

联合国《中国反家庭暴力立法国际经验交流会》  
成果技术建议报告

UN Technical Paper Recommendations from the International  
Roundtable on the Family Violence Legislation in China

联合国多机构支持中国反家暴立法工作组  
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Support the China Family Violence Law Drafting Process



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目录

概要.....	2
一、简介.....	3
二、相关国际法律和条约.....	4
三、中国目前针对家庭暴力的法律和政策并不完善.....	6
四、对中国国家反家庭暴力法的具体建议.....	8
五、结论.....	23
六、附件 A.....	25
七、附件 B.....	35

Contents

Executive Summary.....	44
I. Introduction.....	45
II. Relevant International Law and Treaties.....	47
III. Current Laws and Policies That Address Family Violence in China Are Insufficient.....	49
IV. Specific Recommendations for China's National Family Violence Law.....	51
V. Conclusion.....	70
VI. ANNEX A.....	71
VII. ANNEX B.....	83

## 概要

本技术建议报告为中国国家反家庭暴力法的完善提供了具体的建议。这些建议是基于中国签署的国际人权公约、圆桌会议参会国的立法经验及专家报告提出的,主要包括:明确国家所应承担的责任,为家庭暴力受害人提供保护,追究施暴人的责任以及弥补当前中国法律存在的缺陷。2014 年 4 月,在联合国国际家庭暴力圆桌会议上,有来自奥地利、澳大利亚、芬兰、日本、韩国、新西兰、南非、英国以及美国的国际专家就有关家庭暴力、儿童权益、残障人士权益和虐待老人等方面的各国法律做了报告。本报告中所提出的技术建议整合了上述报告的有益经验。

本报告所定义的家庭暴力包括针对妇女、儿童、残障人士和老年人的暴力行为,报告中所提出的针对国家反家庭暴力法的完善建议包括为每一类被害人提供保护。本报告建议中国在国家层面应构建一个针对家庭暴力的系统性应对机制,包括政府部门及社区组织之间的协调与配合,共同防止家庭暴力的发生、为被害人提供援助以及通过惩戒和矫治措施追究施暴人的责任。本报告建议国家有义务为青年人、老年人、残障人士以及妇女提供公共教育以及宣传活动,使其明确什么是家庭暴力以及应该如何寻求援助。国家还应为警察、检察官、法官以及为老年人、儿童和残障人士服务的工作人员提供大量的培训,使其明确应该如何界定、有效应对家庭暴力事件,以及对家庭暴力事件有报告义务。本报告还建议为受害人提供更多法律保护,包括家庭暴力罪的定义和执行以及将受害人纳入民事人身安全保护令的受理范围。

本报告的附件 A 包括国际专家在联合国家庭暴力圆桌会议上的报告所提供的附加信息,附件 B 是中国关于家庭暴力的现行法律和政策的详细情况。

## 一、简介

据联合国妇女署估计,至少三分之一的妇女在其一生中会遭遇殴打、强奸或其他虐待,而施暴人往往是其家庭成员。<sup>1</sup>对妇女的暴力行为,不论是发生在家庭内部的还是其他背景下的,都源于家庭和社会中男女权力的不平等,而这些暴力行为又会导致男女权力进一步失衡。家庭暴力是一种常见的针对妇女的暴力行为。家庭暴力是具有亲密关系的一方通过不同形式的虐待取得对另一方的控制权,通常涉及一系列的带有此种目的或意图的虐待行为。伴侣间暴力(domestic violence)施暴人大多数为男性,而大多数受害人<sup>2</sup>为女性。伴侣间暴力通常包括身体暴力以及其他形式的控制行为,比如精神、言语、情感、心理、经济/财务和性虐待。任何人都可能成为伴侣间暴力的被害人,但有些群体更弱势,比如妇女、儿童、残障人士和老年人。总之,伴侣间暴力,以及家庭中由伴侣和/或监护人对妇女、儿童、老年人和残障人士实施的虐待统称家庭暴力(family violence)。

家庭暴力的成因非常复杂,因此制定有的放矢、全面、有效的国家立法已被证实是困难重重,但的确是非常有效。家庭暴力对于家庭、社区以及社会所造成的巨大负面影响不可否认,家庭暴力不仅会对其直接受害人造成严重的、终身的身心伤害甚至死亡,如果问题得不到解决,家庭暴力还会增加医疗保健费用、降低经济生产力。

2014 年 4 月 10 日至 11 日在中国北京举行的联合国和全国妇联权益部反家庭暴力立法国际圆桌会议上,家庭暴力、伴侣间暴力、儿童虐待、老年人虐待以及残障人士虐待的国际专家们就九个国家为防止家庭暴力、保护家庭暴力受害人并惩治施暴人而采取的国家法律分享了宝贵信息。专家们在发言中还提出了对中国国家反家庭暴力法律的建议。各位发言人达成了一致意见,即一部有效、全面的国家法律和对该法律的严格执行是成功解决家庭暴力问题的最有效途径。例如,据报道,在美国,自 1994 年颁布国家法律以来伴侣间暴力的整体发生率已经下降了 64%。

采取权利本位的整体方案来防治家庭暴力、保护法案主体不受家庭暴力侵害,应与中国所签署的国际协议相一致,如《儿童权利公约(CRC)》,《消除对妇女一切形式歧视公约(CEDAW)》(《消歧公约》),《残疾人权利公约(CRPD)》,《马德里老龄问题国际行动计划(MIPPA)》,以及中华人民共和国宪法及其他法律的规定。权利本位的整体方案将为妇女、儿童、残障人士和老年人提供平等的合法权利。为了让法律发挥效用,中国的国家反家庭暴力法律还必须意识到并解决男女权利不平等,正是这种性别权力失衡使针对妇女以及儿童、残障人士、老年人这些弱势人群的家庭暴力得以巩固并持续下去。此外,中国国家反家庭暴力法不能过于被动保守地处理家庭暴力事件,而应规定一级

<sup>1</sup> 联合国公共信息部门,联合国秘书处“共抗暴力”宣传活动简报(<http://www.un.org/en/women/endviolence/pdf/VAW.pdf>)

<sup>2</sup> 概念“被害人”和“幸存者”在本论文中置换使用,指遭受家庭暴力的个体,包括被虐待的目标,及因目击虐待行为而被影响或处于有虐待发生的家庭的儿童。由于这两个概念传达不同的含义,而遭受虐待的个体在康复的过程中表示希望能冠之其某一名称,所以本文会采用这两个概念。

预防（事前预防家庭暴力的措施）、二级预防（侵害发生当中/开始以后解决家庭暴力的措施）、以及三级预防（事后防止再次发生的措施）。

### 中国的家庭暴力

与很多国家一样，中国的家庭暴力的严重性被低估。由于这种违法或者犯罪的本质以及被害人自身的脆弱性，所有形式的家庭暴力，包括伴侣间暴力，被害人常常不揭发被虐待的真相，因此世界范围内的家庭暴力犯罪都被低估了。就中国有限的数据显示，家庭暴力是个严重问题。全国妇联在 2011 年进行的一项全国调查发现，“约有四分之一的妇女在家里遭受过暴力，包括辱骂、虐待、限制自由以及强迫性行为。”<sup>3</sup> 1999 年，中国法学会反对家庭暴力网络在浙江省、湖南省和甘肃省的九个城市进行调查，结果显示 3780 名受访者中有 71.9% 表示曾在幼年遭受家庭暴力。<sup>4</sup> 在中国，几个近期的较小规模调查显示存在针对老年人的家庭暴力，尽管这些结果并不能代表全国的情况。在一项调查中，60 岁以上的妇女有 19.3% 称她们曾遭受家庭暴力。<sup>5</sup> 尽管有数据显示中国目前有 8500 万残障人士，但他们之中有多少人正在经历或曾经经历家庭暴力却并没有统计。然而，家庭暴力的确在中国非常普遍，影响到了社会的各个部分。中国有责任构建有效框架，防止家庭暴力，为被害人提供保护和支持，对施暴人实施心理辅导、矫治、惩戒并追究其法律责任。

## 二、相关国际法律和条约

中国已经签订了几个国际公约，都要求其对于家庭暴力问题采取行动，包括制定一部全国反家庭暴力法，并报告减少家庭暴力发生率方面取得的进展。这些为中国的反家庭暴力国家立法的制定提供了框架基础。

《消除对妇女一切形式歧视公约》（以下简称《消歧公约》）将针对妇女的暴力行为划入对妇女的歧视范畴。中国在 1980 年签署并批准了《消歧公约》。《消歧公约》的第 2、5、11、12 和 16 条要求缔约国采取行动，保护妇女免受家庭内部、工作场合或任何其他社会生活领域的任何暴力。除此之外，《消歧公约》的一般性建议第 19 条承认，性别暴力是歧视的一种形式并且“严重阻碍了女性享受与男性平等的权利与自由的能力”。该文件还建议缔约国将暴力以及为消除暴力所采取的措施的相关信息纳入到他们的《消歧公约》报告中。为了保证政策、法律的执行，进而消除针对妇女的暴力，缔约国有必要做定期汇报。联合国妇女地位委员会于 2013 年 3 月 15 日通过的“消除并阻止对妇女和女童一

<sup>3</sup> 中国妇联和国家统计局于 2011 年发布本项数据，基于对全国 105,573 位 18 岁和 20 岁以上、405 位 10 岁到 17 岁的受访者的调查问卷。

<sup>4</sup> 参见陈明侠、夏吟兰、李明舜、薛宁兰主编：《家庭暴力防治法基础性建构研究》，中国社会科学出版社 2005 年版，第 239、240 页。

<sup>5</sup> 数据源于全国妇联与联合国人口基金会于 2013 年“女性所受暴力（Violence Against Women）”项目中两个项目点的基线调研。

切形式暴力决定”建议各国“通过制定、强化并执行禁止伴侣间暴力、明确惩罚措施并建立充分保护的法律法规来处理并消除这种暴力行为。”

打击针对老年人的虐待和暴力行为的重要国际公约主要是《马德里老龄问题国际行动计划（MIPPA 2002）》和《消歧公约（1979）》，这两个公约都已经得到了中国政府的签署和批准。《消歧公约》建议缔约国应调查、起诉并惩罚针对老年女性的一切暴力行为。<sup>6</sup> 马德里计划政治宣言的第 5 条声明了政府对“加强对老年人的尊重、消除一切形式的疏忽、虐待和暴力”的承诺。“疏忽、虐待和暴力”被列入 MIPPA 行动建议的优先指引 III 的四个议题中：保障赋能和支持的环境，承认通常以生理、心理、情绪和经济形式表现的“疏忽、虐待和暴力”。

中国还于 1992 年通过并批准了《儿童权利公约（CRC）》，2005 年通过并批准了海牙《跨国收养方面保护儿童及合作公约》。《儿童权利公约》的第 9 条声明，不能违背儿童的意愿将其与父母分离，除非负责司法审查的当局认定将其与父母分离最符合该儿童的利益。《儿童权利公约》的第 19 条要求缔约国：

*采取一切适当的立法、行政、社会及教育措施来保护儿童在受到父母、法定监护人或任何其他照料者的照顾时不受任何形式的身体或精神暴力，伤害或辱骂，疏忽或照料不周，虐待或剥削，包括性侵犯。*

《儿童权利公约》还规定了保护措施，包括为儿童及其照料者提供支持的社会项目，以及重点在虐待案被举报之后的甄别、报告、儿童转介、调查以及儿童治疗的防治工作。这些公约中所描述的保护儿童不受家庭暴力的权利本位的方式要求将儿童视为权利所有者，而非仅仅是被害人。儿童有发表意见的权利，他们的意见也应被尊重。在整个决策过程中必须系统地尊重他们，并且在制定暴力保护策略和规划时应当把儿童的参与置于中心。另外，儿童的利益最大化应该成为所有与儿童相关问题的最基本考量。必须通过制定法律救助计划、畅通的投诉机制以及儿童适用、考虑性别的法庭程序来保证为儿童实现正义。

国际《残疾人权利公约（CRPD）》于 2006 年被英国采用，2008 年被中国批准，《残疾人权利公约》强调了社会环境对残障人士的行动障碍所造成的至关重要的影响，而不仅仅关注身体的残缺。这则公约的部分目的是系统地回应残障人士的需求，提高他们的受关注程度，为他们保证一个公平、包容、每个人都享有同等权利的社会环境。公约要求监督和执行，要求将残障人士纳入到报告和监督中（条款 4.3 与条款 33）：“没有我们的同意，不要作关于我们的决定”。这一声明代表了任何政策都不应在缺乏残障人士群体的充分和直接参与下通过的观点。其吸纳了人权本位的方针，承认了残障人士作为权利主体及国家应保护其权利的职责。该公约还承认，残疾妇女和女童在家庭内外都遭受更大的暴力、伤害和虐待的风险。该公约第 16 条明确要求所有《残疾人权利公约》的缔约国：

<sup>6</sup> 《消除对妇女一切形式歧视公约》一般建议第 27 条，第 37 节。

采取一切适合的立法、行政、社会、教育及其他方法来保护残障人士在家庭内外免受一切形式的，包括基于性别的剥削、暴力和虐待。

《残疾人权利公约》还要求缔约国采取一切适合的措施，保证为残障人士、他们的家庭和照料者提供考虑到性别、年龄差异的援助和支持，为他们提供避免、识别和举报剥削、暴力和虐待相关的知识和教育，从而防止针对残障人士的暴力和虐待。反家庭暴力项目必须解决残障人士的需要，保障遭受家庭暴力的残障人士获得公共教育而提升对自身需求的认识。

### 三、中国目前针对家庭暴力的法律和政策并不完善

目前中国已经制定了一些针对家庭暴力和对妇女的暴力的国家级和省级法律、法规及政策。但是，这些法律和政策中缺少对家庭暴力的全面定义以及保护受害人权利的可执行构架，难以为受害人提供充分的法律保护，在保护或康复的执行和对施暴人的惩处方面的成效有限。要有效阻止家庭暴力，弥补目前中国立法和中国所签署的国际公约的要求之间的差距，一部全国性的反家庭暴力法是必不可少的。

《中华人民共和国婚姻法》，《中华人民共和国妇女权益保障法》，《中华人民共和国未成年人保护法》，《中华人民共和国老年人权益保障法》，《中华人民共和国残疾人保护法》，《中华人民共和国民事诉讼法》和《中华人民共和国刑法》都涉及家庭暴力问题。另外，全国妇联、中共中央宣传部、最高人民检察院、公安部、民政部、司法部和卫生部于 2008 年联合下发了《关于预防和制止家庭暴力的若干意见》，该意见明确规定了有关部门的责任，并为相关地区和相关部门提供了如何解决家庭暴力问题的指导。2013 年，最高人民法院、最高人民检察院、公安部和司法部发布《关于依法惩治性侵害未成年人犯罪的意见》，并公布三起性侵害未成年犯罪的典型案例，意见强调“从严惩治，从严执法”，严惩性侵幼女，校园性侵等行为，将保护遭受性侵的未成年人作为工作重点。目前在中国，已有 22 个省（区、市）出台了专门的预防和制止家庭暴力的地方法规，7 个省制订了专门性政策，90 余个地市制定了反对家庭暴力的政策文件。除此之外，截止到 2008 年 10 月，有 23 个省、市、自治区通过了《实施〈中华人民共和国妇女权益保障法〉办法》，其中，针对家庭暴力问题做出了专门性规定。一些省、市的公安局、法院、检察院和其他政府机构也制定了相应的规定和政策。这些地方法规和政策在部门间划分了职责分工，将伴侣间暴力认定为对妇女人权的侵犯，坚决主张制止和打击家庭暴力是保证家庭和睦、社会稳定的途径。这些地方性法规和政策都鼓励对防止家庭暴力的法律进行宣传教育，以提高公民的法治观念。

#### 中国应用法学研究所就涉及家庭暴力婚姻案件的人身安全保护令发布的审理指南和最高人民法院发布的指导案例

2008 年，最高人民法院中国应用法学研究所发布了《涉及家庭暴力婚姻案件审理指南》（以下简称“审理指南”），供法官审理婚姻案件参考。审理指南中描述了法官如何通过发布人身安全保护令，来为家庭暴力的受害人提供保护。审理指南还给出了家庭暴力的定义，并提及法官们在发布人身安全保护令时应遵循《中华人民共和国民事诉讼法》的规定。在发布审理指南的同时，九个法庭得到了试点授权，可以根据审理指南在婚姻案件中为家庭暴力的被害人发布人身安全保护令。在过去的几年中，越来越多的省份和法庭参与到了该试点项目，目前的数目已增加至 74 个。北京于 2012 年 8 月参与到了该试点项目。据报道，截止 2014 年 2 月，全国共发布了 500 多个人身安全保护令。其中，广东省香洲人民法院发布了 92 个人身安全保护令。

尽管审理指南并不是法律，对中国的法官没有约束力。然而，几个省级高院都已经下发了意见，其中援引了审理指南中关于婚姻案件中发布人身安全保护令的阐释；这些意见被视为规范性文件，在司法管辖区内具有约束力。除此之外，律师在婚姻案件中代理家庭暴力的被害人为其申请人身安全保护令时也会援引审理指南。审理指南还明确禁止性虐待，及通过限制施暴人对家庭财务和个人财产的控制权而实施的经济虐待。最后，审理指南还认为，被害人离开施暴人之后家庭暴力仍会继续，因此不仅婚姻关系存续期间需要进行保护，双方离婚后也要继续进行保护。

2013 年 7 月，江苏省高级人民法院、江苏省人民检察院、江苏省公安厅和江苏省妇女联合会共同发起了“江苏省反对家庭暴力预警系统的测试与评估（试验中）”项目。江苏省是第一个建立反对家庭暴力预警系统的省份，以此来保护家庭暴力被害人的权益、维护家庭与社会的和谐稳定。反对家庭暴力预警系统的建立旨在利用公安机关的行政引导力，完善反对家庭暴力的措施，以加强防止家庭暴力的力度。主要内容包括：警告和教育家庭暴力施暴人；为家庭暴力被害人提供法律支持；通过对施暴人进行教育阻止施暴行为的发生。最近，其他省市如宁夏和苏州都已发布了预警系统。

2014 年 2 月 27 日，最高人民法院公布了十起典型的家庭暴力“指导案例”。通过这些案例，最高人民法院向下级法院指明了什么是构成家庭暴力的证据，谁有可能寻求保护，谁可能成为家庭暴力的施暴人，以及被害人可能寻求针对谁的保护令或对谁提起民事、刑事诉讼。这十起案例的判决作为最高人民法院发布的指导性案件，各级法院应当参照执行，并可以作为裁判理由引述。这些案例体现出目前中国法院在审理家庭暴力案件方面的创新与突破。其中有几个案例显示出精神和情感虐待（包括恐吓和威胁使用暴力）以及骚扰和跟踪都是家庭暴力的表现形式。法院应该高度重视这些非身体虐待事件，搜集这些家庭暴力犯罪的证据。指导案例还将虐待老年人和儿童明确为家庭暴力的一种形式。另外，这些案例重申了法庭有权在家庭暴力被害人提出申请的情况下向其发放人身安全保护令，包括在被害人脱离与施暴人的关系之后继续进行保护。并认定家庭暴力对于儿童造成的负面影响，以及对目击家庭暴力儿童的保护。而且，其中的指导案例明确了法庭可以在家庭暴力的被害人为阻止暴力而不得已杀害了施暴人的刑事诉讼中，应将家庭暴力的因素纳入定罪量刑的考虑范围。

#### 四、对中国国家反家庭暴力法的具体建议

综合中国签署的针对妇女、儿童、残障人士和老年人暴力相关的国际公约中框架和要求、国际专家的建议、以及对中国目前已有的针对家庭暴力的政策和法律的了解，我们对国家反家庭暴力法应包含的条款提出以下建议：

##### 国家应承担消除家庭暴力的义务

国家反家庭暴力法应声明，解决家庭暴力问题是国家的责任、职责和义务，以保证法律得到有效执行。清楚地声明国家责任，能够明确家庭暴力既不是私人问题或家庭内部问题，也不是国家法律法规所触及不到的问题。相反，家庭暴力破坏家庭和谐，是一个公共问题，需要国家通过公权力干预的方式来解决。明确国家义务也意味着会有必要的预算投入来履行该义务，从而实现立法目标。立法中应明文规定国家和政府应实施一级预防措施、二级预防措施及三级预防措施，包括：

##### 预防家庭暴力的发生

- 建立一个调研系统，包括数据收集、分析、监测和评估，以向有关部门提供提高执行国家法律条款效率的建议；
- 为全国、地区或当地的家庭暴力公共教育和宣传活动提供资金，这些宣传包含受害人权利和在认为自己是家庭暴力和虐待受害人的情况下该如何寻求救助的信息；
- 建立一个协调系统，保证来自于不同级别与职能的政府、社会服务机构、卫生部门、教育部门、警察系统、社区中心和其他相关机构的关键利益相关者能共同协作，以及时识别、干预、支持和保护受害人免受伤害；
- 进行具有针对性的宣传活动，将重点放在打击特定群体内与性别暴力相关的不良成见和有害行为上，宣传正确的理解/知识和行动；
- 在学校强制推行有关健康的亲密关系和性别平等的教育，在涉及到家庭暴力观念与预防的教学大纲中，破除关于亲密关系内施暴的合法性的有害性别成见和迷思，同时也应培训教师处理学校内发生的问题，及时举报疑似家庭暴力事件；
- 通过媒体进行广泛的反家庭暴力的宣传教育和提供各种信息，增加手语、盲文等途径使这些宣传教育的信息覆盖尽量多的残障人士。

##### 事发时干预与阻止家庭暴力

- 通过政府与非政府组织，建立一个可靠、保密性好、广泛宣传且易于使用的家庭暴力举报系统，将受到暴力影响的受害人同急救、长期护理以及康复服务机构对接起来；

- 对警察、法官、检察官、社会工作者、医疗服务提供者进行与家庭暴力相关的强制性培训，包括虐待识别、适当回应、支援计划的有关信息，以及成年、未成年受害人、老年人和/或残疾受害人的法定权利；
- 在各个社区建立咨询服务中心和避难所，使受害人能够聚在一起，寻求帮助和获得安全处所，并讲述她们的经历，让她们不感到孤立无援。这些服务中心和避难所应具备无障碍设施，使得儿童、老年人和残障人士也可以使用；
- 为所有受害人提供公共和社会福利计划，如免费医疗和其他可用的社会福利来帮助康复，如果他们希望参加培训、获得住房服务，应为他们提供服务，满足其需求。

##### 降低未来的家庭暴力发生率

- 预算中提供资金及必要的资源，包括处理家庭暴力的所有部门所需的物资，以专门支持法律的执行；
- 设立国家层面的反家庭暴力办公室来管理资金、进行定期审查和评估，并协调全国范围内的公共教育和培训；
- 收集并宣传针对女童、妇女、老年人、残障人士和儿童的家庭暴力发生率的数据；
- 为监护人提供必要的援助以预防家庭暴力。

##### A. 家庭暴力定义

除了明确国家在消除家庭暴力中的角色以外，国家反家庭暴力法须包含定义家庭暴力概念的法律条款，目前中国的法律尚无关于家庭暴力的定义。联合国国际家庭暴力圆桌会议上国际专家们提供了他们各自国家的法律中家庭暴力和伴侣间暴力的几种不同定义，并在报告中介绍了各自国家起草反家庭暴力法的经验以及执行这些法律时遇到的挑战。这些经验包括家庭暴力的定义，也包括足以使受害人获得人身安全保护令的行为。定义包括：（1）构成家庭暴力的行为，以及（2）构成刑法或民法中家庭暴力定义所需要的被害人与施暴人之间的关系。以下是其他国家的法律中家庭暴力定义举例。

##### 韩国对于伴侣间暴力的定义

韩国于 1997 年通过了《惩治家庭暴力专项法案》，目前（即 2014 年）为止共对该法案做出 19 次修改。该法案将家庭暴力定义为：“造成家庭成员身体、精神或财产损害的行为。”更详细地说，上述法案承认了韩国《刑法》中所提及的以下犯罪行为：

伤害或攻击	遗弃或虐待	监禁或囚禁
恐吓	诽谤	侵入住宅
胁迫	欺诈或勒索	毁坏财产

**澳大利亚对于家庭暴力的定义**

2011 年，澳大利亚修订了 1975 年发布的《家庭法案》，并重新定义了家庭暴力和虐待，内容如下：

- 攻击
- 性侵犯
- 其他性虐待
- 跟踪
- 情感及精神虐待
- 经济性虐待

家庭暴力在澳大利亚国家法律中的定义为：“一个人通过暴力、威胁或其他行为强迫或控制其家庭成员，或使该家庭成员感到恐惧”。

**南非对于伴侣间暴力的定义**

南非的《家庭暴力法》中，家庭暴力的定义如下：

- 生理虐待
- 言语谩骂
- 情感虐待/精神虐待
- 财务/经济虐待
- 性虐待
- 恐吓/骚扰
- 跟踪
- 蓄意损坏财产
- 在当事人非同住的情况下未经允许进入原告住处，或
- 任何其他针对原告的控制或虐待行为，该行为损害了或可能损害原告的安全、健康或福祉

2011 年，澳大利亚修改了 1975 年发布的《家庭法案》，包括一份非详尽清单，列举了可能被认定为家庭暴力以及接触家庭暴力的例子，“如果一个儿童看到、听到家庭暴力行为或体验了家庭暴力的结果，即认为其接触到了家庭暴力。”这些清单包括家庭暴力的模式以及单一事件。与儿童有关的虐待定义如下：

“一种暴力行为，包括对儿童进行性侵犯或一个人（第一人）将儿童牵扯到性行为中，无论直接或间接，而第一人或另一个人将该儿童作为性对象，且该儿童和第一人之间力量悬殊，或致使该儿童遭受严重的精神伤害，包括（但不限于）由于受到或接触到家庭暴力或被忽视引起的伤害。”

澳大利亚刑法禁止婚内强奸、暴力威胁、性侵犯、跟踪、持续施暴，未成年人性虐待及卖淫，拐卖女性进行卖淫以及性骚扰。法律认为，儿童易遭受家庭暴力，公民社会有责任提供一个机制来保护儿童及其权利，而该机制需要注意安全、隐私和保密性。

**英国民事法庭对于骚扰的定义**

英国 1996 年的家庭法创立了“禁止骚扰令”，该令由法庭盖章，声明一方不得骚扰另一方。该法规中并未对骚扰作出定义，但以下列举行为都作为骚扰被涵盖其中：

- 暴力
- 暴力威胁
- 骚扰或纠缠行为
- 在家或在工作场合骚扰申请人
- 辱骂性或持续的文字信息或电话
- 言语谩骂或在公共场合对某个人叱喝
- 对申请人进行身体威胁或使用威胁性语言
- 损坏家庭财产
- 身体暴力，包括手扇拳打、推搡、脚踢或逼迫

**英国对老年人虐待的定义是：**

“导致老年人受伤或痛苦的一次性或重复性行为；或建立在信任基础上的关系中适当行为的缺失，且由此导致了老年人受伤或痛苦。”

**英国和日本专家认为虐待老年人事件包括：**

- 生理虐待
- 性虐待
- 精神虐待
- 经济或物质性虐待与剥削
- 忽视
- 社会虐待
- 歧视性虐待
- 机构内虐待
- 非自愿抛弃或孤立
- 滥用药物或不提供药物

日本在 2005 年通过《预防虐待老年人与为照料人提供援助法律》。家庭中照料人和长期护理机构和养老服务提供机构的人员的虐待和忽视行为包括：

- 生理虐待
- 照料疏忽
- 心理虐待
- 性虐待
- 财务虐待

另外，当老年人在尚未同意或无法同意的情况下被说服进行金钱交易或性交易也可能构成老年人虐待。在英国，经济或物质性的老年人虐待可能包括：

- 盗窃
- 诈骗
- 剥削
- 与遗嘱、财产或遗产或金融交易相关的压力，或
- 滥用或侵吞财产、所有物或收益

另外，家庭成员或熟人对老年人进行的经济剥削，即这些人使用其身份或权力的不正当影响力来利用他人的信任、依赖和恐惧，或通过强迫、恐吓、不正当影响、欺骗和/或情感虐待来对老年人进行剥削。尽管老年人可能有足够的心智来做出关于其财产的决定，此类举报仍是非常罕见。

## 家庭暴力定义的建议

根据其他国家的经验，国际公约的指导以及中国现存的法律法规，家庭暴力的定义应该包含一份特定行为的非详尽清单，这些行为的其中之一或多项都构成家庭暴力。它还应该包含虐待的例子，以协助妇女、儿童、老年人及残障人士相关的法律执行。

该定义应以婚姻法司法解释和审理指南中对家庭暴力的定义为基础，避免与之相冲突。这两项规定都更加注重婚姻一方对另一方实施的暴力行为，同时将婚姻外的暴力行为和针对儿童、残障人士、老年人的虐待包含在内。国家反家庭暴力法中家庭暴力的定义应该为：

**任何控制、虐待或伤害的行为，会伤害他人的健康、安全和/或福祉，包括但不限于任何实际身体伤害或身体伤害威胁；性虐待，包括婚内强奸；情感、语言或精神虐待；经济性虐待；恐吓；骚扰；跟踪；损害或破坏参与人的财产或滥用参与人的经济或金融福祉；未经允许进入他人住所或工作场所；和/或照料不足、忽视或疏忽治疗，以及目睹家庭暴力。**

- 控制和虐待行为的举例可以包括拒绝帮助照料，包括洗澡、喂食或药物管理或威胁公开 HIV 或 AIDS 病情；拒绝提供获得医疗看护所必需的交通或其他协助；孤立，遗弃和/或忽视；
- 对儿童和被监护人安全福祉的威胁或能威胁到其安全福祉的行为，包括针对儿童的直接家庭暴力行为，目睹家庭暴力，或者即使他们没有目睹暴力行为，但家庭暴力发生时他们在家或在场，以及其他对儿童的忽视行为；
- 经济虐待包括剥夺或威胁剥夺被害人依法所有的，或被害人所必需的或所拥有的任何经济或财务资源；处置或威胁处置家具或涉及被害人利益的其他财产；使用经济或财务资源威胁、恐吓、劝说、怂恿或以其他方式要求被害人按照行为人所希望的方式行事，包括拒绝被害人参加工作，或强迫他/她放弃工作，或在工作场合骚扰他/她使她被解雇；
- 恐吓包括口头、传达或致使被害人收到使其产生恐惧的威胁；
- 骚扰的定义是引起被害人产生对伤害的恐惧的行为；在被害人居住、工作、经营、学习或碰巧所在的建筑或地点附近观望或徘徊；不论后来是否发生交谈，持续向被害人打电话、发短信，或引诱他人向被害人打电话、发短信；持续向被害人的家或工作地点发送、投递电报、包裹、传真，不论以实体还是虚拟的方式，不论通过网络还是短消息；
- 跟踪的定义是通过任何方式不断跟随、追逐、搭讪或联系被害人，包括亲自、通过电话、邮件、社交媒体或使用互联网隐藏摄像头或跟踪装置进行监控。

## B. 家庭成员或同住家庭成员的定义

除了对构成家庭暴力的行为进行定义之外，国家反家庭暴力法也应该包括使虐待行为构成家庭暴力所必需的必要关系。在中国目前的法律中，家庭暴力对当事人的定义仅局限于配偶或父母、子女、兄弟姐妹、祖孙关系。国际专家们的建议和经验是，该必要关系应不仅限于婚姻关系，还应包括其他亲密关系，包括未婚但同居的关系，未婚但有共同子女的关系，恋爱关系，同性恋爱，以及其他家庭成员之间的关系，包括儿童、父母、及其他监护人或有责任照顾另一家庭成员的家庭成员。

**在韩国，《惩治家庭暴力专项法案》规定，**同住家庭成员可以寻求家庭暴力保护，而同住家庭成员的定义是：

- 配偶或前任配偶（包括同居关系）
- 其或其配偶目前或以前的父母或子女（包括同居关系）
- 处于继父与继子女、或继母与继子女关系中的人，及
- 居住在同一屋檐下的亲属

韩国国家家庭暴力法中对被害人的定义仅限于“直接遭受家庭暴力的人”。

**南非 1998 年的家庭暴力法案保护以下关系中的人不遭受家庭暴力：**

- 婚姻
- 同居或曾经同居但并未结婚
- 同居或曾经同居的同性伴侣
- 已订婚或约会中，或双方自愿的亲密关系或性关系
- 通过血缘、婚姻或领养联系起来的家庭成员，以及
- 同住一个屋檐下的人

南非法律明确且特意将业主与租户、家政从业人员与雇主、雇农从符合受到家庭暴力保护的关系清单中排除。

相反，**新西兰的残疾人虐待问题专家认为，**国家家庭暴力法应把雇佣的照料人纳入考虑范围，基于其在残疾人生活的角色和随之而来的虐待风险。因此，遭受虐待的残疾人曾特别主张把雇佣的照料人纳入定义。

## 构成家庭暴力所需关系建议

根据国际专家的经验以及目前中国法律存在的不足，构成家庭暴力犯罪所必需的关系范围应包括：

- 处于婚姻关系中或曾经处于婚姻关系中；
- 同性或异性同居关系或曾经同居的关系，不论结婚与否；
- 共同育有一个或多个子女的关系，不论结婚还是同居；
- 订婚关系、恋爱关系，或基于自愿的亲密或性关系；不论相处时间长短以及亲密程度高低，包括女同性恋者、男同性恋者、双性恋者以及变性者。
- 血缘婚姻联系起来的家庭成员，包括父母、子女、（外）祖父母、（外）孙子女、兄弟姐妹，或者养子养女、继子继女、侄子和侄女等，以及
- 住在同一屋檐下的人，包括儿童、老年人或残障人士的通过血缘或婚姻联系的照料者以及没有血缘或婚姻联系的有薪酬的或无偿的照料者。



### c. 举报及警方调查体系

我们已经通过行动、行为和必要的关系定义了家庭暴力犯罪，接下来将要转向家庭暴力刑法执行的重要性。很多国际专家谈到，国家需要有力地执行针对家庭暴力的国家刑法，特别是警察在法庭上的指控、作证。家庭暴力国家法需要明确警察部门作为反家庭暴力执法者的角色，包括应对家庭暴力电话举报，对家庭暴力举报进行详尽的调查，在必要的情况下保护被害人的安全，并协助检察官和法官对施暴人进行拘留、逮捕并提起刑事诉讼。有必要对警方进行家庭暴力以及举报应对等的相关培训，以保证他们认识到家庭暴力是一种严重犯罪并知道应该如何帮助被害人，高度关注儿童、老年人和残障人士所面临的特殊障碍。

**根据韩国国家法律，警方收到发生家庭暴力的通知后，必须立刻赶到事件现场并采取紧急措施，包括：**

- 制止暴力行为
- 将施暴人与被害人分离
- 进行犯罪调查
- 带领被害人去咨询中心或避难处，如果被害人表现出此种意愿的话
- 告知施暴人如若再次使用暴力，将按照法律第 8 条下的临时措施予以处置
- 迅速进行调查并将案件递送至检察官办公室
- 就该案件是否适宜视作家庭保护案件给出意见

**在新西兰，警方可以在案发现场下发警方安全令，该令持续五天有效。**警方安全令是给被害人的文件，下发后可将施暴人驱逐出家门，时效五天。芬兰于 2002 年通过了一部法律，该法律要求施暴人释放出狱时要通知被害人。美国的几个州也有类似的法律，要求施暴人释放出狱时要通知被害人。在芬兰，国家法律还要求警方在有犯罪行为嫌疑时对虐待进行调查；伤害罪的最高刑罚为两年有期徒刑。

**日本在《预防虐待老年人与为照料人提供援助法律》中规定了妨碍老年人虐待案件调查的罚金：**

*“任何人，如没正当理由，拒绝接受、妨碍执行、或阻碍法律许可进入其住所的老年人虐待案件调查，以及拒绝回答问题，提供虚假信息，拒绝允许老年人作证，或强制老年人提供虚假信息，最高将会被罚款 300,000 日元。”*

**1999 年，南非制定了家庭暴力国家警察指令，描述了家庭暴力法的执行过程中警方的角色、责任和功能。指令中提出警察部门所承担的最重要的若干职责：**

- 抵达犯罪现场后首先要定位被害人，并接受其陈述
- 在隔离施暴人的情况下询问被害人
- 判断被害人是否处于迫切的生命危险当中
- 保护被害人安全
- 查抄所有实施暴力行为所使用的危险武器
- 如有需要，立案起诉侵害人
- 执行逮捕

### 1. 挑战

南非专家指出的挑战之一是需要对警方进行监测与评估，以保证他们遵守国家警察指令，并保证他们获得该指令相关的培训。另一个挑战是警察局要有足够的物资和财力以保证警察能依法履行其职责和职能。这些资源对于支援和保护被害人，及时有效地应对家庭暴力事件，是必不可少的。美国专家也指出了一个类似的挑战，她提到，当警察无法及时应对而导致被害人死亡的情况下，让警察为被害人的死亡承担责任的尝试被证明是失败的。

来自韩国的专家提出，韩国正面临关于施暴人的刑罚和问责的挑战。她认为国家法律并未落实。在 2009 年，只有 10.4% 的举报案件被定性为家庭暴力刑事案件。警察提的问题，诸如“你想提出控告么？”和“你想你丈夫获得刑罚么？”，把负担从警察转移到被害人身上，并为幸存者寻求保护带来了挑战。她还提到，在韩国，家庭暴力不被认为是犯罪，而是一种需要被教育和辅导纠正的行为。韩国有双轨式的法律应对：刑事处罚与家庭保护，但两者并不兼容。2012 年对避难所被害人进行的一项调研表明，被害人不举报家庭暴力，是因为他们恐惧施暴人的暴力升级，他们不知如何举报，也不认为向警察举报后会好转，而且他们害怕施暴人会知晓他们的举报。据报道，通常警察到达发生家庭暴力的家庭中，没有隔离被害人与施暴人，也未逮捕施暴人。

### 2. 警方举报及调查家庭暴力建议

国家反家庭暴力法应制定警方处理家庭暴力案件的标准操作程序（SOP），包括如何回应家庭暴力通报，到达现场后如何进行调查，如何定位被害人并保护其安全，收集证据，将案件提交司法系统的必要步骤，在被害人希望的情况下使施暴嫌疑人离开住宅，给施暴人提供矫治措施等方面的详细指导，及为不愿离开虐待关系的被害人制定安全方案。法律还应该包括施暴人释放出狱时对被害人进行通知。SOP 还须包括监督和评价警方是否遵循 SOP 的框架。SOP 应该为警方建立清晰的权限与责任：

- 建立多样的举报机制和渠道，使幸存者、其家人、利益相关方和社区群众都可以方便地举报家庭暴力；
- 迅速回应家庭暴力相关举报电话；
- 到达现场后制止暴力行为并将被害人与施暴人分开；
- 进行详尽的调查，包括与被害人、施暴人、任何邻居或目击者分别进行询问；
- 根据被害人的意愿，逮捕家庭暴力施暴人；
- 查抄实施暴力的危险武器，并作为证据保存于安全地方；
- 如果在调查过程中发现儿童虐待、老年人虐待和残障人士虐待的，应当向上级报告这些情况；
- 撰写案件报告并提交给检察官；
- 如果被害人正处于遭受严重身体伤害危险之中，则应申请签发紧急保护令；
- 将家庭暴力警方报告记入数据库，以追踪并调查累犯者；
- 为家庭暴力的被害人及任何目击者提供支持服务，包括：
  - 告知被害人其法定权利以及卫生保健、咨询、庇护等权利。须由一种便利的格式提供此类信息，以保证如残障人士、其他语言使用者等所有被害人都能理解
  - 协助被害人留在安全的家中，或者如果被害人有意愿，为其制定安全计划，或将其送至庇护所，协助其寻求治疗并提供保护
  - 在调查过程中发现儿童虐待必须上报，以儿童的最大利益为目的对任何儿童进行保护

#### D. 司法应对

国家反家庭暴力法的一个重要条款为明确家庭暴力为犯罪行为，并保证警方、检察官和法官都了解家庭暴力是严重、危险的犯罪行为，需要对施暴人进行强有力的、坚决的、系统的起诉，以通过对施暴人个别或一般的震慑来有效减缓家庭暴力。几个国际专家称，有必要对警方、法官和检察官进行家庭暴力相关的强制性培训，以保证有效的起诉和量刑。

**在美国**，《妇女暴力防治法》为各州、民间团体组织提供资金来对警方、检察官和法官进行家庭暴力和性暴力相关培训。针对检察官的培训包括如何收集并在法庭上出示家庭暴力的证据。针对法官的培训包括如何考量家庭暴力的证据。

**根据韩国国家法律**，家庭暴力有复发嫌疑时，检察官可以要求法庭采取临时措施，包括：

- 暂时将施暴人驱逐出房屋或房间
- 禁止施暴人接近被害人周围 100 米范围之内
- 禁止施暴人通过电信途径联系被害人

**奥地利的《刑事诉讼程序法修正案》**加强了家庭暴力刑事检控中妇女的权利和对其保护，包括知情权、获得法庭文件和被通知施暴人出狱日期的权利、参与和被害人相关的诉讼的权利。除此以外，法案还包括如何询问妇女和儿童被害人，社会心理学，社工与律师协助法庭，国家提供法律援助，施暴人赔偿被害人遭受的损失，非政府组织 White Ring 为被害人提供财务支持。

中国最高人民法院最近发布的家庭暴力指导案例中包括这样两个案例，家庭暴力的被害人杀死了施暴人，而两个案件中的被害人都被减轻量刑、处以短期徒刑，这是由于认识到了他们再犯的可能性、对社会造成危害的可能性都较小。

#### 1. 挑战

几位外国专家指出的挑战为，检察官需要意识到家庭暴力是能致使严重身体伤害甚至死亡的犯罪行为，国家有责任进行干预，以惩治施暴人、保护被害人。检察官需要接受如何搜集和出示证据以成功起诉施暴人的培训，此外，警察、检察官和法庭的协作对于保证被害人安全、有效起诉施暴人是至关重要的。当被害人报复及杀死其施暴人，她们经常会被起诉，且比男性施暴人获得更长的刑期。检察官和法官必须接受关于家庭暴力对于被害人的影响的培训，尤其是妇女、儿童、老年人和残障人士的被害人，这样相关信息才能在家庭暴力犯罪案件的审判和量刑中适当地被陈述和考虑。

#### 2. 建议

国家反家庭暴力法应该与中国《中华人民共和国刑法》和《中华人民共和国刑事诉讼法》相一致，保证：

- 对于残障人士（成年或未成年）的家庭暴力应被归类到专门条款/计划，作为重刑重罪，应特别地表明对残障人士实施家庭暴力的情节更为严重。对此类犯罪应比其它未涉及到残障人士的家庭暴力案件规定更长的刑期；
- 对于一次或多次家庭暴力的施暴人拒绝保释；
- 对于被判有罪的家庭暴力施暴人强制性最低监禁时间为一年；
- 对于累犯者加重刑罚，如监禁时间增加三分之一；
- 涉及儿童的案件除了对施暴人实施惩罚性/纠正性措施之外，还应为儿童、施暴人和家庭成员提供救助、改造、回归和支持性服务，以使家庭暴力对儿童的负面影响最小化；
- 保证法院系统、执法机关和审判人员受到培训，并采取具有考虑性别、适用于老年人、儿童和残障人士的程序；
- 保证在所有涉及儿童的案件中优先考虑儿童的最大利益；
- 只有出于保护儿童的最大利益的情况下才可决定将儿童与其父母或家庭环境分离；
- 保证因父母实施的家庭暴力而不得与父母隔离后的儿童获得安全措施和安全地点；
- 儿童回归家庭后要保证定期密切监测该家庭情况；
- 如果家庭暴力的被害人杀害或严重伤害了施暴人，应指导法庭考虑家庭暴力对被害人的影响，包括法庭听取专家证词的规定；
- 规定警察、法官、检察官、教育工作者、社工和医疗专业人员有义务举报儿童虐待、老年人虐待以及残障人士虐待情况，并提供简明的举报程序；
- 应采取严格的措施，考虑施暴人服刑后的释放，及重新融入社区和家庭的可行性。

## E. 民事人身安全保护令条款：家庭与民事诉讼

如上所述，中国法院已经开始发布人身安全保护令，在离婚案件中为家庭暴力被害人提供保护。建议中国的国家反家庭暴力法应包括民事人身安全保护令的创建，以审理指南中的规定为基础，并将亲密家庭关系以外的被害人纳入其中。

国际专家在联合国研讨会上分享了各自国家的反家庭暴力法，包括民事人身安全保护令。通过迅捷地为被害人提供保护和财务支持以及由警察和法院将施暴人绳之于法，这项民事人身安全保护令被认为是中止正在发生的家庭暴力的最有效的干预手段。被害的个人向民事或家庭法庭申请民事人身安全保护令，法官在有充分证据显示正在进行的家庭暴力会产生迫切危险的情况下发布民事人身安全保护令。每个国家的法律都明确了申请保护令所必需的关系，法官发布人身安全保护令所必须起诉的暴力行为，以及可以包括在保护令内的强制救济和赔偿类型。另外，每个国家的法律还规定，民事人身安全保护令的副本必需下发至被告、施暴人，并且应该为警方提供一份保护令的副本。民事人身安全保护令由受害人和警方共同执行，受害人在施暴人违反保护令后应该通知警方，警方立即逮捕施暴人，并以违反保护令起诉他/她。对保护令进行刑事执行，违反保护令的施暴人可能被判监禁并被罚款。重要的是，受害人向法庭申请民事保护令的决定独立于警察和检察官逮捕和起诉家庭暴力施暴人的决定。事实上，一个被害人可以在刑事起诉进行中当中获得保护令。

### 在南非，法庭可代表被害人向家庭暴力的施暴人下发保护令。它可以要求：

- 一名治安官陪同被害人到某处协助其收拾个人财物
- 施暴人支付租金或房贷
- 施暴人支付紧急金钱救济来满足被害人的财务需要
- 保护令中必须略去原告的实际住址，除非保护令的性质或要求需要包含该地址
- 出于儿童的最大利益考虑，法庭可以根据具体情况命令施暴人不得与儿童接触或联系

该保护令还可以禁止施暴人进行以下任何行为：

- 获取其他人的帮助来实施任何家庭暴力行为
- 进入原告（被害人）与被告（施暴人）共同的住所，前提是法庭为了原告的最大利益而实施该禁令
- 进入原告的住所
- 进入原被告共同住所的某一区域
- 进入原告的工作场所
- 阻止一贯住在或曾经住在原被告共同住所的原告进入或停留在共同住所内或共同住所的某一区域内
- 实施保护令中明令禁止的行为

### 在英国，如果家庭暴力确实发生，则可以在该家庭内部对儿童进行保护。另外，禁止骚扰令可防止一方骚扰相关儿童，相关儿童指：

- 与诉讼双方的任何一方住在一起的或可能会住在一起的任何儿童
- 诉讼程序中涉及 1976 年收养法、2002 年收养与儿童法或 1989 年儿童法下保护令的儿童，以及
- 法庭认为其利益相关的任何其他儿童

执行禁止骚扰令时，家庭暴力的被害人必须通知警方是属于违反刑事法庭还是藐视民事法庭。自 2007 年家庭法得到修订开始，违反禁止骚扰令在英国就已成为刑事犯罪，违反者最高可能受到五年的监禁或罚款或既监禁又罚款。

## 1. 挑战

南非专家提出的挑战之一是尽管确保治安警察陪同受害人回家取回个人财产的规定是明确的，但实际操作中有困难。另一个挑战是，受害人和儿童离开共同住所后，施暴人在离婚预期时，会事先耗尽夫妻共同财产。针对该问题的一个解决方案是在民事人身安全保护令中要求施暴人在未得到受害人的允许的情况下不得出售、转移、破坏或以其他方式动用夫妻共同财产，并且任何关于财产的指控都会被上报警方。另外，警方应有一份面谈使用的清单，来帮助申请保护令，以及保证保护令申请中涵盖尽量全面的信息。这一面谈使用的清单应包括所有不同类型的虐待，从而指引询问人在获取原告证词时能彻底探讨所有的这些问题。这会消除保护令的多重性，以及随之不必要的修正。

专家认为，南非需要建立地方法官家庭暴力纲要，来处理法官的玩忽职守、不符合规定以及问责。据专家经验，一些地方法官认为只要没有身体伤害就不存在家庭暴力。南非面临的另一项挑战是一些法庭收到很多保护令的申请，但却没有足够的人力来处理这些申请。这就导致保护令下发的延迟，从而使受害人迫于施暴人的威胁不得已撤回申请。建议是，申请保护令的出庭日期在十四天以内。另一项建议是，立法提供其它措施，保证家庭暴力被害人能够免费、有效且方便地使用警方提供的服务，以保证施暴人收到保护令，或者当被告家中无人时将保护令贴在门上。南非提出的另外一项建议是，将体检表和申请保护令的文件证明包括在内，南非的刑事案件中已经采取了这种做法。这将帮助被害人证明其遭受家庭暴力时受伤的程度，因为这些伤痕在她出庭时已经不明显了。

在英国，1996 年的家庭法案创立了禁止骚扰令，该令可用来禁止某一方骚扰“相关儿童”和成人（骚扰定义请参照上文）。“相关儿童”是指“与诉讼双方的任何一方住在一起的或可能会住在一起的任何儿童”。禁止骚扰令的应用范围不仅限于婚姻双方或民事伴侣关系。很多人，包括儿童在内，都可以申请禁止骚扰令。以下情况适用于禁止骚扰令申请：

- 申请人与被告现为婚姻关系或民事伴侣关系，或曾经为婚姻关系或民事伴侣关系
- 申请人现在或曾经与被告为同居关系
- 申请人与被告住在同一屋檐下，而双方并非员工与雇主，租户、房客与业主或寄居关系
- 申请人与被告为亲戚关系，包括父母、继父继母、继子继女、祖父母、外祖父母兄弟姐妹、姨妈、叔伯、堂兄弟姐妹等
- 申请人与被告达成协议结婚或进入民事伴侣关系，不论此协议是否已被终止
- 申请人与被告有或曾经有过一段比较持久的亲密个人关系
- 在牵涉到儿童的情况下，申请人与被告有关联，若一方为儿童的家长或曾经对该儿童具有父母责任即可申请
- 申请人和被告是同一家庭诉讼的双方；以及
- 十六岁以下儿童只有获得法庭允许才可申请禁止骚扰令

## 2. 人身安全保护令建议

中国的国家反家庭暴力法应该以开始于上述审理指南的试点项目为基础，将民事人身安全保护令纳入其中，为家庭暴力受害人提供保护。保护令应附带具体要求，以便受害人能够向民事法庭寻求保护，并从不同形式的保护和救济中选择最符合其处境与需求的选项。保护令应该包括国家反家庭暴力法中对家庭暴力的定义，包括之前描述的构成家庭暴力的行为以及所需的关系。另外，法律还应要求法庭制作标准表格，供受害人申请保护令时填写，表格的设置应方便受害人描述其所遭受的暴力行为并引导他们寻求保护令以及保护和救济的形式。法律应明确，受害人可以申请民事人身安全保护令，当受害人是儿童、残障人士、或处于昏迷、住院及其他本人不能申请的情况时，任何利益相关方，包括家庭成员和警察，皆可代表受害人申请民事保护令；由法官签发保护令；警方在法庭监督下执行保护令。如果施暴人在保护令签发的庭审时不在场，法庭应保证施暴人收到保护令的副本，且警方也应保存人身安全保护令记录。法律应规定，一旦有证据表明未在出庭日参加审讯的施暴人行为升级，法官有权力签发紧急保护令。

法庭应就受害人要求在保护令中于特定时间提供以下救济：

- 任何时间施暴人不得在一定范围之内靠近被害人及家中任何儿童；
- 施暴人不得通过任何方式联系被害人，包括亲自、通过电话、邮件等，也不得以任何方式联系家中儿童；
- 将施暴人驱逐出家门；
- 受害人获得家中儿童的临时监护权；
- 受害人获得任何儿童的儿童抚养费；
- 受害人获得维持家庭生活所必需的经济支持；
- 如果受害人选择离开家庭住所，法庭可命令警方陪同受害人到家里取走私人物品；
- 私人物品应包括法官采用自由裁量权授予的保护令中所列出的物品，这些物品对于受害人和其子女的日常生活必不可少，例如家具和设备；
- 保护令申请应包括原告和其子女需要的私人物品，因而法庭在审理保护令时应接受这些物品的申请并明确规定；
- 保护令有效期内，施暴人不得破坏、变卖或以其他方式减少个人和/或婚姻财产，和/或受害人及施暴人的房产；
- 施暴人必须赔偿受害人任何因暴力行为所致的财产损失，包括医药费、因暴力行为导致失去工作情况下的工资损失以及其他花费；
- 保护令有效期内施暴人必须支付养育任何由受害人监护的与未成年儿童相关的生活费用；
- 禁止施暴人对保护令中包括的成年人和儿童实施任何暴力行为；
- 禁止施暴人寻求其他人帮助来对保护令中包括的成年人和儿童实施暴力行为；
- 禁止施暴人进入原告（受害人）与被告（施暴人）共同的住所，前提是法庭从原告的最大利益出发下达此禁令；

- 禁止施暴人进入原告的住所；
- 禁止施暴人进入其与受害人共同住所的某一区域；
- 禁止施暴人进入原告的工作地点；
- 禁止施暴人进入或靠近任何利益相关的儿童一定范围之内，既包括在家庭也包括在学校；
- 要求施暴人就家庭暴力行为参加心理辅导和教育；
- 其他保护原告及其某些家庭成员的人身安全的措施。

为确保家庭暴力被害人知晓这些选项，当被害人来到法院寻求民事保护令的援助时，需为其提供包含以上选项的标准表格。执行保护令时，家庭暴力的受害人应当通知警方被告违反了保护令。应对民事保护令进行刑事执行，警方应逮捕违反保护令的被告并对其进行关押，直至法官对其进行审讯，判处刑罚。违反保护令的刑罚最高为两年监禁，和/或罚款和/或针对暴力行为的心理辅导。

## 3. 证据考量

受伤的照片、警方记录、目击人的口供、社会公共服务组织的文件记录以及有关暴力行为的文件记录，包括被告发出的包含威胁的短消息，都可作为受害人提出的证据，法官也可使用这些证据来帮助受害人陈述施暴人进行家庭暴力的事实。法官在考量证据时应考虑举证责任。一旦受害人出示了家庭暴力以及被告的暴力行为导致其受伤的证据，举证的责任就转移至被告。如果被告否认其导致原告受伤，但却不能提供证据来证明，则法官应该认定发生了家庭暴力并签发保护令。因此，民事人身安全保护令案件以及家庭暴力案件所需证据的标准与刑事案件所需证据的标准不同。

## F. 房屋和就业的法律保护

国际专家谈到，他们国家的法律要求在不同时期将被控家庭暴力的人驱逐出房屋以使受害人与家庭成员一起待在家中。国际专家注意到家庭暴力被害人居住在家里最能满足本身需求，为安全起见而强迫她离家是不切实际的。

**英国 1996 年的家庭法包含一种房屋占有保护令，来管理房屋占有。**该保护令使法庭能够禁止个人进入其自有物业。如果家庭暴力的被害人有权占有房屋并符合申请条件（包括，但不限于，他/她曾与物业产权的持有者共同居住），则可以向法庭申请占有家庭暴力施暴人的房屋占有保护令。法官签发房屋占有保护令的前提条件是其认为，根据家庭法的第 33（7）条，存在发生重大损害的风险。若满足以下条件，则说明存在发生重大损害风险：

- 在法庭看来，如果不签发房屋占有保护令，申请人或法庭认为的任何利益相关的儿童有可能因为被告的行为而受到重大损害
- 除非签发房屋占有保护令会使被告或法庭认为的任何利益相关的儿童有可能受到重大损害，并且
- 签发房屋占有保护令后被告或儿童可能遭受的损害等于或大于不签发房屋占有保护令情况下由于被告的行为而使申请人或儿童有可能遭受到的损失

如果不满足重大损害的条件，法庭仍可根据以下家庭法第 33（6）条的规定酌情决定签发房屋占有保护令（基于被害人与物业/被告的关系可修订适用条款）：

- 当事双方以及任何相关儿童的住房需求和物力
- 当事双方的财力
- 任何保护令或者不签发保护令的决定可能对当事方及任何儿童的健康、安全或幸福造成的影响；以及
- 当事方对对方的行为等

被害人可申请，法官可签发的房屋占有保护令中，可以规定在一段特定时间内或直到新的保护令生效（取决于保护令的要求）前：

- 受害人有继续居住在房屋内的权利
- 命令施暴人/被告同意被害人进入房屋或房屋的某个区域并居住在那里
- 对住宅的居住权进行管制，包括对住宅进行划分，并限制某一方进入住宅的某一区域
- “管制”包括暂停或限制被告对住宅权利的行使
- 命令施暴人/被告离开房屋或离开房屋的某一区域
- 禁止被告进入房产周围的规定区域，例如要求被告不得进入房产周围 50 米内的区域
- 还可签发补充令，命令一方支付租金、房贷或一般家庭开支，负担房产的维护或修理，或要求留在房屋中的一方付款给被迫离开房屋的一方，也可针对关于案件或家具的使用的纠纷签发补充令

另外，在英国，如果家庭暴力的受害人需要紧急保护，而通知被告会使保护令申请者的处境更加危险，根据家庭法的第 45（1）条可以在“没有预先通知”的情况下申请房屋占有保护令。在“没有预先通知”的保护令申请听证后会尽快有一场预先通知的公平听证，这次听证会上双方可以在法官面前陈述辩论。而且，“没有预先通知”的保护令只有在被告得到通知后才能生效。

**在韩国，国家法律中包含保护令，**家庭暴力的受害人可以向法庭递交申请来寻求保护，保护内容包括将施暴人驱逐出住所，如果受害人选择离开住所会为受害人提供经济支持，并且家庭暴力受害人优先享用公共住房。

**在奥地利，预防暴力法案授权警察将家庭暴力施暴人驱逐出共同住所。**警方的驱逐于两个月内有效。如果被害人希望延长驱逐期，她可以在两周内向地方法庭申请额外两周的临时禁令。

**在美国，如果家庭暴力被害人向法庭申请人身安全保护令，**她可以要求法官将施暴人驱逐出住所，或者选择离开住所。如果他们住在公共住房中，则由于其受害人的身份不能被驱逐出住所，因此施暴人可以被驱逐。另外，几个州都通过了法律，禁止私人房东在出租房屋时歧视家庭暴力受害人，且禁止他们将家庭暴力受害人赶出住所。另外，国家公平住房法禁止在住房问题中的性别歧视，这也被理解为禁止在住房问题中歧视家庭暴力受害人。

同时，美国包括加利福尼亚州和纽约在内的几个州都有法律禁止雇主拒聘或解雇家庭暴力、性暴力或被跟踪的受害人。这些法律还要求雇主为这些受害人提供住宿，保证他们在工作中的安全，包括工作地点转移和房门上锁。美国包括加利福尼亚、华盛顿和伊利诺伊在内的几个州都通过了法律，要求雇主为受害人提供休假，让他们能够治愈创伤、重新安置并参加法庭审理，以保证他们的安全，不再遭受施暴人的暴力行为。

## 建议

中国的国家反家庭暴力法应包括针对家庭暴力受害人的住房保护，法院应签发以下命令：

- 行使让被害人留在住宅内的权利；
- 命令施暴人/被告同意受害人进入房屋或房屋的某个区域并居住在那里；
- 对住宅的居住权进行管制，包括对住宅进行划分，并限制某一方进入住宅的某一区域；
- “管制”包括暂停或限制被告对住宅权利的行使；
- 命令施暴人/被告离开房屋或离开房屋的某一区域，但仍继续承担对子女的责任，如有婚姻关系，这一责任归于其配偶；
- 禁止被告进入房产周围的规定区域，例如要求被告不得进入房产周围 50 米内的区域。

另外，法律还应规定，选择离开住所的家庭暴力受害人优先使用公共住房、紧急和临时性住房，并且不得由于其家庭暴力受害人的身份拒绝为其提供住房。

同样，法律还应该禁止雇主不得解雇或拒聘家庭暴力受害人，并要求雇主为受害人提供休假，让他们能够解决与所遭受的暴力行为相关的问题，比如参加法院审理以获得人身安全保护令或其他救济。

## 五、结论

中国必须承诺消除家庭暴力，国家法律应对国家责任作出明确规定，以防止家庭暴力事件的发生，保护受害人权益并对施暴人施以矫治及处罚。中国必须建立一个必要的法律

框架以确保政府机构和非政府机构之间的协调和合作，从而保证法律得到有效的执行。国家反家庭暴力法必须保护所有家庭暴力受害人及他们的权利，包括：妇女、儿童、老年人和残障人士。在设计受害人的救济措施，以及对施暴人问责，包括惩戒和矫治的过程中，必须考量受害人的经历。法律的保护措施也必须反映伴侣间暴力的独特特征，作为家庭暴力的一种，法律所提供的救济措施和法律构架应当解决使用暴力来对受害人实施权力和控制的暴力模式，而这种暴力的受害人主要是女性，社会性别歧视允许了此种暴力的存在。最后，国家反家庭暴力法必须包括针对法庭、法官、检察官、律师、警察、医疗卫生、教育、社会服务提供者以及社区伙伴的清晰的程序和职责，以确保法律的实施能够终止所有形式的家庭暴力。

## 附件 A

### 本附件包括来自联合国反家庭暴力立法国际圆桌会议上国际专家演讲的内容

#### 财政支持

韩国，南非和美国都提供了一些重要案例，以说明国家所发挥的作用以及执行国家法律单独预算的必要性。韩国的《家庭暴力预防和受害人保护法》颁布于 1997 年，这一法律确立了国家在为受害人构建报告体制、调查研究和教育体系、预防宣传、保护设施集资和建造、机构之间的合作网络建立以及政策实施和评价等方面的责任。它还创建了国家和地方政府预算分开的机制，并建立了负责预防和保护的组织和政府官员。根据这项法律的规定，咨询中心和庇护所应得到财政支持，每三年应进行家庭暴力相关的调查，并生成相应报告，数据可用作未来的工作指导。

美国的《妇女暴力防治法》最初于 1994 年通过，并于 2000 年、2005 年及 2013 年被重新批准。过去 20 年中，美国司法部妇女暴力防治办公室负责执行这部国家法案的规定，共向国家、地区、地方和部落政府、市、受害人服务提供者授予了 50 亿美元的赠款，其中包括 2013 财年的近 3.79 亿美元，用于建立对家庭暴力、性侵犯、约会暴力和跟踪的更有效应对方式。他们组织的活动包括直接服务、危机干预、过渡性住房、向受害人提供法律援助、法院改善及为执法机构和法院提供培训等等。

#### 公众教育和意识

几乎每位国际专家都特别提到了公众教育在防止家庭暴力中发挥的关键作用。被推荐列入国家立法的有效措施应包括下列主要特征：

- 国家资助全国公共教育运动的责任；
- 聚焦于提高关于家庭暴力的意识：什么是家庭暴力，遭遇家庭暴力应如何寻求帮助，如何协助那些可能正身处险境的人；
- 使用多种形式的媒体，包括电视、社交媒体、公交和地铁海报，联合知名演员和民众，不论男女，均可参与；
- 学校应进行关于家庭暴力的义务教育。

韩国的国家法律要求在中小学校进行关于家庭暴力预防的义务教育，新西兰也有关于性暴力防范和教育的校本课程。来自南非的国际专家还指出，关于家庭暴力的教育应纳入各级学校的课程设置中，这是一个主要的预防方法。

韩国专家建议在社区教育项目中应包含暴力预防和受害人保护等视频，并分发给广播业务运营商。新西兰还有一个名为“这样不行！”的公众教育运动，重点支持针对家庭暴力的社区行动，提供信息、咨询、培训、教育材料和其他资源。美国最近推出了一个新的公

众教育活动，名为“再也没有了！”，很多知名演员的姿势和形象做成海报，海报上有他们的名字、“再也没有了！”的字样以及家庭暴力或性暴力等主题。

### **关于家庭暴力动态的培训**

几乎所有国际专家都提到了的另一个预防工作的关键点是关于家庭暴力动态的培训，及其对受害人的影响。法官、检察官、警察、护士、医生、社会工作者及其他常与暴力家庭和受害人进行交流的人都必须对性别差异有所理解。

有效的培训必须由专家定期提供，培训由国家资助，因此对参加培训的人来说是免费的。

培训是很有必要的，因为法律无法改变人们对家庭暴力的态度和心态，不能说服警务人员将家庭暴力视作严重犯罪并做出相应反应，也无法向社会工作者解释如何支持残疾的受害人。

只有通过定期对所有服务提供商的广泛培训和教育才能实现对家庭暴力的文化和态度的转变。重要的是，培训必须针对每个不同的目标群体进行定制。

芬兰所面临的挑战是要改变服务供应者们对暴力侵害妇女、法律改革及法律评估、性别知识、暴力以及法律的态度。在韩国，心理咨询师和培训师必须参加 100 小时的教育课程和培训，得到合格认证后才能在紧急呼叫中心、咨询中心和庇护所工作。

律师、法官、社会工作者和护士都应该得到与自己的岗位和角色相对应的具体培训。此外，还要有关于家庭暴力和残障人士，家庭暴力和虐待儿童，家庭暴力和虐待老人等方面的交叉培训，以确保所有服务供应者都知道如何识别各种形式的虐待，并采取适当的应对。

新西兰建立了一套暴力干预项目。这个医疗服务项目会询问所有 16 岁以上的寻求医疗服务的妇女是否经历过家庭暴力。这些问题全都是在她们独处时私下询问，一旦发现任何风险，都会采取相应的措施。该项目会为工作人员提供持续的培训，项目管理层都接受这一项目方式，由工作人员与被确定为受害人的个人建立联系，提供支持服务；针对这些活动都有配套的评估，以衡量其成效。

在美国，平均而言，国家妇女暴力防治法为 50 多万执法人员、检察官、法官、受害人帮助者和其他工作人员资助了培训，并且每年都为 70 多万受害人提供服务。

南非的专家还建议，国家立法应包括要求所有服务提供者都熟悉安全规划，有过相应的培训，并能针对受害人的经历为其提供相应的安全规划。此外她还表示，关于家庭暴力的国家警察说明应清楚地陈述警察的权力，包括搜查处所、寻找受害人、确保受害人和儿童的安全和保护、没收危险武器和所有的需要在法庭上呈现的必要证据，以及逮捕犯罪人并将所有其他职能留给法院等。

### **报告、研究和数据收集**

有几位专家认为收集关于女孩和妇女、老人和残障人士及儿童的遭遇家庭暴力的比率的数据非常重要。为确保成果和影响，应定期审查进行中的政策和项目执行情况，在本次国际会议的多个国家代表都使用了这一方法，非常有效。

会议一再指出，缺乏有关残障人士和老年人所经历的暴力比例和类型的信息，使得我们难以了解这个问题的范围，并将这种理解纳入有效预防、保护和惩罚的结构。有人建议国家家庭暴力法应规定必须收集有关家庭暴力的交叉数据，可基于年龄、地点、是否残疾、暴力发生时孩子是否在家等信息。

例如，2003-2004 年，日本卫生、劳动和福利省进行了一次关于家庭环境里虐待老人的全国调查。该调查发现，受害人的平均年龄是 81.6 岁，其中 76.2% 为女性，约 99.6% 的受害人都需要某种形式的照顾。确定的施暴人包括儿媳妇（20.6%）、女儿（16.3%）及配偶（丈夫：11.8%；妻子：8.5%）。88.6% 的施暴人与受害人一起居住生活。最常见的虐待是心理上的，占 63.6%，另外，疏忽类虐待占 52.4%，身体虐待占 50%，财务虐待占 22.4%，还有 1.3% 的性虐待。如下文所述，这些信息后来被证明在起草和通过关于虐待老人的国家法律时起了非常重要的作用。

同样，新西兰在 2001 年和 2006 年也进行了全国调查，旨在更好地了解确定残障人口的比例。2006 年调查显示，全国人口中 17% 有残疾，其中 82% 的残障人士是长居于私人家庭的成年人。残障人士的比例随年龄增加而提高，成人中最常见的残疾类别是身体和感官类。居于养老院的成年人中，99.7% 有残疾。这些信息对理解如何制定有效的干预措施，帮助那些可能遭受虐待威胁的残障人士而言是非常宝贵的。

此外，关于警察应对和法院涉及虐待指控的办案经验的定期报告和数据收集对确保受害人得到保护且拥有合法权益而言也是极为关键的。这类数据应定期收集并加以分析，其中的一些信息可能被用于改善法律和社会服务响应。建议由国家拨款明确支持这类项目的开展。

### **多部门协调与合作为受害人提供支持服务的范例**

在日本，虐老问题的相关国家法律将每个城市的综合社区服务中心确定为接收虐待老人报告的机构，各都道府县的政府负责各市之间的协调，提供信息及必要的协助和咨询。与此相关的确定的合作及伙伴机构包括警察、长期护理机构的专业人士、医生、公共卫生护士、律师以及任何其他与老年福利相关的机构的工作人员。每个城市都有宣传中心，专门支持老年人和残疾老年人；每个城市都有责任开发一套相关机构之间的合作机制，公布一个接受虐待报告的机构，宣传可提供的虐待防治服务，并对受害人和看护人提供支持。当看护人被认定为负担过重，需要紧急的生理和心理帮助时，市里必须为需要照顾的老人提供房间及相应的看护。

在韩国，国家法律规定国家必须为受害人（包括外国人）开办并经营紧急呼叫中心。与韩国律师协会和其他法律援助机构、医疗机构、庇护所和咨询中心等组织的服务合作与协调是一个关键。

南非专家还建议像南非一样在全国各地为受害人建立一站式服务中心。在南非，这类中心被称为 Thuthuzela 护理中心，是指在一个地方就能为受害人提供诸如医疗卫生、社会、司法咨询等所有服务，且这些服务对受害人必须是 24 小时可用的，包括热线和警察响应。

奥地利和美国都有受害人庇护所和咨询中心，重点关注是亲密关系中的暴力，特别是对妇女的暴力。受害人可以拨打热线寻求帮助，中心还提供不同语言的翻译，方便在受害人拨打热线时提供咨询。

### 在家庭暴力的背景下保护儿童

有几位专家都推荐了将儿童特别保护列入解决家庭暴力问题的国家立法中。特别是来自英国和澳大利亚的专家还提供了如何从家庭暴力角度将儿童保护纳入国家法律的相关指导。

澳大利亚研究表明，暴力家庭明显比非暴力家庭有孩子的可能性更高，而且暴力家庭里五岁以下儿童的比例显然较高。来自美国的专家还提供了家庭暴力长远影响的有关信息：当家庭暴力发生时，孩子在场对孩子所带来的负面影响，不论他们是否是家庭暴力的目标或受害人。

- 550 万美国儿童生活的家庭中，在过去一年中至少发生过一次伴侣暴力，700 万儿童的家庭曾发生过严重的伴侣暴力；
- 遭遇过童年创伤的儿童，包括见证过家庭暴力事件，出现严重成人健康问题的风险更高，包括抽烟、药物滥用、肥胖、癌症、心脏疾病、抑郁症等，甚至意外怀孕的风险也更大；
- 遭遇过产前身体暴力的母亲所生下的孩子们具有攻击性、焦虑、抑郁或亢奋行为等问题的风险也会增加。

来自澳大利亚和美国的专家都表示，确定儿童伤害的风险并制定保障措施、在家庭法律制度中保护他们是很困难的。在不同关系的背景下，虐待可能会像肢体暴力行为那么明确，但也可能只是涉及轻微的控制和威胁行为。2011 年，澳大利亚的《家庭法立法修正法案》试图把这一认识纳入法律制度的响应中。重要的是，在澳大利亚的家事法庭上，由司法裁决的 79% 的案件都包括了家庭暴力和/或虐待儿童的指控，而在联邦法院的案件里的比例为 67%。

几位专家还特别建议，国家法律中关于家庭暴力的定义应包括家庭暴力对儿童的影响。例如，在澳大利亚，2011 年的《家庭法法案》修订了对家庭暴力与虐待的定义，包括了暴露于家庭暴力的概念：“如果孩子看到或听到了家庭暴力或以其他方式经历了家庭

暴力的影响，就可以定义为孩子暴露在了家庭暴力下。”虐待儿童的定义为“对儿童的攻击，包括对儿童的性侵犯，或让儿童与自己或第三人进行性活动并将儿童作为直接或间接性对象的第一人或其他人，且儿童与第一人之间的关系极为不平等，或导致儿童遭受严重的心理损害，包括（但不限于）孩子正经历或暴露的家庭暴力，或对儿童的严重疏忽所造成的损害。”

在英国，如果某个家庭确立了与家庭暴力相关的事实，儿童可在家庭范围内受到保护。人们认识到，脆弱的儿童容易受到家庭暴力的伤害，并且民间社会有责任在保证安全性、隐私性和保密性考虑的前提下，提供一个能保障权利并提供保护的机制。如下所述，此信息被纳入了禁止骚扰的保护令和居住保护令中。

### 有效应对虐待老年人的范例

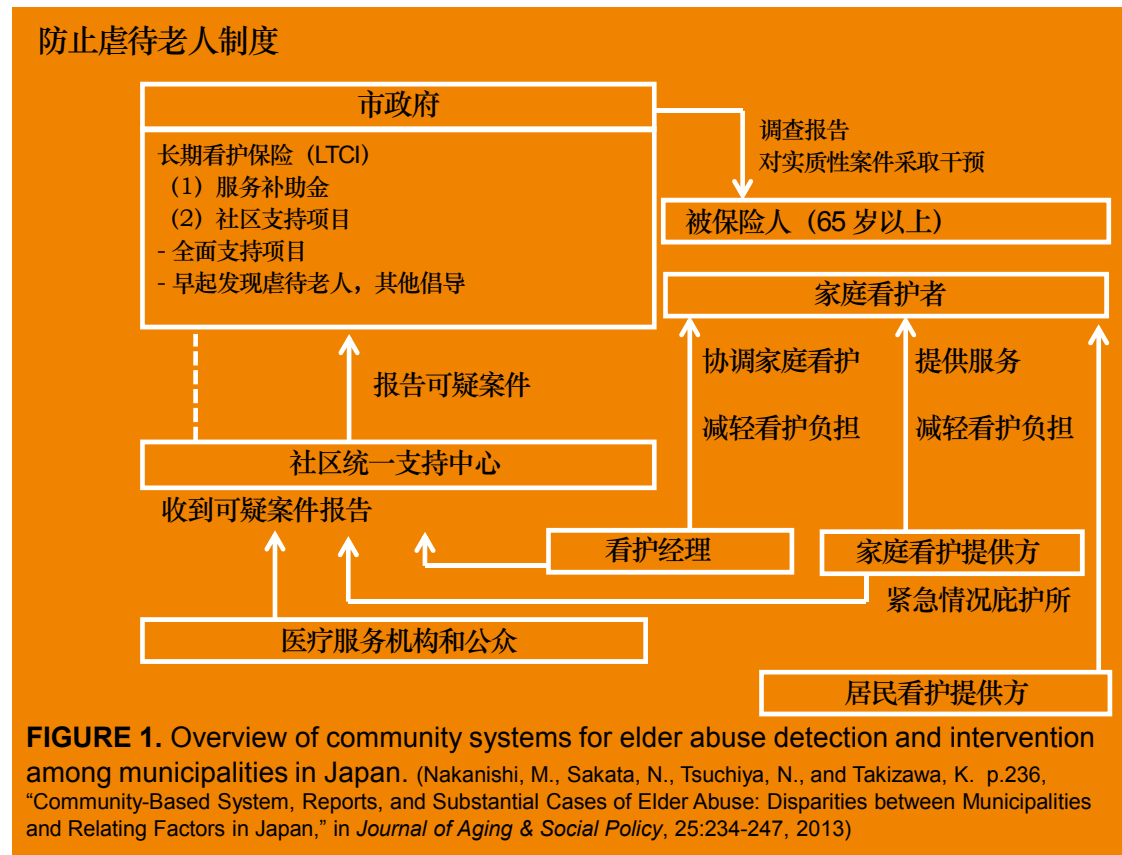
日本和英国的专家提供了与虐待老人相关的极为宝贵的信息，并分享了他们在通过和执行相关国家法律方面的经验。值得注意的是，这两个国家所通过的关于虐待老人的法律法规都独立于国家的反家庭暴力法。会议专家达成共识：认为国家应该有法律专门处理虐待老年人的问题，并且有方法把虐待老人纳入全国反家庭暴力或家人暴力的法律之中。有人提出了一个关键问题：是否要将家人所雇佣的看护人在家中或某个机构里对老人的虐待认定为家庭暴力或家庭暴力的犯罪人。专家们的共识是，这一类虐待很严重，必须由法律来解决，不过可能并不是国家反家庭暴力法的覆盖范围，因为劳动法往往会包括这些形式的虐待。

例如，日本有一部关于防止老年人虐待与向看护人提供援助的法律。虐老防治法的目的是规定国家和地方政府及公民个人在防止老年人虐待、保护虐待的受害人、协助看护人减轻照顾负担等方面的角色和职责。传统上来说，日本的家庭成员一般都将年长的父母留在家中照顾，但工业化和城市化导致了人们离开自己的家园，将老人独自留在农村地区，得不到孩子的照顾和支持。家庭成员觉得照顾年长父母的负担越来越重，包括财政困难，因此，他们可能在家中以虐待的形式对父母表达自己的压力或不快。任何家庭成员，包括丈夫、儿子、儿媳和孙子孙女都可能虐待老人。常常出现的情况是：家庭成员之外的人，如专业护理人员会报告虐老行为。不过，在日本，即使行政机关收到了虐待老人的举报，他们未经家属允许也不能进入家庭调查。因此，让政府可以有权进入家庭调查的报告体系和流程是必不可少的。

下图展示的是日本的虐待老人响应系统：



图 1. 日本城市老人虐待早期发现和干预社区模式



一位来自英国的虐老专家指出，引入社会和文化背景、性别和权力关系，明白虐待不只在家庭和人际关系中发生是很重要的。同样重要的是，认识到这其中的部分原因来自年龄歧视。任何情况下都可能发生虐老问题，包括当这个脆弱的成人单独居住或与亲戚一起居住，或住在疗养院、老人院或日托中心，或医院，监护中心以及接受到家里来提供家庭支援服务的情况或其他以前普遍被认为很安全的地方。确认虐待的关键是要评估环境；这种行为所发生的背景是密切相关的，因为剥削、欺诈、滥用职权、恐吓或胁迫都可能使弱势的老人无法作出自己的决定。

类似于上述关于“残疾”的社会模式定义，专家们建议虐待老人的社会模式定义应指出，老人并不脆弱，但他们身处的某个环境或情境可能使他们容易受到虐待。因此，防止虐待需要涉及到风险评估和风险管理。制止虐待老人的有效干预措施包括着眼于受害人和施暴人的法律、治疗、支持性干预。对警察、法官和检察官、以及为家庭暴力受害人和老年人提供服务的供应者进行关于虐待老人独特性的教育和培训是必不可少的。建议采用国家指导、地方执行的模式，发展多学科观点，强调合作方向和合作伙伴关系。保密性也是一个关键问题，如果老人寻求协助，或他人举报虐待行为，则必须有明确的协议来保证机密性。相关机构应起草一份关于保密性的双方协议，在保障弱势个体最佳利益的基础上，列明关于信息共享的原则。在应对暴力侵害妇女行为的发展过程中，英国的一个关键主题是赋能——使人们能为自己做出决定，在自己的照顾、支持和代表性方面有发言权，着眼于虐待发生前的预防、伙伴关系和问责。

英国的虐老定义是在任何信任关系内单次或重复的对老人造成伤害或痛苦的行为、或缺乏恰当行动而对老人造成伤害或痛苦的。虐老被认为是任何其他个人或群体伤害另一个人人权和公民权利的行为。英国专家列举了一些肢体虐待的例子，包括身体虐待、性虐待、精神虐待、财务或物质虐待和剥削、忽视、社会虐待、歧视性虐待、机构虐待、蓄意遗弃或隔离、医疗虐待或拒绝医疗服务。虐待老人的行为人通常可能包括配偶、其他家庭成员和亲戚、看护人、朋友和邻居、专业护工、护理员和志愿者。受害人的同意也是一个问题。个人是否有能力同意照顾或同意国家调查虐待是个关键问题。考虑到个人的自决和拒绝保护权利，考虑到他们的能力，以及虐待的类型及他们的参与程度都是关键。当一个脆弱的人被说服进行他们自己没有同意或不能同意的金融或性交易时，就可能会出现虐待情况。财务或物质虐待可能包括盗窃、诈骗、剥削、遗嘱压力、财产或遗产或金融交易或财产或利益的误用或滥用。尽管老年人可能有心理能力做出关于自己财务状况的决定，但仍然很少接到由家庭成员或他们熟悉的人利用自己的角色和权利对老年人产生不当影响，利用其信任、依赖、害怕或胁迫、恐吓、不当影响、欺诈和/或情绪虐待来进行财务剥削的举报。随着时间推移，大家对财务虐待的看法变得不太一致。

在日本，65 岁以上的成人才被算作老年人，看护人是指在家庭环境中为老人提供护理服务的个人，但不包括专业人士。虐待老人是指虐待和疏忽行为，包括家庭看护人、长期护理机构的工作人员及护理服务供应商的工作人员进行的身体虐待、护理疏忽、精神虐待、性虐待及财务虐待。身体虐待是指损害或可能损害老人身体的虐待行为。护理疏忽是指老人缺乏照顾，导致营养不良，包括长时间让老人独处或独居。精神虐待是会对老年人造成极大心理创伤的消极行为，包括粗言秽语和情感虐待等。性虐待是指对老年人施行不恰当的性行为，与老年人进行强迫性接触或非自愿的性相关讨论。财务虐待是指看护人或家庭成员未经老人同意不恰当使用或处理老人财产，或者看护人或家庭成员从老人同意的行为中获取不恰当收益的行为。

自 1975 年起，在英国<sup>1</sup>，人际暴力的年龄观点一直被认为是个新问题。最初，人际暴力被称为“奶奶殴打”，从中能看出年龄在开始时就已经被认可；性别也是针对老年人暴力不可避免的一个观点。随着人口老龄化，老年人的性别比率会逐渐降低，因为年龄越大，女性数量会渐渐多于男性，女性占老年人口的大部分比例。尽管女性的预期寿命长于男性，但妇女遭受较差的健康状况折磨的时间也比男性更长，身心障碍使他们更容易受到暴力侵害。在特定文化环境中，例如在某些传统社会里，年长的寡妇会遭到遗弃和“财产抢夺”。

### 挑战

持续面临的挑战包括当受害人不希望离开自己的家庭或施虐人时如何处理虐老案件，如何成功地实现家人团聚，以及如何对施虐的看护人给予支持。来自日本的参会人建议应该对虐待老人的家庭成员予以支持，而非惩罚。不了解不同形式的暴力行为使我们无法了解老年人的脆弱，特别是那些遭受性暴力和经济控制的老年女性。

<sup>1</sup> 见 1975 年的英国科学文章 (Baker, 1975)

## 关于解决侵害残障人士的家庭暴力的建议

来自新西兰和中国的专家都提供了有关残障人士在暴力面前的脆弱性的宝贵信息，并就如何将有效保护残障人士受害人纳入国家法律提出了建议。保护家庭暴力的残障人士受害人的关键是在政府项目中建立强大的干预措施，让预防家庭暴力成为主流。

新西兰的《家庭暴力法案》对家庭关系的定义并不明确，因此，此法案可能未覆盖残障人士，也不要求警察对残障人士进行培训（新西兰专家非常推荐这个做法），从而无法为残障人士受害人提供家庭暴力受害人的服务。新西兰还需要对残障人士遭受家庭暴力的比例进行研究和数据收集，确保大家普遍都能获得服务。据了解，残障人士遭受家庭暴力的几率更高，但残障人士却无法获得为受害人提供的服务，因此，他们的需求往往得不到满足。结果是，警方无法识别对残障人士施行的家庭暴力，也无法获得受害人在法庭上行使自己的权利以免受暴力的信息，可以说，他们相当于没有任何权利。同样，家庭暴力辅导和服务项目对残障人士的了解也非常有限，家庭暴力和残疾倡导社区之间的合作也一样有限。同样，残疾服务提供商对家庭暴力的知识或培训也有限，因此不会识别或协助虐待幸存者。对家庭暴力（包括残障人士）和残障人士虐待经历的公众教育活动同样也很重要。韩国专家建议，庇护所应当分为长期和短期两种，并且要能收容残障人士。

## 刑事处罚和罪犯问责的范例

所有专家都认为将家庭暴力犯罪化是追究罪犯责任和保护受害人安全的重要组成部分。

来自韩国的专家解释说，韩国国家立法授权的民事和刑事混合救济的方式说明家庭暴力仍未被视作严重犯罪。然而，保护令的刑事执法是很重要的。在韩国，家庭暴力法的目标包括惩罚暴力犯罪人，提供家庭保障，以便重新安排环境并改变行为，并且重新恢复被家庭暴力破坏的家庭和平与稳定，建立健康的家庭，保障受害人及家属的人权。刑法里的家庭暴力罪行包括伤害或人身侵犯、遗弃或虐待、逮捕或监禁、威胁、诽谤、入室行窃、胁迫、欺诈或勒索以及财富或财产破坏。家庭暴力的行为人是指导施行了家庭暴力犯罪的个人，而受害人是指被家庭暴力直接伤害的人。

在韩国，每当出现家庭暴力危险反复发生的证据时，检察官可以请求法院颁布临时措施令。有了临时措施令，法官可命令施暴人从家里或与受害人共享的房间里搬离，并可能会禁止其进入受害人 100 米距离以内，也禁止其通过电话联系受害人。如果受到临时措施令限制的人违反了命令，检察官可要求将其拘留或监禁。另外，韩国也有紧急临时措施令，当反复出现家庭暴力危险时，警方可要求法院发出紧急临时措施令，并且可要求 48 小时内获得紧急临时措施令。如果请求无法那么快实现或如果法院不批准临时措施令，则也应取消紧急临时措施令。

在韩国，因不实施保护性处分或违反临时保护令或受害人保护令而被判有罪的肇事人可获长达 2 年监禁或罚款或拘留。屡次违反者，法官可判决罪犯长达 3 年的监禁或罚

款。如果机构工作人员侵犯了受害人的隐私权，法官可以判他们最多 1 年监禁或罚款。如果报纸或广播公司或出版商侵犯了受害人的隐私权，他们可能面临较小额度的罚款。如果家庭暴力罪犯拒绝配合调查，他们会被罚款。

不幸的是，韩国在对罪犯的处罚和问责方面面临挑战：无力且未执行。2009 年，只有 10.4% 的家庭暴力案件被起诉。警察诸如“你想起诉吗？”和“你想让你的丈夫被处罚吗？”的问题将负担从警方转移到受害人身上。家庭暴力不被视作犯罪，而只是能通过教育和辅导来改变的行为。刑事处罚和家庭保护这两条法律响应轨道并没有很好的合作。2012 年对收容所受害人的一项调查表示，受害人没有举报家庭暴力是因为他们害怕来自施暴人的更多暴力，他们不知道如何举报，他们认为向警方报案也不会对事情改善有所帮助，而且他们担心罪犯会知道他们的举报。经常有报道说，当他们回家后，警方不会将受害人和犯罪人分开，警方也不会逮捕罪犯。

新西兰也有警察安全令，可由警察当场发放，效力持续五天。这是一个提供给受害人的文件，可以将罪犯从家里赶走五天。目前已发行共 27,400 份。

奥地利刑法禁止婚内强奸、持续的暴力跟踪、对未成年人进行性剥削和卖淫、贩卖人口卖淫和性骚扰等。其《刑事诉讼法修订法案》还增加了妇女权利和保护，包括信息权、文件访问权、获得罪犯从监狱释放的日期通知以及对受害人诉讼的参与权。

1994 年，芬兰认可婚内强奸；2002 年通过了一项法律，要求当行为人为人从监狱释放时，应提前通知受害人。当怀疑有罪犯行为时，警方应对虐待进行调查，对侵犯人身的惩罚最多为两年。

在发展虐待防治法的过程中，日本提出的问题包括有关法院是否应有权发出书面许可允许进入家庭的分歧。只有当出现虐待老举报时，法律才允许工作人员进入家庭进行调查。另一个问题是虐待老人的肇事人是否应该受到惩罚。后来的决定是将看护人作为需要支持的个人比惩罚他们更为合适。

## 处理好保密的重要性

在韩国，政府官员、助理、顾问和机构负责人必须保证为家庭暴力的事实保密。在家庭保护的情况下，不允许打印或传播任何个人物品或照片。教师及学校和日托中心的工作人员不得透露因家庭暴力引起的儿童入学、转学或升级到另一所学校的信息。

在美国，有些州已经通过了禁止在法院或其他公共记录公布受害人地址或联系信息的法律。保密性是确保受害人勇于挺身而出和寻求援助的关键。在美国，《妇女暴力防治法》和国家反家庭暴力法都包含了保密性。保密性适用于所有与受害人一起工作的服务供应者，并且必须清楚地传达给受害人。同样，南非的国家《家庭暴力法》规定，除非保护令的条款要求必须包含投诉人的物理地址，否则它必须从保护令中略去。法庭可发出任何指示，以确保投诉人的物理地址不会以任何方式被披露，以免危及投诉人的安全、健康或

福祉。《刑事诉讼法修订法案》还增加了妇女权利和保护，包括受害人能享有新地址保密的权利。

### 经济和财政救济及受害人权利

几位国际专家强调了认可家庭暴力对受害人的经济影响的必要性，以及在反对家庭暴力的国家法律中纳入经济补救措施的需要。

在韩国，国家或地方政府可能以财务收益的方式支持受害人，包括生活费、儿童教育费、儿童保育费用或其他需求。韩国国家法律也禁止雇主解雇或刁难作为家庭暴力受害人的雇员。受害人有优先享用公营房屋的权利。

南非专家指出，国家反家庭暴力的法律需要承认受害人所面临的财政和经济挑战，因为如果他们没收入的话，可能会因此觉得自己离不开家庭。南非的《刑事诉讼法修订法案》还增加了妇女权利和保护，包括受害人在刑事诉讼中从罪犯处获得经济赔偿的权利。

在美国，有一些州已经通过了禁止雇主由于雇员是家庭暴力或性暴力的受害人而解雇员工的法律，法律还要求雇主提供就业住宿环境，并且能让受害人可以请假去解决他们生活中的暴力行为，不用担心会失去工作。

## 附件 B

### 关于中国家庭暴力现行法律和政策的其他信息

2004年，中国宪法修订时，规定了“国家尊重和保障人权”的基本原则。中国的国家法律将家庭暴力视作侵犯人权。根据《中华人民共和国民事诉讼法通则》<sup>1</sup>规定，公民享有生命健康权。婚姻、家庭、老人、母亲和儿童受法律保护。殴打他人是违反人权的。在中国，《婚姻法》、《妇女权益保障法》、《未成年人保护法》、《残疾人保障法》以及《老年人权益保障法》都明确禁止家庭暴力。此外，还有《刑法》、《刑事诉讼法》、《民事诉讼法》和《治安管理处罚法》保障家庭成员的人身权利。

《婚姻法》规定禁止家庭暴力。家庭暴力的受害人可以向当地基层组织或当事人所在单位寻求调解帮助，或请求公安机关介入，以制止暴力<sup>2</sup>。《婚姻法》还规定，若其严重程度足以构成根据《刑法》的犯罪<sup>3</sup>，则实施家庭暴力的个人应承担刑事责任。如调解无效，可将家庭暴力确认为离婚理由<sup>4</sup>。最后，它还详细地说明了，如果配偶能证明其离婚的理由是家庭暴力，那她有权要求对家庭暴力造成的损害索取赔偿<sup>5</sup>。虽然这些规定非常清楚，但这一法律并没有为这些目的而提供家庭暴力的定义，因此导致了这些规定的混乱和缺乏执行。2001年12月24日，最高人民法院颁布的“关于适用《婚姻法》若干问题的解释（一）”，其界定的家庭暴力定义是：“行为人殴打、捆绑、残害、强行限制人身自由，给其家庭成员的身体、精神等方面造成一定伤害后果的行为。”

1992年颁布的《妇女权益保障法》于2005年进行了修订，在婚姻和家庭权益部分禁止了对妇女的家庭暴力<sup>6</sup>。该法律还提供了一个多部门干预的模式，以预防和制止家庭暴力。国家采取措施，预防和制止家庭暴力。公安、民政、司法行政等部门以及城乡基层群众性自治组织、社会团体，应当在各自职责范围内预防和制止家庭暴力，依法为受害妇女提供救助。该法律还规定，受害人有权要求有关部门依法处理，或依法向人民法院起诉。不过，这部法律没有为这些词汇提供定义，也没有提供这些保护的执法机制。

<sup>1</sup> 《中华人民共和国民事诉讼法通则》（由全国人民代表大会常务委员会于1986年4月12日颁布，1987年1月1日生效），2 P.R.C. LAWS 255-49（中国）

<sup>2</sup> 参见《中华人民共和国婚姻法》前注43，第3, 43条。

<sup>3</sup> 同上，第45条。

<sup>4</sup> 《中华人民共和国婚姻法》（由全国人民代表大会常务委员会于1980年9月10日颁布，1981年1月1日生效，2001年4月28日修订），第32(B)条，<http://www.nyconsulate.prchina.org/eng/lsqz/laws/t42222.htm>【以下称作《中华人民共和国婚姻法》】。

<sup>5</sup> 同上，第46(c)条；参见 Zhao，前注44，第211条。

<sup>6</sup> 参见《妇女权益保障法修订法》（全国人民代表大会常务委员会于2005年8月28日颁布，2005年12月1日生效），（中国），第46条。

<http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf>.

于 2012 年 10 月 26 日修订的《未成年人保护法》禁止了对未成年人的家庭暴力，进而在家庭关系中保护未成年人的权利及其身心健康，使其免遭家庭暴力。中国还有其他专门的法律进一步保护儿童，确保儿童在自己的角色中得到保护，例如作为家庭成员或学生等。此外，一般立法涵盖了很多人身侵害罪，因此也覆盖了儿童。尽管如此，中国仍然缺乏对儿童暴力的一个明确法律定义以及禁止一切形式的儿童暴力问题的法律规定。

《老年人权益保护法》第 25 条于 1996 年通过并于 2012 年 12 月 28 日修订，禁止了对老年人的家庭暴力。第 75 条规定指出，干涉老年人婚姻自由，对老年人负有赡养义务、扶养义务而拒绝赡养、扶养，虐待老年人或者对老年人实施家庭暴力的，由有关单位给予批评教育；构成违反治安管理行为的，依法给予治安管理处罚；构成犯罪的，依法追究刑事责任。不过，当前尚未有适当的规定和明确的程序保护老年人权益，也没有针对老年人家庭虐待和暴力的特殊规定。

关于针对残障人士的家庭暴力，中国关于残障人士保护的《法律（2008 年）》提供了一些有关康复、教育、就业、社会保障和文化生活的保护，但其中并未解决残障人士家庭暴力的问题。

中国《刑法》第 260 条规定，“虐待家庭成员，情节恶劣的，处 2 年以下有期徒刑、拘役或者管制。犯前款罪，致使被害人重伤、死亡的，处 2-7 年有期徒刑。第一款罪，告诉的才处理”。

与此同时，国家行动计划中也加入了预防和制止家庭暴力。《国家人权行动计划（2012-2015 年）》、《中国妇女发展纲要（2011-2020 年）》以及《中国儿童发展纲要（2011-2020 年）》宣布将预防和制止家庭暴力作为主要目标，并提供了相应的策略和措施。

为解决清楚定义《婚姻法》中的家庭暴力的需要，中国最高人民法院在 2001 年 12 月发布了“有关中华人民共和国婚姻法的司法解释（一）”。这是第一个关于法官应如何处理涉及家庭暴力指控的婚姻案件的司法解释，其中包括了对家庭暴力的定义指导。

### 1. 中国应用法学研究所颁布的司法准则

2008 年 3 月，中国最高人民法院应用法学研究所颁布了“涉及家庭暴力婚姻案件的审理指南”（以下简称为审理指南），帮助法官审理婚姻案件。审理指南详细描述了法官应如何签发人身安全保护令（为家庭暴力受害人提供保护）。审理指南的目的是协助法官处理涉及家庭暴力指控的婚姻案件，它包含了对家庭暴力的定义，并将国家民事诉讼法作为法官签发人身安全保护令的参照。颁布审理指南的同时，还有九个试点法院被授权能使用审理指南代表家庭暴力受害人在婚姻案件中发

出人身安全保护令。过去的几年里，参与试点项目的省份和法院数量已经扩大到了 74 个。北京于 2012 年 8 月被列入试点项目。

目前在中国，只有与涉嫌家庭暴力的人结了婚的人，或者刚刚与涉嫌家庭暴力的人离了婚的人才能获准向法院申请人身安全保护令。正如审理指南所指出的，只有将立即着手申请离婚或在申请离婚后有限时间内的人才能提交人身安全保护令的申请。法院颁布人身安全保护令后，受害人必须在十五天内申请离婚，否则人身安全保护令将会过期。受害人也可以在离婚诉讼完结后的半年内申请人身安全保护令。用这种方式的话，审理指南要求人身安全保护令与离婚诉讼一并发出。人身安全裁定的申请，可以在离婚诉讼提起之前，诉讼过程中或者诉讼终结后的 6 个月内提出。紧急保护裁定有效期为 15 天，长期保护裁定有效期为 3 至 6 个月。

自 2008 年起，审理指南参照《消歧公约》，并引入了来自《中华人民共和国婚姻法司法解释（一）》的家庭暴力定义。该审理指南定义家庭暴力的目的是为了确定何时适宜在婚姻案件发出人身安全保护令，从而解决婚姻法不够明确所造成的迷惑。家庭暴力的定义比家庭成员间暴力的定义更为广泛：

*“家庭成员之间，特别是夫妻之间一方通过胁迫、暴力、虐待、经济控制等手段，侵犯对方的身体、性、情感和其他个人权利，以达到控制对方的目的的行为”。*

之后，它还引用了国际公约、法律和研究作为进一步描述家庭暴力四大表现的基础：身体暴力，性暴力，精神暴力和经济控制。这些形式的家庭暴力被框定为侵犯了与国际人权原则相一致的个人权利。在审理指南中列入情绪、精神、经济和性伤害等多种形式的家庭暴力展示了对家庭暴力动态的清晰认识。家庭暴力是一系列用于对受害人主张权力和控制的身体的和其他的虐待行为和策略。

审理指南不是法律，对中国法官也无约束力。然而，有些省级高等法院已发出自己的意见，包括审理指南中关于在婚姻案件发布人身安全保护令的表述；这些意见在那些司法管辖区里被认为是法律，且有效力。此外，律师在代表家庭暴力受害人在婚姻案件寻求人身安全保护令时也会参照审理指南。

据报道，2008 年 3 月（审理指南颁布时）至 2010 年 10 月间共发出 100 个保护令。截止 2014 年 2 月，这一数字超过 500。例如，陕西 2010 年加入试点保护令项目，截至 2013 年 1 月共为受害人发出 35 个保护令。

2014 年 2 月 27 日，最高人民法院发布了 10 个典型的家庭暴力案件作为审理家庭暴力的指导性案例，并通过案例推广审判经验，统一法律适用。下级法院应参照并遵守最高法院发布的案件指导，更低级别的法院还可在判决书引用这些案件指导。这 10 个案件延伸了目前司法解释中的家庭暴力定义，明确地将精神暴力，如威胁及恐吓也视作家庭暴力。另外，这 10 个案件将权力控制看作是家庭暴力的根源，也正因此，家庭暴力才能与其他种类的纠纷区分开来。此外，这 10 个案件就

一些有争议的问题作出了明确的典范，如发布保护令、对分手暴力受害人的保护、保护目睹家庭暴力的儿童、受害人在以暴制暴的情况下减轻其处罚等等。

经过多年努力，反对家庭暴力的中国法律框架已经建立，反对家庭暴力的立法也取得了显著的进步。然而，目前的规则是在许多不同的法律里分别规定的，并没有系统性的法律，而且对家庭暴力行为也没有明确的定义。这些规则大多是口号和宣传性、倡导性的，无法实施；并且这些规则侧重事后的处罚，而非强调事前的预防或干预，因此，他们不能有效地保护受害人，制止暴力。所以说，中国需要的是—部特殊的全面的反家庭暴力法，以便确立一个预防和制止家庭暴力的系统性体系，能解救受害人，惩治并纠正暴力行为人，从而有效地控制家庭暴力。

## 2. 保护令案件对证据的考量

在中国，根据审理指南，一般情况下，受害人的陈述可信度高于加害人。法官应将受害人的说法视为比罪犯的更可信。为了支持这一建议，审理指南指出，如果所言非实，受害人不会冒险来到法庭分享这些信息。审理指南还提供了满足人身安全保护令的证据要求、能证明原告遭受家庭暴力或正面临家庭暴力威胁的证据示例。受伤的照片、报警记录、证人的证词、社会服务机构的文件及虐待的文件记录（包括加害人的威胁短信等）都是受害人可以提出或法官可以搜寻的证据示例，以支持受害人的陈述。审理指南指出，法官考虑这个证据是优势证据时，应使用的证据标准可由法官“基于逻辑推理和经验法则做出判断，避免采用刑事诉讼的证明标准。”一旦受害人提出了受伤的证据，并提出伤害是因被告的行为所致，举证责任就会转移到被告。如果被告否认造成原告伤害，但无法提供证据支持的话，那么依照审理指南，法官可判定家庭暴力已经发生，并发出保护令。审理指南允许中国法官发出的人身安全保护令也包括了一系列禁令救济，与美国的有类似之处：要求被告人与受害人及其住所、工作场所或所在的其他地方保持一定的距离，禁止被告骚扰、跟踪、殴打、威胁原告或与原告发生任何其他不受欢迎的联系或接触。此外，法官还可以责令被告禁止殴打或威胁原告的家人和朋友。法官也可命令被告暂时迁出双方共同的住处。

由于人身安全保护令只能与离婚一起获得，中国还有一些与离婚诉讼相关的具体补救措施。例如，法官可命令，在保护令生效期间，“一方不得擅自处理价值较大的夫妻共同财产”。这样一来，人身安全保护令与离婚诉讼的联系就有助于保护夫妻共同财产。审理指南特别认可了财务方面的考虑可能会影响被告寻求安全的决定，因此，审理指南指出，当法官认为有必要时可在保护令有效期间，命令被告向受害人支付生活费及其抚养未成年子女的开支。此外，法官还可以命令打人者支付所有的医疗费用、治疗费或“申请人由于被告暴力行为而需接受的医疗护理的必要费用”。这些有关离婚诉讼和财政支持的对受害人的具体补救措施承认了女性在中国挺身而出、寻求离婚的风险，也认可了她在分开后将面临的财政障碍的风险，包括获得住房等。

审理指南也承认，受害人希望虐待停止，打人者可能需要专业人士的协助，以改变自己的行为，所以法官可命令被告人自费接受治疗。然而，在中国，合适的施虐人治疗服务非常有限，因此在许多情况下，这一个选项其实形同虚设。最后，审理指南还有一个“兜底性”的规定，让法官能下令采取“其他措施，以保护原告及其特定家庭成员的人身安全”。

根据审理指南，如果被告人在中国以骚扰、殴打或恐吓受害人或其家庭成员（包括专门迫使受害人撤诉或放弃“合法权益”）的方式违反了人身安全保护令，法院应对被告人处以罚款或拘留。如果被告人的行为既违反了裁决，又构成犯罪的，他应被“移交公安机关”或“告知受害人可提起刑事自诉”。审理指南还解决了受害人可能会回到法院要求撤销人身安全保护令的情况。收到保护令的三天内，原告或被告都可以请求对撤销保护令进行听证。如果法官认为有必要召开听证会，他/她可以决定举行一个私人听证会，只有当事人及其家庭成员才能出席。如果原告拒绝出席听证会，保护令就会被撤销，除非能证明受害人未出席的原因是由于受到被告的威胁。如果被告拒绝出席这个撤销保护令的听证会，那么听证仍会继续单方面进行。

联合国《中国反家庭暴力立法国际经验交流会》  
成果技术建议报告

UN Technical Paper Recommendations from the International  
Roundtable on the Family Violence Legislation in China

联合国多机构支持中国反家暴立法工作组  
UN Inter-Agency Task Force to  
Support the China Family Violence Law Drafting Process

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**Contents**

Executive Summary . . . . .	44
I. Introduction . . . . .	45
II. Relevant International Law and Treaties. . . . .	47
III. Current Laws and Policies That Address Family Violence in China Are Insufficient . . . . .	49
IV. Specific Recommendations for China's National Family Violence Law . . . . .	51
V. Conclusion . . . . .	70
VI. ANNEX A. . . . .	71
VII. ANNEX B . . . . .	83

## Executive Summary

This technical report provides specific recommendations regarding provisions to be included in the Chinese national Family Violence Law. These recommendations are informed by international human rights treaties adopted by China that define the State's responsibility to provide protection to victims of family violence and hold perpetrators accountable as well as by the gaps that exist in current Chinese law. The recommendations also integrate lessons learned from presentations made by international experts on national laws regarding family violence, children's rights, disability rights and elder abuse from Austria, Australia, Finland, Japan, Korea, New Zealand, South Africa, the United Kingdom, and the United States at the UN International Family Violence Roundtable in April 2014.

This report defines family violence to include violence against women, children, persons with disabilities and elders and the recommendations for the national Family Violence Law include protections for victims in each of these categories. The recommendations include development of a national systemic response to family violence, including coordination and collaboration between State departments and community-based organizations to prevent family violence, to provide support to victims, and to hold perpetrators of violence accountable through punishment and rehabilitation services. This report recommends that the State's obligation include public education and awareness campaigns targeting youth, elders, persons with disabilities and women regarding what family violence is, and how to seek assistance. It also includes extensive training for the police, prosecutors, judges, and those who work with the elderly, children and persons with disabilities on how to identify family violence, and how to effectively respond and report abuse. The recommendations also include increased legal protections for victims including the definition and enforcement of the crime of family violence and access to civil protection orders for victims.

Annex A to this document contains additional information provided by the international experts during their presentations at the UN International Roundtable on Family Violence in April 2014 in Beijing. Annex B provides more detailed information about current laws and Policies in China that address Family Violence.

## I. Introduction

The UN Women estimates that at least one in every three women will be beaten, raped, or otherwise abused during her lifetime, and in most cases, the offender is a member of her own family.<sup>1</sup> Violence against women, within the family as well as in other settings, is rooted in and reproduces power imbalances between women and men in family and society. Domestic violence is one common form of violence against women. Domestic violence consists of a combination of forms of abuse used by one intimate partner to gain power and control over the other, frequently involving a systematic pattern of abusive behaviors with this goal or intent. The majority of perpetrators of domestic violence are men and the majority of victims<sup>2</sup> are women. It often includes physical violence in combination with other forms of controlling behavior such as mental, verbal, emotional, psychological, economic/financial and sexual abuse. Anyone may be a victim of domestic violence, but some groups are more vulnerable including women, children, persons with disabilities, and the elderly. Collectively, domestic violence and abuse of women, children, the elderly, and persons with disabilities committed by intimate partners and/or caregivers in the home is defined as family violence.

The causes of family violence are complicated and thus it has proven difficult to create a targeted, comprehensive and effective national legislative response. Nonetheless, the dramatic negative impact that family violence has on families, communities and societies cannot be denied. Family violence not only inflicts serious injury on its immediate victims, including lifelong negative psychological, physical injuries and death. When unaddressed, family violence increases health care costs and decreases economic productivity.<sup>3</sup>

At the UN International Family Violence Roundtable on April 10-11, 2014 in Beijing, China, international experts on family violence, domestic violence, gender-based violence, child abuse, elder abuse and abuse of persons with disabilities provided valuable information about the national laws adopted in nine countries to prevent family violence, to protect victims of family

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<sup>1</sup> UNITED NATIONS DEP'T OF PUBLIC INFORMATION, U.N. SECRETARY-GENERAL'S CAMPAIGN, UNITE TO END VIOLENCE, FACTSHEET, DPI/2498 (Feb. 2008), available at <http://www.un.org/en/women/endviolence/pdf/VAW.pdf>.

<sup>2</sup> The terms "victim" and "survivor" are used interchangeably in this paper in reference to individuals who experience family violence including those who are the targets of the abuse and children impacted by the abuse as witnesses or because they are present in the home where abuse is taking place. Since these terms convey different meanings and individuals who experience abuse express a desire to be referred to by one term or the other during the process of healing, both are utilized in this document.

<sup>3</sup> The U.S. Centers for Disease Control and Prevention estimates that the cost of intimate partner rape, physical assault and stalking totaled \$5.8 billion each year for direct medical and mental health care services and lost productivity from paid work and household chores. *See* Costs of Intimate Partner Violence Against Women in the United States. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control. 2003. Available at <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.



violence, and to hold perpetrators accountable. These presentations also included recommendations for China's national Family Violence Law. There was consensus among presenters that an effective, comprehensive national law and a commitment to implementation are essential to successfully address family violence. For example, it was reported that in the U.S., overall rates of domestic violence have decreased by 64% since the passage of a national law in 1994.

Adopting a rights-based and holistic approach to preventing and protecting subjects of the proposed law from family violence should be in accordance, and harmonized with international treaties to which China is a signatory such as the International Convention on the Rights of the Child (CRC), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Convention on the Rights of Persons with Disabilities (CRPD), and the Madrid International Plan of Action on Ageing (MIPAA) as well as with the provisions of the Constitution and national laws of the People's Republic of China. A rights-based and holistic approach will provide women, children, persons with disabilities and the elderly with equal access to justice as a rights-holder under the law. To be effective, the Chinese national Family Violence Law must also recognize and address the gender-based power imbalance that underpins and perpetuates family violence against women and the unique vulnerabilities of children, persons with disabilities and the elderly. Furthermore, the Chinese national family law must not be exclusively reactionary to incidents of family violence, but should provide for primary prevention (measures preventing family violence before its occurrence), secondary prevention (measures addressing family violence during the course of the commission of the offence/after it has started) and tertiary prevention (measures preventing its repetition even after the occurrence).

### **Family Violence in China**

As is the case in many countries, family violence in China is underreported. Because of the nature of the crimes and the vulnerability of its victims, all forms of family violence, including domestic violence, victims often do not report the abuse and thus the crime is underreported globally. The limited data that has been reported in China demonstrates that family violence is a serious problem. A national survey conducted by the All China Women's Federation in 2011 found that one in approximately every four women has experienced violence at home including verbal and physical abuse, having their freedom restricted and being forced to have sex.<sup>4</sup> In 1999, the Anti-Domestic Violence Network of the China Law Society conducted a survey in nine cities in Zhejiang, Hunan and Gansu provinces in which 71.9 percent of 3780 individuals reported that they experienced family violence during their childhood.<sup>5</sup> In China, several recent smaller surveys indicate the existence of domestic violence against older persons, though these results are not nationally representative. In one survey, the prevalence of violence among people over 60-year older women is 19.3%.<sup>6</sup> Although there are 85 million persons living with disabilities in China, there is no estimate for how many are experiencing or have experienced family violence. Similarly, there is no data regarding the number of children exposed to family violence.

<sup>4</sup> All-China Women's Federation and the National Bureau of Statistics released this data in 2011 following a national survey of 105,573 people aged eighteen and over and twenty, 405 teenagers aged between ten and seventeen).

<sup>5</sup> This information is from Xia Yinlang so I do not have a citation for it.

<sup>6</sup> Data from baseline survey in two project sites of ACWF/UNFPA VAW project, 2013.

Nonetheless, it is understood that family violence is pervasive in China, impacting every segment of society and the Chinese State has a responsibility to develop effective structures to prevent family violence, provide protection and support to victims, and punishment and rehabilitation to perpetrators.

## **II. Relevant International Law and Treaties**

China has adopted several international treaties that require it to address family violence, including adopting a national Family Violence Law and reporting on progress toward the goal of decreasing the incidence of family violence. These provide a framework for China on which to base its development of a national legislative response to family violence.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defines discrimination against women to include violence against women. China became a signatory and ratified CEDAW in 1980. Articles 2, 5, 11, 12 and 16 of CEDAW require the State parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life. In addition, General Recommendation No. 19 of CEDAW recognizes that gender-based violence is a form of discrimination and that it "seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." It also recommended that States include information on violence and measures introduced to address it in their CEDAW reports. Regular reporting by States is necessary to ensure implementation of policies and laws toward ending violence against women. The UN Commission on the Status of Women agreed conclusions on the elimination and prevention of all forms of violence against women and girls on March 15, 2013 recommend that countries "address and eliminate domestic violence through adopting, strengthening and implementing legislation that prohibits such violence, prescribes punitive measures and establishes adequate legal protection against such violence."

Key international conventions that address abuse and violence against older persons are the Madrid International Plan of Action on Ageing (MIPAA 2002) and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW 1979), both of which have been adopted and ratified by China. Specifically, CEDAW recommends that States that are parties to the treaty should investigate, prosecute and punish all acts of violence against older women.<sup>7</sup> Article 5 of the Madrid Plan's Political Declaration states the commitment of governments "to enhance the recognition of the dignity of older persons and to eliminate all forms of neglect, abuse and violence". "Neglect, abuse and violence" was listed as one of the 4 issues of Priority direction III of MIPAA's recommendations for action: ensuring enabling and supportive environments, recognizing physical, psychological, emotional, financial forms that those "neglect, abuse and violence" usually takes.

China also adopted and ratified the International Convention on the Rights of the Child (CRC) in 1992 and the Hague Convention on the Protection of Children and Cooperation in Respect of

<sup>7</sup> Paragraph 37, GR 27 CEDAW

Inter-Country Adoption in 2005. Article 9 of the CRC states that a child shall not be separated from his or her parents against their will except when authorities subject to judicial review determine that separation is in the best interest of the child. Article 19 of the CRC requires that State Parties:

shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.

Further it defines protective measures to include in social programs to provide support for the child and those who have the care of the child and prevention efforts focused on the identification, reporting, referral, investigation, and treatment of children when abuse is reported. A rights-based approach to protecting children from family violence as described in these treaties requires the recognition of a child as a rights-holder rather than just a victim. Children have the right to be heard and to have their views given due weight. They must be respected systematically in all decision-making processes and their participation should be central when developing violence protection strategies and programs. Further, the best interests of the child should be a primary consideration in all matters affecting a child. Access to justice for children must be guaranteed through development of legal assistance programs, accessible complaint mechanisms, and child-friendly and gender sensitive court procedures.

Adopted in 2006 by the UN and ratified by China in 2008, the International Convention on Rights of Persons with Disabilities (CRPD) emphasized the critical influence caused by obstacles of the social environment to persons with disabilities, not only focusing on impairments.. Some of its goals are to create a systemic response to the needs for persons with disabilities and to increase visibility of persons with disabilities, ensuring a just and inclusive society in which everyone enjoys the same rights. CRPD requires monitoring and implementation by State parties and requires that persons with disabilities are involved in the reporting and monitoring (Article 4.3 and Article 33): “nothing about us without us”. This statement represents the understanding that no policy should be decided without the full and direct participation of members of the disability community. It incorporates the human rights framework approach, recognizing persons with disabilities as rights holders and the responsibility of the State to protect their rights. CRPD also recognizes that women and girls with disabilities are often at greater risk, both within and outside of the home, of experiencing violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Article 16 specifically requires that all States that are parties to CRPD:

shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home from all forms of exploitation, violence and abuse, including their gender-based aspects.

It also requires that State parties shall take all appropriate measures to prevent violence and abuse by ensuring gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. Anti-family violence programs must address the needs of persons with disabilities, ensuring accessibility and public

education and awareness of the needs of persons with disabilities who experience family violence.

### III. Current Laws and Policies That Address Family Violence in China Are Insufficient

Several national Chinese laws, national policies, provincial laws and policies address family violence and violence against women, however they do not provide a comprehensive definition of family violence, sufficient legal protections for victims or language enabling effective enforcement of those protections or rehabilitation and punishment of perpetrators. A national Family Violence Law is necessary to effectively prevent and stop family violence, to address gaps between current Chinese legislation, and the requirements of international treaties to which China is a party.

The Chinese Marriage Law, the Women’s Rights and Interests Law, the Law on the Protection of Minors, the Elder Rights and Interests Protection Law, the Law on the Protection of Persons with Disabilities, and the Criminal Law all address family violence. In addition, the All China Women’s Federation and the Propaganda Department of the Central Committee of the CPC, the Supreme People’s Procuratorate, the Ministry of Public Security, the Ministry of Civil Administration, Ministry of Justice, Ministry of Health promulgated a joint opinion on the prevention and ending of family violence in 2008, explicitly describing the duty of related departments and offered regulatory instruction for all regions and all departments as to how to address family violence. In 2013, the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, and the Ministry of Justice issued a joint opinion on child sexual abuse describing the duty of these departments to prioritize the protection of minors who are sexually assaulted. Currently in China, there are local regulations against family violence in 22 provinces (autonomous regions, municipalities); there are special policies in 7 provinces; there are more than 90 districts and cities where policies against family violence have been developed. In addition, as of 2008, twenty-three provinces, municipalities, and autonomous regions had passed enforcement plans for the national Law on the Protection of Women’s Rights and Interests specifically addressing family violence. Also police stations, courts, prosecutors, and other governmental organizations in some places have also developed regulations on family violence. Local regulations and policies identify family violence as a violation of a woman’s human rights and affirmatively state that preventing and responding to family violence is a means of ensuring harmonious families and social stability. These regulations encourage promotion of and public education regarding laws on the prevention of family violence in China to raise citizens’ legal awareness. A more detailed description of Chinese law and government policies on preventing an responding to family violence may be found in Annex B tot his document.

#### **Judicial Guidelines and Guiding Cases Regarding Civil Protection Orders in Family Cases and Criminal Cases Involving Family Violence in China**

In 2008, the Institute for Applied Jurisprudence of the Supreme People's Court of China issued "The Judicial Guidelines on Marriage Cases Involving Family Violence" (涉及家庭暴力婚姻案件审理指南 roughly translated as "Bench Book") for judges hearing marital cases. The Bench Book contained a description of how judges may issue civil protection orders (renshen anquan baohu ling or 人身安全保护令) to provide protection to victims of family violence. It includes a definition of family violence, and it incorporates reference to Article 100 of the national Civil Procedure Law as the authority for judges to issue civil protection orders. In conjunction with issuance of the Bench Book, nine pilot courts were authorized to use the Bench Book to issue civil protection orders on behalf of victims of family violence in marital cases. Over the last few years, the number of provinces and courts involved in the pilot project has expanded to include at least seventy-four. Beijing was included in the pilot project in August 2012. As of February 2014, it had been reported that over 500 civil protection orders had been issued. For example, Xiangzhou People's Court in Guangdong province has issued 92 civil protection orders.

The Bench Book is not law, and it is not binding on Chinese judges. However, several high provincial courts have issued opinions including language from the Bench Book regarding issuance of civil protection orders in marital cases; these opinions are considered law and binding in those jurisdictions. Moreover, attorneys have referred to the Bench Book when representing victims of family violence seeking civil protection orders in marital cases. The Bench Book also specifically prohibits sexual violence and economic abuse by restricting the victim's control over family finances and personal property. Finally, both the Bench Book recognizes that family violence continues after the victim leaves the offender and thus protection is needed not only when the parties are still together, but also after they separate.

In July 2013, "Jiangsu Province's Implementation Measurement of Warning System Against Family Violence (on trial)" was issued jointly by Jiangsu Province Higher People's Court, Jiangsu Province People's Procuratorates, Public Security Department of Jiangsu Province and Jiangsu Province Women's Federation. Jiangsu province is the first province to establish a warning system against family violence to protect family violence victims' rights and interests, and maintain family and social harmony and stability. The establishment of warning system against family violence is aimed at strengthening the power of family violence prevention by using the administrative guidance power from Public Security Organizations, and improving anti-family violence measures. The main contents include: warning and educating family violence perpetrators; providing legal support to family violence victims and; addressing perpetrators' abusive behaviors through batterers' education. More recently, other provinces and cities such as Ningxia and Suzhou have also issued warning systems.

On February 27, 2014, the Supreme People's Court released 10 family violence "Guiding Cases" to provide direction to the lower courts about what constitutes evidence of family violence, who may seek protection and who may be a perpetrator of family violence against whom a victim may seek a protection order or criminal prosecution. These Guiding Cases were announced at a press conference where it was acknowledged that Chinese courts currently face difficulties adjudicating cases involving family violence. Several cases demonstrated that mental and emotional abuse, including intimidation and threats of violence are forms of family violence as well as harassment and stalking. Courts should take such non-physical abuse seriously and should collect evidence of these forms of family violence. The guiding cases also specifically

recognize elder abuse and a child's exposure to abuse as a form of family violence. In addition, the cases reaffirm the authority of the courts to issue civil protection orders when requested by victims of family violence, including protection of the victim after he or she has separated from the batterer, and recognition of the negative impact of family violence on children and the need for protection for children who witness domestic violence. Finally, the Guiding Cases address the need for the court to consider the impact of family violence on a victim in criminal proceedings when a victim has no choice but to kill the perpetrator in order to stop the violence.

#### IV. Specific Recommendations for China National Family Violence Law

Incorporating the framework and requirements from the international treaties on violence against women, children, persons with disabilities and the elderly to which China is a party, recommendations from international experts, and an understanding of the current policy and law in China addressing family violence, we make the following recommendations regarding the provisions to be included in the national Family Violence Law.

##### **State Should Establish Obligation to End Family Violence**

The national law should state that addressing family violence is the responsibility, the duty, and the obligation of the State in order to ensure meaningful implementation of the law. By clearly articulating the State's responsibility, the national law will clarify that family violence is not a private matter, within the family and beyond the reach of national laws and regulations. Instead, family violence destroys the harmony of the family and is a public issue requiring a public response from the State. Establishing the State obligation will also implicate the budgetary investment necessary to implement those obligations to achieve the goals of the legislation. The legislation must include language that requires that the State government to address primary prevention, secondary prevention, and tertiary prevention of family violence including:

##### **Prevent the Occurrence of Family Violence**

- Establish a system of research, including data collection, analysis, monitoring and evaluation to provide recommendations to increase effectiveness of implementation of provisions under the national law;
- Funding national, regional, and local public education and awareness campaigns about family violence including information on the rights of victims and how to seek help if someone believes they are a victim of family violence and abuse;
- Establishment of a coordinating mechanism to ensure collaboration among key stakeholders at various levels of government and between government, social services, health, education, police, community centers and other relevant agencies, in order to identify, intervene, support, and protect survivors from harm in a timely manner;
- Targeted awareness campaigns focused on addressing harmful stereotypes and practices surrounding gender and violence within specific, strategic population

groups, promoting alternative understandings/knowledge and actions, should be implemented;

- Mandatory education in schools about healthy relationships and gender equality, addressing harmful gender stereotypes and misconceptions related to the legitimacy of violence in intimate relations in school syllabi including family violence awareness and prevention, and teachers trained on addressing the issues in the school setting and responding to suspicions of family violence; and
- Providing education and information dissemination on family violence through the media in order to reach to as many persons with disabilities as possible through accessible means, e.g. sign language, Braille, etc.

**Intervene and Stop Family Violence When It is Occurring**

- Establish a credible, confidential, well-publicized and accessible nationwide system for reporting incidences of family violence through government and non-governmental organizations which link people affected by violence to emergency and long-term care and rehabilitation services;
- Require training by experts in family violence for police, judges, prosecutors, social workers, healthcare providers, and anyone who works with victims of family violence on the dynamics of domestic violence, including identification of abuse, and appropriate response, information about support programs and legal rights of adult and child victims, victims who are elderly and/or disabled;
- Establish counseling and support centers and shelters in all communities where victims can come together and seek support and safety and talk about their experiences so that they do not feel alone. Such centers and shelters need to be accessible to children, the elderly, and persons with disabilities; and
- Provide all survivors with civil and social programs such as free medical care and other available social benefits for their rehabilitation, access to training programs and housing services if so desired.

**Decrease the Occurrence of Family Violence in the Future**

- Designate funding in the budget and provide all the necessary resources specifically for implementation of the law, including physical, material resources for all the departments dealing with family violence;
- Develop a national-level office to administer the funds, conduct periodic review and evaluation, and coordinate national public education and training;
- Collect and disseminate data on the occurrence of family violence experienced by girls and women, elders, and persons with disabilities and children; and
- Provide caregivers with necessary assistance to prevent family violence.

**A. Definition of the Crime of Family Violence**

In addition to establishing the role of the State in ending family violence, the national Family Violence Law must contain legal provisions that define the crime of family violence. Current Chinese law does not have a criminal definition of family violence. The international experts at the UN International Roundtable on Family Violence provided several different definitions of family violence

and domestic violence from their national laws. The experts reported on both the experiences of their countries in drafting their national Family Violence Laws and the challenges that their countries faced in implementation of their laws. These examples included definitions of the crime of family violence as well as the behavior that is sufficient for a victim to obtain a civil protection order. Definitions included: (1) behaviors that constitute family violence; and (2) the required relationship between the victim and the perpetrator for it to be considered family violence in criminal law or civil law. The following are examples of the definitions of family violence included in other countries' national laws.

**Korean Definition of Domestic Violence**

In Korea, the Act on Special Cases Concerning Punishment of Crimes of Domestic Violence was enacted in 1997 and revised 19 times including in 2014. The law defines domestic violence as: "Behavior causing physical, psychological or property damage among household members." The Act recognizes the following crimes contained in the national Criminal Code of Korea as domestic violence:

- |                       |                      |
|-----------------------|----------------------|
| Injury or assault     | Abandonment or abuse |
| Arrest or confinement | Threats              |
| Defamation            | Housebreaking        |
| Coercion              | Fraud or blackmail   |

**Australian Definition of Family Violence**

In 2011 Australia amended its Family Law Act of 1975 and changed the definitions of family violence and abuse to include:

- Assault
- Sexual assault
- Other sexual abuse
- Stalking
- Emotional and psychological abuse
- Economic abuse

Family violence is defined in its national law as:

"Violent threatening or other behavior by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful."

**Criminal Definition of Domestic Violence in South Africa**

The crime of domestic violence in the South African national Domestic Violence Act is defined as:

- Physical abuse
- Verbal abuse
- Emotional abuse/psychological abuse
- Financial/economic abuse
- Sexual abuse
- Intimidation/harassment
- Stalking
- Malicious damage to property
- Entry into the complainant's residence without consent, where the parties do not share the same residence or
- Any other controlling or abusive behavior toward a complainant where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant

**United Kingdom Definition of Molestation in Civil Court**

In the U.K., the Family Law Act of 1996 created a non-molestation order that is sealed by the court stating that one party must not molest the other party. Molestation is not defined in the statute but it includes the following examples of behavior to be considered molestation:

- Violence
- Threats of violence
- Harassing or pestering behavior
- Pestering an applicant either in the family home or at work
- Abusive or persistent text or phone calls
- Verbal abuse and shouting at the individual in public
- Physically intimidating an applicant or using threatening language
- Damaging property in the family home
- Physical violence including slapping, shoving, kicking or pushing

**Examples of elder abuse, according to the U.K. and Japanese experts include:**

- Physical abuse
- Sexual abuse
- Psychological abuse
- Financial or material abuse and exploitation
- Neglect
- Societal abuse
- Discriminatory abuse
- Institutional abuse
- Involuntary abandonment or isolation
- Abuse or denial of medication

In 2011 **the Australian Family Law Act** from 1975 was amended and includes a non-exhaustive list of potential examples of family violence and exposure to family violence including “a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.” These lists included patterns of family violence as well as single events. Abuse in relation to a child is defined as: “[a]n assault, including a sexual assault of the child or [a] person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person or causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subject to or exposed to, family violence, or serious neglect of the child.”

Austrian criminal law prohibits marital rape, dangerous threats, sexual assault, stalking, persistent perpetration of violence, sexual abuse, exploitation and prostitution of minors, trafficking in prostitution and sexual harassment. It is recognized that children are vulnerable to family violence, and there is a duty of civil society to provide mechanisms to provide rights and protections allowing a mechanism for providing safety, privacy and confidentiality are considerations.

**The definition of elder abuse in the U.K. is:**

“a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress of an older person.”

**Japan issued the Law for Preventing the Abuse of Older People and Providing Assistance to Caregivers in 2005.** Abusive and neglectful acts of both caregivers in domestic settings and personnel of long term care institutions and of nursing care service providers includes:

- physical abuse
- caregiving neglect
- psychological abuse
- sexual abuse
- financial abuse

Elder abuse may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented or cannot consent.

**Financial or material elder abuse in the U.S. and U.K. may include:**

- Theft
- Fraud
- Exploitation
- Pressure in connection with wills, property or inheritance or financial transactions or
- The misuse or misappropriation of property, possessions, or benefits

Financial exploitation against older persons by family members or people they are familiar with using undue influence due to their role and power to exploit the trust, dependence, and fear of others or by means of coercion, intimidation, undue influence, deception and/or emotional abuse are very rarely reported, although an elder may have the mental capacity to make decisions regarding his or her finances.

Financial exploitation against older persons by family members or people they are familiar with using undue influence due to their role and and/or emotional abuse are very rarely reported, although an elder may have the mental capacity to make decisions regarding his or her finances.

**Recommendations for Definition of Family Violence**

Based on the experiences of other countries, guidance from international treaties and China’s existing law, the definition of family violence should include a comprehensive, non-exhaustive list of specific behaviors that taken alone or together constitute family violence. The law should also include specific examples of abuse to assist with implementation of the law in relation to women, children, elders, and persons with disabilities.

The definition should build upon but not conflict with the definition of family violence in China’s Marriage Law and the Judicial Bench Book for civil protection order cases both of which focus more exclusively on violence committed by one spouse against the other to include forms of violence committed outside of marriage, and abuse committed against children, persons with disabilities and the elderly. The definition of family violence in the national law should be:

- **Any controlling, abusive, or generally detrimental act engaged in that harms the health, safety, and/or well-being of that person, including, but not limited to: any threats of, or actual physical abuse; sexual abuse, including marital rape; emotional, verbal or psychological abuse; economic/financial abuse; intimidation; harassment; stalking; damage or destruction of property belonging to the person or abuse of economic or financial well-being of the person; entry into the residence or workplace without consent; and/or inadequate care, neglect and negligent treatment; and witnessing family violence.**

Examples of controlling and abusive behaviors may include refusing to assist in caregiving, including bathing or feeding or administering of medicine or threats to disclose medical conditions such as HIV or AIDS; refusing to provide transportation or other assistance to obtain necessary medical attention; isolation, and abandonment and/or neglect;

Threats or acts threatening the safety and well-being of children and dependent persons including witnessing family violence and being present in a home where family violence is occurring even if they have not witnessed the abuse as well as direct family violence as described here committed against a child or other dependent person and neglect;

Economic/Financial abuse includes the deprivation or threatened deprivation of any or all economic or financial resources to which the victim is entitled under law or which the victim requires out of necessity; the disposal or threatened disposal of household effects or other property in which the victim has an interest (irrespective of whether the parties are married in community of property or not); the use of economic or financial resources to threaten, intimidate, persuade, motivate or otherwise ensure the victim behaves in a way the perpetrator desires, including refusing to let the victim work, or forcing him or her to quit his or her job, or forcing him or her to surrender her earnings/salary, or harassing the person at work so that she or he is fired from her or his job.

The definition of intimidation includes uttering, conveying or causing a victim to receive a threat that induces fear.

Harassment is defined as engaging in a pattern of conduct that induces the fear of harm; watching or loitering outside of or near the building or place where the victim resides, works, carries on business, studies or happens to be; repeatedly making telephone calls, sending text messages, or inducing another person to make telephone calls to the victim whether or not a conversation ensues; repeatedly sending, delivering telegrams, packages, facsimiles to the victim's home or work, whether physically or virtually through the internet or text messaging.

Stalking is defined as repeatedly following, pursuing, accosting, or contacting the victim by any means including in person, via telephone, email, social media, or surveillance using the internet, hidden cameras or tracking devices.

## B. Definition of Family Members or Household Members

In addition to defining the behaviors that constitute family violence, it is important for the national law to include the requisite relationship that is necessary for the abuse to constitute the crime of family violence. Under current Chinese law, the definition of family violence is limited to spouses or former spouses. The recommendations and experiences from the international experts are that the relationships go beyond marriage to include those in intimate relationships who may not be married, but are living together or sharing a residence, who may have children together but are not married, are dating, are in a same-gender relationship, and other family members including children, parents and others who are caregivers or for whom a family member may be responsible for the care of another.

### In Korea, the Act on Special Cases Concerning Punishment of Crimes of Domestic Violence

stated that household members could seek protection from domestic violence and defined household members as:

- Spouse or former spouse (including common-law marriage)
- One's or spouse's current or former parents or children (including defacto relationship)
- Persons in relationship of step-parent and child, or mother and step-child, and
- Relative(s) living in the same household

The definition of victim in national Korean domestic violence law is limited to "one who is directly damaged by domestic violence."

### In South Africa, the Domestic Violence Act of 1998

protects people from perpetrators of domestic violence in the following relationships:

- Marriage
- Parties who live together or have lived together but are not married
- Same sex partners who are living together or have lived together
- Individuals who are engaged, dating or a consensual intimate or sexual relationship
- Family members related by blood marriage or adoption, and
- People who ordinarily live together in the same residence

The South African law specifically and intentionally excluded landlords and tenants, domestic workers and their employers, and farmworkers from the list of relationships that qualify for protection from family violence.

In contrast, the New Zealand expert on abuse of persons with disabilities stated that national family violence laws should consider inclusion of paid caregivers among the relationships given their role in the lives of disabled individuals and the risk of abuse. Specifically, persons with disabilities who have experienced abuse have argued that paid caregivers be included in the definition.

## Recommendations for Relationship Requirement of Definition of Family Violence

Based upon the experiences of the international experts and the gaps that exist in current national Chinese law, the requisite relationship for the crime of family violence includes:

- **Individuals who are or were married;**
- **Individuals of the same or opposite gender who live together or have lived together regardless of whether they are married;**
- **Individuals who have one or more children together regardless of whether they are married or living together;**
- **Individuals who are engaged, dating or a consensual intimate or sexual relationship; irrespective of the duration of their dating or intimacy including lesbian, gay, bisexual and transgender individuals.**
- **Family members related by blood, marriage or adopted children, step-children, parents, grandparents, nieces and nephews, etc. and other extended family members; and**
- **People who ordinarily live together in the same residence including caregivers for children, the elderly or persons with disabilities who are related by blood or marriage and paid and unpaid caregivers who are not related by blood or marriage.**

### C. Reporting and System of Investigation by Police and Other Institutions

Having defined the crime of family violence through actions and behaviors and requisite relationships, we move on to the importance of enforcement of the criminal law of family violence. Many of the international experts spoke of the need for effective enforcement of the national criminal law against family violence by the State, specifically by the police and through prosecution in the courts. The national law needs to clearly designate the role of the police as enforcing the law against family violence, including responding to calls reporting family violence, conducting thorough investigations of reports of family violence, providing safety to the victim immediately if necessary, and coordinating with the prosecutor and the courts to ensure the perpetrator will be detained and criminally prosecuted.

Training for the police on family violence and their response is necessary to ensure that they understand family violence is a serious crime and how to appropriately assist survivors, paying specific attention to the unique barriers facing children, the elderly and persons with disabilities.

Under Korean national law, when they receive notice of family violence occurring, the police must go to the scene and take emergency measures including:

- Stop the violent behavior
- Separate the offender and the victim
- Investigate the crime
- Guide the victim to counseling center or shelter if the victim expresses an interest in going
- Notify that recurrence of violence can lead to interim measures under Article 8 of the law
- Investigate quickly and send the case to the public prosecutor's office
- Present an opinion as to whether the case is appropriate as a family protection case

New Zealand has Police Safety Orders that may be issued by the police on the spot and is effective for five days. It is a document given to the victim and the offender is evicted from the home for five days. In Finland in 2002 a law was passed requiring notification of the victim when the perpetrator is released from prison. Several states in the U.S. have laws requiring notification of the victim when the perpetrator is released from prison. Also in Finland, the national law requires the police to investigate the abuse when there is suspected criminal behavior; the penalty for assault is a maximum of two years.

Japan fines those who interfere with an elder abuse investigation in its Law for Preventing the Abuse of Older People and Providing Assistance to Caregivers:

“Anyone who, without any justifiable reason, refuses to accept, interferes with the execution of, or avoid the lawful entrance of an elder abuse investigator into his/ her premises, and who refuses to answer questions, provides false information, refuses to permit the older person to testify, or forces the older person to submit false information shall be punished by a fine of less than 300,000 yen.”

In 1999, South Africa developed the National Police Instructions on Domestic Violence that describes the roles, responsibilities, and functions of the police regarding implementation of the Domestic Violence Act. Some of the most important responsibilities of the police provided by the South African National Police Instructions include the need for the police to:

- First locate the victim and take her statement on arrival at the scene of crime
- Interview the victim separately from the perpetrator
- Determine if there is imminent danger to the life of the victim
- Secure and protect the victim
- Confiscate any dangerous weapons used in the commission of the offence
- Open the case against the perpetrator, and if necessary
- Effect arrest
- 

Other police responsibilities include assisting the victim to find a suitable shelter and transport if she requires to leave the shared residence and to assist her to go for medical treatment.

### 1. Challenges

A challenge identified by the South African expert is the need for monitoring and evaluation of police to ensure their compliance with the instructions and to ensure that they have received

training on the National Police Instructions. Another challenge is the availability of sufficient physical, material and financial resources in police stations to ensure the police are able to perform their responsibilities and functions in terms of the law. These are the resources necessary for victim support and protection such as timely and effective response to the incident of family violence. The U.S. expert identified a similar challenge; she reported that efforts to hold the police accountable for the death of victims when they fail to respond have proven unsuccessful.

The expert from Korea reported that Korea faces challenges in the punishment and accountability for offenders. She stated that the national law is not enforced. In 2009, only 10.4% of those identified were indicted for domestic violence cases. Questions from police like “Do you want to press charges?” and “Do you want your husband to be punished?” transfer the burden from the police to the victim and creates challenges for survivors in seeking protection. She stated that in Korea, domestic violence is not considered a crime but rather a behavior to be changed by education and counseling. There are two tracks of legal response in Korea: criminal punishment and family protection and they are not working well together. A survey in 2012 of victims in shelters indicated that victims are not reporting domestic violence because they fear increased violence from the offender, they don’t know how to report, they don’t think things will improve if they report to the police, and they fear that the offender would know that they are reporting. Often it is reported that the police do not separate the victim and the offender when they come to the home and they do not arrest the offender.

## 2. Recommendations Regarding Police Reporting and Investigation of Family Violence

The law should include Standard Operating Procedures (SOP) for police in dealing with family violence cases including specific guidelines on how to respond to notification of family violence, how to investigate when arriving at the scene, how to locate the survivor and secure her safety, the collection of evidence, necessary steps for cases to proceed within the justice system, removing the suspected perpetrator from the family dwelling when it is consistent with the victim’s wishes, provision of rehabilitation options for perpetrators and organizing Safety Plans for victims who are not willing to leave the abusive relationship. It should also include notification and involvement of the victim and her family when the perpetrator of the family violence is released from prison. The SOP must also include structures to monitor and evaluate the compliance of officers with the SOP. The SOP should establish a clear mandate and responsibility for the police to:

- Establish various mechanisms and measures for reporting of family violence by survivors, their families, interested parties and community members;
- Respond quickly to calls regarding family violence;
- Stop the violence when they arrive at the crime scene and separate the victim and the perpetrator;
- Conduct a thorough investigation including safety assessment to victim and separately interview the alleged victim(s), perpetrator, any neighbors or witnesses;
- Arrest the perpetrator of family violence, incorporating the wishes of the victim;
- Confiscate any dangerous weapons involved in the commission of family violence and keep them in a safe place to be used as evidence;

- Report child abuse, elder abuse, and abuse of persons with disabilities to the authorities if discovered during investigation;
- On completion of investigation, draft a report regarding the incident and submit it to the public prosecutor;
- Apply for the issuance of an emergency protective order if the victim is in danger of serious bodily injury;
- Enter police reports of family violence into a database so that repeat offenders may be tracked and investigated;
- Refer the survivor and any witnesses of the family violence to support services. This should include:
  - Informing the survivor of her/his legal rights, her rights to health care, counseling, shelter, etc. This information must be provided in an accessible format to ensure availability for all victims, including persons with disabilities or those who speak another language
  - Assisting the survivor to stay in her/his home environment safety through the establishment of a Safety Plan or go to shelter if she/he wishes, seek medical treatment, as well as to provide protection
  - Mandatory reporting of child abuse identified during an investigation, safeguarding of any children if it is in the best interests of the children.

## D. Prosecutorial Response

A key provision in national family violence laws as reported by international experts at the UN International Roundtable on Family Violence Law is clearly defining family violence as a crime, and ensuring that police, prosecutors and judges collaborate and coordinate a consistent, systematic prosecution of offenders and sentencing which effectively ensures the reduction of family violence through individual and general deterrence of offenders. Several international experts stated that mandatory training for police, judges, and prosecutors on family violence is necessary to ensure effective prosecution and sentencing.

**In the U.S., the national Violence Against Women Act** provides funding for states and civil society organizations to provide trainings for police, prosecutors and judges on domestic and sexual violence. Prosecutor training includes how to collect and present evidence of family violence in court. Training for judges includes how to consider evidence of family violence.

**Under Korean national law**, when danger of reoccurrence of domestic violence is suspected, the prosecutor may request the court to issue temporary measures that include:

- Temporary expulsion of the perpetrator from the house or room
- Prohibiting the perpetrator from approaching the victim within 100 meters
- Prohibiting the perpetrator from contacting the victim through telecommunication



**Amendments to the Act of Criminal Procedure in Austria** increased rights and protections for women in criminal prosecution of domestic violence including the right to information, right to access the court file and notification of the date when the offender will be released from prison, right to participation in proceedings granted to the victim. In addition, questioning of the female victim and/or child victim is included in the Act, psycho-social and legal court assistance by social workers and lawyers, legal aid by the state, damages for the victim to be paid by the perpetrator, and financial support for the victim to be provided by White Ring, a nonprofit organization.

The Guiding Cases recently issued by the Chinese Supreme People's Court regarding domestic violence include two cases where domestic violence perpetrators were killed by their victims and in both cases the victim is sentenced to short prison terms with longer probationary terms, recognizing the low possibility of recidivism or harm to society.

## 1. Challenges

Challenges identified by several experts was the need for prosecutors to understand that family violence is a serious crime that can lead to significant bodily injury or death and that the State has a responsibility to intervene to hold the perpetrator accountable and provide protection for the victim. Prosecutors need training on how to gather and present evidence of family violence to successfully prosecute perpetrators. In addition, coordination between police, prosecutors, the courts and judges is critical to ensure safety of victims and effective prosecution of perpetrators. When victims retaliate against their perpetrators and kill them, they are often prosecuted and receive longer prison terms than male perpetrators of violence. Prosecutors and judges must receive training on the impact of family violence on victims including women, children, elders and persons with disabilities, so that this information may be appropriately presented and considered at trial and sentencing for commission of family violence crimes.

## 2. Recommendations

The national Family Violence Law should harmonize with the Chinese Criminal Law and Criminal Procedure Law, ensuring:

- That family violence perpetrated against a person with a disability (adults and children) be classified under a special section/schedule as a serious offence requiring severe sentence, specifically to recognize that commission of family violence on person with a disability carries on its own, an aggravating factor. Such a scheduled offence should carry a longer sentence than other family violence cases involving people with no disabilities;
- Denial of bail for individuals arrested for one or more crime(s) of family violence;
- Mandatory minimum jail time of one year for convicted offenders of family violence;
- Tougher sentencing for repeat offenders such as increased jail term by one-third;

- In the case of child victims: in addition to the punitive/correctional measurements for the abusers, provision of rehabilitation, integration and supportive service for children, the abusers and the families to minimize the negative impact of family violence on them;
- Ensuring that the court system, law enforcement and judicial officers receive training and adopt gender sensitive, age-friendly, child-friendly and disability-friendly procedures;
- Ensuring that the best interests of the child is a primary consideration in all matters affecting a child;
- Any decision to separate a child from his or her parent(s) or family environment is made only when it is in the child's best interests;
- Ensuring that safety measures and places of safety are made available for children who have to be separated from their parent as a result of family violence perpetrated by the parent;
- Ensuring periodic, close monitoring of the family situation of the children returned to their families;
- Providing guidance for the courts to consider evidence of the impact of family violence on a victim when she or he kills or severely injures the perpetrator, including evidence rules regarding hearing expert testimony;
- Make police, judges, prosecutors, educators, social workers and health care professionals mandatory reporters of child abuse, elder abuse, and abuse of persons with disabilities and provide clear procedures for reporting; and
- Put in place stringent measures for consideration on the release of the perpetrator from prison after sentence has been served, for the feasibility of either reintegration of the perpetrator into the community or his family.

## E. Civil Protection Order Provisions: Family and Civil Court Proceedings

As described above, Chinese courts have begun to issue civil protection orders to provide protection to victims of family violence in family law cases. It is recommended that the Chinese national Family Violence Law include the creation of a civil protection order, building upon the example from the Bench Book, to include access by victims outside of the intimate family relationship.

International experts at the UN Workshop shared that their country's national family violence laws included civil protection orders. The civil protection order is considered one of the most effective legal intervention tools to stop violence that has already occurred from continuing, by providing protection and financial support to victims quickly as well as holding the perpetrator accountable through enforcement by the police and courts if it is violated. An individual victim applies for a civil protection order from the civil or family court, and a judge issues an order against the perpetrator of family violence when sufficient evidence is presented of imminent danger of ongoing family violence.

Each country's law clearly defined the relationship necessary to apply for an order, the abuse that must be alleged in order for a judge to issue an order, and the types of injunctive relief and remedies that a judge may include in an order for the victim. In addition, each country's law detailed that a copy of the court order must be served on the respondent, offender, and that the police must be provided with a copy. The civil protection order is enforced by the victim and by the police. When the victim learns that the perpetrator has violated the order, they are to call the police and the police are to immediately arrest the perpetrator and he or she is to be charged with violating the order. The order is criminally enforced: the perpetrator may be sentenced to a prison sentence and/or a fine for violating the civil order. Importantly the victim's decision to petition the court for a civil protection order is separate from the decision by the police and the prosecution to arrest and prosecute the perpetrator of the crime of family violence. In fact, a victim may have a civil protection order while the criminal prosecution of the crime is ongoing.

**In the U.K., protections for children are available**

within the context of a family where there is a factual nexus with domestic violence. In addition, a non-molestation order may be made to prohibit a party from molesting a relevant child defined as:

- Any child who is living with or might reasonably be expected to live with either party to the proceedings
- Any child in relation to whom an order under the Adoption Act of 1976, the Adoption and Children Act of 2002 or the Children Act in 1989 is in question in the proceedings, and
- Any other child whose interests the court considers relevant

To enforce a non-molestation order, the victim of family violence may call the police and choose to have the breach dealt with in the criminal courts or initiate contempt of court proceedings in the civil courts. A violation of a non-molestation order in the U.K is a criminal offence since 1 July 2007, when the Family Law Act was amended, and the offender may be imprisoned for up to five years or fined or both.

**South Africa has a protection order** that the court may issue on behalf of a victim against a perpetrator of domestic violence. It may require that:

- A peace officer accompanies a victim to a place to assist with collecting her or his personal property
- The perpetrator pay rent or mortgage payments
- The respondent to pay emergency monetary relief to address the financial needs of the victim
- The physical address of the complainant must be omitted from the protection order unless the nature or terms of the order necessitates the inclusion of such address
- If the court determines that it is in the best interest of the child, it may order that the respondent shall not have contact with the child or order contact with the child based on specific conditions

It also may prohibit the respondent from committing any of the following:

- Any act of domestic violence
- Enlisting the help of another person to commit any such act
- Entering a residence shared by the complainant (victim) and the respondent (perpetrator) provided that the court may impose this prohibition only if it appears to be in the best interest of the complainant
- Entering the complainant's resident
- Entering a specified part of such a shared residence
- Entering the complainant's place of employment
- Preventing the complainant who ordinarily lives or lived in a shared residence from entering or remaining in the shared residence or a part of the shared residence
- Committing any other act as specified in the protection order

## 1. Challenges

A challenge identified by the South African expert is ensuring that the personal property that the victim is escorted by a peace officer to obtain from the home is clearly defined. Another challenge is when the offender depletes the communal estate when the victim and children have left the shared residence in anticipation of divorce. A proposed solution for this problem is to include in the civil protection order the requirement that the offender not sell, remove, destroy or otherwise deplete the property of the communal estate without the permission of the other victim and that any allegations of property shall be reported to the police. In addition, the police should have a checklist to be used for interviews to support applications for protection orders in order to ensure that as much comprehensive information as possible shall be included in the application for protection order. The checklist used for interviews should include all the different types of abuse in order to guide the interviewer to exhaust all these questions when taking a statement from the complainant. This will eliminate the multiplicity of protection orders and the unnecessary amendments thereof.

According to the expert, South Africa needs to establish Guidelines for magistrates on domestic violence to deal with issues of negligence, non-compliance and accountability of magistrates who fail to strictly implement the provisions of the law. Their experience is that some magistrates think that if there is no physical abuse then there is no domestic violence. Another challenge faced in South Africa is that some courts receive many petitions for protection orders and they do not have sufficient staff to handle them. This leads to delays in issuance of orders and victims then being subject to threats by the perpetrator leading them to request that the petition be withdrawn. The recommendation is that the return date to seek a protection order needs to be within 14 days. Another recommendation is that the

**In the U.K., the Family Law Act of 1996** created a non-molestation order that may be made to prohibit a party from molesting (as defined above) a "relevant child" as well as an adult. A "relevant child" is "any child who is living with or might reasonably be expected to live with either party to the proceedings." A non-molestation order is not limited to couples that are married or in a civil partnership. A wide range of applicants including children can apply for non-molestation order. Applicants may seek a non-molestation order where:

- The applicant is married to or in a civil partnership with or was formerly married to or formerly in a civil partnership with the respondent
- The applicant and respondent are or were former cohabitants
- The applicant lives in the same household as the respondent other than by reason of one of them being the other's employee, tenant, lodger or boarder
- The applicant and the respondent are relatives including parents, stepparents, stepchildren, grandparents, aunts, and uncles, first cousins and others
- The applicant and the respondent have agreed to marry one another or enter into a civil partnership whether or not the agreement has been terminated
- The applicant and the respondent have or have had an intimate personal relationship which is or was of significant duration
- In relation to a child, the parties are associated and an application can be made where a party is the parent of the child or has had parental responsibility for the child
- The applicant and the respondent are parties to the same family proceedings, and
- Children under 16 may only apply for an order with the court's permission

legislation provide alternative methods for ensuring that victims of domestic violence are afforded a free, effective and user-friendly model to use the services of the police to ensure that the perpetrator receives services and the possibility of substituted service where the police would affix the order on the door when there is no one at the residence of the respondent. Another recommendation from South Africa is to include the use of a medical form or certificate with the application for a protection order as already happens in criminal cases in South Africa. This will provide guidance for the victim so that she can prove the extent of the injuries that she suffered at the time of the abuse when they are no longer visible when she returns.

## 2. Recommendations for Civil Protection Order

The Chinese national law should include a civil protection order to provide protections for victims of family violence, building upon the pilot project begun with the Bench Book as described above. The law should include detailed requirements so that the victim can seek protection from the civil court and choose among different forms of protection and relief those that are most appropriate for her situation and needs. The protection order should include the definition of family violence included in the national law, including the behaviors and requisite relationships described above. In addition, the law should require the courts to develop standardized forms for victims to use when applying for a protection order that enables them to describe the abuse that led them to seek the protection order and the types of protection and remedies they are seeking. The law should clearly state that the victim or any other interested party, including family members and the police may apply for a civil protection order on behalf of the victim who could either be a child, a person with disability or a person who is unconscious or hospitalized and is not in a position to make an application herself, the judge issues the protection order, and the police enforce the protection order under the supervision of the court. If the perpetrator is not at the court hearing where the order is issued, the court should make sure that the perpetrator is served a copy of the order and that the police have a record of the civil protection order. The law should ensure that judges have powers to confirm an emergency Protection order once there is a proof of positive service on the perpetrator who fails to attend court on the return date.

The following remedies should be available to the victim on request and the court to order in the protection order for a specified time:

- The offender must stay a certain distance from the victim and any children in the home at all times;
- The offender must not contact the victim in any way – in person, via phone, email, etc. – or the children in the home;
- The offender be evicted from the home;
- The victim is awarded temporary custody of children in the home;
- The victim is awarded child support for any children;
- The victim is awarded economic support necessary to maintain the home;
- If the victim chooses to leave the home, the court can order that the victim be escorted by the police to the home to collect personal belongings;

- Personal belongings must, include articles, items, which in the discretion of the judge granting the protection order, are necessary for the daily use by the victim and the children, which may include household furniture and equipments;
- The application for protection order should make provision for the complainant to stipulate what she and her children would require as personal belongings so that such items are applied for and granted by the court in terms of the protection order;
- The offender must not destroy, sell, or otherwise diminish the personal, and/or marital property, and/or residential property of the victim and the perpetrator during the order;
- The offender must reimburse the victim for any costs incurred because of the violence including medical bills, lost wages if a job is lost because of the violence, and other expenses;
- The offender must pay for living expenses related to raising any minor children in the custody of the victim while the order is in effect;
- Prohibit the offender from committing any act of domestic violence against adults and children included in the order;
- Prohibit the offender from enlisting the help of another person to commit any such act;
- Prohibit the offender from entering a residence shared by the complainant (victim) and the respondent (perpetrator) provided that the court may impose this prohibition only if it appears to be in the best interest of the complainant;
- Prohibit the offender from entering the complainant's residence;
- Prohibit the offender from entering a specified part of such a shared residence;
- Prohibit the offender from entering the complainant's place of employment;
- Prohibit the offender from entering or coming within a certain distance of any children, including at home or at school;
- Require the offender/batterer to attend counseling and education programming regarding committing family violence;
- Other measures to protect the personal safety of the claimant and their specific family members.

To ensure that these options are made known to the victim of family violence, they should be included in a standard form provided to a victim who comes to the court seeking a civil protection order. To enforce the order of protection, the victim must call the police and tell them that the defendant has violated the order. The civil protection order should be criminally enforced and the defendant should be arrested by the police and held until there is a hearing before the judge who will determine punishment. Punishment for violation of the protection order should be up to two years in prison, and/or fines and/or counseling for battering.

## 3. Consideration of Evidence

Pictures of injuries, police records, a statement from a witness, documentation from a social service organization, and documentation of the abuse, including text messages containing threats from the respondent, are all examples of evidence that the victim may bring forward or the judge may seek in support of a victim's statement that the offender has committed family violence in a civil protection order hearing. The standard of proof that the judge should use to consider this evidence is preponderance of the evidence. Once the victim presents evidence of the family violence and that the respondent committed the act that caused the injury, the burden of proof

shifts to the respondent. If the defendant denies causing the harm but is unable to provide evidence in support of his denial, then the judge should find family violence has occurred and grant the order. In this way, the standard of evidence used in civil protection order cases and family law cases where family violence is alleged is different from the standard of evidence applied in criminal cases.

## F. Housing and Employment Legal Protections

The international experts described how their countries laws required that the individual accused of family violence be evicted from the home for different periods of time to enable to survivor to stay in their home with their family. International experts noted that for a victim of family violence living in a home that has been made accessible for her needs, it is impractical for her to be forced to leave her home in order to be safe from abuse.

**The Family Law Act 1996 of the U.K.** includes an occupation order that allows for the regulation of the occupation of the family home. It allows the court to exclude a person from entering his or her own property. If she or he meets the requirements to make an application by being entitled to occupy the home or otherwise (including, but not limited to, where she or he is a former cohabitant of a person who does have a right to occupy the property), a victim of family violence may apply to the court for an occupation order against the offender of family violence. Where the judge has found that there is risk of significant harm it may (or must in certain circumstances) grant an occupation order. The test is defined in Section 33(7) of the Family Law Act. The significant harm test is met:

If it appears to the court that the applicant or any child whose interests the court considers relevant is likely to suffer significant harm attributable to the conduct of the respondent if an occupation order is not issued.

- UNLESS the respondent or any child the court considers relevant is likely to suffer significant harm if the order is made and
- The harm likely to be suffered by the respondent or child in that event is as great as or greater than the harm attributable to conduct of the respondent, which is likely to be suffered, by the applicant or child if the order is not made

Even if the significant harm test is not met, a court may still issue an occupation order considering these factors from section 33(6) of the law if the victim is applying under section 33 (modified provisions apply depending on the victim's relationship with the property/respondent):

- The housing needs and resources of each of the parties and of any relevant child
- The financial resources of the parties
- The likely effect of any order or decision not to issue an order on the health, safety or well-being of the parties and of any relevant child, and
- The conduct of the parties in relation to each other and otherwise

In an occupation order, a victim may request and a judge may issue an order that may be made for a specified time or until further order (depending on the order sought) that includes:

- Enforcement of the victim's right to remain in the home
- Order an offender/respondent to allow the victim to enter a home or part of a home and remain there
- Regulate the occupation of the dwelling house, including dividing it up and restricting a party from entering a specified part of it
- Regulate, including suspending or restricting the exercise of a respondent's rights in relation to the dwelling house
- Order an offender/respondent to leave a house or part of it
- Exclude a respondent from a defined area around the property, for example require the offender to stay at least 50 meters away from the home
- Supplemental orders may also be made that a party pay the rent, mortgage payments or general household expenses, to maintain, or repair the property, that the party remaining in the property make payment to the party removed or orders dealing with disputes over the case and the use of furniture

In addition, **in the U.K.**, where a victim of family violence is in need of urgent protection and where giving notice to the respondent would put the applicant in further danger, an application for an occupation order or a non-molestation order can be made "without notice" under Section 45(1) of the Family Law Act. The without notice hearing should be followed by an on notice hearing as soon as just and convenient where both parties can argue their case before a judge. Also, without notice orders will only be effective once the respondent has been served.

**In Korea**, the national law includes a protection order in which a victim may submit an application to the court for protection that includes expulsion of the perpetrator from the home and financial support for housing if the victim chooses to leave the home and a victim of family violence has preferential rights to public housing.

**In Austria**, the Protection from Violence Act empowers the police to expel perpetrator of domestic violence from the shared home. The police expulsion is effective for two weeks. If the victim wishes the protection to be extended, she may apply for a temporary injunction to the local court within the two weeks seeking an additional two weeks.

**In the U.S.**, if a victim petitions the court for a civil protection order, a request may be made to the judge to evict the perpetrator from the home, or the victim may choose to leave. If they are living in public housing, victim cannot be evicted from her home because of her status as a victim, and the perpetrator may be evicted. In addition, several states have passed laws prohibiting private landlords from discriminating against victims of domestic violence in renting homes, and prohibit eviction from housing. In addition, the national fair housing law prohibits discrimination based on sex in housing, and this has been interpreted to prohibiting discrimination in housing against victims.

Also, **in the U.S.** several states including California and New York have laws that prohibit employers from refusing to hire or fire a victim of domestic violence, sexual violence or stalking. These laws also require the employer to provide accommodations to keep the victims safe at work including relocation to another workplace and locks on doors. Several states in the U.S. including California, Washington State and Illinois have passed laws requiring employer to provide leave from work for victims to heal from injuries, relocate and attend court proceedings to ensure their safety from the perpetrator of the violence.

## Recommendations

The Chinese national Family Violence Law should include housing protections for victims of family violence including the ability of the court to:

- Enforcement of the victim's right to remain in the home;
- Order an offender/respondent to allow the victim to enter a home or part of a home and remain there;
- Regulate the occupation of the dwelling, including dividing it up and restricting a party from entering a specified part of it;
- Regulate, including suspending or restricting the exercise of a respondent's rights in relation to the dwelling house;
- Order an offender/respondent to leave a house or part of it and still continue carrying out his responsibilities towards the children and if married, such responsibilities accruing to his spouse as a result of their marriage;
- Exclude a respondent from a defined area around the property, for example require the offender to stay at least 50 meters away from the home.

In addition, the law should provide for preference in public housing for victims who choose to leave their home, access to emergency and transitional housing and prohibit denial of housing to victims and their children because of their status as victims of family violence.

Similarly, the law should prohibit employers from firing or refusing to hire a victim of family violence because they are victims of family violence and require employers to provide leave from work to address the violence in their lives, including attending court proceedings to obtain a civil protection order or other relief.

## V. Conclusion

China must demonstrate its commitment to ending family violence by adopting a national law that establishes the State's obligations and responsibilities to prevent family violence, to protect its victims and to provide rehabilitation and punishment to perpetrators. It must create the framework necessary to ensure the coordination and collaboration among government and non governmental organizations to ensure the law's effective implementation. The national Family Violence Law must contain specific protections and rights for all victims of family violence including women, children, elders and persons with disabilities. The experiences of survivors of violence must inform the development of remedies for victims and accountability for perpetrators including punishment and rehabilitation. Legal protections must also reflect the unique characteristics of domestic violence, a form of family violence, by integrating remedies and legal structures that address the pattern of abuse used to exert power and control over victims who are primarily women and the societal gender bias that permits it. Finally, the law must contain clear procedures and responsibilities for courts, judges, prosecutors, attorneys, the police, the health community, social service providers and community partners to enforce the law to end family violence in all its forms.

## ANNEX A

### This Document Contains Additional Information from International Experts Presentations from the UN International Roundtable on Family Violence

#### Financial Support

Korea, South Africa, and the U.S. provide key examples of the role of the state and the necessity of a separate budget to implement national law. Korea's Act on the Prevention of Domestic Violence and Protection of Victims was enacted in 1997. It establishes the duty of the state to develop a reporting system for victims, a system of investigation, research, education, and publicity for prevention, funding and creation of protection facilities for victims, establishment of cooperation network between agencies, and implementation and evaluation of policies. It also created a separate budget allocation by the state and local governments, organization and public officials in charge of prevention and protection was created, counseling centers and shelters should be financially supported, investigate and report on domestic violence every three years and use the data to inform future efforts.

The Violence Against Women Act was initially passed in the U.S. in 1994, and was reauthorized in 2000, 2005 and 2013. Over the last 20 years, the Office of Violence Against Women in the U.S. Department of Justice which is charged with implementing the provisions of the national law, has awarded over \$5 billion in grants to states, territorial, local and tribal governments, municipalities, and victim service providers, including nearly \$379 million in fiscal year 2013, to develop more effective responses to domestic violence, sexual assault, dating violence, and stalking through activities that include direct services, crisis intervention, transitional housing, legal assistance to victims, court improvement, and training for law enforcement and courts.

#### Public Education and Awareness

Almost every international expert specifically mentioned the critical role that public education plays in preventing family violence. Key features of effective campaigns recommended to be included in national legislation include:

- The State's responsibility to fund national public education campaigns;
- The focus should be raising awareness of domestic violence, what it looks like, how to seek assistance if you are experiencing, how to assist another person who you may suspect may be at risk;
- Use of all different forms of media, including television, social media, posters on buses and subways, integration of well-known actors, men and women;
- Mandatory education in schools about domestic violence.

The national law in Korea requires mandatory education on domestic violence prevention in elementary and secondary schools. New Zealand also has a school-based program on sexual violence prevention and education. The international expert from South Africa also stated that

education on domestic violence should be included in school curricula at all levels as a primary prevention method.

Korea's expert recommended community education programs including videos on prevention and protection of victims disseminated to broadcasting business operators. There is also a public education campaign in New Zealand called "It's Not Ok!" that focuses supporting community action on family violence. It provides information and advice, training, and provides education materials and other resources. In the U.S. a new public education initiative was launched recently called "No More!" and it includes having well-known actors agree to pose for posters with their name and the words "No More" and domestic violence, or sexual violence.

### **Training on the Dynamics of Family Violence**

Another key aspect of prevention efforts described by almost every international expert was training on the dynamics of domestic violence and its impacts on victims, including an understanding of gender bias is necessary for judges, prosecutors, police, nurses, doctors, social workers, and anyone else who regularly interacts with families and victims.

Training, to be effective must be provided by experts, provided regularly, at no cost to the attendees, and it must be funded by the State.

Training is necessary because a law cannot change attitudes and mindsets about domestic violence, it cannot convince a police officer to consider it a serious crime and thus respond appropriately, and it cannot explain how a social worker can support a disabled victim. Only through extensive and regular training and education of all service providers can the necessary shift in culture and attitude about domestic violence be achieved. Importantly, trainings must be tailored to each group.

In Finland, challenges faced are changing attitudes about violence against women, legal reform and evaluation of the laws, knowledge about gender, violence and the law by service providers. In Korea, counselors and trainers must be qualified to work on emergency call centers, counseling centers and shelters. They must attend a 100-hour education program and training.

Attorneys and judges should receive training specific to their roles, and social workers and nurses should receive training specific to their role. Moreover, cross training on domestic violence and disability, domestic violence and child abuse, and domestic violence and elder abuse is required to ensure that all service providers know how to identify all forms of abuse, and response appropriately.

New Zealand has a violence intervention program that is a health services program in which all women who are 16 years old or older seeking health services are asked if they have experienced family violence. The questions are asked privately when she is alone and any risks identified are medicated. The program provides ongoing training for staff, there is management-level buy-in, staff connects individuals who are identified as victims with support services and there is evaluation of these activities to evaluate their effectiveness.

In the U.S., on average, the national Violence Against Women Act funds train over 500,000 law enforcement officers, prosecutors, judges, victim advocates, and other personnel, and provide services to more than 700,000 victims every year.

The South African expert also recommended that national legislation should include requiring that all services providers be familiar with and training on safety planning and provision of them to victims based on her experience. In addition, she stated that National Police Instructions on Domestic Violence should clearly state the powers of the police as being to search the premises, look for the victim, ensure the security and protection of the victim and children, confiscate the dangerous weapons and all necessary evidence required in court and effect arrest on the perpetrator and leave all other functions to the court.

### **Reporting, Research and Data Collection**

Several experts highlighted the importance of the need to collect data on the rates of domestic and family violence experienced by girls and women, elders, and persons with disabilities as well as children. Regular review of implementation of policies and procedures to ensure outcomes and impact has proven effective in more than one country represented at the International Conference.

It was repeatedly noted that a lack of information about the rates of violence and types of violence experienced by persons with disabilities and elders made it difficult to understand the scope of the problem and incorporate that understanding into effective prevention, protection and punishment structures. It was recommended that the national domestic violence law require that intersectional data be collected on domestic violence, based on age, location, whether the person has a disability, and whether children were present in the home for the violence.

For example, in 2003-2004, the Japanese Ministry of Health, Labor and Welfare conducted a nationwide survey on elder abuse in a domestic setting which found that the average age of victims was 81.6, 76.2 percent of the victims were female, and 99.6% of the victims needed some form of care. Identified perpetrators of the abuse included daughters-in-law (20.6%), daughters (16.3%) and spouse (husband: 11.8%; wife: 8.5%). 88.6% of perpetrators were living with the victims. The most frequently reported abuse was psychological, 63.6%, neglect, 52.4%, physical, 50%, financial 22.4%, and sexual, 1.3%. This information proved extremely helpful in the drafting and passage of their national law regarding elder abuse as described below.

Similarly, New Zealand conducted a national survey in 2001 and 2006 to develop a better understanding of the percentage of persons who identify as having a disability. In 2006, the survey indicated that 17% of the population was living with a disability, 82% of whom were adults living in private households. The percentage of persons with disabilities increased with age and the most common disability types for adults were physical and sensory. Of the adults living in residential care, 99.7% had a disability. This information was valuable in understanding how to develop effective interventions to reach persons with disabilities who may be at risk for abuse.

In addition, regular reporting and data collection regarding the police response and the courts' experience with handling cases involving allegations of abuse is also critical to ensuring victims are receiving the protection and access to their rights as contemplated in the national law. This research should be collected regularly and analyzed for information that may be used to improve legal and social service responses. The recommendation was for the State to dedicate funding for this purpose expressly.

#### **Examples of Multi-Sector Coordination and Collaboration to Provide Support Services for Victims**

In Japan, the national law against elder abuse identified the Comprehensive Community Support Center in each municipality as the agency that receives reports of elder abuse and each prefectural government is responsible for coordination among municipalities, provision of information and any assistance and advice necessary. Partnering and cooperating organizations identified include the police, professionals at long term care institutions, doctors, public health nurses, lawyers, and any other individuals who work at institutions related to welfare for the elderly. There are advocacy centers in each municipality to support older people and older persons with disabilities. It is the responsibility of the municipality to develop a cooperation system among related agencies and to publicize the agency that accepts abuse reports and what services are available for preventing abuse and providing support to victims and caregivers. Rooms are held for older people in need of care when caregivers are identified as so burdened that they need emergency physical and psychological help.

In Korea, the national law required the state to establish and operate emergency call centers for victims, including foreigners. Collaboration and coordination of services is key, with the Korean Bar Association and other legal aid agencies, with medical institutions, with shelters and counseling centers.

The South African expert also recommended creating one stop service centers for victims across the country like in South Africa where they are called Thuthuzela Care Centres. They are meant to have all services at one place for health, social, judicial counseling, etc. for victims. Services must be available for victims 24 hours including a hotline and police response.

In Austria, as well the U.S., there are shelters for victims and counseling centers that focus on violence in intimate relationships with a focus on violence against women. There are hotlines for victims to call and translators are available to help victims who speak various languages when they call the hotline.

#### **Protections for Children in the Context of Family Violence**

Several experts recommended inclusion of specific protections for children in national legislation addressing family violence. Experts from the United Kingdom and Australia in particular provided guidance as to how to incorporate protections for children in the national law in the context of family violence.

Research in Australia indicates that violent households are significantly more likely to have children than non-violence households and that violent households have a significantly higher proportion of children age five years and under. The expert from the U.S. also provided information about the long-term impact of domestic violence on children who are present in the home when it occurs, whether or not they are targeted or the direct focus of the abuse:

- 5.5 million U.S. children live in families in which partner violence occurred at least once in the past year, and seven million children live in families in which severe partner violence occurred;
- Children who experience childhood trauma, including witnessing incidents of domestic violence, are at a greater risk of having serious adult health problems including tobacco use, substance abuse, obesity, cancer, heart disease, depression and a higher risk for unintended pregnancy;
- Children of mothers who experience prenatal physical domestic violence are at an increased risk of exhibiting aggressive, anxious, depressed or hyperactive behaviour.

Experts from Australia, and the U.S. all stated that identifying the risk of harm to children and enacting safeguards to protect them in a family law system is difficult. In the context of relationships, abuse may not be as clear as an act of physical violence, but may involve subtle and prolonged exposure to controlling and threatening behaviors. Australia's Family Law Legislative Amendment Act of 2011 attempted to incorporate this understanding into the legal system response. Importantly, 79 percent of judicially determined cases in the Family Court and 67 percent of cases in the Federal Magistrates Court in Australia included allegations of family violence and/or child abuse.

Specifically, several experts recommended that the definition of family or domestic violence in the national law include children's exposure to family violence. For example, in Australia, the Family Law Act of 2011 amended the definitions of family violence and abuse to include exposure to family violence defined as: "a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence." Abuse in relation to a child is defined as "[a]n assault, including a sexual assault of the child or [a] person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person or causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subject to or exposed to, family violence, or serious neglect of the child."

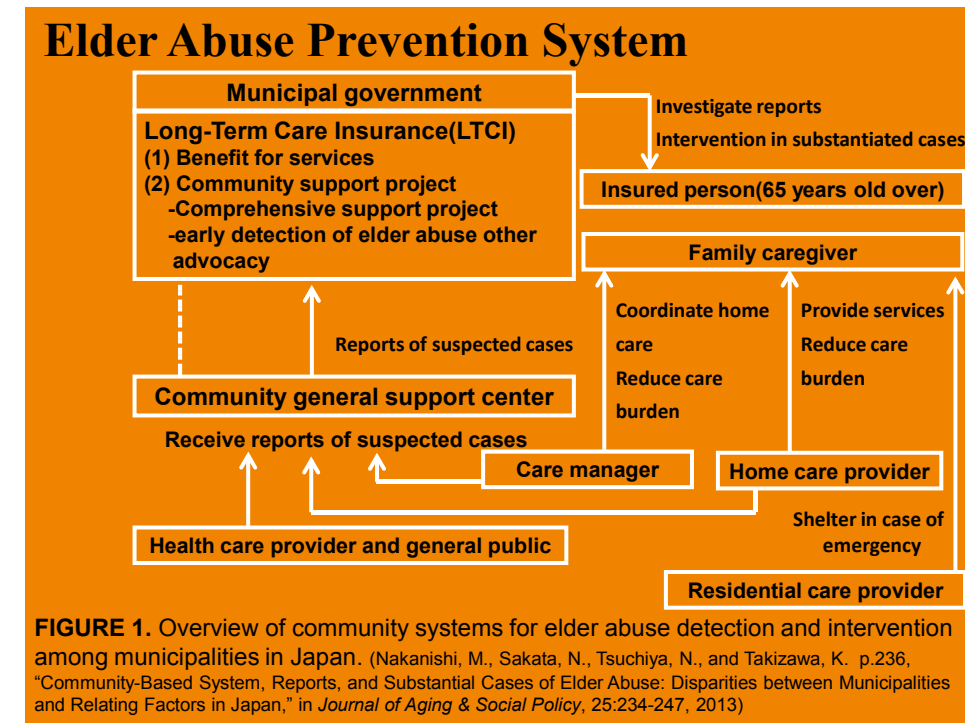
In the U.K., protections for children are available within the context of a family where there is a factual nexus with domestic violence. It is recognized that children are vulnerable to family violence, and there is a duty of civil society to provide mechanisms to provide rights and protections allowing a mechanism for providing safety, privacy and confidentiality are considerations. This information is incorporated into the access of non-molestation orders an occupation orders as described below.

## Examples of Effective Responses To Elder Abuse

Experts from Japan and the United Kingdom provided extremely valuable information about elder abuse and their experience in adopting and implementing national laws to address it. Notably, both countries have adopted laws on elder abuse separate from national anti-domestic violence laws. It was agreed by experts that a national law addressing elder abuse is important, and there are ways to incorporate elder abuse into a national anti-domestic violence or family violence law. A key question that was raised was whether to include abuse by caregivers employed by the family in the home or in an institution in the group of individuals identified as offenders of domestic violence or family violence. The consensus among the experts is that this type of abuse is serious and must be addressed by the law, but not in the context of a national anti-domestic violence law, since labor laws typically cover these forms of abuse.

For example, Japan has a Law for Preventing the Abuse of Older People and Providing Assistance to Caregivers. The purpose of the Elder Abuse Prevention Law is to specify the roles and responsibilities of the national and local governments as well as private citizens for preventing the abuse of older people, for protecting victims of abuse, and for assisting caregivers in reducing the burden of caregiving. Traditionally in Japan, family members have taken care of older parents at home, however industrialization and urbanization led people to leave their homes and left older people in rural areas without support of children. Family members have increasingly felt the burden of caring for older parents including financial difficulty and they may express their stress or unhappiness against their parents in the form of abuse at home. Any family member including husbands, sons, daughters-in-law, and grandchildren living at home may perpetrate elder abuse. It is more likely that people other than family members, such as professional caregivers will report the abuse. Even if an administrative body in Japan receives a report of elder abuse, they cannot investigate without permission from family members to enter the home. Thus a system of reporting and a process by which the government can have the authority to enter the home and investigate was essential.

This graphic demonstrates the system of response to elder abuse in Japan:



An expert on elder abuse from the U.K. stated that it is important to incorporate social and cultural contexts, gender and power relationships and know that abuse occurs not just family and interpersonal relationships. It is also critical to recognize ageism is a part of the issue. Elder abuse may take place in any context including when a vulnerable adult lives alone or with a relative, or when they live in nursing, residential, or day care settings, in hospitals, custodial situations, support services who come into people homes, or other places previously considered safe. It is critical to assess the environment to identify the abuse, the context in which the behavior is occurring is relevant because exploitation, deception, misuse of authority, intimidation, or coercion may render a vulnerable adult incapable of making his or her own decisions.

Similar to the social model definition of disability described above, experts recommended adopting the social model definition of elder abuse states that the person is not vulnerable, but the circumstances or situation they are in may render them vulnerable to abuse. As a result, prevention of abuse involves risk assessment and risk management. Effective interventions to stop elder abuse include legal, therapeutic, supportive, focus on victim and perpetrator. Education and training about the unique aspects of elder abuse for police and all service providers for elders and victims of domestic violence is essential, as well as judges and prosecutors. National guidance with local approaches is recommended, the development of multidisciplinary perspectives that emphasize collaborative orientation and partnerships. Confidentiality is also a critical issue, if an elder seeks assistance or another reports abuse and there must be clear protocols to ensure confidentiality. Agencies should draft a common agreement relating to confidentiality and setting out the principles governing the sharing of information based on the best interests of the vulnerable individuals. A key theme in the development of responses to violence against women in the U.K. is empowerment. Empowering



people to make decisions for themselves and have a say in their care, support and representation. Focus on preventing of abuse before it occurs, partnership, and accountability.

The definition of elder abuse in the U.K. is a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress or an older person. It is considered a violation of an individual's human and civil rights by any other person or persons. Examples of physical abuse, according to the U.K. expert include physical abuse, sexual abuse, psychological abuse, financial or material abuse and exploitation, neglect, societal abuse, discriminatory abuse, institutional abuse, involuntary abandonment or isolation, abuse or denial of medication. It was shared that perpetrators of elder abuse may include partners, other family members and relatives, caregivers, friends and neighbors, professional carers, care workers, and volunteers. The consent of the victim is an issue as well. Whether the individual has the ability to consent to care, or consent to the state's investigation into abuse is a key question. Consideration of an individual's right to self-determination, right to refuse protection, consideration of their capacity, and the type of the abuse and the extent of their participation is key. Abuse may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented or cannot consent. Financial or material abuse may include theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions or the misuse or misappropriation of property, possessions, or benefits. Also financial exploitation against older persons by family members or people they are familiar with using undue influence due their role and power to exploit the trust, dependence, and fear of others or by means of coercion, intimidation, undue influence, deception and/or emotional abuse are very rarely reported, although an elder may have the mental capacity to make decisions regarding his or her finances. Perceptions of financial abuse appeared less consistent over time.

In Japan, elder person is defined as someone who is over 65 years old or older. Caregiver is defined as individuals who provide nursing care in domestic settings, excluding professionals. Elder abuse is defined as abusive and neglectful acts including physical abuse, caregiving neglect, psychological abuse, sexual abuse and financial abuse by caregivers in domestic settings and personnel of long term care institutions and of nursing care service providers. Physical abuse is defined as abusive acts, which harm or may harm the body of an older adult. Caregiving neglect is a lack of caregiving that leads to malnutrition including leaving older people alone for a long time. Psychological abuse is defined as negative behaviors directed at older people including abusive language, emotional abuse that causes considerable psychological trauma to older adults. Sexual abuse is defined as inappropriate sexual behaviors directed at older people, forced sexual engagement or unwanted engagement in sexual related discussions with older adults. Financial abuse is the inappropriate or disposal of an older persons property without their consent by a caregiver or family member or undue gains allotted to the caregiver or family member from an action approved by an older adult.

The age perspective of inter-personal violence has been considered as an emerging issue since 1975 from UK<sup>1</sup>. It was initially called as "granny battering", that indicates from beginning of its recognition; gender was unavoidable perspective of violence against older persons. While population ages, the sex ratio of older persons will decrease along age cohort as women

<sup>1</sup> In British scientific journals in 1975 (Baker, 1975).

outnumber men in old age. Elder women are the majority of the older population. But women suffer longer than men in bad health though their life expectancy is higher than men. Physical and mental impairment leaves them more vulnerable to violence. In cultural specific contexts, for example, in some traditional societies older widows are subject to abandonment and "property grabbing".

### Challenges

Continuing challenges include how to treat cases of elder abuse when victims do not want to be removed from their families or their abusers, and how can a family reunion is made successfully. Similarly, how can support be given to caregivers who are perpetrating the abuse. The presenter from Japan recommended that the perpetrators of elder abuse who are family members be supported rather than punished. Ignorance of different forms of violence leaves us blind to vulnerability of older persons, particular older women who are subject to sexual violence and economic control.

### Recommendations Regarding Addressing Family Violence Against Persons with Disabilities

International experts from New Zealand and the national expert from China on disability provided invaluable information about the increased vulnerability of persons with disabilities to violence and recommendations for how to include effective protections for victims with disabilities in the national law. The key to protecting victims of domestic violence who have disabilities is to develop robust interventions across government programs leading to mainstreaming of family violence prevention.

In New Zealand, the definition of domestic relationship in the national Domestic Violence Act is unclear so the Act may not cover disabled please, and it does not require police officer to be trained in disability, something that the New Zealand expert recommended and it does not address the need for services for victims of domestic violence be accessible for persons with disabilities. There is a need for research and data on the percentage of disabled persons who experience domestic violence, and a need to ensure universal access. It is known that persons with disabilities experience domestic violence at higher rates, and yet disabled people do not have a way to be a part of the service design for victims to ensure that it addresses their needs. As a result, police may not identify domestic violence committed against persons with disabilities, the information available in the courts for victims to enforce their rights to be free from violence are not accessible, and so then effectively they do not have any rights. Similarly, domestic violence counselors and service programs have limited knowledge about persons with disabilities and there is limited collaboration between domestic violence and disability advocacy communities. Similarly, disability service providers have limited knowledge or training about domestic violence and thus are not identifying and assisting abuse survivors. It is important similarly that public education campaigns about domestic violence include persons with disabilities and abuse experienced by persons with disabilities. Korea's expert recommended that shelters should be long term and short term and include access for persons with disabilities.

### **Examples of Criminal Punishment and Accountability of Offenders**

All of the experts address criminalization of domestic violence as a critical part of holding offenders accountable and keeping victims safe.

The expert from Korea explained that the mixture of civil and criminal remedies authorized in their national legislation has meant that domestic violence is still not being taken seriously as a crime. However, criminal enforcement of protection orders is important. In Korea, the goals of their laws regarding domestic violence include to punish the perpetrator of the violence, to provide family protection to rearrange the environment and change the behaviors so that peace and stability in the family that has been destroyed by the domestic violence can be restored and healthy family can be developed and the human rights of the victim and family members can be protected. Domestic violence crimes in the criminal code include injury or assault, abandonment or abuse, arrest or confinement, threatening, defamation, housebreaking, coercion, fraud or blackmail, destruction of wealth or property. A perpetrator of domestic violence is defined as a person who has committed a domestic violence crime and a victim is one who has been directly damaged by domestic violence.

When there is evidence of danger of a recurrence of domestic violence in Korea, the prosecutor may petition the court to issue Temporary Measures. With Temporary Measures, a judge may order a perpetrator be evicted from the home or room shared with the victim, may prohibit him from coming within 100 meters of the victim, and prohibit the perpetrator from contacting the victim via telecommunications. If the person subject to Temporary Measures violates the order, the prosecutor may request detention in a police cell or prison. Korea also has Urgent Temporary Measures where the police may request the court to issue Urgent Temporary Measures when there is danger of recurrence of domestic violence. The police can request for Urgent Temporary Measures within 48 hours. If the request does not occur that quickly or if the court does not grant the Temporary Measures the Urgent Temporary Measures should be cancelled.

Punishment for perpetrators convicted of not implementing protective disposition or for violating a temporary protection order or a victim protection order in Korea is up to 2 years imprisonment or a fine or detention. For repeated violations, judges may order perpetrators be imprisoned for up to 3 year or a fine. If an agency staff member violates a victim's confidentiality, a judge may order them to up to one-year imprisonment or a fine. If a newspaper or broadcasting company or publisher violates the victim's confidentiality, they may face a smaller fine. If a domestic violence offender refuses to cooperate with an investigation they can be fined,

Unfortunately, Korea faces challenges in the punishment and accountability for offenders: it is weak and not enforced. In 2009, only 10.4% were indicted for domestic violence cases. Questions from police like "Do you want to press charges?" and "Do you want your husband to be punished transfer the burden from the police to the victim. Domestic violence is not considered a crime but rather a behavior to be changed by education and counseling. Two tracks of legal response: criminal punishment and family protection and they are not working well together. A survey in 2012 of victims in shelters indicated that victims are not reporting domestic violence because they fear increased violence from the offender, they don't know how to report, they don't think things will improve if they report to the police and they fear that the

offender would know that they are reporting. Often it is reported that the police do not separate the victim and the offender when they come to the home and they do not arrest the offender.

New Zealand also has Police Safety Orders that may be issued by the police on the spot and is effective for five dates. It is a document given to the victim and the offender is evicted from the home for five days. 27,400 have been issued.

Austrian criminal law prohibits marital rape, stalking persistent perpetration of violence, sexual exploitation and prostitution of minors, trafficking in prostitution and sexual harassment. Amendments to the Act of Criminal Procedure also increase rights and protection for women including the right to information, right to access the file and notification of the date when the offender will be released from prison, right to participation in proceedings granted to the victim. In 1994, Finland recognized rape in marriage and in 2002 a law was passed requiring notification of the victim when the perpetrator is released from prison. The police investigate the abuse when there is suspected criminal behavior; the penalty for assault is a maximum of two years.

Questions raised in Japan in the process of developing the Elder Abuse Prevention Law included disagreements about whether the court should have authority to issue a written permit to enter homes. The law permits personnel to enter the home for investigation only if there is a reported case of elder abuse. Another concern raised was whether perpetrators of elder abuse should be punished. It was decided that it is more appropriate to treat caregivers as individuals who need support instead of punishment.

### **Importance of Addressing Confidentiality**

In Korea, public officials, assistants, counselors, and heads of agencies must keep the facts of domestic violence confidential. In family protection case, no personal items or photos can be printed or broadcast. Teachers and staff members of schools and day care centers may not reveal information on children's enrollment, transfer or advancement to another school due to domestic violence.

In the U.S., some states have passed laws prohibiting publication of the victim's address or contact information in court or other public records. Confidentiality is critical to ensuring that victims feel comfortable coming forward and seeking assistance. In the U.S. confidentiality is included in the Violence Against Women Act, the national anti-domestic violence law, and it applies to all service providers who work with victims and is communicated to the victim. Similarly, in South Africa, the national Domestic Violence Act requires that the physical address of the complainant must be omitted from a protection order, unless the terms of the order necessitate its inclusion. The court may issue any directions to ensure that the complainant's physical address is not disclosed in any manner that may endanger the safety, health or wellbeing of the complainant. Amendments to the Act of Criminal Procedure also increase rights and protection for women including the right to have the new address of the victim is kept confidential.

## **Economic and Financial Remedies and Rights of Victims**

Several international experts emphasized the need to recognize the economic impact of domestic violence on victims and the need for the national law against domestic violence to incorporate economic remedies.

In Korea, state or local government may support victims with financial benefits including cost of living, education expenses for children, childcare expenses or other needs. Korea's national law also prohibits an employer from dismissing or giving other disadvantages to an employee who is a domestic violence victim. Victims have preferential rights to public housing.

The South African expert stated the need for the national anti-domestic violence law to recognize the financial, economic challenges facing victims who may not feel that they can leave if they have no income. Amendments to the South African Act of Criminal Procedure also increase rights and protection for women including the right of the victim to receive financial reparations from the offender in the criminal proceedings.

In the U.S., several states have passed laws prohibiting employers from firing employees because they are victims of domestic or sexual violence and providing job accommodations and leave from work for victims to address the violence in their lives without fear of job loss.

## **ANNEX B**

### **Additional Information about Current Laws and Policies in China Addressing Family Violence**

“The state respects and protects human rights” is a basic principle established by China’s Constitution when it was revised in 2004. National Chinese law specifically addresses domestic violence as a violation of human rights. Citizens have the right to life and the right to health. Marriage, family, elderly, mothers and children are protected by law. Battering other individual is considered a violation of women’s rights of the person according to the General Principles of Civil Law of the People’s Republic of China.<sup>1</sup> In China, the Marriage Law, Women Rights & Interests Protection Law, Minor Protection Law, the Disability Protection Law, and The Elder Rights & Interests Protection Law explicitly prohibit domestic violence. In addition, the Criminal Law, the Criminal Procedure Law, the Civil Procedures Law and the Public Security Law safeguard the personal rights of the family members.

The Marriage Law also stated that family violence should be prohibited, and a victim of family violence may seek assistance from local committees, the victim’s family and public security to seek mediation and to stop the violence.<sup>2</sup> The Marriage Law also states that individuals who commit family violence that is sufficiently severe as to constitute a crime under the Criminal Law shall be held criminally liable.<sup>3</sup> Finally, it detailed that if a spouse is able to prove domestic violence is the basis for divorce; she is entitled to claim damages for the domestic violence.<sup>4</sup> Although this language is clear, the law did not provide a definition of family violence or domestic violence for these purposes, leading to confusion and a lack of enforcement of these provisions. In December 24th 2001, the several interpretation of the Chinese Marriage Law [1] issued by China's Supreme People's Court included establishment of domestic violence as a permissible basis for divorce if mediation fails.<sup>5</sup> It defined domestic violence is defined as: “the perpetrator batters, binds, injures, or forcibly restrict personal liberty of the family member causing physically or mentally harm to the family member.”

The Women Rights & Interests Protection Law of 1992 was amended in 2005 and prohibits domestic violence against women in the section of rights and interests in

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<sup>1</sup> General Principles of the Civil Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), 2 P.R.C. LAWS 255-49 (China).

<sup>2</sup> See Marriage Law of the People’s Republic of China, *supra* note 43, arts. 3, 43.

<sup>3</sup> *Id.* at art. 45.

<sup>4</sup> *Id.* at art. 46(c); see Zhao, *supra* note 44, at 211.

<sup>5</sup> Marriage Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, effective Jan. 1, 1981, amended Apr. 28, 2001) art. 32(B), <http://www.nyconsulate.prchina.org/eng/lqz/laws/t42222.htm> [hereinafter Marriage Law of the People’s Republic of China].

marriage and family.<sup>6</sup> The law also provides a multi-sectorial intervention model so as to prevent and stop domestic violence. The state takes steps to prevent and stop domestic violence. The police, the civil administration bureau, the judicial administration bureau and the rural and urban grass roots self-governing mass organization, social organization, should prevent and stop domestic violence within their duty scope and offer relief for the battered women by law. The law also provides that the victim may claim for administrative punishment imposed on the perpetrator; also the victim may file civil litigation to the court. These laws also do not provide definitions of these terms nor enforcement mechanisms for these protections.

The Minor Protection Law, which was revised on 26 October 2012, prohibits domestic violence against a minor and thus protects the minor's rights in family relationships and protects the physical and mental health of the minor. China's children are further protected by other legal provisions specifically aimed at protecting them in their roles as, for example, family members or as students, as well as being covered by general legislation covering crimes against the person. Despite this, China still lacks a clear legal definition of violence against children as well as legal provisions prohibiting violence against children in all its forms.

Article 25 of the Elder Rights and Interests Protection Law was adopted in 1996 and revised on 28 December 2012 and prohibits domestic violence against an elder. Article 75 provides that one who commits intervention of the freedom of marriage of the elder, the abuse against the elder or domestic violence against the elder should be criticized and educated by the organization or company in which one works for; one, who is in violation of public security management rules, should be administratively punished; one, who is commit crimes, should be liable for one's crimes. It is however, without a proper provisions and clear procedures for the elderly benefit and there is no provision for elderly against family abuse and violence.<sup>7</sup>

With respect to family violence against the disabled the Chinese law on the Protection of Persons with Disabilities (2008) provides some protection with respect to rehabilitation, education, employment, social security and cultural life, but the issue of family violence against the disabled is not addressed therein.

Article 260 of the China Penal Code provides that "One who maltreats the family member shall, if the circumstances are severe, be sentenced to no more than two-year term, criminal detention or public surveillance. One who commits the above crime with

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<sup>6</sup> See Revised Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Dec. 1, 2005) (China) art. 46, <http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf>.

<sup>7</sup> Article 46: People who insult, defame or abuse older persons via violence, with minor harm resort to administrative punishment according to Security Administration Punishment Act; with criminal nature, should be punished according to criminal law.

Article 47: People who interfere with marital freedom of older persons via violence or refuse to take care of older persons with criminal nature should be punished according to the criminal law. Enforcement body of the law as mentioned in the general guideline of the law is governments at different levels, public sectors and villagers' committee and older persons NGOs. Complaints to relevant sectors and justice department.

serious injury or death of the victim, shall be sentenced to a term between 2 years and 7 years. The first crime shall not be tried without complaint."

At the same time, prevention and stop domestic violence are added into National Action Plan. National Human Rights Action Plan (2012-2015). China Women Development Outline (2011-2020), China Children Development Outline (2011-2020), declare prevention and stop of the domestic violence the main target, and provide corresponding strategy and measures.

Addressing the need for clarity regarding the definition of family violence in the Marriage Law, China's Supreme People's Court issued the "Judicial Interpretation for Issues Regarding the Marriage Law of the People's Republic of China" in December 2001. This document provided the first national-level guidance on how judges should handle marital cases involving allegations of domestic violence, including a definition of family violence.

### **1. Judicial Guidelines Issued by China's Applied Jurisprudence Institute**

In March 2008, the Institute for Applied Jurisprudence of the Supreme People's Court of China issued "The Bench Book on Marriage Cases Involving Domestic Violence" (涉及家庭暴力婚姻案件审理指南 roughly translated as "Bench Book") for judges hearing marital cases. The Bench Book contained a description of how judges may issue civil protection orders (renshen anquan baohu ling or 人身安全保护令) to provide protection to victims of domestic violence. The purpose of the Bench Book is to provide assistance to judges handling marriage cases involving allegations of domestic violence. It includes a definition of domestic violence, and it incorporates reference to the national Civil Procedure Law as the authority for judges to issue civil protection orders. In conjunction with issuance of the Bench Book, nine pilot courts were authorized to use the Bench Book to issue civil protection orders on behalf of victims of domestic violence in marital cases. Over the last few years, the number of provinces and courts involved in the pilot project has expanded to include at least seventy-four. Beijing was included in the pilot project in August 2012.

Only individuals who are married to the person whom has allegedly committed domestic violence, or those who are recently divorced from the individual whom has allegedly committed the domestic violence are currently permitted to petition the court for a civil protection order in China. As stated in the Bench Book, an individual may only file for a civil protection order immediately proceeding or for a limited time after, filing for divorce. A victim must file for divorce within fifteen days of when the court has issued the civil protection order or the civil protection order will be deemed expired. The victim may also apply for a civil protection order for six months after the divorce proceedings are completed. In this way, the Bench Book requires that the civil protection order be issued in conjunction with divorce proceedings. Application for civil protection judge may start at the starting day of, during, or within 6 months of the divorce proceedings. Urgent protection order has a 15-day period of validity while long-term protection order lasts for 3-6 months.

The Bench Book references CEDAW and incorporates the definition of family violence from the Judicial Interpretation of the Chinese Marriage Law from 2008. The Bench Book defines domestic violence for the purposes of determining when it is appropriate to issue civil protection orders in marital cases, thereby addressing confusion caused by the lack of clarity in the Marriage Law. The definition of domestic violence is broader than the definition of family violence:

Behavior, among family members, especially between husband and wife whereby one party violates the other party's physical, sexual, emotional and other personal rights through coercion, violence, abuse, economic control and other means in order to attain the purpose of controlling the other party."

It then references international conventions, laws, and research as the basis for further describing the four manifestations of domestic violence: physical violence, sexual violence, emotional violence, and economic control. These forms of domestic violence are framed as violations of individual rights, consistent with international human rights principles. The inclusion of emotional, mental, economic, and sexual harm as forms of domestic violence in the Bench Book demonstrates a clear understanding of dynamics of domestic violence, that it is a pattern of physical and other abusive behaviors and tactics designed to assert power and control over the victim.

The Bench Book is not law, and it is not binding on Chinese judges. However, several high provincial courts have issued opinions including language from the Bench Book regarding issuance of civil protection orders in marital cases; these opinions are considered law and binding in those jurisdictions. Moreover, attorneys have referred to the Bench Book when representing victims of domestic violence seeking civil protection orders in marital cases.

Between March 2008, when the Bench Book was issued, and October 2010, it was reported that one hundred protection orders were issued. It is estimated that over two hundred have been issued as of April 2013<sup>1</sup> For example, Shaanxi became a part of the pilot protection order project in 2010, and they have issued thirty-five protection orders for victims as of January 2013.

On February 27, 2014, the Supreme People's Court released 10 typical domestic violence guiding cases with judicial intervention, through which the Supreme Court direct the courts' trial of domestic violence cases. The lower level courts should refer to and comply with the Guiding Cases released by the Supreme Court. The Guiding Cases can also be quoted in the judgment by the lower level courts. The 10 cases extend the definition of domestic violence in the current judicial interpretation, explicitly deem the mental violence such as threatening, intimidation as domestic violence. Also the 10 cases consider the control of power as the roots of domestic violence, though which the domestic violence can be distinguished from other sorts of disputes. In addition, the 10 cases made explicit model on some controversial issues such as the issuance of protection order, protection of the victim in break-up violence, protection of the children who witness the domestic violence, the relief of punishment in the case where the victim revenged violence with violence.

A Chinese legal framework against domestic violence has been established after years of effort and legislation against domestic violence has made significant progress. However,

the current rules are prescribed separately in many laws and there is no systematic law. There are no explicit definitions of domestic violence behavior. The rules are mostly slogans and advocacy articles so that they cannot be implemented. The rules put emphasis on the punishment afterwards instead of prevention or intervention in advance so that it cannot protect the victim and stop the violence effectively. Therefore, China needs a special comprehensive anti-domestic violence law to set up a systemic institution to prevent and stop domestic violence, to rescue the victim, to punish and correct perpetrators so as to control domestic violence effectively.

## 2. Consideration of Evidence in Protection Order Cases

In China, the Bench Book asserts that a judge should treat the statement of the victim as more credible than that of the offender. In support of this recommendation, the Bench Book states that the victim would not take the risk of coming to court and sharing this information unless it was the truth. The Bench Book also provides examples of evidence that may prove that a petitioner has suffered domestic violence or is facing the threat of domestic violence in order to meet the evidence requirements of a civil protection order. Pictures of injuries, police records, a statement from a witness, documentation from a social service organization, and documentation of the abuse, including text messages containing threats from the respondent, are all examples of evidence that the victim may bring forward or the judge may seek in support of a victim's statement. The Bench Book states that the standard of proof that the judge should use to consider this evidence is preponderance of the evidence and the judge is to make the decision "based on logic reasoning and the rule of experience and avoid the evidence standards of criminal procedures." Once the victim presents evidence of the injury and that the respondent committed the act that caused the injury, the burden of proof shifts to the respondent. If the defendant denies causing the harm but is unable to provide evidence in support of his denial, then the Bench Book instructs the judge to find domestic violence has occurred and grant the order. The Bench Book permits judges in China to issue a civil protection order that includes a similar range of injunctive relief as in the U.S.: requiring the respondent to stay a certain distance from the victim, her home, work, or other places she frequents, prohibiting the respondent from harassing, stalking, beating, threatening, or having any other unwelcome contact with the claimant. In addition, the judge may also order the respondent from beating and threatening the family and friends of the claimant. The judge may also order that the respondent temporarily move out of the residence shared by the parties.

Because the civil protection order may only be sought along with a divorce, there are also several remedies available that are specifically related to the divorce proceedings. For example, the judge may order that while the protection order is in effect, "either party shall not make decisions on joint property of great value." In this way, the linking of the civil protection order to the divorce proceedings is helpful in preserving assets. The Bench Book specifically recognizes that financial considerations may play a role in her decision to seek safety. It states that when a judge finds it necessary, he or she may order the respondent to pay for living expenses for the victim and expenses related to raising any minor children in the custody of the victim while the order is in effect. Moreover, the judge may order the batterer to pay for any medical expenses, fees for therapy, or

“necessary fees of the claimant for receiving medical care due to the violent behaviors of the respondent.” These specific remedies related to divorce proceedings and financial support for victims acknowledge the risk that women take coming forward to seek a divorce in China and the significant financial barriers that she will face including obtaining housing after the separation.

The Bench Book also recognizes that the victim wants the abuse to stop, and the batterer may need professional assistance in order to change behavior, so the judge may order that the respondent receive therapy at his own expense. However, in China, limited availability of appropriate batterers’ treatment services makes this a false option in many instances. Finally, the Bench Book includes a “catchall” provision that enables the judge to order “other measures to protect the personal safety of the claimant and their specific family members.”

According to the Bench Book, if the respondent violates a civil protection order in China by harassing, beating, or threatening the victim or her family members, including specifically forcing the victim to drop the charges or give up “legitimate rights and interests” the court should impose fines or take the respondent into custody. If the respondent’s behavior is both a violation of the ruling, and a crime, he should be “transferred to the public security agency” or “inform the victim that he or she may file criminal private prosecutions.” The Bench Book also addresses the possibility that the victim may return to the court seeking that the civil protection order be dismissed. Within three days of receiving the order, the claimant or the respondent can request a hearing on dismissing the order. If the judge believes that a hearing is necessary, she may decide to hold a private hearing excluding all but the parties and family members. If the claimant refuses to attend the hearing, the order will be dismissed, unless it is proven the reason the victim did not attend is because the respondent threatened the victim. If the respondent refuses to attend the hearing on dismissal of the order, the hearing will proceed ex parte.

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