extent does the law provide effective measures?*, 2004, *Journal for Juridical Science*, 29(1) 163.

621 Section 28(1)(b).

622 Section 28(1)(d).

623 Section 28(2), see also Singh, *Children who witness adult domestic violence: Part 2 – The law, legal protection and the role of social development and child welfare agents*, 2005 *Child Abuse research in South Africa*, 36.

624 Singh, *Children who witness adult domestic violence: Part 2 – The law, legal protection and the role of social development and child welfare agents*, 2005 *Child Abuse research in South Africa*, 37.

Violence Act allows for an abused child or someone acting on the child's behalf to apply to a court for a protection order which will, if it is granted, prohibit the respondent from committing any act of domestic violence, or from entering a specific place, or from committing any other act as specified in the order.<sup>625</sup>

The required content of an application for a protection order<sup>626</sup> includes particulars specifically aimed at protecting any children involved. The application requires information of persons affected by the domestic violence, notably children and adults sharing the residence, and requires further specifics as to the manner in which they are affected by the alleged violence.<sup>627</sup> In accordance with this, the application provides for the protection of children who are in a relationship with the victim and provides for a court to terminate the abuser's presence in the home or to refuse or restrict the abuser's contact with the child.<sup>628</sup>

The remedy offered by the Domestic Violence Act is limited in that it does not explicitly require that legal representation be offered to children applying for a protection order. The Act merely states that "any party to proceedings in terms of this Act may be represented by a legal representative."<sup>629</sup>

### 5.3 THE CHILDREN'S ACT AND THE CHILDREN'S COURT

The Children's Court, established by the Children's Act,<sup>630</sup> is a special court designed to deal with issues affecting children. These courts take care of children who are in need of care and protection and make judgments about abandoned, neglected or abused children. Any person or child may approach the children's court when he or she believes that a child may be in need of care and protection.<sup>631</sup> It is prescribed that such court hearings must, as far as possible, be held in a room which is furnished and designed in a manner which puts children at ease.<sup>632</sup>

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625 Section 4(3), see also Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 529 and Prinsloo, *An exploration of the efficacy of the Domestic Violence Act: A statistical analysis of domestic violence in the greater Johannesburg area, South Africa*, 2007, Child Abuse research in South Africa 18, 19.

626 In terms of Form 2, Regulation 4 of GNR 1311 of 5 November 1999 under the Domestic Violence Act.

627 Regulation 4 of GNR 1311 of 5 November 1999 under the Domestic Violence Act, section 4.

628 Section 7 & 8 of Form 2, Regulation 4 of GNR 1311 of 5 November 1999 under the Domestic Violence Act, Singh, *Children who witness adult domestic violence: Part 2 – The law, legal protection and the role of social development and child welfare agents*, 2005 Child Abuse research in South Africa, 37–38.

629 Section 14, Kruger, *Addressing domestic violence: to what extent does the law provide effective measures?*, 2004, Journal for Juridical Science, 29(1) 165.

630 Section 42(1).

631 [http://www.justice.gov.za/brochure/2011\\_childrens-act-pamphlet.pdf](http://www.justice.gov.za/brochure/2011_childrens-act-pamphlet.pdf), last accessed 23 April 2013.

632 The Children's Act 38 of 2005 s 42(8).

The Children's Act furthermore provides for the protection of children against domestic violence by establishing four different processes for the removal of offenders or the limiting of contact with offenders.<sup>633</sup>

### Child protection orders

Section 46(1)(h)(ix) allows for a "child protection order" to be obtained from a children's court by a wide range of interested parties to allow for the offender to be removed and for consequential child contact arrangements to be made. Qualifying parties include the affected child, anyone acting in the interest of the child, anyone acting on behalf of a child who cannot act in his or her own name, anyone acting on behalf of a group or class of children and anyone acting in the public interest.<sup>634</sup> Child protection orders may demand the removal of a person from a child's home,<sup>635</sup> limit access of a person to a child, prohibit a person from contacting a child,<sup>636</sup> or grant a person contact with a child on the conditions as specified in the court order.<sup>637</sup>

A limitation of the above remedy is that it requires a full hearing at which both the applicant and the respondent have the opportunity to present evidence, which can result in a lengthy process and delayed relief.<sup>638</sup>

### Court investigation of a child's circumstances

Second, the Children's Act allows for a Children's Court to order its own investigation of a child's circumstances before it decides any matter. Under section 50(4)(d) a police official who joins the investigation may remove any person from the child's place of residence if the police official has a reasonable suspicion that the person "has caused the child harm or is likely to cause the child harm if the person is not so removed." This remedy offers efficient protection to children, as it allows for the immediate removal of dangerous offenders encountered during the investigations into the circumstances of the child.<sup>639</sup>

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633 Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 529.

634 Section 53(2), see also Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 529.

635 Section 46(1)(h)(ix).

636 Section 46(1)(h)(x).

637 Section 46(1)(h)(xi) see also Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 530.

638 Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 530, 531.

639 Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 532.

## Rapid response remedy

A rapid response remedy was introduced by section 110 of the Children's Act, allowing for the removal of child abusers who live in the same household as their victims. Under the Children's Act, designated child protection organisations ("DCPOs"), provincial departments of social development ("DOSDs"), and the police are required to investigate all reports of child abuse received. The subsequent process will depend on the institution to which the report is made.

If reports are made to police, their primary duty is to "ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk."<sup>640</sup> Furthermore, they are obliged to pass on all reports within 24 hours to a DCPO or DOSD.<sup>641</sup> If a police official is satisfied "that it will be in the best interests of the child if the alleged offender is removed from the home or place where the child resides", he or she may immediately issue a written notice to the alleged offender to leave the home.<sup>642</sup>

If reports are made to the DOSD or DCPO (including those reports made by the police), they may also, as a priority, ensure the safety of the child,<sup>643</sup> after which they must investigate the child's circumstances.<sup>644</sup> Subsequent to that, an assessment of future risk of harm to the child must be conducted. It may be concluded that there is a child abuser at the child's place of residence who needs to be removed. Such measure should only be taken if the assessment team is satisfied "that it is in the best interest of the child not to be removed from his or her home or place of residence, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child."<sup>645</sup>

It is left to the police to make a final decision of whether they are "satisfied" that a removal is essential in the best interest of the child.<sup>646</sup> A Children's Court can, once it has weighed up the evidence, confirm a police removal by, *inter alia*, issuing an order prohibiting the alleged offender from entering the place of residence of the child and/or from having any contact with the child for such period as the court deems fit<sup>647</sup> or by ordering that the alleged offender may enter the child's place of residence or have contact with the child only upon such conditions as would ensure that the best interests of the child are served.<sup>648</sup>

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<sup>640</sup> Section 110(4)(a).

<sup>641</sup> Section 110(4)(b).

<sup>642</sup> Section 110 (1)-(2), read with section 153(1) see also Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 533–534.

<sup>643</sup> Section 152 allows social workers to remove a child to temporary safe care without a warrant if the child is in immediate and serious danger.

<sup>644</sup> Section 110(5)(b)-(c).

<sup>645</sup> Section 110(7)(b).

<sup>646</sup> Section 153(1) see also Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 534.

<sup>647</sup> Section 153(6)(a).

<sup>648</sup> Section 153(6)(b) see also Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 537.



## Interdiction

Section 156(1)(k) of the Children's Act provides that, if a children's court has declared a child to be in need of care and protection in cases of abuse by a household member, it may interdict (injunction) a person from maltreating, abusing, neglecting or degrading the child or having any contact with the child.<sup>649</sup>

The application of the above remedy is difficult in that such orders can only be made by the court once the court reaches the stage of being able to declare that the child is "in need of care and protection" and, although it can suspend contact between a child and an offender, it does not allow for the removal of the offender from the child's home. Furthermore, such an order by the court terminates after a maximum of two years, after which the applicant will have to apply to court for a renewal.<sup>650</sup>

## 5.4 OTHER REMEDIES IN RESPECT OF CHILDREN WHO HAVE EXPERIENCED DOMESTIC VIOLENCE

The Protection from Harassment Act empowers a child or any person on behalf of a child, to apply to the court, without the assistance of a parent, guardian or other person, for a protection order against harassment.<sup>651</sup>

The Criminal Procedure Act 51 of 1977 grants courts the discretion to appoint an intermediary to act on behalf of a child witness in criminal proceedings.<sup>652</sup> In such instances, the court may direct that the child's evidence be given at a place which sets the witness at ease and is situated so that the witness will not see or hear any person whose presence may upset the witness and which enables the court to see and hear, either directly or through an electronic device, the intermediary as well as the witness during his or her testimony.<sup>653</sup>

## 5.5 CODES OF CONDUCT OR GUIDANCE REGARDING THE SUPPORT OF CHILDREN WHO HAVE EXPERIENCED DOMESTIC VIOLENCE

The Draft National Plan of Action for Children in South Africa 2012–2017 of the Department of Women, Children and People with Disabilities addresses child abuse. Its objectives include creating safe and supportive homes for children, protecting children against violence, abuse and maltreatment in their homes and providing support to abused children. Proposed strategies include

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649 Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 538.

650 Matthias, *Domestic Violence Perpetrator Removals: Unpacking the new Children's Legislation*, STELL LR, 2010, 3, 538, 539.

651 Section 2(4).

652 Section 170A(1).

653 Section 170A(3).

the establishment of processes that will monitor and enhance a national child protection strategy, ensuring an equitable spread of child protection services, maintaining a child protection record database, facilitating national coordinated awareness and public education programmes to prevent child abuse and neglect and the developing of protocols on the support of child victims of abuse and neglect.<sup>654</sup>

A National Children's Rights Advisory Council exists under the Department of Women, Children and People with Disabilities.

In their Annual Report for the year ended 31 March 2012, the National Department of Social Development recorded the development of documents for the management of child abuse, neglect and exploitation, including guidelines on the principles and core elements for the design and development of Prevention and Early Intervention Programmes and Guidelines for the Prevention of and Response to Child Exploitation. The National Child Care and Protection Forum also exists under the Department of Social Development.<sup>655</sup>

The National Development Plan Vision for 2030 as compiled by the National Planning Commission and delivered on 11 November 2011, acknowledged child sexual abuse as a significant problem in that frequent childhood abuse results in a considerable burden of disease for victims later in their lives. According to this Plan, there is inadequate incidence or prevalence data on child abuse, as no reliable national representative surveys have been conducted.<sup>656</sup>

## 5.6 IMPLEMENTATION OF CHILD PROTECTION MEASURES IN PRACTICE

### Public

As set out above, the Domestic Violence Act places an obligation on members of SAPS to monitor, enforce and oversee the implementation of the requirements of the Act.<sup>657</sup>

For that purpose, the Family Violence, Child Protection and Sexual Offences Unit (FCS)<sup>658</sup> was established within the SAPS in March 1996. Child protection is one of the three categories of crimes that are policed by members of the FCS. In this category, the FCS aims to protect victims under the age of 18 years from crimes such as rape, incest, indecent assault, attempted murder as well

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654 [http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/A6rmhvNqPAAt0GeTcWxk9kt1tH1grj0S\\_YcmwH8U5jwo/mtime:1354544327/files/docs/121129nationalplan.pdf](http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/A6rmhvNqPAAt0GeTcWxk9kt1tH1grj0S_YcmwH8U5jwo/mtime:1354544327/files/docs/121129nationalplan.pdf), last accessed 23/04/2013.

655 <http://www.dsd.gov.za/>, last accessed 23 April 2013.

656 National Planning Commission, *The National Development Plan Vision for 2030*, p 339.

657 Section 2, see also Marumoagae, *The role of the police in fighting acts of domestic violence*, May 2011 De Rebus – SA Attorneys' Journal.

658 See [http://www.saps.gov.za/org\\_profiles/core\\_function\\_components/fcs/policing.htm](http://www.saps.gov.za/org_profiles/core_function_components/fcs/policing.htm), last accessed 22/04/2013.

as crimes with regard to the sexual exploitation of children.<sup>659</sup> The FCS was re-introduced by the development of an FCS Strategy 2011–2015 by the SAPS Provincial Management in Gauteng, being one of the strategies to improve services to victims of child abuse.<sup>660</sup>

The FCS has adopted an integrated approach to improve their service delivery to child abuse victims. Partnerships and interaction between the FCS, the community, victims of violence, non-governmental organisations and other government departments are receiving priority attention as a newly adopted strategy to combat child abuse. The establishment of the Provincial Child Justice Forum, which comprises the Departments of Justice and Constitutional Development, Health, Community Safety, Social Development and Education, non-governmental organisations and the National Prosecuting Authority (NPA), illustrates the multi-disciplinary approach to sustainable partnership policing of the fight against child abuse.

Furthermore, the establishment of one-stop centres throughout South Africa, such as the Thuthuzela Care Centres, attempts to improve service delivery to child abuse victims. These one-stop facilities have been introduced at public hospitals in communities with a high volume of rape incidents, and they play a vital role in South Africa's anti-rape strategy, aiming to reduce secondary trauma for victims, improve conviction rates and minimise the time within which cases are finalised. These centres are managed by an inter-departmental team and linked to sexual offences courts that are staffed by prosecutors, social workers, investigating officers, magistrates, health professionals, non-governmental organisations and police.<sup>661</sup>

Various SAPS policy directives prioritise service delivery to child abuse victims. The SAPS Strategic Plan 2010 to 2014 aims to improve the capacity and professionalism of detectives through continued skills development as a priority. The SAPS Strategic Plan for 2005 to 2010 focused on crimes against children and addressed child abuse as a key priority. The SAPS Annual Performance Plan 2011/2012 attempted to develop detectives through training courses focusing on how to deal effectively with violence against children and to render effective support to child victims.<sup>662</sup>

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659 Van Graan, *The quality of service of the family violence, child protection and sexual offences unit of the South African police service, post-2010*, 2012, Vol 13, Issue 2, Child Abuse research in South Africa, 35.

660 Van Graan, *The quality of service of the family violence, child protection and sexual offences unit of the South African police service, post-2010*, 2012, Vol 13, Issue 2, Child Abuse research in South Africa, 36.

661 Van Graan, *The quality of service of the family violence, child protection and sexual offences unit of the South African police service, post-2010*, 2012, Vol 13, Issue 2, Child Abuse research in South Africa, 37.

662 Van Graan, *The quality of service of the family violence, child protection and sexual offences unit of the South African police service, post-2010*, 2012, Vol 13, Issue 2, Child Abuse research in South Africa, 36.

Each year the Government hosts a “Child Protection Week” in an attempt to raise awareness about the need to protect children against any form of abuse.<sup>663</sup>

“16 Days of Activism for No Violence Against Women and Children” is an international campaign that takes place every year from 25 November to 10 December. The South African Government supports this campaign by leading a coordinated effort to make people aware of the negative impact of violence on women and children and to act against abuse.<sup>664</sup>

### Private

Many non-governmental, not-for-profit organisations have been established to offer support to child victims of domestic violence. These organisations include the following:

- “Women and Men Against Child Abuse” (“WMACA”), a non-government, not-for-profit organisation which fights for the rights of children, aiming to end the abuse of children in South Africa by forming a multi-faceted, dynamic and aggressive offensive against abuse. WMACA has one-stop child-friendly centres (Kidz Clinics) which provide free medical and psychological treatment for children who have experienced sexual, physical and emotional abuse. Kidz Clinics also offer simulated court sessions to children who are required to testify against their offenders in court, thereby familiarising and preparing them for the court procedure and reducing the potential trauma. Staff members conduct psychological and medical assessments of child victims and compile reports to be used in court;<sup>665</sup>
- “Childline” offers a nationwide toll-free 24-hour telephone service through which trained counsellors provide information and support to distressed children, including those exposed to domestic violence. Under the auspices of Childline, the “Sunlight Safe House” organisation was established and offers after-hour care to children who have been removed from their homes by the police and would otherwise have had to stay in police stations until welfare agencies opened their doors during normal working hours. Children undergo medical, emotional and trauma assessments before being referred to the correct facility;<sup>666</sup>
- “South African Society for the Prevention of Child Abuse and Neglect” (“SASPCAN”) aims to promote awareness among the public and professionals on issues relating to child abuse and neglect in South Africa by initiating projects against child abuse, hosting annual conferences, seminars and training courses, acting as an advisory body, formulating policies and promoting legislative measures designed to improve the management of child neglect and abuse within South Africa;<sup>667</sup>

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663 Read about the 2012 Child Protection Week at <http://www.info.gov.za/events/2012/childprotection.htm>, last accessed 23 April 2013.

664 [http://www.info.gov.za/events/national/16days\\_didyouknow.htm#legislation](http://www.info.gov.za/events/national/16days_didyouknow.htm#legislation), last accessed 23 April 2013.

665 <http://www.wmaca.org.za/>, last accessed 22 April 2013.

666 [http://www.childline.org.za/A\\_Advocacy.asp](http://www.childline.org.za/A_Advocacy.asp), last accessed 22 April 2013.

667 <http://www.crin.org/organisations/viewOrg.asp?ID=2216>, last accessed 22 April 2013.

- “Open Disclosure Foundation” has launched “Mission Possible”, a schools counselling programme that seeks to build a safe and trusting environment between school learners and counsellors through offering psychological and emotional support to stimulate communication regarding, amongst other things, violence and abuse;<sup>668</sup>
- “Child Abuse Treatment and Training Services” (“CATTS”) specialise in child sexual abuse services. This unit aims to prevent, detect and treat child sexual abuse victims and provides training to other service providers in issues related to child sexual abuse and child protection;<sup>669</sup>
- “Child Guidance Clinic” (“CGC”) offers direct psychological services to children and their families and provides consultation and training in the fields of sexual and other forms of abuse;<sup>670</sup> and
- “Children’s Rights Project” (“CRP”), hosted by the Community Law Centre of the University of the Western Cape, aims to improve the conditions of children as a vulnerable group in the community through their advocacy, training and teaching, the hosting of conferences and seminars, and evaluations and impact assessments on the topic of, amongst other things, children and violence.<sup>671</sup>

## 6 OFFENCES

Under South African law, a person who commits an act of domestic violence can be prosecuted for one or more of the following offences:

- contravention/breach of any prohibition, condition, obligation or order imposed in a protection order;
- publishing in any manner any information which might directly or indirectly reveal the identity of any party to the domestic violence proceedings;
- murder or attempted murder – provided the offender in committing the act of domestic violence, unlawfully and intentionally caused the death of the victim or attempted to cause the death of the victim;
- culpable homicide – provided the offender in committing the act of domestic violence unlawfully and negligently caused the death of the victim;
- administering poison or other noxious substance – provided the offender in committing the act of domestic violence, administered poison to the victim;
- assault – provided the offender in committing the act of domestic violence unlawfully and intentionally applied force, directly or indirectly

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668 <http://www.opendisclosure.org.za/> (last accessed 23/04/2013).

669 <http://www.jhbchildwelfare.org.za/index.php/services>, last accessed 23 April 2013.

670 <http://web.uct.ac.za/depts/cgc/>, last accessed 23 April 2013.

671 <http://www.communitylawcentre.org.za/projects/childrens-rights-project>, last accessed 23 April 2013.

to the victim or inspired belief in the victim that force is immediately to be applied to him or her;

- indecent assault — provided the offender in committing the act of domestic violence, unlawfully and intentionally assaulted, touched or handled the victim in circumstances in which either the act or the intention with which it is committed is indecent;
- rape — provided (i) the offender is a male; and (ii) in committing the act of domestic violence unlawfully and intentionally had sexual intercourse with the female victim without her consent;
- malicious injury to property — provided the offender in committing the act of domestic violence unlawfully and intentionally damaged the property of the victim;
- arson — provided the offender in committing the act of domestic violence set fire to the immovable property of the victim;
- intimidation — provided the offender:
  - (i) without lawful reason and with intent to compel or induce the victim to do or to abstain from doing any act or to assume or abandon a particular standpoint, assaults, injures or causes damage to the victim or in any manner threatens to kill, assault, injure or cause damage to the victim; or
  - (ii) acts or conducts himself or herself in such a manner, or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequence thereof would be that the victim perceiving the act, conduct, utterance or publication, *inter alia*, fears for his or her own safety or the safety of his or her property or the security of his or her livelihood, or the safety of the property of any other person or the security of the livelihood of any other person;
- numerous firearms and related offences;<sup>672</sup>
- possession of a dangerous weapon — provided the offender in committing the act of domestic violence was in possession of an object which if used to commit assault, would cause serious bodily injury to the victim;
- escaping from custody — provided the offender escapes from a prison or other place of lawful detention following his or her arrest by the police at the scene of the domestic violence or following his or her conviction;
- obstructing the police in the performance of their duties — provided the offender, *inter alia*, resists his or her arrest by the police at the scene of the domestic violence; and
- trespassing — provided the offender without the permission of the victim enters the residence of the victim.

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672 Including: Unlawful Possession of a Fire Arm, Unlawful Possession of a Prohibited Firearm, Unlawful Possession of Ammunition, Causing Bodily Injury to a Person or Damage to Property by Negligently Using a Firearm, Discharging a Firearm in a Manner Likely to Injure or Endanger the Safety or Property of Another, Having Control of a Loaded Firearm in Circumstances Where it Creates a Risk to the Safety or Property of Another, Handling a Firearm Whilst Under the Influence, Pointing a Firearm at Another Person or Discharging a Firearm in a Built Up Area.

## 7 PENALTIES AND SANCTIONS

### 7.1 SENTENCES

When the court issues a protection order, the court authorises the issue of a warrant of arrest for the arrest of the abuser.

The court may also order the seizure of dangerous weapons in the possession, or under the control of the respondent, and that a police officer accompany the complainant to assist with the collection of personal property.

Significantly, to alleviate financial hardships borne by the complainant, the court may order the respondent to pay the rent or mortgage, as well as emergency monetary relief to the complainant.

Where a child is involved, the court may prohibit the respondent from having any contact with the child, if the court is satisfied that this would be in the best interests of the child. This provision offers protection to children, and prevents respondents from gaining control over complainants through their children.

The table below outlines the main offences under the Domestic Violence Act:

OFFENCES	PENALTIES
CONTRAVENTION OF A PROHIBITION, CONDITION, OBLIGATION OR ORDER CONTAINED IN THE PROTECTION ORDER.	A fine or imprisonment for a period not exceeding five years or both. The Supreme Court of Appeal indicated that sentences in domestic violence cases should reflect the gravity of the crime and impose direct imprisonment where required “lest others be misled into believing that they run no real risk if they inflict physical violence upon those with whom they may have intimate personal relationships”. <sup>673</sup>
PUBLICATION OF ANY INFORMATION THAT DIRECTLY OR INDIRECTLY REVEALS THE IDENTITY OF ANY PARTY TO DOMESTIC VIOLENCE PROCEEDINGS.	A fine or imprisonment for a period not exceeding two years or. When a charge of contravening section 17(a) has been instituted it can only be withdrawn if authorised by the Director of Public Prosecutions (“DPP”) or a senior member of the prosecuting authority designated in writing by the DPP.
PUBLICATION, CONTRARY TO A DIRECTIVE BY THE COURT, OF ANY FURTHER INFORMATION RELATING TO DOMESTIC VIOLENCE PROCEEDINGS.	
THE WILFUL MAKING OF A MATERIAL FALSE STATEMENT IN FORM 10.	

<sup>673</sup> *S v Roberts*, 2000, 2 SACR 522 (SCA).

## 7.2 IMPRISONMENT

If sentences include imprisonment, depending on the circumstances, sentences can range from wholly suspended (on condition that the accused is not convicted of another breach of the protection order); a fine and the conditional postponement of the sentencing for five years;<sup>674</sup> or, periodical imprisonment over weekends.<sup>675</sup>

## 7.3 FINES

Penalties can also include fines as outlined above.

## 7.4 OTHER PENALTIES

Other than the penalties outlined above, no other penalties or sanctions are available under South African law in respect of domestic violence offences.

# 8 REHABILITATION MEASURES

## 8.1 IMPOSED REHABILITATION UNDER DOMESTIC VIOLENCE LEGISLATION

The Domestic Violence Act, does not make specific provision for the rehabilitation of offenders, however, section 2 provides:

“The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant, including an order —

- (a) to seize any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 9; and
- (ii) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.”

Section 2 can therefore be interpreted in such a way as to give a court the discretion as to whether to impose a condition in the domestic violence order for the offender to attend a rehabilitation programme the court deems suitable.

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<sup>674</sup> *S v Figueredo*, 2005, JOL 15949 (T).

<sup>675</sup> *S v Moagi*, 2005, JOL 14519 (T).



## 8.2 IMPOSED REHABILITATION UNDER OTHER APPLICABLE LEGISLATION

Due to the fact that the Domestic Violence Act does not directly refer to the rehabilitation of offenders, one needs to look at other South African legislation which provides for the rehabilitation of offenders in order to understand how the rehabilitation process will work in practice and which offenders will be required to attend a rehabilitation programme.

The Correctional Services Act No 111 of 1998 (“Correctional Services Act”) provides for the individual assessment of offenders once admitted to prison. It is deemed important to assess each offender individually so as to develop an individualised treatment plan suitable to the needs of each offender. Even though legislation provides for an individualised approach to offender rehabilitation once incarcerated, this does not happen in practice. South African Correctional Services rather apply a “one size fits all” approach. The fact that there is no individualised treatment plans could be attributed to several factors, the most obvious being a lack of funding and severe staff shortages.

## 8.3 RESTORATIVE JUSTICE

The South African legal structure has started to embrace the concept of restorative justice. Restorative justice is the cornerstone of offender rehabilitation. Due to the fact that South Africa has a strong background of retributive justice, the concept of restorative justice has been slow to take root. Restorative justice is often applied in the case of less serious crimes. However, due to the prevalence of domestic violence and the seriousness of the offences committed by domestic violence offenders, it is frowned upon to merely impose a condition of attending a rehabilitation programme.

Even though restorative justice is a relatively new concept in the South African sentencing regime, there are several programmes available. These programmes are usually facilitated by the Department of Correctional Services and not-for-profit organisations such as NICRO and Khulisa. These programmes are often used in cases of economic crime, rape and murder.

The most popular programme used is victim-offender mediation, where the offender engages with the victims or the survivors of the victim, and where the victims play an active role in the justice process. These programmes are aimed at identifying what caused an offender to act violently and how to treat this cause so as to prevent it from recurring.

Restorative justice is, however, commonly applied to minors who have committed offences. The Child Justice Act No 75 of 2008, extensively provides for the rehabilitation of child offenders in certain instances. The children admitted to these programmes are closely monitored by social workers

and courts. Unlike adult offenders who have been incarcerated, a definite individualised approach can be seen in these circumstances and the child is admitted to a suitable programme.

#### **8.4 WHITE PAPER POLICY ON REHABILITATION**

Presently, there are no prescribed programmes for adult offenders and courts use their own discretion when imposing these programmes as sentences, which does not happen often. An attempt was made to introduce a formal structure for rehabilitation and integration of offenders into the community by the White Paper on Corrections in South Africa ("White Paper"). This White Paper was intended to be used as a policy document in the rehabilitation of convicted accused.

This White Paper follows an approach of needs-based correction, where the individual needs and circumstances of each offender is assessed in prescribing a suitable rehabilitation programme. This approach requires specially trained correctional officials and makes intensive use of social workers. The aim of these programmes is to keep the prisoner involved in the community as far as possible so as to ensure his smooth transition from imprisonment to an active member of society once released. These programmes also aim to get the community involved in the justice process, by making them aware that the offender is paying his dues.

The needs-based approach as described in the White Paper requires specialised skills and correctional officials and social workers must be especially appointed for this to be effective. The needs-based approach set out in the White Paper is therefore only an ideal at this stage.

Therefore, unless a domestic violence offender has been prosecuted for a criminal offence, there are no compulsory rehabilitation programmes which a court can impose. In the case of a domestic violence order, a court may decide to impose a condition that the offender must attend a rehabilitation programme. However, courts do not seem to exercise this discretion and domestic violence offenders are therefore not usually compelled to attend any rehabilitation programmes.

## 9 THIRD PARTY RESPONSIBILITIES

### 9.1 GENERAL RESPONSIBILITIES AND CIVIL DUTY OF CARE

In terms of responsibilities or civil duties of care placed on third parties such as employers, hospitals, schools or other public institutions regarding the identification, reporting or prevention of domestic violence, the Domestic Violence Act places duties on the police and the clerk of the court. In addition, the Older Person's Act,<sup>676</sup> and the Children's Act place responsibilities on specific parties in relation to older persons and children as provided below.

Under the Older Person's Act, duties are placed on:

- any person who is involved with an older person in a professional capacity;
- any person who suspects that an older person has been abused or suffers from an abuse-related injury;
- the police;
- service providers providing community based care and support services in relation to older persons ("service providers");
- operators and managers of residential facilities for older persons ("operators");
- residents' committees;
- the South African Human Rights Commission; and
- local authorities.

The Children's Act, places responsibilities on a large number of people and professionals including:

- legal and medical (including traditional/alternative medicine) practitioners;
- teachers;
- religious and traditional leaders;
- social workers and social service professionals;
- therapists;
- correctional officials; and
- members of staff or volunteer workers at a partial care facility, drop-in centres or child and youth care centres.

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<sup>676</sup> Older Person's Act 13 of 2006.

## 9.2 DOMESTIC VIOLENCE ACT

Under the Domestic Violence Act, police are obliged to render assistance to the complainant at the scene of an incident of domestic violence, soon thereafter or when the incident domestic violence is reported.

If the complainant (as defined by the Act) is not legally represented, the clerk of the court must inform the complainant of the relief available in terms of the Act and the right to lodge a criminal complaint, if a criminal offence is committed by the respondent (alleged offender).

Furthermore, no person shall publish in any manner any information which might directly or indirectly reveal the identity of any party to the proceedings.

## 9.3 CHILDREN'S ACT

If a person who is under a duty pursuant to the Children's Act<sup>677</sup> concludes that a child is abused or deliberately neglected, they are obliged to report such abuse or neglect of the child to a designated child protection organisation, provincial department of social development or a police official.

Similarly, any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.

A person operating or employed at a partial care facility or drop-in centre is also obliged to report serious injury or abuse of a child while in the partial care facility or following an occurrence at such facility to the provincial head of social development. In the event that a child dies in the partial care facility or following an occurrence at the facility, the person operating or employed at such facility must report the death of the child to the parent or guardian of the child, the police and the provincial head of social development.

## 9.4 OLDER PERSON'S ACT

The Minister for Social Development ("Minister") must keep a register of persons convicted of abuse of an older person(s) or any crime or offence where the court found the person convicted had abused an older person in the commission of such crime or offence. Any person whose name appears in the register may not in any way operate or be employed at any residential facility or provide any community-based care and support service to an older person.

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<sup>677</sup> Such persons include: correctional officials, dentists, homeopaths, immigration officials, labour inspectors, legal practitioners, medical practitioners, midwives, ministers of religion, nurses, occupational therapists, physiotherapists, psychologists, religious leaders, social service professionals, social workers, speech therapists, teachers, traditional health practitioners, traditional leaders, members of staff or volunteer workers at a partial care facility, drop-in centre or youth care centres.

A service provider must inform the Minister in writing of any conviction for the abuse of an older person(s) or any crime or offence.

A service provider or an operator must establish whether or not a person is listed on the register of persons convicted of abuse of an older person(s) before such person is allowed to work with older persons.

Under the regulations to the Act, service providers and operators are obliged to have measures in place to promote the rights of older persons including protection of older persons from any form of abuse such as neglect, ill-treatment or financial exploitation. In addition, service providers and operators are to provide education and training to older persons on services designed to assist them to prevent and combat abuse and services available to support abused older persons.

## **9.5 LIABILITY FOR FAILURE**

If such third parties upon whom responsibilities or civil duties of care are placed, fail to appropriately identify, report or prevent domestic violence, the consequences are as follows:

- Domestic Violence Act – SAPS is obliged to institute disciplinary proceedings against any member who fails to comply with an obligation imposed by the Act;
- Older Person's Act – upon conviction a party is liable to a fine or imprisonment not exceeding one year or both; and
- Children's Act – upon conviction a party is liable to a fine or imprisonment not exceeding ten years or both.

# **10 EFFECTIVENESS/IMPLEMENTATION**

## **10.1 LAWS PREVENTING DOMESTIC VIOLENCE**

There are limited records available detailing the number of prosecutions carried out in South Africa in accordance with the domestic violence laws outlined above, or of other enforcement activity aside from prosecutions.

## 10.2 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Commentators have suggested that there are a number of difficulties and challenges in the enforcement of domestic violence laws in South Africa. This is thought to be particularly the case regarding the implementation of the Domestic Violence Act. Some of the main difficulties/challenges, as expressed by non-governmental organisations<sup>678</sup> and researchers,<sup>679</sup> include:

- failure by SAPS to properly respond to complaints of domestic violence, including failure to inform complainants of the right to apply for a protection order, suggesting to the complainant and their family that they sort out the problem on their own and a general sense of apathy and lack of attendance to the victim;
- lack of or non-completion of the forms used to make an application for a protection order by the SAPS and failure to take witness statements properly or at all;
- failure by SAPS to arrest an abuser if an offence of violence has been committed already, coupled with a failure to remove dangerous weapons;
- SAPS providing incorrect or misinformed advice in relation to what constitutes abuse and the “lapse” of a protection order, contrary to the Domestic Violence Act;
- the process of serving the interim protection order on the respondent, where the courts expect the complainant to arrange for SAPS to serve the interim order, or where complainants are left with no option but to serve the interim order themselves. This places a financial burden on the complainant. Coupled with this, is the challenge of explaining to complainants the need to file the original proof of service of the interim protection order with the court;<sup>680</sup>
- delay in service of protection orders by SAPS;
- lack of completion of medical reports in instances of physical abuse and lack of understanding of the importance of medico-legal evidence;
- the waiting period (of sometimes up to two months) between the interim protection order and the return date for the final protection order can create additional stress on the complainant and place him or her at greater risk of abuse;
- court clerks being too busy to fully explain processes and procedures, including how to correctly complete application forms for protection orders, particularly for clients from indigent socio-economic circumstances;

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678 <http://www.tlac.org.za/wp-content/uploads/2012/01/Research-Brief-implementing-the-Domestic-Violence-Act-in-Acornhoek.pdf>.

679 <http://www.mrc.ac.za/gender/domesticviolence.pdf> and L Artz & D Smythe, Bridges and barriers: A five year retrospective on Domestic Violence Act, 2005, Acta Juridica, 200.

680 <http://www.mrc.ac.za/gender/domesticviolence.pdf> and L Artz & D Smythe, Bridges and barriers: A five year retrospective on Domestic Violence Act, 2005, Acta Juridica, 200.

- magistrates are not always available for after hours applications in cases of emergency;
- inaccessibility of the justice system to the poor;
- variations between how people factually experience abuse and how this is narrowly categorised by those drafting applications for protection orders;
- protection orders being obtained as retaliation; and
- poor turn-out of complainants to finalise the protection order.

### 10.3 REVIEW OF DOMESTIC VIOLENCE LAWS

The Civilian Secretariat for Police<sup>681</sup> reviews the compliance by SAPS with requirements of the Domestic Violence Act and audits police stations in order to assess the effectiveness of this legislation. This information is then reported to the relevant Portfolio Committee of Parliament (e.g. the Portfolio Committee on Police<sup>682</sup>).

The duty to review the laws of the Republic lies with the South African Law Reform Commission (“SALRC”), which was established under the South African Law Reform Commission Act No. 19 of 1973, as amended, whose objects are amongst other things:

- to do research with reference to all branches of the law of the Republic;
- to study and investigate all branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof, including the repeal of obsolete or unnecessary provisions and the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic including the consolidation or codification of any branch of the law; and
- steps aimed at making the common law more readily available.

The non-governmental organisation sector and legal academics also play an essential role in assessing the effectiveness of the statutory measures to protect people from domestic violence. These organisations include the: “Legal Resources Centre”, “Woman’s Legal Centre”, “Tshwaranang Legal Advocacy Centre”, “Centre for the Study of Violence and Reconciliation” and the “People Opposing Woman Abuse”.

A strategy that is also utilised to test the legislation is to intervene in court cases as “friends of the court” to raise legal issues relating to domestic violence.

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681 Created under the Civilian Secretariat for Police Act 2 of 2011.

682 To view the Strategic Plan of this Portfolio Committee and its functions relating to domestic violence, see <http://www.pmg.org.za/files/doc/2013/comreports/130521pcpolice-report4.htm>, last accessed 19 August 2013.

## ADDITIONAL RESOURCES

### Applicable law

1. Constitution of the Republic of South Africa
2. Domestic Violence Act 116 of 1998
3. Protection from Harassment Act 17 of 2011
4. Children's Act 38 of 2005
5. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
6. Older Person's Act 13 Of 2006
7. Criminal Procedure Act 51 of 1977
8. The Magistrates' Court Act 32 of 1944
9. Civilian Secretariat for Police Service Act 2 of 2011

### Policy

1. Guidelines for the Implementation of the Domestic Violence Act for the Magistrates
2. National Police Instruction on Domestic Violence

### Other sources

1. Domestic Violence Act full text <http://www.info.gov.za/view/DownloadFileAction?id=70651>
2. Domestic Violence Act application forms for a protection order [http://www.justice.gov.za/forms/form\\_dva.htm](http://www.justice.gov.za/forms/form_dva.htm)
3. Protection from Harassment Act application forms for a protection order [http://www.justice.gov.za/forms/form\\_pha.html](http://www.justice.gov.za/forms/form_pha.html)
4. *The Domestic Violence Act: 15 Years Later*, published by the Legal Resources Centre (March 2013) <http://www.lrc.org.za/images/publications/2013%2005%2015%20Desktop%20Review%20of%20the%20Laws%20in%20South%20Africa%20-%20Series%201.pdf>
5. *Desktop Review of the Laws in South Africa on The Obligations of the State: Legislation, Policy, Guidelines and Directives in respect of Domestic Violence*, published by the Legal Resources Centre (February 2013) <http://www.lrc.org.za/images/publications/2013%2005%2015%20Desktop%20Review%20of%20the%20Laws%20in%20South%20Africa%20-%20Series%201.pdf>
6. Educational Booklet on how to apply for a protection order <http://www.grip.org.za/sites/default/files/grip-files/It's%20an%20Order%20-%20Mosaic.pdf>



7. National Instruction for SAPS on Domestic Violence <http://www.tlac.org.za/wp-content/uploads/2012/02/national-instruction-domestic-violence-act.pdf>
8. Academic Research <http://www.mrc.ac.za/gender/domesticviolence.pdf>
9. Research on Implementation of the DVA <http://www.tlac.org.za/wp-content/uploads/2012/01/Research-Brief-implementing-the-Domestic-Violence-Act-in-Acornhoek.pdf>
10. SA Law Reform Commission Report on Domestic Violence <http://www.justice.gov.za/salrc/rpapers/violence.pdf>
11. SAPS Non Compliance with DVA Report (2011) <http://www.info.gov.za/view/DownloadFileAction?id=124580>

## South Korea

‘Public services focus on counselling for domestic violence victims rather than punishment for perpetrators and prosecution is not always carried out.’



# DOMESTIC VIOLENCE IN SOUTH KOREA

DLA Piper International LLP, Australia

## EXECUTIVE SUMMARY

In South Korea, the prevention of and protection against domestic violence is covered by two main legislative acts. The definition of domestic violence is relatively broad, including physical, psychological and economic harm. However there is some ambiguity as to the extent to which the definition includes relationships other than heterosexual relationships.

The prevention of and protection from domestic violence in South Korea is provided for by the police, the courts and other support facilities such as Protection Centres. Children are also given extra protection under separate specific legislation.

The domestic legislation has been criticised by a number of key stakeholders for failing to provide adequate protection to victims and lack of proper enforcement. However the legislation has been amended since its inception to address a number of these concerns and regular review procedures are in place, which suggests that these issues will continue to be examined.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in South Korea.

The legislation, the Act on Special Cases Concerning the Punishment, etc of Crimes of Domestic Violence, (the Punishment of Domestic Violence Act) defines domestic violence as “activities involving physical or psychological harm or damage to property among family members”.<sup>683</sup>

The definition of family members specifically includes the following types of relationships under Article 2 of the legislation:

- the spouses, whether in a married or *de facto* relationship;
- a person who is or was a lineal ascendant or descendant (including in a *de facto* parent-child relationship by adoption) to himself/herself or his/her spouse;

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<sup>683</sup> The Act on Special Cases of Concerning the Punishment, etc. of Crimes of Domestic Violence, Art 2(1).

- a person who is or was in a relationship between step-parents and offspring or in a relationship between a father's legal wife and the child of a mistress; and
- a person who is in a relationship between relatives living together.

Furthermore, under Article 2(5) of the legislation, a victim is defined as

“a person who suffers direct damage from a crime of domestic violence”, suggesting an expansive scope of the definition in any case. Article 2(3) of the Act on Prevention of Domestic Violence and Protection Etc. of Victims (the “Prevention of Violence Act”) further confirms this definition of victim as “a person who has been directly damaged by domestic violence”.

While the legislation is silent on gay, lesbian and transgender relationships, it is possible that it could be interpreted as including these types of relationships due to the inclusion of *de facto* relationships. Relationships of this nature could be included by virtue of the wide ambit of Article 2(2)(a) where such relationships could be simultaneously classified as *de facto*. Similarly, arguably these groups could also be included under Article 2(2)(c) if they were living together. Notably, therefore, any inclusion of this group in the definition of domestic violence is premised on a condition precedent (i.e. that the transgender, gay or lesbian couple were *de facto* partners, formerly married or are living together currently). This dual classification is possible but suggests that in the case where the gay, lesbian or transgender relationships are not in a *de facto* relationship or do not involving living together there is no protection against domestic violence.

However, it is unlikely that domestic workers would be included within the definition. Nevertheless, likewise as in relation to gay, lesbian and transgender relationships, conceivably these types of relationships could be provided for should any of the above mentioned conditions precedent (namely that they are in a *de facto* relationship, that they were formerly married or are in a relationship and living with their boss) be satisfied. This dual categorisation seems to be highly unlikely however and therefore suggests that there is no scope of protection for such workers ordinarily.

Mental and financial abuse are specifically included, due to the words “psychological” and “property” in the definition. Further, domestic violence crimes that could be classified as entirely ‘mental’ or psychological in nature could be punishable under the general criminal law, the Criminal Act, as are listed in Article 2(3) of the Punishment of Domestic Violence Act. These are:

- intimidation and intimidation of lineal ascendants, found in Articles 283(1) and (2) of the Criminal Act, Article 2(3)(d) of the domestic violence legislation;
- defamation, defamation of deceased persons, defamation through printer materials and insult, found in Article 307, 308, 309 and 311 of the Criminal Act respectively, Article 3(f) of the domestic violence legislation;

- coercion and attempts, found in Article 324 and 324–5 of the Criminal Act respectively, Article 3(h) of the domestic violence legislation;
- extortion and attempts, found in Article 350 and 352 of the Criminal Act respectively, Article 3(i) of the domestic violence legislation; and
- destruction of, damage to, etc. property, found in Article 366 of the Criminal Act, Article 3(j) of the domestic violence legislation.

The above acts constitute criminal acts under the Criminal Act, as noted, and therefore attract the burden of proof required for the establishment of a criminal offence. Specifically, Article 307 of the Criminal Procedure Act (Criminal Procedure Act) requires that fact-finding is based on evidence (Article 307(1)) and that it is proved to the extent that there is no reasonable doubt (Article 307(2)).

Furthermore, the probative value of any evidence is left to the discretion of the judges entirely under Article 308 of the Criminal Procedure Act. Under Article 321 of the Criminal Procedure Act there is a sentence/pronouncement of guilt where “there is proof of guilt in respect of the case against the defendant”. Therefore this suggests that in respect of all of the offences mentioned above (and indeed criminal charges generally) the burden of proof is borne by the prosecutor (to the extent of “reasonable doubt” as noted above in Article 307 of the Criminal Procedure Act). These requirements are detailed further below.

In an article by Hyunah Yang of the Seoul National University,<sup>684</sup> the author considers that the purpose of the domestic violence legislation is ambiguous, in particular in that it promotes the idea of building a healthy family and, separately, protecting human rights of victims. Yang says that these are very different goals as domestic violence could be used as a means to maintain the very normality of the family – thereby making these goals appear to function at cross purposes.

## 1.2 FORMS OF DOMESTIC VIOLENCE

Therefore, domestic violence can be committed in any, or a combination, of the following forms:

- mental abuse – including intimidation, defamation, coercion, abandonment and maltreatment;
- physical violence – including bodily injury, false arrest and confinement;
- sexual violence – including involuntary sexual contact of any kind and rape; and
- economic violence – extortion and property damage.

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684 Yang, H, *Multicultural Families in South Korea: A Socio-Legal Approach*, 37 N.C.J. Int'l L. & Com. Reg. 47 2011–2012.

## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in South Korea is the Act on Special Cases Concerning the Punishment, etc. of Crimes of Domestic Violence.

Additionally, there is there Framework Act on Women's Development which states in Article 25 that:

- the State and the local government shall, in accordance with the relevant statutes, prevent the sexual assault crime and protect the victim therefore; and
- the State and the local government shall provide the measures to solve the violence problem occurring in the family.

Further, the Criminal Act applies in a domestic violence context.

### 2.2 INTERNATIONAL TREATIES

Additionally, South Korea has signed and ratified a number of international treaties relevant to domestic violence. These are the:

- International Covenant on Civil and Political Rights, acceded to on 10 April 1990;
- Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 27 December 1984;
- Optional Protocol to the Convention on the Elimination of Discrimination against Women, acceded to on 18 October 2006;
- Convention on the Rights of the Child, ratified on 20 November 1991;
- Convention Against Torture, acceded to on 9 January 1995; and
- The International Covenant on Social, Economic and Cultural Rights, acceded to on 10 April 1990.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

South Korean criminal law is based on the presumption of innocence principle, i.e. the accused person is innocent until proven guilty.

There is a presumption of innocence under Article 27(4) of the *Constitution of the Republic of Korea* (1948) (the "Constitution").

Furthermore, under Article 321 of the Criminal Procedure Act there is a sentence/pronouncement of guilt "where there is proof of guilt in respect of the

case against the defendant”. This suggests that in respect of all of the offences mentioned below (and indeed criminal charges generally) the burden of proof is borne by the prosecutor (to the extent of “reasonable doubt” as noted above in Article 307 of the Criminal Procedure Act).

Under the legislation, the judicial officer who investigates the matter must refer it to the prosecutor. Primary responsibility for prosecutions rests with the public prosecutor.

### **3.2 RELEVANT COURT**

In general, the relevant court for proceedings is determined upon the subject-matter and territory of the case being tried and in line with Chapter 1 (Jurisdiction of the Courts) of the Criminal Procedure Act.

However the basic structure appears to be a trial at first instance in a district court, with appeals to a High Court and finally the Supreme Court.

### **3.3 PROSECUTION FUNDING**

Article 30 of the Constitution of the Republic of Korea provides that citizens who have suffered bodily injury or death due to criminal acts of others may receive aid from the State under the conditions prescribed by the Act. Otherwise, unlike the civil law mechanisms which have a separate mechanism for compensation of legal action, there are no provisions that are specific on this point in the Criminal Act or Criminal Procedure Act.

### **3.4 TIMESCALES**

While there are no official records available regarding timescales or prosecutions, the Constitution of the Republic of Korea provides that every citizen has a right to a speedy trial and that an accused shall have the right to a public trial without delay, in the absence of justifiable reasons.

## **4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW**

### **4.1 PRELIMINARY/INTERIM MEASURES**

South Korean law provides for the prosecution of domestic violence offences under civil law.

Under the legislation there are a number of interim measures available. These measures are detailed below.

Emergency Measures, Article 5 concerning crimes of Domestic Violence whereby Judicial Police Officers can take the following measures:

- restraining violence, isolate domestic violence offenders from victims;
- refer victims to domestic violence centres;
- refer victims to treatment to medical institutions; and
- notify them to entitlement to apply for *ad hoc* measures (under Article 8) in instances of recurrence of violence.

*Ad hoc* measures, Article 29 whereby Judges can do the following to allow for smooth investigation and examination of home protection case/protection of the victim:

- evacuation from room;
- denial of access of victims or family members;
- denial of access to victims/family members through telecommunications;
- committing the offender to medical institutions or intermediate care centres; and
- confining the offender in a detention centre or room of any State police station.

Decision for Protective Disposition, Article 40 whereby a judge may rule the following protective measures necessary:

- restrictions on offender's access to victims/family members;
- restrictions on offender's access to victims/family members through telecommunications;
- restrictions on exercise of parental authority over victims;
- order to offer social service or to attend lecture on Act of Probation;
- probation under Act of Probation;
- entrustment of offenders to protective facilities under Act on Prevention of Domestic Violence;
- entrustment of treatment of offenders to medical institutions; and
- entrustment of counselling of offenders to counselling centres.

There are numerous people who can instigate the aforementioned civil law actions, including:

- under Article 6, Punishment of Domestic Violence Act: a victim or legal representative of the victim
- under Article 7, 8-2, 8-3, Punishment of Domestic Violence Act: a judicial officer; or
- under Article 8, Punishment of Domestic Violence Act: a prosecutor.



## 4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

While the legislation is silent regarding the burden of proof in civil matters, there appears to be a very low threshold whereby the aforementioned actions can be commenced at times where there is merely a belief that the violence is going to reoccur.

## 4.3 RELEVANT COURT

Generally it would seem such cases ordinarily go to family or local courts as indicated under Article 11 of the Punishment of Domestic Violence Act, which requires the prosecutor to forward home protection cases to such courts. There are various courts prescribed as the designated courts for particular civil law remedies, including:

- home protection cases shall be under jurisdiction of family court, under Article 10 of the Punishment of Domestic Violence Act, and require forwarding from the prosecutor to such courts with this jurisdiction, under Article 11 of that Act; and
- victim Protection Orders cases shall be under the jurisdiction of the family court under Article 55 of the Punishment of Domestic Violence Act.

Where there is a disposition in place in a Court, it may be further forwarded to a 'competent court', under Article 12 of the Punishment of Domestic Violence Act. Additionally, where a court deems itself incompetent, it can forward the case on to a more competent court under Article 15 of the Punishment of Domestic Violence Act.

## 4.4 TIMESCALES

While the legislation is silent of specific timeframes for pursuing these actions, the words "without delay" in the relevant provisions suggest that there is a duty of urgency imposed on all concerned.

## 4.5 FUNDING TO PROSECUTE

The court may provide monetary compensation in respect of a civil law action (and indeed generally to financially compensate victims of domestic violence crimes). In particular the following provisions are relevant in the Punishment of Domestic Violence Act:

- Applications for Compensation, under Article 56 there are available to victims of domestic violence cases where there is a home protection case pending; and
- Compensation Orders under Article 57 may be issued by a Court to pay/compensate in cash a victim in proceedings for home protection cases where:

- payment of cash is necessary for the support of victims or family members; and
- compensation of material damage directly incurred in a home protection case and loss of treatment expenses.

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

Under the legislation, there are a number of specific mechanisms which aim to support victims. These include:

- Establishment and Operation of Emergency Call Centres, under Article 4-6;
- Establishment and Operation of Counselling Centres, under Article 5;
- Services of Counselling Centres, under Article 6;
- Establishment of Protection Facilities, under Article 7;
- Categories of Protection Facilities, under Article 7-2;
- Persons subject to Admission to Protection Facilities, under Article 7-3;
- Discharge from Protection Facilities, under Article 7-4; and
- Services of Protection Facilities, under Article 8.

### 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

In addition to the support provided to victims generally, the legislation includes a measure which supports child victims in returning to school. Further, under Article 24 of the Act on the Protection of Children and Juveniles from Sexual Abuse provides further protection specifically for children.

## 6 OFFENCES

There are ten main criminal offences under which domestic violence offences would be prosecuted. These are detailed in the following table.

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW — ACT ON SPECIAL CASES CONCERNING THE PUNISHMENT, ETC. OF CRIMES OF DOMESTIC VIOLENCE</b>		
Crimes of inflicting bodily injury and violence: <ul style="list-style-type: none"> <li>— inflicting bodily injury on other or on a lineal ascendant</li> <li>— aggravated bodily injury of other or of lineal ascendant</li> <li>— assault against other or on lineal ascendants</li> <li>— special violence</li> <li>— habitual crimes</li> </ul>	Articles 257–264	These offences may attract a range of sanctions including: <ul style="list-style-type: none"> <li><i>Death penalty</i></li> <li><i>Imprisonment</i> <ul style="list-style-type: none"> <li>— Three years to life</li> </ul> </li> <li><i>Limited imprisonment</i> <ul style="list-style-type: none"> <li>— Imprisonment without prison labour</li> </ul> </li> </ul>
Crimes abandonment and maltreatment: <ul style="list-style-type: none"> <li>— Abandonment of lineal ascendants</li> <li>— Abandoning infants</li> <li>— Cruelty to another and to lineal ascendants</li> <li>— Hard labour by children</li> </ul>	Articles 271–274	<i>Fines</i>
Crimes of false arrest and illegal confinement: <ul style="list-style-type: none"> <li>— false arrest, unlawful confinement, those on lineal ascendants</li> <li>— aggravated false arrest, aggravated illegal confinement, those on lineal descendants</li> <li>— special false arrest or illegal confinement</li> <li>— habitual crimes</li> <li>— attempts</li> </ul>	Articles 276–280	
Crimes of intimidation: <ul style="list-style-type: none"> <li>— intimidation, intimidation of lineal ascendants</li> <li>— special intimidation</li> <li>— habitual crimes (limited to crimes under Article 283)</li> <li>— attempts</li> </ul>	Articles 283–286	
Crimes of rape and indecent acts: <ul style="list-style-type: none"> <li>— rape</li> <li>— indecent acts by compulsion</li> <li>— quasi-rape, quasi-indecent acts by compulsion</li> <li>— attempts</li> <li>— death or injury resulting from rape</li> <li>— murder after rape, etc. or rape, etc. resulting in death</li> <li>— sexual intercourse with a minor</li> <li>— sexual intercourse or indecent acts on a minor</li> <li>— habitual offenders (limited to crimes under Articles 297 and 300)</li> </ul>	Articles 297–305	

OFFENCE	LEGAL REFERENCE	SANCTION
Crimes concerning honour: — defamation — defamation of deceased persons — defamation through printed materials — insult	Articles 307–311	These offences may attract a range of sanctions including: <i>Death penalty</i> <i>Imprisonment</i> — Three years to life <i>Limited imprisonment</i> — Imprisonment without prison labour <i>Fines</i>
Crimes of intrusion upon human habitation : — illegal search of human habitation and body	Article 321	
Crimes of obstructing another from exercising his/her right: — coercion — attempts	Article 324	
Crimes of fraud and extortion: — extortion — attempts (limited to crimes under Article 350)	Articles 350–352	
Crimes of destruction and damage: — destruction of damage (destruction of, damage to, etc. property)	Article 366	

## 7 REHABILITATION MEASURES

Rehabilitation measures are specifically provided for in the legislation. These include suspensions of prosecutions of offenders on the condition of counselling as well as any *ad hoc* measures determined to be appropriate by the court.

There are also certain mechanisms in place which confer inalienable rights on offenders. These include:

- Suspension of Indictment on Condition of Counselling (Article 9-2);
- Effects of Protection Order (Article 16);
- Suspension and Effects of Prescription of Public Prosecution (Article 17);
- Notification of Rights to Refuse to Make Statement (Article 23);
- Assistant (Article 28);
- Implementation etc. of Ad Hoc Measures (Article 29-2); and
- Appeals (Article 49).

The key trigger to activate the rehabilitative measures outlined above is found in Article 9-2 which states that “Where deemed necessary for correcting the personality and behaviour of the offender”.

There does not appear to be evidence of the effectiveness or otherwise of these measures.

## 8 THIRD PARTY RESPONSIBILITIES

Under the legislation, there are a number of third party responsibility provisions. These include a duty of the local and state governments to protect and support victims as well as a duty on anyone who becomes aware of domestic violence to report it to the relevant authorities. Further, there are provisions for penalising third parties who do not comply with these provisions.

In particular, under Article 4 of the Prevention of Domestic Violence Act, the State and local government is required to prevent domestic violence and to protect and support victims thereof by establishing reporting systems, protection facilities, cooperation network and making budgetary allowances for such activities.

Furthermore, under Article 4 of the Prevention of Domestic Violence Act, anyone who becomes aware of domestic violence is under an obligation to report it. The duty is also imposed on any persons who become aware of such violence in the course of their duties without a reasonable justification to the contrary. Article 6 imposes a fine of not more than three million won where a person fails to report, without justifiable grounds, during the course of their duties a matter which is otherwise reportable as a domestic violence offender under Article 4(2).

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

In 2003 it was noted that only 14.9% of those arrested for domestic violence were prosecuted under the criminal law.<sup>685</sup> According to the Country Reports, which are a series of reports released by the United States Department of State in relation to human rights practices, in 2005 between January and August there were 1,114 cases of domestic violence of the total of 10,227 registered cases

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<sup>685</sup> Immigration and Refugee Board of Canada, *Korea, Republic of: Domestic violence, including legislation, availability of state protection and support for victims*, UNHCR (26 November 2009), <http://www.refworld.org/docid/4b7cee81c.html> (at 30 May 2013).

of domestic violence prosecuted by the Ministry of Justice.<sup>686</sup> In 2009, when South Korea presented to the UN Committee on Economic, Social and Cultural Rights, there was a total of 1,841 persons indicted for domestic violence.<sup>687</sup>

## 9.2 PROSECUTIONS UNDER CIVIL LAW

In 2008, there were 4,833 requests for protective dispositions, which appear to be the primary civil action in relation to domestic violence.<sup>688</sup>

There does not appear to be any more recent statistics.

## 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Critics of the Act for the Punishment of Domestic Violence have said that it is of limited use since prosecutors can take emergency steps to protect victims only in cases where the police stopped the violence on the spot or turned the victims over to shelters, even when there are fears that the violence will recur. In January 2006, the Supreme Prosecutors' Office announced that it was modifying provisions of the law in order to facilitate the granting of emergency measures to separate perpetrators from victims in domestic violence cases where victims did not make a formal police report or where violence was likely to recur.<sup>689</sup>

The police response times have also been noted as a problem.

Generally, there have been issues with implementation of the legislation given the patriarchal views inherent in South Korean society that emphasises the faults of the victims rather than the guilt of the perpetrators.

Further, there appears to have been a failure by the government to promulgate the legislation.

The nature of the offences, as occurring between closely related partly and covertly over a period of years, has meant that there have been difficulties (by the police) in fact-finding and obtaining evidence. Indeed, those involved tend to make false or exaggerated statements or reverse such statements following reconciliations with the other party.

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686 United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2005 – Korea, Republic of*, 8 March 2006, available at <http://www.refworld.org/docid/4418219020.html> (at 1 October 2013).

687 Ibid, above n 3.

688 Ibid.

689 Immigration and Refugee Board of Canada, *Republic of Korea: Whether the implementation of the Prevention of Domestic Violence and Victim Protection Act and the Special Act for the Punishment of Domestic Violence has been effective in protecting victims of spousal abuse, in increasing victims' willingness to help, and in reducing the incidence of domestic violence*, UNHCR, (3 April 2006), <http://www.refworld.org/docid/451476125.html> (at 30 May 2013).

The Korean Women's Association United has noted that the victims of domestic violence are not fully protected under the existing legislation because violence at home is considered private, legal and institutional safeguards for victims were poor, the police are non-responsive, public services focus on counselling for victims rather than the punishment of perpetrators and prosecutions are not always carried out.

## 9.4 REVIEW OF DOMESTIC VIOLENCE LAWS

The Ministry of Gender Equality is tasked with the responsibility of periodically reviewing the domestic violence legislation. The Ministry perform this function by releasing periodic reports covering the implementation of various pieces of legislation aimed at addressing women's issues in Korea.

The legislation is regularly reviewed, as part of South Korea's international law obligations under the Convention on the Elimination of All Forms of Discrimination against Women. Under the treaty, State parties have a continuing obligation to eliminate all forms of violence against women by reviewing and tracking the effect of their domestic policies.

The committee established under that convention have often commented or criticised South Korea's domestic violence legislation. For example, in 2007 they noted that "the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and society" and suggested "that these stereotypes are a root cause of violence against women".<sup>690</sup>

## ADDITIONAL RESOURCES

### Applicable law

1. Act on the Prevention of Domestic Violence and Protection etc. of Victims
2. Act on Special Cases Concerning the Punishment Etc of Crimes of Domestic Violence
3. Act on the Protection of Children and Juveniles from Sexual Abuse
4. Criminal Act
5. Criminal Procedure Act
6. Constitution of Republic of Korea

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690 Youngsook-Cho, *Country Papers: South Korea*, The First CEDAW Impact Study, 2000

### Bulletins and published articles

1. Immigration and Refugee Board of Canada, *Korea, Republic of: Domestic violence, including legislation, availability of state protection and support for victims*, UNHCR (26 November 2009) <http://www.refworld.org/docid/4b7cee81c.html> (at 30 May 2013)
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3. MinSook Heo, *Globally Agreed Upon, Locally Troubled: The Construction of Anti-Violence Legislation, Human Rights Discourse and Domestic Violence in South Korea* (2008)
4. United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 2005 - Korea, Republic of*, 8 March 2006, available at: <http://www.refworld.org/docid/4418219020.html> (at 1 October 2013)
5. Youngsook-Cho, *Country Papers: South Korea, The First CEDAW Impact Study*
6. Committee for implantation of CEDAW, *Republic of Korea, 19th session*, 7 July 1998

### Other sources

1. The Presidential Commission on Women's Affairs
2. The Ministry of Gender Equality and Family (MOGEF)
3. Asia Pacific Women's International Network Centre (APWINC) South Korea <http://www.women.or.kr/>
4. Korean Laws in English: Ministry of Government Legislation <http://www.moleg.go.kr/english/>



## China (Taiwan)

‘ According to a Shadow Report published by the Garden of Hope Foundation, while the laws implemented to combat issues of domestic violence in Taiwan are quite comprehensive, issues of enforcement continue due to public attitudes towards domestic violence. ’

# DOMESTIC VIOLENCE IN CHINA (TAIWAN)

DLA Piper International LLP, Australia

## EXECUTIVE SUMMARY

In China (Taiwan), the prevention of and protection against domestic violence is covered by the Domestic Violence Prevention Act (1998). Domestic violence is defined broadly to include physical and mental harm as well as to embrace both formal and informal family arrangements.

Courts hearing actions for domestic violence protection orders or criminal matters related to domestic violence have broad discretion to make orders to protect victims and their families. There are also some rehabilitation programs open to offenders, and courts can require offenders to undergo rehabilitation.

Although laws implemented to combat issues of domestic violence in Taiwan are quite comprehensive, issues of enforcement continue due to public attitudes towards domestic violence. Essentially, even with the training of professionals involved in enforcement of domestic violence orders, such as judges and police, as well as mandatory treatment and reporting regulations in the legislation, public attitudes that domestic violence is a family and private issue still prevail.

Relevant government departments are working to increase cooperation and coordination across different service providers, and new legislation such as the Taiwan Gender Equity Education Act will help to raise awareness of issues such as domestic violence in the future.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Taiwan. Domestic violence is defined as “any act of exercising any infringement, mentally or physically, amongst family members”.<sup>691</sup>

The definition embraces formal and informal family arrangements. “Family members” is defined as

- a spouse or ex-spouse;

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<sup>691</sup> Domestic Violence Prevention Act (1998), Article 2.

- person who has ever had on-going marital or *de facto* marital, parental and/or dependent relationship;
- person who has been related as a lineal-blood or a lineal-blood-by-marriage; or
- a person who has or has been related as a lateral blood or a lateral-blood-by-marriage.

Due to this expansive definition, divorcee and *de facto* couples are included, but gay, lesbian and transgender relationships are not included.

While mental abuse is specifically included due to the word “mentally” in the definition, the legislation is silent on financial abuse or economic hardship.

## 1.2 FORMS OF DOMESTIC VIOLENCE

Domestic violence can be committed in any, or a combination, of the following forms provided it is committed among family members:

- mental abuse of any kind;
- physical violence of any kind; and/or
- sexual violence, including sexual harassment.

# 2 APPLICABLE LEGISLATION

## 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Taiwan is the Domestic Violence Prevention Act. The following regulations operate to enable the proper functioning of the legislation:

- the Enforcement Rules for the Domestic Violence Prevention Act;
- the Regulations for the Administrative Authorities to Enforce Protection Orders and to Deal with Domestic Violence Cases; and
- the Regulations on Establishment, management and use of Domestic Violence Electronic Database.

There are two other pieces of peripheral legislation. These are:

- The Criminal Code of the Republic of China which criminalises certain acts that may be performed inside the home; and
- the Taiwan Gender Equity Education Act, which creates long-term educational initiatives that will likely have a positive effect on gender equality and people’s perceptions of social issues such as domestic violence.

## 2.2 INTERNATIONAL TREATIES

As Taiwan has limited international legal personality since losing its seat at the United Nations in 1971, Taiwan is not a signatory to any treaties touching on domestic violence or rights associated with domestic violence.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

The prosecution holds the burden of proof in criminal proceedings for domestic violence in Taiwan.<sup>692</sup> The public prosecutor has the right to initiate prosecutions for criminal proceedings.

### 3.2 RELEVANT COURT

Police can make an arrest for domestic violence or for contravention of a protection order without a warrant.<sup>693</sup> Following their arrest a suspect will be sent to a prosecutor, chief judicial police officer or judicial police officer who will consider whether to retain the suspect in custody and to issue a warrant.<sup>694</sup>

The relevant court for criminal domestic violence proceedings is not specified in the Act. The District Court hears civil and criminal trials in the first instance.<sup>695</sup>

If a suspect is released on bail then orders may be made to:

- forbid the suspect from committing further acts of domestic violence;
- forbid the suspect from directly or indirectly communicating with the victim;
- forbid the suspect from living with the victim;
- specify a distance the suspect must stay away from the victim or places regularly visited by the victim; and/or
- anything else necessary to protect the victim.<sup>696</sup>

### 3.3 STAGES OF THE PROCEEDINGS

Under Taiwanese law, criminal proceedings typically follows these stages:

- investigation by a public prosecutor;

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<sup>692</sup> Code of Criminal Procedure.

<sup>693</sup> Domestic Violence Prevention Act, Article 11.

<sup>694</sup> In accordance with the Domestic Violence Prevention Act, Article 29.

<sup>695</sup> Domestic Violence Prevention Act 1998, Article 11.

<sup>696</sup> Domestic Violence Prevention Act, Article 30.

- initiation of prosecution; and
- trial carried out by the District Court.

### **Investigation by a public prosecutor**

If a public prosecutor, because of complaint, report, voluntary surrender, or other reason, knows there is a suspicion of an offense having been committed, he shall immediately begin an investigation.<sup>697</sup>

### **Initiation of prosecution**

Once the public prosecutor is satisfied that all necessary investigation has been completed a public prosecution shall be initiated by a public prosecutor by filing an indictment with a competent court.<sup>698</sup> A victim also has the option of filing for a private prosecution.<sup>699</sup>

### **Trial carried out by the District Court**

The court then conducts the hearing and will hand down a ruling regarding the guilt of the offender and, if required, the appropriate punishment. The court shall summon the victim or his or her family member, and give them the opportunity to state their opinion unless the victim has expressed their unwillingness to be present, or that the court considers it is not necessary or not appropriate to summon them.<sup>700</sup>

## **3.4 PROSECUTION FUNDING**

There do not appear to be any special funding measures in relation to domestic violence prosecutions. However, a convicted party may be required to pay corresponding attorney fees.<sup>701</sup> There are also provisions which may require payment for a victim's rent for alternative premises, support for a minor, medical care and consultation, or reimbursement of costs for property damage where appropriate.<sup>702</sup>

## **3.5 TIMESCALES**

There are no official records available regarding timescales of criminal prosecutions.

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<sup>697</sup> Code of Criminal Procedure, Article 228.

<sup>698</sup> Code of Criminal Procedure, Article 264.

<sup>699</sup> Code of Criminal Procedure, Chapter 2 of Part 2.

<sup>700</sup> Code of Criminal Procedure, Article 271.

<sup>701</sup> Domestic Violence Prevention Act 1998, Article 14, Paragraph 11.

<sup>702</sup> Domestic Violence Prevention Act, Article 14.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

Under Article 9 of the Domestic Violence Prevention Act, there are two forms of preliminary or interim measures. These are the ordinary and provisional protective orders.

According to Article 9 “An application for a protective order may be filed with the court by a victim, prosecutor, police department, or regulating government authorities. In the event that the victim is a minor, disabled, mentally and/or physically, or is prevented from appointing an attorney for any cause whatsoever, his or her legal representative, any blood relative or relative-by-marriage...may file the petition for a protective order from the court for, and on behalf of, the victim.”

In responding to an application for a protective order the court’s powers are relatively broad. The court can issue any one or more of the following orders:<sup>703</sup>

- restrict the respondent from exercising domestic violence against the victim;
- restrict the respondent from causing any direct or indirect harassment, communication, correspondence with the victim;
- order the respondent to vacate the victim’s residence;
- to order the respondent to clear away from certain places frequented by the victim or the victim’s family members;
- specify and take steps to ensure the victim’s right to use any daily life, occupational or educational necessities;
- make any necessary temporary orders with respect to minors.
- specify and/or restrict visitation rights of the Respondent;
- order the Respondent to pay any support for the victim to the victim and his/her minor;
- order the Respondent to pay medical costs or other consultation, sanctuary or property damage costs incurred by the victim or any particular family member of the victim;
- order the Respondent to complete drug/alcohol addiction rehabilitation, mental therapy, psychological consultation or any other treatment and/or consultation;
- order the Respondent to bear corresponding attorney fees; and/or
- prescribe any other order(s) that is/are required for the protection of the victim and of any particular family member of the victim.

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703 Ibid.

## 4.2 EVICTION OF THE OFFENDER BY THE POLICE

Under Article 13 of the Domestic Violence Prevention Act the court has the power to order the respondent to vacate the victim's residence.

## 4.3 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES

Under Article 277 of the Code of Civil Procedure the victim holds the burden of proof in civil actions.

## 4.4 RELEVANT COURT

Petitions for Protection Orders will be made in the District Court where the victim or respondent is a resident, or the place where the domestic violence occurred.<sup>704</sup> An application may be filed by a victim, prosecutor, police department or regulating municipal or country authorities.<sup>705</sup>

## 4.5 TIMESCALES

There are no official statistics on timescales in civil actions for domestic violence.

However, a 'Shadow Report' published by the Garden of Hope Foundation states that the time taken to rule on cases of domestic violence in Taiwan is generally too long, and that sentences are often lenient due to the court's reluctance to become involved in what it perceives are not matters for the courts.<sup>706</sup>

## 4.6 FUNDING TO PROSECUTE

There will be an exemption from court costs for application, revocation, alteration, extension or appeal of a protection order.<sup>707</sup>

# 5 SUPPORT FOR VICTIMS

## 5.1 STATUTORY PROVISIONS

The *Regulations for the Administrative Authorities to Enforce Protection Orders and to Deal with Domestic Violence Cases* covers some measures which support victims.

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704 Domestic Violence Prevention Act, Article 11.

705 Domestic Violence Prevention Act, Article 10.

706 [Globalgender.org](http://www.globalgender.org/en-global/program/index/5), NGO's Shadow Report on Domestic Violence, available at: <http://www.globalgender.org/en-global/program/index/5>.

707 Domestic Violence Prevention Act, Article 10.

The Taiwan Ministry of the Interior run a “113 Protection Hotline”, which provides 24-hour support to victims. The Ministry also works with local courts and communities to facilitate cooperation among support services and raise awareness and accessibility of these services to victims of domestic violence.<sup>708</sup>

## 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

The legislation provides that where a person is to bear a right or duty in relation to a minor, a court may determine it is not in the interest of the minor for an offender to be appointed to exercise or bear that right or duty.<sup>709</sup> The legislation also allows for the consideration of the safety of victims and minors when considering visitation and/or communication with minors.<sup>710</sup> However, the legislation does not provide further for specific treatment of offenders or victims where minors have experienced domestic violence.

## 6 OFFENCES

There are twelve main criminal offences under which domestic violence offences would be prosecuted. These are detailed in the table below:

OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW—DOMESTIC VIOLENCE PREVENTION ACT</b>		
BREACH OF COURT ORDER RELATING TO DOMESTIC VIOLENCE PROCEEDINGS.	Article 50	Up to three years’ imprisonment, hard labour, and/or a fine of up to NT\$100,000 as well as other discretionary penalties including forcing the offender to undertake rehabilitation.
BREACH OF PROTECTION ORDER.	Article 50	As above.
FOR ANYONE INVOLVED IN ENFORCEMENT OF CONTROL AND PREVENTION OF DOMESTIC VIOLENCE: FAILING TO REPORT ANY SUSPICION OF DOMESTIC VIOLENCE.	Article 51	A fine of NT\$6,000–30,000.
REFUSING TO PROVIDE MEDICAL HELP, DIAGNOSIS, AND/OR EXECUTE A CERTIFICATE OF DIAGNOSIS TO ANY VICTIM OF DOMESTIC VIOLENCE.	Article 51	A fine of NT\$6,000–30,000.

708 Ministry of the Interior, *Social Affairs*, <http://www.moi.gov.tw/outline/en/en-04.html>.

709 Domestic Violence Prevention Act, Article 35.

710 Domestic Violence Prevention Act, Article 36.



OFFENCE	LEGAL REFERENCE	SANCTION
<b>LAW—CRIMINAL CODE OF THE REPUBLIC OF CHINA</b>		
SEXUAL INTERCOURSE AGAINST A PERSON'S WILL.	Article 221	Three to ten years' imprisonment. Minimum of seven years' imprisonment in certain aggravated circumstances.
COMMITTING AN OBSCENE ACT AGAINST A MALE OR FEMALE AGAINST THEIR WILL.	Article 224	Six months' to five years' imprisonment. Three - ten years' imprisonment in certain aggravated circumstances.
SEXUAL INTERCOURSE WITH ANOTHER BY TAKING ADVANTAGE OF THEIR POSITION OF AUTHORITY (INCLUDING IN THE FAMILY CONTEXT).	Article 228	Six months' to five years' imprisonment.
MURDER	Article 271	Death, life imprisonment, or not less than ten years' imprisonment.
MANSLAUGHTER	Article 276	Up to two years' imprisonment, short term imprisonment, or a fine.
CAUSING INJURY	Article 277	Up to three years' imprisonment, short-term imprisonment, or a fine.
CAUSING SERIOUS PHYSICAL INJURY	Article 278	Five to twelve years' imprisonment. Not less than seven years' imprisonment if injury results in death.
CAUSING A PERSON TO DO A THING WHICH THEY HAS NO OBLIGATION TO DO, OR PREVENTING THEM FROM DOING A THING THAT THEY HAVE THE RIGHT TO DO.	Article 304	Up to three years' imprisonment, short-term imprisonment, or a fine.

## 7 REHABILITATION MEASURES

The legislation provides for rehabilitation of offenders by way of allowing for orders requiring completion of the "Batterer's relocation program".<sup>711</sup> This program may include educational and mental consultation, mental therapy, drug/alcohol addiction rehabilitation, or any other consultation and treatments.

A 'Shadow Report' on domestic violence produced by The Garden of Hope Foundation suggests that in practice women are unaware of the

<sup>711</sup> Domestic Violence Prevention Act, Articles 13, 30, and 37.

treatment orders that might be available for offenders or might be fearful of requesting treatment orders.<sup>712</sup>

Further, the above report suggests that treatment of the offender is a lower priority for victims than financial stability, physical safety and the safety of their children.

## 8 THIRD PARTY RESPONSIBILITIES

There are a number of specific third party duties imposed on medical practitioners. These include that no hospital or clinic may refuse treatment to a victim of domestic violence.<sup>713</sup> In the performance of their duties, medical, social, psychological, educational and nursing professionals, police, staff of immigration service, and all personnel involved in the enforcement of control and prevention of domestic violence shall report any suspicion of domestic violence to local regulating authorities within 24 hours.<sup>714</sup> Failure to do so is an offence attracting a fine of between NT\$6,000–30,000.<sup>715</sup>

Medical personnel are exempted from this section where their failure to report is a result of avoiding immediate danger to the physical condition of the victim.<sup>716</sup>

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

The reporting of incidences of domestic violence in Taiwan seems to be carried out by the individual districts within which the claims or charges are brought. There are seven district governments in Taiwan but not all of them publish the statistics of domestic violence on their websites. Hsinchu City Government, Chiayi County Government, Tainan City Government, Keelung City Government, Kaohsiung City Government and the New Taipei City Government do not publish statistics on their websites recording the number of domestic violence reports per year.

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712 **Globalgender.org**, NGO's Shadow Report on Domestic Violence pg 15, available at: <http://www.globalgender.org/en-global/program/index/5>.

713 Domestic Violence Prevention Act, Article 42.

714 Domestic Violence Prevention Act, Article 41.

715 Domestic Violence Prevention Act, Article 51.

716 Domestic Violence Prevention Act, Article 51.

The Department of Social Welfare of the Taipei City Government publishes the incidence of marital abuse and sexual assault on their website. Statistics for the years 2010 until July 2013 for charges of sexual assault are as follows:<sup>717</sup>

YEAR	2010	2011	2012	JULY 2013
SEXUAL ASSAULT	846	862	799	389
MARITAL ABUSE	6,489	6,725	6,339	3,045

However, the Ministry of Interior is also responsible for documenting and reporting on incidences of domestic violence in Taiwan. On the Ministry website, a total of 156,317 valid calls were made to 113 Protection Hotline in 2011. A total of 13,686 sexual assault cases were accepted and a total of 104,315 domestic violence cases were accepted. More recent statistics have not been published on the Ministry's website to date.<sup>718</sup>

## 9.2 PROSECUTIONS UNDER CIVIL LAW

There does not appear to be any official records of the number of civil actions carried out under the legislation.

## 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

According to a 'Shadow Report' published by the Garden of Hope Foundation, while the laws implemented to combat issues of domestic violence in Taiwan are quite comprehensive, issues of enforcement continue due to public attitudes towards domestic violence.

Essentially, even with training of professionals involved in enforcement of domestic violence orders such as judges and police, and mandatory treatment and reporting regulations in the legislation, public attitudes that domestic violence is a family and private issue still prevail.<sup>719</sup>

Further, as domestic violence is regulated under county and city jurisdictions, uniformity of enforcement is difficult to ensure. This is because the commitment

717 Department of Social Welfare, *Protective Services Statistics*, available at: <http://english.dosw.taipei.gov.tw/ct.asp?xItem=143607&ctNode=15826&mp=107002>.

718 Ministry of the Interior, Social Affairs, <http://www.moi.gov.tw/outline/en/en-04.html>.

719 Globalgender.org, *NGO's Shadow Report on Domestic Violence* pg 8, available at: <http://www.globalgender.org/en-global/program/index/5>.

to preventing domestic violence seems to vary between government jurisdictions, leaving some victims with less protection.<sup>720</sup>

The Shadow Report goes further to outline the lack of mechanisms to make abused women and other victims financially independent following incidences of domestic violence. This remains a problem for victims as they may not be in the financial position to pursue claims of domestic violence from fear of losing financial support, especially after seeking medical treatment at a cost to them.<sup>721</sup>

The major issue in enforcement of the legislation appears to be social attitudes towards the crime. Domestic violence is viewed as a family and private issue by many involved in the reporting and judicial process. Police are often reluctant to arrest offenders and even take on a mediatory role when they attend to incidences of reported violence.<sup>722</sup> Police only seem to make an arrest where victims are already in possession of an effective protective injunction, being generally fearful of complaints made by offenders of rights violations. This, combined with the lengthy process of receiving an injunction and the reluctance of judicial officers to award an injunction appears to leave many victims unprotected and at risk.<sup>723</sup>

Additionally, police are required to pay postage and other expenses in order to assist victims in domestic violence cases, decreasing the willingness of police to become involved.<sup>724</sup> Further, police often fail to provide a copy of the injunction sought to the victim, or properly outline what it is that the injunction should include, leaving victims unsure of the content of their case when they do go to court.

Another problem is the failure and reluctance of the medical community to provide medical reports that would result in proof of domestic violence. Even where medical reports are provided, the fees attached to these reports are prohibitive for many victims who do not have the financial resources available to them.<sup>725</sup> This remains an issue in spite of regulations in the Domestic Violence Prevention Act that require reporting of domestic violence incidences.

## 9.4 PLANNED REFORMS/PILOT SCHEMES

While some non-governmental organisations and international non-governmental organisations have continued to monitor the content and application of the legislation, criticism of the law as it stands seems to have been largely overlooked by the government, legal profession and even the media.

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720 **Globalgender.org**, *NGO's Shadow Report on Domestic Violence* pg 12, available at: <http://www.globalgender.org/en-global/program/index/5>.

721 Ibid, pg 7.

722 Ibid, pg 9.

723 Ibid.

724 Ibid, pg 12.

725 Ibid, pg 14.

These groups, like many others throughout Taiwan, still believe in the “myth of domestic violence” and reporting of cases by the media remains inadequate.<sup>726</sup> However, Taiwan’s government does set aside money in the budget to open and operate various domestic violence prevention courses and provide service training for those involved in domestic violence.<sup>727</sup> The impact of such courses in practice has been low, with a continued lenience in judgments even where violence has been long-term.<sup>728</sup>

## 9.5 REVIEW OF DOMESTIC VIOLENCE LAWS

There does not appear to a provision for regular review of the legislation.

## ADDITIONAL RESOURCES

### Applicable law

1. Domestic Violence Prevention Act (1998)
2. Criminal Code of the Republic of China
3. Code of Criminal Procedure
4. Taiwan Gender Equity Education Act
5. Enforcement Rules for the Domestic Violence Prevention Act
6. Regulations for the Administrative Authorities to Enforce Protection Orders and to Deal with Domestic Violence Cases
7. Regulations on Establishment, management and use of Domestic Violence Electronic Database

### Publications

Globalgender.org, *NGO’s Shadow Report on Domestic Violence* available at: <http://www.globalgender.org/en-global/program/index/5>

### Bulletins and published articles

<http://law.moj.gov.tw/eng/>

### Other sources

Ministry of the Interior, *Social Affairs* <http://www.moi.gov.tw/outline/en/en-04.html>

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<sup>726</sup> Ibid, pg 8.

<sup>727</sup> Ibid pp. 7-8.

<sup>728</sup> Ibid.

### Statistics

1. Department of Social Welfare, *Protective Services Statistics* available at: <http://english.dosw.taipei.gov.tw/ct.asp?xItem=143607&ctNode=15826&mp=107002>
2. Ministry of the Interior, Social Affairs <http://www.moi.gov.tw/outline/en/en-04.html>

### Governmental organisations

1. Ministry of the Interior, *Social Affairs* <http://www.moi.gov.tw>
2. Department of Social Welfare <http://english.dosw.taipei.gov.tw>

# Ukraine

**‘** *In 2012, more than 2,000 domestic violence offenders registered with the police in Ukraine; only a mere 165 attended the Correctional Programme centres for rehabilitation.* **’**



# DOMESTIC VIOLENCE IN UKRAINE

CMS, Kyiv

## EXECUTIVE SUMMARY

Ukrainian legislation encompasses many international and national laws which regulate anti-domestic violence matters. The definition of domestic violence is set out in Ukrainian national law and has been further elaborated through academic commentary. In Ukraine, an act of domestic violence is generally defined and recognised as any family member's intentional acts of a physical, sexual, psychological or economic nature which cause damage to the physical health or any other moral<sup>729</sup> or material<sup>730</sup> damages to another family member.

Domestic violence may take place in a variety of contexts and a person who commits an act of domestic violence may bear civil, criminal or administrative liability (liability for minor offences). A person who is a victim of domestic violence may file a civil lawsuit against an offender for compensation for moral or material losses. In terms of criminal liability, offenders may be prosecuted under general criminal law provisions depending upon the type and form of the violent actions committed. The sanctions available for domestic violence offences may vary significantly depending on the type and severity of the offence(s).

Families, children and youths who suffer domestic violence can get support through a network of specialised social services. If necessary, victims of domestic violence may also resort to attending specialised institutions such as shelters and medical and social rehabilitation centres.

Ukrainian legislation also provides for rehabilitation of offenders who have committed domestic violence, in the form of a "Correctional Programme", which aims to foster non-violent behaviour and a new model of family life based on principles of gender equality and respect for family members' rights.

The anti-domestic violence law of Ukraine contains some defects and ambiguities, which can create difficulties in enforcement. At the time of writing, a new draft law "On Prevention and Combating of Domestic Violence" had been registered with the Ukrainian Parliament. Provided that such draft is adopted and the new law comes into force, anti-domestic violence legislation in Ukraine should improve.

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<sup>729</sup> i.e. non-monetary/intangible.

<sup>730</sup> i.e. monetary/tangible.



# 1 DEFINITIONS OF DOMESTIC VIOLENCE

## 1.1 GENERAL DEFINITION OF DOMESTIC VIOLENCE

Ukrainian legislation contains specific legal provisions which regulate issues of domestic violence (see section 2 below).

The Law of Ukraine On Prevention of Domestic Violence defines domestic violence as any intentional physical, sexual, psychological or economic actions, of one family member towards another family member, in a case where such actions infringe that other family member's constitutional rights and freedoms (i.e. personal rights and rights of citizens) and cause damage to his or her physical health or any other moral or material damages.

A number of academics have also provided their own definitions of domestic violence. For instance, academics Mr. Myshyk, Mrs. Golovanova and Mrs. Bilousova define domestic violence as a real act or threat of physical, sexual, psychological or economic violence, caused by one person to another person where both such people are involved in an intimate or other serious relationship.

Although the definition which has been proposed by academics is broader than the legal definition, both definitions share the following features:

- the offender's acts must have been: (i) illegal (i.e. violated provisions of Ukrainian law); and (ii) intentional (rather than merely negligent);
- cover relationships between non-married people who live together as one family (see next 2 paragraphs below); and
- the offender's acts can violate both a person's rights as an individual as well as his or her rights as a citizen.

The definition of domestic violence is quite broad and is not limited to relationships between married people; Ukrainian anti-domestic violence legislation also covers relationships between non-married people who live as one family and share a common household.

Additionally, although the definition does not directly include gay, lesbian or transgender persons/relationships, in practice Ukrainian anti-domestic violence legislation applies to these persons/relationships so far as such people are considered to be family (whether officially married or not, provided they live as one family and have a common household).

However, neither Ukrainian law, nor related legal clarifications, define whether domestic workers are covered by Ukrainian anti-domestic violence legislation. It is therefore, believed that such legislation does not apply to domestic workers.

## 1.2 MENTAL ABUSE AS A FORM OF DOMESTIC VIOLENCE

As described in paragraph 1.1, the definition of domestic violence under Ukrainian law includes psychological (i.e. mental) abuse. The Law of Ukraine On Prevention of Domestic Violence defines psychological abuse as an abuse caused by one family member to the mentality of another family member, by verbal offences or threats, pursuance or intimidations, in order to intentionally cause emotional uncertainty or an inability to defend oneself, which can affect/is already affecting that other's mental health.

Under Ukrainian law, mental abuse and economic abuse may interrelate. For example, financial abuse or economic hardship could be recognised as mental abuse in a case where the financial/economic abuse results, *inter alia*, in mental abuse or a mental health disorder. Financial abuse is considered to be an intentional limitation by one family member of another family member in order to deprive that other person of a house/apartment, food, clothing, other property or money owned by that person, which results in that person's death or causes them to suffer physical or psychological health disorders.

Although Ukrainian law does not specify what evidence is required to prove mental abuse, the practise of the Ukrainian courts suggests that a medical certificate or other proof showing the emotional "uncertainty" of a person, or medical proof of a mental health disorder, can be considered by a court as evidence. It should be noted however that each case is unique and the recognition of mental abuse is at the sole discretion of the court.

Where the mental abuse leads to criminal liability, the burden of proof will always lie with the prosecution. In civil cases (where a person files a civil claim for the compensation of moral or material damages), the burden of proof will lie with the victim.

In contrast with other types of abuse, mental abuse will only lead to criminal liability in very limited cases, namely as a distinct type of crime where the mental abuse is caused through (i) the threat of murder (which may lead to up to six years of imprisonment); (ii) the threat to destroy another family member's property by setting it on fire, blowing it up or its destruction by any other dangerous means (which may lead to up to six months of arrest)<sup>731</sup> and (iii) certain other distinct circumstances.

Ukrainian law does not specify any separate administrative liability for causing mental abuse; the same type of administrative liability should be applied irrespective of the type of the abuse which was caused (i.e. physical, mental or economic). Sanctions for such offences may result in fines up to Ukrainian Hryvnyas 1,700 (EUR170) or up to 15 days imprisonment.

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<sup>731</sup> The taking or keeping of a person in custody by a legal authority, especially in response to criminal charges.

Note, if for some reason the actions of an offender do not qualify as a crime or as an administrative offence, it is still possible to hold him or her liable under civil law provisions claiming damages for moral or material harm (see further section 4 below).

## 2 APPLICABLE LEGISLATION

### 2.1 INTERNATIONAL TREATIES

The legislative framework governing the prevention of domestic violence in Ukraine consists of both international and national laws. Ukraine has ratified a number of international conventions concerning domestic violence prevention, including, amongst others the:

- UN Convention on the Rights of the Child (ratified in 1991);
- International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified in 1973); and
- Convention on Maternity (ratified in 1956).

Where any conflict exists between the provisions of an international convention and the national law of Ukraine, the provisions of the international convention should prevail.

### 2.2 NATIONAL LAW

In 2001 the Ukrainian Parliament adopted one of the main laws in the field of prevention of domestic violence – the Law of Ukraine On Prevention of Domestic Violence. This instrument determines the legal and organisational foundation of domestic violence prevention and specifies the bodies and organisations responsible for preventing domestic violence.

There are also other legal provisions which set out domestic violence offences under Ukrainian law, namely the Criminal Code of Ukraine. This Code outlines the sanctions for various crimes arising out of domestic violence (e.g. murder, crimes against a person's health or property, sexual abuse, economical exploitation of children and other crimes which may constitute domestic violence). The Criminal Code of Ukraine protects not only a person's physical health, but also his or her mental health (as discussed further above). For example, domestic violence can trigger criminal liability if it drives a person to suicide.

If an act of domestic violence does not qualify as a crime, such act may still result in administrative liability as established by the Code of Ukraine on Administrative Offences.

Ukrainian civil law also protects victims of domestic violence. The victim is entitled to file a claim with the court for compensation for moral or material damages.

## **2.3 PROTECTION OF CHILDREN**

Regulation in the field of child protection from violence at the national level is based on the Constitution of Ukraine and the Convention on the Rights of the Child, which both guarantee basic rights and freedoms of children and provide mandatory measures to protect children from all forms of discrimination and violence. Ukraine has also adopted a number of regulations in the field of child protection. In particular, the Law of Ukraine On Protection of Childhood guarantees the protection of children from any possible type of violence.

The prohibition of any kind of exploitation of children, physical punishment, or penalties which degrade a child, by parents or persons acting as a substitute (i.e. guardians), is also contained in the Family Code of Ukraine.

## **2.4 OTHER APPLICABLE STATUTORY LAWS**

The Law of Ukraine “On Provision of Equal Rights and Possibilities for Men and Women” is also applicable in the context of anti-domestic violence legislation, as it regulates matters of sexual harassment. This law defines sexual harassment as actions of a sexual character, expressed verbally (e.g. threats, intimidation or improper remarks) or physically (e.g. touching or slapping) which humiliate or offend a person in the context of their employment, or material or other types of dependant relationships. An abused person has a right to reimbursement of any material losses and moral damages inflicted upon him or her through the act of sexual harassment. Moral damages should be compensated irrespective of any material losses compensated, and such damages are not affected by the size (amount) of material losses.

# **3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW**

## **3.1 BURDEN OF PROOF**

There is no specific provision under the Ukrainian law which specifically determines the burden of proof for domestic violence offences. However, the Code of Criminal Procedure of Ukraine (the “Criminal Procedural Code”) establishes what must be proven in order to hold a person liable for any criminal offence, irrespective of the type and gravity of such offence. Therefore,

provisions of the Criminal Procedural Code apply equally to criminal offences involving domestic violence.

The Criminal Procedural Code states that the burden of proof for criminal offences lies with the prosecution. The prosecution must prove the guilt of the alleged offender beyond reasonable doubt. As to the *corpus delicti* (essence of the crime), the following elements must be proven in order for the court to find the alleged offender guilty:

- the occurrence of the crime (i.e. the time, venue, method and other circumstances of the particular criminal offence);
- the guilt of the person, and the purpose and the motive of the particular criminal offence;
- the type and size of the harm caused by the criminal offence; and
- any other circumstances which influence the gravity of the criminal offence, characterise the personality of the offender or which may serve as aggravating or mitigating factors for the sentence to be imposed by the court.

### 3.2 RELEVANT COURT

Under the Criminal Procedural Code, criminal cases are brought before the local court of first instance. In terms of territorial jurisdiction, criminal cases are considered by the local court of first instance in the jurisdiction in which the criminal offence was committed.

### 3.3 STAGES OF THE PROCEEDINGS

An individual may submit a claim to the prosecution office or local police department informing them about the events which took place and which, in that person's opinion, may constitute the *corpus delicti* and thus should be investigated. After the claim is received by those authorities, the authorities are obliged to check the facts stated in the claim and, if the facts suggest that the crime may have taken place, to start a criminal investigation.

Alternatively, the police or public prosecutor may themselves uncover a criminal offence. In such cases, the investigation should be commenced immediately after the relevant facts of the possible criminal offence have been uncovered.

After the pre-trial investigation has finished and once the authorities have enough evidence to cause them to believe that the offender is or may be guilty, the criminal case will be transferred to the court for trial and conviction of the offender (if the prosecution has successfully proven the offender's guilt in court).

### 3.4 PROSECUTION FUNDING

Under Ukrainian law provisions, public prosecutions of offences are funded through the Ukrainian Government. The system of Ukrainian public prosecution and authorities of internal affairs (which also include police departments) are funded from the State Budget. The State Budget of Ukraine, which is approved annually by the Ukrainian Parliament, always allocates certain funds for the financing of the aforementioned authorities.

Although the amounts of funding each year may vary depending upon prevailing economic circumstances and other factors, the amounts are usually sufficient to keep the public prosecution and authorities of internal affairs fully operational and able to perform their functions.

In terms of the victim's costs incurred in criminal proceedings, victims are not required to bear any mandatory legal costs (see section 5 below for details of additional funding and support available for victims of domestic violence offences).

### 3.5 TIMESCALES

According to the Criminal Procedural Code, the pre-trial investigation may not exceed a period of two months starting from the date on which the person was reported to be suspected of the commission of the criminal offence. However, if the pre-trial investigation is complex and requires the implementation of many investigative actions, this period may be extended by the public prosecutor.

In relation to the timetabling of the trial itself, once the pre-trial investigation has been completed and the case is sent to the court for consideration, no time limits are set. The Criminal Procedural Code simply states that "the court trial should be completed during a reasonable period of time". In practice this period will usually depend on the complexity and particular circumstances of the criminal case and it may therefore range from a couple of months to a number of years.

If the court finds the alleged offender guilty, the verdict must be enforced via the specialised State authorities. Under the Criminal Procedural Code, enforcement should commence no later than three days after it was rendered. In practice however, enforcement may take longer. For instance, if a custodial sentence is given, the guilty person may have to wait for several weeks before being transferred to a prison to serve their sentence. Similarly, if a fine is imposed, it may take up to a month before the actual enforcement of the verdict and collection of the fine is carried out.

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 CIVIL LAW ACTIONS

Under Ukrainian law, a victim (or if a child under the age of 14, a parent or those acting on his or her behalf) of domestic violence may apply to the civil court for general relief (e.g. for compensation of moral or material damages) or for specific relief such as the deprivation of parental rights (the removal of the child from either or both of its parents to other relatives or the guardianship authority (see further at section 4.2 below)).

Claims for compensation of moral or material damages caused by domestic violence may be brought by any member of the family over the age of 14 who has suffered domestic violence. Alternatively, such claim may be brought by the State prosecutor or, in cases where the victim is a child, by the guardianship authority, acting on behalf of the victim. The respondent in such cases will be the family member who committed certain violent acts and who therefore violated the rights of the other family member(s).

### 4.2 DEPRIVATION OF PARENTAL RIGHTS

In relation to claims for deprivation of parental rights, such claims may be filed by one of the parents, other family members, the guardianship authority, the State prosecutor or by the child him or herself if he or she is over the age of 14.

The claim may be filed against one or both parents if they systematically commit violent acts towards their child/children or do not properly perform their parental obligations in general.

If the claim for deprivation of parental rights is upheld by the court, the parent(s) will lose all non-proprietary rights concerning the child, become exempt from the obligation to bring up the child and will cease to be that child's legal guardian.

Along with deprivation of parental rights, the court may additionally order an amount of alimony (spousal support) to be paid for the child.

If the child lives in the same premises as the parent(s) deprived of parental rights, the court should also consider whether the parent(s) can continue to reside at the premises. If the court finds that such common residence is not permissible, the court may order the expulsion of the parent(s) from their place of residence if they have alternative accommodation. Otherwise, the court may order the separation of the premises in order to ensure that the child lives separately from the parent(s) deprived of parental rights. Alternatively, if only one parent loses parental rights, the child may be transferred to and live separately with the other parent whose parental rights remain.

### 4.3 TIMESCALES

In terms of timescales for obtaining the relief described in sections 4.1 - 4.2 above, the Code of Civil Procedure of Ukraine (the “Civil Procedural Code”) states that the first instance court should consider the case and issue a judgement within a period not exceeding two months from the day the proceedings have been initiated. If the case is complex, this period may be extended by up to 15 days.

Practically, however, this rule is not always duly observed and thus the courts of first instance may well consider cases for up to six months or more depending on the particular circumstances of the case.

It is also important to remember that the party who lost at first instance always maintains the right of appeal. In such cases, the court of appeal will also have up to two months for consideration of the appeal (this time limit is usually better adhered to than at first instance). If a further appeal is filed with the court of cassation (a high instance specialised civil court) this court is also likely to consider the case for approximately an additional two months.

### 4.4 BURDEN OF PROOF

The burden of proof for civil cases is not clearly defined and the Civil Procedural Code simply states that each party should prove with sufficient evidence the facts serving as a basis for its claim or defence.

Practically, in cases involving compensation of moral or material damages caused by violent or other unlawful acts, the claimant will have to prove (i) the fact of the damages; (ii) the fact of the violence committed towards him or her; and (iii) the causal relationship between the violence committed and the damages.

In relation to claims for deprivation of parental rights, the claimant will have to submit sufficient evidence in order to prove the facts of the violence committed by the parents, or other facts of unacceptable treatment of the child by his or her parents.

### 4.5 RELEVANT COURT

Civil cases are brought before the local court of first instance. In terms of territorial jurisdiction, the case will be considered by the local court of the first instance in the jurisdiction in which the defendant has its permanent place of residence.

However, claims for compensation of moral or material damages involving injuries to health (irrespective of the cause of the injuries, thus covering physical or mental violence) can be filed on an alternative basis in other first instance courts. The case can be filed in the jurisdiction in which: (i) the respondent



resides (under the general rule in the paragraph above); (ii) the claimant resides; or (iii) the unlawful acts which resulted in damages took place.

#### 4.6 FUNDING

The courts are permanently financed from the State Budget of Ukraine in the same manner as described at section 3.4 above.

It is also important to note that claimants are exempt from any court fees for filing claims for compensation of damages caused by injuries to health.

## 5 SUPPORT FOR VICTIMS

### 5.1 STATUTORY PROVISIONS

There are no specific laws, codes of conduct or guidance notes governing the provision of support for victims of domestic violence in Ukraine. However, the Resolution of the Cabinet of Ministers of Ukraine On Approval the Procedure for Considering Claims on Domestic Violence or a Real Threat of its Commitment provides for, among other things, the organisation of the provision of psychological, legal, social, educational, medical, informational and other support for victims of domestic violence. According to the Resolution, families, children and youths who have suffered domestic violence can get support through a network of specialised social services. If necessary, victims of domestic violence may be referred to institutions such as shelters, and medical and social rehabilitation centres.

In such institutions victims of domestic violence are given consultations and treatment concerning but not limited to: (i) the resolution of psychological and interpersonal relationship problems; (ii) counteraction to violence and cruel treatment of children; (iii) establishment of custody over children; (iv) divorce and issues related to it; and (v) gender discrimination.

The national telephone hotline is also an effective mechanism for the provision of social assistance and for victims of violence. For example, in 2012, the “La Strada — Ukraine” centre worked on 15 cases concerning violence in the family and gender-based violence (providing psychological help, secondary legal assistance and help in obtaining temporary shelter, etc). In 2012, it also helped to prepare and submit a complaint to the European Court of Human Rights, the first of its kind from Ukraine.

Despite this, Ukraine does not have enough centres to assist women who suffer from domestic violence; in Ukraine, there are only 33 institutions, mainly

operated by non-governmental organisations and the City Municipality, in which women affected by domestic violence can receive comprehensive help. Unfortunately, this is a virtually insignificant number: according to the standards of the Council of Europe, there should be at least one such centre per 10,000 people. There are only three such institutions in Kyiv (a city with an estimated population of 10.7 million as of 1 June 2013<sup>732</sup>), and some regions lack this type of institution entirely, in particular, Kharkiv, Vinnitsa, Poltava and others.

Every shelter operated by a women's non-governmental organisation provides free legal, social, and psychological counselling to victims of violence (including domestic and sexual violence as well as trafficking). The Centre of Work with Women operated by the Kyiv Municipality also runs a crisis centre. Since free government legal aid is only available to those facing criminal charges, and not to their alleged victims, the latter must seek the assistance of non-governmental organisations, whose legal activities are often financed by international donors.

Examples of non-governmental organisations working with female victims of violence are:

- the “World of Women” non-governmental organisation in Kharkov, crisis centre and shelter for victims of domestic violence;
- the “Odessa-based Centre for Rehabilitation ‘Stupeny’ (STEPS)”, which provides awareness and rehabilitation training; and
- the “Women’s Information Consultative Centre in Kiev”, which organises conflict prevention activities (Women’s International League for Peace and Freedom n.d.).

## 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

In Ukraine there are also additional laws regarding the support of children who have experienced domestic violence.

The Procedure for Considering Claims about Child Abuse or Real Threat of its Commitment defines the mechanism of interaction between a specially empowered executive body for the prevention of domestic violence, service of district police inspectors and criminal juvenile police, guardianship and care bodies and specialised institutions for the victims of domestic violence. It aims to prevent child abuse, physical, sexual, psychological, social and domestic violence, and provides emergency and rehabilitation support to children who have experienced child abuse. The Procedure, among other things:

- provides for legal support of children in courts, medical care and healthcare centres; and

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<sup>732</sup> <http://oblstat.kiev.ukrstat.gov.ua/content/p.php3?c=114>.

- provides for the use of temporary shelters for the underage and a 24/7 Ukrainian helpline call centre.

In any event under the Law of Ukraine On Social Work with Families, Children and Youth, families, children and youths who have experienced any type of abuse and violence can access social, medical and psychological rehabilitation in the appropriate healthcare centres. Furthermore, the Law of Ukraine On Social Services provides for free social support of children and young people who appear to be in difficult circumstances connected with disability, illness, orphanhood, homelessness, low income, conflicts and domestic violence.

There are no other additional or separate codes of conduct or guidance in Ukraine concerning the support of children who have experienced domestic violence.

### **5.3 IMPLEMENTATION OF SUPPORT**

In practice, there is an efficient support network for victims of domestic violence in Ukraine provided by specialised governmental agencies and non-governmental organisations as well as other organisations and institutions engaged in the sphere of the prevention of violence and child abuse.

Examples of the type of support offered to children who have experienced domestic violence include: play therapy, life story work, crisis work and safety planning. This support can either be provided on a one-to-one basis or as part of group work.

Both individual and group work with children affected by domestic violence is vital in helping children to understand what has happened to them, to overcome the negative impacts of living with abuse and move on in their lives. Such work also raises awareness, helps children learn to keep themselves safe, ensures that they feel less isolated and “different” and helps them to feel more confident and better about themselves.

Support work can be provided either as a home care service or as a residential treatment in specialised centres for the victims of domestic violence.

## 6 OFFENCES

### 6.1 ADMINISTRATIVE LIABILITY

Ukrainian law determines only one offence specifically in the field of domestic violence prevention, which is the administrative<sup>733</sup> offence established by the Code of Ukraine on Administrative Offences (the “Administrative Offences Code”).

Under the Administrative Offences Code a person may be liable for the following domestic violence acts:

“wilful actions of physical, mental or economic manner towards family member(s) (physical violence that did not cause pain and health injuries, threats, insults, deprivation of shelter, food, clothing or other property belonging to the family member) and which resulted, or could have resulted, in the harm to the physical or mental health of the family member.”

Thus, liability for the above administrative offence may be imposed if no serious damages were caused to the victim, i.e. no injuries to health or other severe physical suffering was sustained.

However, if the domestic violence caused injury to health or other substantial harm to the victim, then provisions of the Criminal Code of Ukraine should apply.

### 6.2 CRIMINAL LIABILITY

Unlike the Administrative Offences Code, the Criminal Code of Ukraine does not contain any provisions specifically relating to domestic violence. However, acts of domestic violence can be classified under a number of articles of the Criminal Code of Ukraine depending on the nature and consequences of those acts.

For instance, if a family member (victim) was killed as a result of domestic violence, the guilty person (offender) would bear liability under the general article of the Criminal Code of Ukraine concerning murder. The same principle would apply if, due to certain violent acts, bodily injuries were inflicted upon a family member, or if a family member was physically tortured by another (although there are separate *corpus delicti* for such acts under Ukrainian criminal law).

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<sup>733</sup> Under Ukrainian law, an administrative offence is an offence which results in administrative liability. Such liability may be incurred by individuals (not State bodies or companies) for various unlawful acts or omissions which caused certain harm to society but this harm was not substantial enough in order to classify such acts as crimes and thus impose criminal liability.

Acts of domestic violence involving sexual abuse will be classified under the general article concerning rape. If sexual abuse is committed on a person who is not sexually mature, i.e. a child, this fact will be classified as an aggravating factor and thus a more severe punishment will be imposed.

An additional applicable criminal code article is “sexual contact with a sexually immature person”. It is important to note that this article separately classifies and prescribes more severe penalties for such acts committed against a child by one of its parents or other person who has an obligation to bring up the child (e.g. a guardian).

The Criminal Code of Ukraine also prescribes liability for sexual harassment, i.e. forcing a person to enter into the sexual contact where the person is materially dependant on or subordinated to the offender. This article may apply in relation to domestic violence, for instance, where a materially dependant family member is forced to enter into sexual contact with another member of the family.

Another group of criminal offences concern violence towards children for the purpose of receiving certain economic benefits. For instance, the Criminal Code of Ukraine establishes liability for parents or guardians for involving their child in beggary. Additional criminal liability may be incurred if parents exploit their child who has not reached the age at which employment is permitted under the law, by forcing him or her to work.

## 7 PENALTIES AND SANCTIONS

### 7.1 SENTENCES

If found guilty of domestic violence, the type and severity of the sentence will depend on the offence committed as well as on the aggravating or mitigating circumstances accompanying such offence. Thus, administrative liability for domestic violence actions may result in minor fines, an obligation to conduct certain public works (community service) or arrest for a short period. However, the sanctions for criminal acts are much more severe and may constitute substantial fines, imprisonment for various periods or even life imprisonment as set out at section 7.2 below.

## 7.2 IMPRISONMENT

### Murder

If a person is convicted of murder, the applicable sanction is imprisonment for a range of between seven to 15 years, depending on the circumstances of the crime. Life imprisonment is also possible and may be imposed by the court if particular aggravating circumstances of the crime are present (e.g. serial murder, murder committed in a cruel manner, etc).

### Causing bodily injuries

Causing bodily injuries may also result in various terms of imprisonment ranging from five to ten years for severe bodily injuries and from one to five years for injuries of medium severity.

### Sexual abuse

In relation to sexual abuse, the general sanction ranges from 3 to 10 years of imprisonment. However, if the sexual abuse is committed on a sexually immature person, imprisonment ranges from seven to 15 years.

“Sexual contact with sexually immature person” committed by parents or guardians may result in imprisonment for the period from five to eight years, although less severe punishment is possible.

### Forced child begging and child exploitation

Involving a child in begging may result in up to three years of imprisonment. Child exploitation by way of child labour is punishable by two to five years of imprisonment, although less severe punishment is possible.

## 7.3 FINES

Fines are not imposed for violent crimes, i.e. murder, grave injury to health or sexual abuse. The only exception is “light bodily injury” which may be punished by the fine up to UAH1,700 (EUR170).

Fines are also not available for sexual abuses or various forms of economic exploitation of children. Sexual harassment, however, may be punished by fine in the amount of UAH850 (EUR80).

However, administrative liability for domestic violence (outlined at section 6.1 above) quite commonly results in a fine and this may constitute up to UAH170 (EUR17).

## 7.4 OTHER PENALTIES

The commission of certain aforementioned criminal and administrative offences may also result in the imposition of other sanctions, such as a requirement to undertake public works, corrective labour (where the convicted person continues to work at his or her place of employment but 10–20% of earnings are deducted and contributed to the State Budget) or arrest.

Arrest may be imposed for the exploitation of children by forcing them into labour, provided that no aggravating circumstances are present. “Moderate bodily injury” may also be punished by up to two years of corrective labour.

Arrest of up to six months may also be imposed for sexual harassment offences if certain aggravating circumstances are present.

As well as the imposition of fines, a person committing the administrative offence of domestic violence may also be sentenced to public works (of up to 60 hours), corrective labour (of up to two months) or up to 15 days of arrest.

## 8 REHABILITATION MEASURES

### 8.1 IMPOSED REHABILITATION

Since 2010, Ukrainian legislation has provided for rehabilitation of offenders who have committed domestic violence, in the form of a “Correctional Programme”. The Correctional Programme is aimed at fostering non-violent behaviour and a new model of family life based on principles of gender equality and respect for family members’ rights. The Correctional Programme constitutes separate, social and socio-pedagogical work providing social support services and rehabilitation in specialised centres for domestic violence offenders.

During the rehabilitation period in these specialised centres, domestic violence offenders receive intensive supervision and substance abuse therapy, and treatment is designed to improve and/or address:

- poor social skills;
- emotional attachments to children; and
- poor sexual self-regulation (i.e. sexual impulsivity and self-control).

The Correctional Programme is obligatory, although it is imposed by police inspectors and not by the court. The legal background to the Correctional Programme is a combination of the following Laws of Ukraine:

- On Prevention of Domestic Violence;
- On Social Work with Children and Youth;

- On the Police;
- On Government Authorities and Services in Juvenile Affairs; and
- On Social Services.

## **8.2 SERVICES PROVIDED BY NON-GOVERNMENTAL ORGANISATIONS**

Non-governmental organisations in cooperation with international donors have also established successful practices for the rehabilitation of offenders and support for victims of domestic violence. Their activities have in particular focused on supporting family violence centres and hotlines for victims of abuse, rape, human trafficking etc., working with offenders and protecting children's rights.

## **8.3 REHABILITATION IN PRACTICE**

Under Ukrainian legislation, there are no criteria which offenders have to meet before being given rehabilitation. However, before being referred to the Correctional Programme centres, domestic violence offenders should be provided with official notices and warnings about the prohibition of domestic violence in Ukraine.

Domestic violence offenders are registered with the prevention registry of the Ukrainian law enforcement bodies and this registry is tasked with controlling the offenders' rehabilitation process. In addition, law enforcement bodies maintain records of the number of reports drawn up regarding acts of domestic violence.

In practice however, the rehabilitation of domestic violence offenders in Ukraine does not function exactly as it is supposed to according to law. The foremost reason for this is that not every region has a specialised centre for domestic violence offenders. This is due to the fact that such centres are not on the list of "obligatory institutions" which every region should have (although this can be established by the City State Administration under an official letter from the local executive authority according to the social needs of the region). By way of illustration, in 2012, of more than 2000 domestic violence offenders registered with the police in Ukraine, only a mere 165 attended the Correctional Programme centres.

## **9 THIRD PARTY RESPONSIBILITIES**

No direct responsibilities or civil duties of care are placed on third parties regarding the identification, reporting or prevention of domestic violence in Ukraine.



However, Ukrainian law does authorise healthcare and educational institutions to accept and register claims of domestic violence. If such claims are received, then these institutions are required to immediately report the claim to the police.

Furthermore, a draft law has recently been registered On Prevention and Combating of Domestic Violence (the “Draft Law”) which will, if implemented, expand the range of bodies and institutions responsible for prevention of domestic violence (see further at sections 10.6 and 10.7 below).

The Draft Law establishes a list of duties for educational and healthcare institutions. Educational institutions will have to identify the facts of domestic violence, organise psychological support for victims and conduct explanatory works. Health care institutions would be required to provide twenty-four hour medical care and rehabilitation for victims.

Currently in Ukraine, it is not an offence for a public institution to fail to prevent domestic violence. Moreover, the Draft Law does not provide for any such liability. However, the Draft Law is subject to passage through two hearings before it is formally adopted and may therefore be significantly amended, including, *inter alia*, by the inclusion of liability for public institutions.

## 10 EFFECTIVENESS/IMPLEMENTATION

### 10.1 LAWS PREVENTING DOMESTIC VIOLENCE

In general, the laws outlined above provide sufficient opportunities to file domestic violence claims with government agencies and institutions in Ukraine. Furthermore, the laws provide for certain measures aimed at the prevention of domestic violence.

However, according to the Kharkiv Human Rights Protection Group<sup>734</sup> the State police need to undergo substantial improvement regarding prevention of domestic violence. Additionally, it is believed that the governing legislation will be more effective if broader access to information concerning the problem of prevention of domestic violence is available and there is closer cooperation between non-governmental organisations, government bodies and local authorities.

### 10.2 CRIMINAL PROSECUTIONS

At the time of writing, no information concerning criminal prosecutions in Ukraine in 2012 was publicly available.

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<sup>734</sup> Kharkiv Human Rights Protection Group, <http://khp.org/en/index.php?r=2.1>.

In 2011, the Ukrainian police received 168,000 claims of domestic violence. Among them there were 758 criminal cases (concerning: 98 murders; 424 bodily injuries; 107 threats of murder; and 7 incestuous rapes<sup>735</sup>).

### 10.3 ADMINISTRATIVE LAW PROSECUTIONS

At the time of writing, the only records available are the statistics of administrative liability for domestic violence for the years 2008-2011:<sup>736</sup>

YEAR	2008	2009	2010	2011 (6 MONTHS)
NO. CLAIMS REGISTERED WITH RESPONSIBLE AUTHORITIES	85,085	93,327	102,133	104,892
NO. OFFENDERS HELD LIABLE FOR DOMESTIC VIOLENCE	6,394	6,551	6,684	2,706

### 10.4 WHICH ASPECTS OF THE LAWS ARE MORE/LESS EFFECTIVE?

Human rights activists<sup>737</sup> have identified a number of defects in the current Ukrainian anti-domestic violence legislation and its enforcement. The most significant are:

- the definitions of terms contained in the Law of Ukraine On Prevention of Domestic Violence — these do not correspond with either the reality of the problem of domestic violence or applicable international standards. For example, the scope of the law applies only to those who fall within the concept of “family members”. In practice, it is impossible to protect certain groups who, although suffering from domestic violence, do not fall under this definition;
- there is no direct reference to the provisions of applicable international treaties;
- the Law of Ukraine On Prevention of Domestic Violence is not consistent with the Law On Protection of Childhood regarding protection of children from violence and abuse;
- the authorities responsible for prevention of domestic violence are not clearly defined in legislation; and
- the mandatory establishment of crisis centres is not prescribed by the law; such centres are established by local administrations according to the social needs of the regions, however there is no definition as to how to determine these needs.

735 <http://glavcom.ua/articles/6657.html>.

736 Ukrainian Helsinki Human Rights Union, <http://helsinki.org.ua/index.php?id=1298361848>.

737 Human Rights in Ukraine 2011, [http://khpg.org/index.php?id=1332335116#\\_ftnref2](http://khpg.org/index.php?id=1332335116#_ftnref2).

## 10.5 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

Human rights activists<sup>738</sup> have stated that there are a number of difficulties in enforcing the domestic violence laws of Ukraine. Such difficulties include, among others:

- the reluctance of victims to come forward and report the act of violence;
- insufficient quantity of specialised institutions (crisis centres) for victims;
- insufficient financing of correctional programs; and
- gaps in the education system related to the prevention of domestic violence.

However, human rights activists comment that by far the biggest challenge to effective enforcement is the inactivity of the Ukrainian police. The police rarely intervene in cases of domestic violence largely because the victims are reluctant to provide details of such violence.

Further, according to human rights activists,<sup>739</sup> the police seem to be unwilling to intervene in family disputes and do not wish to make arrests in domestic violence cases. In addition, the human rights activists emphasise that Ukrainian police use a wide range of tools to “reduce” domestic violence. For example, dissuading victims from applying for prosecution; not properly responding to statements on domestic violence; refusing to accept the claims of victims etc.

## 10.6 REFORMS OF DOMESTIC VIOLENCE LAWS

As referred to at section 9.1 above, on 14 March 2013, the Ukrainian Government registered with the Ukrainian Parliament the Draft Law. This introduces the concept of “child abuse in the family”, which will include not only deliberate acts against children but also the omissions (negligence) of parents, which have the potential to harm children. This bill specifically introduces the concept of “domestic violence.”

In addition, under the Draft Law, the range of bodies and institutions responsible for the prevention and addressing of domestic violence are expanded. Such bodies will include, among others, local state administrations, local governments, social service centres for families, children and youths and agencies and institutions of education and health care.

The Draft Law also implements the imposition of temporary restrictions on a person who commits an act of domestic violence, preventing them from taking any further actions towards the victim. Such restrictions can be imposed by the court.

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<sup>738</sup> Ukrainian Helsinki Human Rights Union, <http://helsinki.org.ua/index.php?id=1298361848>.

<sup>739</sup> Project “Stop violence!”, [http://www.vsirivni.com.ua/sites/default/files/stan\\_systemy\\_2011.pdf](http://www.vsirivni.com.ua/sites/default/files/stan_systemy_2011.pdf).

Other relevant reforms such as the National Strategy on Prevention of Child Abandonment until 2020 and the Concept of State Programme on Supporting Family until 2016 have also been adopted in Ukraine.

## 10.7 REVIEW OF DOMESTIC VIOLENCE LAWS

In Ukraine there is no specific system for regular review, amendment or improvement of the law. However, Members of Parliament, the President, the government and the National Bank have the right of legislative initiative and are proposing the implementation of certain changes to anti-domestic violence legislation. However, Ukrainian law does not stipulate a definite time frame for adoption of the law after its registration with Ukrainian Parliament. In practise it may take between one month to a couple of years to adopt the law.

In summary, any changes to anti-violence domestic legislation will depend upon the adoption of the Draft Law. However, even if the Draft Law is adopted, further preparation and adoption of a number of secondary acts will be necessary to provide for its enforcement.

## ADDITIONAL RESOURCES

### Applicable law

1. Criminal Code of Ukraine, No 2341-III dated 5 April 2001  
<http://zakon1.rada.gov.ua/laws/show/2341-14>
2. Civil Code of Ukraine, No 435-IV dated 16 January 2003  
<http://zakon2.rada.gov.ua/laws/show/435-15>
3. Family Code of Ukraine, No 2947-III dated 10 January 2002  
<http://zakon2.rada.gov.ua/laws/show/2947-14>
4. Code of Criminal Procedure of Ukraine, No 4651-VI dated 13 April 2012 <http://zakon2.rada.gov.ua/laws/show/4651-17>
5. Code of Civil Procedure of Ukraine, No 1618-IV dated 18 March 2004 <http://zakon4.rada.gov.ua/laws/show/1618-15>
6. Code of Ukraine on Administrative Offences, No 8073-10 dated 7 December 1984 <http://zakon1.rada.gov.ua/laws/show/80731-10>
7. The Law of Ukraine On Prevention of Domestic Violence, No. 2789-III, dated 15 November 2001 <http://zakon2.rada.gov.ua/rada/show/2789-14>
8. The Law of Ukraine On Protection of Childhood, No. 2402-III dated April 26, 2001 as amended from November 6, 2012 <http://zakon2.rada.gov.ua/laws/show/2402-14>

9. The Resolution of the Cabinet of Ministers of Ukraine On Approval of the Procedure for Considering Claims on Domestic Violence or a Real Threat of its Commitment, No. 616, dated 26 April 2003 as amended <http://zakon1.rada.gov.ua/laws/show/616-2003-%D0%BF>
10. The Law of Ukraine On Social Work with Families, Children and Youth, No. 2558-III, dated 21 June 2001 as amended <http://zakon4.rada.gov.ua/laws/show/2558-14>
11. The Law of Ukraine On Social Services, No. 966-IV, dated 19 June 2003 as amended <http://zakon2.rada.gov.ua/laws/show/966-15>
12. The Resolution of the State Committee of Ukraine for Family and Youth "On procedure for Considering Claims about Child Abuse or Real Threat of its Commitment" No. 5/34/24/11, dated 16 January 2004 <http://zakon.nau.ua/doc/?code=z0099-04>
13. The Law of Ukraine On Provision of Equal Rights and Possibilities for Men and Women, No.2866-IV, dated 08 September 2005 <http://zakon2.rada.gov.ua/laws/show/2866-15>
14. Draft Law On Prevention and Combating of Domestic Violence No. 2539 registered on March 14, 2013 [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=46129](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=46129)
15. *National Strategy on Prevention of Child Abandonment until 2020* approved by Decree of the President No. 609/2012 on October 22, 2012 <http://zakon1.rada.gov.ua/laws/show/609/2012>
16. *Concept of State Programme on Supporting Family until 2016* approved by Order of the Cabinet of Ministers of Ukraine No. 325-p on May 31, 2012 <http://zakon1.rada.gov.ua/laws/show/325-2012-%D1%80>

### Other sources

1. Project "Stop violence!" [http://www.vsirivni.com.ua/sites/default/files/stan\\_systemy\\_2011.pdf](http://www.vsirivni.com.ua/sites/default/files/stan_systemy_2011.pdf)
2. Kharkiv Human Rights Protection Group, <http://khpg.org/en/index.php?r=2.1> (in English)
3. Human Rights in Ukraine 2011, [http://khpg.org/index.php?id=1332335116#\\_ftnref2](http://khpg.org/index.php?id=1332335116#_ftnref2)
4. Ukrainian Helsinki Human Rights Union, <http://helsinki.org.ua/index.php?id=1298361848>
5. <http://www.stopvaw.org/ukraine>
6. <http://www.osce.org/ukraine/43371>

# Vietnam

‘ 178,847 domestic violence cases were recorded between 2009 and June 2012, of which more than 16,000 cases involved elders, 23,300 involved children and the remainder involved spouses, mostly wives. ’



# DOMESTIC VIOLENCE IN VIETNAM

DLA Piper International LLP, Melbourne

## EXECUTIVE SUMMARY

In Vietnam, the prevention of and protection against domestic violence is covered by one main legislative act and two accompanying decrees. The definition of domestic violence is relatively broad. Physical, mental and financial abuse are specifically included in the definition. In relation to mental harm, Vietnam's definition of what constitutes mental abuse goes beyond what is understood to be violence by international standards. However the legislation is silent on whether gay or lesbian relationships are covered under the legislation.

Prevention of and protection from domestic violence in Vietnam is provided for by the police, the People's Courts and agencies such as the People's Committees.

The main issue with the domestic violence legislation is not in the document itself, but rather the unwillingness of victims to come forward. There is a feeling amongst women that domestic violence is something to be endured for the sake of maintaining family harmony.

There have also been issues in enforcing the laws at a community level due to the close relationships between nominated enforcers and offenders.

## 1 DEFINITIONS OF DOMESTIC VIOLENCE

### 1.1 LEGAL DEFINITION

Domestic violence has an express legal definition in Vietnam. The legislation, Vietnam's Law on Domestic Violence, Prevention and Control, defines domestic violence as:

"Domestic violence means an intentional act by a family member which causes or potentially causes physical, spiritual and financial damage to other members of a family".<sup>740</sup>

The definition of family members includes divorcees or couples in cohabitation.

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<sup>740</sup> Vietnam's Law on Domestic Violence, Prevention and Control (2007), Article 1.

While the legislation is silent on gay, lesbian and transgender relationships, it is possible that it could be interpreted as including these types of relationships.

There appears to be no provision within the domestic violence legislation in relation to domestic workers.

Mental abuse and financial abuse or hardship are specifically included, due to the words “spiritual” and “financial damage” in the definition.

Further, forcing family members to overwork, make financial contributions beyond their capacity or controlling family members’ income to create financial dependence is also included in the legislation.

In 2011, the United Nations Office on Drugs and Crime released a working paper which considered the domestic violence legislation - including a brief comment on the definition.<sup>741</sup> The working paper considered the definition of domestic violence to be even broader than what is generally understood to be violence by international standards. For instance, psychological or emotional abuse is generally limited internationally to acts of persistent threatening, demeaning or controlling behaviour, rather than, as is stated under the Vietnam legislation, simply creating mental pressure.

## 1.2 FORMS OF DOMESTIC VIOLENCE

Domestic violence can be committed in any, or a combination, of the following forms:

- mental abuse — including intentionally offending someone’s honour;
- physical violence;
- sexual violence — including forcible sexual intercourse;
- economic violence — including destroying property and forcing family members to work overtime; and
- social violence — including forcible marriage or prevention of marriage.

The legislation does not provide for the burden of proof requirements regarding mental abuse.

Likewise, punishments under the legislation refer to acts of domestic violence as a whole and therefore there are no specific punishments in relation to mental abuse offences.

Article 3 of the legislation provides that all acts of domestic violence must be promptly detected, stopped and handled in accordance with law.

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<sup>741</sup> United Nations Office on Drugs and Crime, Research on Law Enforcement Practices and Legal Support to Female Victims of Domestic Violence in Vietnam, 2011, [http://www.unodc.org/documents/southeastasiaandpacific/2011/09/domestic-violence/Research\\_English\\_version\\_final.pdf](http://www.unodc.org/documents/southeastasiaandpacific/2011/09/domestic-violence/Research_English_version_final.pdf).



## 2 APPLICABLE LEGISLATION

### 2.1 DOMESTIC VIOLENCE LAWS

The central piece of legislation on domestic violence in Vietnam is Vietnam's Law on Domestic Violence, Prevention and Control (the "Domestic Violence Law").

There are two decrees enacted to implement this law. These are:

- the Decree on Administrative Punishment for Domestic Violence; and
- the Decree on Specifying Certain Articles of the Law on Prevention of and Control over Domestic Violence.

Additionally, offences under the Domestic Violence Law are punishable under the Penal Code (2005).

### 2.2 INTERNATIONAL TREATIES

Vietnam has also signed or ratified a number of international treaties relevant to domestic violence. These are the:

- International Covenant on Civil and Political Rights, acceded to on 24 September 1984;
- Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 17 February 1982;
- Convention on the Rights of the Child, ratified on 28 February 1990; and
- International Covenant on Social, Economic and Cultural Rights, acceded to on 24 September 1984.

## 3 LEGAL REDRESS FOR VICTIMS UNDER CRIMINAL LAW

### 3.1 BURDEN OF PROOF

Vietnamese criminal law is based on the presumption of innocence principle, i.e. the accused person is innocent until proven guilty.

The prosecution holds the burden of proof in criminal proceedings for domestic violence in Vietnam.

### 3.2 RELEVANT COURT

Domestic violence prosecutions are brought in either the District and Local People's Courts or the Supreme People's Court of Vietnam.

Under the Domestic Violence Law, police officers and commune-level People's Committees are compelled to take primary responsibility for protecting the lawful rights of domestic violence victims. Victims can also complain to the courts directly.

### 3.3 STAGES OF THE PROCEEDINGS

Under 18(2) of the Domestic Violence Law, primary responsibility for prosecution rests with police officers, Commune-level People's Committees and community heads have this responsibility. Interestingly, the actual word prosecution is not used (at least not in the English translation). What it states at Section 19(c) of the Domestic Violence Law is that these bodies are required to take stoppage measures including applying criminal procedures.

### 3.4 PROSECUTION FUNDING

Under the Domestic Violence Law, the State is to annually allocate funds for domestic violence prevention and control. However there is no indication as to which agencies receive this funding.

### 3.5 TIMESCALES

While there are no official records available regarding timescales of prosecutions, according to some sources the judicial system moves slowly for domestic violence victims. For example, according to one national newspaper, it takes between six to nine months simply to prepare the documents required to send a person found to have committed domestic violence to an education centre.<sup>742</sup>

## 4 LEGAL REDRESS FOR VICTIMS UNDER CIVIL LAW

### 4.1 PRELIMINARY/INTERIM MEASURES

Under the Domestic Violence Law there are a number of interim measures available, the most important of which is the Article 19 ban on an offender approaching or contacting a victim referred to as a ban-from-contact-measure.

Additionally, Article 19 includes the following measures:

- prevention and protection measures shall be applied to protect the victim of domestic violence, stop violent acts and minimise the consequences of domestic violence, including:

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<sup>742</sup> Immigration and Refugee Board of Canada, Vietnam: Domestic violence, 8 January 2010, available at: <http://www.refworld.org/docid/4b7cee8ec.html>, (accessed 2 October 2013).

- » stopping domestic violence acts;
- » making first aid arrangements for the victim of domestic violence;
- » taking preventive measures in accordance with the Law in dealing with the violations of civil and criminal nature applicable to the person committing domestic violence; and
- » the person committing violent acts shall not be allowed to approach the victim and not to use telephone or other medium to get in touch with the victim in order to commit violence (hereinafter referred to as a measure of forbidden contact).

## **4.2 BURDEN OF PROOF PRELIMINARY/INTERIM MEASURES**

While the Domestic Violence Law is silent regarding the burden of proof in civil matters, there are two avenues of obtaining this sort of relief and the burdens in relation to each may be different. A victim may appeal to the President of the local commune-level or to a People's Court. It is unclear whether the victim, offender or government official will have the burden.

## **4.3 RELEVANT COURT**

As with criminal prosecutions, domestic violence civil actions are brought in either the District and Local People's Courts or the Supreme People's Court of Vietnam.

## **4.4 TIMESCALES**

Under the Domestic Violence Law, after receiving a written request, the President of the commune-level People's Committee shall consider and decide to apply the ban-from-contact measure within 12 hours from the time of receiving the notice (or reject the written request).

The notice of the ban is sent to all parties (victim, offender and the heads of the local community) and the ban is then in place for 3 days.

# **5 SUPPORT FOR VICTIMS**

## **5.1 STATUTORY PROVISIONS**

Under the Domestic Violence Law, a victim of domestic violence may receive healthcare, a copy of the domestic code of conduct and legal and psychological counselling to deal with domestic violence.

Further, victims are entitled to receive urgent support for essential needs from Commune-level People's Committees.

## 5.2 ADDITIONAL SUPPORT FOR CHILDREN/MINORS

While there are no specific provisions in the legislation in relation to children, the Law on Protection, Care and Education of Children covers this area.

However there are no specific provisions in that legislation specifically dealing with child victims of domestic violence. Rather there are broad provisions dealing with child protection and care. In practice these provisions operate to provide support services in much the same way as they do to other victims of domestic violence — e.g. ‘women’. The Domestic Violence Law states that support services are available to all domestic violence victims — i.e. they don’t discriminate between women, children, or elders.

## 6 OFFENCES

There are six main criminal offences under which domestic violence offences would be prosecuted. These are detailed in the following table:

OFFENCE	LEGAL REFERENCE	SANCTION
LAWS - THE LAW ON DOMESTIC VIOLENCE, PREVENTION AND CONTROL AND VIETNAM PENAL CODE		
INTENTIONALLY CAUSING HARM	Article 2 of the Domestic Violence Law	<i>Imprisonment</i> three months to life (depending on severity of injury) or fine <i>Fine</i>
INTENTIONALLY OFFENDING SOMEONE’S HONOUR	Article 2 of the Domestic Violence Law	<i>Imprisonment</i> three months to two years <i>Non-custodial reform</i> up to two years
ILL-TREATING A MEMBER OF ONE’S FAMILY	Article 2 of the Domestic Violence Law	<i>Imprisonment</i> three months to three years <i>Non-custodial reform</i> up to three years
FORCIBLE SEXUAL INTERCOURSE	Article 2 of the Domestic Violence Law	<i>Imprisonment</i> six months to 18 years
DESTROYING PROPERTY	Article 2 of the Domestic Violence Law	<i>Imprisonment</i> six months to three years <i>Non-custodial reform</i> up to three years <i>Fine</i> ten million to 100 million dong
FORCIBLE MARRIAGE OR PREVENTION OF MARRIAGE	Article 2 of the Domestic Violence Law	<i>Imprisonment</i> three months to three years <i>Non-custodial reform</i> up to three years

## 7 REHABILITATION MEASURES

Rehabilitation measures are specifically provided for under the Domestic Violence Law. These measures are implemented at the commune or township level. This includes, at first instance, educational measures. If the offender re-offends, but does not attract penal liability, they may be required to attend (and be confined within) education schools.

The criteria governing whether an offender is to be rehabilitated requires that offender to have committed acts of violence (that are not serious offences) within six months from the date of receiving comment and criticism by their communities.

A national study titled Domestic Violence against Women in Vietnam considering how these measures operate in practice has stated that in a lot of communities, the male perpetrators and the local authorities responsible for disciplining them often have an established relationship.<sup>743</sup> Therefore it is difficult for the Domestic Violence law to be applied strictly.

## 8 THIRD PARTY RESPONSIBILITIES

Under the legislation, responsibilities or duties of prevention, protection, detection and investigation of domestic violence are mandated. These agencies include:

- government ministries;
- the Vietnam Women's Union;
- the Vietnam Fatherland Front;
- Commune-level People's Committees, Police and Court offices; and
- any domestic violence prevention and control counselling organisations that may be created.

The various government ministries concerned with domestic violence issues are to manage domestic violence prevention and control. In particular, these agencies are required to oversee the implementation of education and training programs, review and analyse the domestic violence situation, disseminate the law and policies of domestic violence and control and work with other agencies and organisations in performing these responsibilities. The Vietnam Women's Union and Fatherland Front are required to disseminate, educate and encourage members and people to comply with the laws of domestic violence and to supervise the implementation of the law.

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<sup>743</sup> Vietnam Ministry of Planning and Investment and UN Resident Coordinator, *Keeping Silent is Dying - Results from the National Study on Domestic Violence against Women in Vietnam 2010*, available from [http://www.un.org.vn/en/publications/un-wide-publications/cat\\_view/130-un-viet-nam-joint-publications/201-gender-joint-un-publications.html](http://www.un.org.vn/en/publications/un-wide-publications/cat_view/130-un-viet-nam-joint-publications/201-gender-joint-un-publications.html).

Further, the Vietnam Women's Front, must organise the domestic violence counselling organisations and victim assistance organisations, organise training and credit and savings activities to support domestic violence victims and coordinate with concerned agencies to protect and assist domestic violence victims. Additionally, police offices, courts and procuracies are responsible for protecting the lawful rights and interests of victims and proactively prevent and promptly detect, stop and handle violations of the law on domestic violence.

There are no express consequences for failure to comply with these requirements. However the legislation does provide that tolerating, covering up, failing to handle acts of domestic violence or handling them in contravention with law constitutes a prohibited act. Thus it may be possible that if a person or agency discussed above commits one of these offences, there will be consequences under the legislation.

## 9 EFFECTIVENESS/IMPLEMENTATION

### 9.1 CRIMINAL PROSECUTIONS

There are no official records of the number of prosecutions carried out under the legislation. However it has been reported that between 2009 and 2012, there were 178,847 recorded cases of domestic violence.<sup>744</sup>

### 9.2 PROSECUTIONS UNDER CIVIL LAW

There are no official records of the number of civil actions carried out under the legislation.

### 9.3 DIFFICULTIES AND CHALLENGES IN ENFORCEMENT

The Domestic Violence against Women in Vietnam study suggests that the major problem with the legislation is not enforcing the law, but rather getting women to report the violence. The Study interviewed approximately 4800 women. Of those, over half had never spoken to anyone about their experiences. These women reported feeling that domestic violence is normal and they should endure it for the sake of family harmony. The study also revealed 60% of those surveyed do not know of the existence of the legislation or of the relevant local authorities established to deal with the issue.<sup>745</sup>

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<sup>744</sup> *Domestic violence a symptom of family breakdown*, 28 March 2013, <http://www.thanhniennews.com/index/pages/20130328-domestic-violence-a-symptom-of-family-breakdown.aspx>.

<sup>745</sup> Ibid, above n 4.

Arguably, there is a significant issue with promulgating the existence of the legislation and promoting it as a viable option for women suffering from domestic violence. In relation to enforcement, the Study highlighted that when local authorities are tasked with enforcing the laws their task is complicated by a pre-existing relationship with the perpetrator.

Another issue which has been highlighted is a lack of support services (e.g. women's shelters, counselling centres) in rural areas.

## 9.4 PLANNED REFORMS/PILOT SCHEMES

In 2008 the Vietnamese government initiated an anti-violence pilot model throughout the country at a local level. This pilot involved local authorities and law enforcement and health professionals.

In 2010 the Vietnamese government launched a National Program of Action which will continue for the next decade.

## 9.5 REVIEW OF DOMESTIC VIOLENCE LAWS

The National Program of Action is tasked with reviewing the legislation. . The most recent review of the laws was commissioned in 2010.<sup>746</sup>

# ADDITIONAL RESOURCES

### Applicable law

1. Law on Domestic Violence Prevention and Control 2007
2. Vietnam Penal Code 1999

### Other sources

1. *Domestic violence a symptom of family breakdown*, Thanh Nien News, 28 March 2013, <http://www.thanhniennews.com/index/pages/20130328-domestic-violence-a-symptom-of-family-breakdown.aspx>
2. Immigration and Refugee Board of Canada, *Vietnam: Domestic violence*, 8 January 2010, available at: <http://www.refworld.org/docid/4b7cee8ec.html>, (accessed 2 October 2013)

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<sup>746</sup> Ibid.

### Non-governmental organisations

1. UN Development Fund for Women (UNIFEM), Domestic Violence Legislation and its Implementation: An analysis for ASEAN countries based on international standards and good practices, June 2009, <http://www.refworld.org/docid/4c299f652.html>, accessed 2 October 2013
2. United Nations Office on Drugs and Crime, *Research on Law Enforcement Practices and Legal Support to Female Victims of Domestic Violence in Vietnam*, 2011, [http://www.unodc.org/documents/southeastasiaandpacific/2011/09/domestic-violence/Research\\_English\\_version\\_final.pdf](http://www.unodc.org/documents/southeastasiaandpacific/2011/09/domestic-violence/Research_English_version_final.pdf)

### Governmental organisations

Vietnam Ministry of Planning and Investment, *Keeping Silent is Dying - Results from the National Study on Domestic Violence against Women in Vietnam 2010*, available from [http://www.un.org.vn/en/publications/un-wide-publications/cat\\_view/130-un-viet-nam-joint-publications/201-gender-joint-un-publications.html](http://www.un.org.vn/en/publications/un-wide-publications/cat_view/130-un-viet-nam-joint-publications/201-gender-joint-un-publications.html)



# ADDENDUM: DOMESTIC VIOLENCE IN MONGOLIA & MYANMAR

DLA Piper International LLP

## **MONGOLIA**

In Mongolia there does appear to be specific legislation in relation to domestic violence. However, much of what can be learned about the effect of Mongolia's domestic violence laws is limited due to a lack of access to key reliable information. What can be said is that the government of Mongolia appears to be working towards introducing laws aimed at protecting women from violence. In March 2013, the Mongolian Minister for Population Development and Social Protection delivered a speech to the 57th Session of the Commission on the Status of Women. In this speech, (which is available at <http://www.un.org/womenwatch/daw/csw/csw57/generaldiscussion/memberstates/mongolia.pdf>) the Minister made a number of important commitments to this process. Nevertheless, due to the lack of access to key reliable information, this report does not include a separate chapter covering that jurisdiction.

## **MYANMAR**

In Myanmar there does not appear to be any specific legislation in relation to domestic violence. However, the law in relation to domestic violence and violence against women is currently in a state of flux and transition. Indeed, Myanmar itself is currently experiencing a monumental transition into a form of democracy and many are hopeful that the system of criminal law will evolve to incorporate protection for victims of all forms of violence. Nevertheless, at this time, accurate and reliable information in relation to domestic violence in Myanmar is not readily accessible and therefore this Report does not include a separate chapter covering that jurisdiction.

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