

VIOLENCE WITHIN THE FAMILY: CIVIL PROTECTION AND CRIMINAL RESPONSIBILITY IN HONG KONG

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Abstract: In Hong Kong, there has been an increasing number of domestic violence cases involving child abuse and spouse battering. This paper explores Hong Kong's legal redress in dealing with problems of domestic violence by way of criminal prosecution and civil redress for protection under the relevant legislation and the common laws.

There is no specific criminal offence of domestic violence in Hong Kong. If the act of domestic violence involved a criminal element, it would be dealt with under the general criminal legislation. Marital rape is now included as a criminal offence after the law amendment in 2002. While physical violence can be a criminal offence, there is difficulty in prosecuting verbal abuse. Sentencing of domestic violence is also a challenging task as imprisonment is not an appropriate choice in most cases.

Victims of domestic violence may also seek protection from civil proceedings. On application for protection, the court may grant the necessary injunctions provided that it has the jurisdiction to make the orders, namely non-molestation order, ouster order and entry order. The court may also grant an injunction for same sex couples if it is satisfied that the applicant has been molested by the other party to the cohabitation relationship.

Domestic violence is not only damaging to individuals and families, but also to society as a whole by being a serious economic burden. More funding should be granted to cover legal costs for victims in need of assistance, supporting services and public education on domestic violence.

Keywords: Violence in family; criminal prosecution; marital rape; civil remedy; injunction; molestation; ouster order; cohabitation relationships; same sex couples; variation of existing custody and access orders; batterer intervention

programme; legal assistance for injunction; public education.

Introduction

There are many attempts to define “domestic violence” or “family violence”. Various countries have provided a definition for “domestic violence” in their legislation. So, what is domestic violence? The Social Policy Section of the Parliament of Australia defined domestic violence in general terms as “(...) acts of violence that occur between people who have, or have had, an intimate relationship in domestic settings. These acts include physical, sexual, emotional and psychological abuse. (...) Domestic violence is most commonly perpetrated by males against their female partners, but it also includes violence against men by their female partners and violence within same-sex relationships.”¹

In Hong Kong statistics on cases involving child abuse and spouse battering captured by the Child Protection Registry (CPR) and the Central Information System on Battered Spouse Cases and Sexual Violence Cases (CISBSSV) provide the astonishing figures of 875 cases in child abuse and 3,382 cases in spouse battering for the year of 2015 (Social Welfare Department, 2015).

Domestic violence is occurring every minute and second and everywhere in the world. Different country is finding ways to tackle the problem of domestic violence which could be very devastating to a person in a domestic relationship with grave consequence. The legal redress in dealing with such issue is by way of criminal prosecution and civil redress for protection under the relevant legislation and the common laws.

Criminal Prosecutions on Domestic Violence

In Hong Kong, there is no specific criminal offence of domestic violence. Recommendations have been put forth to the Hong Kong government by different sectors of the society for criminalization of domestic violence, especially following the Tin Shui Wai incident in 2004, in the aftermath of which the public called for immediate revamp of the antiquated Domestic Violence Ordinance (Cap. 189) (“1986 DVO”). The incident caught the public’s attention when on 12 April 2004, Madam Jin and her twin daughters were stabbed to death by her husband, who then committed suicide. In a report called “Peace at Home”, the writers suggested criminalization of domestic violence saying “... we should consider making breach

1 Domestic violence in Australia—an overview of the issues, 22 November 2011.

of a non-molestation order and exclusion order a criminal offence”². Margaret Ng, a barrister and a former legal sector lawmaker said, “Domestic violence can be treated seriously after a criminal remedy is inserted in the ordinance. The public will understand it clearly, including police. The whole mindset can therefore be changed”³.

In the Preliminary Proposed Amendments to the 1986 DVO prepared in May 2006, the Health, Welfare and Food Bureau (“Bureau”) of the Government of Hong Kong rejected the call for criminalization of domestic violence, and explained that the 1986 DVO was there to provide for civil remedy for the protection of victims of domestic violence. If the act of domestic violence involved a criminal element, it would be dealt with under other legislation such as the Crimes Ordinance (Cap. 200) and the Offence Against Persons Ordinance (Cap. 212). Another piece of legislation called Protection of Children and Juveniles Ordinance (Cap. 213) provided the necessary protection for children and young persons under the age of 18. The Bureau explained that domestic violence was in essence just another form of violence, whereas the present criminal law in the area is structured on criminal acts, regardless of whether such acts take place at home or in the public. The Bureau therefore concluded by saying that “to include in the DVO legal provisions dealing with identical criminal acts may give rise to unnecessary duplication and complication in our current law. We therefore consider the proposal undesirable and result in no practical advantages”⁴.

Hence, in dealing with criminal sanction on domestic violence there was no proposal to introduce any changes. Hong Kong has been satisfied to rely on existing frameworks comprising the Offence Against the Persons Ordinance (Cap. 212) stopping criminal acts such as murder, manslaughter, attempts to murder, wounding or inflicting grievous bodily harm, exposing child whereby life is endangered, ill-treatment or neglect by those in charge of child or young person, assaults occasioning actual bodily harm and common assaults; and the Crimes Ordinance (Cap. 200), dealing with acts of intimidation, arson, destroying or damaging property, and sexual offences including rape, incest, indecent assaults etc..

In 2002, Hong Kong amended its law to include marital rape. Under section 118 of the Crimes Ordinance, a man who rapes a woman shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for

2 Chan, K. L., Chiu, M. C., & Chiu, L. S., “*Peace at home: Report on the review of the social and legal measures in the prevention and intervention of domestic violence in Hong Kong*”, para 8.54 and Recommendation 17(b).

3 Lau, M., & Wong, A. (January, 2006). Crimes push over domestic violence. *The Standard*.

4 Health, Welfare and Food Bureau - The administration’s review on domestic violence ordinance – Preliminary proposed amendments (LC Paper No. CB(2)2132/05-06(01)).

life. In section 117(1B) it provides that for the purposes of sections 118 without affecting the generality of any other provisions, unlawful sexual intercourse does not exclude sexual intercourse that a man has with his wife. The change had removed the outdated marital immunity under common law and allows the conviction of a husband of the offence of rape. As a matter of public policy, Hong Kong has given greater protection to woman in marriage which reflected the modern view of sexual equality.

In 2005, three years after the change in laws on rape, Norman Connolly reported and said, “Since the rape laws were changed, not a single marital rape case has been prosecuted. Police say their officers are made aware of changes to the Crimes Ordinance through memos or the force’s internal website. However, according to Amanda Whitford, assistant professor at the University of Hong Kong’s law faculty, the lack of prosecutions reflects a worldwide trend. She said reluctance among police to become involved in domestic disputes - even those in which rape or sexual assault is alleged - and the difficulty in prosecuting marital rape meant cases simply did not make it to court.”⁵

Physical violence within the family can be a criminal offence, however, it is difficult to bring about prosecution for verbal abuse which can be a serious form of domestic violence. The offence of intimidation provides for criminal liability for threatening any person with any injury to the person with intent, reputation or property of the person⁶. It is rare to see a member of a family to pursue a charge against someone in the family for criminal intimidation not to mention that the police may find it unrealistic. Very often this does not cover verbal abuses within the family. Coercive and controlling behaviour can be harder to recognize but this can have a devastating impact on the victims. At present, there is no criminal offence in Hong Kong for domestic abuse involving coercive and controlling behaviour in an intimate relationship.

It should be noted that England and Wales has enacted a new offence of controlling or coercive behaviour in an intimate or family relationship. Section 76 of the Serious Crime Act 2015, which takes effect from 29 December 2015, provides that if a person repeatedly or continuously engages in behaviour towards another person that is controlling or coercive he or she would have committed an offence.

When it comes to sentencing a defendant committed a crime connected to violence with the family, Patrick Li, Chief Magistrate of Hong Kong (as he then was), shared his view on the dilemmas that courts face in sentencing domestic violence offenders and said, “In cases of domestic violence, the sentencing court

5 Norman Connolly, “Marital rape victims ignorant of law change” SCMP, 17 October 2005.

6 Section 24 of Crimes Ordinance, Cap. 200.

is often caught in a dilemma”⁷. He said in the article, “For most cases of domestic violence, imprisonment is not the most appropriate choice. To put a parent or spouse in prison would probably add further tension to the family. Imprisonment sometimes worsens the situation and creates hostility in the family. Having said that, we do acknowledge that a domestic setting for violence should not make it a lesser offence. Where there are circumstances that warrant imprisonment, a court will have no hesitation in making the order”⁸. He found that the sentence in this sort of cases must reflect the culpability of the offence and send the right message to the public. Yet, he cannot ignore the personal problems of the defendant and family. He feels this is not only difficult but sometimes also disturbing because to impose an inappropriate sentence may mislead potential offenders and cause grievance to the victims or even serious consequences. He agreed with Judge LJ of the Court of Appeal in England who commented in the case of *R v Hegarty* [2004] EWCA Crime 1693, that “The fact that violence occurs in a domestic situation may require the court to examine with as much sensitivity as it can a good deal of background material. That may provide mitigation: it may aggravate the offence. It should be clearly understood – and sentencing judges up and down the country do fully understand – that the fact that there is a domestic background to violence does not of itself begin to diminish or reduce, let alone extinguish, its criminality, and on some occasions indeed the background may itself accentuate the criminality”⁹.

Civil Protection Against Domestic Violence

Apart from charging a perpetrator of a criminal offence, the other way to stop a perpetrator from committing another act of violence against the victim is for the victim to take legal action in the civil proceedings. This is entirely in the hands of the victims and it is for the victims to decide whether or not to proceed with such application. On an application for protection, the court may grant the necessary injunctions provided that it has the jurisdiction to make the orders. The court derives its powers to grant the injunctions from the Domestic and Cohabitation Relationship Violence Ordinance (Cap. 189) (“DCRVO”).

The first legislation on domestic violence in Hong Kong was the 1986 DVO. This legislation went through a major amendment in 2008 and then on 1 January 2010 with the new name DCRVO. This piece of legislation provides protection

7 Patrick Li, *Sentencing in cases of domestic violence*. Retrieved from Hong Kong Lawyer website: http://www.hk-lawyer.com/InnerPages_features/0/1765/2006/2, page 60

8 Ibid, page 59

9 Ibid, page 60

to spouse and ex-spouse¹⁰, relatives¹¹ and cohabittees whether of the same sex or of the opposite sex¹². The court may grant an injunction on the application of a victim containing any or all of the following provisions under s.3 :-

(1) A non-molestation order – s.3(1)(a)(b), s. 3A (4)(a) and s.3B (1)(a)(b)

Restrains the respondent from molesting the applicant, the specified minor or the cohabitee

(2) An ouster order – s.3(1)(c), s.3A(4)(b) and s.3B(1)(c)

- (i) Prohibiting the respondent from entering or remaining in the residence, a specified part or area
- (ii) Whether or not the residence is the common residence or matrimonial home of the applicant/the specified minor and the respondent

(3) An entry order – s.3(1)(d), S.3A(4)(c) and s.3B(1)(d)

The respondent to permit

- (i) The applicant to enter and remain in the common residence or matrimonial home of the applicant and the respondent or in a specified part of such common residence or matrimonial home; or
- (ii) The minor to enter and remain in the common residence of the minor and the respondent or in a specified part of such common residence

Unlike some other countries, there is no definition given to domestic violence in DCRVO and in fact no such words can be found in the legislation. The only word which bears reference to domestic violence in the DCRVO is “molestation”. The use of the word “molestation” is deliberate because it gives the court a wide discretion to interpret what is “molestation”. Family Judge Sharon D. Melloy in her judgment *P v C*¹³, with reference to the English case laws, explained the meaning of “molestation” and the grant of ouster order as follows,

“Molestation has been defined widely (...) :

“..... molestation may take place without the threat or use of physical violence and still be serious and inimical to mental and physical health”
(Viscount Dilhorne in Davis v Johnson [1979] AC 264)

“It applies to any conduct which can properly be regarded as such a degree

10 Section 3 of the DCRVO.

11 Section 3A of the DCRVO.

12 Section 3B of the DCRVO.

13 *P v C*, FCMC 9655 / 2005, paras. 22 - 27.

- of harassment as to call for the intervention of the court”.*
 (Ormrod LJ in *Horner v Horner* [1982] Fam 90)
 “Molest is a wide, plain word which I would be reluctant to define or paraphrase. If I had to find one synonym for it, I would select ‘pester’.”
 (Stephenson LJ in *Vaughan v Vaughan* [1973] 3 All ER 449)
23. In Hong Kong “scolding” has been found to be sufficient for both a non molestation and an ouster order. (See *Chan Chun Hon v Chan Lam Lai Bing Shirley* [1994] 3 HKC 196).
24. In addition, there usually has to be a form of intent.
 “Harassment, it has to be said, of course, includes within it an element of intent, intent to cause distress or harm”.
 (Donaldson J in *Johnson v Walton* [1990] 1 FLR 350)
- Ouster orders*
25. Ouster orders are viewed seriously. It has often been said that it is a draconian order. It should only be granted in “extreme circumstances”.
 (See *Davis v Johnson* [1979] AC 264)
26. In determining whether an ouster order should be made the court must have regard to
- the conduct of the parties,
 - their respective needs,
 - their financial resources,
 - the needs of any child living with the applicant,
 - and to all the circumstances of the case.
27. All of these elements are of equal importance. The welfare of the child is not of paramount consideration.”

The DCRVO also provides protection against violence between relatives. The meaning of “relatives” for the purpose of DCRVO is defined in s. 3A(2), which covers,

- “(a) the applicant’s father, mother, grandfather or grandmother (whether natural or adoptive);
- (b) the applicant’s step-father, step-mother, step-grandfather or step-grandmother;
- (c) the applicant’s father-in-law or mother-in-law who is the natural parent, adoptive parent or step-parent of the applicant’s spouse;
- (d) the applicant’s grandfather-in-law or grandmother-in-law who is the natural grandparent, adoptive grandparent or step-grandparent of the applicant’s spouse;
- (e) the applicant’s son, daughter, grandson or granddaughter (whether

- natural or adoptive);
- (f) the applicant's step-son, step-daughter, step-grandson or step-granddaughter;
 - (g) the applicant's son-in-law or daughter-in-law who is the spouse of the applicant's natural child, adoptive child or step-child;
 - (h) the applicant's grandson-in-law or granddaughter-in-law who is the spouse of the applicant's natural grandchild, adoptive grandchild or step-grandchild;
 - (i) the applicant's brother or sister (whether of full or half blood or by virtue of adoption);
 - (j) the brother or sister (whether of full or half blood or by virtue of adoption) of the applicant's spouse;
 - (k) the applicant's step-brother or step-sister;
 - (l) the step-brother or step-sister of the applicant's spouse;
 - (m) the applicant's uncle, aunt, nephew, niece or cousin (whether of full or half blood or by virtue of adoption);
 - (n) the uncle, aunt, nephew, niece or cousin (whether of full or half blood or by virtue of adoption) of the applicant's spouse; or
 - (o) the spouse of any person mentioned in paragraph (i), (j), (k), (l), (m) or (n)."

When it comes to the protection for same sex couples, section 3B(1) of the DCRVO provides that if there is a relationship between two persons (whether of the *same sex or of the opposite sex*) who live together as a couple in an intimate relationship, the court may grant an injunction if it is satisfied that the applicant has been molested by the other party to the cohabitation relationship. However, it should be noted that DCRVO does not give protection to dating couples, lodgers, domestic helpers and flat mates.

When an ouster order is granted and if there is in force a custody or access order concerning a child in favour of the perpetrator, the court may vary or suspend the court order for giving effect to the injunction. However, when considering such variation/suspension of the custody/access order, the court shall have regard to the welfare of the minor as first and paramount consideration and give due consideration to the wishes of the child as well as any material information including any social welfare report. The duration of the variation/suspension shall not exceed the expiry of the validity period of the injunction¹⁴.

On granting the injunction under sections 3, 3A or 3B, the court may include a provision requiring the perpetrator to participate in any programme to change the

14 Section 7A DCRVO.

attitude and behaviour that lead to the granting of such injunction¹⁵. If there is a breach of an injunction order, this may be dealt with by way of contempt of court where the court may order the defendant to pay a fine or serve a prison sentence¹⁶.

Conclusion

Any case of domestic violence could involve a lot of people and organizations and these could be: the victim, the perpetrator, children of the family, police, doctors, hospital, social workers, temporary refuge, housing department, prosecution department, legal aid service, judiciary, lawyers, organizations providing counseling or other services, employers of the victim and the perpetrator and the children's schools. No doubt, one would appreciate the involvement of the above list of people and organizations would mean a substantial amount of public fund has to be spent. If one could work out an annual spending on domestic violence, one can imagine that this could be a huge sum of money from the public fund. We should be aware that not only domestic violence hurts people and destroys family, it also has a serious economic impact on society as a whole.

The civil redress should be in most cases a better remedy to deal with domestic violence. Once an injunction order is granted by the court, most perpetrators will stop in fear of involvement in court proceedings which may lead to imprisonment and the need to pay legal costs. Unfortunately, the low utilization rate of civil redress as discovered by Chan K.L., Chiu M.C. & Chiu L.S. in the Consultants' Report¹⁷ appears to remain the same despite reform has been done. It is time to review the reasons for this phenomenon if the stakeholders concur that the use of civil redress is a better way to deal with domestic violence.

One of the reasons for the few use of the civil protection could be the legal costs for applying for an injunction and the difficulty to obtain legal aid assistance. To deal with domestic violence, more funding to cover legal costs should be made available for those in need of assistance. It should also provide better understanding of the use of civil remedy to victims and frontline professionals dealing with domestic violence. Hence, a holistic approach to resolve domestic violence always involves better investment in supporting services and public education.

15 Sections.3(1A), 3A(5) or 3B(3) DCRVO.

16 *H v O* (Contempt of Court: Sentencing).

17 Chan, K. L., Chiu, M. C., & Chiu, L. S., "*Peace at home: Report on the review of the social and legal measures in the prevention and intervention of domestic violence in Hong Kong*", para 4.73.