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FACING THE CHALLENGE OF DOMESTIC VIOLENCE IN TIMOR LESTE: CAN THE NEW LAW DELIVER?

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CONTENTS

INTRODUCTION	3
A. INTERPRETATION AND CRITIQUE OF THE LAW	4
1. <i>Interpretation of definitional provisions</i>	4
2. <i>Principles</i>	6
3. <i>Support</i>	8
4. <i>Proper use of information</i>	8
5. <i>Maintenance</i>	11
B. CRIMINAL ISSUES	11
1. <i>Pre-existing criminal acts</i>	11
2. <i>Acts constituting crimes</i>	12
3. <i>Definition of the victim</i>	12
4. <i>Sentencing options</i>	12
5. <i>Consent</i>	14
C. ROLE OF THE DV LAW IN PROSECUTION	14
D. KEY OBSERVATIONS AND RECOMMENDATIONS	17

INTRODUCTION

Domestic violence is an enduring and pervasive problem in Timor-Leste, causing harm to and violating the individual rights of an alarmingly high number of citizens. The broader community suffers through the negative effects to entire families, the health care system, and economic productivity. For over a decade East Timorese civil society has advocated for domestic violence victims to be better protected and able to access effective assistance, and a stronger systemic approach to punish and deter people who commit domestic violence.

In 2003 work on a draft law specifically addressing domestic violence began, culminating in a draft law submitted to Government for approval in 2005. Without a corresponding criminal law which criminalized domestic violence, the draft law lacked sufficient force and was shelved. Four years later, the 2009 East Timor Penal Code criminalized some domestic violence acts and paved the way for the draft law on domestic violence to be reconsidered.

In its Justice Update of March 2010, JSMP discussed the urgency and rationale behind the DV law. Firstly, Timor-Leste has an obligation under its Constitution and numerous international human rights conventions to ensure gender equality and protection against unlawful or harmful treatment. Pursuant to Article 9(2) of the Constitution of Timor-Leste, the government is bound to apply international treaties it has signed within the domestic system.

Accordingly, the government is required to guarantee dignity and rights and freedoms as identified in the Universal Declaration for Human Rights, the Convention on International Convention on Civil and Political Rights (ICCPR), the Convention on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of Discrimination Against Women (CEDAW) and its Optional Protocol. All of these international instruments emphasise the importance of physical integrity and require the prohibition and punishment of practices and actions which amount to domestic violence.

Secondly, JSMP identified the high rate of domestic violence in Timor-Leste, problems with social attitudes towards violence against women, and its mediation through traditional processes. In fact, in 2009 the CEDAW Committee noted that women in Timor-Leste face practical barriers in accessing justice to protect their rights, and that various forms of violence against women are prevalent in the community.¹ It urged the speedy enactment of a law against domestic violence as a mechanism to better protect women against violence.² JSMP echoed this sentiment, because the vulnerability of women and children in Timorese society calls for a specific law to be used as a tool against domestic violence.

On 7 July 2010, the Law Against Domestic Violence (DV Law) was promulgated in the *Jornal de Republica* of Timor-Leste, and the Government turned to implementing its provisions.

¹ Paragraph 29, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, 7 August 2009, CEDAW/C/TLS/CO/1.

² Ibid., Paragraph 30.

While JSMP applauds the introduction of the DV Law as a tool to both change the behaviour of individuals and better assist victims of domestic violence, understanding the new legal framework is critical to properly achieving these objectives.

Accordingly, the purpose of this report is to critique the DV Law and provide suggestions about the preferred interpretation of certain provisions, phrases and words. The report does not excerpt or exhaustively discuss every article in the DV law, but focuses instead on key provisions, ambiguous terminology and the possible implications of specific interpretations. Articles establishing assistance services for victims are not dealt with except in passing, because they are conceptually self-explanatory and pragmatic in intent.

It is hoped the analysis and recommendations will be helpful for all stakeholders in the prosecution of DV crimes: government, judges, public prosecutors, public defenders, lawyers, health professionals and other service providers. The recommendations are, however, suggestions only intended to stimulate discussion and promote further action to better achieve the purposes outlined in the DV law.

This report first interprets and critiques the DV Law, with a particular focus on definitional provisions, underlying principles, and the proper use of information. Second, the DV Law is analysed with respect to criminal issues, including the historical context, the types of actions which constitute crimes, the definition of the victim, sentencing options, and confidentiality and consent. Third, the role the DV Law may play in prosecution is considered, including possible practical challenges. Finally, key observations and recommendations are extracted from the analysis for relevant organs to consider in improving the efficacy of the DV Law.

A. INTERPRETATION AND CRITIQUE OF THE LAW

1. Interpretation of definitional provisions

As outlined in Article 1 of the DV Law, its three-fold purpose is to prevent domestic violence, as well protect and assist victims of domestic violence. The concept of domestic violence is defined in Article 2, and differs in its categorization of types of domestic violence from the draft originally commented on by JSMP in March 2010.

According to JSMP, Article 2.1 defines the scope of acts constituting domestic violence in a manner that properly considers the underlying complex social relationships. In particular:

- a) “any act or a result of an act or acts” acknowledges that domestic violence can consist of one act only and may directly, or indirectly, cause harm;
- b) Not requiring cohabitation takes into account that although family members may not live in the same house they can nevertheless commit domestic violence because it is characterized by the familial-type of relationship. This is particularly appropriate in the East Timorese context where extended family members (by blood or marriage or

- de facto) may spend considerable time in houses in which they do not live permanently; and
- c) The inclusion of non-physical types of abuse such as threats, intimidation, insults, coercion and harassment is to be commended, as such behaviour frequently coincides with physical acts constituting abuse, and can be equally humiliating, demeaning and disempowering for the victim.

Article 2.2 (a) defines physical violence as ‘any conduct which offends bodily integrity or physical health’; this is sufficiently all-encompassing to ensure no physical act is excluded from this definition, and an improvement on the draft definition. JSMP interprets the phrase “offends bodily integrity” to mean interfering with an individual’s autonomy over his/her body, such that it includes acts which may not directly affect health but involve involuntary acts or physical experiences by the victim.

Similarly, defining sexual violence as a distinct form of violence defined in Article 2.2(b) is an improvement on the draft law, which included sexual violence in Article 2.2(a) as a form of physical violence. JSMP regards it critically important that marital sexual violence is explicitly recognized; that is, the law recognizes sexual violence is possible even within a marriage. While such a concept may seem obvious, because of the cultural values and practices, and the prevalence of different forms of domestic violence within Timor-Leste this inclusion may prove very important for prosecutors and victims alike.

The definition of sexual violence in the DV law is more specific than the UN definition: “[any] violence, physical or psychological, carried out through sexual means or by targeting sexuality”.³ The most significant aspect of the UN definition which should be implied in the interpretation of Article 2.2(b) is the targeting of sexuality as a form of violence. Given Timor-Leste’s religious and traditional culture, sexual minorities may be at particular risk of domestic violence on the grounds of their sexuality, so violence that targets sexuality should be understood to fall within the scope of the DV law.

JSMP also regards it important that sexual violence explicitly includes conduct ‘which limits or nullifies the exercise of sexual and reproductive rights’, as these rights are internationally regarded as fundamental and inextricably linked to human dignity and autonomy. JSMP notes that sexual violence typically includes a number of acts not mentioned in the DV law, but which should be understood as constituting sexual violence in Timor-Leste. The generally understood forms of sexual violence include: sexual harassment, verbal abuse, leering, threats, exposure, unwanted touching, incest, rape, mutilation and ritual abuse.

JSMP welcomes the more extensive definition of psychological violence in the final version of Article 2.2(c) compared to the draft DV law. The amended article better captures the numerous methods and outcomes of psychological abuse. Further, the phrase “or

³ United Nations, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur (New York: United Nations, 1998), E/CN.4/Sub. 2/1998/13, pp. 7-8.

otherwise adversely affecting psychological health and self-determination” ensures that psychological violence can be legally recognized even if it involves behaviour falling outside the list in the DV law. For example, behaviour that intentionally seeks to exploit the particular fears of a victim to provoke psychological distress may not easily be categorized within the listed forms of psychological violence, but the effect of causing trauma to the victim is nonetheless easily recognizable as “adversely affecting the psychological health and self-determination” of the victim. Economic violence under Article 2.2(d) is also an important inclusion in the East Timorese context because of the large gender disparity in economic capacity and relative economic power.

The relationships to which the DV law applies are defined in Article 3. JSMP believes this article should be interpreted as broadly as possible to ensure that all vulnerable parties in relationships that can be characterized as domestic are legally protected. For example, JSMP approves of the inclusion of former spouses in Article 3(a), as it recognizes that a power imbalance and familial characteristics may exist between ex-spouses, even after their partnership is legally dissolved.

Further, JSMP believes that a broad interpretation is particularly important with respect to Article 3(b), which refers to “people who live or have lived in conditions similar to that of spouses, even without cohabitation”. First, this protects those who live together without being legally married, which is important. Second, it can include not just heterosexual couples, but also homosexual couples. Irrespective of conservative opinions from the church and some parts of Timorese society about the appropriateness of such relationships, JSMP believes homosexuals should not be discriminated on account of their sexuality, and therefore must be equally protected against domestic violence.

The reference to ascendants and descendants in Article 3 (c) ensures that different generations are equally protected, appropriate to the Timorese culture in which extended family members may live together, work with each other and otherwise spend significant time in each others’ households.

Finally, JSMP notes that individuals who perform continuous and subordinate domestic labor activity are also considered family for the purposes of the DV law. JSMP regards this as an appropriate inclusion, because there are many situations where non-family members may live in the family household or spend a significant time working in a household, such that they are also particularly vulnerable to domestic violence and in need of protection.

2. Principles

While the principle of equality is straightforward, in light of the need to ensure total equality, JSMP suggests that the terms “sexuality and sexual orientation” should be implied in Article 4, consistent with international legal principles of non-discrimination⁴ and equality.⁵

⁴ See Article 2 of the ICCPR

⁵ See Article 26 of the ICCPR.

JSMP recognizes the role the principle of consent plays in providing services to support the victim, the importance of protecting young people and people who lack capacity to give consent. However, JSMP believes it is also important to recognize that in relationships with significant power imbalances where domestic violence occurs, determining whether a victim is really 'freely withdrawing his/her consent' according to Article 5.6 will be difficult as he/she may be subject to pressure from other individuals.

For example, the police will be unable to intervene in a situation where it is unclear if there is a crime to be prosecuted unless the victim consents to this intervention. In ambiguous and emotionally charged situations where there is a power imbalance between parties, it is highly likely that the vulnerable party will be too intimidated to grant police consent to intervene, thereby defeating the purpose of the law. JSMP suggests that in situations where it is uncertain if the withdrawal of consent to the intervention is 'free' or not, service providers are required to investigate this issue and document reasons for determining withdrawal is done freely before terminating any intervention. Further, in a volatile situation, where service providers (police or otherwise) believe a threat to the victim's safety is imminent, immediate protection of the victim should be the highest priority.

Further, although Article 5.2 is consistent with Article 47 of the Penal Code, Article 5.5 is not. JSMP recommends that the determination of maturity of a victim under 12 years be conducted by an independent official authority such as a court or social service, on the basis of an assessment of the victim by a qualified professional, to ensure the victim's wellbeing is not compromised because of his/her immaturity.

JSMP also recommends that Article 5.5 procedures related to children's consent comply with Article 12 of the Convention of the Rights of the Child (CRC), which Timor Leste is obliged to implement:

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Most importantly, JSMP recommends in accordance with Article 3(1) of the CRC:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

JSMP also notes government obligations pursuant to Article 9 of the CRC:

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

More generally, JSMP urges that all interactions with child victims of violence comply with all provisions of the Convention on the Rights of the Child.

JSMP applauds the inclusion of professional obligations and government responsibilities to raise awareness, disseminate information and educate school students about domestic violence. The training of heads of Sucos and Villages and police officers will be critical in changing community attitudes and tolerance to domestic violence and deterring violent behavior. JSMP notes the wording of Article 8 ensures pre-existing professional obligations such as confidentiality and fiduciary duties are preserved.

3. Support

JSMP hopes that while the government has the primary responsibility for the National Action Plan pursuant to Article 13.1, it will consult with NGOs that work with domestic violence victims, women and in social services. For example, JSMP's WJU and VSS, Fokupers, the Alola Foundation, and Rede Feto all have experience and knowledge in providing services to victims, and the associated challenges.

JSMP commends the establishment of services to assist victims and suggests that the government network of support centers established by the DV law integrate existing services performing similar functions by NGOs. This will ensure pre-existing initiatives are properly supported, and all victims receive a consistent level of service.

4. Proper use of information

Article 19 and its guarantee of confidentiality and privilege is a critical aspect of the information sharing regime established by the DV law. It ensures the obligation to communicate circumstances involving domestic violence does not jeopardize the rights or

wellbeing of the victim, and is consistent with the current practice of NGOs such as FOKUPERS, PRADET and the WJU of JSMP. Moreover, it mirrors the obligations government service providers have to inform the police when a crime is suspected to have been committed; since domestic violence is clearly a crime, it is entirely logical that a similar obligation exists in this circumstance. Article 20 and 21 regarding emergency and direct assistance also reflect the roles and practices of existing organizations which assist victims of domestic violence.

Nevertheless, JSMP acknowledges that the balance between maintaining confidentiality of victims and complying with mandatory reporting requirements is difficult to maintain, and critical for the safety and protection of victims. This applies to obligations of specialized services (Article 21(a)), hospital services (Article 22 (d)), social assistance services (Article 23(c)) and lawyers (Article 25(b)).

JSMP approves of the Code of Professional Ethics that applies to certain service representatives, and urges all services interacting with victims to formulate standard practices regarding the nature of information to be communicated to law enforcement officers or prosecutors. In particular JSMP notes that reception centers are obliged to communicate circumstances of domestic violence victims to the police or prosecution with respect for confidentiality, analogous to the relationship between a physician and patient (Article 19).

While there is not a similar qualification applicable to emergency assistance services, JSMP advises that Article 20(3) dealing with communication between emergency assistance services and police be interpreted such that the communication is limited to what is required for appropriate police intervention only. Emergency service providers should not be obliged, nor permitted, to provide any information not directly required for intervention, which they may possess by virtue of previous knowledge of the victim. For example, if the police are required to remove the perpetrator of violence, information regarding the nature of the violence exerted, history of violence and outcomes of previous incidents is not necessary and should not be disclosed, as it could prejudice the rights of the victim.

Article 22(d) does not delimit which ‘facts of the case’ are to be immediately reported by the hospital services to the police or Public Prosecutor by hospital services. Again, JSMP urges that such an obligation be limited to information that is specifically required for the police or public prosecutor to perform their immediate duty in arresting a suspect or initiating an investigation. Hospital staff should be provided with procedural guidelines about what information is required to be reported for this purpose to better protect victims’ rights. Similarly, a template of the report required to be sent to authorities pursuant to Article 22(e) should be distributed among hospitals to ensure all the required information, and no unnecessary information, is reported. JSMP supports the explicit inclusion of the Code of Professional Ethics to govern the reporting procedures of social assistance services pursuant to Article 23(c).

Article 24 governing police assistance is exemplary in its requirements of referring victims to shelters, ensuring victims receive medical and psychological assistance, and a summary

report within five days. JSMP hopes that these requirements can be met, and encourages the government to invest resources in services, including the police to ensure adequate services exist for victims' care. Article 24(f) requires the police to inform the Public Defender if the victim cannot retain a lawyer, however JSMP is concerned about conflicts of interests if a victim is referred to a Public Defender and questions whether informing the prosecutor of this fact would be more appropriate. While Public Defenders represent individuals who do not have financial means to retain a lawyer, these are generally defendants in civil or criminal cases who require representation in order to receive a fair trial. Given the limited resources available for public defence lawyers, it is likely that such conflicts of interest will arise, to the detriment of vulnerable individuals the victims of domestic violence.

JSMP understands that in March 2010 a Legal Aid Law was drafted to provide state-financed legal assistance in either criminal or civil proceedings. However, the draft has not been debated either in National Parliament or in the Council of Ministers; there are still many unanswered questions about levels of funding, the scope of legal assistance, and how matters are distributed between Public Defenders and Legal Aid lawyers. The success of a state Legal Aid system depends on ensuring that the truly disadvantaged have access to proper and accurate legal advice and representation. This in turn, depends on adequate resources, training procedures, as well as recognition and enforcement of the right to legal assistance by relevant authorities, including the judiciary and the police. JSMP urges the government to develop a comprehensive system as a matter of priority, because this will reduce the chance that conflicts of interests arise for Public Defenders.

Similarly, Article 25.1 requires the victim be accompanied by a lawyer or a public defender in all legal proceedings; Article 25.2 outlines the related responsibilities. JSMP is concerned that the small pool of public defenders gives rise to the possibility that defendants charged with crimes of domestic violence will be represented by a Public Defender because of their limited financial resources, and the victim will also be unable to pay for a lawyer and entitled to legal assistance from a Public Defender under the DV law. Since there are only 20 Public Defenders in Timor-Leste, it is inevitable that there will not be enough Public Defenders for both victims and defendants in the districts to receive legal assistance without conflicts of interests arising. JSMP recommends that legal assistance for the victim be channeled through the prosecutor's office, rather than through Public Defenders.

Disturbingly, the VSS unit of JSMP reported earlier in 2011 that some judges are currently refusing to recognize victims' rights to legal assistance and representation; some trials have been closed to victims' private lawyers, preventing them from representing their clients' interests. JSMP suggests that judges need to respect the role and permit the participation of victims' lawyers, whether they are private lawyers or Public Defenders. This will reinforce the public's sense of universal access to legal representation and to justice.

Article 28(a) also refers to the services of the Public Defender to assist victims who cannot afford a lawyer, as part of assistance provided by the Public Prosecutor. Again, JSMP urges caution in the regulation of this service. While private lawyers are often retained in a Public

Defender capacity, particularly in rural areas, the need to ensure conflicts of interest do not arise is particularly pressing.

5. Maintenance

JSMP encourages the provision of maintenance as outlined in Articles 29 to 34, recognizing that such arrangements require substantial resources to monitor, enforce and regulate. JSMP is cautious about Article 31.1, which allows the maintenance amount to be defined by an agreement between the offender and the victim, because of the inherent power imbalances which exist in such relationships. Since Article 32.3 provides that the Ministry of Social Solidarity provides maintenance in cases where the defendant cannot, JSMP recommends the same Ministry have oversight of maintenance agreements concluded independently, to ensure the victim receives the correct amount of maintenance from the offender. Especially since the draft Civil Code is yet to be properly reviewed and put before Parliament, JSMP believes it is important Parliament ensures the final Civil Code provisions which regulate parental responsibilities are consistent with the DV Law with respect to maintenance.

B. CRIMINAL ISSUES

This area of the law is complex and requires detailed discussion to be fully understood. There are a number of issues addressed by both laws. The first is the type of act that constitutes the crime; the second is the definition of the victim, and the third is the punishment range in terms of imprisonment.

1. Pre-existing criminal acts

Decree Law 19/2009 approving the Penal Code explicitly recognized a limited form of domestic violence through two articles. Article 154, titled “Mistreatment of a spouse” provides:

Any person who inflicts physical or mental mistreatment or cruel treatment upon a spouse or person cohabiting with the perpetrator in a situation analogous to that of spouse is punishable with 2 to 6 years imprisonment, if no heavier penalty is applicable by force of another legal provision.

Article 155 provides penalties for mistreatment of a minor including in domestic cases. The provision stipulates that any person who inflicts mistreatment to a minor under the age of 17 years old, having guardianship or custody is punished with a maximum of 3 years of imprisonment. If the minor is a descendant, collateral, in-law to the 2^o degree or adopted is punished with a maximum of 4 years imprisonment.

Article 156 provides that if serious offences to physical integrity are committed, the range of sentences is three to ten years imprisonment, and if death occurs the punishment is 5 to 15 years imprisonment.

2. Acts constituting crimes

Article 35 of the DV Law confirms domestic violence crimes are as defined in Articles 153 to 156 of the Penal Code, as well a number of other criminal acts if they occur in the context of a relationship identified in Article 2 of the DV Law. Article 36 confirms that crimes of domestic violence are public crimes.

Under Article 154 of the Penal Code, mistreatment of a spouse includes physical, mental or cruel types of treatment; this contrasts with Article 2 of the DV law which specifies physical, sexual, psychological and economic violence. This could suggest that some domestic violence is criminal (if the behaviour is included in the Penal Code) but some domestic violence is not criminal (if the behavior is included in the DV law but not the Penal Code); for example, behaviour which qualifies as economic/property violence under Article 2 of the DV Law.

JSMP believes that to ensure there is no confusion, the term *cruel treatment* in Article 154 of the Penal Code could be interpreted to include any behaviour in Article 2 of the DV law that is not already covered by Article 154 of the Penal Code. Otherwise the goal of the DV law in making domestic violence a public crime is defeated, since certain domestically violent behaviour will not be able to be prosecuted as public crimes pursuant to the Penal Code.

3. Definition of the victim

The definitions of a spouse and a minor according to Articles 154 and 155 of the Penal Code are different to the definition of family in Article 3 of the DV Law. Again, to ensure those suffering domestic violence are protected it is important these differences are resolved. For example, Article 3 includes people who have lived in conditions analogous to spouses even without cohabitation, but Article 154 requires cohabitation. JSMP recommends Article 3 of the DV Law be adopted in preference to Article 154 of the Penal Code to ensure the broadest group of people is protected.

4. Sentencing options

Article 139 of the Penal Code, which outlines circumstances of aggravated homicide, stipulates a sentence of 12 to 25 years imprisonment “if the victim is a spouse, descendant, parent, collateral or similar relation to the second degree, a person adopted by the perpetrator or a person living with the perpetrator under analogous conditions where a hierarchical, economic or labor dependency exists”. It is deeply regrettable that Article 156 stipulates that if death is caused due to a spouse or minor, the sentence range is 5 to 15 years. Thus, if the charge is that death was caused through domestic violence, the minimum sentence is 7 years less, and the maximum 10 years less, than if homicide is charged. This is important because Article 15 (3) of the Penal Code provides that intent includes:

3. Whenever an act that constitutes a defined crime is committed as a possible consequence of the conduct of a perpetrator, and the perpetrator acts while accepting said possibility, he or she acts with intent.

This means that in the case of domestic violence, if death was a possible consequence and the perpetrator accepted that possibility he or she committed murder. The lower maximum sentence if death occurs after abuse gives the impression causing death in the context of mistreating a spouse or minor is somehow less serious than homicide where the intent was similar. JSMP recommends that where death is caused in a domestically violent situation, the more serious charge under Article 139 should be prosecuted in preference to Article 156. Otherwise, the range of sentences will systematically be lower for homicide within a domestic context, and the seriousness of domestic violence undermined.

Article 37 of the DV law makes available other coercive measures to the trial judge, which JSMP sees as prudent and necessary to ensure the ongoing safety of DV victims. However, it should be noted that such measures may be difficult to enforce because of the familial context of the two involved parties. Nevertheless, JSMP encourages judicial parties to use these measures as an additional barrier to recurring violent behaviour, and a mechanism which can be triggered by the victim in the case he/she is contacted by the perpetrator. There are a range of coercive measures that can be developed, including prohibition of telephone, written or physical contact and geographical or movement restrictions. Breaches of coercive measures should be regarded as criminal acts themselves, so that the offender knows that punitive consequences are attached.

It may be possible for the judicial system to encourage the involvement of community leaders in the development of coercive measures that adequately protect the victim, monitoring the perpetrator's compliance, and ensuring that breaches of coercive measures are followed up within the justice system. However, it will be important to ensure that such community initiatives are consistent with the DV Law and effectively protect the victim.

JSMP is concerned with the inclusion of a fine as an alternative penalty as defined in Article 38 of the DV law. Judges already have the discretion to choose from a range of penalties, including a fine, so explicitly including the fine penalty is not only unnecessary, but it could lead to the perception that crimes of domestic violence are not that serious. Moreover, given the economic dependence of women on their husbands in Timor-Leste, a fine will inevitably impact negatively on women and the whole family, not just the husband defendants. JSMP would encourage the courts to use other sentences such as community service and suspended sentences in lieu of financial penalties.

JSMP recognizes that in some cases, fines have been paid by the perpetrator to the victim directly, rather than to the court or the victim's family. If a fine is administered, then this practice is preferable, but only if the relationship between the perpetrator and victim does not render the fine meaningless because the perpetrator controls the finances of the victim and the family. Given the economic disparity between men and women in Timor-Leste, JSMP is concerned that a fine is rarely an appropriate and meaningful measure of punishment for domestic violence.

JSMP regards Article 39 providing for witness protection as critical for the success of the DV law and prosecution of DV crimes. Fear of a violent family member will be a significant obstacle to prosecution and reason for withdrawal of statements by victims and family

witnesses. While domestic contexts will create additional challenges in appropriately formulating and applying protection measures, JSMP believes resources should be allocated for this purpose as a matter of priority.

To this extent, JSMP notes that the Law on Protection of Witnesses is particularly relevant and helpful in proceedings concerning domestic violence. For example, Article 4 of this Law permits concealment measures for witnesses in judicial proceedings where, according to Article 1(1):

[Their lives, physical or psychological integrity, freedom or assets of considerable value are jeopardized due to their contributing to ascertaining the proof of facts or to the discovery of the truth which constitute the object of the proceedings.

Security measures and the use of teleconference facilities are also included in the Law on Protection of Witnesses. Given the context in which domestic violence is committed, it is highly likely that although protection is an 'exceptional' measure according to Article 1(3), it will be justified where other family members are likely to possess information required in court proceedings.

5. Consent

The issue of the victim's consent becomes important in criminal cases. The prosecution of a public crime is conducted by the state against a defendant. This means that even if the victim decides after the prosecution has started, to withdraw claims of DV as is their right under Article 5 of the DV law, the state may choose to continue with the prosecution. The prosecution will however encounter difficulties if the victim chooses to not participate in the DV claim being prosecuted.

As JSMP has previously noted, Article 125 of the Criminal Procedure Code is still problematic with respect to consent in criminal cases involving family members: it permits victims and witnesses who are related to the accused to choose not to give evidence. Again, in the context of domestic power imbalances giving rise to violence, JSMP believes Article 125 undermines both the capacity for the state to adequately protect family member victims of crimes, and the criminal justice system itself. If Article 125 remains in its current state, JSMP would urge the requirement of judicial instructions to the witness that Article 125 does not refer to "a right to remain silent", which only applies to the perpetrator. The instructions should explain that it is a choice, and the consequences of exercising that choice not to give evidence: that the judicial system is unlikely to be able to convict the perpetrator, or protect the victim in the future.

C. ROLE OF THE DV LAW IN PROSECUTION

The introduction of the DV law means the prosecutor should be aware of a number of issues when prosecuting crimes:

The relationship of the victim to the defendant: even if the relationship qualifies as family only within the DV law, but not as a spouse or minor under the Penal Code, it is important that the prosecutor highlight the domestic nature of the relationship so that the domestic violence situation is recorded. It is important that Timor-Leste citizens can see that domestic violence is punished, even if the crime falls outside the scope of Articles 154 and 155, and is prosecuted under other articles of the Penal Code.

The use of Articles 153-156: unless necessary, the prosecutor may choose not to prosecute domestic violence cases under these articles of the Penal Code, because the range of sentences is lower than for other crimes in the Penal Code. Defendants should not be seen to get lower sentences because the prosecution occurs after a long history of domestic violence.

Evidence: given the nature of domestically violent relationships, prosecutors will be aware of and should be prepared for victims withdrawing their statements and their claims. It is very important in prosecution of violence within a domestic context, for all other objective evidence to be collected to support the allegations, including physical and forensic evidence, and statements from health professionals, community leaders, neighbors and lawyers.

Obligations: prosecutors should be familiar with the DV law, and the services it refers to, so they can fulfill their obligations under Article 28 of the DV law to provide assistance and refer victims to services.

Penalties: prosecutors should in general be against the use of a fine as a penalty in domestic violence cases, not only because they impose further hardship on the family, but also because it does not adequately reflect the seriousness of domestic violence as a crime. Prosecutors should know Articles 37 and 38 of the DV law, because these penalties may be very appropriate in domestic violence cases. Article 37 details a range of coercive measures while Article 38 refers to the possibility of fines, agreements to undergo treatment, follow-up support services, and the prohibition of future contact between the perpetrator and the victim.

Challenges

Victims' reluctance to continue with DV claims could be due to economic dependence on the defendant, fear of being outcast by their family, fear of retaliation from the defendant, fear for the safety of children or the belief that prosecution will not help. These challenges can only be overcome if the services mentioned in the DV law are provided for victims. Prosecution is an important part of the process in reducing domestic violence, but the other services to assist victims are equally important, for the victims and for the success of the prosecutions. Without access to shelters and other services, victims will continue to choose to live with domestic violence because they fear they cannot survive any other way.

The judicial system itself poses challenges for domestic violence victims who are generally already disempowered socially and economically. The handling of complaints by police

officers, lawyers and hospital staff may not be sensitive to the victims' fears and situation, or compliant with the law, if the law is not adequately disseminated and explained to service providers. To this extent, it is important that police, lawyers and health professionals are required to act professionally in accordance with the law, irrespective of their own attitudes, which may not be positive towards a formal prosecution process.

Once a case reaches the Office of the Prosecutor, and the court system, investigation and processing times for cases continue to take many months and years. While the national justice system is still developing systems to properly and efficiently manage cases, time delays are particularly harmful for victims of domestic violence, who may economically, logistically and emotionally be unable to live with an uncertain lengthy criminal process. There is an additional risk that unless health, medical, social and legal assistance is properly available to victims, that they will not have the requisite knowledge, conviction and logistical support to continue with a court case.

Beyond the self-evident importance of the Office of the Prosecutor and judges being properly trained on the conduct and importance of domestic violence cases, is the capacity for judicial proceedings to adequately uncover the truth. The large majority of Timorese citizens does not understand or speak Portuguese, the official language of the courts; this severely undermines extent to which victims can understand and actively participate in court proceedings. If a judgment is delivered in their favour, there must be effective enforcement of the ruling in the victim's home and community. Without proper human resources to follow-up and enforce judgments, defendants and victims alike will have no faith that the new law will change their experience of domestic violence. These challenges are not exhaustive, but rather a snapshot of the issues associated with the new law which may prove to be obstacles to its proper implementation.

D. KEY OBSERVATIONS AND RECOMMENDATIONS

- The term *cruel treatment* in Article 154 of the Penal Code should be interpreted broadly to include acts constituting types of violence defined in Article 2 of the DV Law which are not included explicitly in the Penal Code, to ensure legislative consistency and the capacity to prosecute these crimes of domestic violence.
- The definition of family should be construed broadly so as to protect the widest range of vulnerable individuals who are victims of domestic violence. To do otherwise would be to allow crimes and the violation of human rights to go unpunished in breach of the government's obligations to all its citizens.
- All service organizations interacting with victims of domestic violence should develop procedural guidelines regarding: reporting incidents of domestic violence to law enforcement authorities; and ensuring victims' rights to privacy and confidentiality are maintained.
- Caution should be exercised and procedures developed in situations where the victim wishes legal assistance and conflicts of interest regarding Public Defenders are a possibility, particularly in remote areas. Given the vulnerable position of domestic violence victims, such procedures should ensure their access to impartial legal assistance, notwithstanding the fact that the Public Defender may be retained to represent the defendant.
- Courts should expansively use Articles 37 and 39 to ensure restrictions of offender's behaviour and protection measures for the victims' benefit are effective. These are not only an intermediary step before criminal prosecution and punishment, they are also absolutely critical to the success of the DV law; if victims are not adequately protected by the state from the offender, they will not give evidence in criminal proceedings.