

**MEMORANDUM ON Review and Proposals for Amendments to The Domestic Violence Act 1994 submitted by Pusat Krisis Wanita, Pulau Pinang on 9 December 1999.**

**PRIORITISATION OF THE PROPOSED AMENDMENTS**

**1. Increase access to warrant of arrest power (Section 7(1))**

*Recommendation: the warrant of arrest power should be incorporated into all protection orders (POs) and interim protection orders (IPOs) as a matter of course.*

The DVA permits the court to append a warrant of arrest to an IPO or a PO. The purpose of the warrant of arrest power is to empower the police to immediately apprehend someone suspected of violating a court order. The purpose of this power is to protect the victim from further violence while demonstrating that defiance against the court will not be tolerated.

The WCC is pleased that the DVA recognizes the gravity of domestic violence and the need to act quickly in order to prevent ongoing abuse. However, the Act currently requires the victim to request that the warrant of arrest power be attached to the protection order. A woman who attends court without representation or assistance is not likely to know that the warrant of arrest power exists, and therefore she cannot request it.

The WCC therefore recommends that the warrant of arrest power be incorporated into all protection orders (POs) and interim protection orders (IPOs) as a matter of course. This pro-active step would simplify the process of obtaining protection, ease the burden on victims, and clarify the responsibilities of police officers.

**2. Expedite service of Interim Protection Order on aggressors and inform victims when service is effected (Section 17)**

*Recommendation: Amend the DVA to require that service of the IPO shall be given priority by the police. Preferably the IPO should be served on the offender within 24 hours after being delivered to the police by the Registrar. In addition, the victim should be promptly informed when service is effected.*

The WCC is concerned about the omission to specify a time limit for the service of the IPO on abusers. Although Section 17 of the DVA states that the IPO must be delivered to the police by the Registrar within 24 hours of being issued, it does not delineate a similar time period during which the officer must serve the IPO. Consequently, there may be a long and volatile gap of time for service during which the victim is vulnerable to the recurrence of domestic violence. Lawyers affiliated with the WCC have had cases where service of the IPO to the offender took over two months to be effected.

In addition, there is no requirement in the DVA to inform victims whether service has been effected or not. The victim consequently does not know if or when she is protected. Worse still, she may believe she is protected when she is not.

It is therefore crucial that the victim be informed of service and this responsibility should rest with the police who are already charged with the duty to serve the IPO.

### **3. Introduce presumption in favour of exclusive possession for protected persons (Section 6(4)(a))**

*Recommendation: the DVA should be amended to include a default rule that confers exclusive possession of a shared residence to a protected person unless extenuating circumstances merit alternative arrangements.*

Currently, the DVA permits the issuance of exclusive possession of a shared residence only when "there is no other way to secure the personal safety of any protected person for the time being" (Section 6(4)). The rationale for this condition appears to be based on maintaining the "status quo" and not uprooting persons from their homes except as a last resort.

However, this view of the situation unjustly privileges the interests of the abuser over the needs of the victim, especially since almost all victims, by definition, have less power than their abusers. Moreover, most domestic violence cases under the DVA involve women being abused by their partners and many of these women have children, who will follow their mothers.

In the spirit of preserving the family and minimizing disruption to the children's lives, it is more appropriate to award exclusive possession to the victim than to the abuser.

For this reason, the WCC advocates the introduction of a default rule that would confer exclusive possession of a shared residence to the victim unless extenuating circumstances merit alternative arrangements. A default rule to this effect would appropriately recognize the needs of victims.

The WCC emphasizes that it does not advocate the default rule as a means of punishing the abuser. Punishment for violations of the law can only be determined by the court. Rather, the WCC's position is based on the need to find pragmatic and equitable solutions during a difficult transition period for both parties. The reality is that exclusive possession must be awarded to one party while the other seeks shelter elsewhere.

In light of power inequalities, the hardship of uprooting a victim and most likely her children, and the respective resources available to the parties, there is a more compelling case for conferring exclusive possession to the protected person than to the abuser as a matter of course. If an abuser feels that there are special reasons why the presumption in favour of victims should not apply, he can make his arguments before the court. However, an order of exclusive possession in favour of the abuser should be granted only in exceptional circumstances when it is clear that he would suffer extreme hardship in comparison to the protected person.

#### **4. Increase access to exclusive possession for protected persons (Section 6(1)(a))**

*Recommendation: the court's discretion to make orders of exclusive possession to protected persons should be available at both the IPO and PO.*

Unlike the warrant of arrest power, the ability of the court to order exclusive possession of a shared residence to a protected person exists only for the PO (Section 6(1)(a)). However, the need to stay at home in safety may be equally important for a victim at the IPO stage as at the PO stage. Thus the exclusive occupation order should be available at both time periods.

Consonant with the proposal that the IPO be issued within 24 hours, this proposal to make available exclusive possession immediately upon occurrence of domestic violence will serve to minimise the trauma faced by the victim and her children.

**5. Confer right of occupation to victim who has been granted exclusive possession order (Section 4(2))**

*Recommendation: the DVA should be reformed such that a protected person's right of exclusive occupation of a shared residence is recognised as a registrable interest.*

In order to ensure that a protected person who is awarded exclusive possession be able to exercise that right of occupation where the abuser is the sole registered proprietor of the home, the WCC advocates for exclusive possession rights to be recognized as a registrable interest under the *National Land Code*. (Such interest to possession is already recognised under English law.)

Once the right to possession becomes a registrable interest, victims may lodge a caveat against the property. Such a caveat would protect the victim's right to possession from being overtaken by the right of a bona fide purchaser who acquires the property from the abuser for good consideration without notice of the victim's rights.

Once the right to exclusive possession is recognised, this can also serve to assist a person who has been granted similar rights to possession pursuant to divorce settlements to protect their interests from a partner who attempts to dispose of the property notwithstanding the first party's interest to possession.

**6. Eliminate "suitable alternative residence" of victim as a ground for revoking exclusive possession order**

*Recommendation: Section 6(4)(a) of the DVA, which states that an order for exclusive possession for the protected person is to be revoked if a suitable alternative residence is found for the protected person, should be eliminated.*

The DVA presently states that an order of exclusive possession shall be revoked if "a suitable alternative residence is found for the protected person" (Section 6(4)(a)). The DVA's definition of "alternative residence" is "the premises or accommodation which the victim is or has been compelled to seek or move into as a result of domestic violence" (Section 2). This definition is broad enough to encompass the desperate and makeshift arrangements that women and children fleeing abuse manage to find with little or no resources. Such arrangements include temporary shelter at a crisis centre, hostel or the home of a friend or relative.

The DVA allows for the anomalous result that these clearly temporary arrangements may be considered a "suitable alternative residence", thus preventing victims from continuing to live in their homes. This situation is particularly unfair given that possession of the home may be granted to an abuser even though the home may be jointly owned or leased by the abuser and the victim.

The DVA effectively awards possession to the abuser while seriously disrupting the life of the victim and perhaps the lives of her children as well. From the perspective of the victim, this result may well resemble punishment for attempting to free herself from a violent situation. This result would be an affront to the ultimate aim of the legislation: to be an instrumental part of the fight to end domestic violence.

A final note should be made with respect to a victim who has fled her home. Her flight must not be construed as evidence that she does not need to live there anymore or that she has broken up the family and must therefore pay the consequences of her actions. A victim in these circumstances leaves because she is in danger. She has taken the extreme step of fleeing because she desperately needs an alternative to the domestic violence. She is not responsible for breaking up the family; the family is already severely damaged by domestic violence. Any argument favouring exclusive possession for the abuser that is based on the notion of the victim's wrongdoing in leaving the home is founded on fundamental misconceptions of the causes and effects of domestic violence.

#### **7. Ensure efforts at reconciliation are initiated by victims and do not undermine their safety (Section 11)**

*Recommendation: Reconciliation attempts should only be undertaken upon the request of the victim and only after an IPO has been obtained to ensure her safety.*

Although abused women want domestic violence to stop, not all victims seek a permanent separation from the abuser. The desire to sustain the relationship may be based on financial needs, children's needs, emotional attachment or social pressures. In light of this reality, the WCC supports reconciliation attempts under the DVA provided that they are initiated by the victim and there is assurance that she will be protected from further violence. In order to engage in the efforts at reconciliation as an equal and valued participant, the woman *must* be confident that she is no longer vulnerable to domestic violence.

For this reason, an IPO must be obtained *before* reconciliation begins. The current policy of permitting reconciliation to ensue before an IPO has been obtained is highly problematic because it appears to prioritize reconciliation above protection. This inclination to pursue reconciliation efforts in a climate of fear of further abuse thwarts the goals of the DVA. Such a policy does not offer effective protection to domestic violence victims and offers little hope that reconciliation attempts will result in an improved family situation for the victim.

#### **8. Broaden definition of domestic violence under DVA (Sections 2 and 3)**

*Recommendation: The definition of domestic violence should be broadened to encompass all forms of abuse, including mental, psychological and emotional harm which threatens a person's personal well being or safety, or causes that person to fear for, or to be apprehensive about the same.*

The DVA does not make domestic violence a crime. Rather, it simply defines domestic violence to encompass physical injury, threats of physical injury, forced acts, forced confinement and damage to property. This definition, while reasonably broad, does not reach the full ambit of domestic violence. Due to the fact that domestic violence is not a separate crime, it must be captured by provisions in the Penal Code in order to fall within the DVA. For example, domestic violence under the DVA includes compelling a person to engage in any conduct, including sexual acts, from which a victim has right to abstain (Section 2).

The WCC commends the recognition that a person has a right to engage or abstain from sexual acts. Yet this provision, which seems to protect a victim from sexual activity to which she has not consented, does not protect her if the abuse does not fall under a recognized crime. Thus, a woman who is forced by her husband to watch him have sex with another woman, view pornographic material, or pose nude for home video, are all acts from which a woman has a right to abstain, yet they are not crimes under the Penal Code. A victim of domestic violence in this position is thus left without relief under the DVA.

In addition, the current definition of domestic violence omits reference to mental, psychological and emotional forms of domestic violence. In light of the centrality of abuse of power and trust to all types of domestic violence, non-physical violence may be just as debilitating as physical injury. A few of the many examples of mental

harm include: threats of withdrawing financial support; threats to send the children away, constant ridicule and belittlement; the abuse of drugs such that a woman fears injury to her partner, herself or her children and the moral corruption of children. A victim in these circumstances may have a serious need for protection.

For these reasons, the definition of domestic violence in the DVA must be broadened in order to protect all victims of domestic violence and thus allow for greater access to IPOs.

**9. Eliminate the requirement of obtaining an Order to Investigate for non-seizable offences before obtaining an Interim Protection Order (IPO)  
(Section 4)**

*Recommendation: the DVA should be amended to allow issuance of IPO other than during the pendency of investigations. In the alternative classify domestic violence as a seizable offence either under a separate provision of the Criminal Procedure Code or under the DVA.*

Early conceptions of the DVA posited domestic violence as a civil offence. However, this view produced a division of powers conflict due to the Syariah courts' jurisdiction over Muslim marriages. The WCC and other advocates of the DVA supported the move to transform the DVA into a criminal statute for two main reasons. First, it would overcome the jurisdictional division. Secondly, it would emphasize the fact that domestic violence is a crime and therefore a matter of public concern.

However, this change has produced unforeseen implementation concerns. Although domestic violence is defined under the DVA, it does not constitute a separate crime. Rather, the domestic violence offence must be contained under a suitable provision of the *Penal Code*.

The *Criminal Procedure Code* distinguishes crimes under the *Penal Code* as seizable offences (that is, offences involving grievous bodily hurt or the use of weapons and for which investigations may automatically commence) and non-seizable offences (for which an order to investigate must be issued by the Deputy Public Prosecutor prior to the commencement of investigations). This classification however does not

take into account the unique nature of domestic violence; the fact that it is almost always a recurring crime naturally exacerbates the harm to the victim.

Since most domestic violence cases are considered non-seizable, the police cannot investigate unless explicitly instructed to do so by the Deputy Public Prosecutor.

Section 4(1) of the DVA specifies that an IPO may be issued "during the pendency of investigations" into the domestic violence.

Because an IPO can only be ordered during the pendency of investigations, this classification of offences presents an obstacle to domestic violence victims. In essence, victims of non-seizable offences cannot get an IPO unless the Deputy Public Prosecutor orders investigations to commence.

There is therefore a pressing need for public prosecutors to work closely with enforcement officers to ensure that investigations are undertaken whenever appropriate. Unfortunately, Deputy Public Prosecutors, are not necessarily readily accessible to abused women in small towns throughout Malaysia.

In Penang, the WCC is happy to report that the Deputy Public Prosecutor has been most responsive to the needs of domestic violence victims and has appropriately issued orders to investigate their cases.

It is also important to note that evidence of investigation must be brought before the court. Unless the investigating officer provides proof of investigation, the IPO may be set aside.

#### **10. Broaden the availability of protection under the DVA to offences other than the *Penal Code* offences (Section 3)**

*Recommendation: the DVA and other legislation, in particular the Child Protection Act 1991 and the Women and Girls Protection Act 1973, should be read harmoniously such that the fullest protection possible is provided to victims of abuse. Protection orders under the DVA should therefore be available for abuses defined in other Acts.*

Although the DVA limits itself to crimes under the Penal Code, there are other Acts dealing with issues that intersect with those implicated in the DVA. The *Women and Girls Protection Act* for example makes it an offence for a person to force a woman into prostitution and the *Child Protection Act* makes it an offence to abuse or traffic in children.

In addition to physical and sexual violence, the *Child Protection Act* also protects children against emotional abuse, neglect and exploitation, thus acknowledging the gravity of non-physical abuse.

In order to give women and children the fullest protection possible, the DVA should be interpreted in harmony with both these legislations. Protection orders under the DVA should therefore be available to prevent further incidence of abuse as defined in the *Child Protection Act* and the *Women and Girls Protection Act 1973*.

#### **11. Completion of Investigations (Section 4)**

*Recommendation: the police should be required to complete investigations speedily and inform domestic violence victims immediately of any change of status in the investigations pertaining to their case.*

The IPO expires when investigations end. At that point, the aggressor is charged if circumstances mandate such action. A victim who feels she still needs the protection of a court order to ensure her safety must then apply for a PO.

This transition period is an important time for the victim. She needs to know the status of her case and the IPO in order to take appropriate steps to protect herself from further domestic violence. In practice, however, there is no obligation on the police to inform the victim of the status of her case. As a result, she does not know whether the abuser is being charged or when the IPO expires.

This uncertainty leaves her vulnerable to the abuser in at least two ways: firstly, she may conduct herself in ways that expose her to danger thinking she is under the protection of an IPO when in fact she is not; and secondly, she may not be aware that she can apply for a PO and thus lose the protection of a court order to which she is

entitled. It is therefore essential that the police inform the victim immediately when there is a change of status in the domestic violence case, especially if the IPO will expire.

Secondly as the entitlement of the victim to a PO is dependant on charges being preferred against the abuser, the WCC is concerned that investigations be undertaken and concluded expeditiously and a provision be incorporated into the DVA to that effect.