

## Injunction under Domestic Violence (Amendment) Ordinance – Cap.189

Dennis C. Ho  
Solicitor  
Messrs. Ho & Ip  
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## History

- DVO was first enacted in Hong Kong in 1986
- Law Society Report on the Domestic Violence Ordinance – December 2005
- Law Society made 38 recommendations (see <http://www.hklawsoc.org.hk>)
- DVO amendments became law and took effect from 1<sup>st</sup> August 2008

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## Power of Court

- s.3 : Court may grant injunction if applicant/a specified minor has been molested by the spouse or former spouse of the applicant
- s.3A : Court may grant injunction against the relative of the applicant if the applicant has been molested by a relative

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### Type of Protection Granted

- A non-molestation order – s.3(1)(a)
  - Restrains the respondent from molesting the applicant
- A non-molestation order – s.3(1)(b)
  - Restrains the respondent from molesting any specified minor
- A non-molestation order – s. 3A (4)(1)(a)
  - Restrains the respondent from molesting the applicant

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- An ouster order – s.3(1)(c)(i)&(ii) and s.3A (4)(1) (b)
  - Prohibiting the respondent from entering or remaining in the residence
  - Whether or not the residence is the common residence or matrimonial home of the applicant/the specified minor and the respondent

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- An entry order – s.3(1)(d)(i) and (ii) and S.3A(4)(1)(c)
  - The respondent to permit
    - 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
    - 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

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### Definition of Molestation

- No definition of “molestation” in the Ordinance
- In *Horner v Horner*, per Ormrod LJ:
  - “it [molesting] applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court”

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- In *F v F*, ‘molestation’ includes the forcing by the respondent of his or her society on the unwilling suffering applicant or the minor, whether the purpose of the molester is seeking to resume affectionate relations or to harm or annoy the suffering applicant or the minor.

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- No violence or threat of violence is necessary to constitute molestation.
- Harassment justified court intervention will suffice.

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Example :

- Calling the other party in the morning, late at night or at work place causing nuisance to the party
- Sending abusive letters to the victim
- Shouting obscenities at the victim

'molestation' does not include protecting an invasion of privacy per se. – C v C

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**Persons to be Protected**

Who can be the Applicant :

- Spouses/former spouses
- Cohabitees/former cohabitees
- Applicant who has been molested by a relative
- A minor – s.3(1) and s.3A

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A specified minor – s.3(3)(a) and (b)

- A child of the applicant/respondent concerned
- A child living with the applicant concerned
  - Under 18
  - No particular relationship required

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**□ Definition of "relative" – s. 3A(2)**

- (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;

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- (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;

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- (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;

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- (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)

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- Who are not protected?**
- Same sex couple
  - Lodgers
  - Domestic helpers
  - Co-tenants / flatmates

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- Who can apply?**
- All persons protected under the Ordinance
    - Spouses/former spouses
    - Cohabitees/former cohabitees
    - Applicant who has been molested by a relative
    - A minor as provided by s.3(1) and s.3A
  - A minor shall apply by his/her next friend – under s.3A

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**Discretionary Power**

**Factors to be considered in respect of ouster/entry order**

- Application under s.3
  - The conduct of the parties
  - Their respective needs and financial resources
  - The needs of any specified minor
  - All the circumstances of the case

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□ Application under s.3A

- Who has:
  - the legal or beneficial interest in; or
  - A contractual or legal right to occupy, the common residence of the applicant and the respondent
- The impact of the injunction on the relationship between the applicant

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- The conduct of the applicant and the respondent
- The respective needs and financial resources of the applicant and the respondent
- All the circumstances of the case

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Ouster order is a draconian order, would not be lightly granted unless it is really necessary

- Richards v Richards [1983] 2 All ER 807
- Chan Chun Ho v Chan Lam Lai Bing Shirley [1994] 3 HKC 196

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The welfare of the children was to be the first and paramount consideration has no application

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On granting an ouster or entry order, the court shall have regard to :-

- Interests in / legal right to occupy the common residence of the applicant and the respondent
- Impact on the relationship between the applicant, the respondent and their other family who reside with them
- Conduct of the applicant and the respondent
- Respective needs and financial resources
- All the circumstances of the case

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**“Authorisation of Arrest”**  
**(Power of Arrest)**

- You may attach an authorisation of arrest order to the injunction
- s.5 set out the criteria
  - s.5(1): either it is an injunction restraining the use of violence or an ouster order is granted
  - s.5(1A): actual bodily harm has been caused OR the court reasonably believes that the actual bodily harm will be caused to the applicant/the minor by the respondent

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- s.5(2): if an authorisation of arrest is expressly attached to an injunction, the police officer may arrest without warrant
- The respondent shall be brought before the expiry of the day after the day of his arrest
- s.5(3): he shall not be released before he is brought before the Court except on the direction of the Court.

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**Terms of the molestation order**

- Molestation in general and/or particulars acts of molestation
- The undertakings

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**Duration of ouster/entry order or an authorisation of arrest order**

- An ouster/entry order shall have effect no more than 24 months – s.6(1)
- An authorisation of arrest shall have effect no more than 24 months and would expire on the expiry of the period for which the injunction is granted – s.6(2)

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**Extension of ouster/entry/ authorisation of arrest order**

- An ouster/entry order may be extended so that the total period of the particular order does not exceed 24 months – s.7(1)(a)
- Same applies to authorisation of arrest – s.7(1)(b)

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**Variation and Suspension of existing custody or access order – Section 7A**

- When an ouster order is granted that concerns a minor; and
- if there is in force a custody or access order concerning a minor in favour of the respondent, the court may vary or suspend the court order for giving effect to the injunction; and

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When considering such variation/ suspension of the custody/access order, the court shall:

- Regard the welfare of the minor as first and paramount consideration; and
- Give due consideration to
  - The wishes of the minor; and
  - Any material information including any social welfare report

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Duration of the variation/suspension shall not exceed the expiry of the validity period of the injunction

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**Better Intervention Programme**

The court may on granting the injunction under either s.3 or s.3A may include a provision requiring the respondent to participate in any programme to:

- change the attitude and behaviour that lead to the granting of such injunction [ss.3(1A) and 3A(5)]

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### Domestic Violence – Criminal Offence

- The Government insists that criminalisation of domestic violence is not necessary.
- There are other civil remedies to victims of domestic violence other than the DVO, e.g.
  - The Protection of Children and Juveniles Ordinance (Cap.213)
  - The Mental Health Ordinance (Cap.136)

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### Breach of the Injunction Order

- Breach of an injunction order may be dealt with by the court for contempt of court
  - May be ordered to pay a fine or serve a prison sentence
  - H v O (Contempt of Court: Sentencing)

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