

THE COMBATING OF DOMESTIC VIOLENCE BILL: WHY WE NEED IT NOW

Dianne Hubbard, Legal Assistance Centre, 2002

Sarah has just been badly beaten up by her husband, and this is not the first time. What are her legal options? She could lay a charge of assault with the police. "But what will happen if he is released on bail", she asks? She is clearly afraid of revenge. And since Sarah is unemployed, she is dependent on her husband's income for herself and their four children – if he is sent to prison, how will they live? "Is there anything else I can do?" she asks. She could approach the High Court for an urgent interdict ordering her husband not to use any further violence against her, but this would require legal assistance and so is not a very easy or practical option, not well-tailored to the problem of domestic violence. What about divorce? This is a possibility, but Sarah is not yet ready to give up on the relationship. She is also worried that friends and family members will blame her for the failure of the marriage. Not to mention the fact that her husband has threatened to kill her if she ever tries to leave him. The truth is that the current law does not offer Sarah very useful protection against further violence.

This is why Namibia needs the Combating of Domestic Violence Act. What options would this proposed law give Sarah? The bill does not create any new crimes, but it does create some special procedures for existing crimes which occur in the context of a domestic relationship – which is defined to include husband-wife, parent-child and boyfriend-girlfriend as well as relationships between other close family members. If Sarah laid a criminal charge in terms of the proposed law, she would have a right to give input to the court before a decision is taken on bail. This would give her a chance to make sure that the court knows if the abuser has threatened her. If bail were granted, the court would normally impose a condition forbidding Sarah's husband to have any contact with her before the trial, an order prohibiting the possession of any firearm or other specified weapon, and (if appropriate) an order stating that he must continue to support Sarah and their children at the same level as prior to the arrest. Sarah would be informed of these bail conditions if she was not personally present at the bail hearing.

The prosecutor would have a legal duty to make sure that Sarah gets information in advance of the criminal trial to help make it less traumatic for her. This could help to prevent Sarah from following the pattern of so many domestic violence victims and dropping the charges before the trial starts. The trial would be held in closed court, like a rape trial, and the press would be prohibited from publishing any information that might reveal Sarah's identity, which could remove some of Sarah's worries about what other people would think of her situation.

Sarah would also have a right to express her views on sentencing before the court made its decision. For example, if Sarah was worried about losing her husband's financial support, she might motivate weekend imprisonment or community service. Or, if she was more worried for her future safety, she might want to argue against such alternatives.

Suppose Sarah was not comfortable with the idea of laying a criminal charge, despite the new protections? The proposed law would empower the police to give the abuser a formal warning. Copies of this warning would be filed with the police and the Office of the Prosecutor-General, and might be used as evidence of a pattern of conduct in future proceedings. This mechanism grows out of suggestions from police officers who have recognised the need for official action even in cases where the victim is not ready to lay charges.

Under the proposed law, Sarah also has other options. As an alternative to, or in addition to, criminal proceedings, she could go to a magistrate's court and request a special court order called a protection order. The procedure for getting a protection order is a vastly simplified version of the procedure for seeking an urgent interdict in the High Court. It is not necessary to involve lawyers – all clerks of court and prosecutors assigned to magistrates'

courts will have a legal duty to assist complainants to complete the necessary forms. If Sarah can make out a convincing case of domestic violence, then she can get a temporary order in the absence of her husband. Her husband will have an opportunity to come to court and tell his side of the story at an informal enquiry before the order is made final.

A protection order can be tailored to fit the situation. All protection orders will contain a provision saying that the respondent must not commit domestic violence. The order might also contain “no-contact” provisions ordering Sarah’s husband to stay away from her. It might suspend his firearm licence and authorise the police to search for and seize a firearm or other weapon. In a case of physical violence, if the complainant and the abuser are living in the same house, the court can order the abuser to vacate the premises – no matter whose name is on the deed or the lease. The idea here is that the violent person should be the one to suffer the expense and the inconvenience or relocation, rather than the victim of the violence. Alternatively, the abuser might be ordered to pay rent or otherwise make arrangements for alternative accommodation for the complainant. The court can make orders about the possession of household goods and personal property, to prevent the abuser from trying to use material goods as a means of controlling the complainant. The police might be directed to accompany Sarah to the shared home to supervise the safe removal of her personal belongings. The protection order can even include temporary orders for maintenance, and child custody and access – with the theory being that a person like Sarah who is suffering from violence should not be expected to launch an array of court proceedings all at the same when she is feeling most vulnerable.

The police will be placed on notice that the protection order is in place, meaning that they will be prepared to take any violation of the court order very seriously. Violation of a protection order will be a criminal offence.

There are safeguards against abuse of the proposed procedures. In deciding on the terms of protection orders, the court must consider the overall context of the violence – including the history and nature of the violence, as well as the danger to persons and property, and the risk to children or other persons in the care of the complainant. Both parties have a right of appeal, as well as the right to request variations or withdrawals of the protection order. The provisions of protection orders have limited durations, and there are stiff penalties for giving false information about the violation of protection orders or for trying to entrap someone into violating such orders. Every effort has been made to balance the rights of parties on both sides of the picture.

For the purposes of protection orders, the definition of domestic violence is a broad one. It includes physical abuse, sexual abuse, economic abuse, intimidation, harassment, trespass and serious instances of emotional, verbal and psychological abuse – including threats of such forms of violence. All of these forms of abuse are carefully defined to exclude trivial disagreements from the coverage of the law. The normal disputes which take place in close relationships will not be a basis for legal action. But it is important to be comprehensive, because domestic violence typically starts small and escalates over time. Providing possibilities for action before the violence has become serious is a form of crime prevention.

It is possible that none of these options will help Sarah. For example, nothing in the law can stop a person who is so deranged that they plan to kill their spouse and children before turning the gun on themselves. Some violence simply cannot be deterred. But the experience of other countries indicates that improved legal approaches can help to bring an end to violence in some households.

The problem is so severe that bold action is called for in Namibia. A national study initiated by the Law Reform and Development Commission (LRDC) in preparation for drafting the bill found that *“More than one-fifth of all violent crime in Namibia occurs within the context of domestic relationships.”* And there is a clear gender dimension to violent crime in Namibia. According to the LRDC report: “In the domestic violence cases reported to the police during the

period studied, *86% of the victims were female*, compared to only 14% male. In violent crimes *other than* domestic violence, about 60% of the complainants were male and about 40% female. Thus, if domestic violence could be eliminated from our society, women would be significantly safer from violence.”

There has probably never been another law in Namibia which has been preceded by such an extensive process of study and consultation. The Law Reform and Development Commission began its research into the issue eight years ago. It commissioned a series of research papers, which included three different studies into the profile of the problem in Namibia and a study of domestic violence laws in other countries. Materials on domestic violence from institutions all over the world were consulted, including model legislative approaches prepared by the United Nations Special Rapporteur on Violence against Women. In preparation for the bill, government officials made visits to other countries, and hosted experts on the topic in Namibia. The Law Reform and Development Commission also held regional hearings in 19 locations in Namibia during 1996 and 1997, as well as a national hearing in 1997 which heard views from a wide range of interested parties.

This does not mean that the bill is perfect, but it has been given a great deal of thought by a great many concerned and well-informed experts. The next step is to enact the bill, and to test the law in practice. Then experience can be the guide to future fine-tuning.

We have had case after grisly case in Namibia-- girlfriends stabbed to death by boyfriends, wives killed and cooked by their husbands, grandmothers axed by their grandsons – the list could go on and on. We cannot wait any longer to take decisive action against this national scourge. For the sake of our nation’s future, we need the Combating of Domestic Violence Bill in action as soon as possible.

Dianne Hubbard was a member of the Law Reform and Development Commission subcommittee which worked on early drafts of the Combating of Domestic Violence Bill.