



The Law Reform Commission

REPORT OF THE LAW REFORM COMMISSION

PROTECTION AGAINST DOMESTIC VIOLENCE

Final Report

31st March, 2010

The Law Reform Commission

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ACKNOWLEDGEMENTS

The Law Reform Commission extends thanks to all stakeholders and the general public for the valued contribution leading up to the formulation of appropriate legislative proposals intended to respond to domestic violence conduct.

PROTECTION AGAINST DOMESTIC VIOLENCE

INTRODUCTION

1. The Law Reform Commission submits for consideration a Bill entitled The Protection Against Domestic Violence Bill, 2010. This Bill contains legislative proposals intended to enhance the protective remedies available to specified categories of persons living within a household residence and who are or may become exposed to domestic violence conduct.

2. These proposals reflect an increased awareness in the incidence of acts of domestic violence within the household setting and the need to ensure that all victims are afforded the appropriate remedies, irrespective of the nature of the domestic relationship or the type of abusive conduct committed. The Bill has benefited from wide consultations, suggestions by other legal and non-legal sources and the experience of other jurisdictions with comparable legislation.

3. Accordingly, the Bill seeks to repeal the current Summary Jurisdiction (Domestic Violence) Law (1998 Revision) in order to effectively accommodate the proposed legislative measures and in so doing it primarily expands, and in some instances clarifies, the current legislative regime.

BACKGROUND

4. The Summary Jurisdiction (Domestic Violence) Law (“the current Law”) was originally enacted in 1992.¹

5. At the time the primary objective of the current Law was to introduce additional remedies to afford timely protection to victims or potential victims of domestic violence. This was done with a view to preventing the further development of the more serious types of crimes that would attract criminal law sanctions. In this regard, any act of violence used or threatened against either party to a marriage or a child of the family currently falls within the ambit of the legislation.

6. The current Law has been in operation for approximately seventeen years during which time there has been opportunity to observe its implementation and to identify areas in which it can be strengthened. In fact, issues of gender based violence and conduct of a violent nature within the domestic setting have prominently featured in recent times through the Special Report on Gender Violence (“the Report”) prepared by the Special Advisory Committee on Gender Violence.²

7. The primary focus of the Report was on the need to preserve the social health of the typical family unit and to devise responsive mechanisms which are geared towards

¹ Law 20 of 1992 – 11th September, 1992, Revised in 1998

² November 25, 2008. The Committee was appointed by the then Leader of Government Business, Hon. D. Kurt Tibbetts, JP and the then Minister for Health and Human Services, Hon. Anthony Eden, OBE, JP

providing the appropriate support to persons exposed to gender based violence in circumstances where there is a violent breakdown of that unit.³

8. The broad priority areas identified⁴ in the Report relate to-

- (a) The education of the- (i) general public; (ii) practitioners who by virtue of their profession may come into contact with victims and perpetrators of domestic violence; and (iii) leaders within the public and civil service. Additionally, focus is placed on a strategy of combining formal training programmes and general public education in order to eliminate violence of any kind from homes and communities.
- (b) The introduction of changes to, and improvements in, the governmental and non-governmental institutional resources that are available within the community to respond to the needs of victims and indeed perpetrators of gender based violence, domestic abuse and child abuse. The objective in this regard is to ultimately prevent the emergence of victims or perpetrators of domestic violence, gender based violence, and child abuse.
- (c) The review and modernisation of existing legislation that deal with gender based violence and the establishment of a Family Court which specialises in matters of a domestic and family nature.
- (d) The improvement of the statistical and research capabilities of various agencies in order to facilitate the accurate documentation of the occurrences of gender violence and related issues. In this instance, the ultimate goal is to be strategically positioned to assess the trends in domestic abuse and tailor the responses accordingly.

9. Following upon the Report of the Special Advisory Committee on Gender Violence a directive⁵ was issued, requiring that gender violence be examined within the parameters of the Law Reform Commission.

10. It is against this background that the Law Reform Commission has included the legislative issues that touch and concern gender based violence, domestic abuse and child abuse as an additional element of its current reform agenda dealing with family law reform.

³ Special Report on Gender Violence, p. 3

⁴ Special Report on Gender Violence, p. 4 and p. 10 -12

⁵ Extract From Minutes of the Cabinet of the Cayman Islands, Item No 2812 or Meeting No 178/08 on 16th December, 2008 and Cabinet Paper by the then Honourable Minister of Health and Human Services, 11th December, 2008, para. 4c

RESEARCH AND CONSULTATION PROCESS

11. In advancing this process and having had the benefit of reviewing the Special Report on Gender Violence, while paying due regard to the wider need to reform the laws that generally govern familial relations, the Law Reform Commission (the Commission) prepared for public consultation a draft Protection Against Domestic Violence Bill, 2009 (“the Bill”).

12. The Commission benefited from the learning emerging from the Report and that of the legislative experience of several other jurisdictions including the Bahamas,⁶ Barbados,⁷ Belize,⁸ Bermuda,⁹ Jamaica¹⁰ and Saint Lucia¹¹. Some of these jurisdictions have updated their domestic violence legislation by way of amendments or by the repeal and replacement of the earlier legislation. This is evidence of the need for periodic review of critical and sensitive legislation of this nature in an effort to improve its effectiveness and ensure that it is consistent with societal needs and modern legislative trends.

13. The Bill was subsequently published¹² for stakeholder and public consultation along with a background paper highlighting the proposals encapsulated in the Bill.

14. On conclusion of the consultation period,¹³ the Commission received written submissions from the following stakeholders-

- the Department of Children and Family Services;
- the Department of Community Rehabilitation;
- the Legal Department;
- the Ministry of District Administration Works and Gender Affairs (DAW&GA);
- the National Drug Council; and
- Dr. Victor Look Loy.

15. The Commission during its deliberations considered all responses from the above-mentioned organisations and persons. Attached to this report is a table which reflects the provisions of the draft consultation Protection Against Domestic Violence Bill, 2009, the comments made by respective stakeholders on the Bill and the Commission’s responses to those comments.¹⁴

16. Generally, the comments of stakeholders were supportive of the proposals though in some instances recommendations were made for refinement.

⁶ Domestic Violence and Sexual Offences Act, 1991

⁷ Domestic Violence (Protection Orders) Act, 1993

⁸ Domestic Violence Act, 2000

⁹ Domestic Violence (Protection Orders) Act 1997

¹⁰ Domestic Violence Act 2004

¹¹ Domestic Violence (Summary Proceedings) Act, 1995

¹² Dated 12th October, 2009

¹³ Dated 30th November, 2009

¹⁴ See Appendix I

17. After considering the relevant comments, the Commission prepared a revised draft Bill which reflected the comments of stakeholders which were accepted.

18. Accordingly, attached as Appendix II is the final Protection Against Domestic Violence Bill, 2010 which reflects the research and consultation of the Commission.

RECOMMENDATIONS

19. The Commission recommends that the domestic violence legislative framework cover the following areas-

- (a) types of conduct constituting domestic violence;
- (b) definition of household residence;
- (c) who is protected;
- (d) definition of child;
- (e) types of court orders available; and
- (f) who may initiate legal proceedings.

Types of conduct constituting domestic violence

20. The current Law does not define domestic violence, but arguably the type of conduct contemplated is indicated by the orders¹⁵ which may be made and the grounds for the making of such orders. If the Magistrate is satisfied that the respondent has used or threatened to use violence against the applicant, he may make a matrimonial order prohibiting the respondent from continuing an act of violence against the applicant. The emphasis here is on physical violence.

21. However, based on the research of the Commission, the experience is that domestic violence can transcend physical violence and extend to behaviour of an emotional, psychological or financial nature. In recognition of this fact, the Commission thought it appropriate to introduce a definition of domestic violence conduct which is more reflective of common occurrences. Accordingly, under the Bill,¹⁶ the type of behaviour that constitutes domestic violence relates to conduct which causes or is intended to cause the victim- (a) emotional or psychological abuse; (b) financial abuse; (c) physical abuse; or (d) sexual abuse.

22. During the consultation process, recommendations were made¹⁷ for the expansion of the activities which could cause emotional and psychological abuse to include threats to compromise the immigration status of a victim of domestic abuse. While the Commission supports the conceptual thinking behind this recommendation, we are of the view that such a proposal does not properly fall within the scheme of the legislative framework in contemplation.

¹⁵ Section 3

¹⁶ Clause 3

¹⁷ Department of Children and Family Services, Ministry of DAW&GA and Dr. Victor Look Loy

23. The Commission however recommends that this issue be dealt with under the appropriate immigration laws. It is envisioned that the relevant authorities, in making a determination on the immigration status of an individual, will take into consideration any evidence which points to the fact that the individual is a victim of domestic abuse and that the immigration status of that victim is being used as a tool to perpetuate the domestic abuse.

Definition of household residence

24. Under the current Law,¹⁸ the reference to household or matrimonial home is in relation to married spouses, a man and woman living together and a child of the family. By implication, that reference would exclude other categories of persons living within the household and who may be in need of protection. In remedying this situation the approach of the Commission was to first introduce a provision which specifically defined the household residence as the place where persons are likely to spend most of their time and thus be exposed to the potential of domestic abuse. Secondly, and this is a matter that is dealt with in more substance later, the definition covers a range of persons referred to as “prescribed persons” who are identified as individuals likely to be present in the household with the respondent and may be in need of the type of protection contemplated by the legislation.

Who is protected?

25. As alluded to earlier, the current Law affords protection to married spouses, a man and woman living together and a child of the family. In the view of the Commission, the coverage of the Law is considered to be inadequate in light of the familial and living arrangements which are commonplace in our society today. Two particular areas of deficiency have been identified– (a) the denial of relief to persons who share a common household but do not fall within the already stipulated relationships; and (b) the exclusion of persons in a visiting relationship.

26. The denial of relief to persons who share a common household, but who do not fall within the stipulated relationships under the current law, is an instance of the restrictive coverage of the current Law. For example, these persons may include the elderly infirm parent, a dependant or an older person living with, but not dependent on the respondent. This could be viewed as a serious limitation in our social context where household composition is characterised by a variety of relationships that are not necessarily based on blood or marriage.

27. Members of the household are in fact treated as a distinct category of applicants under the domestic violence legislation of some jurisdictions in the region.¹⁹ This approach could usefully be employed to cure the deficiency identified in our Law.

¹⁸ Section 2

¹⁹ Jamaica and Trinidad and Tobago

28. Consequently, the Commission recommends the expansion of the category of applicants to include a range of prescribed persons such as a parent, dependant of the respondent or any person who is a member of the household residence.

29. Under the Law a “party to a marriage” includes a man and woman living with each other as man and wife although not married to each other. Therefore, the “common law spouse” is covered, but not a person who is in a visiting relationship. A visiting relationship is one of the three established union types on which family and domestic relations are based in most Caribbean jurisdictions examined and it may very well hold true that the Cayman Islands is no different. The legal difficulty arises in the inability to recognise that such relationships are in existence.

30. In a visiting relationship the parties do not live together, but may spend a lot of time with each other and in many cases have children together. The experience is that a number of women in visiting relationships are the victims of domestic violence but may be unable to access the remedies provided by the current Law given that it does not contemplate such relationships.

31. In recognition of this deficiency, the Commission recommends that the categories of applicants entitled to protective remedies be expanded to include a person who is or has been in a visiting relationship with the respondent. Visiting relationship should be defined²⁰ to mean a close personal relationship between a man and a woman who do not share a common household residence. In determining whether such a relationship exists, the court must have regard to the following factors- (i) the nature and intensity of the relationship and in particular (ii) the amount of time the persons spend together; (iii) the place or places where that time is ordinarily spent; (iv) the manner in which that time is ordinarily spent; (v) the duration of the relationship; and (vi) the presence of a child of both parties.

Definition of child

32. The current Law²¹ defines “child of the family” in relation to the parties to a marriage as-

- (a) a child of both of those parties; and
- (b) any child who has been treated by both of those parties as a child of their family.

33. Paragraph (a) contemplates a biological child of both or either spouse, while paragraph (b) contemplates a child who may not be biologically related to either spouse. The point being made is that the reference to a party to a marriage seems to limit the application of the Law to spousal households and would therefore exclude a child living in a household in which no spouse is present. The intention of the provisions should be to cover a child who, by virtue of his or her presence in the household or his or her

²⁰ Clause 2

²¹ Section 2

relationship to an adult member of the household, might be exposed to the risk of domestic violence.

34. In that regard, under the Bill²² the definition of child has been reformulated to make it clear that a child not falling in paragraphs (a) or (b) but who is, or has been, a member of the household or who resides in the household on a regular basis, or of whom a member of the household is a parent or guardian, has access to the remedies afforded by the legislation.

35. The opportunity has also been taken to examine the age stipulation attached to a child. Presently there is no age stipulation with regard to a child who is covered by the current Law. It is argued that this could leave open an interpretation of a child to include an adult offspring. The term child, in this context, usually means a child under the age of eighteen years of age who is unmarried and this is usually the stated position in domestic violence legislation. Although our law does not specifically so state, conceivably this may have been the intention. However, for the purpose of clarity, it is proposed that the definition of child be amended to refer specifically to a person under the age of eighteen years who is not or has never been married.

Types of court orders available

36. The proposals²³ of the Commission have sought to replace the matrimonial order currently available under the Law²⁴ with a wider range of remedies. These remedies are a protection order, an occupation order, a tenancy order and various ancillary orders. This approach was in recognition of the need to afford flexibility in allowing an applicant to avail himself of a remedy which is relevant to the particular circumstances.

37. *Protection Order* - The essence of the protection order is to prevent the respondent from acting in particular way towards the applicant. The procedure²⁵ requires the applicant to apply to the court for a protection order and the court after hearing an application may make an order prohibiting the respondent from committing any further act of domestic violence. By such order a respondent is prohibited²⁶ from- (i) engaging or threatening to engage in conduct which would constitute domestic violence towards the applicant; (ii) being on specified premises; (iii) engaging in communication with the applicant or (iv) taking possession of or damaging property in which the applicant may have an interest.

38. *Occupation Order* - The occupation order proposed under the Bill²⁷ is similar in import to the Matrimonial Order currently provided under the Law. However, the occupation order is intended to be expansive in application in that it can be accessed by

²² Clause 2

²³ Clause 4

²⁴ Section 2

²⁵ Clause 5

²⁶ Clause 6

²⁷ Clause 10

any prescribed person covered in the Bill, including a spouse, and permits that person to occupy the household residence to the exclusion of the respondent.

39. *Tenancy Order* – The proposed tenancy order deals with the situation where the applicant leases his household residence. A tenancy order²⁸ gives a prescribed person the right to the tenancy of any household residence in which that person is, or may be likely to be, exposed to domestic violence.

40. *Ancillary Orders* – Based on experiences in other jurisdictions examined,²⁹ the learning seems to be that after an order has been made against a spouse under domestic violence legislation, that spouse often engages in conduct which may be calculated to frustrate the beneficiary of a particular order. For example, a spouse may cease to contribute towards the maintenance of his partner, child or dependant. Also attempts may be made to damage property within the household residence to which a prescribed person may ordinarily have access or efforts may be made to restrict the use of such property.

41. In this regard, provisions have been included in the Bill to permit the court, on making a protection order, an occupation order or a tenancy order, to concurrently and of its own volition or at the instance of an applicant, make ancillary orders including a maintenance order³⁰ in favour of the prescribed person in circumstances where there is a legal obligation to maintain that person. Additionally, the court may order that the prescribed person be permitted the use of property³¹ within the household residence.

Who may initiate legal proceedings?

42. The current Law³² permits an application to be made by a party to a marriage for a matrimonial order in response to an act of domestic violence. The Commission believes that the deficiency in the Law stems from the fact that it does not allow for applications to be made on behalf of one of the parties to a marriage.

43. Often times a spouse, through fear or intimidation, may be unable or unwilling to take the steps necessary to seek the assistance of the court in obtaining a relevant order under the Law. This is particularly true in the case of women who suffer from “battered women’s syndrome” and in circumstances where the child is also exposed to the violence; his interests are not protected due to the failure of that abused spouse to take the appropriate action.

44. The proposals³³ under the Bill seek to reform this position by allowing third party applications on behalf of any person falling within the ambit of the legislation. Where the child or dependant is the victim or potential victim of domestic violence, an

²⁸ Clause 14

²⁹ See, for example, Jamaica

³⁰ Clause 19

³¹ Clause 20

³² Section 3

³³ Clause 4

application for the relevant order may be made by a range of persons including- (a) a person with whom the child or dependant ordinarily resides or resides on a regular basis; (b) a parent or guardian of the child or dependant; or (c) a person who is approved by the relevant ministry responsible for family services.

45. In the case of a spouse, parent, member of the household residence or person in a visiting relationship with the respondent, it is recommended that third party applications be permitted by- (a) a police officer; or (b) any other person, whether or not he is a member of the household residence. It is felt that a provision of this nature has the potential to ensure that no victim is left exposed to violent domestic acts without having access to the court.

CONCLUSION

46. The Commission is of the view that laws which seek to address domestic violence demonstrate that society considers such conduct unacceptable, rather than just being a private or cultural issue. The objective of these legislative reforms is to improve the systemic reaction to violence within the domestic setting by ensuring that societal and legal responses are based on a shared philosophy, namely to protect the most vulnerable people who are, or may become, exposed to domestic violence.

47. In light of the issues identified and against the background of the legal framework currently in place to deal with domestic violence conduct, the legislative models of other jurisdictions, the welcomed contribution of all stakeholders and the recommendations of the Law Reform Commission, our final Report including a draft Bill entitled the Protection Against Domestic Violence Bill, 2010³⁴ is commended for consideration.

Chairman
31st March, 2010

³⁴ See Appendix II