

## 7 REASONS TO PROTECT SAME-SEX COUPLES UNDER THE COMBATING OF DOMESTIC VIOLENCE ACT



Legal Assistance Centre, 2020

**The current *Combating of Domestic Violence Act 4 of 2003* is about to be amended.** Section 3(1) of the Act lists several forms of domestic relationships. The assistance for victims of domestic violence applies only to these listed types of relationships. Currently, the section is worded so that it covers only people “of different sexes” who are cohabiting or in dating relationships. Thus, same-sex couples are excluded from any protection under the Act. **The LAC suggests removing the phrase “being of different sexes” from the Act, so as to extend protection against domestic violence to same-sex couples, for the following reasons:**

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**1. Failing to protect persons in same-sex relationships from domestic violence may violate the Namibian Constitution, which is Namibia’s Supreme Law.** This could violate the constitutional right to dignity and protection against cruel, inhuman or degrading treatment (Art 8) or the right to equality before the law (Art 10(1)). Even though the Supreme Court of Namibia ruled in the 2001 *Frank* case<sup>1</sup> that the existence of a same-sex relationship was irrelevant to an application for permanent residency, the Court explicitly stated: “*Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprive[s] them of the protection of other provisions of the Namibian Constitution.*”

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**2. All persons living in Namibia, regardless of their sexual orientation, deserve the same protection from violence.** Protecting same-sex couples from domestic violence does not necessarily mean that the government approves of or encourages such relationships. It merely fulfils government’s obligation to protect all persons in the Namibian house. It is a reality that some Namibians are living in same-sex relationships. Protecting same-sex couples against violence will not lead to more people living in such relationships; conversely, failing to protect same-sex couples from domestic violence will not discourage them from staying together.

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**3. Namibia’s National Human Rights Action Plan 2015-2019** proposes as a key intervention the need to “research and review laws and policies to identify provisions that discriminate against vulnerable groups”, including “sexual minorities”.<sup>2</sup> The exclusion of same-sex couples from the protection from domestic violence is an example of such discrimination against “sexual minorities” – and on the issue of discrimination against vulnerable groups, the Plan includes a commitment to implement legal reform as necessary to implement “the right not to be discriminated against” (Focus Area 7).

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**4. International standards prohibit violence against people based on their sexual orientation.** The African Commission on Human and Peoples’ Rights in its 2017 “Resolution on Protection against

<sup>1</sup> *Chairperson of the Immigration Selection Board v Frank and Another* (SA8/99) [2001] NASC 1 (05 March 2001).

<sup>2</sup> Republic of Namibia, *National Human Rights Action Plan 2015-2019*, page 41.

Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity” strongly encourages States to end all acts of violence and abuse against persons because of their sexual orientation. It suggests doing so by “enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence”.<sup>3</sup>

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**5. The United Nations Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, has expressed concern about the lack of protection for same-sex couples in domestic relationships in Namibia.** In 2016, the Human Rights Committee, in its concluding observations on Namibia’s second report under this Covenant, strongly urged Namibia to “include same-sex relationships in the Combating of Domestic Violence Act (Act No. 4 of 2003) so as to protect same-sex partners”.<sup>4</sup> Similarly, the United Nations Committee against Torture recommended in 2016 that Namibia “should take all necessary measures to protect lesbian, gay, bisexual, transgender and intersex persons from threats and any form of violence”.<sup>5</sup>

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**6. Protecting same sex couples in domestic relationships would harmonize Namibia’s laws with the legislation of neighbouring countries.** For example, South Africa’s Domestic Violence Act 1998 provides protection from domestic violence for both same-sex couples and couples of different sexes. Similarly, the definition of a “domestic partnership” in Botswana’s Domestic Violence Act 2008 does not explicitly require that the persons involved in such relationships must be of different sexes.

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**7. There are other Namibian laws that do not differentiate between same-sex couples and couples involving partners of different sexes.** One precedent is the *Combating of Rape Act 8 of 2000*, which uses gender-neutral language that covers sexual violence between persons of the same sex. Another example is section 158A(3)(c) of the *Criminal Procedure Act 51 of 1977*. Its definition of vulnerable witness includes a person “against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship”. This wording would include people of the same sex who are partners in a permanent relationship. Therefore, amending the Combating of Domestic Violence Act to protect persons in same-sex relationships against violence would not be a new step in Namibian legislation.

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**RECOMMENDATION:** In order to provide protection from domestic violence for persons living in a same-sex relationship, it would be sufficient to remove the phrase “being of different sexes” from section 3(1)(b) and (f). These two paragraphs would then read as follows:

*(b) they, ~~being of different sexes,~~ live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;*

*(f) they, ~~being of different sexes,~~ are or were in an actual or a perceived intimate or romantic relationship.*

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<sup>3</sup> African Commission on Human and Peoples’ Rights, “Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity”, 2017.

<sup>4</sup> UNHRC, “Concluding observations on Namibia”, 2016.

<sup>5</sup> UN Committee against Torture, “Concluding observations on Namibia”, 2016.