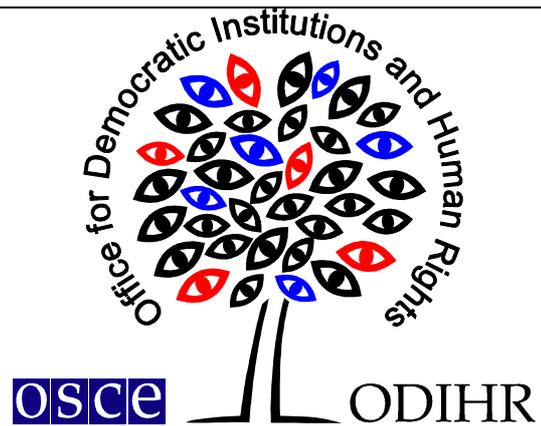


Warsaw, 15 October, 2009

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**Final  
Opinion  
On the Draft Law of  
The Republic of Kazakhstan  
On Prevention of Domestic Violence.**

**based on an English translation of the laws and draft laws  
commissioned by the ODIHR and the OSCE Centre in Astana.**

**TABLE OF CONTENTS**

- 1. INTRODUCTION**
- 2. SCOPE OF REVIEW**
- 3. EXECUTIVE SUMMARY**
- 4. ANALYSIS AND RECOMMENDATIONS**
  - 4.1 The Place of the Draft Law in the Hierarchy of the Extant Legal Order
  - 4.2 Purpose
  - 4.3 Chapter 1: Main Concepts/General Provisions
  - 4.4 Chapter 2: Functions and Powers of Entities Involved in Prevention of Domestic Violence
  - 4.5 Chapter 3: Domestic Violence Prevention Measures

## **1. INTRODUCTION**

1. *By letter dated 26 June, 2009, addressed to the OSCE Centre in Astana, the Deputy of the Majilis of the Parliament of the Republic of Kazakhstan requested the review of four pieces of draft legislation related to prevention of Domestic Violence.*
2. *The request was made in the context of the continued work on the package of laws related to domestic violence being developed in the country. The process of drafting of the said legislation by the authorities of Kazakhstan has been accompanied and assisted by the OSCE Centre in Astana and the OSCE Office for Democratic Institutions and Human Rights (hereinafter, “OSCE ODIHR”) through previous recommendations, contained in preliminary opinions and consultations with the authorities.*
3. *As previously, the OSCE Centre in Astana, has referred this request of 26 June, 2009 to the OSCE ODIHR for opinion. The previous opinions<sup>1</sup> of the OSCE ODIHR have been attached for information as Annex 2, 3, and 4 hereto. The said opinions contained in the annexes, include also detailed information on the process and consultations which have taken place to date.*
4. *The Opinion contained herein, is a review of the draft Law on the Prevention of Domestic Violence (hereinafter referred to as “the Draft Law on DV”, the “Draft Law” or “the Draft”), in the revised version dated 8 June, 2009 which was developed following a workshop in Astana on 1 June, 2009, where recommendations and practice of other OSCE participating States were shared. The text of the said 8 June, 2009 version of the Draft Law, is provided as Annex 1 hereto. The Draft Law passed through the first reading of the parliament of the Republic of Kazakhstan thereafter.*
5. *Finally, while the request of 26 June, 2009, referred to above, concerned also the draft Law on Crime Prevention<sup>2</sup>, and in consideration of the fact that the two drafts concern connected, but also very distinct areas of the law, the OSCE ODIHR provides its recommendations in two separate opinions.*

## **2. SCOPE OF REVIEW**

6. *The scope of the Opinion includes the draft Law on Prevention of Domestic Violence, in the version of 8 June 2009, constituting Annex 1 hereto.*
7. *The Opinion will not repeat the recommendations that have been articulated in prior ODIHR opinions attached as annexes 2, 3 and 4 hereto, and which remain applicable, instead it will focus on the revision made to the Draft Law.*

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<sup>1</sup> ODIHR Opinion-Nr.:GEND-KAZ/115/2008 of 22 December, 2008, ODIHR Opinion-Nr.:GEND/KAZ/115/2008/rev.1 of 20 February, 2009 and Opinion-Nr.:GEND-KAZ/133/2009 of 25 May, 2009.

<sup>2</sup> The subject of ODIHR Opinion-Nr.: CRIM-KAZ/140/2009 of 24 September, 2009.

***OSCE ODIHR Final Opinion on the Draft Law of the Republic of Kazakhstan on Prevention of Domestic Violence***

8. The Preliminary Opinion has been drafted to serve as a set of considerations which should be taken into account in light of international standards and practice in the field of prevention of domestic violence.
9. The Opinion has been developed mainly for the purpose of consultations with the authorities of Kazakhstan with a view to assistance in refining and improving the Draft Law.
10. The Opinion is based on unofficial translations of the Draft Law. Errors from translations may result.
11. In view of the above, the OSCE ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Draft Law that the OSCE ODIHR may make in the future.

**3. EXECUTIVE SUMMARY**

12. The revised version of the Draft is welcomed, as it introduces some important amendments to the previous versions subject to OSCE ODIHR Opinions. The Draft Law constitutes a significant step in addressing the occurrence of domestic violence in Kazakhstan. It is also welcomed that the Draft Law in particular, has been developed in a consultative and open process. While the OSCE ODIHR is aware that, as mentioned above, the Draft Law has passed through the first reading in the Parliament of the Republic of Kazakhstan, nevertheless, the following observations are made:
  - A. The definition of domestic violence appears much improved, however, it nevertheless appears to limit acts of domestic violence to persons who share a domicile. An expansion of the context within which domestic violence, could be committed should be considered; [par 18,19,20]
  - B. the definition of ‘victim’ of domestic violence is welcomed; [par 21]
  - C. the principles of the Draft Law in Article 3 are recommended to be clarified; [par 23]
  - D. while Article 5 of the Draft Law is welcomed, it is not possible to assess the types of assistance measures that would be applicable and available to victims of domestic violence under the Law on Social Services. What is recommended however, is to ensure that these services and assistance take into account the specific nature of domestic violence related crime; [par 25]
  - E. while the Draft Law on DV no longer contains a provision on the provision of official notice to perpetrators of domestic violence, the measure of “official notice” remains on Article 24 of the Draft Law on CP and thus applicable to perpetrators of domestic violence. It is recommended that the measure be deleted from the operation of both the draft Law on DV and the draft Law on CP; [par.26]

- F. the functions and powers of various authorities involved in prevention of domestic violence are welcomed as positive in general. However, it is recommended that these provisions are made more precise in assigning powers and competences to different bodies; [par 27, 28, 29, 30, 34, 35, 36]
- G. it is considered as particularly important for the Draft Law to clearly outline the powers and competences of bodies of interior. This is especially important in relation to the issuance of protection orders; [par 31, 32]
- H. mandatory reporting of instances of domestic violence should only be applicable to victims who are minors. Reporting of domestic violence occurring against adult victims, is recommended to be on their consent; [38, 39]
- I. it should be made clear in the draft Law that “preventative interviews” do not constitute an alternative to criminal or administrative responsibility for committed acts of domestic violence; [par 41, 43]
- J. protection orders, in as far as they are able to be issued immediately on interception of cases of domestic violence, are welcomed. [par 44]

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### **4.1 The Place of the Draft Law in the Hierarchy of the Extant Legal Order**

- 13. The issue of the placement of the Draft Law in the legal order of the legislation of Kazakhstan was raised in previous OSCE ODIHR analysis. The importance of a clear indication of whether or not the Draft Law constitutes “*lex specialis*” over other laws is of prime significance.
- 14. While Article 2 of the Draft Law, remains as in previous version of the Draft Law, Article 15 of the Draft Law expresses the supremacy of the “Law on the Republic of Kazakhstan on Crime Prevention” (currently in draft form and hereinafter referred to as, the “Draft Law on CP”)) as having superior operation over the Draft Law. The clarification is welcomed, in as far as Article 15 of the Draft Law provides certainty that the measures contained in the Draft Law on CP, are to be applied to perpetrators of domestic violence. As mentioned above, the recommendations of the OSCE ODIHR to the draft Law on CP are provided in a separate opinion.
- 15. In view of the above, it is understood that international instruments to which Kazakhstan is a party, the Constitution of Kazakhstan, amongst others, the Criminal Code and Criminal Procedure Code, the Administrative Offences Code, the Civil and Civil Procedure Code (based on Article 2 of the Draft Law) and finally, the draft Law on CP (based on Article 15 of the Draft Law) have supreme operation over the Draft Law on DV.

##### **4.2 Purpose of the Draft Law**

- 16. It is welcomed that the purpose of the Draft Law is now focused on the grounds and measures to be undertaken by the State and other organizations as

well as physical persons in the combat of domestic violence. The removal of a reference to ‘matrimonial relations’ is welcomed in particular, as it reflects the understanding that domestic violence may occur also outside of matrimonial relations.

17. It is also noted, that the purpose of the Draft Law is particularly important in the implementation of the provisions as well as, in the future in reviewing and assessing the operation of the law in practice. The scale and success in implementation of the draft Law, will be measured against its intended purpose.

### **4.3 Chapter 1: Main Concepts/General Provisions**

18. The definition of domestic violence appears to have been improved by including unlawful actions “in the field of family and domestic relations” which suggests that it would apply to a wider scope of persons than merely spouses or ex-spouses. This revision is welcomed.
19. Further to the above, it is positive that the definition of domestic violence contains includes not only acts, but also the “threat” of causing physical, psychological, sexual or economic abuse. It is however noted that the definition continues to focus on acts which are ‘deliberate’ on the part of the perpetrator.
20. The definition of family and domestic relations has also been revised and the revision has seen a change for the positive. However, the definition appears to continue to restrict domestic violence to violence which is committed by or between people living together in one house, or other domicile. Other (supreme in the hierarchy of legal acts) legislation does not provide for such limitation, for instance, Article 1 (1) of the Draft Law on Changes and Amendments to Some Legislative Acts of the Republic of Kazakhstan on Prevention and Suppression of Domestic Violence (hereinafter referred to as, the “Draft Law on Changes and Amendments”), which amends by addition to Article 7 of the Criminal Procedure Code of the Republic of Kazakhstan (1997) refers only to “family relationship”. Furthermore, Article 79-5 (2) of the Code on Administrative Offenses offers a definition of “family relations” which includes persons who live or have lived together, persons who are married, ex-spouses and close relatives. However, it is not clear whether this includes all persons having an intimate or sexual relationship, (including, persons involved in a significant romantic or sexual relationship or who have formerly been involved in a significant romantic or sexual relationship<sup>3</sup>) individuals who are family members based on adoption, custody or guardianship. Thus the limitation of domestic violence applying only to those living together as expressed in Article 1 (3) continues to be inconsistent with supreme acts.

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<sup>3</sup> See “U.N Framework,” a report of the 2008 United Nations expert group available at [http://www.un.org/womenwatch/daw/egm/vaw/legislation\\_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw/legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf).

21. The definition of ‘victim’ of domestic violence is welcomed in particular, since it includes the wording that a victim may be any person against whom domestic violence has been committed but also a person who has been realistically threatened with domestic violence. While it may be difficult to assess what constitutes a “realistic” threat, and this part of the definition may be considered to be revised, the provision is nevertheless welcomed.
22. It is understood that the removal of the definitions of “preventative record-keeping” and “preventative control” results from the alignment of the Draft Law on DV with the Draft Law on CP.
23. As mentioned by previous OSCE ODIHR Opinions, Article 3 introduces important principles in the prevention of domestic violence. This provision in the Draft Law, now includes two additional principles. One new principle is that of “support and maintenance of the family”. While preservation of family life should be protected and supported by the State, it should be stressed that the life and health of victims of domestic violence (rights, freedoms of persons also listed in the provision), should be the primary concern of the draft Law and maintenance of the maintenance of the family should be a secondary consideration.. The new principle of “individual approach to everyone who is in a difficult life situation” while altruistic, appears vague and it is not clear how this principle would operate in the context of the Draft Law and to whom it would apply.
24. The addition in Article 4 of the Draft Law, of education, public health, and social protection agencies in the prevention of domestic violence is welcomed.
25. The additional of Article 5 in the Draft Law is also welcomed. The provision is pivotal in the prevention of domestic violence. As has been repeatedly stressed in prior OSCE ODIHR opinions, while law enforcement is a legitimate goal of domestic violence prevention it is the protection offered to the victim that should be at the centre of the law enforcement effort. It is however, not possible to assess herein, the extent of the protection and assistance offered to victims, as Article 5 refers to the Law on Special Social Services. What may be suggested however, is that any provisions of the law which address victims of domestic violence, should be tailored to the specific nature of the crime and relationships within which the crime takes place.
26. While the Draft Law no longer includes a provision on “official notice” or warning given to the perpetrator, which is positive, it is understood that in accordance with Article 15 of the Draft Law on DV, Article 24 of the Draft Law on CP on “official warning on inadmissibility of crime prevention” remains applicable to perpetrators of domestic violence. In such case, the OSCE ODIHR continues, as previously to recommend the Draft Law, to exclude the possibility of “official notice” being provided in cases of domestic violence, in particular. In general, the provision of “official warning” for which appears to constitute a measure of repression, is also recommended to be removed from the draft Law on CP.

**4.4 Chapter 2: Functions and Powers of Entities Involved in Prevention of Domestic Violence.**

27. It is positive that the Draft Law introduces the power to consider reports by local representative bodies of reports on implementation of prevention measures (Article 7-1 par (1)). Furthermore, approval and control of local budgets in domestic violence prevention is also welcomed. However, it is not clear what the result of such “consideration” of reports shall have.
28. Further to the above, Article 7 -2 sets out the role of the local executive bodies. In this connection, it is unclear what purpose record-keeping on minors and problem families would serve. This paragraph (4) is recommended to be clarified.
29. It is not possible to comment of the provision of service that will be offered to victims of domestic violence, under Article 7 of the Draft Law, as this provision refers to the Law on Special Social Services of the Republic of Kazakhstan, which has not been submitted for assessment. However, the recommendation made above, in relation to Article 5 of the Draft Law, is equally applicable here.
30. While the provisions of Chapter 2 are welcomed, the duties and tasks remain very general. Setting out tasks and responsibilities of such a general nature, without an indication of reporting procedures (except for that mentioned above), time-cycles for reporting, and specific tasks assigned, as well as exactly the measures to be taken, risks that these provisions will remain on paper and become redundant. This is thus recommended to be made more specific, whether by virtue of the provisions of this Draft Law, or secondary legislation, as unfortunately, while “to carry out measures to prevent domestic violence” is a worthy purpose, it is not a task nor command, which would assign a task and responsibility. Legislation in general, should be a series of commands, rather than declarations of aims and purposes.
31. Article 9<sup>4</sup> of the Draft Law constitutes a pivotal provision of the Draft Law. Importantly, in contrast with previous versions of the Draft Law, it introduces new powers of the bodies of interior. It remains unclear however, which bodies of interior are being referred to in particular, in each case of the measures outlined. On the one hand, the provision refers to carrying out criminal prosecutions (paragraph 15) and on the other it sets out the task of ‘delivering the perpetrators to the bodies of interior’ (paragraph 9) and applying to the court for establishing special requirements to the behaviour of the perpetrator of domestic violence (paragraph 14).
32. Further to the above, while it is very positive that Article 9 introduced the possibility for issuance of protection orders (paragraph 10) and applying to the

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<sup>4</sup> Article 9, appears as Article 8 in the translation received – given that Article 7 precedes this provision and Article 10 follows, it is assumed that the provision on “authorities on bodies of the interior”, is intended to be Article 9 and is referred to in the translation as such.

prosecutor for the sanctioning of the prolongation of the protection order (paragraph 11) it is not certain whom of the interior bodies would have the power to issue such orders. It is assumed that the provision gives these tasks to the police, in which case it may be considered as positive.

33. As recommended in prior OSCE ODIHR Opinions, the possibility of immediate issuance of protection orders upon the interception of domestic violence, or threat of domestic violence, is the basic manner in which domestic violence (or further domestic violence) may be prevented and must be a tool available to the police. This is also reflected in Article 16 of the Draft Law, in more detail. Whereas, at this juncture, it is recommended to consider refining this article to include a specific reference to which body has this power (to issue protection orders) The Draft Law presents an excellent opportunity to outline the role and functioning of police in intercepting cases of domestic violence and protecting victims.
34. Carrying out criminological forecasting stipulated in Article 9, is also welcomed. One of the starting points in any crime prevention effort is to gather information about the crime and its occurrence. Again, it is emphasized that while the task is an important one, if the Draft Law, or secondary legislation does not assign it to a specific entity, it may remain a dormant provision.
35. The subsequent articles of this chapter outline the tasks of educational and healthcare agencies. These additions, as mentioned above, are welcomed. In particular, it is positive that these entities are foreseen to be involved in the drafting of statutory acts.
36. It is recommended however, to reconsider whether healthcare institutions should be tasked simultaneously with assisting victims and rehabilitating perpetrators. The rehabilitation of both differs in a significant manner, and both tasks (rehabilitation of victims and rehabilitation of perpetrators) require specialized skills. Furthermore, rehabilitation programmes for perpetrators are recommended to come as a secondary goal in comparison to the time and resources that ought to be invested in the rehabilitation of victims.
37. The right of victims to receive psychological, pedagogical, medical and importantly, legal assistance outlined in Article 14 of the Draft Law is a positive development and welcomed. Only a comprehensive approach to assistance will glean positive results and prevent further violence against a victim. Furthermore, provision of temporary residence is also crucial. Again, as with the recommendation provided above, the provision of rehabilitation and correctional programmes to perpetrators is a distinct and specialized task, and if this is a goal of the Kazakh legislator, it is recommended to provide this in a separate provision, and the responsibility of a special body.
38. It is noteworthy, that Article 12 introduced the requirement by healthcare providers to report instances of domestic violence. Victims of violence are most often the best judges of the dangers presented to them by their violent partners. Including them also in the decision to apply for preventive control is

critical. It is therefore recommended that mandatory reporting applies only to of domestic violence who are children (minors). Reporting in relation to adult victims, should always be on consent.

39. Furthermore, the required “consent” of the victim has been removed in Article 14 of the Draft Law, in informing bodies of internal affairs of the commission of domestic violence. In this case also, it should be emphasized that while a different standard may be applied to children (where not consent needs to be sought), in the case of adult victims, this is not recommended to be the case.

#### **4.5 Chapter 3: Domestic Violence Prevention Measures.**

40. As discussed above, Article 15 of the Draft Law established the Draft Law on CP, as the supreme law over this draft Law on DV.
41. Article 16 of the Draft Law introduced measures for the prevention of domestic violence. Article 16-1 states that these so-called individual measures are applicable also to the perpetrators of domestic violence. It is recommended be made clear in the Draft Law that measures such as “preventative interview” can only apply to actual perpetrators of domestic violence, only after they have been held accountable for their acts, and not as an alternative measure to being held liable (whether under administrative or criminal law) for acts of domestic violence.
42. It is positive that Article 17 of the Draft Law stipulates protection orders as one of the measures for prevention. The order will be discussed in relation to Article 19 of the Draft Law.
43. Article 17<sup>5</sup> sets out the grounds for application of individual measures of prevention of domestic violence. It is positive that in accordance with Article 17-1 paragraph 2, the measures may also be applied to attempted acts of domestic violence. However, as mentioned above, measures such as the preventative interview introduced by Article 18 of the Draft Law, should not be an alternative to liability under criminal or administrative liability for committing or attempting to commit an act of domestic violence.
44. Article 19 of the Draft Law is welcomed. Article 19 of the Draft Law constitutes one of the key, if not most important measures of protection for victims and prevention of the committing of further acts of domestic violence. In as far as the Draft Law clarifies who may issue the protection order, and that it may be issued immediately on interception of an act or attempted act of domestic violence, the development is considered positive. The protection order although offering 5 day protection, importantly, may be prolonged to 30 days and thus, secures time for the victim to rehabilitate, receive legal assistance and decide on next steps.

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<sup>5</sup> This provision appears as Article 22 of the translation received, however, given that it is between Article 16 and Article 18 of the Draft Law – it is referred to as Article 17 of the Draft Law.

45. Previous recommendations on financial penalties in cases of domestic violence, imposed on perpetrators, remain applicable in relation to Article 21 herein.

[END TEXT]

Law of the Republic of Kazakhstan

‘On **Prevention of Domestic Violence**’

This Law establishes legal, **economic and social** grounds for state bodies, **bodies of local self-government, organizations, and physical persons to conduct activities for the prevention of domestic violence.**

Chapter 1. General Provisions

Article 1. Main concepts used in this Law

The following main concepts have been used in this Law:

- 1) **Prevention of domestic violence** means activity of **domestic violence prevention entities** directed at the protection of constitutional rights, freedoms, and **legal** interests of a person and a citizen **in the field of family and domestic relations**, at the prevention and suppression of domestic violence, also at the detection and elimination of causes and conditions that trigger demonstration of domestic violence;
- 2) Domestic violence is **deliberate** unlawful actions of some persons against others in the field of family and domestic relations, causing or containing a threat of causing physical **and/or** mental suffering. Domestic violence can be manifested in the form of physical, **psychological**, sexual and **economic** abuse;
- 3) family and domestic relations means a scope of relationship between persons related by marriage; persons cohabiting **in an individual residential house, apartment or other residential facility, also ex-spouses**;
- 4) **physical violence is deliberate infliction of harm to health by using physical force and causing physical pain**;
- 5) **psychological is deliberate influence on human psychics, humiliation of dignity, and disparagement by means of intimidation, insult, blackmail or coercion to commit offences or actions posing a risk to life and health, also interfering with mental, physical and personal development**;
- 6) **sexual violence is an action infringing upon human sexual impunity or sexual freedom, also actions of sexual character against minors, interfering with their mental development**;
- 7) **economic violence is deliberate deprivation of a person of his/her accommodation, food, clothing, property, money that he/she is entitled to**

- by law, which might cause a damage to his/her physical or mental health;
- 8) **a victim is a person against whom domestic violence has been committed or realistically threatened;**
- 9) **Domestic violence prevention entities shall be state agencies, bodies of local self-government, organizations and physical persons carrying out domestic violence prevention.**

Article 2. Legislation of the Republic of Kazakhstan On **Prevention of Domestic Violence**

1. The Legislation of the Republic of Kazakhstan On **Prevention of Domestic Violence** is based on the Constitution of the Republic of Kazakhstan, and consists of this Law and other statutory acts of the Republic of Kazakhstan.

2. In the event an international treaty ratified by the Republic of Kazakhstan establishes rules other than those contained in this Law, rules of the international treaty shall apply.

Article 3. Principles of Legislation On **Prevention of Domestic Violence**

**Prevention of domestic violence** is based on the principles of:

- 1) legality;
- 2) guarantees of observing rights, freedoms and lawful interests of a person and a citizen;
- 3) inadmissibility of causing physical **and/or** mental suffering to a person and a citizen;
- 4) support and maintenance of the family;
- 5) observing confidentiality when providing assistance to **a victim**;
- 6) individual approach to everyone who is in a difficult life situation.

Article 4. Domestic Violence Prevention Entities

1. Domestic Violence Prevention Entities include:

- 1) the Government of the Republic of Kazakhstan;
- 2) local representative and executive bodies;
- 3) Commissions on Women Issues and Family and Population Policy;
- 4) Commissions on Minors and Protection of their Rights;
- 5) bodies of the interior;
- 6) **an authorized agency in the area of education;**
- 7) **an authorized agency in the area of public health;**
- 8) **healthcare institutions;**
- 9) **an authorized agency in the area of social protection;**
- 10) assistance providers;
- 11) **other state bodies and organizations within their competence established by laws of the Republic of Kazakhstan.**

**Article 5. Special Social Services**

1. **Special social services shall be provided to the victim;**
2. **Special social services shall include a guaranteed package of special social services and paid-for special social services;**
3. **Provision of a guaranteed scope of special social services and(or) an additional scope of special social services provided in addition to the guaranteed scope, shall be ensured by local executive bodies of districts (cities of the province importance);**
4. **Standards for special social services, the order of their provision, rights and responsibilities of a person (a family) in a difficult life situation, shall be defined by the Law on Special Social Services of the Republic of Kazakhstan.**

**Chapter 2. Authority of Domestic Violence Prevention Entities**

**Article 6. Authority of the Government of the Republic of Kazakhstan**

The Government of the Republic of Kazakhstan shall:

- 1) **elaborate and ensure implementation of, state policy in the field of domestic violence prevention;**
- 2) **approve program documents in the field of domestic violence prevention;**
- 3) **ensure interaction between domestic violence prevention entities, and coordinate their activities.**

**Article 7. Authority of Local Representative and Executive Bodies**

1. **Local representative bodies shall:**
  - 1) **approve program documents in the field of domestic violence prevention, and consider reports about their implementation;**
  - 2) **approve and control fulfilment of, local budgets in the line of domestic violence prevention.**
2. **Local executive bodies shall:**
  - 1) **elaborate and implement program documents in the field of domestic violence prevention;**
  - 2) **ensure interaction between domestic violence prevention entities;**
  - 3) **establish assistance provider organizations and ensure their functioning;**
  - 4) **detect and keep record of minors having suffer from domestic violence, and problem families;**
  - 5) **organize for provision of special social services to victims as established by the Law on Special Social Services of the Republic of Kazakhstan.**

**Article 8. Authority of the Commission on Women Issues and Family and Population Policy and Commissions on Minors and Protection of their Rights**

1. Commissions on **Women Issues and Family and Population Policy** shall:

- 1) interact with state bodies, organizations, **physical persons**, on issues of preventing domestic violence;
- 2) introduce proposals to local executive bodies for taking organizational/practical measures directed at the prevention of domestic violence;
- 3) together with assistance providers, organize and carry out measures for the prevention of domestic violence and rehabilitation of persons having suffered from domestic violence;

2. Commissions on Minors and Protection of their Rights shall:

- 1) interact with state bodies, organizations, **physical persons**, on issues of preventing domestic violence among minors;
- 2) participate in the development and implementation of regional programs to prevent domestic violence among minors;
- 3) introduce proposals to local executive bodies for taking organizational/practical measures directed at the prevention of domestic violence among minors;
- 4) together with assistance providers, organize and carry out measures for the prevention of domestic violence and rehabilitation of minors having suffered from domestic violence;

**Article 9. Authority of Bodies of the Interior**

Bodies of the interior shall:

- 1) **elaborate and together with other interested state bodies implement program documents in the field of domestic violence prevention;**
- 2) participate in drafting statutory acts **in the field of domestic violence prevention;**
- 3) **implement measures of individual domestic violence prevention;**
- 4) detect parents or foster parents failing to perform or to properly perform their responsibilities for upbringing children and committing unlawful acts **against them;**
- 5) make visits to the site to investigate upon petitions and notifications about facts of domestic violence **or real threat of its commission;**
- 6) **take measures to suppress domestic violence;**
- 7) refer victims **and their family members** to assistance providers or **to health organizations;**
- 8) **carry out preventive interviews;**
- 9) **deliver perpetrators of domestic violence to bodies of the interior;**
- 10) **issue a protection order;**
- 11) **apply to the prosecutor for sanctioning prolongation of the term of the protection order;**

- 12) process cases of administrative offences;
- 13) carry out administrative detention;
- 14) apply to court for establishing special requirements to the behaviour of perpetrator of domestic violence;
- 15) carry out criminal prosecution;
- 16) apply measures of criminal-procedural coercion;
- 17) apply measures of criminal law to ensure safety of the victim;
- 18) make registration for monitoring to monitor information about persons inclined to domestic violence;
- 19) carry out registration for prevention and provide preventive control;
- 20) provide for organization of special training courses on issues pertaining to domestic violence prevention for officers of bodies of the interior;
- 21) carry out criminological forecasting in the field of domestic violence prevention.

#### **Article 10. Authority of an Authorized Education Agency**

**An authorized education agency shall:**

- 1) elaborate and upon agreement with authorized social protection and public health agencies approve of, standards for special social services;
- 2) carry out monitoring and needs analysis of students and inmates having suffered from domestic violence, for provision of special social services in line with standards of special social services provision;
- 3) participate in drafting statutory acts in the field of domestic violence prevention;
- 4) elaborate and implement in the practice of educational organizations programs and methodologies directed at cultivation of law-abiding behaviour of students and inmates of educational institutions.

#### **Article 11. Authority of an Authorized Public Health Agency**

**An authorized public health agency shall:**

- 1) elaborate and upon agreement with authorized bodies in the field of social protection and education approve standards of special social services;
- 2) elaborate and implement in the practice of health care institutions methodological recommendations for providing medical and psychological assistance to victims;
- 3) participate in drafting statutory acts in the field of domestic violence prevention.

#### **Article 12. Authority of Healthcare Institutions**

**Public health institutions shall:**

- 1) provide addiction treatment, psychological, mental, preventive assistance and carry out medical rehabilitation of victims and perpetrators of domestic violence;**
- 2) inform bodies of the interior about visits of persons having suffered from crimes, and about provision of medical assistance to them;**
- 3) detect, register and monitor persons suffering from addictions to alcohol, narcotic drugs and toxic substances, and mental disorders;**
- 4) implement programs for prevention of addictions to alcohol, narcotic drugs and toxic substances;**

#### **Article 13. Authority of the Authorized Social Protection Agency**

**The authorized social protection agency shall:**

- 1) elaborate and upon agreement with authorized bodies in the field of social protection and education approve standards of special social services;**
- 2) develop measures for using active forms of employment promotion, also including employment of persons inclined to unlawful behaviour.**

#### **Article 14. Assistance provider organizations**

**1. Assistance provider organizations shall:**

- 1) receive victims and their family members;**
- 2) arrange for provision of necessary psychological, pedagogical, medical, legal assistance to victims, and whenever necessary, refer them to healthcare institutions for medical care and further rehabilitation;**
- 3) whenever possible, provide temporary residence to victims of domestic violence and their family members;**
- 4) conduct psychocorrectional programs with perpetrators of domestic violence;**
- 5) inform bodies of internal affairs about committed or threatened domestic violence;**
- 6) carry out legal awareness raising on issues of domestic violence prevention;**
- 7) interact with individuals and legal entities on issues of domestic violence prevention.**

**2. Assistance provider organizations shall be established by local executive bodies, also by legal entities and physical person as specified by the legislation of the Republic of Kazakhstan.**

**3. Activities of assistance provider organizations shall be funded from the state budget and other sources that are not prohibited by the legislation of the Republic of Kazakhstan.**

**Chapter 3. Domestic Violence Prevention Measures**

**Article 15. Regulating Relations Emerging from Application of Domestic Violence Prevention Measures**

**Relations emerging from application of domestic violence prevention measures shall be regulated in compliance with the Law of the Republic of Kazakhstan on Crime Prevention and in view of the specifics established by this Article.**

**Article 16. Measures of Individual Measures of Domestic Violence Prevention**

**1. Individual measures of domestic violence prevention shall be applied for systematic targeted influence upon consciousness and behaviour of a perpetrator of domestic violence, for the purpose of preventing him/her from committing new offences and of ensuring safety of the victim and his/her family members.**

**2. Individual Measures of Domestic Violence Prevention shall include:**

- 1) preventive interviews;**
- 2) delivery of the perpetrator of domestic violence to bodies of the interior for drawing up a administrative offence report, or a protection order;**
- 3) protection order;**
- 4) administrative detention;**
- 5) compulsory measures of medical character;**
- 6) establishment of special requirements to the behaviour of the offender;**
- 7) administrative penalty;**
- 8) deprivation or restriction of rights of parents, abrogation of child adoption, dismissal from guardianship/trusteeship, early termination of a patronage agreement;**
- 9) measures of procedural coercion and measures for ensuring security of victims in the criminal process;**
- 10) penalty as ruled by court.**

**3. Individual measures for domestic violence prevention shall be determined in view of individual specifics of the person against whom they are taken, the nature and degree of impact that their offences have on public security.**

**4. A decision on using individual crime prevention measures may be appealed against by interested persons as stipulated by the legislation of the Republic of Kazakhstan.**

**Article 17. Grounds for Using Measures of Individual Domestic Violence Prevention**

- 1. Grounds for using measures of individual domestic violence prevention shall include:**
  - 1) Applications or notifications by physical persons and legal bodies;**
  - 2) Direct detection of facts of committed domestic violence or an attempted offence;**
  - 3) Materials obtained from other state bodies, bodies of local self-government;**
  - 4) Other cases envisaged by laws of the Republic of Kazakhstan.**
- 2. Applications and notifications about a committed or attempted domestic violence or a real threat of its commission shall be considered by state bodies as specified by the legislation of the Republic of Kazakhstan.**

**Article 18. Preventive interview**

- 1. A preventive interview shall be conducted by a domestic violence prevention entity with a perpetrator of domestic violence or a person posing a threat of its commission. Preventive interviews shall be carried out together with other measures of individual domestic violence prevention;**
- 2. Main objectives of a preventive interview shall be detection of causes and conditions for domestic violence, explanation of social and legal consequences of domestic violence, and persuasion in the need of lawful behaviour.**
- 3. Preventive talks shall be conducted in offices of domestic violence prevention entities or directly on the spot of committed domestic violence.**

**Article 19. Prevention Order**

- 1. For the purpose of ensuring the security of the victim and in the absence of grounds for administrative detention as envisaged by part 3, Article 622 of the Code of Administrative Offences of the Republic of Kazakhstan, or detention as envisaged by Article 132 of the Criminal Procedural Code of the Republic of Kazakhstan, the head or deputy head of a body of the interior shall issue a protection order that shall be served for implementation upon the perpetrator of domestic violence, or upon the person posing a threat of its commission, against his/her signature. Should the person refuse to sign, a respective record shall be made in the protection order.**
- 2. Copies of the protection order shall be within twenty four hours sent to the prosecutor's office.**
- 3. The protection order shall be issued to a sane person having reached the age of 16 by the moment of its issuance.**

4. A protection order prohibits searching, chasing, visiting, holding oral, telephone conversations, or otherwise communicating with, the victim against his/her will.
5. A protection order shall indicate time and place of its issuance, by whom and to whom it is issued, time and circumstances of committed or threatened domestic violence, legal consequences in case of continuing the unlawful actions and violation of the protection order.
6. The term of the protection order shall be five days.
7. At the request of the victim, the term of the protection order may be prolonged to thirty days by a sanction of the prosecutor following petition of the head or deputy head of a body of the interior.
8. Violation of a protection order shall entail a liability as envisaged by the Code of Administrative Offences of the Republic of Kazakhstan.
9. The person to whom a protection order is issued shall be registered for prevention by bodies of the interior and shall be made subject to preventive control.

#### **Article 20. Administrative Detention**

1. For the purpose of suppressing domestic violence containing components of administrative offense, and when there are reasons to believe that a protection order would not be sufficient for ensuring the security of the victim, an official from bodies of the interior shall carry out administrative detention of the perpetrator of domestic violence which means temporary deprivation of the freedom of action and movement by means of coercive custody in a special room;
2. The procedure and terms of administrative detention, rights and responsibilities of detained persons shall be specified by the Code of Administrative Offences of the Republic of Kazakhstan.

#### **Article 21. Establishment of Special Requirements to Behaviour of Offender**

1. A court may establish special requirements to behaviour of a domestic violence perpetrator for the purpose of ensuring the security of the victim;
2. Establishment of special requirements to the behaviour of offender shall be a measure of administrative-legal influence and shall be applied both along with imposition of an administrative penalty or instead of it when exempting the person having committed an administrative offense from administrative liability.
3. The person to whose behaviour special requirements are established, shall be prohibited to:

- 1) Search for, chase, visit, hold oral, telephone conversations, or otherwise communicate with, the victim;
- 2) Dispose of property acquired jointly with the victim;
- 3) Purchase, own, and use firearms and other types of weapons.
4. During the term of special requirements to the behaviour of offender, he/she may be held responsible for compensating the victim for costs of treatment and rehabilitation in relation to the offence committed against him/her, and to appear in bodies of the interior from one to four times a month for preventive talks.
5. The procedure for establishing special requirements to the behaviour of offender, its terms, rights and responsibilities of parties in cases of administrative offenses shall be specified by the Code of Administrative Offenses of the Republic of Kazakhstan.
6. The person to whose behaviour special requirements are established, shall be registered for prevention by bodies of the interior and shall be made subject to preventive control.

#### **Article 22. Procedural Coercion Measures and Security Measures in Criminal Procedure**

1. For the purposes of suppressing domestic violence containing components of crime, also for ensuring the security of a victim, witness, and other persons participating in the criminal procedure, their family members and close relatives, bodies providing criminal prosecution and leading the criminal procedure shall take measures of procedural coercion and procedural security measures.
2. Grounds for application of procedural coercion measures and procedural security measures, the application procedure, rights and responsibilities of persons participating in the criminal procedure, shall be specified by the Criminal Procedural Code of the Republic of Kazakhstan.

#### **Chapter 5. Final Provisions**

#### **Article 23. Supervision over application of the legislation of the Republic of Kazakhstan on prevention of domestic violence**

**Supreme supervision over precise and uniform application of the Law on Crime Prevention of the Republic of Kazakhstan shall be provided by prosecution bodies.**

**Article 24. Observation of confidentiality when providing assistance to victims**

Domestic violence prevention entities shall have no right to disclosure information about personal and family life of victims that becomes known to them *ex officio*.

Disclosure of confidential information by a person who *ex officio* learned about a fact of domestic violence shall entail liability as **established by laws of the Republic of Kazakhstan**.

Article **25**. Procedure of Enacting This Law

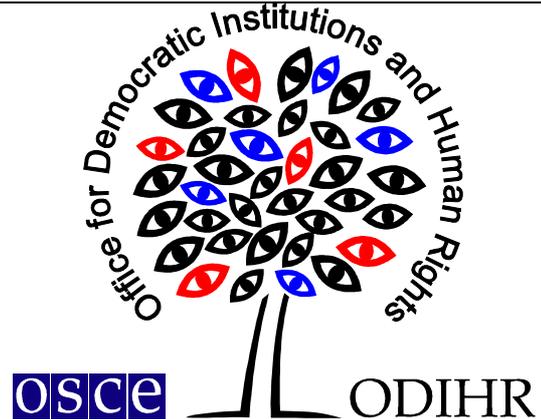
This Law shall be enacted 10 calendar days **after its first** official publication.

President of the Republic of Kazakhstan

Warsaw, 22 December, 2008

Opinion-Nr.: GEND-KAZ/115/2008  
(MASz)

[www.legislationline.org](http://www.legislationline.org)



**Preliminary  
Opinion  
On the Draft Laws of the  
Republic of Kazakhstan  
On Domestic Violence.**

**based on an English translation of the draft Laws  
commissioned by the ODIHR and the OSCE Centre in Astana.**

Aleje Ujazdowskie 19 PL-00-557 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

**1. INTRODUCTION**

1. *In 2008, by letter a letter addressed to the OSCE Centre in Astana, the Deputy Minister of the Ministry of Interior of the Republic of Kazakhstan requested a review of the draft Law on Counteracting Domestic Violence of the Republic of Kazakhstan (hereinafter referred to as the “MoI draft Law”).*
2. *The OSCE Centre in Astana, referred the request to the OSCE Office for Democratic Institutions and Human Rights, for opinion. The OSCE ODIHR conducts this evaluation within the mandate established by the OSCE Action Plan for the Promotion of Gender Equality, which states that, “The ODIHR, in co-operation with other international organisations and relevant national bodies and institutions, will assist OSCE participating States in complying with international instruments for the promotion of gender equality and women’s rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments.”<sup>6</sup>*
3. *Some months later, the National Commission on Women and Family-Demographic Policy under the President of Republic of Kazakhstan made revisions to the MoI draft Law, making amendments based also on the opinions gathered from the non-governmental sector (the said version of the draft Law is hereinafter referred to as, the “NC draft Law”).*
4. *Both the MoI draft law and the NC draft Law were the subject of discussions between the OSCE Centre in Astana, the OSCE ODIHR and the authorities of Kazakhstan.*
5. *Most recently, in December, 2008 in meetings between the authorities of Kazakhstan, the OSCE Centre in Astana and the OSCE ODIHR, it was considered that the most constructive way forward would be for the OSCE ODIHR to conduct a preliminary review of both drafts and make recommendations, which would then be discussed and consulted.*
6. *Following the consultations mentioned above, the authorities of Kazakhstan would have time to consider making amendments to the draft Law on Countering Domestic Violence, and sending the final draft version for final opinion and review by the OSCE ODIHR, should this be considered necessary, prior to adoption.*

## **2. SCOPE OF REVIEW**

7. The scope of the Preliminary Opinion includes the MoI draft Law and the NC draft Law. It is stressed, that the Preliminary Opinion does not seek to compare the two drafts, but instead comment on them simultaneously in the interests of a unified and coherent approach to the issue.
8. The Preliminary Opinion is not a comprehensive review of all regulations which may pertain to the prevention of domestic violence in the Republic of

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<sup>6</sup> Point 44(b) Chapter 5, MC DEC/14/04 7 December, 2004

Kazakhstan, but is rather restricted only to an analysis of the drafts of legislation mentioned in the paragraph above. The Preliminary Opinion has been drafted to serve as a set of considerations which should be taken into account in light of international standards and practice in the field of prevention of domestic violence.

9. The Preliminary Opinion has been developed mainly for the purpose of consultations with the authorities of Kazakhstan with a view to assistance in refining and improving the mentioned draft law.
10. The Preliminary Opinion is based on unofficial translations of both the MoI draft Law and the NC draft Law. Errors from translations may result.
11. In view of the above, the OSCE ODIHR would like to make mention that this Preliminary Opinion is without prejudice to any recommendations and comments to the mentioned draft Laws that the OSCE ODIHR may make in the future.

### **3. EXECUTIVE SUMMARY**

12. It is recommended that a final draft of the Law on Counteracting Domestic Violence in the Republic of Kazakhstan includes as follows;
  - A. The scope and purpose of should include any family and close relations, and not be restricted to “matrimonial relations” [par. 13]
  - B. The definition do domestic violence should be supplemented, also with references to the Criminal Code of Kazakhstan [par.14];
  - C. The concept of “fear” should be introduced into the definition of domestic violence [par.15];
  - D. The definition of domestic violence should clearly state that acts may also occur unintentionally or recklessly [par.16];
  - E. The definition of sexual abuse may be supplemented with direct references to the sexual crimes in the Criminal Code of Kazakhstan, such as rape, etc., [par.17];
  - F. The scope of the term “family member” should be broadened [par. 18 and 19];
  - G. The concept of “official warning” should be removed [par.19, 20, 30];
  - H. The term “minor” should be defined and cross referenced with the Criminal Code and Family Code of the Republic of Kazakhstan, as applicable [par. 21];
  - I. The principle of confidentiality in cases of domestic violence is welcomed and should be retained [par. 22];

- J. Reporting of cases of domestic violence by certain professionals, should be considered, and mandatory reporting by professionals in cases of child victims of domestic violence is highly recommended [par. 24, 25 and 38];
- K. A national machinery should be established which would permit the proper functioning of preventative measures, emergency intervention and protection and assistance to victims of domestic violence – also through the listing and introduction of secondary implementing legislation [par 26 and 27];
- L. The institutions and bodies responsible for implementation of the law should be clearly defined (for instance, the role of police etc.) and the law should also outline their tasks, responsibilities and reporting obligations [par. 28 and 29];
- M. Preventative measures in the form of emergency intervention orders and protection orders should be supplemented and refined [par 31 and 32];
- N. A system of referral of victims to assistance providers and the scope of the assistance provided to them, should be improved in the law [par 33];
- O. A system of special measures pertaining to children should be provided for in the law [par. 34];
- P. Liability for acts of domestic violence, should be clearly outlined in the law and it should be considered how in these cases, penalties are to be applied in consideration of the fact that pecuniary penalties imposed on the perpetrator may affect household finances which are shared with the victim [par 36];
- Q. Provisions on assistance to victims and child victims, in general would benefit from supplementing, for instance by including articles on compensation of victims and assistance in re-building his/her life. Furthermore, it would be beneficial for the law to contain provisions dealing with the situation of child victims – in particular, where the perpetrator is a parent or legal guardian [par.37]
- R. A schedule of implementing (secondary legislation) should be included which would make reference to a national action plan that is recommended to be developed (if not already the case) on this issue [par. 39];
- S. The law would benefit from the inclusion of a monitoring mechanism, which would permit its review on a regular basis [par. 40];

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### **4.1 Purpose of the MoI draft Law and the NC draft Law**

- 13. While the purpose of both draft Laws is welcomed, it is suggested that the purpose set out in the final draft law that will be submitted for adoption to refer to not only to prevention and protection from domestic violence in “matrimonial relations” but all family and close relations.

## **4.2 Chapter 1: Main Concepts/General Provisions**

14. The first definition which may require supplementing in both the draft MoI and draft NC law is the definition of “domestic violence”. It may be useful for this definition to be supplemented by another paragraph which would contain a list of acts which defines crimes involving domestic violence.<sup>7</sup> For instance, the supplementary paragraph may state those crimes from the criminal code of the Republic of Kazakhstan, which may occur within the context of domestic violence – for instance, arson, assault offenses such as aggravated assault, intimidation, burglary, breaking and entering, destruction, damage and vandalism of property, homicide offenses, including murder, manslaughter, as well as, kidnapping, abduction, sexual offenses, including rape, weapons law violations, stalking, trespass, etc. Such an enumeration of the range of criminal conduct employed by many perpetrators of domestic violence would underscore the breadth of violent crimes and fear-inducing or harmful conduct often committed.<sup>8</sup>
15. Furthermore, although the MoI Draft Law definition of domestic violence refers already to a ‘threat of causing physical and/or mental suffering’, it is suggested for the definition to include clearly include the concept of “fear”. This means that an act of domestic violence may occur, when the perpetrator “places the victim in fear of physical harm”, but may never actually go through with the harm (or where solid evidence is lacking that he/she would in fact do so). Introducing this concept in the definition would give recognition to the fact that abusive persons (perpetrators) often instill fear (of physical harm) in their victims<sup>9</sup> in order to exert other types of violence, such as psychological or economic.
16. The definition of ‘domestic violence’ is also recommended to make clear that the violence does not only have to be intentional on the part of the perpetrator, but may also be reckless, negligent and based on omission rather than commission of a certain act. The definition of domestic violence should also include the intentional destruction of or damage to another family members’ property.
17. It is positive that the NC draft Law set out definitions of physical, sexual, psychological and economic violence (translation uses the word “abuse”). It is further recommended that physical and sexual abuse be directly referenced

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<sup>7</sup> Paragraph 3, Part II, “A Framework for Model Legislation on Domestic Violence”, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, United Nations Commission on Human Rights, E/CN.4/1996/53/Add.2 2 February 1996, states that “It is urged that States adopt **the broadest possible definitions of acts of domestic violence** and relationships within which domestic violence occurs...”

<sup>8</sup> “Model Code on Domestic and Family Violence”, Advisory Committee of the Conrad N. Hilton Foundation Model Code Project of the Family Violence Project, National Council of Juvenile and Family Court Judges, California. 1994, page 3.

<sup>9</sup> “Model Code on Domestic and Family Violence”, Advisory Committee of the Conrad N. Hilton Foundation Model Code Project of the Family Violence Project, National Council of Juvenile and Family Court Judges, California. 1994, Page 2

with the Criminal Code of the Republic of Kazakhstan. This is particularly important in cases sexual violence in the form of rape.

18. It is important to note that neither the MoI draft Law nor the NC draft Law define the subjects of the law (the subjects of protection from domestic violence) adequately. The MoI draft Law makes a reference to family and domestic relations, and the NC draft Law does not make any reference at all. It is therefore recommended that the term “family member” , who may be the subject of domestic violence and protection by the law is precisely defined. References may be made to the Criminal Code and the Family Code of Kazakhstan – which may contain such definitions already.
19. Further to the above, it is recommended that if not already the case in the Criminal or Family Codes – “family members” should include individuals related to by blood or marriage, including individuals who do not reside together, individuals who are not married (not registered in the civil register as married) but are residing together (de facto marriage, or concubines), individual who are family members based on adoption, custody or guardianship, individuals who are in separation, divorced and no longer residing together, as well as those having permanent or temporary domicile in the home where the violence has occurred.
20. It is suggested that the definition and concept of “official warning” be removed from Article 1 (5) of the MoI draft Law, in particular the notion of “minor harm” should be deleted.
21. For the purposes of easy reference, the term “minors” should also be defined.
22. It is noteworthy, that Article 3 (5) of the MoI draft Law, states the principle of observing confidentiality when providing assistance to persons who suffered from domestic violence. This is an important principle and should be included in the law.
23. Additionally, Article 4 of the NC draft Law introduces the grounds for taking measures to prevent and counteract domestic violence. While the intention of the article is clear, it is somewhat ambiguous. For instance, who should take the measures when the grounds are met? The entity responsible should be clearly stated. Is the act reported to the police? or a specialized unit within the police? Given this, it is recommended for the article to be made clearer.
24. The Article referred to above also specifies the persons who may report domestic violence. While it is important to state at this point that the protection of private and family life as a matter of principle must be respected by the State, this undisturbed status of the home must end whenever State intervention is required to protect the safety of individuals in the domestic sphere. Following this interpretation, it may be of value to consider including any other parties who may report on suspicion of the occurrence of domestic violence. Other parties which may be useful in identifying possible

occurrences of domestic violence are health care workers<sup>10</sup>, amongst others. Their role in assisting by identification may also be set out. It is noteworthy that although Council of Europe standards are not binding on Kazakhstan, the Council of Europe Committee of Ministers Recommendation No. R (85) 4 on Violence in the Family encourages States to “consider the possibility of removing the obligation of secrecy from the members of certain professions so as to enable them to disclose [...] any information concerning cases of violence in the family.” Whereas, concerning reporting on children who are suspected to be suffering or have suffered from domestic violence, a different standard is suggested, as explained in the paragraph below

25. Further to the above, Article 4 of the NC draft Law is also recommended to include the notion of mandatory reporting requirements to be established for certain professions in the case of children suffering or suspected to be suffering from domestic violence. This recommendation is further explained in paragraph 38 below. It is however suggested that these reporting concepts may be mentioned in the general provisions of Article 4 and better developed in a separate Article in the law.

#### **4.3 Chapter 2: Functions and Powers of Entities Involved in Prevention of Domestic Violence.**

26. Above all other functions, the most important function of a law which is *lex specialis* and deals with a finite area of the law or social problem – is that it provides an opportunity to not only turn special attention to the solution of an issue, but also to establish a functioning national machinery for implementation of the law, and thus the meeting of the principles set out in the law.
27. In general it may be said that this Chapter in both the MoI and the NC draft Law lacks the requisite detail for implementation. Indeed part of such a supplement is the introduction of secondary legislation, to which currently, there is no reference.

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<sup>10</sup> As an example from outside the OSCE region, health care workers have been deemed pivotal in the prevention of domestic violence, in New Zealand the following guidelines for identification and response to domestic violence within health care settings were established: 1. Identification - This includes asking adults about possible abuse in a non-threatening manner, recognising symptoms and in some cases screening for abuse. 2. Emotional Support/Empowerment of Confirmed or Suspected Victims of Abuse - Victims of all ages need clear messages of support and reassure them that they are not at fault, and that help is available. 3. Risk Assessment - The purpose of risk assessment and subsequent referral is to determine the likely level of immediate risk for a patient leaving the health care setting. 4. Safety Planning/Intervention - Useful intervention options help victims to contact support services and access legal options for protection of abused women. Safety plans prepared for victims can include helping them avoid injury and escape violent situations. 5. Documentation - Careful documentation of injuries can assist abused partners to obtain protection orders immediately or in the future, and can assist police investigations of child abuse. 6. Referral Agencies - External referral agencies are vital in providing support to actual or suspected victims of partner abuse and child abuse. Source: <http://www.scoop.co.nz/stories/PO0211/S00065.htm> “Domestic violence guidelines launched” Monday, 11 November 2002, 9:38 am Press Release: Ministry of Health, New Zealand

28. The introduction of the Commissions (Article 7 of the MoI draft Law and Article 9 of the NC draft Law) is welcomed. The activities of these commissions are also welcomed. However, it is not clear from the either draft laws what the true powers and duties of the commissions will be – who will be responsible and accountable to them, and to whom they should be accountable. A clear system of power and accountability in conducting activities aimed at preventing domestic violence and protecting persons suffering from domestic violence is pivotal for implementation of policy and law on this issue. Any additional powers and responsibilities of police should also be set out.
29. Article 11 of the MoI draft Law and Article 12 of the NC draft Law refer to assistance providers and set out their tasks and responsibilities. It is recommended that the provision of legal assistance be a key service provided to victims of domestic violence (as in the MoI draft Law) and it is welcomed that the question of funding of the assistance organizations is resolved in Article 12.3 of the NC draft Law. Another important aspect which is recommended to be taken into consideration is that the shelters and centres for rehabilitation of victims should be covered by absolute confidentiality as to address, employees and persons/victims present in the centres at any time.

#### **4.4 Chapter 3: Organizing the Activities of State Bodies for the Prevention and Suppression of Domestic Violence.**

30. As already mentioned above, it is recommended that the measure and concept of “official warning” be removed in its entirety. It is clear from ordinary criminal procedure that the police always have the discretion to provide a ‘warning’, where there is insufficient evidence to suggest that a crime has been committed. In cases of domestic violence a system of concrete protective measures that would be available to the victim and police and other authorities is required.
31. While the intention behind the measure of ‘preventative control’ expressed in both the MoI draft Law and the NC draft Law is welcomed, it is nevertheless recommended that these articles be reconsidered to include preventative measures such as an emergency intervention order and protective orders for victims<sup>11</sup>. The preventative control currently offered in both drafts implies that the perpetrator remains only under surveillance. It also not clear from the MoI draft Law, nor the NC draft Law, how such preventative control would be administered on perpetrators who remain in the family home. While protection in the form of barring contact with the victim, or coming within the range of the family home will work in the cases where the perpetrator and victim are no longer living together, they certainly will not work where they remain in common domicile.

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<sup>11</sup> For instance, based on Article 13 and Article 14 of the Law on Counteracting Domestic Violence of the Republic of Poland, where all conditions of committing an act of domestic violence (as defined by the law) are met, the police may take the perpetrator into custody or alternatively, issue a protection order for the victims of the violence, once the perpetrator is removed from the home. The protection order may consist in a prohibition of contact with the victim of the violence. *Official Journal 05.180.1493, Law on Counteracting Domestic Violence of 29 July, 2005.*

32. Further to the above, it is recommended for a final version of the law to include a clear provision on emergency intervention and furthermore, protection orders that would include the possibility of removing the perpetrator from the residence<sup>12</sup>, an order directing the perpetrator to stay a specified distance from the residence, school, workplace or any other specified place of the victim, children of the victim or other family member, an order prohibiting the perpetrator from using or possessing firearms or other weapons specified, an order granting the victim possession or use of an automobile, or other essential personal effects, and order granting custody of children, and order denying visitation rights, or specifying visitation under supervision, an order requiring the payment of certain costs and fees, and order concerning any other property rights.<sup>13</sup> The order could be served by the police and subject to court confirmation within 24 hours of issuance<sup>14</sup>.
33. A final version of the law should also include a system of referring victims to shelters and places of alternative domicile, when police make emergency interventions – such an option, is recommended however, not to exclude removing the perpetrator himself/herself from the home. In any case, given that the aim of law should be the victim/s life and safety; this is one of the options that should be provided in the law.
34. A final version of the law would also benefit from special provisions concerning shelter and safety provisions for children.
35. Additionally, it would also be beneficial to include a provision specifying that a perpetrator of domestic violence is subject to the ordinary principles of criminal and administrative law and the protective orders discussed above constitute an additional measure that may be applied.
36. In terms of criminal and administrative liability for acts of violence committed in the home, it must be borne in mind that where fines may be applicable to the perpetrator, imposing a monetary penalty on perpetrators of domestic violence affects directly the victims of that violence, where they continue to share a common household, financial obligations and/or responsibility over children. In these cases, alternative forms of reimbursement should be established to ensure that the victim does not carry the burden of the punishment together with the perpetrator. One form of alternative reimbursement would be to order the perpetrator a set amount of hour of community work, which would not severely interfere with any employment obligations he or she may have.

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<sup>12</sup> This measure (removal of the perpetrator from the home) has been applied in many OSCE participating States, including Austria, Germany, Switzerland, Liechtenstein, Luxembourg, Spain and Poland.

<sup>13</sup> “*Model Code on Domestic and Family Violence*”, Advisory Committee of the Conrad N. Hilton Foundation Model Code Project of the Family Violence Project, National Council of Juvenile and Family Court Judges, California. 1994, Page 5.

<sup>14</sup> Chapter 3 of the recently developed Draft Law of the Republic of Armenia on Domestic Violence, provides an excellent example of the detailed manner in which such protection orders may be regulated (*OSCE ODIHR can provide a copy of this draft on prior request*).

## **5. ADDITIONAL RECOMMENDATIONS AND COMMENTS**

37. It is suggested that a final law regulating this issue in Kazakhstan should include clearer and more detailed provisions on victim assistance measures. In as far as both the MoI draft Law and the NC draft Law speak of assistance providers, there are provisions lacking on forms of compensation and assistance to victims- for instance, with housing, legal proceedings, finances, education and training etc., In particular, there is a lack of provisions which would provide for special measure for children who are victims of domestic violence, especially, where the violence is committed by their parents or legal guardians/care-takers.
38. Further to the above discussion on reporting requirements, it is recommended for mandatory reporting requirements to be established for certain professions in the case of children suffering or suspected to be suffering from domestic violence. Although a failure to report crime may be criminalized under existing provisions of criminal law, it does not serve as an effective deterrent in child maltreatment cases, especially when the offence committed does not amount to a particularly grave crime and takes place within a family home. Moreover, ordinary principles of criminal law require reporting of known crimes, while mandatory procedures for designated professional categories typically use “known or suspected abuse or neglect” as the standard for reporting. Often, especially in the cases of violence against children in the home reporting by designated individuals would remain the only effective mechanism for child protection. In order to bring this recommendation into effect, the Law would need to first identify the categories of “designated individuals” which would be bound by this requirement. Normally, the category of mandatory reporters would include professionals who have frequent contact with children. Secondly, the Law would need to specify that a report must be made when the designated individual has reasonable cause to believe or suspect child maltreatment, or has observed conditions which would reasonably result in child maltreatment. Thirdly, provisions in the Law on mandatory reporting would also have to provide for a “privileged communication” exemption, recognizing the right to maintain the confidentiality of communications between certain categories of professionals and their clients or patients.<sup>15</sup>
39. A final version of the draft law regulating domestic violence in Kazakhstan, should also include a schedule of implementing (secondary) legislation to be introduced in order for the law to be brought to life in practice. In particular, it is recommended that a national action plan on this issue be developed in order to ensure a comprehensive and inter-disciplinary approach to the issue. The law should also provide for mandatory reporting of activities of the various bodies responsible for the implementation of the law.

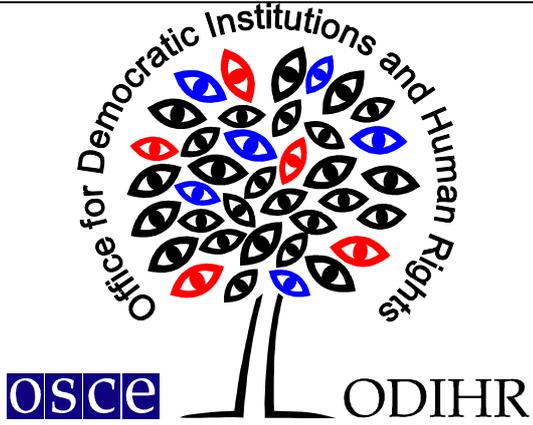
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<sup>15</sup> Please see for example: Section 11164-11174.3 of the California Penal Code: Child Abuse and Neglect Reporting Act <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=11001-12000&file=11164-11174.3>

40. It would also be beneficial for the law to include a monitoring mechanism, allowing for an assessment of the operation of the law following for example, two years of its implementation.

*[End of text]*

ANNEX 3

<p>Warsaw, 20 February, 2009</p> <p>Opinion-Nr.: GEND- KAZ/115/2008/rev.1 (MASz)</p> <p><a href="http://www.legislationline.org">www.legislationline.org</a></p>	
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**Preliminary  
Opinion  
On the Draft Laws of the  
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**based on an English translation of the draft Laws  
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## **1. INTRODUCTION**

1. *In 2008, by letter a letter addressed to the OSCE Centre in Astana, the Deputy Minister of the Ministry of Interior of the Republic of Kazakhstan requested a review of the draft Law on Counteracting Domestic Violence of the Republic of Kazakhstan (hereinafter referred to as the “MoI draft Law”).*
2. *The OSCE Centre in Astana, referred the request to the OSCE Office for Democratic Institutions and Human Rights, for opinion. The OSCE ODIHR conducts this evaluation within the mandate established by the OSCE Action Plan for the Promotion of Gender Equality, which states that, “The ODIHR, in co-operation with other international organisations and relevant national bodies and institutions, will assist OSCE participating States in complying with international instruments for the promotion of gender equality and women’s rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments.”<sup>16</sup>*
3. *Some months later, the Working Group of the Parliament of Kazakhstan reviewing the draft Law made revisions to the MoI draft Law, making amendments based also on the opinions gathered from the non-governmental sector (the said version of the draft Law is hereinafter referred to as, the “WG draft Law”).*
4. *Both the MoI draft law and the WG draft Law were the subject of discussions between the OSCE Centre in Astana, the OSCE ODIHR and the authorities of Kazakhstan.*
5. *Most recently, in December, 2008 in meetings between the authorities of Kazakhstan, the OSCE Centre in Astana and the OSCE ODIHR, it was considered that the most constructive way forward would be for the OSCE ODIHR to conduct a preliminary review of both drafts and make recommendations, which would then be discussed and consulted.*
6. *Initial consultations between the Parliamentary Working Group and the OSCE ODIHR on the WG Draft Law took place in Astana on 22 January 2009. Given that time permitted only some issues, concerning the WG draft Law to be raised, it was agreed between the Parliamentary Working Group and the OSCE ODIHR, that further consultations would take place before the WG draft Law was adopted (planned for the middle of 2009).*

## **2. SCOPE OF REVIEW**

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<sup>16</sup> Point 44(b) Chapter 5, MC DEC/14/04 7 December, 2004

7. The scope of the Preliminary Opinion includes the MoI draft Law and the WG draft Law. It is stressed, that the Preliminary Opinion does not seek to compare the two drafts, but instead comment on them simultaneously in the interests of a unified and coherent approach to the issue.
8. The Preliminary Opinion is not a comprehensive review of all regulations which may pertain to the prevention of domestic violence in the Republic of Kazakhstan, but is rather restricted only to an analysis of the drafts of legislation mentioned in the paragraph above. The Preliminary Opinion has been drafted to serve as a set of considerations which should be taken into account in light of international standards and practice in the field of prevention of domestic violence.
9. The Preliminary Opinion has been developed mainly for the purpose of consultations with the authorities of Kazakhstan with a view to assistance in refining and improving the mentioned draft law.
10. The Preliminary Opinion is based on unofficial translations of both the MoI draft Law and the WG draft Law. Errors from translations may result.
11. In view of the above, the OSCE ODIHR would like to make mention that this Preliminary Opinion is without prejudice to any recommendations and comments to the mentioned draft Laws that the OSCE ODIHR may make in the future.

### **3. EXECUTIVE SUMMARY**

12. It is recommended that a final draft of the Law on Counteracting Domestic Violence in the Republic of Kazakhstan includes as follows;
  - A. The scope and purpose of should include any family and close relations, and not be restricted to “matrimonial relations” [par. 13]
  - B. The definition do domestic violence should be supplemented, also with references to the Criminal Code of Kazakhstan, or at least certain key references thereto [par.14, par 15];
  - C. The definition of domestic violence should clearly state that acts may also occur unintentionally or recklessly [par.16];
  - D. The definition of sexual abuse may be supplemented with direct references to the sexual crimes in the Criminal Code of Kazakhstan, such as rape, etc., [par.17];
  - E. The scope of the term “family member” should be broadened [par. 18 and 19];
  - F. The concept of “official warning” should be removed [par.19, 20, 30];
  - G. The term “minor” should be defined and cross referenced with the Criminal Code and Family Code of the Republic of Kazakhstan, as applicable [par. 21];

- H. The principle of confidentiality in cases of domestic violence is welcomed and should be retained [par. 22];
- I. Reporting of cases of domestic violence by certain professionals, should be considered, and mandatory reporting by professionals in cases of child victims of domestic violence is highly recommended [par. 24, 25 and 38];
- J. A national machinery should be established which would permit the proper functioning of preventative measures, emergency intervention and protection and assistance to victims of domestic violence – also through the listing and introduction of secondary implementing legislation [par 26 and 27];
- K. The institutions and bodies responsible for implementation of the law should be clearly defined (for instance, the role of police etc.) and the law should also outline their tasks, responsibilities and reporting obligations [par. 28 and 29];
- L. Preventative measures in the form of emergency intervention orders and protection orders should be supplemented and refined [par 31 and 32];
- M. A system of referral of victims to assistance providers and the scope of the assistance provided to them, should be improved in the law [par 33];
- N. A system of special measures pertaining to children should be provided for in the law [par. 34];
- O. Liability for acts of domestic violence, should be clearly outlined in the law and it should be considered how in these cases, penalties are to be applied in consideration of the fact that pecuniary penalties imposed on the perpetrator may affect household finances which are shared with the victim [par 36];
- P. Provisions on assistance to victims and child victims, in general would benefit from supplementing, for instance by including articles on compensation of victims and assistance in re-building his/her life. Furthermore, it would be beneficial for the law to contain provisions dealing with the situation of child victims – in particular, where the perpetrator is a parent or legal guardian [par.37]
- Q. A schedule of implementing (secondary legislation) should be included which would make reference to a national action plan that is recommended to be developed (if not already the case) on this issue [par. 39];
- R. The law would benefit from the inclusion of a monitoring mechanism, which would permit its review on a regular basis [par. 40];

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### **4.1 Purpose of the MoI draft Law and the NC draft Law**

13. While the purpose of both draft Laws is welcomed, it is suggested that the purpose set out in the final draft law that will be submitted for adoption to refer to not only to prevention and protection from domestic violence in “matrimonial relations” but all family and close relations.

#### **4.2 Chapter 1: Main Concepts/General Provisions**

14. The first definition which may require supplementing in both the draft MoI and draft WG law is the definition of “domestic violence”. It may be useful for this definition to be supplemented by another paragraph which would contain a list of acts which defines crimes involving domestic violence.<sup>17</sup> For instance, the supplementary paragraph may state those crimes from the criminal code of the Republic of Kazakhstan, which may occur within the context of domestic violence – for instance, arson, assault offenses such as aggravated assault, intimidation, burglary, breaking and entering, destruction, damage and vandalism of property, homicide offenses, including murder, manslaughter, as well as, kidnapping, abduction, sexual offenses, including rape, weapons law violations, stalking, trespass, etc. Such an enumeration of the range of criminal conduct employed by many perpetrators of domestic violence would underscore the breadth of violent crimes and fear-inducing or harmful conduct often committed.<sup>18</sup>
15. Further to the above, during the consultations which took place on 22 January, 2009, it was noted that the WG draft Law is to be read together with the Criminal Code of Kazakhstan, which already establishes all crimes that may come within the ambit of domestic violence. Indeed, this is the case in most OSCE participating States, however, the purpose of a *lex specialis* (*special law*) on domestic violence is to make clear to those who will be implementing the law, that some crimes, such as rape, may also happen within the home which may not necessarily be obvious to all persons responsible for implementing the law, nor to the victims of domestic violence themselves. In general, the enacting of a special law on domestic violence, also has the purpose of deepening the understanding of society that crimes committed in the home are no longer a private affairs, but a matter of State interest, and that victims of crime should be protected whether they are in the home or on the street.
16. The definition of ‘domestic violence’ is also recommended to make clear that the violence does not only have to be intentional on the part of the perpetrator, but may also be reckless, negligent and based on omission rather than commission of a certain act. The definition of domestic violence should also

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<sup>17</sup> Paragraph 3, Part II, “A Framework for Model Legislation on Domestic Violence”, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, United Nations Commission on Human Rights, E/CN.4/1996/53/Add.2 2 February 1996, states that “It is urged that States adopt **the broadest possible definitions of acts of domestic violence** and relationships within which domestic violence occurs...”

<sup>18</sup> “Model Code on Domestic and Family Violence”, Advisory Committee of the Conrad N. Hilton Foundation Model Code Project of the Family Violence Project, National Council of Juvenile and Family Court Judges, California. 1994, page 3.

include the intentional destruction of or damage to another family members' property.

17. It is positive that the WG draft Law set out definitions of physical, sexual, psychological and economic violence (translation uses the word “abuse”). It is further recommended that physical and sexual abuse be directly referenced with the Criminal Code of the Republic of Kazakhstan. This is particularly important in cases sexual violence in the form of rape.
18. It is important to note that neither the MoI draft Law nor the WG draft Law define the subjects of the law (the subjects of protection from domestic violence) adequately. The MoI draft Law makes a reference to family and domestic relations, and the WG draft Law does not make any reference at all. It is therefore recommended that the term “family member”, who may be the subject of domestic violence and protection by the law is precisely defined. References may be made to the Criminal Code and the Family Code of Kazakhstan – which may contain such definitions already.
19. Further to the above, it is recommended that if not already the case in the Criminal or Family Codes – “family members” should include individuals related to by blood or marriage, including individuals who do not reside together, individuals who are not married (not registered in the civil register as married) but are residing together (de facto marriage, or concubines), individual who are family members based on adoption, custody or guardianship, individuals who are in separation, divorced and no longer residing together, as well as those having permanent or temporary domicile in the home where the violence has occurred.
20. It is suggested that the definition and concept of “official warning” be removed from Article 1 (5) of the MoI draft Law, in particular the notion of “minor harm” should be deleted.
21. For the purposes of easy reference, the term “minors” should also be defined.
22. It is noteworthy, that Article 3 (5) of the MoI draft Law, states the principle of observing confidentiality when providing assistance to persons who suffered from domestic violence. This is an important principle and should be included in the law.
23. Additionally, Article 4 of the WG draft Law introduces the grounds for taking measures to prevent and counteract domestic violence. While the intention of the article is clear, it is somewhat ambiguous. For instance, who should take the measures when the grounds are met? The entity responsible should be clearly stated. Is the act reported to the police? or a specialized unit within the police? Given this, it is recommended for the article to be made clearer.
24. The Article referred to above also specifies the persons who may report domestic violence. While it is important to state at this point that the protection of private and family life as a matter of principle must be respected by the State, this undisturbed status of the home must end whenever State

intervention is required to protect the safety of individuals in the domestic sphere. Following this interpretation, it may be of value to consider including any other parties who may report on suspicion of the occurrence of domestic violence. Other parties which may be useful in identifying possible occurrences of domestic violence are health care workers<sup>19</sup>, amongst others. Their role in assisting by identification may also be set out. It is noteworthy that although Council of Europe standards are not binding on Kazakhstan, the Council of Europe Committee of Ministers Recommendation No. R (85) 4 on Violence in the Family encourages States to “consider the possibility of removing the obligation of secrecy from the members of certain professions so as to enable them to disclose [...] any information concerning cases of violence in the family.” Whereas, concerning reporting on children who are suspected to be suffering or have suffered from domestic violence, a different standard is suggested, as explained in the paragraph below

25. Further to the above, Article 4 of the WG draft Law is also recommended to include the notion of mandatory reporting requirements to be established for certain professions in the case of children suffering or suspected to be suffering from domestic violence. This recommendation is further explained in paragraph 38 below. It is however suggested that these reporting concepts may be mentioned in the general provisions of Article 4 and better developed in a separate Article in the law.

#### **4.3 Chapter 2: Functions and Powers of Entities Involved in Prevention of Domestic Violence.**

26. Above all other functions, the most important function of a law which is *lex specialis* (*special law*) and deals with a finite area of the law or social problem – is that it provides an opportunity to not only turn special attention to the solution of an issue, but also to establish a functioning national machinery for implementation of the law, and thus the meeting of the principles set out in the law.
27. In general it may be said that this Chapter in both the MoI and the WG draft Law lacks the requisite detail for implementation. Indeed part of such a

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<sup>19</sup> As an example from outside the OSCE region, health care workers have been deemed pivotal in the prevention of domestic violence, in New Zealand the following guidelines for identification and response to domestic violence within health care settings were established: 1. Identification - This includes asking adults about possible abuse in a non-threatening manner, recognising symptoms and in some cases screening for abuse. 2. Emotional Support/Empowerment of Confirmed or Suspected Victims of Abuse - Victims of all ages need clear messages of support and reassure them that they are not at fault, and that help is available. 3. Risk Assessment - The purpose of risk assessment and subsequent referral is to determine the likely level of immediate risk for a patient leaving the health care setting. 4. Safety Planning/Intervention - Useful intervention options help victims to contact support services and access legal options for protection of abused women. Safety plans prepared for victims can include helping them avoid injury and escape violent situations. 5. Documentation - Careful documentation of injuries can assist abused partners to obtain protection orders immediately or in the future, and can assist police investigations of child abuse. 6. Referral Agencies - External referral agencies are vital in providing support to actual or suspected victims of partner abuse and child abuse. Source: <http://www.scoop.co.nz/stories/PO0211/S00065.htm> “Domestic violence guidelines launched” Monday, 11 November 2002, 9:38 am Press Release: Ministry of Health, New Zealand

supplement is the introduction of secondary legislation, to which currently, there is no reference.

28. The introduction of the Commissions (Article 7 of the MoI draft Law and Article 9 of the WG draft Law) is welcomed. The activities of these commissions are also welcomed. However, it is not clear from the either draft laws what the true powers and duties of the commissions will be – who will be responsible and accountable to them, and to whom they should be accountable. A clear system of power and accountability in conducting activities aimed at preventing domestic violence and protecting persons suffering from domestic violence is pivotal for implementation of policy and law on this issue. Any additional powers and responsibilities of police should also be set out.
29. Article 11 of the MoI draft Law and Article 12 of the WG draft Law refer to assistance providers and set out their tasks and responsibilities. It is recommended that the provision of legal assistance be a key service provided to victims of domestic violence (as in the MoI draft Law) and it is welcomed that the question of funding of the assistance organizations is resolved in Article 12.3 of the WG draft Law. Another important aspect which is recommended to be taken into consideration is that the shelters and centres for rehabilitation of victims should be covered by absolute confidentiality as to address, employees and persons/victims present in the centres at any time.

#### **4.4 Chapter 3: Organizing the Activities of State Bodies for the Prevention and Suppression of Domestic Violence.**

30. As already mentioned above, it is recommended that the measure and concept of “official warning” be removed in its entirety. It is clear from ordinary criminal procedure that the police always have the discretion to provide a ‘warning’, where there is insufficient evidence to suggest that a crime has been committed. In cases of domestic violence a system of concrete protective measures that would be available to the victim and police and other authorities is required.
31. While the intention behind the measure of ‘preventative control’ expressed in both the MoI draft Law and the WG draft Law is welcomed, it is nevertheless recommended that these articles be reconsidered to include preventative measures such as an emergency intervention order and protective orders for victims<sup>20</sup>. The preventative control currently offered in both drafts implies that the perpetrator remains only under surveillance. It also not clear from the MoI draft Law, nor the WG draft Law, how such preventative control would be administered on perpetrators who remain in the family home. While protection in the form of barring contact with the victim, or coming within the range of the family home will work in the cases where the perpetrator and

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<sup>20</sup> For instance, based on Article 13 and Article 14 of the Law on Counteracting Domestic Violence of the Republic of Poland, where all conditions of committing an act of domestic violence (as defined by the law) are met, the police may take the perpetrator into custody or alternatively, issue a protection order for the victims of the violence, once the perpetrator is removed from the home. The protection order may consist in a prohibition of contact with the victim of the violence. *Official Journal 05.180.1493, Law on Counteracting Domestic Violence of 29 July, 2005.*

victim are no longer living together, they certainly will not work where they remain in common domicile.

32. Further to the above, it is recommended for a final version of the law to include a clear provision on emergency intervention and furthermore, protection orders that would include the possibility of removing the perpetrator from the residence<sup>21</sup>, an order directing the perpetrator to stay a specified distance from the residence, school, workplace or any other specified place of the victim, children of the victim or other family member, an order prohibiting the perpetrator from using or possessing firearms or other weapons specified, an order granting the victim possession or use of an automobile, or other essential personal effects, and order granting custody of children, and order denying visitation rights, or specifying visitation under supervision, an order requiring the payment of certain costs and fees, and order concerning any other property rights.<sup>22</sup> The order could be served by the police and subject to court confirmation within 24 hours of issuance<sup>23</sup>.
33. A final version of the law should also include a system of referring victims to shelters and places of alternative domicile, when police make emergency interventions – such an option, is recommended however, not to exclude removing the perpetrator himself/herself from the home. In any case, given that the aim of law should be the victim/s life and safety; this is one of the options that should be provided in the law.
34. A final version of the law would also benefit from special provisions concerning shelter and safety provisions for children.
35. Additionally, it would also be beneficial to include a provision specifying that a perpetrator of domestic violence is subject to the ordinary principles of criminal and administrative law and the protective orders discussed above constitute an additional measure that may be applied.
36. In terms of criminal and administrative liability for acts of violence committed in the home, it must be borne in mind that where fines may be applicable to the perpetrator, imposing a monetary penalty on perpetrators of domestic violence affects directly the victims of that violence, where they continue to share a common household, financial obligations and/or responsibility over children. In these cases, alternative forms of reimbursement should be established to ensure that the victim does not carry the burden of the punishment together with the perpetrator. One form of alternative reimbursement would be to order the perpetrator a set amount of hour of

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<sup>21</sup> This measure (removal of the perpetrator from the home) has been applied in many OSCE participating States, including Austria, Germany, Switzerland, Liechtenstein, Luxembourg, Spain and Poland.

<sup>22</sup> “*Model Code on Domestic and Family Violence*”, Advisory Committee of the Conrad N. Hilton Foundation Model Code Project of the Family Violence Project, National Council of Juvenile and Family Court Judges, California. 1994, Page 5.

<sup>23</sup> Chapter 3 of the recently developed Draft Law of the Republic of Armenia on Domestic Violence, provides an excellent example of the detailed manner in which such protection orders may be regulated (*OSCE ODIHR can provide a copy of this draft on prior request*).

community work, which would not severely interfere with any employment obligations he or she may have.

## **5. ADDITIONAL RECOMMENDATIONS AND COMMENTS**

37. It is suggested that a final law regulating this issue in Kazakhstan should include clearer and more detailed provisions on victim assistance measures. In as far as both the MoI draft Law and the WG draft Law speak of assistance providers, there are provisions lacking on forms of compensation and assistance to victims- for instance, with housing, legal proceedings, finances, education and training etc., In particular, there is a lack of provisions which would provide for special measure for children who are victims of domestic violence, especially, where the violence is committed by their parents or legal guardians/care-takers.
38. Further to the above discussion on reporting requirements, it is recommended for mandatory reporting requirements to be established for certain professions in the case of children suffering or suspected to be suffering from domestic violence. Although a failure to report crime may be criminalized under existing provisions of criminal law, it does not serve as an effective deterrent in child maltreatment cases, especially when the offence committed does not amount to a particularly grave crime and takes place within a family home. Moreover, ordinary principles of criminal law require reporting of known crimes, while mandatory procedures for designated professional categories typically use “known or suspected abuse or neglect” as the standard for reporting. Often, especially in the cases of violence against children in the home reporting by designated individuals would remain the only effective mechanism for child protection. In order to bring this recommendation into effect, the Law would need to first identify the categories of “designated individuals” which would be bound by this requirement. Normally, the category of mandatory reporters would include professionals who have frequent contact with children. Secondly, the Law would need to specify that a report must be made when the designated individual has reasonable cause to believe or suspect child maltreatment, or has observed conditions which would reasonably result in child maltreatment. Thirdly, provisions in the Law on mandatory reporting would also have to provide for a “privileged communication” exemption, recognizing the right to maintain the confidentiality of communications between certain categories of professionals and their clients or patients.<sup>24</sup>
39. A final version of the draft law regulating domestic violence in Kazakhstan, should also include a schedule of implementing (secondary) legislation to be introduced in order for the law to be brought to life in practice. In particular, it

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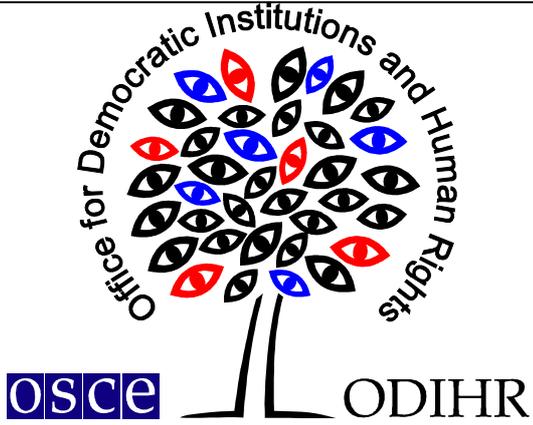
<sup>24</sup> Please see for example: Section 11164-11174.3 of the California Penal Code: Child Abuse and Neglect Reporting Act <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=11001-12000&file=11164-11174.3>

is recommended that a national action plan on this issue be developed in order to ensure a comprehensive and inter-disciplinary approach to the issue. The law should also provide for mandatory reporting of activities of the various bodies responsible for the implementation of the law.

40. It would also be beneficial for the law to include a monitoring mechanism, allowing for an assessment of the operation of the law following for example, two years of its implementation.

*[End of text]*

ANNEX 4

<p>Warsaw, 25 May, 2009</p> <p>Opinion-Nr.: GEND- KAZ/133/2009(MASz)</p> <p><a href="http://www.legislationline.org">www.legislationline.org</a></p>	
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**Preliminary  
Opinion  
On the Package of Laws and Draft Laws of the  
Republic of Kazakhstan  
Related to Domestic Violence.**

**based on an English translation of the laws and draft laws  
commissioned by the ODIHR and the OSCE Centre in Astana.**

*This Preliminary Opinion has benefited from the contributions made by Mary C. Ellison, Staff Attorney, Women's Human Rights program, The Advocates for Human Rights, MN, USA, expert on legislation concerning domestic violence and Dr. L.V Golovko, Professor of Law, Faculty of Law, Lomonosov Moscow State University.*

**TABLE OF CONTENTS**

- 5. INTRODUCTION**
- 6. SCOPE OF REVIEW**
- 7. EXECUTIVE SUMMARY**
- 8. ANALYSIS AND RECOMMENDATIONS**
  - 8.1 The Place of the WG Draft Law in the Hierarchy of the Extant Legal Order
  - 8.2 Purpose and Definitions
  - 8.3 Chapter 1: Main Concepts/General Provisions
  - 8.4 Chapter 2: Functions and Powers of Entities Involved in Prevention of Domestic Violence
  - 8.5 Chapter 3: Organizing the Activities of State Bodies for the Prevention and Suppression of Domestic Violence
- 5. ADDITIONAL COMMENTS AND RECOMMENDATIONS**

## **1. INTRODUCTION**

1. *In 2008, by letter addressed to the OSCE Centre in Astana, the Deputy Minister of the Ministry of Interior of the Republic of Kazakhstan requested a review of the Draft Law on Counteracting Domestic Violence of the Republic of Kazakhstan (hereinafter referred to as the “MoI Draft Law”).*
2. *The OSCE Centre in Astana, referred the request to the OSCE Office for Democratic Institutions and Human Rights, for opinion. The OSCE ODIHR conducts this evaluation within the mandate established by the OSCE Action Plan for the Promotion of Gender Equality, which states that, “The ODIHR, in co-operation with other international organisations and relevant national bodies and institutions, will assist OSCE participating States in complying with international instruments for the promotion of gender equality and women’s rights, and in reviewing legislation to ensure appropriate legal guarantees for the promotion of gender equality in accordance with OSCE and other commitments.”<sup>25</sup>*
3. *Some months later, the Working Group of the Parliament of Kazakhstan reviewing the Draft Law made revisions to the MoI Draft Law, making amendments based also on the opinions gathered from the non-governmental sector (the said version of the Draft Law is hereinafter referred to as, the “WG Draft Law”).*
4. *Both the MoI Draft Law and the WG Draft Law were the subject of discussions between the OSCE Centre in Astana, the OSCE ODIHR and the authorities of Kazakhstan.*
5. *In December, 2008 in meetings between the authorities of Kazakhstan, the OSCE Centre in Astana and the OSCE ODIHR, it was considered that the most constructive way forward would be for the OSCE ODIHR to conduct a preliminary review of both drafts and make recommendations, which would then be discussed and consulted.*
6. *Initial consultations between the Parliamentary Working Group and the OSCE ODIHR on the WG Draft Law took place in Astana on 22 January 2009. Given that time permitted only some issues, concerning the WG Draft Law to be raised, it was agreed between the Parliamentary Working Group and the OSCE ODIHR, that further consultations would take place before the WG Draft Law was adopted (planned for the middle of 2009).*
7. *On 26 February 2009, on account of a Roundtable on legislation pertaining to prevention of domestic violence, held in Astana (organized by the City Council of Astana, Ministry of Interior of Kazakhstan, United Nations Development Fund for Women, “Sojus” in Kazakhstan and the OSCE) it was agreed that the ODIHR would provide an opinion on a package of laws and draft laws which regulate this area of the law (hereinafter, “the Package of Laws”) in*

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<sup>25</sup> Point 44(b) Chapter 5, MC DEC/14/04 7 December, 2004

*order so a broader picture of the situation may be reflected. It was also agreed that, on specific request of the authorities, the OSCE and OSCE ODIHR would make available international expertise and practices, from States which have introduced laws on domestic violence and in particular, can share their practices in implementing them.*

8. *The Package of Laws was transferred to the OSCE Centre in Astana by the authorities and this Preliminary Opinion is provided as a response thereto. The Package of laws includes the WG Draft Law on Counteracting Domestic Violence. From here on in reference shall be made solely to the WG Draft Law, as that which is proposed for adoption and which has not been amended since the latest opinion of 20 February 2009. Annex 1 hereto consists in a list of the Package of Laws subject to this Preliminary Opinion.*

## **2. SCOPE OF REVIEW**

9. The scope of the Preliminary Opinion includes the Package of Laws. Laws and draft Laws are reviewed primarily as they relate to the WG Draft Law. The opportunity has also been taken to provide some additional general remarks on the laws and draft Laws contained in the Package of Laws
10. The Preliminary Opinion assumes that the Package of Laws transferred by the authorities is comprehensive in that it includes all regulations which may pertain to the prevention of domestic violence in the Republic of Kazakhstan.
11. The Preliminary Opinion has been drafted to serve as a set of considerations which should be taken into account in light of international standards and practice in the field of prevention of domestic violence.
12. The Preliminary Opinion has been developed mainly for the purpose of consultations with the authorities of Kazakhstan with a view to assistance in refining and improving WG Draft Law on Domestic Violence.
13. The Preliminary Opinion is based on unofficial translations of the entire Package of Laws. Errors from translations may result.
14. In view of the above, the OSCE ODIHR would like to make mention that this Preliminary Opinion is without prejudice to any written or oral recommendations and comments to the mentioned Package of Laws that the OSCE ODIHR may make in the future.

### **3. EXECUTIVE SUMMARY**

15. The drafting of the Package of Laws is welcomed. The Package of Laws constitutes a significant step in addressing the occurrence of domestic violence in Kazakhstan. It is also welcomed that the WG Draft Law in particular, has been developed in a consultative and open process. Nevertheless, there Package of Laws could be improved. It is therefore recommended as follows;
  - A. The placement of the WG Draft Law within the hierarchy of legal acts of Kazakhstan should be addressed [par.16];
  - B. In particular, the relationship of the WG Draft Law with the Draft Law on Crime Prevention should be clarified [par. 17];
  - C. The definition of “family relations”, thus, who is a subject of the WG Draft Law, should be clarified across all the acts coming within the Package of Laws [par 19 and 20];
  - D. The definition of domestic violence is proposed to be supplemented [par 21]
  - E. A list of criminal acts, including those resulting in low-level injury, that may be committed in the home should be considered to be included [par 23]
  - F. The measure of “official warning” should be removed from the WG Draft Law and perpetrators should not come within the operation of the measure of “official warnings” through the Draft Law on Crime Prevention [par 27, 28, 29, 30, 31, 32 and 33];
  - G. The order of protection offered under Article 1-1 (2) of the Draft Law on Changes and Amendments (amending Article 143 Part 2-1 of the Criminal Procedure Code) offered is welcomed and may be further supplemented, by including sanctions for violation of the order [par 36, 37 and 38];
  - H. It should be considered to refrain from a system of imposition of fines on perpetrators of domestic violence, in cases where they share a home economy with the victims [par 39]
  - I. The WG Draft Law is strongly recommended to include and emergency order of protection [par 40]
  - J. It is proposed that Chapter 3 includes clearer guidance on the role and tasks of law enforcement in dealing with cases of domestic violence rather than primarily focusing on monitoring of perpetrators and potential perpetrators [par 42 and 43]
  - H. Regulation of protection measures for children should be considered [par 44];
  - I. Chapter 3 of the WG Law should focus on protection of victims, rather than monitoring of potential offenders [par. 48]
  - J. Chapter 3 of the WG Draft Law may also include provisions which would establish that victims would be promptly informed of their rights , and be afforded free legal aid in criminal proceedings [par 49, 50]
  - K. Chapter 3 of the Draft Law is also proposed to include provisions granting court authority to issue protection measures on application of the victim [par 51 and 53]
  - L. Protection orders should include the option of removing the perpetrator from the home [par. 52]
  - M. Prevention (protection orders) are proposed to be terminated on the request of the victim [par 54]

- N. The WG Draft Law would benefit from including provisions on monitoring the operation and implementation of the regulations, to ensure they are working in practice [par 57].

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### **4.1 The Place of the WG Draft Law in the Hierachy of the Extant Legal Order**

16. The issue of the placement of the WG Draft Law in the legal order of the legislation of Kazakhstan has been raised in previous OSCE ODIHR analysis. The importance of a clear indication of whether or not the WG Draft Law constitutes “*lex specialis*” over other laws is of significance and shall be mentioned as appropriate in the analysis below.
17. Further to the above, Article 2 (1) refers to “other regulatory acts” as being the basis on which the WG Draft Law consists. It is therefore suggested for the WG Draft Law to make clear the manner in which it relates to the Draft Law on Crime Prevention, in particular, as regards liability for domestic violence and application of measures of restraint. It is essential to establish the exact scope and inter-relation of each of the said regulatory acts.

##### **4.2 Purpose and Definitions**

18. While the purpose of the WG Draft Law is welcomed, it is again suggested that the purpose set out in the final WG Draft Law that will be submitted for adoption to refer to not only to prevention and protection from domestic violence in “matrimonial relations” but all family and close relations. Recommendations as to the exact nature of relations that may be referred to are provided below.

##### **4.3 Chapter 1: Main Concepts/General Provisions**

19. Further to the above, general consistency on how “family relations” are defined, is recommended. For instance, Article 1 (2) of the WG Draft Law on refers to “matrimonial relations towards others as well as by ex-spouses”, whereas Article 1 (1) of the Draft Law on Changes and Amendments to Some Legislative Acts of the Republic of Kazakhstan on Prevention and Suppression of Domestic Violence (hereinafter referred to as, the “Draft Law on Changes and Amendments”), which amends by addition to Article 7 of the Criminal Procedure Code of the Republic of Kazakhstan (1997) refers only to “family relationship”.
20. It is noted that while Article 79-5 (2) of the Code on Administrative Offenses offers a definition of “family relations” which includes persons who live or have lived together, persons who are married, ex-spouses and close relatives. However, it is not clear whether this includes all persons having an intimate or sexual relationship, (including, persons involved in a significant romantic or sexual relationship or who have formerly been involved in a significant

romantic or sexual relationship<sup>26</sup>) individuals who are family members based on adoption, custody or guardianship. A specification of these relations is recommended. It is also unclear from the WG Draft Law, whether the mentioned definition from the Code of Administrative Violations is applicable, which again raises the question of the placement of the WG Draft Law in the hierarchy of the extant legal order (mentioned in paragraph 16 above).

21. The definition of “domestic violence”, appears satisfactory, however, its operation in practice will be improved if the definition of the term “family relations”, is clarified as suggested above. It is also recommended that the term “intentionally” be removed, so as to make certain that the offender’s state of mind (“*mens rea*” or “*guilty mind*”) does not have to be proven, but that only the acts must be proven (“*actus reus*” or “*wrongful act*”).
22. Although a question of legislative technique, it is also noted that currently, the Draft Law on Changes and Amendments inserts the definition of domestic violence in the Code of Criminal Procedure, which is a Code which ordinarily establishes the order of criminal court procedure, rather than classifying criminal acts. A question as to the appropriateness of such a provision in the Code of Criminal Procedure therefore arises.
23. It should be noted that the WG Draft Law and the Draft Law on Changes and Amendments do not contain a list of crimes that are believed to come within the remit of domestic violence. Article 1-1 (2) of the Draft Law on Changes and Amendments supplements Article 143 of the Criminal Procedure Code referring to “crimes related to domestic violence”, however these are not specified.<sup>27</sup> This may result in different law enforcement practices in defining this category of crimes. The practice in other OSCE participating States<sup>28</sup> has shown that it is beneficial for criminal laws to clarify that domestic assault is a distinct crime, including those assaults that involve low-level injuries such as bruises, cuts, scrapes and burns.<sup>29</sup> Sexual assault within intimate relationships,

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<sup>26</sup> See “U.N Framework,” a report of the 2008 United Nations expert group available at [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf).

<sup>27</sup> Paragraph 3, Part II, “A Framework for Model Legislation on Domestic Violence”, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, United Nations Commission on Human Rights, E/CN.4/1996/53/Add.2 2 February 1996, states that “It is urged that States adopt **the broadest possible definitions of acts of domestic violence** and relationships within which domestic violence occurs...”

<sup>28</sup> See for Instance Minnesota. Stat. § 609.341 (2008) available at <https://www.revisor.leg.state.mn.us/statutes/?id=609.341>.: which provides the following crimes as those which may occur within the context of domestic violence “Assault (commits an act with intent to cause fear in another of immediate bodily harm or death; or intentionally inflicts or attempts to inflict bodily harm upon another); Terroristic threats (threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another); Interference with an emergency call (intentionally interrupts, disrupts, impedes, or interferes with an emergency call or who intentionally prevents or hinders another from placing an emergency call); or Criminal sexual conduct”

<sup>29</sup> See Minnesota Statute Section 609.2242 (2008) available at <https://www.revisor.leg.state.mn.us/statutes/?id=609.2242>

including marital rape, should also be criminalized.<sup>30</sup> Including these specifications in the WG Draft Law would make clear that law enforcement and prosecutors are obligated to pursue all cases of domestic violence, including assaults resulting in low-level injuries. It is important to ensure that crimes involving domestic violence are not treated less seriously than other crimes. In fact, many jurisdictions increase criminal penalties for repeated domestic violence offenses, even if they involve low-level injury.

24. It is assumed that Article 1 paragraphs (8) and (9) of the WG Draft Law are to be read together with the Code on Administrative Offences and the Draft Law of the Republic of Kazakhstan on Crime Prevention<sup>31</sup> (hereinafter referred to as “Draft Law on Crime Prevention”), which are both part of the Package of Laws. An analysis of these provisions shall be provided below. It remains to be resolved, however, the placement in the hierarchy of norms, of each of these legal acts (see paragraph 16 above)
25. It is welcomed, that Article 3 (4) of the WG Draft Law on Domestic Violence, states the principle of observing confidentiality when providing assistance to persons who suffered from domestic violence. This is an important principle recognised by the WG Draft Law.
26. As stated in previous OSCE ODIHR opinions, Article 4 of the WG Draft Law appears sound and is welcomed, in particular, regarding the seeking of consent of the victim as well as reporting on acts of domestic violence committed against minors. It was also noted previously that other parties which may be useful in identifying possible occurrences of domestic violence are health care workers, amongst others<sup>32</sup>. The article is particularly welcomed since it recognises that the victims of violence are most often the best judges of the dangers presented to them by their violent partners. Therefore, including them also in the decision to apply for preventive control is critical. This is particularly true since research shows that one of the most dangerous times for many victims is when they separate from their abusers.
27. Article 5 of the WG Draft Law on Domestic Violence stipulates the manner in which prevention and suppression of domestic violence shall be ensured. Paragraph (6) and (11) in particular speak of “official notice of inadmissibility of domestic violence” and “preventative filing and preventative control by interior bodies”, respectively.
28. In the Package of Laws provided, the concept of “official warning” appears also in Article 28 of the Draft Law on Crime Prevention. It is not clear in the context of prevention of domestic violence, whether this refers to persons who

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<sup>30</sup> See “U.N Framework,” a report of the 2008 United Nations expert group, 27 available at [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/Report%20EGMGPLVAW%20\(final%2011.11.08\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/Report%20EGMGPLVAW%20(final%2011.11.08).pdf).

<sup>31</sup> Resolution no. 1086 of the Republic of Kazakhstan of 26 November, 2008.

<sup>32</sup> the Council of Europe Committee of Ministers Recommendation No. R (85) 4 on Violence in the Family encourages States to “consider the possibility of removing the obligation of secrecy from the members of certain professions so as to enable them to disclose [...] any information concerning cases of violence in the family.”

have already perpetrated and act of domestic violence, or those who may be suspected of committing such act. In both cases however, the institution of “official warning” raises serious concerns.

29. Further to the above, in the case that an “official warning” may be provided to a person who has already committed an act of domestic violence, this provision should be removed. Providing an official warning to a perpetrator of domestic violence, as stated in previous OSCE ODIHR opinions, may only serve to aggravate the situation between the perpetrator and victim. Law enforcement should act immediately upon a report of domestic violence whether through criminal sanctions or through the issuance of “preventive control” (protection orders) to hold the offender accountable and to keep the victim safe. The WG Draft Law should communicate zero tolerance for violence.
30. Furthermore, given the inter-relation of the WG Draft Law with the Draft Law on Crime Prevention, it appears that removing the measure of “official warning” from the WG Draft Law, would nonetheless permit its application under the Draft Law on Crime Prevention. Until the question of placement in the hierarchy of legal norms is addressed, and thus the inter-relation of these two regulatory acts is resolved the application of this measure (“official warning”) will remain unclear.
31. In the case that an “official warning” is foreseen to be issued (whether under the WG Draft Law, or Draft Law on Crime Prevention) to a person who has not committed an act of domestic violence, but is only suspected to do so in the future, then such an application of the measure also raises concerns. Application of this kind of measure on an individual who has not yet committed a crime entails significant limitations on their freedoms. If a person has not committed an offence, they would also in this case be prevented from benefiting from the guarantee of rights ordinarily available to a person suspected of committing a crime.
32. Additionally, while Article 5 of the WG Draft Law lists “official warning” as a measure, Article 13 establishes that “*a perpetrator of domestic violence with no constituent elements of administrative violation or misdemeanor, shall be issued and official notice on inadmissibility of commitment of domestic violence..*” This appears to suggest that some forms of domestic violence are not criminalized. A lack of clarity in the types of acts which may constitute domestic violence and the group of offenders falling into this category would result in inconsistencies in implementation of the law and a failure to hold perpetrators liable for acts of domestic violence.
33. Further to the above, it is recommended that both the WG Draft Law and the Draft Law on Crime Prevention remove the measure of official warning, regardless of whether it is issued on a person suspected to commit a crime in the future or someone who has already committed a crime (in this case domestic violence) who should instead be held liable for the criminal acts committed.

34. The opportunity is also taken here to make some general remarks regarding principles and practice in the field of crime prevention which is clearly a priority for many OSCE participating States, including Kazakhstan. Similarly to the WG Draft Law, the draft Law on Crime Prevention (under which perpetrators of domestic violence may fall), does not resolve the dilemma of whether the measures applied will benefit from the same guarantees of rights and freedoms that are afforded to offenders under the Criminal Code, Criminal Procedure Code and the Administrative Offences Act. This is of particular concern given that certain measures, such as those contained in Article 28 (official warning, already discussed above), Article 29 (record keeping) and Article 25 (referral to compulsory treatment, amongst others) of the Draft Law on Crime Prevention, may be considered as measures of restraint rather than preventative measures. The risk is therefore, that the Draft Law on Crime Prevention will create parallel criminal measures with very weak guarantees of personal freedoms and rights of those to whom the measures are applied. It is recommended that the Draft Law on Crime Prevention should be revised in order to strike a better balance between Crime prevention and the guarantee of fundamental freedoms and right.
35. In addition, many participating States of the OSCE have found that non-governmental organizations, funded and supported by the government, are best positioned to take on crime prevention activities. Laws may set out broad parameters for the duties of government agencies responsible for crime prevention, which may include the duty to gather and publish information and education materials on violence prevention, foster collaboration among those working on violence prevention, provide training and technical assistance in violence intervention and prevention, and develop national strategies for violence prevention. The Draft Law on Crime Prevention assigns many crime prevention tasks to law enforcement, and thus, it may be considered to be revised to involve non-governmental organizations to a greater degree.
36. Returning to the issue of measures of prevention and protection, Article 1-1 (2) of the Draft Law on Changes and Amendments (amending Article 143 Part 2-1 of the Criminal Procedure Code), appears to offer a type of protection order and is welcomed. It is suggested that prohibitions on the perpetrators behaviour should be extended to include approaching the victim's home, workplace and children's school. It may also be considered for the courts to be in the position to provide relief to victims in the form of temporary support to the victim and his/her children, temporary custody of the children, temporary use and possession of property (house or dwelling).
37. Further to the above, it is recommended to ensure that the violation of protection orders should be subject to criminal sanctions. In two OSCE participating States, Bulgaria and Georgia, the Ministries of the Interior found the implementation of preventive measures to be difficult. Prosecutors and judges have discovered, through the direct experience of trying to ensure victim safety and to hold offenders accountable, that criminalizing the

violation of restrictive or protective measures was extremely important in ensuring the effectiveness of their laws<sup>33</sup>.

38. Further to the above, it is welcomed that Article 1-2 (2) of the Draft Law on Changes and Amendments includes the possibility of prohibition on use and possession of firearms, disposal of property jointly purchased with the victim, communication etc.,
39. Article 1-2 (4) of the Draft Law on Changes and Amendments, which introduces the failure to fulfill an official warning. As stated above, the concept and institution of “official warning” should be removed from the Package of Legislation, in particular, in the prevention of domestic violence. Furthermore, as stated in previous opinions, the establishment of a system of fines which may be connected with acts of domestic violence (as in the said Article 1-2(4)), should be re-considered. This is because where fines may be applicable to the perpetrator, imposing a monetary penalty on perpetrators of domestic violence affects directly the victims of that violence, where they continue to share a common household, financial obligations and/or responsibility over children. In these cases, alternative forms of reimbursement should be established to ensure that the victim does not carry the burden of the punishment together with the perpetrator. One form of alternative reimbursement would be to order the perpetrator a set amount of hour of community work, which would not severely interfere with any employment obligations he or she may have.
40. Taking into account the measures proposed in the Package of Laws, what appears to be missing is a system of “emergency protection” in cases where domestic violence is intercepted by police. Emergency intervention order and protective orders for victims<sup>34</sup> are fundamental in addressing and preventing of further violence. The WG Draft Law should ensure that victims may apply for emergency “preventive control.” It is recommended for the court to be granted the power to issue the order without a hearing in emergency situations. Such an emergency order is often called an “*ex parte*” order for protection. Such an order could be served by the police and subject to court confirmation within 24 hours of issuance<sup>35</sup>. Where such an “*ex parte*” order for protection is issued, either the petitioner or the respondent may request a later hearing. Legal system officials should act immediately upon a report of domestic violence to hold the offender accountable and keep the victim safe. Where no

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<sup>33</sup> On 13 April 2009 Bulgaria passed an amendment to their law making the violation of the order for protection issued under the domestic violence law a crime under Article 296 of the Bulgarian penal code. *See also:* Genoveva Tisheva, “An Important Victory,” StopVAW Expert’s Corner available at [http://www.stopvaw.org/Expert\\_s\\_Corner.html#An\\_Important\\_Victory](http://www.stopvaw.org/Expert_s_Corner.html#An_Important_Victory) (last visited May 20, 2009)

<sup>34</sup> For instance, based on Article 13 and Article 14 of the Law on Counteracting Domestic Violence of the Republic of Poland, where all conditions of committing an act of domestic violence (as defined by the law) are met, the police may take the perpetrator into custody or alternatively, issue a protection order for the victims of the violence, once the perpetrator is removed from the home. The protection order may consist in a prohibition of contact with the victim of the violence. *Official Journal 05.180.1493, Law on Counteracting Domestic Violence of 29 July, 2005.*

<sup>35</sup> Chapter 3 of the recently developed Draft Law of the Republic of Armenia on Domestic Violence, provides an excellent example of the detailed manner in which such protection orders may be regulated (*OSCE ODIHR can provide a copy of this draft on prior request*).

emergency exists, a permanent “order for protection” should be issued after a hearing, as already proposed by Article 143 Part 2-1 of the Draft Law on Changes and Amendments. This type of emergency order may be introduced in Article 6 of the WG Draft Law.

#### **4.4 Chapter 2: Functions and Powers of Entities Involved in Prevention of Domestic Violence.**

41. The Law presents an excellent opportunity to outline the role and functioning of police in intercepting cases of domestic violence and protecting victims. The Package of Laws and WG Draft Law does not take the opportunity to develop the standards for the critical role of police in holding offenders accountable for the domestic violence. It is welcomed that the Law on Changes and Amendments established the requirement of training however; it may be more specific in outlining the role of the police on contact with domestic violence incidents.
42. In addition to the law enforcement being under the obligation to “fulfill court writs” (Article 1-3 (1) of the draft Law on Changes and Amendments, the WG Draft Law may specifically task law enforcement to (a) take action necessary to provide for the safety of the victim or of any household member; (b) confiscate any weapon involved in the alleged domestic violence; (c) transport or obtain transportation for the victim and any child to a shelter or place of safety; (d) assist the victim in removing essential personal effects; and (e) assist the victim and any child in obtaining medical treatment, including obtaining transportation to a medical facility.<sup>36</sup>
43. Article 10 of the WG Draft Law provide internal affairs bodies with expansive authority to intervene in domestic violence cases. The focus should be on identifying the violent offender, holding the offender accountable, and ensuring the victim’s safety.
44. Article 10 (2) of the WG Draft Law, proposes measures for the protection of children. It is suggested that while instances of reporting domestic violence against of involving children should be addressed in the WG Draft Law, the issue of child protection should be better developed in separate regulations. Generally, domestic violence laws are intended to provide an immediate remedy of separation and protection. Child abuse should be addressed as a separate law containing specifically tailored remedies for neglected or abused children and procedural protections for parents.<sup>37</sup> Specific laws addressing child abuse are also needed to hold offenders accountable, protect parental rights and to provide safety and assistance to children. Research on the impact of domestic violence on children should be taken into consideration in any determinations about custody of children. In particular, it is important that custody of children is at least initially given to the non-violent parent until a

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<sup>36</sup> See Section 204, page 4 of Family Violence: A Model State Code (1994)

<sup>37</sup> See Minn. Stat. § 260C.007 (2008) for definitions of “child abuse” and “domestic child abuse” available at <https://www.revisor.leg.state.mn.us/statutes/?id=260C.007> (last visited May 19, 2009).

court may hold a hearing to determine long-term or permanent custody arrangements.

45. Article 12 of the WG Draft Law on Domestic Violence refer to assistance providers and set out their tasks and responsibilities. It is welcomed that the Law on Changes and Amendments, in Article 1-2 (3) amending Article 86-1 of the Code of Administrative Offences, includes penalties for disclosure of confidential information obtained *ex officio* while providing assistance to victims of domestic violence. If not already the case, this duty to protect the private life and confidentiality of the victims, should be extended to ensuring confidentiality as to address, employees and persons/victims present in the assistance centres/shelters at any time.
46. If possible, the WG Draft Law is recommended to provide for one shelter/aid center for every 10,000 inhabitants, one women's help center for every 50,000 women, and one rape crisis center for every 200,000 women. It is also recommended that the Package of Laws provides for the funding of a national women's hotline where all victims of violence may get around-the-clock assistance, free of cost, and where they may be referred to shelters and aid centers.<sup>38</sup>

#### **4.5 Chapter 3: Organizing the Activities of State Bodies for the Prevention and Suppression of Domestic Violence.**

47. As discussed above, it is recommended for Article 13 of the WG Draft Law to be revised.
48. Further articles in this Chapter elaborate on persons under "preventative control". It is suggested for the WG Draft Law to strike a balance between what should be the primary purpose of the regulations – that is, establishing preventative measures such as an emergency intervention order and protective orders for victims<sup>39</sup>, and the secondary purpose of surveillance and control of the perpetrator. Amongst others, police time spent on the suggested actions in Article 20 of the WG Draft Law (monitoring behaviour and visiting homes) may be utilized more efficiently by focusing ensuring victim safety and the implementation of protection orders.
49. Furthermore, this Chapter may include provisions which would establish that all victims be promptly and adequately informed of their rights, the details of the relevant legal proceedings, available services, support mechanisms and protective measures, and the release of the perpetrator from pre-trial detention or from jail; such a provision would oblige the prosecutor who discontinues a

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<sup>38</sup> See The U.N. Framework for Model Legislation on Violence against Women (2008) page 34

<sup>39</sup> For instance, based on Article 13 and Article 14 of the Law on Counteracting Domestic Violence of the Republic of Poland, where all conditions of committing an act of domestic violence (as defined by the law) are met, the police may take the perpetrator into custody or alternatively, issue a protection order for the victims of the violence, once the perpetrator is removed from the home. The protection order may consist in a prohibition of contact with the victim of the violence. *Official Journal 05.180.1493, Law on Counteracting Domestic Violence of 29 July, 2005.*

criminal case of domestic violence to explain to the victim(s) why the case was dropped.<sup>40</sup>

50. It is also recommended to be considered for the WG Draft Law to include a requirement that victims have the right to free legal aid in all proceedings, especially criminal proceedings, in order to ensure access to justice and avoid secondary victimization.
51. Article 16 of the WG Draft Law specifies that “an interior body” shall impose preventive control. It is recommended that courts should have the authority to issue protective measures such as “preventive control” based on the application of a non-violent partner for themselves and on behalf of their child. Courts are best suited to receive and review such applications, act on them immediately, and ensure that the guarantees of notice and a hearing are carried out in a fair and impartial manner.<sup>41</sup> It ought to be noted that decisions about custody and parenting time should never delay the issuance of protective measures.
52. As recommended in previous OSCE ODIHR recommendations it is suggested that within the remit of the protection orders, perpetrators of domestic violence may be ordered to leave the home<sup>42</sup>.
53. It is also recommended to consider to grant courts the authority to order possession and use of an automobile and other essential personal effects, and direct law enforcement to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile and other personal effects (as suggested in paragraph 41 above).
54. In relation to Articles 18 and 19 of the WG Draft Law, it is recommended that any form of preventative control (protection orders, etc) should be terminated by court at the victim’s request, in the case that the court is able to determine that the victim’s safety can be assured. .
55. A final version of the law should also include a system of referring victims to shelters and places of alternative domicile, when police make emergency

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<sup>40</sup> See The U.N. Framework for Model Legislation on Violence against Women (2008) page 40-41.

<sup>41</sup> In some FSU/CEE countries, measures such as an “emergency intervention order” or a “restrictive measure” have been used to give police the ability to respond immediately to threats of or actual acts of domestic violence. The emergency orders do not deal with issues of custody or visitation rights, but simply prohibit perpetrators from contacting the victim and order the perpetrator out of the home. Where this is true, courts have the authority to later grant permanent orders protecting victims of domestic violence and their children.

<sup>42</sup> For instance, based on Article 13 and Article 14 of the Law on Counteracting Domestic Violence of the Republic of Poland, where all conditions of committing an act of domestic violence (as defined by the law) are met, the police may take the perpetrator into custody or alternatively, issue a protection order for the victims of the violence, once the perpetrator is removed from the home. The protection order may consist in a prohibition of contact with the victim of the violence. *Official Journal* 05.180.1493, *Law on Counteracting Domestic Violence of 29 July, 2005*.

interventions – such an option, is recommended however, not to exclude removing the perpetrator himself/herself from the home.

56. A final version of the law would also benefit from special provisions concerning shelter and safety provisions for children.

## **5. ADDITIONAL RECOMMENDATIONS AND COMMENTS**

57. It would also be beneficial for the law to include a monitoring mechanism, allowing for an assessment of the operation of the law following for example, two years of its implementation. As practice in many OSCE participating States has shown, continual revision and strengthening of the WG Draft Law and Package of Laws will ensure that the measures introduced are working in practice

*[End of text]*