



LAWYERS COLLECTIVE WOMEN'S RIGHTS INITIATIVE

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Frequently Asked Questions on the Protection of Women from Domestic Violence Act 2005¹

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KEY :

PWDVA	Protection of Women from Domestic Violence Act 2005
PWDVR	Protection of Women from Domestic Violence Rules
CrPC	Code of Criminal Procedure, 1973
IPC	Indian Penal Code, 1860

AGGRIEVED PERSONS

1. Are minors entitled to reliefs under this law?

Yes, as the term 'child' is defined under the law, minors will also be within the ambit of the definition of 'domestic relationship'. Section 2 (b) of the PWDVA defines child as "any person below the age of eighteen years and includes any adopted, step or foster child".

2. Can a minor male apply for reliefs under this law?

The mother can make an application on behalf of her minor child (whether male or female). In cases where the mother makes an application to the court for herself, the children can also be added as co-applicants for a relief under the PWDVA. The Court can also, whenever appropriate, appoint a guardian or next of friend to represent the child.

3. What is the meaning of the expression 'relationships in the nature of marriage' used in the definition of 'domestic relationship' (Section 2(f))?

- ❖ 'Relationship in the nature of marriage' refers to those relationships where there is no marriage between the parties, in the sense of solemnization of a marriage under any law. Yet the parties represent to the world that they are a couple and there is stability and continuity in the relationship. Such a relationship is also known as a 'common law marriage'.
- ❖ Proof of such a relationship would be: the use of a common name, common ration card, same address, etc.
- ❖ It is useful to look at the South African case of *Ethel Robinson Women's Legal Centre Trust versus Richard Gordon Volkas etc.* (Case no 7178/03, in the High Court of South Africa, Cape Province Division), in which the following factors were considered in arriving at a conclusion on whether or not a relationship can be deemed to be a relationship in the nature of marriage between the parties :

- The commitment of the parties to the shared household.
- The existence of a significant period of cohabitation.
- The existence of financial and other dependency between the parties including significant mutual financial arrangements vis-à-vis the household.
- The existence of children of the relationship
- The role of the partners in maintaining the household and in the care of the children.

Indian cases on relationships on relationships in the nature or marriage -

- *Badri Prasad* AIR 1978 SC 1557 The Supreme Court held that a strong presumption arises in the favor of wedlock where the partners have lived together for a long spell as husband and wife.
- *Sumitra Devi* (1985) 1 SCC 637. The Supreme Court held that relevant facts such as how long have the parties been living together, does society recognize them as husband and wife, etc need to be looked into to determine whether the relationship is in the nature of marriage.

Accordingly, the following categories of women are intended to be covered under 'relationship in the nature of marriage':

- Women, whose marriages are void or voidable under the law, as apart from the legal invalidity of the marriage, the relationship satisfies all other criterion.
- Women who are living in a shared household in a conjugal relationship without contracting marriage.
- Common law marriages- when a couple has been cohabiting for a number of years and have held themselves out to the world as being husband and wife.

4. Does the use of this term bring 'relationships in the nature of marriage' at par with marriages?

The law simply provides protection from violence to all women whether they are sisters, mothers, wives or partners living together in a shared household. To the extent of providing protection, the law does not differentiate between married and unmarried women. The law, however, does not state anywhere that an invalid marriage is valid. It provides protection from violence, the right to

reside in the shared household, temporary custody of children, etc. However, for succession to the property of a male partner or in deciding the legitimacy of children, the general law of the land or the personal laws of the parties will have to be relied upon.

RESPONDENTS

5. Who can a woman complain against?

A woman can file a complaint against any adult male perpetrator [Section 2 (q)] of an act of violence. In cases where the woman is married, or lives in a relationship that is in the nature of marriage, she can also file a complaint against the male or female relatives of the husband/ male partner who have perpetrated the violence.

The proviso to Section 2 (q) was included in the PWDVA as, under Section 498A of the IPC, it is possible to prosecute the relatives of the husband for cruelty, whether male or female, example, mother-in-law, father-in-law, sister-in-law, etc.

6. Who fall within the definition of 'relatives' under section 2 (q)?

The word 'relative' has not been defined in the PWDVA. Hence the ordinary meaning will have to be assigned. Therefore, examples of relatives would be the father, mother, sister, uncle; brother of the respondent who may be included in the word 'relative' in Section 2(q). Section 498A also uses the term 'relative' which is not defined. Hence the ordinary meaning of the word 'relative' will include female relatives.

7. Can a complaint be filed by a wife against the husband's female relatives, for example, mother-in-law, sister-in-law?

Yes, orders can be passed against the female relatives of the husband. However, relief of dispossession against a female relative cannot be granted according to the *proviso* to Section 19(1) which states that no order under Section 19(1) (b) directing the respondent to remove himself from the shared household can be passed against any person who is a woman.

The aggrieved woman may obtain a protection order against the female relatives of the husband or the male partners. Maintenance (under orders for monetary reliefs) can only be obtained by those persons falling within the ambit of Section 125 CrPC.

8. Can a mother-in-law file an application for reliefs against the daughter in law?

No, a mother-in-law cannot file an application against her daughter-in-law (Section 2 (q)). However in cases where a mother-in-law is facing violence at the hands of her son and daughter-in-law she can file an application against her son and daughter-in-law as abetting the acts of violence perpetrated by the son. She, however, can not ask for removal of the daughter-in-law from the shared household.

DOMESTIC INCIDENT REPORT

9. What is a "Domestic Incident Report" ("DIR")?

The format of a DIR is provided in Form I of the PWDVR. It is to be used for recording complaints of domestic violence brought by an aggrieved woman to the Protection Officer or the Service Provider. It is a record of the fact that an incident (s) of violence has been reported, in that it is similar to an NCR (report of a non-cognizable offence). It has to be signed by the Protection Officer or registered Service Provider who fills it in. It is a public document.

10. How is a DIR to be recorded?

A DIR is meant to be a faithful record of what the woman says. This means that all complaints must be recorded in a non-biased manner as long as the act complained of falls within the purview of the PWDVA.

If a woman is not able to narrate her story then the Protection Officer may call her on separate occasions to fill in the DIR. The Protection Officer can maintain a daily diary to enter details of each of the woman's visit.

11. What is to be done once a DIR has been recorded?

The DIR is to be forwarded to the Magistrate by the Protection Officer. A copy of the DIR is to be forwarded to the police officer in charge of the police station in the jurisdiction.

The Service Provider on recording the DIR may forward it to the Protection Officer and the Magistrate, if the woman so desires.

If the woman so desires, the Protection Officer or a Service Provider can assist a woman to file an application for reliefs after recording a DIR and if the woman so desires. The DIR must be annexed to the application filed in Court in such cases.

12. What should a Magistrate do on the receipt of a DIR?

A magistrate should preserve it for the purposes of maintaining a record. It may be referred to in cases where an application is filed directly by the aggrieved woman. It may also be used in cases where an application is filed by with the assistance of a Protection Officer along with a DIR at a later stage.

13. Can a DIR be filled in by the aggrieved woman or her lawyer?

No, a DIR can only be filled in by the Protection Officer or a registered Service Provider as Form I requires the signature of either one of them. Further, as a DIR is a public document, it can only be filled in by a Public Servant. Section 30 deems all Protection Officers and members of Service Providers as public servants while discharging their functions under the PWDVA.

14. Can an aggrieved woman file an application without a DIR?

Yes, an aggrieved woman can file an application for reliefs without filing a DIR.

15. In cases where women directly file applications for relief, should the Magistrate call for a DIR once the case is filed?

There is no need for a DIR at the stage when an application is filed in court as stage for the DIR is past and its purpose (i.e. recording the history of violence) does not exist. Once an application is filed in court, a Magistrate may order the Protection Officer to conduct a home visit or any other report under Rule 10 (1) if the circumstances so require.

16. Can a Protection Officer conduct a home visit when recording a DIR?

No, a Protection Officer cannot conduct a home visit without a court order.

EVIDENCE TO PROVE DOMESTIC VIOLENCE

17. What evidence is needed to prove "verbal and emotional abuse" or sexual abuse?

Since the relief sought under the PWDVA is civil in nature, proof will be tested on the balance of probabilities and proof beyond reasonable doubt is not required. It must be remembered that domestic violence is unique as it takes place within the privacy of the home where no outside witnesses are likely to be present. If it happens within a joint family then, although the relatives of

the husband witness the violence, it is unlikely that any relative of the husband will support the woman. The woman, therefore, will be the primary witness in cases under the PWDVA.

When no direct eye witness evidence is available, and there is only the statement of the statement of the woman, circumstantial evidence is considered to arrive at a conclusion on the facts of the case. It is therefore important, that the context in which the verbal or emotional abuse takes place be mentioned (Explanation II Section 3). Care should be taken to record the history and circumstances of the case, the impact of the violence on the woman and her children must be mentioned. Verbal and emotional violence often has health consequences for the women. Children also may suffer adverse consequences in their performance at school or in their interactions with others. All this must be pointed out as evidence of violence to the court.

EX PARTE ORDERS

18. At what stage of the proceedings can an interim order be given? Under what conditions can an *ex parte* order be given?

The SC in *Morgan Stanley v Kartick Das* [(1994) 4 SCC 225] has outlined guidelines in deciding whether an *ex parte* injunction is to be given. It held that *ex parte* injunction is to be given only in exceptional circumstances and the factors that should be considered are as follows:

- (a) where irreparable or serious mischief will ensue to the plaintiff.
- (b) whether the refusal of *ex parte* injunction would involve greater injustice than the grant of it would involve;
- (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented.
- (d) The court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant *ex parte* injunction.
- (e) The court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application.
- (f) Even, if granted, the *ex parte* injunction would be for a limited period of time.
- (g) General principles like *prima facie* case, balance of convenience and irreparable loss would also be considered by the court.

INTERIM ORDERS

19. How long does an interim order remain in force for?

Interim orders shall remain in force till such time either of the parties applies for its alteration, modification or revocation. In order to get such an order, a change in circumstances has to be shown. (Section 25 (2)). Interim orders are also vacated on the granting of the final order by the court.

20. Can there be any appeals from an interim order?

Section 29 of the PWDVA allows appeals to sessions courts from any orders passed by Magistrate. Appeals against interim orders have been limited by courts on numerous occasions while interpreting relevant provisions under the CPC and the CrPC. No appeal should lie from an order which has not affected the rights of the parties or is procedural.

RELIEFS UNDER THE PWDVA

Right to residence

21. What is a shared household?

A shared household is a household where the woman lives or has lived with the man in a domestic relationship. She may not be living in the shared household at the time of the application for relief, as she may have been disposed from the shared household in the past. Such women are also entitled to relief under the PWDVA as long as the domestic relationship subsists.

It does not matter that the shared household is not owned by either the woman or the man. In India, the general pattern of family is the joint family, where more than one generation lives under the same roof with their spouses and children. In case a woman's husband is living in such a joint family, that household will be the shared household of the woman. Sisters, who live in ancestral property owned by their father or other ancestor, are also living in the shared household. All that has to be proved is that the woman lives or has lived with the perpetrator of violence in this home in a conjugal relationship; or in a familial relationship as described above.

22. What is the meaning to be given to the expression 'lived or has lived' used in Section 2 (s)?

The words 'lived or has lived' must carry the same meaning as the term 'reside'. In *Jeevant Pandey v Kishan Chandra Pandey* [(1981) 4 SCC 517], the

Supreme Court while construing the term 'residing' as used in Section 19 (iii) of the Hindu Marriages Act observed as follows :

"in its ordinary sense residence is more or less of a permanent character. The expression resides means to make an abode for a considerable time; to dwell permanently or for a length of time; to have settled abode for a time. It is the place where a person has fixed home or abode. Where there is such a fixed home or such abode at one place, his legal and actual residence is the same and he cannot be said to reside at any other place where he has gone on a casual or temporary visit. But if he has no established home, his actual and physical habitation is where he actually or personally resides."

However, in a recent judgment of the Madras High Court in *Vandana Vs. Mrs. Jayanthi Krishnamachari* (O.A No. 764/2007), it was observed that in view of Section 17, the married woman has a right to reside in the shared household and even if she has not physically lived in the shared household, she is deemed to have lived in the shared household as it is her *de jure* right.

23. Does a right to residence affect the respondent's right to property?

The PWDVA does in no way create any substantive right in the property in favor of the woman or transfer property from the respondent to the aggrieved person. A residence order simply enables a woman to reside in the shared household or be restored and prevents dispossession. It also enables a woman to bar the perpetrator of violence from entering the house even if he is the owner of the property (in order to guard against any further acts of violence).

24. Can an aggrieved woman who has been disposed from the shared household ask for an order restoring her to the possession of the shared household?

Section 3(e) (iv) defines "economic violence" to mean prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Hence, denial of access to the shared household is "domestic violence". A dispossessed wife can therefore, file an application to be given access to the shared household as a protection order under Section 18 read with Section 17(1) which gives her a *de jure* right to reside in the shared household. She is deemed to be residing there. (See Madras High Court judgement mentioned in the answer to Question 19)

25. Will a divorced wife have a right to claim relief under this PWDVA from her ex-husband?

The answer to this question depends on the facts of the case. In cases where, at the time of divorce, she has in express terms waived such a right, she cannot claim it in the future. If, for example, she has been divorced and has waived her right to maintenance in her divorce settlement which does not entitle her to the shared household, she will not be entitled to a residence order or any other order. The law in this regard is settled in the case of B.P. *Achala Anand* versus *Appi Reddy & Anr.* (2005) 3 SCC 313 and *Ruma Chakraborty* versus *Sudha Rani Banerjee & Anr.* (2005) 8 SCC 140

A woman may be advised to settle her right to residence at the time of divorce. Where there are children and the mother has custody, the court will ordinarily give appropriate relief at the time of granting the divorce or alimony, including a residence order as the children are to be housed and the mother is regarded as the custodian and caretaker.

In cases where the woman has not waived her right to maintenance or alimony at the time of divorce she may apply for permanent alimony under the relevant matrimonial law. She is also entitled to seek maintenance under Section 125 of the CrPC or under her relevant personal laws.

26. Can a husband who has been ordered out of a shared household under Section 19 (b) apply for an order for the restitution of conjugal rights?

An order for the restitution of conjugal rights can only be obtained if the following grounds are proven :

- That the person has 'withdrawn from the society' of the petitioner.
- That there is no reasonable cause or excuse withdrawing.
- That there is no legal ground against the granting of such a relief.

The first condition is satisfied when the woman gets a residence order directing the petitioner to remove himself from the shared household.

Courts, in various judgments, have held that conduct amounting to domestic violence provides the other party a reasonable cause to withdraw from the society of the other person. Conduct on part of the petitioner that makes it impossible for the respondent to live with the petitioner (*Gurudev v Sarwab*, 1960 PLR 744), or to live happily with the petitioner, has also been regarded as 'reasonable cause' and hence restitution can be refused. Restitution has also been refused when the petition is not *bona fide* or with an ulterior motive.

(*Hamid v Kunra* ILR (1918) 40 All 332). If an application of restitution of conjugal rights is filed to frustrate a woman's claim to the right to reside then such application can be denied by the court.

Under Section 18 (2) (b) of the HAMA, a wife has the right to live separately from her husband if he has treated her with cruelty and in such a case no restitution can be granted.

27. If the aggrieved woman facing domestic violence does not want to live in the shared household as she apprehends further violence, can she claim a separate residence under the PWDVA?

Yes, she can under Section 19(1)(f). This provision is also useful in cases where the husband who lives in rented or official accommodation, either leaves the house or the job to show that he is not in a position to provide access to the shared household. It will prevent the woman from being rendered homeless in cases where she is evicted by following due process of law as the respondent, under the Section 17 (2) of the PWDVA, could be directed to provide her with an alternative accommodation or pay rent for a place that the woman may be living in.

Hindu Adoption and Maintenance Act, 1956 ("HAMA") also entitles a woman to live separately

It is recommended that an order directing the respondent to pay rent for alternate accommodation be made only in cases where the woman is capable of finding an alternate residence herself or if she so desires. In other cases, the respondent should be made liable to secure the alternate residence as it is his obligation to maintain her and residence has been deemed to be part of the right to maintenance.

ORDER FOR MONETARY RELIEF/COMPENSATION ORDERS

28. Who is entitled to claim maintenance under the PWDVA?

All categories of persons mentioned under Section 125 of the CrPC are entitled to claim maintenance under this law. This includes the wife, minor children whether legitimate or illegitimate, major children suffering from physical or mental abnormalities or injuries and the mother. Others entitled under their personal laws may also claim.

29. How is the amount for monetary relief to be calculated?

Under Section 20 of the PWDVA- the monetary relief amount has to be adequate, reasonable and fair and consistent with the standard of living to which the

aggrieved woman is accustomed. In calculating the amount of monetary relief the courts will follow the standards prescribed under the law of maintenance.

[Section 23(2) of the HAMA] Court has to consider the following factors while arriving at the amount of monetary relief to be granted:

- The social status of the couple, this includes the husband's income and standard of living of the couple
- The reasonable needs of the wife: this includes, at the very minimum, her needs as to food, clothing, residence and medical expenses
- The value of the wife's property and income, if any
- The number of persons entitled to maintenance from the husband under the HAMA: this includes, besides the wife, children, her parents and a widowed daughter-in-law.

30. Can an order for monetary relief be a lumpsum amount or does it have to be in monthly instalments?

Whether monetary relief is a monthly payment or in the form of a lump sum one time payment will depend on what the aggrieved woman has asked for and on the discretion of the court. Under the PWDVA either monthly payment or lump sum may be granted under Section 20 (3)

31. If a woman has already obtained an order under Section 125 CrPC or any other suit for maintenance, can she apply under the PWDVA seeking its enforcement?

There is no advantage to seeking the enforcement of a Section 125 order under this law. However, the breach of Section 125 order can be regarded as being economic abuse, and hence 'domestic violence'.

32. What does the proviso to Section 12(2) mean? How will the set off be calculated?

Proviso to Section 12 (2) states that where a decree for any amount as compensation or damages has been passed by any court in favor of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under the PWDVA shall be set off against the amount payable under such decree and the decree shall be executable for the balance amount, if any, left after such set off.

After the order is passed, the amount will then be deducted in accordance with the provisions under Section 125 Cr PC or HAMA or any other law.

33. Can a Muslim woman seek an order for monetary relief under the PWDVA?

A Muslim woman who is not divorced can ask for monetary relief under the PWDVA. However, if she is divorced her rights will be determined under the Muslim Women (Protection of Rights on Divorce) Act, 1986 and she will have to go under that law or under Section 125 CrPC. (See Daniel Latifi v Union of India [(2001)7 SCC 740]

A Muslim woman can apply for an order for monetary relief against her son.

34. How will the court ensure that orders for monetary relief and compensation, alternate accommodation are executed when the respondent does not have the means of making the payment?

The Supreme Court in *Leelavati v State of Uttar Pradesh* (1982 (1) SCC 437) has opined that if a person is healthy and able bodied he must be held to have the means to support his wife, children and parents. The Court may initiate proceedings under Section 125 (3) of the CrPC and cause the Respondent to be arrested, if he does not pay on an order under Section 125.

35. What is the procedure to be followed in cases where an order for monetary relief is not complied with?

Rule 6 (5) provides that all orders under the PWDVA will be enforced the manner laid down under Section 125 of the Code of Criminal Procedure.

Rule 10 (e) provides that the Protection Officer, if directed to do so in writing by the Magistrate shall assist the court in the enforcement of orders in the proceedings under the Act in the manner directed by the Magistrate, including orders under Section 12, 18, 19, 20, 21, 23.

Proceedings for enforcement of orders under the PWDVA may be initiated as provided under Section 125 (3) of the CrPC. Magistrate may issue a warrant for levying the amount due in the manner provided for levying fines and may sentence a person for the whole or any part of the monthly amount or any other amount mentioned in the order granting monetary relief.

In appropriate cases the Court may direct the respondent's employer to pay the aggrieved person directly, under Section 20 (6) of the PWDVA, by attachment of property, etc.

When the Magistrate gives an order for monetary relief coupled with a Protection Order, then non-compliance with the order shall amount to breach under Section 31 of the PWDVA. It is advisable always to ask for a protection order coupled with any other relief.

36. Under Section 20(4) the magistrate is required to send a copy of the order for monetary relief to the police. How will this order be enforced since the police have not been given any power to get the order enforced?

When the order is given to the police, the aggrieved person should also ask for an order directing the police to assist in the enforcement of the order. Even if such a direction is not given, it is necessary to keep a record of the domestic violence with the police so that they have a history of the case and can assist when the necessity arises. If a Protection Order has been given in conjunction with the order for monetary relief, then breach of a protection order is a cognizable offence and a complaint may be lodged with the police under Section 31.

CUSTODY ORDERS

36. Can a woman claim custody over her children under the PWDVA?

Yes, under Section 21 of the PWDVA. It is to be noted that custody orders can be applied for only in addition to applications for protection or other orders. This means that where there is domestic violence and a woman wants a protection order, etc, she can also apply for temporary custody.

The magistrate can give for orders of temporary custody of children only. This will not prevent the other party from going to an appropriate forum and seeking permanent custody or joint custody of the children.

If a matter with regard to custody of children is pending in a court, an application under the PWDVA for temporary custody of children can be made in the same court.

37. How will the court decide on the best interest of a child?

At the time of deciding on applications of temporary custody the best interests of the child or the welfare of the child must be kept in mind. In *Rosy Jacob v Jacob Chakramakkal*, the SC while opining on matters to be considered in appointing a guardian, held that

"In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, character and capacity of the proposed guardian and his nearness of kin to the minor..."

The welfare of the child is not to be decided on the aspect of material comforts alone. In *McGrath (Infants)*(1983) 1 Ch 143 quoted with approval in *Dhanwanti Joshi v Madhav Unde* (1998) 1 SCC 112 it was held that

".. the welfare of the child is not to be measured by money alone nor by physical comfort only. The word 'welfare' must be taken in its widest sense.

The moral and religious welfare must be considered as well as its physical well being. Nor can the ties of affection be disregarded."

Walker v Walker - 6 1981 New Ze Recent Law 257

"Welfare is an all encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters, understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents."

ENFORCEMENT

38. How will an order against prohibiting the respondent from communicating with the aggrieved woman be enforced?

If the communication is by phone, a record can be kept and the aggrieved person can be advised to install a caller ID.

If the communication is by e-mail, a record of the same can be kept and produced before the court as evidence. If the respondent visits the aggrieved person at her office or at the residence, the aggrieved person should immediately call the police so that the respondent violating the order can be arrested.

Rule 10 (e): The Protection Officer, if directed to do so in writing by the Magistrate shall assist the courting enforcement of orders in the proceedings under the PWDVA in the manner directed by the Magistrate, including orders under Section 12, 18,19,20 21,23.

The Protection Office should be contacted and informed about the communication made by the respondent so that immediate action can be taken as per procedure under the PWDVA.

A bond to maintain peace (for preventing any further acts of domestic violence) may also be executed under section 19 (4). Police help may also be sought to give protection to the aggrieved woman or aiding her in the enforcement of any order given under this law.

39. What can be done to prevent the breach of a residence order?

The Magistrate order the Respondent to execute a bond for preventing the commission of domestic violence under Section 19 (3) which provides for residence orders. The breach of any order under Section 19 shall then be dealt with in accordance with the procedure set out in Chapter VIII of the CrPC. Hence violations of conditions in the bond may lead to the arrest of the respondent.