

chapter 1

# Introduction

*“While Namibia has made great strides in achieving formal protection for women against gender-based violence through new laws such as the Combating of Rape Act and the Combating of Domestic Violence Act, effective implementation and consistent enforcement of these laws are lacking.”*

Ministry of Gender Equality and Child Welfare,  
*National Gender Policy (2010-2020)*, 2010 at 29-30

The primary purpose of this study is to assess the application of the Combating of Domestic Violence Act with respect to protection orders, with a view to assessing whether the law is serving its intended purpose effectively.

The study begins with an overview of the international recognition of domestic violence as a human rights issue and the evolution of international definitions of domestic violence, showing how Namibian policy and law has drawn upon the international statements. The next chapter contains a discussion of the Namibian Combating of Domestic Violence Act and its background.

This is followed by an extensive literature review. There are several large-scale studies of domestic violence in Namibia, but most of them are not well-known and seldom cited as a basis for policy decisions. This report attempts to draw together what is known about the occurrence of domestic violence in Namibia, and individual and official responses to it.

The study then presents the findings of the field research which included data from:

- the court files of 1122 protection order applications opened during 2004- 2006, from 19 of the 31 magistrates' courts in place at the time of the study, located in 12 of Namibia's 13 regions;
- 46 key informant interviews in 19 locations, mainly with magistrates and clerks of court involved in applying the law;
- group discussions with traditional leaders, police and magistrates;
- 14 follow-up interviews with magistrates, clerks of court and social workers; and
- an examination of reported and unreported court judgements to see how the Combating of Domestic Violence Act features in criminal cases.

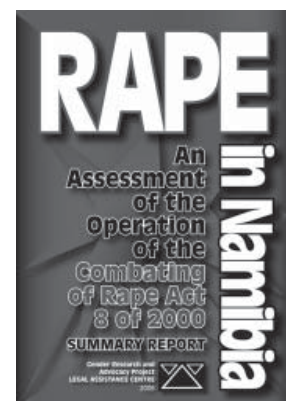
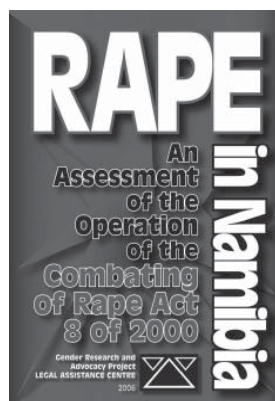
The study concludes with recommendations for fine-tuning the law and regulations, and for improving implementation of the law.

The key findings of the study are presented in a separate summary available from the Legal Assistance Centre.

***Namibian women's rights activists say existing gender legislation has failed to improve women's lives because it is not being implemented widely enough... [L]egislation is only effective if it is accompanied with financial support and strategies for implementation...***

Moses Magadza, "Gender Legislation Futile If Not Implemented"  
Inter Press Service News Agency, 30 March 2009, <http://ipsnews.net/africa/nota.asp?idnews=46321>

This is a companion study to a similar assessment of rape in Namibia and the operation of Namibia's Combating of Rape Act 8 of 2000.



chapter 2

# Defining Domestic Violence

*“... family violence is one of the most insidious forms of violence against women.”*

Committee on the Elimination of Discrimination against Women,  
General Recommendation No 19 (eleventh session, 1992): Violence against women,  
UN General Assembly Official Records, 1992, Doc No A/47/38 at paragraph 1

## 2.1 INTERNATIONAL RECOGNITION OF THE PROBLEM

*There are important consequences that flow from categorizing violence against women as a matter of human rights. Recognizing violence against women as a violation of human rights clarifies the binding obligations on States to prevent, eradicate and punish such violence and their accountability if they fail to comply with these obligations.*

UN General Assembly,  
*In-depth study on all forms of violence against women: Report of the Secretary-General*,  
6 July 2006, A/61/122/Add.1 at paragraph 39

Domestic violence is a form of gender-based violence which arises from the unequal power relations between women and men. It has also been described as a gender-based crime where the majority of abusers are men and the majority of victims are women.<sup>1</sup>

Internationally, domestic violence and other forms of violence against women first began to emerge as human rights issues in the succession of world conferences on women which began over 30 years ago.<sup>2</sup> The World Plan of Action adopted by the **first World Conference on Women in Mexico in 1975** did not refer explicitly to violence, but drew attention to the need for the family to ensure the dignity, equality and security of each of its members.<sup>3</sup> The **1980 World Conference in Copenhagen** referred to violence in the home in its final report and adopted a resolution on “*battered women and violence in the family*”.<sup>4</sup> However, it was only at the **1985 Nairobi World Conference** (and at the parallel NGO forum which accompanied it) that violence against women truly emerged as a serious international concern. The Nairobi Forward-Looking Strategies recognised the pervasiveness of violence against women and cited violence as a major obstacle to the achievement of development, equality and peace – the three overarching objectives of the preceding UN Decade for Women. The Nairobi document stated that “*legal measures should be formulated to prevent violence and to assist women victims. National machinery should be established in order to deal with the question of violence against women within the family and society. Preventative policies should be elaborated, and institutionalized forms of assistance to women victims provided.*”<sup>5</sup>

<sup>1</sup> University of Namibia (UNAM) and Southern African Research and Documentation Centre – Women In Development Southern Africa Awareness Programme (SARDC-WIDSAA), *Beyond Inequalities 2005: Women in Namibia*, Windhoek and Harare: UNAM/SARDC, 2005 at 38-39.

<sup>2</sup> See UN General Assembly, *In-depth study on all forms of violence against women: Report of the Secretary-General*, 6 July 2006, A/61/122/Add.1 at Chapter II for an overview of the international background. Copies of key international and regional documents on gender-based violence have been collected in Legal Assistance Centre (LAC), *Gender and International Human Rights Law*, Windhoek: LAC 2005.

<sup>3</sup> *Report of the World Conference of the International Women's Year, Mexico City, 19 June-2 July 1975*, New York: United Nations, 1976, as referred to in the Division for the Advancement of Women, *Information Note: United Nations Work on Violence Against Women* (<[www.un.org/womenwatch/daw/news/unwvaw.html](http://www.un.org/womenwatch/daw/news/unwvaw.html)>).

<sup>4</sup> *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace Copenhagen, 14 to 30 July 1980*, New York: United Nations, 1980, as referred to in the Division for the Advancement of Women, *Information Note: United Nations Work on Violence Against Women* (<[www.un.org/womenwatch/daw/news/unwvaw.html](http://www.un.org/womenwatch/daw/news/unwvaw.html)>). See Resolution 5 at 67.

<sup>5</sup> *Nairobi Forward-looking Strategies for the Advancement of Women*, Adopted by the World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace, held in Nairobi, Kenya, 15-26 July 1985 at paragraph 258.

In the wake of the Nairobi Conference, the **UN General Assembly passed its first resolution on domestic violence in 1985**. This resolution urged member states to take a range of steps to make their criminal and civil justice systems more effective in their responses to domestic violence.<sup>6</sup> The implementation of this resolution led to a **1986 Expert Group Meeting on Violence in the Family**, with special emphasis on the effect of domestic violence on women. This meeting adopted further concrete recommendations with regard to legal reform; police, prosecutor and health sector training; and social and resource support for victims. It also noted that domestic violence was a global phenomenon which was significantly underreported.<sup>7</sup>

The next major step forward for women at an international level came in the wake of the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**, which came into force internationally in 1981. Astonishingly CEDAW makes no explicit reference to violence against women.<sup>8</sup> However, in 1989, the Committee which monitors CEDAW published General Recommendation 12 which made it clear that gender-based violence falls within the meaning of discrimination against women and directed signatories to include information on “*the incidence of violence of all kinds against women*” in their periodic CEDAW reports.<sup>9</sup> In 1992, General Recommendation 19 gave detailed consideration to the problem of violence against women. This document announced emphatically that “*gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men*”.<sup>10</sup> It defined gender-based violence as “*violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.*”<sup>11</sup>

General Recommendation 19 also warned that “*states may be... responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence*” and to provide for compensation.<sup>12</sup> It noted that “*family violence is one of the most insidious forms of violence against women*”,<sup>13</sup> and concluded by putting forward a set of recommendations for combating all forms of gender-based violence.<sup>14</sup>

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<sup>6</sup> UN General Assembly Resolution 40/36 (29 November 1985), Article 7.

<sup>7</sup> Expert Group Meeting on Violence in the Family with Special Emphasis on its Effect on Women, Vienna, 8-12 December 1986, as referred to in the Division for the Advancement of Women, *Information Note: United Nations Work on Violence Against Women* (<[www.un.org/womenwatch/daw/news/unwvaw.html](http://www.un.org/womenwatch/daw/news/unwvaw.html)>).

<sup>8</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol 1249 at 13 (<[www.unhcr.org/refworld/docid/3ae6b3970.html](http://www.unhcr.org/refworld/docid/3ae6b3970.html)>).

<sup>9</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No 12 (eighth session, 1989): Violence against women, UN General Assembly Official Records, 1989, Doc No A/44/38 at Preamble (referencing Articles 2, 5, 11, 12 and 16 of the Convention which deal with discrimination) and paragraph 4.

<sup>10</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No 19 (eleventh session, 1992): Violence against women, UN General Assembly Official Records, 1992, Doc No A/47/38 at paragraph 1.

<sup>11</sup> *Id* at paragraph 6.

<sup>12</sup> *Id* at paragraph 9.

<sup>13</sup> *Id* at paragraph 23.

<sup>14</sup> *Id* at paragraph 24. Violence against women in the family drew further comment in General Recommendation 21, (thirteenth session, 1994): Equality in marriage and family relations, UN General Assembly Official Records, 1994, Doc. No. A/47/38. Here the Committee stressed at paragraph 40 that “*the provisions of General Recommendation 19... concerning violence against women have great significance for women’s abilities to enjoy rights and freedoms on an equal basis with men*”, and urged signatories to ensure that women will be free of such violence in both public and family life.

The **1993 Vienna World Conference on Human Rights** proved to be an international turning point on gender-based violence, by recognising this problem as a general human rights issue.<sup>15</sup> The Vienna Declaration and Programme of Action made the adoption of a UN Declaration on the Elimination of Violence against Women a priority and decided that a Special Rapporteur on Violence against Women should be appointed by the UN.<sup>16</sup>

Pursuant to this commitment, the **1993 UN Declaration on the Elimination of Violence** defined “*violence against women*” as “*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*”.<sup>17</sup> Article 2 of the Declaration elaborated on this definition:

*Violence against women shall be understood to encompass, but not be limited to, the following:*

(a) *Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*

(b) *Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*

(c) *Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.*<sup>18</sup>

The **1995 Beijing Declaration and Platform for Action** agreed upon at the **Fourth World Conference for Women** adopted the definition of “*violence against women*” used in the 1993 UN Declaration, with a few additions:

**113.** *The term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:*

(a) *Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*

(b) *Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*

(c) *Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.*

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<sup>15</sup> World Conference on Human Rights, Vienna, 14-25 June 1993.

<sup>16</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 at paragraph 40 (<[www.unhcr.org/refworld/docid/3ae6b39ec.html](http://www.unhcr.org/refworld/docid/3ae6b39ec.html)>).

<sup>17</sup> UN Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104, dated 20 December 1993 at Article 1.

<sup>18</sup> *Id* at Article 2.

*114. Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.*

*115. Acts of violence against women also include forced sterilization and forced abortion, coercive/forced use of contraceptives, prenatal sex selection and female infanticide.<sup>19</sup>*

The accompanying Beijing Declaration identified violence against women as one of 12 critical areas of concern requiring urgent action to achieve the goal of gender equality.<sup>20</sup>

In 1998, the Southern African Development Community (“SADC”) adopted an **Addendum to the SADC Protocol on Gender and Development on the Prevention and Eradication of Violence against Women and Children**. It defined violence as including:

*physical and sexual violence, as well as economic, psychological and emotional abuse –*

*(a) occurring in the family, in such forms as threats, intimidation, battery, sexual abuse of children, economic deprivation, marital rape, femicide, female genital mutilation, and traditional practices harmful to women;*

*(b) occurring in the community, in such forms as threats, rape, sexual abuse, sexual harassment and intimidation, trafficking in women and children, forced prostitution, violence against women in armed conflict; and that*

*(c) perpetrated or condoned by the agents of the state...<sup>21</sup>*

The Addendum notes that violence against women “*reflects the unequal relations of power between women and men, resulting in the domination and discrimination of women by men*” and recommends the adoption of various measures to respond to and prevent violence.<sup>22</sup>

This non-binding declaration and addendum were supplemented in 2008 by a new binding **SADC Protocol on Gender and Development** which defines “*gender-based violence*” as:

*all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could have caused them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.<sup>23</sup>*

It then devotes an entire chapter to measures for combating various forms of gender-based violence.<sup>24</sup>

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<sup>19</sup> Fourth World Conference on Women. *Beijing Declaration and Platform for Action*, Beijing, China: 4-15 September 1995, DPI/1766/Wom at paragraphs 113-115.

<sup>20</sup> *Id* at paragraph 44.

<sup>21</sup> Southern African Development Community (SADC), *The Prevention and Eradication of Violence against Women and Children: An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State of Government*, Grand Baie, 14 September 1998 at Article 5.

<sup>22</sup> *Id* at Article 3 and Article 8-28.

<sup>23</sup> Southern African Development Community (SADC), *SADC Protocol on Gender and Development*, Johannesburg, 17 August 2008 at Article 1.

<sup>24</sup> *Id*, Part Six, Articles 20-25.

**The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa** adopted in 2003 defines “*violence against women*” as:

*all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.*<sup>25</sup>

The Protocol devotes one article entirely to the topic of violence against women, calling for a range of state measures to address violence which takes place “*in private or public*”.<sup>26</sup>

In 2004, the **UN Resolution on the Elimination of Domestic Violence against Women** elaborated on domestic violence as a specific form of gender-based violence, recognising:

- (a) *That domestic violence is violence that occurs within the private sphere, generally between individuals who are related through blood or intimacy;*
- (b) *That domestic violence is one of the most common and least visible forms of violence against women and that its consequences affect many areas of the lives of victims;*
- (c) *That domestic violence can take many different forms, including physical, psychological and sexual violence;*
- (d) *That domestic violence is of public concern and requires States to take serious action to protect victims and prevent domestic violence;*
- (e) *That domestic violence can include economic deprivation and isolation and that such conduct may cause imminent harm to the safety, health or well-being of women.*<sup>27</sup>

In 2006, a **Report of the UN Secretary-General** described “*intimate partner violence*” as follows:

*Intimate partner violence includes a range of sexually, psychologically and physically coercive acts used against adult and adolescent women by a current or former intimate partner, without her consent. Physical violence involves intentionally using physical force, strength or a weapon to harm or injure the woman. Sexual violence includes abusive sexual contact, making a woman engage in a sexual act without her consent, and attempted or completed sex acts with a woman who is ill, disabled, under pressure or under the influence of alcohol or other drugs. Psychological violence includes controlling or isolating the woman, and humiliating or embarrassing her. Economic violence includes denying a woman access to and control over basic resources.*<sup>28</sup>

This brief survey shows that international and regional understandings of what constitutes gender-based violence are remarkably consistent and inclusive of domestic violence. This general understanding has been internalised in Namibian law and policy, as discussed in the next section.

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<sup>25</sup> Assembly of the African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Maputo, 11 July 2003 at Article 1.

<sup>26</sup> *Id.*, Article 4, quoting Article 4.2(a).

<sup>27</sup> *UN Resolution on the Elimination of Domestic Violence against Women*, General Assembly Resolution 58/147, 19 February 2004 at Article 1.

<sup>28</sup> *UN General Assembly, In-depth study on all forms of violence against women: Report of the Secretary-General*, 6 July 2006, A/61/122/Add.1 at paragraph 113.



## 2.2 NAMIBIAN DEFINITIONS OF GENDER-BASED VIOLENCE

*Violence, whatever form it takes particularly against women and children, must today undoubtedly rank as one of Namibia's most severe human rights problems. Therefore the State has the responsibility to protect all its citizens against violence...*

Hon Kaiyamo, National Council, 29 April 2003

Namibia's first **National Gender Policy, adopted in 1997**, states that violence against women and children violates Article 8 of the Namibian Constitution, which protects against “*torture*” and “*cruel, inhuman or degrading treatment or punishment*”.<sup>29</sup>

The 1997 National Gender Policy adopted the core of the definition of violence against women put forward in the Beijing Platform for Action, as follows:

*‘Violence against women and children’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women and children.*<sup>30</sup>

It also quotes most of the Beijing elaboration of this definition:

- a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*
- b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*
- c. Other acts of violence against women include murder, systematic rape, sexual slavery, forced pregnancy, forced sterilization and forced abortion.*<sup>31</sup>

The 1997 National Gender Policy then lists 23 strategies for combating violence, ranging from law reform to awareness-raising, the provision of shelters and other services.<sup>32</sup>

The **National Gender Policy 2010-2020** follows international trends by replacing the term “*violence against women and children*” with the term “*gender-based violence*”. The glossary defines “*gender-based violence*” as follows:

<sup>29</sup> Department of Women's Affairs, Office of the President (DWA), *National Gender Policy*, Windhoek: DWA, 1997 at paragraph 6.1.

<sup>30</sup> *Id* at paragraph 6.2.

<sup>31</sup> *Id* at paragraph 6.3.

<sup>32</sup> *Id* at paragraph 6.7. These strategies are given more specific content in the National Gender Plan of Action (1998-2003).

*This means all acts perpetrated against women, men, girls and boys on the basis of their sex, which causes or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace-time and during situations of armed or other forms of conflict or in situations of natural disasters, that cause displacement of people.*<sup>33</sup>

The policy includes a section on gender-based violence which says that this term “refers to all forms of violence that happen to women, girls, men and boys because of the unequal power relations between them” and notes that the two most common forms of gender-based violence in Namibia are “rape and domestic violence, both of which disproportionately affect Namibian women more than men”. It goes on to emphasise the impact of domestic violence on children, noting that “children in abusive homes are more likely to be abused themselves and children exposed to abusive relationships may be more likely to become abusers themselves later in life”.<sup>34</sup>

The 26 strategies for addressing gender-based violence in the current National Gender Policy include strategies which focus on law and policy; access to legal and social services; education and awareness; and human trafficking.<sup>35</sup>

The definition of “domestic violence” in the Combating of Domestic Violence Act, discussed in detail in the following chapter, is consistent with these international and national definitions of domestic violence, by including broad definitions of physical, sexual, psychological and economic abuse.



<sup>33</sup> Ministry of Gender Equality and Child Welfare (MGE CW), *National Gender Policy (2010-2020)*, Windhoek: MGE CW, 2010 at 53.

<sup>34</sup> *Id.*, section 4.4 at 26.

<sup>35</sup> *Id.*, section 4.4 at 30-31. The accompanying Plan of Action was still under development at the time of writing.



## 2.3 OVERLAPPING TERMINOLOGY

This report uses the term “domestic violence” as defined in the Combating of Domestic Violence Act to include physical, sexual, emotional and economic abuse between intimate partners or family members. Domestic violence is thus one subset of the broader category of gender-based violence.

There are overlapping terms. For example, “abuse” and “violence” are often used synonymously.

The term “family violence” is sometimes used instead of “domestic violence”. The term “battering” was once common, but is now less often used because it denotes physical abuse, while it is now widely acknowledged that domestic violence can also take many other forms. The term “intimate partner violence” is increasingly used interchangeably with domestic violence, but this is only one manifestation of domestic violence in terms of the Namibian law.<sup>36</sup> Intimate partner violence has in the past been referred to by other terms such as “spousal abuse” or “wife beating”; however, the term “intimate partner violence” is now more commonly employed to ensure that the concept includes intimate couples who are not married and do not necessarily share a residence. Other more unusual terms located in recent internet searches on the topic included “situational couple violence” (referring to mild to moderate violence) and “intimate terrorism” (referring to more severe and repetitive violence).

In addition to “intimate partner violence”, sub-categories of the Namibian legal concept of domestic violence include “child abuse” or “elder abuse” in family situations. When referring to sub-categories of domestic violence, this report will refer primarily to “intimate partner violence” and “child abuse”.

<sup>36</sup> One recent study asserts that the term “domestic violence” is now being replaced by “intimate-partner violence”. *WHO Multi-country Study on Women’s Health and Domestic Violence against Women, Summary Report: Initial results on prevalence, health outcomes and women’s responses*, Geneva: WHO, 2005 at 1, footnote 1.



**STOP**  
*the violence!*

chapter 3

# The Combating of Domestic Violence Act

*“Violence, whatever form it takes, particularly against women and children, must today undoubtedly rank as one of Namibia’s most severe human rights problems ...”*

Hon Kaiyamo, National Council, 29 April 2003

# 3.1 LEGAL REMEDIES FOR DOMESTIC VIOLENCE PRIOR TO THE COMBATING OF DOMESTIC VIOLENCE ACT

Prior to the enactment of the Combating of Domestic Violence Act in 2003, there was no Namibian law aimed specifically at domestic violence. A person experiencing domestic violence would have had the following legal options:

- (1) The victim could lay an appropriate **criminal charge** such as assault or trespass.
- (2) The victim could obtain an **interdict from the High Court**, which involved a relatively complicated and costly procedure.
- (3) The victim could obtain a **peace order** in terms of section 384 of the Criminal Procedure Act 15 of 1977. In terms of this provision, a complaint is made under oath to a magistrate that the person in question “*is conducting himself violently towards, or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault*”. The magistrate can summon the person, or order the person to be arrested and brought to court, and conduct an enquiry into the complaint. The magistrate can then issue a peace order which is valid for up to six months, and order the respondent to give “*recognisances*” – usually referring to a deposit of money which will be forfeited if the order is disobeyed. There is no automatic arrest or prosecution if the peace order is disobeyed, but the person in question may be committed to prison for up to six months if he refuses to give any recognisance at the initial hearing. This remedy was available in theory, but virtually never used in practice.
- (4) A victim who is married to the abuser could seek a formal end to the relationship by means of a **divorce**, which can be obtained in the case of a civil marriage only in the High Court.
- (5) A victim could bring a **civil action** against the abuser for damages such as medical costs, loss of wages and pain and suffering stemming from the abuse. This is ordinarily a relatively expensive legal process involving lawyers, and not very helpful in situations where the finances of the abuser and the victim are interconnected.

These remedies – such as they are – all survive after the enactment of the Combating of Domestic Violence Act.

## 3.2 OVERVIEW OF THE COMBATING OF DOMESTIC VIOLENCE ACT

The Combating of Domestic Violence Act 4 of 2003 was passed by Parliament in March 2003 and came into force on 17 November 2003.<sup>1</sup>

The law covers a range of forms of “*domestic violence*”, including sexual violence, harassment, intimidation, trespass, economic violence and psychological violence. It covers violence between persons in “*domestic relationships*”, which include husbands and wives, parents and children, boyfriends and girlfriends, and close family members.

The law gives those who have suffered violence an alternative or an adjunct to criminal charges, by providing a simple procedure for getting a protection order from a magistrate’s court. A protection order is a court order directing the abuser to stop the violence. It can also prohibit the abuser from having any contact with the victim and require the surrender of weapons. In cases of physical violence, it can include an order giving the complainant an exclusive right to occupation of the joint residence for a temporary period. Protection orders can also include orders pertaining to the possession of personal property as well as temporary orders for maintenance, child custody and access to children.

No new crimes are created by the law, but existing crimes between persons in a domestic relationship are classified as “*domestic violence offences*”. These offences are subject to special provisions which encourage input from the victim on bail and sentencing, and protect the victim’s privacy.

## 3.3 BACKGROUND TO THE LEGISLATION

The process which led to the enactment of the law involved government, communities and non-governmental organisations. Advocacy around the proposed law was combined with more general advocacy around the issue of violence against women and children.

The Law Reform and Development Commission (LRDC) began research into the issue of violence against women and children seven years before the Combating of Domestic Violence Act became law. It consulted materials on domestic violence from institutions all over the world, including model legislative approaches prepared by the United Nations Special Rapporteur on Violence against Women. It also sent government officials to other countries to see how domestic violence is handled elsewhere.

The LRDC held regional hearings on violence against women in 19 locations in Namibia during 1996 and 1997 and a national hearing in 1997. These hearings heard views from a

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<sup>1</sup> Combating of Domestic Violence Act 4 of 2003, Government Gazette 3002, dated 24 June 2003. Regulations and forms are contained in Government Notice 235 of 2003, Government Gazette 3094, dated 17 November 2003.

wide range of interested parties.<sup>2</sup> The Namibia National Women's Organisation (better known as NANAWO) assisted the LRDC by holding preparatory workshops in the different regions to mobilise community input. Discussion at these hearings was very general in nature, but provided a background which was used to guide later law reform on both rape and domestic violence.

The LRDC also commissioned a series of research papers on domestic violence. One of these studies examined community attitudes and practices relating to domestic violence in Namibia.<sup>3</sup> A second examined the nature and extent of domestic violence in Namibia through interviews with medical personnel, community leaders and victims of domestic violence.<sup>4</sup> A third examined legislation on domestic violence in South Africa and its possible adaptation for Namibia.<sup>5</sup> A fourth compiled information on programmes and services available to victims of such violence.<sup>6</sup> None of these studies were ever formally published.

The LRDC then asked the Legal Assistance Centre to assist by compiling a study of domestic violence laws in other countries. This study compared strategies to combat domestic violence in other countries, explored what worked well in practice and what did not, and put forward a set of proposals for law reform in Namibia for further discussion.<sup>7</sup> The Legal Assistance Centre published this study in 1998 and circulated it widely.

The Legal Assistance Centre next hosted two workshops in Windhoek for people who work in the area of domestic violence, in 1999 and 2000, to discuss the recommendations which grew out of the study and to look at South Africa's experience with laws on domestic violence. Representatives of the LRDC attended these workshops and took note of the feedback from the different stakeholders and experts. Legal experts from South Africa also attended one of the workshops to share their insights.<sup>8</sup>

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<sup>2</sup> The input made at the national hearing is recorded in Law Reform and Development Commission (LRDC), *Violence against and Abuse of Women and Children Project: Formal Addresses made at the National Hearing*, LRDC 7, May 1997 and Law Reform and Development Commission (LRDC), *Violence against and Abuse of women and Children Project: Verbatim Discussions held at National Hearing*, LRDC 8, May 1997.

<sup>3</sup> Heike Becker and Pamela Classen, *Violence Against Women and Children: Community Attitudes and Practices*, paper prepared for the Women and Law Committee of the Law Reform and Development Commission (unpublished), 1996.

<sup>4</sup> Debie LeBeau, *The Nature, Extent and Causes of Domestic Violence Against Women and Children in Namibia*, paper prepared for the Women and Law Committee of the Law Reform and Development Commission (unpublished), 1996.

<sup>5</sup> D Hubbard, *Lessons for Namibia from South Africa's Prevention of Family Violence Act*, paper prepared for the Women and Law Committee of the Law Reform and Development Commission (unpublished), 1997.

<sup>6</sup> Barbro-Isabel Bruhns, *Violence Against Women and Children: Programmes and Services Responding to the Needs of Women and Children as Victims of Violence*, paper prepared for the Women and Law Committee of the Law Reform and Development Commission (unpublished), 1996.

<sup>7</sup> Dianne Hubbard and Daina Wise, *Domestic Violence: Proposals for Law Reform*, Windhoek: Legal Assistance Centre, 1998.

<sup>8</sup> The Gender Research & Advocacy Project of the Legal Assistance Centre hosted a workshop for Namibian experts and representatives of groups working in the field of domestic violence on 11 February 1999. Several members of the Law Reform and Development Commission and government legal drafters were also in attendance. There were a total of 25 participants. The purpose of this workshop was to give specific input on the draft proposals prepared by the Legal Assistance Centre for the Law Reform and Development Commission. Detailed minutes of the meeting were prepared by a rapporteur. "Minutes of Expert Working Group Meeting on Law Reform on Domestic Violence", 11 February 1999 (unpublished minutes on file at the Legal Assistance Centre).

On 21 September 2000, the Gender Research & Advocacy Project hosted a one-day workshop in Windhoek entitled "Domestic Violence Legislation: Lessons from South Africa". This workshop featured



A study of domestic violence cases reported to the Namibian police was published jointly by the LRDC and Legal Assistance Centre in 1999, to provide a profile of reported cases and their outcomes.<sup>9</sup>

The LRDC established a subcommittee on domestic violence in May 1999 to develop the ideas gathered into a draft law on domestic violence. This subcommittee included a representative from the Legal Assistance Centre. The recommendations of the subcommittee were considered by the full LRDC, which refined the draft bill. The LRDC published a report containing a proposed draft bill in December 2000.<sup>10</sup>

## 3.4 KEY ADVOCACY EFFORTS

During this period the Namibian women's movement, organised in an informal coalition called the Multi-Media Campaign on Violence Against Women and Children, employed intensive lobbying to raise public awareness of the problem of domestic violence, and to move the draft legislation forward. Its interventions included petitions, letters, media articles, panel discussions, demonstrations, marches and meetings with Parliamentarians.<sup>11</sup>

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South African guest speakers Helene Combrink of the Community Law Centre at the University of the Western Cape, Lillian Artz of the Institute of Criminology at the University of Cape Town, and Deborah Quenet and Lulama Nongogo of the Women's Legal Centre in Cape Town. All four women had been involved in monitoring South Africa's new domestic violence legislation, the *Domestic Violence Act 116 of 1998*, which was enacted in December 1999. The workshop was attended by about 90 participants from various Namibian sectors involved with domestic violence, including police, social workers, counsellors, academics and men and women from community-based groups – as well as a Minister, a Deputy Minister and several members of the Law Reform and Development Commission.

<sup>9</sup> Legal Assistance Centre (LAC) and Law Reform and Development Commission (LRDC), *Domestic Violence Cases Reported to the Namibian Police: Case Characteristics and Police Response*, LRDC 9, Windhoek: LAC and LRDC, 1999. The findings of this study are discussed in Chapter 4.

<sup>10</sup> Law Reform and Development Commission (LRDC), *Report on Domestic Violence*, LRDC 9, Windhoek: LRDC, 2000. This report suggested that it should be read together with the report prepared by the Legal Assistance Centre for the LRDC, cited in note 7 above.

<sup>11</sup> The Multi-Media Campaign included the following groups: AIDS Care Trust, Catholic AIDS Action, Criminals Return into Society, Gospel Outreach, Law Reform and Development Commission, Legal Assistance Centre, Let's Help Each Other (Karibib), LifeLine/ChildLine, Ministry of Information and Broadcasting, Namibian Girl Child Organisation, Namibian Girl Child Organisation, Namibia Institute for Democracy, Namibia Media Women's Association, Namibian Police, Namibia Red Cross Society, Namibia Social Marketing Association, Namibia Women's Association, Ombetja Yehinga Organisation, Rainbow Project, Sister Collective, Social Marketing Association, Try Again (Otjiwarongo), Tsumeb Women and Child Centre, Unit for Sexually Abused Children (Swakopmund), United Nations Information Centre, Walvis Bay Child and Family Centre, Woman and Child Protection Units throughout Namibia, Women for Action in Development, Women in Namibia, Women Support Women Shelter, Women's Network (Okahandja), Women's Solidarity and Youth for Christ Namibia.

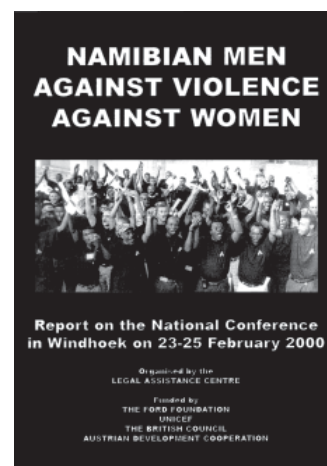
Members of the Multi-Media Campaign met regularly for several years to share ideas and coordinate campaigns, such as lobbying for amendments to proposed legislation on rape, organising a march to support legislation against domestic violence, organising activities around the Day of the African Child and planning a White Ribbon Campaign where men pledged not to engage in violence or support violence by other men. The coalition no longer exists.

Several of the lobbying initiatives are described as case studies in Legal Assistance Centre (LAC), *Advocacy in Action: A guide to influencing decision-making in Namibia*, Windhoek: LAC, 2004, updated 2007. See also Department of Women Affairs (DWA), *Namibia National Progress Report on the "Implementation of the Beijing Platform for Action*, Windhoek: DWA, July 1999 at 47:

*Another organ that has been in the frontline with gender- and law-related research is the Gender Research Project (GRP) of the Legal Assistance Centre. The GRP has continued to plan work together with the Multi-Media Campaign on Violence Against Women and Children, organising specific awareness and advocacy campaigns on domestic violence. These campaigns have been,*

The Gender Research & Advocacy Project of the Legal Assistance Centre drafted sample lobbying letters and provided background briefings to interested NGOs to assist them with independent lobbying efforts. In February 1998, the Multi-Media Campaign launched a local film on violence against women which it had commissioned. The film, produced in English, was entitled *A Trust Betrayed*. It was aired on national television. This film had an urban setting and focused on rape and incest.

In February 2000, in an effort to involve men in the building momentum around the issues of domestic violence and rape, the Legal Assistance Centre hosted a national conference for men against violence against women. This workshop was attended by 250 men from all over Namibia, selected as delegates through local and regional consultations, as well as by guest speakers from Zimbabwe, South Africa and Canada. The conference was successful in inspiring men in the various regions to begin work around the issue of violence against women, and led to the formation of a national men's organisation – Namibian Men for Change. The event received excellent media coverage, including reports showing Namibia's "real men" demonstrating against violence against women outside the High Court building, an event which featured a stirring keynote speech by the Vice Chancellor of the University of Namibia.<sup>12</sup>



This cover photo shows "real men" who formed the group Namibian Men for Change demonstrating against violence against women outside the High Court following the national conference for men against violence against women hosted by the LAC in February 2000.

In 2001-2002, the Legal Assistance Centre ran a public awareness campaign on domestic violence with several components:

- (1) a locally-produced film on domestic violence produced in English, Afrikaans, Oshiwambo, Otjiherero and Nama/Damara, entitled *Love & Respect* in English, which was shown in the various languages on the national broadcasting station;<sup>13</sup>
- (2) a 10-episode radio drama broadcast on the national radio services in Afrikaans, Oshiwambo, Otjiherero and Nama/Damara, entitled *In Die Familie (In the Family)* in Afrikaans, which highlighted the problem of domestic violence and targeted rural audiences;
- (3) a website design contest which involved some 13 schools around the country;<sup>14</sup> and
- (4) an art project in which school students in six locations in different parts of the country workshopped and produced murals about domestic violence on public buildings.

In 2002, the Legal Assistance Centre produced another feature-length film in English, entitled *Whispers in the Wind*, which combined the theme of domestic intimate partner violence with the issues of child abuse and HIV/AIDS. This film was also screened on the national broadcasting station.

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*so far, the most effective means of disseminating information to combat violence against women and children. In addition through the GRP it has been possible to advocate for the Combating of Rape Bill and the 'Domestic Violence Bill', which are two of the most important Bills to combat violence against women and children.*

<sup>12</sup> Legal Assistance Centre (LAC), *Namibian Men against Violence against Women, Report on the National Conference in Windhoek on 23-24 February 2000*, Windhoek: LAC, 2000.

<sup>13</sup> During October-December 1999, the film-maker appointed by the Gender Research & Advocacy Project held focus group discussions and personal interviews in Oshakati, Rehoboth, Keetmanshoop, Okakarara, Khorixas, Otjimbingwe, Walvis Bay and Rundu to gauge attitudes and understandings about domestic violence in different communities, as a way of informing the script.

<sup>14</sup> For this initiative, the Legal Assistance Centre partnered with another NGO, Schoolnet Namibia.

The Combating of Domestic Violence Bill (the “Bill”) was introduced in the National Assembly by the Minister of Justice on 22 October 2002.<sup>15</sup> To facilitate understanding of the proposed law, the Legal Assistance Centre prepared a simplified summary of the Bill which was distributed to all members of the National Assembly. The Bill was referred to a Standing Committee of the National Assembly on 25 November 2002.

The Legal Assistance Centre provided a half-day workshop on the Bill in January 2003 for members of the Multi-Media Campaign to explain the Bill in detail so that different groups could lobby from a more thoroughly-informed position.

The Multi-Media Campaign organised a high-profile demonstration on the Bill to coincide with the re-opening of Parliament in February 2003. Police efforts to block this demonstration led to an urgent application in the High Court seeking to remove restraints on the demonstration. Although this application was not successful, the police action actually produced a higher level of media attention than the demonstration might have otherwise received (see box below).

Ironically, at the same moment, President Sam Nujoma was inside the Parliament buildings emphasising the problem of violence against women and children in his official speech:

*I would particularly like to express my concern about the recent spate of violent crimes directed against women and children. These crimes represent a gross violation of the fundamental rights of our citizens, while causing unwarranted damage to the good name of our country. These despicable acts of barbarism must therefore be roundly condemned and completely uprooted.*<sup>16</sup>

Simultaneous demonstrations were held nationwide, organised primarily by Women’s Action for Development, Namibia Women’s Voice and the Women’s Political Manifesto Network. For example, large demonstrations took place in Okahandja, Omaruru, Rehoboth and Khorixas.

## Demonstrating against domestic violence

A group of 250 people dressed in black stand against a barrier facing police officers. The hands of the multi-racial demonstrators, mostly women and children, are painted red. They chant “stop violence against women and children,” as President Sam Nujoma officially opens the new 2003 session of Parliament.

The scene was the culmination of many months of advocacy work around the Combating of Domestic Violence Bill. Advocacy is an essential component of the democratic process and as a young democracy, Namibia is working to ensure that more individuals and civil society organisations are advocating on important issues...

To express their concern on domestic violence, a group of Namibians applied to demonstrate at the official opening of Parliament by President Nujoma. The application was initially approved, with the stipulation that demonstrators would not be allowed on the President’s

<sup>15</sup> Combating of Domestic Violence Bill [B. 14 – 2002].

<sup>16</sup> Chrispin Inambao, “President Nujoma condemns violence against women and children”, *The Namibian*, 12 February 2003.

motorcade route, nor close to the Tintenpalast which houses the National Assembly. As the main intent of the demonstration was to ensure that the President was aware of their concerns, the demonstration organisers went to the High Court for an interdict which was denied.

Two hundred and fifty people, mostly women and children, did demonstrate, but at the Supreme Court. Police barriers were positioned and as the demonstration progressed the police eventually pointed and cocked their weapons at the demonstrators.

At the same time, President Nujoma was addressing the National Assembly. He was extremely supportive of the Bill, encouraging Parliament to pass it. He has always been supportive of gender issues and the rights of women and children.

The police action was met with public outrage and resulted in wide coverage of both the demonstration, but more importantly, the Bill. While the incident was detrimental to democratic ideals, it did serve to raise awareness on the issue of domestic violence. Combined with the President's support, the demonstration served to raise public awareness to previously unimagined levels.



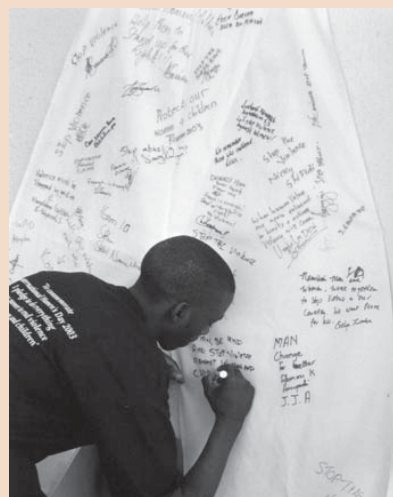
**Namibia Institute for Democracy,**  
 "Namibians Speak Out Against Domestic Violence", 2003  
 re-printed in Legal Assistance Centre, Legal Assistance Centre, *Advocacy in Action:*  
*A guide to influencing decision-making in Namibia*, 2007 at 88

Another major advocacy initiative was a White Ribbon Campaign organised through the Multi-Media Campaign to coincide with International Women's Day in March 2003. The campaign was taken forward very effectively in Windhoek, particularly because of the efforts of many local schoolchildren who set up stands in public places such as shopping centres and asked members of the public to take a pledge against violence against women and then demonstrate their support by wearing a white ribbon.

The pledge which participants made when they wore the white ribbon was:

***"I will do everything within my power to put an end to violence against women and children in our society."***

Photos:  
**Participants in the White Ribbon Campaign, including school learners, wrote anti-violence messages on a giant 'white ribbon'.**



## 3.5 THE PARLIAMENTARY DEBATE

The Ministry of Justice tabled the Combating of Domestic Violence Bill in the National Assembly on 22 October 2002.<sup>17</sup>

In Parliament, the Bill aroused such heated debate that the Deputy Minister of Justice suggested that “*the number of speakers who have spoken is maybe a record since this Parliament started*”.<sup>18</sup> The discussion was extremely “*sexually polarised*”, and it seemed to be primarily about sex.<sup>19</sup>

### 3.5.1 Monitoring bedrooms?

Fear that the law would lead to ‘monitoring bedrooms’ was a thread that ran throughout the debate. The bedroom theme was inadvertently opened by the Deputy Minister who introduced the Bill, when he said that the Bill would “*give legal authority to the State to empower it to monitor our bedrooms in cases where a crime of domestic violence is committed*”.<sup>20</sup> This was an unfortunate bit of hyperbole, as the only thing in the law which comes even vaguely close to such an impact is a provision stating that any police officer who has a reasonable suspicion that a domestic violence offence has been committed may make an arrest without a search warrant and search the scene for weapons – powers which apply to many other criminal situations.<sup>21</sup> But for some Parliamentarians, this statement harkened back to the days of the infamous immorality laws under apartheid rule, when police made intensive efforts to catch people out in illegal inter-racial sexual relationships.<sup>22</sup> One Parliamentarian tried to inject a note of calm:

*... [T]he Bill is essentially about protection orders. That is what this Bill is all about, not about divorces, not about marriages, not about prying into others’ bedrooms.*<sup>23</sup>

The Deputy Minister wrapped up the bedroom theme firmly in a speech closing the Second Reading debate:

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<sup>17</sup> Combating of Domestic Violence Bill [B. 14 – 2002]. Unless otherwise indicated, all of the quotations in this chapter are taken from the published debates of the National Assembly and National Council.

<sup>18</sup> Deputy Minister of Justice (Hon Kawana), speaking at close of second reading debate, National Assembly, 25 November 2002. He also noted the diversity of viewpoints: “*We have heard views of conservatives, traditionalists, sexists, feminists and liberals. In the name of democracy, it was fair and just to listen to all such backgrounds so that at the end of the day the final product would be highly enriched.*”

<sup>19</sup> The apt term “*sexually polarised*” was used by Hon Chata, National Assembly, 19 November 2002.

<sup>20</sup> Deputy Minister of Justice (Hon Kawana), Second Reading Speech, National Assembly, 22 October 2002.

<sup>21</sup> See Combating of Domestic Violence Act 4 of 2003, section 23.

<sup>22</sup> In 1934, the Immorality Proclamation 19 of 1934 applied the main provisions of the South African Immorality Act (1927) to ‘South West Africa’, criminalising sexual intercourse between persons of different races. See Minister of Trade and Industry (Hon Nyamu), 22 October 2002: “*... [Y]ou will remember especially our generation is aware of a law which existed here, the so-called Immorality Act, which gave the power to the police to enter the bedroom of couples...*”; Minister of Higher Education, Training and Employment Creation (Hon N Angula), National Assembly, 19 November 2002: “*... [Y]ou now want to introduce the State into the bedroom... This reminds me of the Immorality Act...*”. See also statements by Hon Nyamu on 21 November 2002, where he picked up on this theme to protest against what he viewed as excessive state interference in family life.

<sup>23</sup> Hon Gurirab, National Assembly, 22 November 2002.

*What I want to make clear... is that the bedroom should be used as a place for tender love, not a place of slaughter. If a murder weapon, such as a fire-arm, is in the bedroom, the police should have the power at any time of the day or night and following the correct procedure to remove it from the bedroom. After all, this Bill will only interfere in violent bedrooms, not where such bedrooms are used as places of love. If physical violence is being committed in the bedroom, the State will have the power to enter the bedroom without a warrant according to the law in order to protect the victim of domestic violence. Therefore, peaceful bedrooms will become untouchable, while violent bedrooms will be as accessible as highways. The only solution is to make our bedrooms peaceful places for romance, rather than slaughter chambers...*

*... [O]ur women and children need protection... let us give them protection in the sitting room, kitchen, dining room, toilet and bedroom...<sup>24</sup>*

### 3.5.2 'Sexual denial'

Male fears and defensiveness were evident in the debate, with some men worried that the gender-neutral Bill did not do enough to protect men – especially against forms of 'violence' such as wives who deprive their husbands of their 'sexual rights' or use 'witchcraft' to interfere with their husband's sexual functions.

For example, one male MP argued that the Bill was "*not neutral, it is just aimed at one group*" (men) because it covers "*economic denial*" but not "*sexual denial*". He went on to say that wives are "*contractually under obligation*" to provide sex to their husbands. He elaborated on the seriousness of this problem, saying that it also leads to homosexuality:

*When you deny that somebody's right, you are humiliating that person. You know that person has feelings and a psychological disturbance, and that person can go to hospital if you deny him perpetually. Therefore, it is violence, because it has the capacity to bring violence. The reaction is not predictable. It is painful, you cannot imagine how painful it is LAUGHTER. ... That requirement is exactly the same as bread. If you are denied bread, you are denied food. If you are denied sex which you have become accustomed to, you will not be normal, you will be abnormal. The origin of homosexuality was because in one way or another they were denied the right to a partner. In the absence of that they used what was available. But all these have the character of creating violence.<sup>25</sup>*

He proposed (informally) that the definition of domestic violence should be amended to include "*the unreasonable denial of sex*".<sup>26</sup>

Another male MP claimed that wives mistreat their husbands by giving them "*herbal or djudju*" so that they "*lose their erection*", saying that this causes the wives to start having affairs with other men, which in turn leads to domestic violence.<sup>27</sup> One of his colleagues

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<sup>24</sup> Deputy Minister of Justice (Hon Kawana), speaking at close of second reading debate, National Assembly, 25 November 2002. See also "Violence Bill delayed", *The Namibian*, 26 November 2002.

<sup>25</sup> Minister of Agriculture, Water and Rural Development (Hon Angela), National Assembly, 30 October 2002.

<sup>26</sup> *Id.* See also Max Hamata, "Sex, sex, sex, it ALL boils down to SEX, says Minister", *The Namibian*, 31 October 2002.

<sup>27</sup> Hon Moongo, National Assembly, 29 October 2002. See also Max Hamata, "MP rises to the occasion with erection claims", *The Namibian*, 30 October 2002; "Bedroom 'balderdash'", *The Namibian*, 1 November 2002.

## Minister Versus Feminism

*THE Namibian* of November 12 carried a full page editorial Political Perspective on the Combating of Domestic Violence Bill now before the National Assembly. The commentary in question alleged that I was in the forefront of opposition to the Bill. The impression was also given as if I gave the principal reason for domestic violence as a lack of sex. It is pathetic that the power of media is repeatedly misused to cast doubt on the integrity of persons in political authority for obvious reasons.

Comrade Gwen knows very well that right from the start of my presentation, I expressed strong support for the Bill including support for stronger measures against culprits including denial of bail and arbitrary salary confiscation.

Quite clearly I expressed reservations about certain aspects of the Bill. That is quite normal in the process of legislation. To those who have not watched the news or who have no access to the Hansard will forever remain with the impression that I was an opponent of the Bill. Where is the objectivity of *The Namibian*? Intentionally the editor wants me to look a villain in the eyes of the public. Why?

This is what I had to say in relation to the aspect of the Bill that I have a problem with. Section 2(b) of the Bill gives the right to the complainant to lay charges against a partner who obliges the complainant to have unwanted sex. The section is not implying such complainant to be female. He/she could be of either sex. In my statement I said I will move an amendment to section 2(b) so that a partner who is continuously denied sex could have recourse to the law to lay a complaint and seek protection.

Where did comrade Gwen get it that such a partner will be a man? I never suggested that. In fact judging from snaps from the rooms it is the men who are accused of deserting wives, thus also turning their backs against their partners. The reasons comrade Gwen, could as well be among those which you mentioned, such as bad smell, drunkenness, suspicion of being carriers etc. Whatever the good reason such could constitute cause for violence.

I then refer to the other problem I have. That of removing a respondent from the common residence while maintaining thereof of the same by the respondent. I then express my dismay at the naivete for the different family setups in this country by the authors of the section. I assume it is this aspect of my comment that provoked comrade Gwen's reaction.

Truly speaking our compatriots of European descent continue to want to impose their indo-european jurisprudence over the black majority. Such and other cultural domination is no longer to be left unchallenged.

The contemplated measures under section 14(2)(c) may work well in an urban situation. In the National Assembly debate, I called it the brick or stone house situation. But transfer it to a rural subsistence farming culture, then you will realise it is not implementable. More so if the respondent is a traditional polygamist, which our constitution allows.

Sight must not be lost of the patriarchal or matriarchal clannish complex relationships existing in our black community family set up. The relationship is not that simple as the authors of these parts of the legislation would like the world to believe.

Then Gwen was lecturing me on the would-be rationale for rejection of one partner by another. Being no longer attractive or filthy or opulent etc. Well good granted – so why sticking to the partner, why not propose separation, why wait for so long until someone enforces his right to sex? The answer is clear. Such a partner is opportunistic. He or she is no longer in community of love but only of property.

Granted it is his/her right to lay a charge as in 2(b)(ii) but the same right must be extended to the other party denied sex to lay a complaint with the police, that is all I am demanding.

Dianne Hubbard's reinforcement of Gwen's expose does not address itself to my concern about the selectivity of sexism or call it feminism of certain sections of the Bill. Her narration of Sarah's plight gives an impression as of the draft law *per se* being questioned. Sarah's protection must be guaranteed. What is questionable is why must Haimbodi be exiled from his property even long before the due process is carried out?

To the extent that such power is given to the Police. What guarantee is there that Sarah and the Police are incapable of cooking up such a story to get rid of Haimbodi from his property. Worst of it is Sarah will be granted the right of use of all property within the residency irrespective as to whether such asset belongs to the joint estate or not. Thus practically alienating such assets to Sarah without due compensation. Such legislation will be draconian in nature.

I suggest that short of exiling any party from the common residence that such be demarcated into two according to needs until such time as the dispute is settled.

The assumption by the editorial that the Minister was against the Bill without proof is clear demonstration of the spirit of feminism agenda advocated by some in the name of gender equality which must be rejected. As a self-respecting legislator, I will not stand by watching the gender police being hijacked by feminism.

**Helmut K Angula**  
**Minister**

*The Namibian*, "Readers' Letters", Friday 15 November 2002

## A response to the Minister

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# Stopping the Violence Spiral

I would like to comment on some of the issues raised by Honourable Helmut K Angula on the Combating of Domestic Violence Bill in his letter to the editor published in *The Namibian* last week (15 November).

Section 2(b) of the Combating of Domestic Violence Bill makes it possible for a complainant to seek a protection order in a case where a partner obliges him or her to engage in unwanted sexual conduct. If the sexual conduct in question falls within the definition of "sexual act" in the Combating of Rape Act, the wronged partner could also lay a charge of rape – otherwise, the criminal offence would be indecent assault or assault.

In his speech in Parliament, the Honourable Minister proposed that there should be parallel remedies for partners who are continuously denied sexual relations. There is no legal obligation on persons to engage in sexual relations outside of marriage. But, if the Honourable Minister is referring to marriage partners, the civil law already provides a remedy for the partner who is continuously denied sex in the absence of a legitimate health-related reason for abstention – that remedy is divorce. Sexual relations are an expected component of the marital relationship. The long-term denial of sexual relations is a form of desertion and an accepted grounds for divorce under civil law. (This remedy could be extended by statute to customary marriages if it does not already exist in that context.)

But forcing someone to engage in a sexual activity can never be equated with refusing to engage in a consensual sexual activity. To see the logic of this, think of it in another context. Your business partner wants to shake hands with you. You do not want to comply. He grabs you and forcibly seizes your hand, threatening to punch you in the nose if you do not submit. You could charge him with assault for this intrusion on your bodily integrity. But should he be able to lay a criminal charge against you simply because you repeatedly refused to extend the expected hand of friendship? His injury is simply not equal to yours – commission and omission are not always two sides of the same coin.

Moving on to some of the Minister's other concerns, I agree with him that the Combating of Domestic Violence Bill will not work for everyone. No law on this topic can help everyone, because



domestic violence takes so many different forms. To take an extreme example, consider murder-suicides in domestic relationships, where a disgruntled partner shoots his/her spouse and then kills himself/herself. No law on earth is likely to be effective in such a situation. And there will be many people in both urban and rural areas who will not feel comfortable discussing their private lives in court, or who will never use legal remedies because of their hopes for reconciliation.

But the bill has been drafted in a way that tries to be as sensitive to rural settings as to urban ones. For example, the list of personal effects which might be dealt with in a protection order includes agricultural implements and livestock along with credit cards and chequebooks (section 14(2)(f)). Another provision talks about directing the respondent to pay rent for the complainant or “otherwise make arrangements for any other accommodation or shelter” (section 14(2)(d)). The thinking behind this wording was that in rural areas, the most sensible approach to alternative accommodation might be to construct another dwelling in the homestead. There was certainly an attempt to move beyond the brick and stone house situation.

Minister Angula is also concerned about the plight of Haimbodi, the violent partner of our battered wife Sarah, who can be ordered to leave the joint residence even before he gets a chance to tell his side of the story to the court.

There are several safeguards for Haimbodi in the draft bill. An order giving Sarah the right to exclusive occupation of the joint residence would be available only where an act of physical violence has been committed, and only after the court has considered a number of key factors – the length of time the residence has been shared, the accommodation needs of the complainant (Sarah) and any other occupants of the residence, and any undue hardship that may fall on the respondent (Haimbodi). And, until the court has heard from Haimbodi, the order is only a temporary one. He will have his chance to try to convince the court that Sarah was lying.

In my opinion, this is fair. Why should the victim of the violence always be the one who has to flee? Why shouldn't the violent party be the one who suffers the inconvenience of relocation?

And yes, Sarah can be given the right to use some or all of the property in the joint residence, but what is wrong with that? If she is the one who has to flee, she is not likely to take more than the clothes she can carry – why should the violent party end up comfortably ensconced in the home with the use of all the household goods?

Another safeguard is that orders for exclusive occupation of a joint residence owned by the other partner can remain in force for a maximum of six months. Such an order is intended only as a short-term measure to give the victim of the violence a fair chance to reorganise his or her life. Haimbodi will suffer some temporary inconvenience, but he is not at risk of losing his ownership of house or furniture.

Certainly, it is possible that false claims may be made under the domestic violence law, but that is no reason to reject the law. People lay false charges of assault and theft from time to time, but this does not stop us from trying to prosecute the guilty. Presenting false information to a court is a serious offence, and those who lie to the court are likely to be caught and punished accordingly.

The alternative proposed by the Minister of drawing a line down the middle of the joint residence so that both parties can remain there seems unworkable (and downright dangerous) in a violent situation.

Domestic violence is a thorny problem. The Bill which is before Parliament is probably not the ideal solution – it is quite likely that no society has found the ideal solution to the problem as yet.

But should Parliament really quibble about sexual deprivation when there are women (and perhaps some men) being cooked and stabbed and burnt and shot by their partners? Let us not lose sight of the magnitude of the problem. The court is specifically directed not to grant protection orders in respect of “minor or trivial acts or incidents of domestic violence” (section 7(2)(b)). The bill is not aimed at arguments over who washes the nappies. It is intended to interrupt the spiral of violence which is common in domestic relationships, in the hope of saving some lives.

**Dianne Hubbard**  
**Legal Assistance Centre**

*The Namibian*, “Readers' Letters”, Friday 22 November 2002

picked up on this, saying that “*in the rural communities you find that it is not uncommon for a partner to disable the other’s phallus*”, and that this will be said of a man who helps with household chores such as “*washing nappies and underwear*”. He proposed that the definition of domestic violence should include “*disablement of phallus through physical harm or herbal or any traditional method*”.<sup>28</sup> The female Minister of Health responded in very practical terms by giving a medical lecture on erectile dysfunction, which inspired keen interest in the House.<sup>29</sup>

The issue of ‘sexual denial’ came up again in the National Council debate, this time with the interesting twist of being motivated by concern for women whose husbands are having extra-marital affairs. One male MP suggested that the definition of domestic violence should cover several problems stemming from adultery: sexual denial (“*some husbands nowadays have a common practice in Namibia to cohabit with other ladies in other places and don’t care to visit their spouses for a period of even two years which results in denial of someone’s sexual right*”), economic abuse in allowing the third party to the adultery to have financial control over family resources (“*men in most cases have their bank accounts managed by their mistresses*”), and the possibility of obtaining a protection order against the mistress “*who has contributed to such abuse*”.<sup>30</sup>

These informal proposals for amendments were not actually added to the Bill at any stage.

### 3.5.3 Gender issues

The ‘battle of the sexes’ around the Bill cut across political party lines. At one stage, the Minister of Women Affairs and Child Welfare (female) expressed her disappointment that “*many Members of Parliament, especially our male colleagues, have turned the Bill into a women’s Bill*”. She also complained that “*it is common in this house that when you discuss issues that really touch women, there is laughter, jokes, there is no seriousness*”.<sup>31</sup> Conversely, the male Minister of Home Affairs asserted that the debate was biased against men:

*... [T]his Bill has been tabled by a male Minister and we are all concerned and want to soften the plight of the women folk who are traditionally oppressed. But listening to all the female colleagues who spoke, I don’t know whether they really want the support of the men or not, because that is not the aim of the Bill. We are here to combat this crime, which is domestic violence. But in all their speeches they are just targeting men and in that case they will force us to withdraw our support, and we are in the majority here. If we are serious that the Bill should pass, they not just come and complain about men. Otherwise I will withhold my support. We are not here to have a fight between male and female, it is everybody’s Bill. We drafted it, we made our input, but in that case we will withdraw our support.*<sup>32</sup>

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<sup>28</sup> Minister of Agriculture, Water and Rural Development (Hon Angula), National Assembly, 30 October 2002.

<sup>29</sup> Minister of Health and Social Services (Hon L Amathila), National Assembly, 14 November 2002. During the course of the discussion, she urged: “*Gentlemen, these things can be treated.*” See also Max Hamata, “*Impotence has nothing to do with juju*”, *The Namibian*, 15 November 2002.

<sup>30</sup> Hon Ndjambula, National Council, 29 April 2003.

<sup>31</sup> Hon Nandi-Ndaitwah, National Assembly, 18 November 2002.

<sup>32</sup> Hon Ekandjo, National Assembly, 21 November 2002.

The debate continued for some time in this vein, with male MPs arguing that female MPs were misusing the debate to blame men for domestic violence, rather than addressing specific aspects of the Bill.<sup>33</sup> Two male MPs accused the female MPs of trying to capitalise on the Bill for political self-advancement.<sup>34</sup> The Speaker chided the House at one stage for trivialising the Bill, while the Deputy Speaker remarked that the whole debate had “*degenerated and deteriorated*” into a sex and gender debate.<sup>35</sup>

Many male MPs emphasised that men should be considered equally the victims of domestic violence with women. Some examples:

*There are some Hon Members who seem to harbour the view that only men are perpetrators of domestic violence. This view is totally misplaced... Compared to women, men are reluctant to report domestic violence.*<sup>36</sup>

*... [I]t appears that this Bill is not about domestic violence, it is rather combating of beating up women, because in all arguments there is no gender balance.*<sup>37</sup>

Another male Parliamentarian conceded that “*the bulk of abuse in our communities is against women and children*”, but stated that there was nevertheless “*discrimination against men throughout this Bill*” because it does not give sufficient attention to psychological abuse perpetrated by women against men.<sup>38</sup> Yet another asserted that the “*people who are going to suffer the most are the men*”.<sup>39</sup> On the other hand, one speaker noted (correctly) that “*there is nowhere in the Bill where the provisions seek to protect only women and not men*”.<sup>40</sup>

It is internationally accepted that women and children suffer far more domestic violence than men, meaning that insistence on ‘gender balance’ in this context actually denies the gendered nature of such violence.<sup>41</sup> Some male Parliamentarians did call attention to this fact. For example:

*... [T]he true facts are that today in Namibia 80% or more of the violence are [sic] committed against women and children... [T]here is no denial from my side that women can be violent but what I am saying is most violence that causes injuries is perpetrated by men against women.*<sup>42</sup>

*Violence against women and children is one of Namibia’s most severe human rights problems. We also know that women and children are most vulnerable as far as*

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<sup>33</sup> Minister of Fisheries and Marine Resources (Hon Iyambo), National Assembly, 21 November 2002.

<sup>34</sup> Minister of Trade and Industry (Hon Nyamu), National Assembly, 21 November 2002.

<sup>35</sup> Deputy Speaker, (Hon Konjore), National Assembly, 21 November 2002.

<sup>36</sup> Deputy Minister of Justice (Hon Kawana), speaking at close of second reading debate, National Assembly, 25 November 2002.

<sup>37</sup> Hon ya Kasita, National Council, 29 April 2003.

<sup>38</sup> Hon Junius, National Assembly, 13 November 2002.

<sup>39</sup> Deputy Minister of Environment and Tourism (Hon Ilonga), National Assembly, 19 November 2002.

<sup>40</sup> Deputy Minister of Justice (Hon Kawana), speaking at close of second reading debate, National Assembly, 25 November 2002.

<sup>41</sup> For example, a Namibian study of reported crimes involving domestic violence found that 86% of victims were female, while 93% of perpetrators were male. Legal Assistance Centre (LAC) and Law Reform and Development Commission (LRDC), *Domestic Violence Cases Reported to the Namibian Police: Case Characteristics and Police Response*. Windhoek: LAC and LRDC, 1999.

<sup>42</sup> Hon Kaiyamo, National Council, 29 April 2003.

*violence is concerned. Although I have to admit that women can be also violent and they can in terms of the Bill also commit acts of domestic violence against men. However, most violent acts in [the] domestic environment are perpetrated by men.*<sup>43</sup>

But it was for the most part only women Parliamentarians who acknowledged the relationship between the prevalence of women as victims of domestic violence and the position of women in society. The following statements were typical:

*Most domestic violence crimes reported to the police are committed by men, about 93%. A similar pattern holds true for other violent crimes reported to the police, showing that men are responsible for most of the violent crimes in our society... If domestic violence could be eliminated from our society, women would be significantly safer from violence, because violence is a constraint for women to access land, credit and other productive resources and, therefore, reduces their effective participation in the decision-making process for their advancement and their economic empowerment, social and political status.*<sup>44</sup>

*Although women can be violent towards their male partners and violence occurs also between partners of the same sex, the overwhelming burden of partner violence is borne by women at the hands of men... Women are particularly vulnerable to abuse by their partners in societies where there are marked inequalities between men and women, rigid gender roles, cultural norms that support a man's right to sex regardless of a woman's feelings and weak sanctions against such behaviour.*<sup>45</sup>

Only three male Parliamentarians made similar connections between domestic violence and underlying inequalities in society, with this statement being representative:

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<sup>43</sup> Hon Kapere, National Council, 12 May 2003.

<sup>44</sup> Hon Namises, National Assembly, 30 October 2002. The statistics she cited come from the LRDC-LAC report cited in footnote 41 above.

<sup>45</sup> Minister of Health and Social Services (Hon L Amathila), National Assembly, 14 November 2002. Other statements made by female MPs connecting domestic violence to structural inequalities between women and men included the following:

*... [S]tatistical evidence from the Law Reform Commission points to the fact that more women than men are victims of domestic violence. It is hence safe to conclude that oppressive gender relations within society, as reflected through culturally determined gender roles, have a lot to do with domestic violence. It is hence my sincere hope that this radical piece of legislation will serve to eradicate the traditional portrayal of an 'ideal woman' as being submissive, married, rural-based, faithful and loyal to the spouse and parents. These misconceptions, coupled with alcohol and drug abuse, have for too long contributed a great deal of domestic violence within society. (Hon Amukugo, National Assembly, 14 November 2002)*

*The debate on the Bill has also shown that everything evolves around property, ownership and control which are still regulated in the traditional way in our rural areas... There are important factors contributing to violence. (Hon Nandi-Ndaitwah, National Assembly, 18 November 2002)*

*During the liberation struggle for our independence, women carried a double yoke of oppression – on the one hand, the yoke of foreign domination by both the German and South African regimes. Murder, rape and all sorts of discrimination were imposed on women. On the other hand, it was the yoke of our husbands with their traditional beliefs, where the husband was a king and the wife was the slave for fetching firewood, water, cook, plough and hoe the field even though she was pregnant. All she had to do was to fulfil the requirements of the king... The Namibian women continued to suffer even after independence by being subjected by their countrymen to domestic violence, while men are fully enjoying the peace and stability of this country which were brought about by both men and women. For how long will Namibian women not enjoy equal status like the fellow men folk? (Hon Sioka, National Assembly, 21 November 2002; interjections omitted)*

*I believe one of the root causes for domestic violence is the unequal relations of power between men and women and this results in domination and discrimination against women at home, at work and in community generally.<sup>46</sup>*

### 3.5.4 Echoes of gender concerns from previous debates

Some of the themes which arose in the Parliamentary debate around domestic violence echoed concerns from the debate around the Married Persons Equality Act 1 of 1996, which removed the husband's legal "marital power" over his wife and his automatic status as head of household. The connection was explicitly noted by the Minister of Women Affairs and Child Welfare, who also drew parallels between the removal of sexism and the removal of racism:

*I was at the point to remind this House that the debate on this Bill is taking me back to the debate on the Married Persons Equality Bill in 1996. During that time I said to this august House that the Married Persons Equality Bill, once it becomes a law, will protect both men and women. I also mentioned that I had understood the reaction of some members of this House that their reaction was based on [the] power relationship between men and women, coupled by their fear of the unknown. I can say what guided the reaction of some members of this House is the fear of the unknown that always comes with any change... [A]t the time of Namibia's independence, some Namibians who benefited from the colonial policies, especially the whites, sold their homes and other assets and moved to South Africa and other countries due to fear of the unknown that comes with change – just to come back a few days after Namibia's independence. That was fear of the unknown and that is what we are seeing now, fear of the unknown.<sup>47</sup>*

Support for the man as the "head of the household" came up in this debate, oddly, in a speech supporting the Bill because of its gender neutrality:

*This Bill... is also most welcomed by many of us because it is a neutral Bill... The Bill is trying to curb the problems between women, men and children and how they treat each other... there are also men who are daily punished by their wives but who*

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<sup>46</sup> Hon Kapere, National Council, 12 May 2003. Two others made similar statements:

*Because most victims of intimate violence are women, researchers who analysed social factors contributing to spouse abuse, often focus on the role of women in society. In most societies, economic and social systems operate directly and indirectly to support a patriarchal social order and family structure. ... [P]atriarchy is associated with the subordination and oppression of women. Some analysts believe that patriarchy accounts for the historical patterns of violence directed against women in intimate relationships. Over and above, in a patriarchal society, violence is often institutionalised or formalised in the social system, for instance the traditional laws and customs that permit husbands to physically punish their wives. Also, it is believed that patriarchy contributes to lower economic status for women, which may increase women's likelihood of becoming entangled in an abusive relationship... [L]awmakers in this august House should not allow antiquated customary laws and traditions which oppress women to prevail in Namibia. (Deputy Minister of Regional and Local Government and Housing (Hon Kaapanda), National Assembly, 18 November 2002)*

*In man's attempts over the millennia to dominate, control and exploit women and minors, violence has always been the tool and last resort of enforcing power and control. Suffice it to concede, therefore, that for millennia, domestic relations had been the reflection of gender power relations and structures. (Hon Ulenga, National Assembly, 20 November 2002)*

<sup>47</sup> Hon Nandi-Ndaitwah, National Assembly, 18 November 2002.

*are afraid to report these cases to the police. That is why the numbers of their cases are not increasing gradually just like those of their female counterparts. I will not deny that women and children are really mistreated by male counterparts or the traditional heads of the households. From an African perspective, the head of the household is the man and I hope it remains that way. Therefore, I am appealing to both sides to settle their problems amicably without resorting to any form of force or violence.*<sup>48</sup>

At this stage, the debate degenerated into a dispute (primarily between male and female MPs) about the changing roles of men and women in the family, whether a first wife must consent to additional wives in polygamous marriages, whether women who wear provocative clothing invite rape (with several female MPs pointing out that women in several cultures in Namibia have historically gone “*naked*” or with bare breasts without promoting rape), and whether women “*promote*” domestic violence by having extra-marital affairs.<sup>49</sup>

The Biblical story of creation came up in this debate, as in past Parliamentary debates involving gender issues.<sup>50</sup> One male MP asserted that the part of the Bill dealing with “*intimate relationships*” such as those between husbands and wives, is “*more sensitive*” and “*cannot really be addressed at the same level and angle as any other domestic relationships, because an intimate relationship dates back as far as history*”:

*We remember that during the Creation a man was created and I think all the things that were created belonged to this man only, but it was thought that it is not good for a man to be alone although he was the owner of everything on earth. The only shortcoming that was there was a life partner. After the life partner was created, they were told that ‘you are to leave your parents and your family and you are to stick to your partner and not vice versa’. It was not said that ‘you are to leave your husband or wife and you have to stick to your parents’. I think this is where the problem is...*

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<sup>48</sup> Hon /Ui/o/oo, National Assembly, 22 November 2006. Another male MP in the same debate had previously acknowledged that “*most victims of domestic violence are women and children*” (Hon Ndjoze, National Assembly, 22 November 2006).

<sup>49</sup> One female MP pointed to the custom of *lobola* as being one factor that maintains the subordinate role of women:

*To illustrate my point, traditional norms and values have accorded women a secondary place in society, community and at the family level. She is, for example, bought by the husband through lobola and is destined to spend the rest of her productive life taking care of not only the husband and children, but his extended family as well. Consequently, she will not have time to participate in self-development activities, which would enable her to play a meaningful role in the social arena. In other words, she is disempowered and turned into a dependent human being without a voice. If she does not live up to expectations, she will be punished accordingly.* (Hon Amukugo, National Assembly, 14 November 2002)

She also referred to the “*head of the household*” disparagingly as the “*boss of the household*”.

As the dust began to settle, another male Parliamentarian continued with the theme that women and men are both violent, citing as evidence the fact that “*political history has shown us that no woman has even been in power without going to war*” and saying that women have become individual victims of violence due to their “*biological nature*” (Hon ya France, National Assembly, 22 November 2006).

On other days in Parliament, the symbol of changing gender roles was the question of whether or not a man could wash nappies. As noted above, one male MP said that a man who washes nappies would be recognised as the victim of his wife’s witchcraft. Some men maintained that such actions by men would be contrary to many Namibian cultures (Minister of Agriculture, Water and Rural Development (Hon Angula), National Assembly, 30 October 2002). One female MP retorted that “*culture and tradition are not static but changeable*” and that she would not be ashamed to ask her husband in front of his own mother to “*go and wash the nappies*” (Hon Amukugo, National Assembly, 14 November 2002).

<sup>50</sup> See Dianne Hubbard, “Gender and Sexuality: The Law Reform Landscape” in Dianne Hubbard and Suzanne LaFont, eds, *Unravelling Taboos*, Windhoek: Legal Assistance Centre, 2007.

... If we can provide the partners that are abused with the assurance that after you have laid a charge against your partner, the relationship will remain the same, I think the partners will never hesitate to lay charges against their partners. If they are not assured about the status of the relationship after everything has happened, they will still proceed on the same trend, that they are being abused, they cannot report because they are protecting the relationship. No one wants to be without a partner, it was already there with the Creation and the desire will remain.<sup>51</sup>

Two male MPs referred to the Biblical admonition that wives should obey their husbands, with one of them saying:

*Some members of our society are believers, they believe in the Bible and the Bible says women should obey their husbands, and it is difficult for them to get away from that. They now perhaps believe that we want to amend the Bible.*<sup>52</sup>

In the course of an ensuing discussion on whether or not the Bible can be amended, a female MP pointed out that “*the Bible was written by men*”,<sup>53</sup> and the male Deputy Speaker interjected that “*the Bible says wives should obey their husbands, but it also says the husbands must love their wives*”.<sup>54</sup>

In the National Council, the creation story was offered as a reason for valuing women:

*... when God created man and woman he was not stupid. He thought that a society without a woman is incomplete. Therefore, women should appreciate and thank God who gave us a very expensive diamond in the form of a woman.*<sup>55</sup>

The animal world also came up, as in some previous debates on gender issues, with cattle being cited as being more civilised than some men:

*Can't we learn from them on how to treat our women and other fellow human beings? Men, look at the bulls... a bull is always protecting cows and calves. They never violate the cows. What is wrong with the human being...?*<sup>56</sup>

The suggestion that the Bill was a tool of some small group of elite women came up in this debate, as in the debate on the Married Persons Equality Act:

*This law is addressing only the people who live in the stone houses [urban residents] and that is where the problem is... It cannot only address those people who live in stone houses, but also those who live in grass thatch houses [rural residents]... There are fancy people coming from somewhere with fancy ideas and they have*

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<sup>51</sup> Hon Katjita, National Assembly, 22 November 2006.

<sup>52</sup> Minister of Persons and Correctional Services (Hon ya Toivo), National Assembly, 22 November 2006. The other reference to this Biblical injunction was as follows: [T]he morals of the home and household say, ‘wives, give way to your husbands, as you should in the Lord. Husbands love your wives and treat them with gentleness’. The husbands must also love their wives and not beat them up. ‘Children, be obedient to your parents.’” (Hon Moongo, National Assembly, 20 October 2006)

<sup>53</sup> Minister of Health and Social Service (Hon L Amathila), National Assembly, 22 November 2006.

<sup>54</sup> Deputy Speaker (Hon Kanjore), National Assembly, 22 November 2006. As noted above, Hon Moongo also made reference to this point on another day.

<sup>55</sup> Hon Shangheta, National Council, 29 April 2003.

<sup>56</sup> *Ibid.*

*never lived in [the village of] Kongolo. They don't know what it is to be in [the village of] Kanhenge...*<sup>57</sup>

*I discussed this Bill with quite a number of women and I can probably say that this Bill does not enjoy the support of the ordinary Namibian women. It may enjoy the support of a few elite women who are trying to have this Bill in order to control their husbands and boyfriends. It does not enjoy the support of the ordinary Namibian women.*<sup>58</sup>

Another echo of a previous debate concerned the topic of marital rape, which was outlawed by the Combating of Rape Act 8 of 2000, after a heated discussion in Parliament.<sup>59</sup> Three years later, the introductory speech by the Deputy Minister of Justice to the debate on the Combating of Domestic Violence Bill acknowledged the prevalence of forced sex within intimate relationships:

*Some men in our society like to patronise bars, get drunk, sleep around with other women without protection and in the process contract HIV/AIDS, go home drunk and start beating their partners and infect them with HIV/AIDS. This is the sad reality of some of our men today.*<sup>60</sup>

However, the existence of marital rape was vehemently disputed by another male Parliamentarian:

*If you look at clause 2 of this Bill [on sexual violence]... we are told, for the first time as Africans, that if a husband, for example, advances sexual requests to his wife when his wife's sexual desire has not been mobilised, that it will be interpreted as rape. What nonsense! Do you mean a married wife is being raped by her husband? Is this African?... what would happen if a husband is refused sex to which he is entitled? What would happen is that I would start looking around outside [the marriage]. The husband would start looking outside for other favours and the consequence will be that we will not be able to control HIV/AIDS. Yes, because immediately the husbands go outside, looking for girlfriends...*<sup>61</sup>

When this speaker was reminded that he himself was a Member of Parliament when the Combating of Rape Act made marital rape illegal, he insisted “*I am not aware of a wife raping her husband. I never read of a case in a court of law where a husband was sentenced because he had raped his wife.*”<sup>62</sup>

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<sup>57</sup> Minister of Agriculture, Water and Rural Development (Hon Angula), National Assembly, 30 October 2002.

<sup>58</sup> Deputy Minister of Prisons and Correctional Services (Hon Nambinga), National Assembly, 25 November 2006.

<sup>59</sup> See Legal Assistance Centre (LAC), *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, Windhoek: LAC, 2006 at 88-ff for a discussion of the Parliamentary debate on marital rape.

<sup>60</sup> Deputy Minister of Justice (Hon Kawana), Second Reading Speech, National Assembly, 22 October 2002.

<sup>61</sup> Deputy Minister of Prisons and Correctional Services (Hon Nambinga), National Assembly, 25 November 2002.

<sup>62</sup> Deputy Minister of Prisons and Correctional Services (Hon Nambinga), National Assembly, 25 November 2002. The speaker was correct if he was referring to Namibian court cases; the first reported Namibian case involving marital rape came almost one year later: *S v Lopez* 2003 NR 162 (HC), decided on 16 September 2003.



## 3.5.5 Culture

Culture was raised from several different angles. When the Deputy Minister introduced the Bill, he stated that the need for the Bill “*is a manifestation of the failure of our religious values, cultural values and family values*”.<sup>63</sup>

One of his colleagues, on the contrary, felt that the Bill itself was a sign that “*we Africans are gradually, but thoroughly, losing track of our traditional values*”. Focusing on sexual violence, this MP argued that “*we are making laws that we know will only divide families and then force them to start looking elsewhere for their [sexual] entitlements*”, emphasising that “*if a person commits serious domestic violence, he must feel it, but not the petty things that happen in the bedroom*”. He went on to allege that the Bill was “*anti-marriage*” and should be named the “*Incitement of Domestic Violence and Disunity among Family Members Bill*”.<sup>64</sup>

Another MP made an interesting reference to the Bill as being “*culture-neutral*”:

*I am alive to the issues of cultural or traditional values when dealing with a law that is meant to govern or regulate our conduct and, for that matter, conduct of this in intimate relationships... The challenge before the honourable House is to craft legislation that will be all-inclusive, or to use the clumsy phrase, legislation that will be culture-neutral, if it were to be of relevance in a multi-cultural environment such as ours. In any case, we must not see culture and tradition as static and must be prepared to discard those practices in our cultures which serve no purpose in the day and age we live.*<sup>65</sup>

Other interventions focused on the cultural acceptance of domestic violence as a sign of affection. One female MP said that “*sometimes in our country you hear that the women are saying, ‘oh, he gave me a blue eye because he loves me’*”.<sup>66</sup> A female MP spoke about how this cultural belief has become corrupted by men:

*[T]here is a tendency in Namibia by some violent men who think that when you have a wife or a permanent companion and you do not beat her, this means you do not love her from the bottom of your heart. This was only practically possible in the previous decade when traditional norms were very much respected and adhered to. Nowadays some violent men do not apply the method for the purpose it was intended for. Instead, they opt for serious abuse of their wives as they claim to have bought them from their parents.*<sup>67</sup>

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<sup>63</sup> Deputy Minister of Justice (Hon Kawana), Second Reading Speech, National Assembly, 22 October 2002.

<sup>64</sup> Deputy Minister of Prisons and Correctional Services (Hon Nambinga), National Assembly, 25 November 2002.

<sup>65</sup> Hon Gurirab, National Assembly, 22 November 2002.

<sup>66</sup> Minister of Health and Social Services (Hon L Amathila), National Assembly, 14 November 2002. The Minister of Women Affairs and Child Welfare (Hon Nandi-Ndaitwah) also spoke to this issue:

*It has been argued to some extent domestic violence against women is done at the pressure of women as a sign of love. That may be the case as part of history, but I have to tell you that it is no longer the case. Insinuations have been made that if women living in urban areas no longer accept domestic violence as a sign of love, that is not the case in rural areas. What an insult to the majority of the Namibian women who live in rural areas. ... (National Assembly, 18 November 2002)*

<sup>67</sup> Hon Lucas, National Assembly, 15 November 2002.

On the other hand, one male MP with a background as a traditional leader used references to “*African culture*” as an argument for mutual respect within the home and the recognition of the rights of both husband and wife:

*Don't beat your wife like a donkey. Don't insult her like a stranger. Respect her as a human being who happens to be with you. That is the culture I know. She must not insult you like a stranger, she must respect you like a husband.*<sup>68</sup>

The Minister of Women Affairs and Child Welfare asserted that people raise “*tradition*” only it suits their interests.<sup>69</sup>

The Deputy Minister of Justice made a strong statement on the supremacy of constitutional values over cultural values at the close of the Second Reading debate. Noting that some had alleged that aspects of the Bill were “*alien to the Namibian culture and tradition*”, the Deputy Minister reviewed in detail Namibia’s constitutional and international obligations pertaining to equality between men and women. He then stated:

*These are the values which every Hon Member of this august House affirms every day. If these fundamental principles and values are in conflict with our culture and tradition, then the supreme law of the land should prevail. Equality between men and women is guaranteed in the supreme law of the land, the Namibian Constitution. If international instruments, which our government has acceded to or ratified, are in conflict with our culture and tradition, then in terms of Article 144 of the Namibian Constitution, these international instruments prevail over the Namibian culture and tradition. In terms of Article 66 of the Namibian Constitution, the Namibian culture and tradition is only valid to the extent that they do not conflict with the Namibian Constitution or any other statutory law.*<sup>70</sup>

He went on to say: “*I support the Namibian culture and tradition to the extent that they are not used as hidden instruments of oppression against women or any other person.*” On the point that the Bill imposed alien cultural ideas, his response was that:

*We live in the 21<sup>st</sup> century, the era of globalisation; whether we like it or not, certain foreign cultures and traditions would always have a major role to play in this country. The evidence is with regard to our own children: their ways of life are fundamentally different from the ways in which we used to live when we were growing up.*<sup>71</sup>

Three male MPs in the National Council also took a particularly strong stand against using culture as an excuse for inequality:

*The notion of hiding behind culture and tradition to justify enslaving of women does not hold water and must be dismissed at all costs. Anyhow I only respect but I don't subscribe to customs, culture or tradition if it is promoting backwardness. In*

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<sup>68</sup> Hon Riruako, National Assembly, 29 October 2002. Another male MP said that some of the things in the Bill are not appropriate to “*African tradition*”, referring specifically to a husband’s right to bring a child that he has conceived outside the marriage into the marital household (Minister of Lands, Resettlement and Rehabilitation (Hon Pohamba), National Assembly, 30 October 2002).

<sup>69</sup> Hon Nandi-Ndaitwah, National Assembly, 18 November 2002.

<sup>70</sup> Deputy Minister of Justice (Hon Kawana), speaking at the close of the Second Reading Debate, National Assembly, 25 November 2002.

<sup>71</sup> *Ibid.*

*our house without any shame, contrary to the belief of some conservative members meant particularly in the National Assembly, I will assist my wife in changing our baby nappies. I will assist my wife in the kitchen by washing the dishes, and if need be I will prepare food. My wife is not a slave, she is a partner in the marriage... an equal partner.*<sup>72</sup>

*Although it is true that certain backward traditional heritages, cultural norms and some religious beliefs have a direct influence in making certain men believe in their superstitious superiorities and women believe in themselves being inferior, those days are gone... [T]he message we are sending out from this august House is that noble men are those men who take women as their equal partners and not subjects and as our mothers and not our opponents.*<sup>73</sup>

*[The Bill] also seeks to promote the eradication of elements in the traditional norms and religious beliefs, practices and stereotypes that legitimise and exacerbate the persistence and tolerance of violence against women and children.*<sup>74</sup>

### 3.5.6 The meaning of “domestic relationship”

Some of the comments about the definition of “domestic relationship” in the Bill revealed much about Namibian society. The Deputy Minister noted that the Bill covers cohabitating couples, as “*we cannot ignore the fact that a large section of our people are living together as if they are in a marriage relationship*”. However, he ended his speech by emphasising that the Bill “*does not give protection to any homosexual relationships*”, because such relationships “*are not recognised by the Namibian customs and traditions or by the laws of our Republic*”.<sup>75</sup>

Another Parliamentarian made a similar statement:

*... [W]hat is of utmost important is that the Domestic Violence Bill does not give protection to any homosexual relationship... I am aware that there are some elements in our society who are exploring all possible avenues to further the agenda and interests of homosexuals. I wish to remind them that the law of the land is supreme and all other laws that were enacted and to be enacted by this lawmaking body should be binding. My argument can be attested to by the case of two women who wanted to be recognised as a married couple and were disqualified by a court decision because it is contrary to the Namibian customs and traditions.*<sup>76</sup>

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<sup>72</sup> Hon Kaiyamo, National Council, 28 April 2003. He went on to point out the hypocrisy of ridiculing men who cook in the home when paid chefs are usually men.

<sup>73</sup> Hon Hakaye, National Council, 7 May 2003.

<sup>74</sup> Hon Kapere, National Council, 12 May 2003.

<sup>75</sup> Deputy Minister of Justice (Hon Kawana), Second Reading Speech, National Assembly, 22 October 2002. In support of this opinion, the Deputy Minister referred to the Supreme Court case of *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC), which held that failure to take into account a lesbian relationship with a Namibian citizen as a positive factor in an application for permanent residence by the foreign partner in the relationship is not unfair discrimination in terms of the Namibian Constitution, referring extensively to Namibian traditions and values and saying that “[e]quality before the law for each person does not mean equality before the law for each person’s sexual relationships”. At 155E-F. However, Parliament apparently failed to note that the Court emphasised that nothing in its judgement “*justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution*”. At 156H.

<sup>76</sup> Hon Lucas, National Assembly, 15 November 2002. The court case referred to here is also the *Frank* case, although it is not accurately described. See the footnote above.

One opposition MP in the National Council proposed that the law *should* apply to romantic relationships between persons of the same sex:

*I am well aware that some of us are totally against romantic relationships between people of the same sexes and here I am referring to homosexuality and lesbianism. But it is something that exist[s] and I must say that it is quite for me understandable why the legal drafter was omitting to address this specific issue because of perhaps how most of the members are feeling about this issues. But there are violent cases in such relationships going on and they need to be addressed since these people are also sometimes behaving very violently. My question is which act is going to be applied if there are violent cases between people who are of the same sex and they are living together intimately?*<sup>77</sup>

This proposal was reportedly met with loud objections from ruling party MPs, who made comments such as “*are you referring to moffies, not in Namibia*”.<sup>78</sup> It did not make any headway.

One female MP said that the fact that the Bill refers to men and women who are “*married to each other*” promotes the spirit of shared responsibility and mutual respect, and nullifies male domination; this is because traditionally in many Namibian cultures the man would be perceived as having “*married*” the woman, with the woman being in a passive position more akin to an acquired commodity.<sup>79</sup>

### 3.5.7 Support for the Bill

Despite the many points of debate, the Bill was eventually supported in both Houses by most MPs, both male and female. Here are examples of some of the statements of support:

*... [T]he Bill does not aim at making women get even with men, but rather at liberating those that are vulnerable in the privacy of their homes. The Bill is not simply about extending the law in the domestic chambers but it is about providing a response that is aimed at protecting the vulnerable at home. The proposed law on combating domestic violence intends to introduce a transition from a culture of impunity to a culture of accountability. Though the Bill will not necessarily nip domestic violence in the bud, it will be a sufficient deterrent.*<sup>80</sup>

*We must also acknowledge that domestic violence is a problem and is prevalent in our society. Domestic violence is a crime just like any other crime and cannot be treated in a different manner, and therefore, we have to fight it tooth and nail... Domestic violence is an evil, a cancer which... is slowly killing the values and ethics of our young nation and should be condemned in the strongest terms. We all must*

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<sup>77</sup> Hon Murorua, National Council, 7 May 2003. The same MP raised the issue again (on 12 May 2003), arguing that failure to cover same-sex relationships would constitute unconstitutional discrimination on the basis of sex or social status.

<sup>78</sup> Petros Kuteeue, “Bill should deal with ‘same-sex’ situations”, 8 May 2003. *Moffie* is a derogatory term for gay men. These reported interjections do not appear in the official record of the Parliamentary debate. One SWAPO MP commented on record that “*any life or love without opposite sexual partnership is immoral or dead*” (Hon Tuhadeleni, National Council, 6 May 2003).

<sup>79</sup> Hon Amukugo, National Assembly, 14 November 2002.

<sup>80</sup> Hon Chata, National Assembly, 19 November 2002.

*agree that crime should not be tolerated and, therefore, as the saying goes, charity begins at home. We should start fighting domestic violence in our homes where we do not need any law enforcement unit to come and do it for us. Every one of us must be a policeman of his or her own... Namibia has had enough of violence and now that we are independent everybody should enjoy freedom, including freedom of our homes.*<sup>81</sup>

*I rose to give my full support to the Bill without any “ifs” or “buts”, my full support... I do not agree with the trivialities made with the intent to ridicule the seriousness of the Bill.*<sup>82</sup>

*Violence, whatever form it takes, particularly again[st] women and children, must today undoubtedly rank as one of Namibia’s most severe human rights problems... Honourable Members, these prophets calling this Bill interference in private affairs do not convince me. Domestic violence where it manifests itself must be rooted out and if need be even in private bedrooms.*<sup>83</sup>

## 3.6 AMENDMENTS TO THE BILL AND PASSAGE BY PARLIAMENT

In late 2002, Parliament referred the Bill to the Parliamentary Standing Committee on Governmental Affairs. This Committee sent the Bill back to the full National Assembly in March 2003, with proposals for some minor amendments to the Bill, primarily concerning technical matters of detail.

In March 2003, the Deputy Minister of Justice tabled amendments based on the Committee report, and the House followed its usual procedure of going into session as a “Committee of the Whole” to consider amendments to the Bill clause by clause.

At this stage, building on concerns about men as victims of domestic violence, a member of one of the opposition parties proposed an amendment to the Bill which would define three new forms of domestic violence: (1) “*deliberate denial of sexual intercourse in domestic relations*” (with a caveat that condoms or other safe sex methods could be insisted upon if there was a suspicion that one of the partners was HIV positive); (2) “*deliberate economic or financial exploitation*” in a domestic relationship; and (3) causing impotency “*in any way*” or accusing the other partner of causing impotency.<sup>84</sup> Female Parliamentarians in particular objected vociferously to these proposals, with one female MP being forced by the Chairperson to withdraw a statement that the MP in question and his brothers were “*killers*”.<sup>85</sup> However, another male MP supported his colleague by suggesting that women who deny sex to their husbands in this way are the cause of marital rape:

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<sup>81</sup> Director-General of Namibia Central Intelligence Service (Hon Tsheehama), National Assembly, 25 November 2002.

<sup>82</sup> Minister of Foreign Affairs (Hon Hamutenya), National Assembly, 25 November 2002.

<sup>83</sup> Hon Kaiyamo, National Council, 29 April 2003. This male MP went on to point out that domestic violence is against the law, harmful to the family and harmful to society at large.

<sup>84</sup> Amendments offered by Hon Moongo of the DTA/UDF Coalitoin, National Assembly, 27 March 2003.

<sup>85</sup> Exchange between Chairperson of Committees and Hon Muhurukua, National Assembly, 27 March 2003.

*The killing is taking place because of the quarrelling. There is rejection of your husband and he is forcing you until he rapes you because of your reluctance... And you want to put your husband as a hostage of your own desire. You know what you want all the time, that's not fair...*<sup>86</sup>

Without mentioning sexual equality, the (male) Minister of Justice took the position that the House should not “*legislate for superstition*” and concluded that “*the amendment is not worth the paper on which it is written*”.<sup>87</sup> The Deputy Minister of Justice chimed in by saying that the proposal was “*a stone age amendment in the 21<sup>st</sup> century*”.<sup>88</sup> The proposed amendment was then rejected by a divided House.

All of the amendments proposed by the Deputy Minister of Justice on the basis of the Committee report were accepted without opposition (see box below for details), and the National Assembly passed the Bill on 27 March 2003.<sup>89</sup>

### PARLIAMENT'S AMENDMENTS TO THE COMBATING OF DOMESTIC VIOLENCE BILL

The following amendments to the Combating of Domestic Violence Bill were proposed and accepted in the National Assembly after the second reading of the Bill:

- insertion of a definition of “*dependant*” as “*a person who is legally entitled to be maintained by another person*”;
- a minor amendment of the definition of “*weapon*”;<sup>1</sup>
- limitation of the definition of economic abuse directed at third parties to “*dependants*” of the complainant rather than the broader reference to “*family members and dependants*” of the complainant used in the initial Bill;<sup>2</sup>
- substitution of a new definition of emotional, verbal or psychological abuse, which was somewhat broader and more concrete than the original definition;<sup>3</sup>
- a corresponding technical amendment to the provision which defined psychological abuse of a child to include exposing the child to domestic violence against another person with whom the child has a domestic relationship;<sup>4</sup>
- the provision in the original Bill stating that a “*domestic relationship*” is considered to continue for two years after the relationship ends (through divorce, break-up or the death of a child who was the basis of a continuing bond between an unmarried couple) was reduced to one year, but a clause allowing a court to extend the time period if satisfied that there are good reasons to do so was retained;<sup>5</sup>

<sup>86</sup> Hon Riruako, National Assembly, 27 March 2003.

<sup>87</sup> Hon Tjiriange, National Assembly, 27 March 2003.

<sup>88</sup> Hon Kawana, National Assembly, 27 March 2003.

<sup>89</sup> National Assembly, 27 March 2003. However, the Deputy Minister of Justice nevertheless seemed to be exaggerating at this point when he thanked all the Members of the House for their “*unqualified support*”.

- an amendment to the provision in the Bill which would have allowed a minor to seek a protection order in respect of any form of domestic violence without the assistance of an adult if the court is satisfied that the minor has sufficient understanding and if the alleged domestic violence is of a serious nature, limiting this possibility to cases of physical abuse, sexual abuse and intimidation but removing the requirement of seriousness;<sup>6</sup>
- an amendment adding an additional factor to the list of factors which the court must consider before making an order for exclusive occupation of the joint residence, to require that the court consider “*in the case of communal land, the respective customary practice which governs the rights of ownership to or occupation of that communal land*”;<sup>7</sup>
- a limit to the original provision which would have allowed the court to order the respondent to make provision for alternative accommodation for the complainant and “*any child or other person in the care of the complainant*” in appropriate cases if the respondent is legally liable to support the complainant, to provide that this applies only to alternative accommodation for the complainant and dependants of the complainant if the respondent is legally liable to support the complainant *and those dependants*;<sup>8</sup> and
- an amendment specifying that orders pertaining to the possession of property must be limited to property owned by one of the parties, and excluding property that is partially owned by any third party.<sup>9</sup>

<sup>1</sup> Clause 1 of the original Bill said that weapon “*means a firearm or any other object that can be used to inflict injury on another person*”. The amended definition in section 1 of the final Act said that weapon “*includes an arm as defined in section 1 of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996) or any other object designed or used to inflict or cause physical bodily harm*”. The explanation offered in the National Assembly for the amendment was that the new definition would not cover objects which are not ordinarily designed or used to cause harm, but the women’s movement felt that the practical effect of the definition was essentially unchanged by the alteration.

<sup>2</sup> The original Bill defined “economic abuse” in clause 2(1)(c) as including

- (i) *the unreasonable deprivation of any economic or financial resources to which the complainant, or a family member or dependant of the complainant is entitled under any law, requires out of necessity or has a reasonable expectation of use, including household necessities, and mortgage bond repayments or rent payments in respect of a shared household;*
- (ii) *unreasonably disposing of moveable or immovable property in which the complainant or a family member or dependant of the complainant, has an interest or a reasonable expectation of use;*
- (iii) *destroying or damaging, property in which the complainant, or a family member or a dependant of the complainant, has an interest or a reasonable expectation of use; or*
- (iv) *hiding or hindering the use of property in which the complainant, or a family member or dependant of the complainant, has an interest or a reasonable expectation of use.*

The amended definition adopted in section 2(1)(c) of the final Act simply removed the reference to “*family member*” in subclause (i) while retaining it in subclauses (ii)-(iv). The women’s movement felt that the definition was still sufficient to cover most of the envisaged situations, such as where, for example, a man tries to control the behaviour of a former girlfriend by threatening not to pay maintenance for their child if she gets involved with another man.

<sup>3</sup> The original definition in clause 2(1)(g) of the Bill was “*any pattern of conduct which seriously degrades or humiliates the complainant, or a family member or dependant of the complainant, or deprives such person of privacy, liberty, integrity or security*”. The amended definition adopted in section 2(1)(g) of the final Act was

*a pattern of degrading or humiliating conduct towards a complainant, or a family member or dependant of the complainant, including –*

- (i) *repeated insults, ridicule or name calling,*
- (ii) *causing emotional pain; or*
- (iii) *the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's, or the complainant's dependant or family member's privacy, liberty, integrity or security.*

<sup>4</sup> Because of the change to clause 2(1)(g), the introductory wording of clause 2(2) of the Bill, “*without detracting from the general definition in subsection (1)(g)...*”, was changed to “*for the purposes of subsection (1)(g)...*”.

<sup>5</sup> Compare clauses 3(2)-(3) in the original Bill with section 3(3) in the final Act. The original Bill stated:

*(2) Subject to subsection (3), where a “domestic relationship” is based directly or indirectly on past marriage or engagement, past cohabitation or any other past intimate relationship, the “domestic relationship” continues for two years after the dissolution of the marriage or engagement, the cessation of cohabitation or the end of any other intimate relationship, but, where a child is born to any couple, their “domestic relationship” continues throughout the lifetime of that child or for two years after the death of the child.*

*(3) If, in an application for a protection order, a court is satisfied that good reasons exist not to restrict the continuation of a relationship to two years as provided for in subsection (2), the court may extend that period to exceed two years.*

The final Act substituted “*one year*” for “*two years*” in both of these subsections.

<sup>6</sup> Compare clause 4(5) in the original Bill with section 4(5) in the final Act. The original Bill stated:

*(5) Notwithstanding any other law, a minor may apply for a protection order without the assistance of an adult person if the court is satisfied that the minor has sufficient understanding to make the proposed application, but the court must not proceed with the application unless the court is satisfied that the alleged domestic violence is of a serious nature.*

The final Act stated:

*(5) Notwithstanding any other law, a minor may apply for a protection order without the assistance of an adult person if the court is satisfied that the minor has sufficient understanding to make the proposed application, but the court must not proceed with the application unless the court is satisfied that the alleged domestic violence consists of the conduct contemplated in section 2(1)(a), (b) or (d) [referring to the definition of physical, sexual and intimidation].*

<sup>7</sup> Compare clause 14(2)(c) in the original Bill with section 14(2)(c) in the final Act.

<sup>8</sup> Compare clause 14(2)(d) in the original Bill with section 14(2)(d) in the final Act. The women’s movement felt that this limitation was not an unreasonable one, although it could work to disadvantage children who had in fact been up to that time a part of the common household but were not actually children of the respondent (such as step-children). It noted that children born outside marriage would be not be disadvantaged by the amendment, as both parents have legal liability for the maintenance of children born to them inside or outside marriage.

<sup>9</sup> Compare clause 14(2)(f) in the original Bill with section 14(2)(f) in the final Act. The women’s movement concluded that this limitation seemed to be a reasonable one and would protect the rights of third parties who are not involved in the domestic relationship, noting that the provision was in any event primarily designed to cover situations where an abuser tries to control someone by hiding a passport, a bank book, clothes or equipment necessary for work or school, or some other such personal item.

These amendments passed through the National Assembly too quickly to allow for effective lobbying. However, the Legal Assistance Centre prepared an analysis of the proposed amendments prior the Bill’s tabling in the National Council, and the Legal Assistance Centre and the Multi-Media Campaign attempted to persuade the National Council to oppose one of the amendments. The contested amendment was the addition of a requirement that the court consider the customary practices governing communal land before making an order for exclusive occupation of a joint residence on communal land. The women’s movement was concerned that this factor might work to the disadvantage of rural women (see the following box).



## Excerpt from submission by Multi-Media Campaign to National Council, 2003

**The Multi-Media Campaign strongly supports the Combating of Domestic Violence Bill and urges its speedy passage.** We believe that the issues in the Bill have been thoroughly canvassed throughout the country. Several of our member organisations have explained the provisions of the Bill to their members, and there were numerous demonstrations in locations throughout the nation during February this year calling for the urgent enactment of this important law. The horrific cases reported in the press on a daily basis illustrate the desperate need for improved measures to combat domestic violence. We realise that a new law is only one small part of the process, but we feel that the protections offered by the Bill would be of great assistance to many Namibians – women children and even men – in both urban and rural areas.

We have only one concern about the Bill as it currently stands. The National Assembly made a number of last minute amendments to the Domestic Violence Bill. Our members are particularly concerned about **the amendment made to Clause 14(2)(iii)**. This clause concerns the power of a court to make an order that the abusive party must temporarily vacate a joint residence of the parties. This order is available only in cases where there has been physical violence. It does not make any change in property ownership, but allows for the victim of the violence to continue living in his or her accustomed home for a temporary period until he or she can sort out a future plan. The order can remain in force only for specified periods – a maximum of six months if the residence is owned by the respondent, and a maximum of one year if the residence is jointly owned. In the case of a leased residence, the order cannot extend beyond the period of the current lease. We support the general idea behind this provision – why should the victim of the violence be the one to suffer the inconvenience of immediate relocation rather than the abuser who has made the home a dangerous place?

Our concern lies only with the last-minute amendment made by the National Assembly. In terms of the original Bill, the court must consider a list of factors before it can grant one party exclusive occupation of a joint residence – the length of time the residence has been shared, the accommodation needs of the complainant and any other occupants of the residence, and any undue hardship that will result to the respondent or any other person. The amendment adds an additional factor to the existing list:

*in the case of communal land, the respective customary practice which governs the rights of ownership or occupation of that communal land.*

**Our concern is that this new factor may prejudice the ability of rural women to obtain the right to occupy a joint residence on communal land temporarily.** The amendment also seems to indicate a misunderstanding of the purpose of the provision. As explained above, a protection order can never affect ownership or allocation of a residence, not under any circumstances. It governs only the temporary right to occupy the residence. The purpose of the provision is to allow a victim of domestic violence an opportunity to continue to reside in the accustomed place for a temporary period, to allow him or her a reasonable opportunity to make alternative arrangements rather than having to flee to safety right away. So, because the order is temporary, it should not involve customary law issues at all. The ownership and

occupancy rights of the communal land in question are not affected in the long term and so do not really need to be taken into account.

**We submit that a better course of action would be to amend Clause 15, which sets out the maximum time periods for orders for exclusive occupation of a joint residence.** This clause neglects to set a maximum time period for an order for exclusive occupation of a joint residence which is on communal land allocated to the respondent or the complainant. This omission could easily be corrected, by setting a time period of six months in a case where the land is allocated to the respondent, and a maximum time period of one year in a case where the land is allocated jointly to the complainant and the respondent. (If the land has been allocated to the complainant alone, then there should be no maximum time period – the length of the order can be left to the discretion of the court.) These time periods would mirror the ones already provide for joint residences which are owned by one or both of the parties. **Our proposed amendment would make it clear that no permanent right is being affected, and so should take care of the concerns which may have given rise to the inappropriate amendment to Clause 14...**

We note that many members of the National Assembly raised concerns about the need to make sure that the Bill will adequately serve women in the rural areas. Because it is customary in most Namibian communities for communal land to be allocated to male members of the household, the amendment made to Clause 14 will clearly mitigate against the interests of abused women in rural areas. We hope that the National Council, being more closely aligned to the regions of Namibia and thus in a better position to serve regional interests, will be able to adjust this problem in a way which takes the concerns of rural women into account more effectively.

The Bill was tabled in the National Council on 28 April 2003. The National Council debated the Bill and passed it without any recommendations for change on 12 May 2003.

Although the effort to persuade the National Council to reject the amendment pertaining to joint residences on communal land was unsuccessful, the women's movement was pleased that the basic structure and philosophy of the Bill remained unchanged as it made its way through Parliament.

Rumour had it that personal support for the Bill on the part of then-President Sam Nujoma was instrumental in its ultimate passage.

The Act was signed by the President and then published in the *Government Gazette* in June 2003.<sup>90</sup> Regulations and forms to be used with the Act were drafted by the Ministry of Justice and published in the *Government Gazette* a few months later.<sup>91</sup> The Act came into force on 17 November 2003.<sup>92</sup>

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<sup>90</sup> Government Gazette 3002, dated 24 June 2003. It should be noted that the initial Gazette contained an inaccurate version of the law which failed to incorporate the amendments made on the floor of the National Assembly. The correct Gazette bears the same number and date but contains a notation at the top stating "This Gazette replaces Gazette No. 3002 of 24 June 2003".

<sup>91</sup> Regulations and forms are contained in Government Notice 235 of 2003, Government Gazette 3094, dated 17 November 2003.

<sup>92</sup> Government Notice 234 of 2003, Government Gazette 3094, dated 17 November 2003.

## 3.7 DETAILED SUMMARY AND ANALYSIS OF THE LAW

The basic approach taken by the Act is to provide choices regarding remedies. The legal framework chosen was guided by the opinion of many international experts that a comprehensive domestic violence statute dealing with both criminal and civil aspects of the problem is ideal.<sup>93</sup>

In terms of the Namibian law, anyone who has experienced “*domestic violence*” in a “*domestic relationship*” can do the following:

- apply to a magistrate’s court for a protection order which will say that the abuser must stop the violent behaviour;
- if the abuse amounts to a crime, lay a charge with the police or ask the police to give the abuser a warning; or
- take both of these courses of action at the same time.<sup>94</sup>

The provisions of the Act are summarised in simple language, with illustrations and examples, in the Legal Assistance Centre’s *Guide to the Combating of Domestic Violence Act 4 of 2003*.<sup>95</sup>

### 3.7.1 Definition of “domestic violence”

The definition of “domestic violence” in the Act was guided by the UN Framework for Model Legislation on Domestic Violence,<sup>96</sup> and is similar to the definition in the South African *Domestic Violence Act 116 of 1998*.<sup>97</sup>

The following conduct constitutes “*domestic violence*” in terms of the Act if it occurs in a “*domestic relationship*”:

- physical abuse
- sexual abuse
- economic abuse (including destruction or damage to property)
- intimidation
- harassment (including stalking)
- trespass
- emotional, verbal or psychological abuse.<sup>98</sup>

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<sup>93</sup> See Dianne Hubbard and Daina Wise, *Domestic Violence: Proposals for Law Reform*, Windhoek: Legal Assistance Centre, 1998 at 17.

<sup>94</sup> See Combating of Domestic Violence Act 4 of 2003, section 19.

<sup>95</sup> Legal Assistance Centre (LAC), *Guide to the Combating of Domestic Violence Act 4 of 2003*, Windhoek: LAC, most recent re-print 2010. This booklet is available in English, Afrikaans, Nama/Damara, Oshiwambo and Otjiherero.

<sup>96</sup> UN Framework for Model Legislation on Domestic Violence, E/CN.4/1996/53/Add.2.

<sup>97</sup> Other sources consulted as models included the New Zealand Domestic Violence Act 86 of 1995, the Mauritius Protection from Domestic Violence Bill 1997 and the Puerto Rico Domestic Abuse Prevention and Intervention Act 54 of 1989, as well as various international and regional commitments to which Namibia is a party. See Legal Assistance Centre (LAC), *International Human Rights Law & Gender*, Windhoek: LAC, 2005 at “Part C: Violence against Women” for a summary of these commitments. “Part C” is based on a paper entitled *International Human Rights Law and Violence Against Women* prepared for a 3-day workshop hosted by the Ministry of Women Affairs in 2001 on an Integrated Strategy on Violence against Women and distributed as a reference document to all participants.

<sup>98</sup> Combating of Domestic Violence Act 4 of 2003, section 2(1).

**Physical abuse** includes:

- physical assault or any use of physical force against the complainant;
- forcibly confining or detaining the complainant; or
- physically depriving the complainant of access to food, water, clothing, shelter or rest.<sup>99</sup>

**Sexual abuse** includes:

- forcing the complainant to engage in any sexual contact; engaging in any sexual conduct that abuses, humiliates or degrades or otherwise violates the sexual integrity of the complainant;
- exposing the complainant to sexual material which humiliates, degrades or violates the complainant's sexual integrity; or
- engaging in such contact or conduct with another person with whom the complainant has emotional ties.<sup>100</sup>

**Economic abuse** includes:

- the unreasonable deprivation of any economic or financial resources to which the complainant, (or a dependant of the complainant) is entitled under any law, requires out of necessity or has a reasonable expectation of use – including household necessities, and mortgage bond repayments or rent payments in respect of a shared household;
- unreasonably disposing of moveable or immovable property in which the complainant (or a family member or dependant of the complainant) has an interest or a reasonable expectation of use;
- destroying or damaging property in which the complainant (or a family member or dependant of the complainant) has an interest, a reasonable expectation of use;
- hiding or hindering the use of property in which the complainant (or a family member or dependant of the complainant) has an interest or a reasonable expectation of use.<sup>101</sup>

**Intimidation** means intentionally inducing fear in the complainant (or a family member or dependant of the complainant) by:

- committing physical abuse against a family member or dependant of the complainant;
- threatening to physically abuse the complainant, or a family member or dependant of the complainant;
- exhibiting a weapon;
- any other menacing behaviour, including sending, delivering or causing to be delivered an item which implies menacing behaviour.<sup>102</sup>

**Harassment** means repeatedly following, pursuing or accosting the complainant (or a family member or dependant of the complainant), or making persistent unwelcome communications – such as:

- watching, or loitering outside or near the building or place where such person resides, works, carries on business studies or happens to be;
- repeatedly making telephone calls or inducing a third person to make telephone calls to such person, whether or not conversation ensues; or repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects or messages to such person's residence, school or workplace.<sup>103</sup>

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<sup>99</sup> *Id*, section 2(1)(a).

<sup>100</sup> *Id*, section 2(1)(b).

<sup>101</sup> *Id*, section 2(1)(c).

<sup>102</sup> *Id*, section 2(1)(d).

<sup>103</sup> *Id*, section 2(1)(e).

**Trespass** means entering the residence or property of the complainant, without the express or implied consent of the complainant, where the persons in question do not share the same residence.<sup>104</sup>

**Emotional, verbal or psychological abuse** means a pattern of degrading or humiliating conduct towards a complainant (or a family member or dependant of the complainant) including:

- repeated insults, ridicule or name calling;
- causing emotional pain;
- the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's, or the complainant's dependant or family member's privacy, liberty, integrity or security.<sup>105</sup>

**Threats or attempts** to carry out any of these acts also constitute domestic violence.<sup>106</sup>

The Act also provides that **psychological abuse of a child** includes a situation where someone other than a victim of domestic violence:

- repeatedly causes or allows a child to see or hear the physical, sexual, or psychological abuse of a person with whom that child has a domestic relationship;
- repeatedly puts a child at risk of seeing or hearing such abuse;
- repeatedly allows a child to be put at risk of seeing or hearing such abuse.<sup>107</sup>

The Act specifies that a single act can amount to domestic violence, also noting that a number of acts that form part of a pattern of behaviour may amount to domestic violence even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.<sup>108</sup>

## 3.7.2 Definition of “domestic relationship”

Like the definition of domestic violence, the definition of “*domestic relationship*” in the Act was guided mainly by the UN Framework for Model Legislation on Domestic Violence<sup>109</sup> and the South African *Domestic Violence Act 116 of 1998*.

In terms of the Act, a “*domestic relationship*” includes:

- a civil or customary marriage, a former marriage or an engagement to be married;
- a cohabitation relationship, where two people of different sexes are or were living together as if they were married;
- parents who have a child together, or are expecting a child together (regardless of whether they have ever lived together);
- parent and child;

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<sup>104</sup> *Id.*, section 2(1)(f).

<sup>105</sup> *Id.*, section 2(1)(g).

<sup>106</sup> *Id.*, section 2(1)(h).

<sup>107</sup> *Id.*, section 2(2). The provision expressly providing that the victim of the abuse cannot be guilty of this form of psychological violence was inserted to remove a possible loophole which would enable the perpetrator of violence to use this provision against the victim. It was based on a similar provision in section 3 of New Zealand's *Domestic Violence Act 86 of 1995*.

<sup>108</sup> *Id.*, sections 2(3)-(4) and 7(3).

<sup>109</sup> UN Framework for Model Legislation on Domestic Violence, E/CN.4/1996/53/Add.2.

- any family member related by blood, marriage or adoption, as long as there is some actual connection between them, such as financial dependency or sharing a household (including people who *would* be family members if a cohabiting couple were married);
- any two people of different sexes who are or were in an intimate or romantic relationship.<sup>110</sup>

The Act explicitly limits its protection of romantic and cohabiting relationships to those between persons of different sexes. The express exclusion of same-sex couples was made in a context of public criticism of homosexuality by the President and other leading government figures.<sup>111</sup>

Because it was recognised that times of change can be the most dangerous in terms of domestic violence, a “*domestic relationship*” for the purpose of the Act extends for one year after the connection between the parties has come to an end (such as by a divorce or a break-up). If two people have a child together, their “*domestic relationship*” continues for the lifetime of the child, or for one year after the child’s death. The court has the power to consider the further extension of a “*domestic relationship*” if there are good reasons to do so.<sup>112</sup>

### 3.7.3 Protection orders

A protection order is a civil order which resembles an urgent interdict issued by the High Court, but is less expensive and more accessible to obtain. It can be issued by a magistrate’s court in a proceeding which does not require lawyers. Protection orders are intended to provide abused persons with an option which is less drastic than laying a criminal charge, or to give additional protection during the period when a criminal charge is being laid.

#### Procedure for obtaining protection orders

Anyone who has been abused or threatened with abuse in a domestic relationship may apply to a magistrate’s court for a protection order.<sup>113</sup> A minor may bring an application without the assistance of an adult in cases of physical abuse, sexual abuse or intimidation, provided that the court is persuaded that the minor has sufficient understanding to act alone.<sup>114</sup>

It is also possible for a person with an interest in the well-being of the victim to bring an application on his or her behalf. This could be, for example, a family member, a police officer, a social worker, a health care provider, a teacher, a traditional leader, a religious leader or an employer. The person who has actually suffered the violence must give written consent for the application to be made by someone else, unless the victim of the violence is:

<sup>110</sup> Combating of Domestic Violence Act 4 of 2003, section 3(1), (4).

<sup>111</sup> See “Namibia: Obsession and Opportunism” in Human Rights Watch and The International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, New York: Human Rights Watch, 2003, available at <[www.hrw.org/reports/2003/safrica/index.htm](http://www.hrw.org/reports/2003/safrica/index.htm)>.

<sup>112</sup> Combating of Domestic Violence Act 4 of 2003, section 3(2)-(3).

<sup>113</sup> *Id.*, section 4(1).

<sup>114</sup> *Id.*, section 4(5).

- a minor;
- a mentally incapacitated person;
- an unconscious person;
- a person who is regularly under the influence of alcohol or drugs, where the court approves such an application; or
- a person who is at risk of such serious physical harm that the court approves an application in the absence of the victim's consent.<sup>115</sup>

In terms of the Act, the person who applies for a protection order is called the *applicant*. The person who is experiencing the domestic violence is called the *complainant*. The applicant and the complainant can be the same person (where a person applies for a protection order for himself or herself) or different people (in cases where the application is made by one person on someone else's behalf). The person against whom the protection order is requested is called the *respondent*.<sup>116</sup>

The jurisdiction requirements are very liberal. A magistrate's court can issue a protection order in the jurisdiction where the complainant or the respondent resides or works, or where the abuse took place. There is no minimum period of residence for the complainant, to take care of the possibility that the complainant might have fled from his or her usual home to avoid the violence.<sup>117</sup> Any protection order is enforceable throughout Namibia.

An application for a protection order is made by means of an affidavit, written on a pre-prepared form (or in any similar manner).<sup>118</sup> Clerks of court have a statutory duty to help applicants complete the application forms.<sup>119</sup> Protection order applications must be dealt with as a matter of urgency, and the regulations issued under the Act specifically state that the court may sit outside ordinary court hours and days to hear such applications if the need arises.<sup>120</sup>

An applicant can provide supporting evidence, such as affidavits from witnesses or medical reports, but this is not required; the court considering the application has the discretion to call for further documentary evidence or oral evidence before making a decision.<sup>121</sup> Complainants may omit their current physical address from the application if they do not want the respondent to have access to this information, but in such cases the court will not be able to make an order forbidding the respondent to enter the complainant's residence.<sup>122</sup>

It is a specific criminal offence in terms of the Act to make false statements in respect of an application for a protection order, with a penalty of a fine up to N\$4000 or imprisonment for up to one year, or both.<sup>123</sup>

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<sup>115</sup> *Id*, section 4(2)-(4), (6); regulation 2(2)-(3).

<sup>116</sup> *Id*, section 1.

<sup>117</sup> *Id*, section 5.

<sup>118</sup> *Id*, section 6; regulation 2.

<sup>119</sup> Section 6(4) states: "*The clerk of the court, or a prosecutor assigned to the court concerned, must inform an applicant who approaches him or her for the purpose of making an application of the relief available under this Part and must assist the applicant to prepare the application.*"

<sup>120</sup> Combating of Domestic Violence Act 4 of 2003, regulation 2(5).

<sup>121</sup> *Id*, section 8(2)-(3).

<sup>122</sup> *Id*, section 6(5).

<sup>123</sup> *Id*, section 6(7).

The Act provides for both interim and final protection orders. The theory behind protection orders is that they must be available quickly and on an *ex parte* basis, like urgent interdicts. This is because any legal action may place the applicant at greater risk of intimidation or harm. But if the application for a protection order has been heard *ex parte*, the court must issue only an interim protection order with a return date.<sup>124</sup> This mirrors the procedure for urgent interdicts in the High Court.

The return date is normally 30 days from the date of the interim order, but the respondent must have at least 10 days to answer after receiving notice of the interim order. The interim order will remain in force until the return date or the extended return date.<sup>125</sup>

A copy of the interim order must be sent to the police station which the respondent has named in the application as being the closest, and the police have a duty to provide the complainant with police protection “*to the extent reasonably necessary and possible*” until the interim order has been served on the respondent.<sup>126</sup>

The interim order comes into force as soon as it has been served on the respondent. The respondent must also be served with copies of any affidavits presented in support of the interim order, so that he or she will have a fair opportunity to oppose the final order.<sup>127</sup>

If the interim order was properly served on the respondent but the respondent does not give notice of intent to oppose it by the return date, then the interim order will become final.<sup>128</sup> However, the procedure here is not entirely clear. The court must (a) be satisfied that proper service has been effected on the respondent and (b) if so, confirm the interim protection order without holding an enquiry.<sup>129</sup> It is not clear whose responsibility it is to initiate this process of confirmation: the clerk of court or the complainant.

If the respondent *does* give notice of intent to oppose the order on or before the return date, then the clerk of court will set a date for an enquiry within one month of the respondent’s notice. Tying the date to the respondent’s notice gives the respondent the power to speed up the process, with the goal of minimising the inconvenience to the respondent if the

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<sup>124</sup> *Id.*, section 8(3)(a) and (4).

<sup>125</sup> *Id.*, section 8(5).

<sup>126</sup> *Id.*, section 8(6).

<sup>127</sup> *Id.*, section 9(1); Form 5 appended to the regulations. There is something of a gap here. Section 9(1) says that “*An interim protection order together with any other prescribed information must, within the prescribed period and in the prescribed form and manner, be served on the respondent.*” The regulations do not directly prescribe any information in terms of this provision; regulation 6 simply says that an interim protection order “*must be in a form substantially corresponding to Form 5*”, and Form 5 says that “*A copy of the sworn statement made in support of the application is attached, along with any other evidence which was put before the court.*”

<sup>128</sup> *Id.*, section 10.

<sup>129</sup> Section 10 of the Act states: “*10. If the respondent does not give notice of an intention to oppose the confirmation of the protection order on or before the return date contemplated in section 8, and the court is satisfied that proper service has been effected on the respondent, the court must confirm the interim protection order without holding the enquiry contemplated in section 12.*”

Furthermore, regulation 10 states: “*10. A final protection order contemplated in section 13(1) of the Act, whether or not it is preceded by an interim protection order, or an order for the modification or cancellation of a protection order as contemplated in section 17 of the Act, must be in a form substantially corresponding to Form 9A, accompanied by Form 9B where appropriate.*” It appears that the interim protection order issued on Form 5 is supposed to be supplemented with a final protection order on Form 9A, which contains the following as one possible option: “*The Court orders that the attached interim protection order be confirmed and made final.*”



interim order is not confirmed.<sup>130</sup> The respondent also has the right to request that the enquiry be held even sooner, so long as the clerk of court is able to give at least 24 hours notice to the applicant.<sup>131</sup>

Both the applicant and the respondent must be notified of the date for the enquiry. The interim order remains in force until the date of the enquiry, for the protection of the complainant.<sup>132</sup>

It is also possible that the court may decide that the evidence initially placed before it is insufficient to grant an interim order. In such a case, the court has the discretion to order that the matter be referred directly to an enquiry for decision, and to give any directions necessary in respect of this enquiry (such as directives about notice to the relevant parties).<sup>133</sup>

The enquiry is intended to be informal in nature, similar to the procedure for enquiries in respect of maintenance orders. Witnesses identified by either party, or by the court, will be summoned by subpoena; parties can ask for assistance with this step from the clerk of the court if necessary.<sup>134</sup> In keeping with the somewhat informal nature of the procedure, the applicant and the respondent can represent themselves, or they may be represented by a legal practitioner or any other person of their choice.<sup>135</sup> It was envisaged that some counselling groups might train support personnel how to assist in these proceedings, for the benefit of persons who cannot afford lawyers.

Enquiries are closed to the public, but each party is entitled to be accompanied by two support persons of their choice.<sup>136</sup>

The regulations specifically direct the court to focus on “*substantial justice between the parties*” rather than on strict adherence to rules of practice or procedure.<sup>137</sup> They go on to say that where one or both parties lack legal representation, the court must “*assist such parties in the quest to ensure that substantial justice is achieved and may use its discretion to ensure that the inquiry is held in a relaxed atmosphere where the parties can express themselves freely*”.<sup>138</sup> Regardless of legal representation, the court is expected to “*play an active role in the proceedings*” and to take an inquisitorial role “*in*

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<sup>130</sup> Combating of Domestic Violence Act 4 of 2003, section 11(1).

<sup>131</sup> *Id.*, section 11(2).

<sup>132</sup> *Id.*, section 11.

<sup>133</sup> *Id.*, section 8(3)(b)-(c).

<sup>134</sup> *Id.*, section 12(3)-(6) and regulation 4(11): “*Where a party wishes to arrange to summon witnesses through the court, the clerk of the court must assist such person to identify and summon such witnesses where the court considers it necessary, it may however limit the number of persons to be called as witnesses.*” The role of the phrase “*where the court considers it necessary*” is somewhat unclear in this formulation; it could refer to assistance in summoning witnesses or to limiting the number of persons to be called as witnesses.

<sup>135</sup> *Id.*, section 12(7).

<sup>136</sup> *Id.*, section 12(8); regulation 4(1). There seems to be a contradiction here. Section 12(8) states: “*Except with the permission of the court, a person whose presence is not necessary must not be present at an enquiry...*” – implying that a closed court will be the norm. Regulation 4(1) states: “*Where it considers it appropriate in the interests of the moral welfare or safety of the applicant, the court may order that the public or press be excluded from a domestic violence enquiry...*” – suggesting that an open court will be the norm, but that the court may exercise its discretion to remove press and public. The statutory rule would be the controlling one since regulations are subsidiary to their enabling legislation.

<sup>137</sup> *Id.*, regulation 4(5).

<sup>138</sup> *Id.*, regulation 4(6).

*an objective attempt to determine the facts in a manner that is aimed at ensuring that substantial justice is achieved between the parties*".<sup>139</sup>

Admissible evidence at an enquiry includes previous convictions of violent crimes in any context, records of previous protection orders refused or granted against any of the parties, reports of domestic violence previously made to the police, formal warnings issued by the police and variations or cancellation of protection orders.<sup>140</sup>

The statute limits postponements to cases where the court is satisfied that "*the party making the request would be severely prejudiced if the postponement is not granted*".<sup>141</sup> If the court grants a request for a postponement, it must extend any interim order in force to cover the period of the postponement.<sup>142</sup>

If the respondent, or both parties, fail to appear on the date of the enquiry, then the court may confirm the interim order or postpone the enquiry.<sup>143</sup> If the respondent shows up but the complainant fails to appear, the court may dismiss the enquiry if it is satisfied that the complainant no longer wishes to pursue the matter, or it may postpone the enquiry.<sup>144</sup> It may also decide that the matter may be decided on affidavit evidence, in which case the respondent has the option of asking for any person who made an affidavit to be summoned to court to be cross-examined.<sup>145</sup>

If the court is not satisfied that the complainant no longer wishes to pursue the matter, the court must direct the station commander of the police station named in the application to enquire into the reasons for the complainant's non-appearance, to ensure that there has been no intimidation. The police must provide appropriate police protection if any intimidation is discovered, and find out if the complainant still wishes to proceed with the application.<sup>146</sup>

The same procedures apply if the application is made by an applicant other than the complainant and neither the applicant nor the complainant appears on the date of the enquiry.<sup>147</sup>

The court has a wide discretion at the conclusion of the enquiry to confirm, discharge or adjust the interim order. Any order made after an enquiry is a final protection order.<sup>148</sup>

A final protection order must be served on the respondent in person at the conclusion of the enquiry, or in a manner prescribed by regulation if the respondent did not attend the enquiry. In the latter case, the interim protection order must be extended by the court to remain in force until the final protection order has been served. A copy of the final protection order must also be sent to the police station named by the applicant as being the closest.<sup>149</sup>

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<sup>139</sup> *Id.*, regulation 4(7).

<sup>140</sup> *Id.*, regulation 4(9).

<sup>141</sup> *Id.*, section 12(10).

<sup>142</sup> *Id.*, section 12(11); see also regulation 8.

<sup>143</sup> *Id.*, section 12(13).

<sup>144</sup> *Id.*, section 12(14).

<sup>145</sup> *Ibid.*

<sup>146</sup> *Id.*, section 12(15); regulation 9. A flaw with this procedure is that it is not clear how the court could satisfy itself of the complainant's wish to drop the matter in the absence of the complainant or a representative of the complainant. Neither the Act nor the regulations provide any withdrawal form or any procedure for withdrawal.

<sup>147</sup> See *id.*, section 12(14)-(15); regulation 9.

<sup>148</sup> *Id.*, section 12(16)-(17).

<sup>149</sup> *Id.*, section 13.

If either an interim or a final protection order “*involves*” children, the clerk of court must send a copy to the Permanent Secretary of the Ministry of Gender Equality and Child Welfare to consider if any action is warranted to ensure the protection of these children.<sup>150</sup> This could include, for example, investigation or monitoring by a social worker, or removal of the child from the home environment.

It should be noted that the court *must* grant a protection order if it is satisfied that there is evidence that the respondent is committing, or has committed domestic violence towards or in connection with the complainant. However, this directive comes with a caveat. A court must not grant a protection order solely in respect of behaviour which took place before the commencement of the Act; or in respect of minor or trivial incidents – keeping in mind the fact that behaviour which appears minor or trivial or unlikely to recur, could still form “*part of a pattern of behaviour which establishes a need for protection*”.<sup>151</sup>

There is no charge for the service of any notice or order in respect of an application for a protection order.<sup>152</sup> However, a court holding an enquiry may make an order relating to costs after taking into consideration the conduct of the parties involved and the means of the person against whom the order for costs is to be made.<sup>153</sup> This would enable the court, for example, to recover charges in respect of a vexation or frivolous application.

## Terms of protection orders

All protection orders must order the respondent not to commit domestic violence.<sup>154</sup> Other provisions are optional, depending on the circumstances. This means that an interim or a final protection order can be tailored to fit the situation at hand.

In determining what to include in a protection order, a court must have regard to a specified list of factors:

- (a) *the history of domestic violence by the respondent towards the complainant;*
- (b) *the nature of the domestic violence;*
- (c) *the existence of immediate danger to persons or property;*
- (d) *the complainant’s perception of the seriousness of the respondent’s behaviour;*  
*and*
- (e) *the need to preserve the health, safety and wellbeing of the complainant, any child or other person who is in the care of the complainant.*<sup>155</sup>

Protection orders can include provisions from the following categories:

- (a) **Weapons:** A protection order may order the respondent to surrender a firearm or other weapons. This can include, if appropriate, an order suspending any firearm licence for the duration of the protection order, or a provision ordering the police to search a specified place and seize any weapon.<sup>156</sup>

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<sup>150</sup> *Id.*, sections 8(7) and 13(4).

<sup>151</sup> *Id.*, section 7(1)-(3).

<sup>152</sup> *Id.*, section 20(1).

<sup>153</sup> *Id.*, section 20(2)-(3).

<sup>154</sup> *Id.*, section 14(1).

<sup>155</sup> *Id.*, section 7(4).

<sup>156</sup> *Id.*, section 14(2)(a).

- (b) **No-contact provisions:** A protection order may include “no contact” provisions which direct the respondent not to come near specified places frequented by the complainant or by any child or other person in the care of the complainant. This can include, for example, the complainant’s residence, workplace or school; a shelter or residence where the complainant is temporarily residing (such as a shelter for battered women) or the residences of specified family members. The no-contact provisions may also include a provision directing the respondent not to communicate in any way with the complainant or “*any child or other person in the care of the complainant or specified members of the complainant’s family*”. This restriction includes personal, written telephonic or electronic communication. As an alternative to complete prohibitions, the order can place conditions on contact or communication. If any “no-contact” provision is extended to a third party other than a child or other person in the care of the complainant, then that third party must give consent to be covered by the order. If a child other than a child of or in the care of the complainant is covered, the consent must come from that child’s parent or caretaker.<sup>157</sup>
- (c) **Exclusive occupation of a joint residence:** If an act of physical violence has been committed, a protection order may include a provision giving the complainant an exclusive right to occupy a joint residence, regardless of which party actually owns or leases it. This can include a provision directing that the contents of the joint residence (or certain specified contents) remain in the residence for the use of the person given possession; a provision directing a police officer to remove the respondent from the residence; or a provision authorising the respondent to collect personal belongings from the residence under police supervision.<sup>158</sup> Before making any order for exclusive occupation, the court must consider certain factors:
- the length of time that the residence has been shared (without prejudicing a complainant who has fled the residence because of the domestic violence);
  - the accommodation needs of the complainant as well as any other occupants of the residence, “*considered in light of the need to secure the health, safety and wellbeing of the complainant or any child or other person in the care of the complainant*”;
  - any undue hardship that might result for the respondent or any other person as a result of the order;<sup>159</sup>
  - in the case of a joint residence located on communal land, the customary law or practice which governs the allocation of that communal land.<sup>160</sup>

The right to occupy a joint residence is a common feature of protection order legislation in other countries. The theory is that it should not be the abused party – often a woman with children – who has to flee the home to escape the violence, but rather the person who has made the home situation intolerable. The specified factors which the court must consider are intended to guard against any unfair application of this aspect of protection orders.

- (d) **Alternative accommodation:** As an alternative to an exclusive right to occupy a joint residence, a protection order may include a provision directing the respondent to pay rent for alternative accommodation for the complainant, or to otherwise arrange

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<sup>157</sup> *Id.*, section 14(2)(b); see also regulation 2(4).

<sup>158</sup> *Id.*, section 14(2)(c).

<sup>159</sup> The qualifier “*undue*” is important here, as it is not unfair for a person who has committed an act of violence to suffer some hardship as a consequence.

<sup>160</sup> *Id.*, section 14(2)(c).

for another place for the complainant to stay. The clause on arranging for other accommodation was included with rural residences in mind, where the best solution might be the construction of a new rural homestead or a new hut within a family kraal.<sup>161</sup>

- (e) **Securing complainant's belongings:** The Act includes several options for securing the complainant's property. A protection order may include a provision directing a police officer to accompany the complainant (or another person acting on the complainant's behalf) to a joint residence to collect safely personal belongings of the complainant (or personal belongings of any person in the complainant's care).<sup>162</sup> This might be appropriate in a case where the complainant prefers to leave the joint residence or fails to secure an order for exclusive occupation of the joint residence. More generally, a protection order may include an order giving either party possession of specified personal property, such as a motor vehicle, furniture, agricultural implements, livestock, furniture, chequebooks, credit cards, children's clothing and toys, keys, personal documents or other necessary personal effects.<sup>163</sup> (The protection order can also direct the complainant to give specified personal property to the respondent, which could be especially relevant if the complainant is the one who remains in the shared home.<sup>164</sup>) Finally, a protection order may include a provision restraining either party, or both, from selling, damaging or disposing of property in which the other party may have an interest or a reasonable expectation of use, such as shared household furniture.<sup>165</sup>
  
- (f) **Temporary maintenance order:** A protection order may include a provision temporarily directing the respondent to make maintenance payments in respect of the complainant or a child of the complainant, if the respondent is legally liable to pay maintenance in respect of this person. This is designed to serve as an emergency measure where no such maintenance order is already in place. This would usually apply to the respondent's spouse or biological children, although there could be rare instances where maintenance could be demanded in respect of a parent or other family member. This provision was included on the theory that a victim of domestic violence might struggle to commence a range of court procedures all at once; the temporary maintenance order was intended to provide a stop-gap measure until the complainant has a reasonable chance to utilise the normal channels for maintenance. It was also included in acknowledgement of the fact that one reason women in particular fail to leave abusive relationships is fear that they will no longer be able to support their children without financial contributions from the abuser.
  
- (g) **Temporary order for child custody or access:** A protection order may include an order for temporary custody or access arrangements concerning a child of the complainant, if this is "*reasonably necessary for the safety of the child in question*".<sup>166</sup> Like the provision on temporary maintenance orders, this was intended as a stop-gap measure to allow the complainant time to utilise normal legal channels for such issues.

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<sup>161</sup> *Id.*, section 14(2)(d).

<sup>162</sup> *Id.*, section 14(2)(e).

<sup>163</sup> *Id.*, section 14(2)(f).

<sup>164</sup> *Id.*, section 14(2)(c)(iii).

<sup>165</sup> *Id.*, section 14(2)(g).

<sup>166</sup> *Id.*, section 14(2)(i)-(j).

- (h) **Other provisions:** A protection order may include any other provisions “*reasonably necessary*” to protect the safety of the complainant “*or any child or other person who is affected*”.<sup>167</sup> This gives the court broad discretion to fit the protection order to the specific circumstances at hand.

An early draft of the Bill proposed that a protection order should be able to include a provision directing the respondent to take part in a counselling or treatment programme approved by an appropriate government ministry for this purpose, with three conditions: (1) an appropriate programme must be available in reasonable proximity to the respondent’s residence; (2) the complainant must have no reasonable objections to such an order; and (3) the court cannot order the complainant to participate (although this does not preclude the complainant from voluntarily choosing to participate in counselling sessions). However, this provision was not retained in the final Bill because of government’s concern that there were insufficient programmes available.

## Duration of protection orders

Different provisions of a protection order can remain in force for different time periods:

- An order for sole occupation of a joint residence can stay in force for a maximum of 6 months (if the residence is owned by the respondent), for one year (if it is jointly owned), or for any period set by the court (if it is owned by the complainant).
- If the joint resident is leased, an order for sole occupation cannot remain in force beyond the end of the current lease period.
- An order about the possession of household effects such as furniture will have the same period as the order for occupation of the joint residence.
- A temporary maintenance order can remain in force for a maximum of six months, seeing that it is only an emergency measure and not intended to replace the role of the ordinary maintenance court.
- An order about child custody or access to children will remain in force until it is changed by another court order. This is because it would not be safe to allow an order which might affect the safety of children to expire automatically.
- Any other provision of a protection order can remain in force for a maximum of three years.<sup>168</sup>

## Modification or cancellation of protection orders

The complainant, the applicant or the respondent can also apply to the court to change or cancel a protection order at any time. The court must grant the request of a complainant or an applicant to cancel a protection order if it is satisfied that the request is in accordance with the complainant’s wishes, that it is freely and voluntarily made, and that cancellation of the order will not endanger the complainant or any child or other person concerned in the matter. If the *complainant or applicant* requests a modification, the court will proceed as though it were an original application for a protection order. If the *respondent* requests a modification or cancellation, the court must hold an enquiry at which it considers all relevant information, after giving at least 10 days notice of the enquiry to the complainant (and the applicant if there was one). The court, or either of the parties, can request an

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<sup>167</sup> *Id.*, section 14(2)(k).

<sup>168</sup> *Id.*, section 15.

independent evaluation of the circumstances by a social worker to guide a decision on modification or cancellation.<sup>169</sup>

## Appeals

Any decision of a magistrate's court concerning a protection order can be appealed to the High Court as a civil appeal, by the complainant or other applicant, or by the respondent.<sup>170</sup>

## Enforcement of protection orders

Violation of a protection order (either directly or through a third party) is a criminal offence.<sup>171</sup>

Where there is an infringement of the order, the normal course of action would be for the person protected by the order to notify the police of the violation. However, it is also possible for someone else to report that the order has been violated.<sup>172</sup> The informant will be required to make an affidavit giving details about how the respondent violated the protection order. The complainant (or someone else with the requisite information) can simultaneously lay a separate criminal charge (such as a charge of assault) against the respondent if the actions amount to a crime.

The police have the power to arrest a respondent without a warrant if there are reasonable grounds to suspect that the protection order has been violated.<sup>173</sup> The suspicion that the protection order has been violated can be based on the complainant's affidavit, on an affidavit from another person or on the observations of the police officer.

The penalty for violating a protection order is a fine of up to N\$8000 or imprisonment for up to two years, or both.<sup>174</sup>

## Other offences

Two provisions were added at a late stage in the Bill preparation, to respond to concerns about possible manipulation by complainants.

Firstly, except in the case of physical abuse, it is a defence to a charge of violation of a protection order to prove that the complainant voluntarily consented to the alleged breach.<sup>175</sup> This was designed to ensure that a complainant could not, for example, invite a respondent to visit and then claim that the respondent had breached a no-contact provision.

Secondly, the provision of false or misleading information to a police officer in relation to the breach of a protection order is a criminal offence in itself, punishable by a fine of up to N\$4000 or imprisonment for up to one year, or both.<sup>176</sup>

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<sup>169</sup> *Id*, section 17; regulation 11.

<sup>170</sup> *Id*, section 18.

<sup>171</sup> *Id*, section 16(1).

<sup>172</sup> *Id*, section 16(7).

<sup>173</sup> *Id*, section 23(1).

<sup>174</sup> *Id*, section 16, read together with section 23(1).

<sup>175</sup> *Id*, section 16(4).

<sup>176</sup> *Id*, section 16(5).

## 3.7.4 Domestic violence offences

### No new crimes

The Combating of Domestic Violence Act does not create any new crimes. The original proposals put forward by the Legal Assistance Centre suggested that there should be a new crime of “*domestic violence*”. The following motivations were put forward:

- Although acts of assault, indecent assault or rape are already criminal offences, a specific offence defined as domestic violence would help to raise public awareness about domestic violence and to indicate clearly that there are special procedures for dealing with it. It might also improve police attitudes towards domestic violence, by emphasising its criminal nature.
- Domestic violence differs from other offences in that it involves people who are in a relationship of mutual trust. The victim (usually a woman) is often reluctant to involve the law or send the perpetrator to jail, and the violence often escalates to serious levels before she turns to the law and the courts. If domestic violence were treated as a specific offence, it would be easier to implement a diversion programme for perpetrators – as has been done for juvenile justice – where a criminal case can be held in abeyance if the abuser agrees to undergo counselling or some other rehabilitative activity. If the perpetrator breaks the agreement, the state can proceed with the criminal case. It would also be possible to opt for diversion after a person is found guilty, in lieu of a prison sentence. It is not proposed that domestic violence offenders should get off lightly, but rather that the emphasis should be placed on changing behaviour. Such diversions might be appropriate for first offenders or where the injury was not serious. The victim often just wants the violence to stop, rather than to see the perpetrator punished. The diversion approach might lead victims to utilise legal remedies before the violence escalates to the point where alternatives to sentencing are inappropriate.
- Treating domestic violence as a discrete offence would make it easier to provide strict bail conditions, amended procedural rules, special arrest and charging policies and alternative sentences which take into account the relationship between the accused and the victim. It could also provide a basis for giving police enhanced powers, particularly in terms of arrest without a warrant and the power to seize firearms. There could also be a procedure to ensure that the views of the victim are considered before bail is granted, as provided in the Combating of Rape Bill which was (at that stage) about to go before Parliament.

The pros and cons of this proposal were hotly debated. The Ministry of Justice was particularly concerned about the complexities which would ensue from the creation of a new offence with a broad definition, and suggested a compromise approach whereby certain special provisions and procedures would be applied in the case of existing crimes which take place within the context of a “*domestic relationship*”. This compromise approach in fact addressed most of the motivations put forward for a new criminal offence, and the women’s movement eventually supported it.

The crimes which qualify for special treatment if they take place in domestic relationships are murder, rape, indecent assault, consensual sexual acts with persons under age 16 by someone more than three years older,<sup>177</sup> common assault, assault with intent to do grievous bodily harm,

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<sup>177</sup> This refers to contravention of section 14 of the Combating of Immoral Practices Act 21 of 1980.



kidnapping, trespass,<sup>178</sup> pointing a firearm,<sup>179</sup> malicious damage to property,<sup>180</sup> and *crimen injuria* (criminal insult). Violating a protection order is also a domestic violence offence.<sup>181</sup>

## Laying charges

A charge in a domestic violence offence can be laid by the complainant or by any person who has an interest in the well-being of the complainant – such as a family member, police officer, social worker, health care provider, teacher or employer.<sup>182</sup> (The *complainant* is the person who is the victim of the domestic violence offence, no matter who has actually laid the charge.<sup>183</sup>)

This is generally true in respect of other crimes; the motivation for emphasising this point was that a victim of domestic violence may be especially confused and disempowered. Also, victims often do not want to have to answer to other family members for a perpetrator's imprisonment, so having a third party lay the charge would remove their feelings of guilt on this score. Furthermore, if a third party can lay a charge, then it is clear that the case is no longer being fought just between victim and perpetrator, but between state and perpetrator. If the victim is an unwilling witness, then others could testify and other evidence (such as medical records) could be used. Making it clear that a third party can lay a charge may be particularly important in cases where children are the victims, or where they are being traumatised by ongoing abuse between their parents.

## Responding to domestic violence offences

A police officer who has a reasonable suspicion that a domestic violence offence has occurred can do either of the following things, taking into account the wishes of the complainant:

- arrest the suspected offender without a warrant;
- issue a formal written warning to the suspected offender, with copies being kept on file with the police and the Prosecutor-General to be taken into account if there are any further problems.<sup>184</sup>

The provision allowing for warnings is intended to apply to situations where the complainant requests police intervention, but does not want an arrest. An abuser who fails to comply with a formal warning may face a fine up to N\$2000 or up to six months imprisonment.<sup>185</sup> The warning may also be used as evidence in a subsequent enquiry regarding a protection order. This option was initially suggested by police, who feel frustrated when approached by victims of domestic violence who are reluctant to pursue a criminal charge.<sup>186</sup>

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<sup>178</sup> This refers to contravention of section 1 of the Trespass Ordinance 3 of 1962 where the necessary permission contemplated would be permission from the complainant.

<sup>179</sup> This refers to contravention of section 38(1)(i) of the Arms and Ammunition Act 7 of 1996 where the fire-arm is pointed at the complainant or at someone else in the presence of the complainant.

<sup>180</sup> This applies to property owned by the complainant, property owned jointly by the complainant and the alleged offender or property in which the complainant has a substantial interest.

<sup>181</sup> Combating of Domestic Violence Act 4 of 2003, section 16(7).

<sup>182</sup> *Id*, section 22. This does not apply where the domestic violence offence is the breach of a protection order. Section 16(7).

<sup>183</sup> *Id*, section 1, definition of "complainant".

<sup>184</sup> *Id*, section 23(1).

<sup>185</sup> *Id*, regulation 12.

<sup>186</sup> *Id*, regulation 4 (9)(d).

The police may also search for weapons without a warrant if they see that a weapon is present or are told that a weapon is on the premises.<sup>187</sup>

Earlier proposals for further enhancement of police powers were made unnecessary by the passage of the Police Amendment Act 3 of 1999 which gives police very broad powers of search and seizure for purposes of investigating offences or alleged offences, maintaining law and order, preventing crime or protecting life and property.

An issue that inspired much debate was whether arrests should be *required* in certain circumstances. Two options that were considered during the research phase were “**mandatory arrest**”, which would mean that police *must* make an arrest if they witness a domestic violence offence themselves, or if they have reasonable grounds to believe that a domestic violence offence has been committed, and “**presumptive arrest**” (sometimes called “preferred arrest” or a “pro-arrest policy”), where police are expected to make an arrest where they see the offence or have a reasonable suspicion that an offence has been committed unless there are clear reasons why such an arrest would be counter-productive. The second approach preserves a greater degree of police discretion.

Both mandatory and presumptive arrest policies give the victim some immediate protection by getting the abuser out of the way long enough for her to seek other forms of assistance before he returns. One strong argument against such approaches is that they further disempower victims of domestic violence by taking decision-making power out of their hands. Another concern is that these approaches may make victims reluctant to seek police assistance. Furthermore, victims of domestic violence often want some level of police intervention without wishing to invoke the full power of the law; for example, they often want immediate protection along with some form of warning from an authority figure which may help to change the abuser’s behaviour.<sup>188</sup>

An early draft of the Bill attempted to forge a compromise approach, by making arrest (but not necessarily prosecution) mandatory in certain limited circumstances:

- (a) where there are signs of injury;
- (b) where there is reason to believe that a weapon was used;
- (c) where there is a reasonable suspicion that a child was physically abused, or that physical abuse took place in a child’s presence;
- (d) where a protective order has been violated;
- (e) where an arrest warrant is in effect; or
- (f) where the perpetrator has a previous arrest or warning for a domestic violence offence.

However, women’s groups were divided on this question. The final Bill removed this limited form of mandatory arrest and left the decision on arrest completely to police discretion, and the women’s movement did not object to this approach.

## Bail

The question of bail for domestic violence offences is treated in the same way as for other crimes, with a few important differences.

As in rape cases, the complainant must be informed about the bail hearing and given a chance to appear at the bail hearing or to put relevant information before the court

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<sup>187</sup> *Id.*, section 23(2).

<sup>188</sup> See Dianne Hubbard and Daina Wise, *Domestic Violence: Proposals for Law Reform*, Windhoek: Legal Assistance Centre, 1998 at 37-43.

either directly or through the investigating officer.<sup>189</sup> If the person who was arrested has threatened the complainant, this might be grounds for denying bail.

If a person accused of a domestic violence offence is released on bail, the law says that there must normally be a bail condition which prohibits the accused from having contact with the complainant and a condition prohibiting possession of a firearm or any other specified weapon. Where the accused is legally liable to maintain the complainant or any child or other dependant of the complainant, the court must normally order that the accused must continue to support these persons while out on bail at the same level as before the arrest, to make sure that the complainant is not financially punished for asserting his or her rights. These standard conditions can be omitted only if the court “*finds special circumstances which would make any or all of these conditions inappropriate*”. The court may add other bail conditions if this is necessary.<sup>190</sup>

A complainant who is not present at the bail hearing must be notified that the accused is out on bail and told of any bail conditions which apply.<sup>191</sup>

## Trial and sentencing

The prosecutor is required to make sure that the victim has all information which might help to lessen the trauma of the criminal trial.<sup>192</sup>

Trials for domestic violence offences are to be heard in closed court, and it is an offence to publish any details that might reveal the identity of the complainant.<sup>193</sup>

The regulations provide for speedy trial and sentencing in respect of domestic violence offences by requiring prosecutors to place criminal cases involving domestic violence offence on the court roll as soon as they are received and to give such cases priority on the court roll when they must be re-scheduled due to postponements. The regulations also authorise the court to remand the accused in custody where a postponement is granted at the request of the accused, even if the accused was previously out on bail, if the court is satisfied that failure to do so may put the complainant at risk.<sup>194</sup>

Evidence of the psychological effects of domestic violence is admissible during trial or sentencing as evidence that the actions complained of actually took place; as evidence of the harm suffered by the complainant; or to enable the court to impose an appropriate sentence.<sup>195</sup> Such evidence is also admissible as a defence or as grounds for mitigation of sentence where a person who has suffered past domestic violence in the past has committed a criminal act against the perpetrator of the domestic violence.<sup>196</sup>

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<sup>189</sup> Combating of Domestic Violence Act 4 of 2003, Second Schedule (section 1(a)), amending section 60A of the Criminal Procedure Act 52 of 1977, as amended by section 12 of the Combating of Rape Act 8 of 2000.

<sup>190</sup> *Id*, Second Schedule (section 1(b)), amending section 62 of the Criminal Procedure Act 52 of 1977.

<sup>191</sup> *Id*, Second Schedule (section 1(a)), amending section 60A of the Criminal Procedure Act 52 of 1977, as amended by section 12 of the Combating of Rape Act 8 of 2000.

<sup>192</sup> *Id*, section 24.

<sup>193</sup> *Id*, section 30, Second Schedule (section 1(c)), amending section 153 of the Criminal Procedure Act 52 of 1977, as amended by section 14 of the Combating of Rape Act 8 of 2000.

<sup>194</sup> *Id*, regulation 16.

<sup>195</sup> *Id*, section 31. This provision is modelled on section 8 of the Combating of Rape Act 8 of 2000.

<sup>196</sup> *Ibid*.

If the accused is convicted, the complainant will be given a chance to give input to the court on what he or she thinks would be an appropriate sentence, in person or by means of an affidavit. If the complainant is deceased, this input can come from the next of kin. The complainant or the complainant's next of kin has the right to express views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.<sup>197</sup>

There is no upper or lower limit on sentencing for a domestic violence offence, meaning that punishment for the offence would be treated in essentially the same way as if it occurred outside a domestic relationship.<sup>198</sup> Depending on the complainant's input and the seriousness of the offence, the court might give greater consideration to sentencing options such as weekend imprisonment, community service, postponing the sentence or suspending all or part of the sentence on condition of successful completion of an appropriate treatment or counselling programme. Conviction on a domestic violence offence involving physical abuse may also disqualify a person from holding a licence for a firearm for a period determined by the court; if the firearm was used in the commission of the offence, the disqualification may be permanent.<sup>199</sup>

An early draft of the Bill proposed that in the case of a first domestic violence offence where there is no serious injury, the prosecutor may suggest a diversion programme rather than proceeding with the court case. This option was modelled on the successful use of diversion programmes for juvenile offenders in Namibia. It was proposed that the prosecutor must consider the following factors in deciding whether diversion is suitable:

- (a) any special characteristics or difficulties of the offender;
- (b) whether the accused is likely to cooperate and benefit;
- (c) whether appropriate programmes are available;
- (d) the impact of diversion on the community;
- (e) recommendations from the police;
- (f) recommendations from the victim;
- (g) whether the accused has voluntarily offered restitution to the victim for any losses suffered; and
- (h) any mitigating circumstances.

This draft provided that if the accused agreed to participate in a diversion programme offered by the prosecutor, then a diversion agreement would be signed and the criminal proceedings stayed for a definite period of time; if the accused did not agree to diversion, then the criminal proceedings would go forward immediately. If the accused violated a diversion agreement, then the criminal case would also go forward. But if the diversion programme were successfully completed, the criminal charges would be dismissed.

This proposed diversion procedure was removed from the Bill before it was tabled in Parliament, mainly because of a concern that there were not sufficient programmes suitable for this purpose.

Another proposal which did not survive was the establishment of a Victim's Advocate Programme in the Office of the Prosecutor General, envisaged as being staffed primarily with community volunteers working under the supervision of a government official, and aimed at giving the victims of domestic violence offences the necessary information and support to discourage case withdrawals and to make the court process less traumatic.

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<sup>197</sup> *Id*, section 25.

<sup>198</sup> See *id*, section 21(2).

<sup>199</sup> *Id*, Second Schedule, amending the Arms and Ammunition Act 7 of 1996.

## 3.7.5 Police duties

The Act *requires* that the Inspector-General issue directives on the duties of police officers in respect of matters pertaining to domestic violence. These directives can include:

- instructions on appropriate police protection to complainants of domestic violence and their children or other persons in their care, including protection in cases where a complainant intends to apply for a protection order as soon as the relevant court is open;
- instructions to ensure that the necessary priority and prompt action are given to reports of domestic violence or breaches of protection orders;
- instructions to ensure that domestic violence complainants and witnesses are interviewed in such a way that they are able to speak freely; and
- instructions on information to be given by police officers to complainants, alleged perpetrators and family members who are present at the scene of an alleged domestic violence offence with regard to assistance for medical treatment, the availability of shelters or other appropriate services, the availability of transport for such treatment or to such shelters, procedures to obtain protection orders and the contents of such orders, the laying of criminal charges or any other matter relevant to domestic violence.<sup>200</sup>

This duty has been carried out. The Police Operations Manual contains a chapter on domestic violence with clear and simple instructions for various police officials.

**Excerpt from  
POLICE OPERATIONS MANUAL (2011)  
Chapter 20: Domestic Violence**

- D.1.** Domestic violence is a serious crime that requires a serious response from the Namibian Police, Justice System and the community.
- D.2.** Although anyone can suffer from domestic violence, women and children are usually the victims of domestic violence at the hands of men.
- D.3.** Domestic violence is a very traumatic crime.
  - a. It usually occurs in the home which is a place where people should feel the safest.
- D.4.** The primary concern of the Namibian Police should be the health, safety and welfare of the person suffering from domestic violence.
- D.5.** The dignity of the domestic violence complainant should be respected at all times.

The law requires the keeping of certain basic police records on all domestic violence cases for purposes of monitoring and research, regardless of whether criminal charges are laid or pursued.<sup>201</sup> The regulations issued under the Act include a simple form for this purpose.<sup>202</sup> The Act also requires the Inspector-General to prepare an annual report based on the statistics gathered from these forms, to be tabled in Parliament.<sup>203</sup> But, in fact, the form is not in systematic use and the most recent annual report of the Namibian Police at the time of writing does not include any specific information about domestic violence.<sup>204</sup>

<sup>200</sup> *Id.*, sections 26 and 28. The Inspector-General is supposed to make an annual report to Parliament on the directives which have been issued on domestic violence. We did not ascertain whether information on these directives is included in the annual reports of the Namibian Police.

<sup>201</sup> *Id.*, section 27. This idea came from Puerto Rican legislation on domestic violence.

<sup>202</sup> *Id.*, regulation 14 (Form 14).

<sup>203</sup> *Id.*, sections 27(3) and 28.

<sup>204</sup> See Namibian Police Force, *Annual Report: 2009/10 Financial Year*. This problem is discussed in more detail in section 5.1.1.

**STOP the abuse!**

